Alma Mater Studiorum - Università di Bologna

DOTTORATO DI RICERCA IN

European Doctorate in Law and Economics

Ciclo XXXIII

Settore concorsuale di afferenza: 13/A3

Settore scientifico-disciplinare: SECS-P/03

Reconciling the Irreconcilable? Sovereign Debt Restructuring and the Principles of International Law
A Law and Economics Perspective

Presentata da: **Carlos Camilo Riquelme Ruz**

Coordinatore Dottorato

prof. Andrea Mattozzi

Supervisore

prof. Dr. A. van Aaken
prof. Dr. M.G. Faure LL.M.

Esame finale anno 2023

Reconciling the Irreconcilable? Sovereign Debt Restructuring and the Principles of International Law

A Law and Economics Perspective

Het niet-verzoenbare verzoenen? Het herstructureren van de staatsschuld onder internationaal recht

Een rechtseconomisch perspectief

Proefschrift ter verkrijging van de graad van doctor aan de
Erasmus Universiteit Rotterdam op gezag van
de rector magnificus
Prof. dr. A.L. Bredenoord
en volgens besluit van het College voor Promoties

De openbare verdediging zal plaatsvinden op
donderdag 9 maart 2023 om 13:00 uur

door

Carlos Camilo Riquelme Ruz

geboren te Santiago, Chili

Erasmus University Rotterdam

Promotiecommissie

Promotoren:	Prof. dr. A. van Aaken Prof. dr. M.G. Faure LL.M.
Overige leden:	Prof. dr. S. Oded
	Prof. dr. M. Waibel
	Prof. dr. E. van der Zee LL.M.

This thesis was written as part of the European Doctorate in Law and Economics programme

An international collaboration between the Universities of Bologna, Hamburg and Rotterdam.
As part of this programme, the thesis has been submitted to the Universities of Bologna, Hamburg and Rotterdam to obtain a doctoral degree.

"Junto al inmenso amor/

El verdadero, el duradero/

Ya no me inquieta más la rapidez del día/

Las penas no conquistan la esperanza/

Yo florezco hasta morir/

De nuevo"

- Kuervos del Sur, "Hasta Poder Respirar".

Para Piera Ignacia, luz de mi vida.

Para Lorenzo Gastón, luz de mis ojos.

Para mis padres, luz de mi infancia.

Para mi familia, con todo mi amor.

ACKNOWLEDGEMENTS

This book would not have been possible without the help of many people. First of all, I would like to thank my supervisors, professors Anne van Aaken and Michael Faure. I cannot thank them enough for their help, guidance, patience and support. They were nothing but kind and generous to me and were always keen to push me forward, particularly in the times where I felt lost and confused. I was honored to have the opportunity to work with and learn from them and I hope that I have met all their expectations.

I would also like to thank all the wonderful people at the RILE, the ILE and University of Bologna, especially to professors Elena Reznichenko, Luigi Franzoni and Stephan Voigt, as well as Marianne Breijer-de Man, Sonia Mestre and Lisa Verniti. Their hospitality made me always feel at home, and their help in academic and administrative matters cannot be quantified.

My fellow EDLE students also deserve to be acknowledged. I am grateful to Laurenz, Paul, Jan, Chiara and María Teresa for their kindness and willingness to help. I learned a lot by listening to their ideas, reading their work and sharing delicious meals together. To be sure, I will never forget Rotterdam's kapsalon and will always cherish our adventures in Bologna and Hamburg.

I am also thankful to the scholars who, without even knowing me and after receiving my emails practically out of thin air, took the time to talk with me, to look at my drafts and to answer my questions. Although I have not yet had the honor to meet these wonderful people in person, I was truly fortunate to receive their comments and insights. Special thanks go to professors Rodrigo Olivares-Caminal, Karina Patricio Ferreira Lima, Matthias Goldmann, Odile Ammann, Giovanni Tuzet and Nicolás Perrone. Their generosity also made this work possible.

I would also like to express my gratitude to my friends, especially Pablo Abufom, Rubén Calvo, Felipe Labrín, Pablo Jorquera, Pablo San Martín, Sofía Jordán, Josefina Sotomayor and José Julio León. All of them took the time to listen to my complaints about sovereign borrowing, look over at my early drafts or to simply provide some comfort while I struggled with the intricacies of academic English.

I also want to thank the National Agency for Research and Development (ANID) for funding my research through the grant "DOCTORADO BECAS CHILE EN EL EXTRANJERO 2017/folio 72180342".

Finally, my most sincere gratitude goes to my wife, Piera. I would like to take the liberty in these lines to address her directly: My dearest, you decided to leave everything behind to join me in this adventure. Europe seemed so far away, and far away it was indeed. Despite all the difficulties, you were always there for me when I needed you, looking at me with your warm smile and making me laugh. Truly, your light carried me to this point and every drop of ink in this book has more than a little bit of you in it, too. I am indebted to you, and I promise to repay (with interest) all the hours that I spent reading, writing and talking about sovereign debt.

Contents

LIST OF TABLES

LIST OF FIGURES

LIST OF ABBREVIATIONS

ABL: Argentine Bankruptcy Law

ACHR: American Convention on Human Rights

AoR: Abuse of Rights

ATS: Alien Tort Statute

BITs: Bilateral Investment Treaties

BVerfG: Federal Constitutional Court (Germany)

CACs: Collective Action Clauses

CBA: Cost-Benefit Analysis

CESCR: UN Committee on Economic, Social and Cultural Rights

CIGA: Corporate Insolvency and Government Act

CPLR: Civil Practice Law and Rules of the State of New York

CPR: Common Pool Resources

CVA: Company Voluntary Arrangements

DSA: Debt Sustainability Analysis

DIP: Debtor in Possession

EBL: Enterprise Bankruptcy Law of the People's Republic of China

ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR: European Court of Human Rights

ESC rights: Economic, Social and Cultural Rights

FET: Fair and Equitable Treatment

GG: Basic Law of the Federal Republic of Germany

GPs: General Principles of Law

GPDs: General Principles of Domestic Law

IACtHR: Inter-American Court of Human Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

ICJ: International Court of Justice

ICMA: International Capital Markets Association

ICSID Convention: Convention on the Settlement of Investment Disputes between States and National of Other States

ILC: International Law Commission

IMF: International Monetary Fund

InsO: German Insolvency Code

NY: New York

PA: Proportionality Analysis

PIL principles: Principles of Public International Law

SDR: Sovereign Debt Restructuring

SICJ: Statute of the International Court of Justice

UK: The United Kingdom

US: The United States

VCLT: Vienna Convention on the Law of Treaties

CHAPTER ONE: INTRODUCTION

1. Introduction and Problem Statement

Sovereign debt crises can give way to insolvency conflicts. The most basic form of insolvency conflict comprises the tensions between an indebted state and those who have claims on its revenue, namely its creditors and citizens. In short, when government revenue is not enough to satisfy both the contractual claims of creditors and the "constitutionally" guaranteed interests of citizens, the state will have to decide how to allocate its resources and thus what to prioritize in its spending[1]. On the one hand, if the state decides to grant priority to debt repayment, citizens' rights could be encroached upon. On the other hand, if the state decides to either default on the debt or renegotiate the terms of the contracts, creditors may see this as an intrusion on their property rights. In practice, states tend to move between those extremes by restructuring (i.e., renegotiating) their debts and imposing austerity measures[2].

Consequently, the relationship between these interests can be construed as involving a potential trade-off between goals. While in some cases the protection of citizens' rights (and of the public interest) will demand restructuring the debt (by modifying the most important contractual obligations of the bonds), the protection of bondholders' property rights will require contractual stability and, therefore debt repayment (and debt renegotiation) in the previously agreed terms. Under certain circumstances, it might not be possible for a state to fully satisfy its citizens' "social" rights (and/or the "public interest") without encroaching upon the property rights of bondholders. Moreover, under the same circumstances, it might not be possible to respect property rights without impairing the enjoyment of "social" rights (and/or affecting the "public interest").

In the context of sovereign insolvency, said interests appear to be irreconcilable. But are they? This *Thesis* attempts to show that, under certain conditions, and from the perspective of international law, they are not.

However, at face value, any attempt to reconcile those interests needs to be conducted from the perspective of domestic legal systems, since it appears that said interests are of their exclusive concern. On the one hand, contracts binding sovereign debtors and creditors tend to be unequivocally governed by the law of domestic legal systems. On the other hand, the protection of citizens' entitlements is provided, first and foremost, by domestic constitutions. This notwithstanding, the law of nations does address issues

---

[1] See Juan Pablo Bohoslavsky, Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of Human Rights, *Debt Disputes, International Investment Arbitration and Human Rights*, A/72/153 (2017), paras 3 and 8.

[2] See Lee Buchheit, Guillaume Chabert, Chanda DeLong and Jeromin Zettelmeyer, The Restructuring Process, in Ali Abbas et al. (Eds.), *Sovereign Debt: A Guide for Economists and Practitioners*. Oxford University Press (2020), p. 342 and Cephas Lumina, Sovereign Debt and Human Rights: Making the Connection, in Ilias Bantekas and Cephas Lumina (Eds.), *Sovereign Debt and Human Rights*. Oxford University Press (2018), pp. 179-180.

relevant to sovereign debt, such as the very notion of sovereignty, state succession, debt continuity, and the domestic enforcement of foreign awards[3]. Yet, since the times of Adam Smith[4], scholars have highlighted the absence of a comprehensive international regulation addressing sovereign bankruptcy.

Despite this apparent legal vacuum, decisions made in the context of insolvency conflicts produce effects that surge beyond the borders of the indebted state[5]. Furthermore, the interests at stake in said conflicts are also protected by the law of nations. This suggests that a solution (and thus, a "reconciliation" of those interests) based on international law is needed.

Following the "incremental approach" literature and considering the absence of an international convention governing sovereign bankruptcy, this *Thesis* investigates the principles of international law relevant to the resolution of sovereign insolvency conflicts. It does so by distinguishing two different types of principles.

First, this *Thesis* inquiries into the international norms which can be characterized as principles according to Robert Alexy and which protect the interests at stake in the context of insolvency conflicts (including those of creditors, citizens and states). From that perspective, it identifies the norms of the law of nations that can be considered functionally and structurally equivalent to domestic constitutional principles (i.e., that can be characterized as "prima facie" or "optimization" requirements). Following an important group of scholars, this *Thesis* refers to said norms as "principles of public international law" (henceforth, "PIL principles").

Second, this *Thesis* address the principles which can be considered as proper "sources" of international law, and which can help to ameliorate the tensions between the aforementioned PIL principles. These principles correspond to the "general principles of law recognized by civilized nations" in the language of the Statute of the International Court of Justice[6] (henceforth, "GPs"). Specifically, it directs the analysis to a particular type of GP that encompasses the norms which can be identified from domestic legal systems and be extrapolated to the international plane (i.e., to "general principles of domestic law", henceforth, "GPDs"). Although there is a rich literature on the subject[7], this contribution goes back to identifying those principles from domestic corporate reorganization regimes and discussing whether they can be extrapolated to the sovereign debt restructuring context. Additionally, this work also examines whether

[3] For a discussion of how international law addresses these issues, see Mark Weidemaier and Mitu Gulati, *The Relevance of Law to Sovereign Debt*, 11 Annual Review of Law and Social Science (2015).

[4] See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*. University of Chicago Press (1977); pp. 1256-1257.

[5] See, for example, Juan Pablo Bohoslavsky and Carlos Espósito, Principles Matter: The Legal Status of the Principles on Responsible Sovereign Financing in Espósito et al. (Eds.), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013), p. 73.

[6] Article 38(1)(c), Statute of the International Court of Justice in Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, T.S. No. 993.

[7] For a discussion, see subsection 4.1 of this *Chapter*.

said GPDs can be applied in sovereign debt litigation before the domestic courts of New York and Germany.

Finally, this *Thesis* tests whether the GPDs identified can contribute to the reconciliation of the interests protected by the aforementioned PIL principles. For this purpose, it outlines a proportionality analysis of measures comprising those GPDs applied to the international plane.

With the purpose of presenting the scope of this work, this (introductory) *Chapter* offers a cursory examination of sovereign debt restructuring and its problems (section 2), discusses the proposed solutions to those problems (section 3), provides an account of the relevant literature and its gaps (section 4) and concludes with the research questions to be addressed, the methodology to be employed and the overall structure of the *Thesis* (section 5).

2. An Introduction to Sovereign Debt Restructuring and its Problems

Debts incurred by states are known as sovereign debt[8]. States borrow for several purposes and from different actors. Of note, creditors of states include multilateral organizations (such as the International Monetary Fund, henceforth "IMF"), other states (i.e., "bilateral official creditors"), and private creditors (i.e., "commercial private creditors")[9]. The majority of the debt owed to commercial private creditors takes the form of loans (usually borrowed from a group of banks, i.e., "syndicated loans") or sovereign bonds.

As with any type of debt, sovereign debt is not exempted from the risk of non-performance (i.e., default). Although sovereign defaults are not the norm, neither are they unprecedented[10]. In the context of financial distress and for the purpose of preventing or resolving defaults, states may request their creditors to renegotiate the debts. The bundle of operations carried out in that context are known as "sovereign debt restructurings". Crucially, said operations tend to be conducted on an ad-hoc and voluntary basis[11].

Depending on the type of creditor (and on the legal nature and terms of the instruments), restructurings rely on different mechanisms and procedures[12]. First, debts owed to multilateral organizations are usually granted *de facto* preferential treatment, and thus, they tend to be exempted from renegotiations[13]. Secondly, debts owed to other states (i.e., "bilateral official creditors") are usually renegotiated under the umbrella of an informal forum known as the "Paris Club"[14]. Thirdly, debts owed to

---

[8] See Udaibir Das et al., *Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts* (International Monetary Fund, Monetary and Capital Markets Department, August 2012), p. 8.

[9] See Buchheit et al., *The Restructuring…* Op. Cit., pp. 331 et seq.

[10] See generally Federico Sturzenegger and Jeromin Zettelmeyer, *Debt Defaults and Lessons from a Decade of Crises*. The MIT Press (2006).

[11] See, for many, Charlotte Julie Rault, *The Legal Framework of Sovereign Debt Management*. Nomos (2017), p. 31.

[12] See Lex Rieffel, *Restructuring Sovereign Debt: The Case of Ad Hoc Machinery*. Brookings Institution Press (2003), pp. 21 et seq.

[13] See Jeannette Abel, *The Resolution of Sovereign Debt Crises: Instruments, Inefficiencies and Options for the Way Forward*. Nomos (2017), p. 37. Nevertheless, multilateral organizations have implemented initiatives aimed at reducing the debt owed by certain eligible countries including the "Highly Indebted Poor Countries" (HIPC) Initiative and the "Multilateral Debt Relief Initiative" (MDRI). For a summary, see Mauro Megliani, *Sovereign Debt*: Genesis*, Restructuring Litigation*. Springer (2015), pp. 312-313.

[14] The Paris Club is a "quasi-formal" organization of creditor countries including 22 permanent members (most of them belonging to the OECD). Occasionally, other creditor states are invited to the renegotiations. It was first convened in 1956 to restructure the debt owed by Argentina and it is usually considered a "soft international organization". Procedurally, renegotiation under the umbrella of the Paris Club starts with a request by the debtor, and it is preconditioned on the involvement of the IMF. The result of the process is a non-binding and confidential Agreement (the "Agreed minutes") between the secretariat of the Paris Club, the debtor country and the representatives of creditor countries. The Agreed Minutes outline in broad terms the concessions recommended to be granted to debtor states (i.e., debt relief and rescheduling). Afterwards, the debtor state is expected to negotiate the details with each creditor on a bilateral

commercial banks (through syndicated loans) are usually restructured under an ad-hoc gathering of creditors known as the "London Club"[15]. Finally, bonded debt is usually restructured through ad-hoc contractual techniques depending on the legal terms and the law governing the instruments.

Nowadays, states borrow heavily from the bond market[16], and this is precisely why this *Thesis* deals with the renegotiation of this type of debt in particular.

Where bonds are concerned, sovereign debt restructurings usually entail the provision of debt relief through debt rescheduling, debt reduction or both[17]. This is why restructurings are usually understood as tools to solve or prevent financial crises and for achieving sustainable debt levels[18].

Nevertheless, it should be noted that bonds are standardized contracts, highly traded on the secondary market[19]. For that reason, the clauses of those instruments are critical

---

basis. As of 2021, the Club counts 476 agreements totaling 611 bn USD. Its activity tends to be conducted under several principles including restructuring on a "case-by-case basis", "consensus", "conditionality", "solidarity", "information sharing" and "comparability of treatment". See Rieffel, *Sovereign Debt*… Op. Cit., pp. 56 et seq.; Mauro Megliani, "Paris Club" Max Planck Encyclopedia; Abel, *The Resolution*… Op. Cit., pp. 38-39; Megliani, *Sovereign Debt*… Op. Cit., pp. 277 et seq.; Das et al., *Sovereign Debt*… Op. Cit., pp. 14 et seq.; Buchheit et al., *The Restructuring*… Op. Cit., pp. 337-338 and Enrique Cosio-Pascal, *The Emerging of a Multilateral Forum for Debt Restructuring: The Paris Club*. UNCTAD Discussion Papers No. 192 (2008). Information is also available on the club's website: https://clubdeparis.org/ [last accessed 25.7.2021].

[15] The London Club is an ad-hoc informal renegotiation "platform" which has been used to restructure syndicated loans. It was first formed in 1976 to resolve the debt problems stemming from the oil crisis of the 1970s. Procedurally, renegotiations start at the behest of the indebted state. The banks involved can decide whether or not to form a committee (i.e., a "Bank Advisory Committee") to renegotiate the loans. The literature highlights that restructuring under the London Club tends to follow three principles: a "case-by-case", a "voluntary" and a "market-based" approach. Commentators also note that the process under the London Club is less formalized than in the case of the Paris Club: for example, they lack both "fixed" members and a permanent secretariat. At the same time, the literature also stresses that this informal "forum" is less utilized nowadays, since sovereign financing through syndicated loans has become less frequent. See Abel, *The Resolution*… Op. Cit., pp. 41-43; Megliani, *Sovereign Debt*… Op. Cit., pp. 329-334; Das et al., *Sovereign Debt*… Op. Cit., p. 16; Rieffel, *Restructuring Sovereign*… Op. Cit., pp. 96 et seq. and Sturzenegger and Zettelmeyer, *Debt Defaults*… Op. Cit. pp. 12 et seq.

[16] "Currently, sovereign bonds are the major source of sovereign financing for modern industrialized nations, which rely on a system of revolving debt". Abel, *The Resolution*… Op. Cit., p. 43. Bonds "constitute the major source of sovereign financing". Megliani, *Sovereign Debt*… Op. Cit., pp. 205-206.

[17] Das et al., *Sovereign Debt*… Op. Cit., p. 8. More specifically, the preferred methods include changing maturity dates, reducing the amount of the principal, reducing the interest rates or repurchasing the instruments on the secondary market. See, Buchheit et al., *The Restructuring*… Op. Cit., p. 343.

[18] See Rodrigo Olivares-Caminal, Transactional Aspects of Sovereign Debt Restructurings in Rodrigo Olivares-Caminal et al. (Eds.), *Debt Restructuring*. Oxford University Press (2011), p. 415.

[19] Barry Herman, *Introduction: The Players and the Game of Sovereign Debt*, 1 Ethics and International Affairs 21 (2007), pp. 14-15.

for debt renegotiation. Beyond their financial terms, bonds contain provisions that can either smooth out or complicate debt restructurings. At the same time, they also include choice of law clauses, invariably establishing domestic jurisdictions as their governing laws[20], and not the international legal order[21]. For those reasons, and due to the absence of an international convention addressing sovereign indebtedness, the role of international law in that context is usually considered to be marginal. In short: debt renegotiations are first and foremost a matter of contracts and domestic law. Commentators usually note that most of the problems in sovereign debt workouts are a consequence of those features, as discussed in the next subsections.

2.1. Problems of Restructuring Sovereign Bonds

According to the literature, the restructuring of sovereign bonds features several problems[22]. For the purposes of this *Thesis*, the most important ones correspond to collective action problems (subsection 2.1.1), moral hazard (subsection 2.1.2), "too little, too late" (subsection 2.1.3), "forum fragmentation" (subsection 2.1.4) and "lack of comprehensiveness" (subsection 2.1.5).

2.1.1. Collective Action Problems

Perhaps the most discussed obstacle to the renegotiation of sovereign bonds relates to the collective action problem that creditors may face in that context. To understand this problem, it is important to recall that restructurings are consensual: they require creditors' consent[23]. Thus, bond restructurings are usually conducted through voluntary exchanges of old debt instruments for new ones containing longer maturities, a different interest rate or a discount on the principal (a "haircut") or by the voluntary modifications of the key terms of the contracts[24].

Of note, assuming that the state is insolvent (i.e., from a strictly ex-post perspective), it may be in the best interest of creditors as a group to participate in the restructuring by providing debt relief to their debtor. This is due to the fact that, by taking less than what was originally owed to them, bondholders may contribute to avoiding some of the dead-weight losses arising during a debt default[25], losses which they tend to share with debtors to a certain extent. Furthermore, by providing debt relief, creditors may benefit

---

[20] See Irmgard Marboe and August Reinisch, "*Contracts Between States and Foreign Private Law Persons"*, Max Planck Encyclopedia of International Law (2011), para 27.

[21] "Sovereign bonds are always governed by some domestic law, rather than international law". Michael Waibel, Sovereign Bonds: Internationalization and Partial Privatization, in Mathias Audit and Stephan Schill (Eds.), *Transnational Law of Public Contracts*. Bruylant (2016), p. 568. "Sovereign bonds are never governed by international law". Michael Waibel, *Eurobonds: Legal Design Features*, 12 Review of Law and Economics 3 (2016), p. 636.

[22] See, for many, Yuefen Li, *The Long March Towards an International Legal Framework for Sovereign Debt Restructuring*, 6 Journal of Globalization and Development 2 (2015), pp. 331 et seq.

[23] Nevertheless, this is not necessarily true in the case of bonds governed by the domestic law of the issuer. See *Chapter Four*.

[24] See Das et al., *Sovereign Debt…* Op. Cit., p. 8.

[25] Sturzenegger and Zettelmeyer, *Debt Defaults…* Op. Cit., pp. 49-51 and Mitu Gulati and William Bratton, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 Vanderbilt Law Review (2004), pp. 18-19.

from the increase in the country's ability to repay them[26], either by means of its economic recovery[27] or its continued access to credit markets[28].

Notably, before 2003, most sovereign bonds issued under New York law lacked any type of provision designed to coordinate the modification of the key terms of the contracts[29]. Restructuring those types of bonds was deemed to be difficult, since the consent of every single bondholder was required to amend the contracts[30].

Under such a setup, collective action problems may arise. In short, even if creditors as a group would be better off through the voluntary provision of debt relief, some of them may withhold their consent and demand a better deal for themselves, thus trying to capture the restructuring surplus[31] (usually referred as the "holdout"[32], the "free rider"[33] or the "anti-commons"[34] problem). Anticipating this situation, other bondholders would

---

[26] See Martín Guzman and Joseph Stiglitz, Creating a Framework for Sovereign Debt Restructuring that Works in Martín Guzmán, Joseph Stiglitz and José Antonio Ocampo (Eds.), *Too Little Too Late: The Quest to Resolve Sovereign Debt Crises*. Columbia University Press (2016), p. 10.

[27] See Gulati and Braton, *Sovereign Debt*… Op. Cit., p. 18.

[28] See Id., p. 24.

[29] See Anna Gelpern, Ben Heller and Brad Setser, *Count the Limbs: Designing Robust Aggregation Clauses in Sovereign Bonds* (2015), available at https://scholarship.law.georgetown.edu/facpub/1793/ [last accessed 19.3.2020], p. 7 and Steven Schwarcz, *"Idiot's Guide" to Sovereign Debt Restructuring*, 53 Emory Law Journal (2004), pp. 1192-1193.

[30] See, James Hays II, *The Sovereign Debt Dilemma*, 75 Brooklyn Law Review 3 (2010), pp. 919-920.

[31] See, for example, Christopher Wheeler and Amir Attaran, *Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation*, 39 Stanford Journal of International Law (2003), p. 259. See also, Stephen Choi, Mitu Gulati and Eric Posner, *The Evolution of Contractual Terms in Sovereign Bonds*, 4 Journal of Legal Analysis 1 (2012), pp. 134-135 and Jonathan Blackman and Rahul Mukhi, *The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos and Other Legal Fauna*, 73 Law and Contemporary Problems 4 (2010), p. 48. Discussing this problem in the context of corporate reorganization, see Rolef de Weijs, *Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool & Anticommons*, International Insolvency Institute Twelfth Annual International Insolvency Conference (2012), p. 9.

[32] See, for example, Li, *The Long*… Op. Cit., p. 331; Olivares, *Transactional Aspects*… Op. Cit., p. 418; Buchheit et al., *The Restructuring*… Op. Cit., p. 344 and International Monetary Fund, *Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring* (2014), available at https://www.imf.org/external/np/pp/eng/2014/090214.pdf [last accessed 28.07.2021], para 23.

[33] See, for example, Sturzenegger and Zettelmeyer, *Debt Defaults*… Op. Cit., p. 77.

[34] In economic terms, "anti-commons" problems arise where several agents are granted the individual prerogative to veto the use of a resource by another (or where, to use a resource, an agent is required to obtain permission from others). Since some of these agents may act strategically to withdraw their permission for (or to veto) the use of the resource (by holding out), an otherwise value-enhancing transaction (from the perspective of the agents as a group) involving the use of this resource will be obstructed. Hence, anti-commons problems may lead to the resource being underused. See Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harvard Law Review 3 (1998) and Lee Anne Fennell,

be tempted to follow suit, and a potentially welfare-enhancing deal would be prevented due to the lack of intercreditor coordination[35]. According to the literature, the liquid nature of sovereign bonds and the number and heterogeneity of their holders may make this problem even worse[36]. Consequently, and as is often noted in the literature, bondholders may find themselves in a typical prisoner's dilemma situation[37].

Furthermore, the holdout problem may be exacerbated if dissenting creditors decide to litigate against the debtor. Admittedly, creditors face several hurdles when attempting to take sovereigns to court, including legal (i.e., the doctrine of sovereign immunity) and practical challenges (i.e., most of the time, states will not have assets to be seized outside their borders)[38]. Considering said obstacles and the empirical evidence available at the time, a group of scholars argued that the holdout problem in sovereign debt renegotiation had been overstated by the literature[39]. For example, they noted that, up to that time, bond restructurings tended to be completed in a small period of time and featured high creditor participation; furthermore, holdout litigation was rare[40]. In the same context, certain scholars also highlighted that hold out litigation even played a positive (ex-ante) role by deterring opportunistic defaults and providing a "check" on restructuring terms[41]. Nevertheless, the consensus in the literature regarding holdout litigation (and significance of the holdout problem in general) has shifted[42]. Nowadays, there seems to be an agreement that the role of holdouts in sovereign debt restructurings is pernicious enough to merit a policy response[43].

What is more, litigation is becoming more prevalent. According to Trebesch et al., almost half of sovereign bond restructurings after the year 2000 have involved holdout's

---

Commons, Anticommons, Semicommons in Kenneth Ayotte and Henry Smith (Eds.), *Research Handbook on the Economics of Property Law*. Elgar (2011).

[35] See Guzman and Stiglitz, *Creating*… Op. Cit., p. 10 and Wheeler and Attaran, *Declawing*… Op. Cit., pp. 259-260.

[36] See, for example, Ugo Panizza, Federico Sturzenegger and Jeromin Zettelmeyer, *The Economics and Law of Sovereign Debt and Default*, 47 Journal of Economic Literature 3 (2009), pp. 655-656.

[37] See, for many, Abel, *The Resolution*… Op. Cit., p. 63.

[38] For a discussion, see *Chapter Four*.

[39] For a summary of this literature, see Abel, *The Resolution*… Op. Cit., p. 65.

[40] See, for example, Ran Bi, Marcos Chamon and Jeromin Zettelmeyer, *The Problem that Wasn't: Coordination Failures in Sovereign Debt Restructurings*, 64 IMF Economic Review 3 (2016); Panizza, Sturzenegger and Zettelmeyer, *The Economics*… Op. Cit., pp. 672 et seq.; Das et al., *Sovereign Debt*… Op. Cit., pp. 28 et seq. and Christoph Trebesch, *Delays in Sovereign Debt Restructuring, Should We Really Blame Creditors?* (2008) Available at https://ideas.repec.org/p/zbw/gdec08/44.html [last accessed 05.08.2021].

[41] See, for example, Jill Fisch and Caroline Gentile, *Vultures or Vanguards: The Role of Litigation in Sovereign Debt Restructuring*, 53 Emory Law Journal (2004).

[42] See, for example, Buchheit et al., *The Restructuring*… Op. Cit., p. 345.

[43] See International Monetary Fund, *Sovereign Debt Restructuring, Recent Developments and Implications for the Funds Legal and Policy Framework*, (2013) available at https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Sovereign-Debt-Restructuring-Recent-Developments-and-Implications-for-the-Fund-s-Legal-and-PP4772 [last accessed 05.08.2021], pp. 27-31

lawsuits[44]. At the same time, domestic courts have tended to favor holdout interests against those of indebted states and other creditors[45]. In this regard, the "pari passu" litigation against Argentina is usually mentioned by scholars[46]. In that context, holdouts were successful in obtaining injunctions against other creditors (who initially participated in the restructuring) and against third parties (i.e., financial intermediaries) processing payments[47]. At the same time, the literature has also highlighted international investment litigation as a new avenue at the disposal of holdouts which may potentially disrupt restructurings[48]. Notably, this option was tested both in the Argentinian and Greek renegotiations, as will be discussed in *Chapter Two*.

For all of the above, the consensus in the literature seems to favor the view that sovereign debt "is becoming more enforceable and that litigation is a relevant cost of default"[49]. Consequently, this trend has increased the obstacles to restructuring sovereign bonds[50].

2.1.2. Moral Hazard

According to the literature, official sector involvement in sovereign debt restructurings (i.e., "bailouts") may contribute to debtor and creditor moral hazard[51]. Broadly speaking, if a debtor faces economic distress, it can approach international organizations (such as the IMF) to request funding[52]. The IMF's financial support may be critical in some cases: it can help the state to recover debt sustainability and to resume economic growth[53]. However, the literature has warned about "bailouts" in debt workouts. In short, knowing beforehand that they would be rescued in case of insolvency, creditors and debtors may be tempted to disregard the risks associated with lending and borrowing

---

[44] See Julian Schumacher, Christoph Trebesch and Henrik Enderlein, *What Explains Sovereign Debt Litigation?* 58 Journal of Law and Economics (2015), pp. 13-17.

[45] Schwarcz, *Idiot's Guide*… Op. Cit., pp. 1193-1194, International Monetary Fund, *Strengthening*… Op. Cit., p. 18.

[46] An account of the enforcement strategy based upon the "pari passu" clause is provided in *Chapter Four*.

[47] See generally Anna Gelpern and Mark Weidemaier, *Injunctions in Sovereign Debt Litigation*, 31 Yale Law Journal on Regulation (2014).

[48] See Abel, *The Resolution*… Op. Cit., pp. 70-71. A discussion of sovereign debt litigation before international investment tribunals is conducted in *Chapter Two*.

[49] Christoph Trebesch, *Sovereign Debt in the 21st Century: Looking Backward, Looking Forward*, CESIFO Working Papers (2021), available at https://www.cesifo.org/en/publikationen/2021/working-paper/sovereign-debt-21st-century-looking-backward-looking-forward [last accessed 05.08.2021], pp. 47-48.

[50] Id., pp. 43-44.

[51] See Lex Rieffel, *Restructuring*… Op. Cit., pp. 10-11 and Das et al., *Sovereign Debt*… Op. Cit., p. 29.

[52] See generally Marco Committeri and Francesco Spadafora, *You Never Give Me Your Money? Sovereign Debt Crises, Collective Action Problems, and IMF Lending*, IMF Working Papers WP/13/20 (2013), available at https://www.imf.org/external/pubs/ft/wp/2013/wp1320.pdf [last accessed 07.08.2021].

[53] See generally James Haley, *Sovereign Debt Restructuring: Good Faith or Self-Interest?* (2017), CIGI Paper No. 150 available at https://www.cigionline.org/publications/sovereign-debt-restructuring-good-faith-or-self-interest/ [last accessed 07.08.2021].

(ex-ante)[54]. As a consequence, both may be tempted to overborrow and over lend[55]. Nevertheless, it is important to note that there is scant empirical evidence regarding moral hazard, at least, in the case of sovereign debtors[56].

2.1.3. The "Too Little Too Late" Problem

Scholars also note that states have tended to delay the recognition of insolvency (i.e., "gambling for resurrection"). Thus, rather than defaulting opportunistically, debtor states tend to postpone (sub-optimally) the decision to restructure their debts (i.e., the "too late" problem)[57]. This is a consequence of the costs associated with default, which tend to punish incumbent politicians with particular force[58]. This may reduce both the debtor's ability and willingness to pay[59]. In short, according to the IMF, "(…) pressures to delay a restructuring of unsustainable debt have historically been commonplace"[60].

At the same time, the literature also highlights that the debt relief provided through restructurings is not usually significant enough to make states' debts sustainable[61]. For example, according to Martín Guzmán and Domenico Lombardi, almost half of renegotiations between the 1970 and 2013 have resulted in a restructuring within the next five years[62]. Two factors may explain this trend. First, states may ask for less debt relief than they should, in order to avoid being punished by the market and to achieve a relatively quick deal[63]. Second, International Organizations (such as the IMF) have been overoptimistic in what pertains to their sustainability assessments, and thus, in the amount of debt relief that they indicated that a state may require to "get back on track"[64].

---

[54] See, Schwarcz, *Idiot's Guide*… Op. Cit., p. 1194 and Abel, *The Resolution*… Op. Cit., pp. 51-52.
[55] See Abel, *The Resolution*… Op. Cit., p. 50; Lee Buchheit et al., *Revisiting Sovereign Bankruptcy*, Committee on International Economic Policy and Reform. Brookings Institution (2013), available at https://www.brookings.edu/wp-content/uploads/2016/06/CIEPR_2013_RevisitingSovereignBankruptcyReport.pdf [last accessed 05.08.2021], pp. 7-9; Molly Ryan, *Sovereign Bankruptcy: Why Now and Why Not in the IMF*, 82 Fordham University School of Law 5 (2014), pp. 2484-2485.
[56] See Buchheit et al., *Revisiting*… Op. Cit., pp. 8-9.
[57] See Li, *The Long*… Op. Cit.; Abel, *The Resolution*… Op. Cit., pp 60-62; Ryan, *Sovereign Bankruptcy*… Op. Cit., p. 2486-2487; Guzman and Stiglitz, *Creating*… Op. Cit., p. 7.
[58] See Buchheit et al., *Revisiting*… Op. Cit. p. 10.
[59] See Id.
[60] See International Monetary Fund, *Sovereign Debt*… Op. Cit., para 25.
[61] According to the International Monetary Fund: "When debt restructurings do occur, they often do not restore debt sustainability and market access, leading to repeated restructurings and dependence on official financing". Id., para 28.
[62] See Martín Guzmán and Domenico Lombardi, *Assessing the Appropriate Size of Relief in Sovereign Debt Restructuring*, Columbia Business School Research Paper No. 18-9 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3088081 [last accessed 05.08.2021], p. 9.
[63] See Buchheit et al., *Revisiting*… Op. Cit., p. 11.
[64] See Id., p. 12.

2.1.4. "Legal Forum Fragmentation"

Additionally, an important consequence of the lack of a comprehensive restructuring procedure for sovereigns is "legal forum fragmentation"[65]. After a default, or in the context of restructurings, suits or applications may be filed before various domestic and international courts and tribunals. For example, the Greek restructuring of 2012 involved litigation before domestic courts, the European Court of Human Rights and international investment tribunals[66]. Of note, since domestic courts and international tribunals may belong to different legal traditions and decide cases based on diverse legal norms, forum fragmentation may expose creditors and debtors to differing and sometimes contradictory rulings[67]. According to the scholarship, this not only delegitimizes sovereign debt restructurings[68] but also reinforces the collective action problems previously discussed[69].

2.1.5. Lack of Due Consideration for All the Interests at Stake

Finally, the last problem affecting sovereign debt restructurings usually stressed by the literature corresponds to the absence of a thorough consideration of all the interests at stake, including those of states, creditors, and citizens[70].

For example, debt workouts can be understood exclusively from the perspective of the contractual relationship between sovereign debtors and their creditors. According to Dania Thomas, the courts of the United States (henceforth, "US") dealing with sovereign debt litigation have operated from that perspective for the last 30 years. In her view, these courts have embraced an understanding of this relationship that identifies sovereigns' promise to pay as the source of creditors' property rights and sees breaches of contracts as a violation to these rights[71]. At the same time, and as stated above, other scholars have highlighted that those courts have tended to favor the interests of holdouts over those of indebted states and other creditors[72]. In short, the interests of some creditors (over those of other actors) have taken precedence in the context of sovereign debt litigation in that jurisdiction.

Nevertheless, sovereign debt restructurings do not concern creditors exclusively. The very notion of "insolvency conflicts" introduced at the beginning of this *Chapter* illustrates the point. In short, there is a distributional conflict between creditors and the citizens of the indebted state in the context of debt renegotiations. Assuming the

---

[65] See Li, *The Long*… Op. Cit., pp. 331-332; Abel, *The Resolution*… Op. Cit., p. 55.
[66] For a discussion of the cases against Greece before international courts and tribunals see *Chapter Two*.
[67] See Guzman and Stiglitz, *Creating*… Op. Cit., p. 4.
[68] See Abel, *The Resolution*… Op. Cit., p. 55.
[69] See United Nations Conference on Trade and Development, *Sovereign Debt Workouts: Going Forward. Roadmap and Guide* (2015), available at https://unctad.org/system/files/official-document/gdsddf2015misc1_en.pdf [last accessed 04.09.2021], pp. 12-13.
[70] See, for example, Guzman and Stiglitz, *Creating*… Op. Cit., p. 9.
[71] See Dania Thomas, *Sovereign Debt as a Commodity: A Contract Law Perspective*, 54 Osgoode Hall Law Journal 2 (2018), pp. 454-457.
[72] See Schwarcz, *Idiot's Guide*… Op. Cit., pp. 1193-1194 and International Monetary Fund, *Strengthening*… Op. Cit., p. 18.

state is insolvent (and thus, that its debt is unsustainable)[73] there will always be tensions regarding the allocation of the scarce resources comprising the public budget. The extreme policy choices that states on the brink of default face illustrates those tensions in their simplest form. On the one hand, a state could use all its current (and future) resources and revenue to pay creditors, cutting every expenditure and raising the taxes needed for debt-service. In that case, all the burden is assumed by the citizens, particularly by those directly dependent on the provision of public services. On the other hand, the state could simply repudiate or default on its bonds, transferring most of the burden to its creditors.

The aforementioned is precisely what US courts have tended to neglect in the context of sovereign debt litigation, by failing to go beyond the "four corners" of the contracts at stake. As will be discussed below, this issue has also been raised by the "incremental approach" literature, in the context of the solutions proposed for this and other problems of the current practice of sovereign debt restructuring.

[73] Sovereign debt sustainability is a concept based on a state's future earning capacity. According to it, a state's debt is considered unsustainable when its future primary surpluses (considering the implementation of the maximum realistic domestic adjustment) are insufficient to pay its debts in full. See Xavier Debrun et al., Debt Sustainability, in Ali Abbas et al., *Sovereign Debt: A Guide for Economists and Practitioners*. Oxford University Press (2020); See Das et al., *Sovereign Debt…* p. 67 and International Monetary Fund, *Modernizing the Framework for Fiscal Policy and Public Debt Sustainability Analysis* (2011), available at https://www.imf.org/external/np/pp/eng/2011/080511.pdf [last accessed 24.02.2020]. A discussion on debt sustainability is provided in *Chapter Four*.

3. Proposed Solutions

With the purpose of solving the aforementioned problems, scholars, international organizations, NGOs and creditors' associations have put forward three types of strategies: the "statutory", "contractual" and "incremental" approaches. Each of these will be discussed in turn.

3.1. The Statutory Approach

The statutory approach relies on the design of an international convention (or on the modification of existing international treaties) establishing a comprehensive set of rules governing sovereign indebtedness and sovereign debt restructuring[74]. Proposals based on this approach can be traced back as far as those of the League of Nations[75] and have accompanied each debt crisis since the 1970s[76]. Academics have not been exempted from this trend, and proposals abound in the literature[77].

Perhaps the most widely discussed proposal in this regard was the one advanced by the IMF at the beginning of the 21st century[78] (the "Sovereign Debt Restructuring Mechanism", henceforth, "SDRM")[79]. In 2002, the IMF considered the SDRM taking inspiration from domestic insolvency laws[80]. According to its executive director, Anne Krueger, the objective of the SDRM was "(…) to facilitate the orderly, predictable, and rapid restructuring of unsustainable debt, while protecting asset values and creditors' rights"[81]. Procedurally, the IMF's proposal granted the initiative for activation to the state, which was not necessarily followed by a general "stay" on creditors' litigation[82]. Additionally, the mechanism considered preferential treatment for interim financing,

---

[74] See Steven Schwarcz, *Sovereign Debt Restructuring Options: An Analytical Comparison*, 2 Harvard Business Law Review (2012), p. 100.

[75] See Ryan, *Sovereign Bankruptcy*… Op. Cit., p. 2477.

[76] See Buchheit et al., *Revisiting*… Op. Cit., p. 1.

[77] See, for example, Steven Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 Cornell Law Review (2000), Christoph Paulus, *Some Thoughts on an Insolvency Procedure for Countries*, 50 The American Journal of Comparative Law 3 (2002); Schwarcz, *Idiot's Guide*… Op. Cit; Patrick Bolton, *Toward a Statutory Approach to Sovereign Debt Restructuring: Lessons from Corporate Bankruptcy Practice Around the World*, 50 IMF Staff Papers (2003); Patrick Bolton and David Skeel, *Inside the Black Box: How Should a Sovereign Bankruptcy Framework be Structured?*, 53 Emory Law Journal (2005) and Guzman and Stiglitz, *Creating*… Op. Cit.

[78] However, it is worth mentioning that the United Nations Conference on Trade and Development was the first international organization to offer such a proposal. See Olivares, *Transactional Aspects*… Op. Cit., p. 420.

[79] See Megliani, *Sovereign Debt*… Op. Cit., pp. 570 et seq. and Buchheit et al., *Revisiting*… Op. Cit.

[80] See Olivares, *Transactional Aspects*… Op. Cit., p. 418 and Patrick Bolton, *Toward a Statutory*… Op. Cit., p. 42.

[81] Anne Krueger, *A New Approach to Sovereign Debt Restructuring*, International Monetary Fund (2002), p. 4.

[82] See International Monetary Fund, *The Design of the Sovereign Debt Restructuring Mechanism – Further Considerations* (2002), available at https://www.imf.org/external/np/pdr/sdrm/2002/112702.pdf [last accessed 27.07.2021].

established supra majoritarian voting mechanisms for debt restructuring and entailed the creation of an impartial forum for the resolution of disputes[83].

However, the IMF's SDRM proposal was rejected soon after its inception[84]. Crucially, the SDRM encountered opposition from a group of sovereign borrowers, the United States and the resistance of market participants[85]. Particularly, most of the criticism came from the fact that the mechanism granted too much power to the IMF and from the worry that the SDRM would create or enhance debtor moral hazard and undermine ex-ante efficiency (by being too lenient as a mechanism ex-post)[86]. Thus, although its implementation would have been able to solve the "holdout" and other problems, opponents indicated that it would also have hurt the sovereign bonds market since creditors would have been less willing to lend (anticipating fewer costs of defaults for sovereign debtors)[87]. Notably, almost ten years later, a United Nations resolution calling for the establishment of a multilateral legal framework for sovereign insolvency[88] suffered the same fate[89]. Consequently, for the time being, the adoption of a Convention on the subject seems unlikely[90].

3.2. The Market (Contractual) Approach

During the debates about the SDRM, a different approach to sovereign indebtedness emerged victorious: the "market" or "contractual" approach[91]. In short, this strategy is aimed at smoothing out sovereign debt restructurings by improving bond provisions[92]. The proposals implemented in that context revolved around a group of clauses intended to coordinate creditors' activities in what pertains to debt renegotiation (i.e., "modification clauses") and were devised to solve the holdout problem[93]. Modification

---

[83] See Id.

[84] See Buchheit et al., *Revisiting*… Op. Cit, p. 2.

[85] See Megliani, *Sovereign Debt*… Op. Cit., p. 574; Olivares, *Transactional Aspects*… Op. Cit., pp. 420-421; Skylar Brooks and Domenico Lombardi, Private Creditors and the Politics of Sovereign Debt Governance, in Martín Guzmán, Joseph Stiglitz and José Antonio Ocampo (Eds.), *Too Little Too Late: The Quest to Resolve Sovereign Debt Crises*. Columbia University Press (2016), p. 57.

[86] See Jeffrey Butensky, *Tango or Sirtaki: The Argentine and Greek Dance with Sovereignty and a Multilateral Sovereign Debt Restructuring Framework*, 35 Boston University International Law Journal 1 (2017), pp. 181-182 and Ryan, *Sovereign Bankruptcy*… Op. Cit., pp. 2512-2513.

[87] See Hays, *The Sovereign*… Op. Cit., pp. 920-921 and Li, *The Long*… Op. Cit., p. 336.

[88] See United Nations General Assembly resolution 69/139, "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes", A/RES/68/304, (17 September 2014).

[89] Said resolution faced fierce opposition by developed countries. See Li, *The Long*… Op. Cit., pp. 335-336 and Butensky, *Tango or Sirtaki*… Op. Cit., pp. 159-160.

[90] See Juan Pablo Bohoslavsky and Matthias Goldmann, *An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law*, 41 The Yale Journal of International Law Online 2 (2016).

[91] See Hays, *The Sovereign*… Op. Cit., p. 921 and IMF, *Strengthening*… Op. Cit.

[92] See Li, *The Long*… Op. Cit., pp. 336-337; Olivares, *Transactional*… Op. Cit., p. 434; Schwarcz, *Sovereign Debt*… Op. Cit., pp. 99-100 and Guzman and Stiglitz, *Creating*… Op. Cit., p. 15.

[93] See Mark Weidemaier and Mitu Gulati, *A People's History of Collective Action Clauses*, 51 Virginia Journal of International Law 1 (2013), p. 70. It is important to note that the approach also considered the improvement of other provisions, including the "pari passu" clause. See, for

clauses, combined with other coordination provisions (including "majority enforcement" clauses and trustee clauses) are usually grouped under the rubric of "Collective Action Clauses" (henceforth, "CACs")[94].

By means of "modification" CACs a supermajority of bondholders can agree to a restructuring proposal through the voluntary amendment of the key terms of the contracts (including maturity, principal and interests). Crucially, this modification also binds dissenting creditors if the supermajority required by the instruments is reached. Consequently, if "modification" CACs are used (and the respective majority is obtained), creditors as a group can legally reduce the value of their claims and provide debt relief to the state.

Of note, "modification" CACs can be divided into three different groups: "series by series", "two-limb" aggregated (or "second generation") and "single limb" aggregated (or "third generation") modification provisions[95]. The key difference among these types of "modification" CACs lies in their scope. First, votes under "series by series" provisions only bind the creditors of a particular series of bonds. This is an important limitation since sovereign debt crises usually involve several different series of outstanding instruments that need to be restructured. Consequently, the previously described "holdout" problem may nevertheless occur if dissenting creditors control blocking positions in any series of bonds whose restructuring is being sought[96].

To continue, second generation modification clauses have the power to capture (i.e., to "aggregate") different bond series for a restructuring proposal (provided that this type of clause is included in all of them). Crucially, second-generation modification clauses gather votes both at the series and the aggregate level[97].

Though "two-limb" "modification" CACs were welcomed as an important innovation for coordinating debt renegotiation, scholars stressed that the holdout risk was still significant, particularly, at the series level, where consent was still required[98]. Therefore, after a drafting process involving government officials, market participants and sovereign debt experts, the International Capital Market Association (a creditors'

---

example, Li, *The Long…* Op. Cit., p. 333. These developments are discussed in detail in *Chapter Four*.

[94] These are the most important types of CACs for the purposes of this *Introduction*. A detailed account of the aforementioned clauses is provided in *Chapter Four*. For a theoretical discussion distinguishing other type of CACs (including "modification clauses", "majority enforcement provisions", "bondholder committee or representative clauses" and "trustee clauses", see Michael Bradley and Mitu Gulati, *Collective Action Clauses for the Eurozone*, Review of Finance (2013), pp. 17- 25.

[95] See Buchheit et al., *The Restructuring…* Op. Cit., p. 354-356.

[96] See Gelpern, Heller and Setser, *Count…* Op. Cit., p. 13; Deborah Zandstra, *New Aggregated Collective Action Clauses and Evolution in the Restructuring of Sovereign Debt Securities*, 12 Capital Markets Law Journal 2 (2017), p. 193.

[97] See Antonia Stolper and Sean Dougherty, *Collective Action Clauses: How the Argentina Litigation Changed the Sovereign Debt Markets*, 12 Capital Markets Law Journal 2 (2017), p. 240.

[98] Zandstra, *New Aggregated…* pp. 187-194.

association, henceforth "ICMA") presented its "standard form Collective Action Clauses"[99] which were also endorsed by the IMF[100]. ICMA CACs provide a "menu" of options for sovereigns attempting to restructure their debts featuring both first- and second-generation clauses and adding one further alternative: "single-limb" aggregated or "third-generation" CACs[101].

This new generation of CACs (representing the most "radical development"[102] in modification clauses) concentrate voting across different series instead of assembling it in individual bonds issuances. Thus, under "single-limb" CACs, the terms of a restructuring are considered approved if the consent of bondholders representing 75% of outstanding principal of all the affected or "aggregated" series is obtained, regardless of the negative of particular bond series[103]. Consequently, this type of CACs makes holding out less attractive by increasing the costs of achieving a blocking position[104] and represents another step towards "bridging the gap between corporate and sovereign bankruptcy"[105].

The improvements provided by CACs notwithstanding, the literature has highlighted that they are "no panacea"[106]. In particular, scholars have noted several limitations of CACs in general and of the "market" approach in particular.

The first limitation of CACs (and of the "contractual" approach) corresponds to their very nature. Since these are contractual solutions, they can only help to solve coordination problems in bonds that explicitly include them[107]. Consequently, bonds lacking CACs will not be legally affected by restructuring votes[108]. Furthermore, regardless of the benefits third-generation CACs may potentially provide to debt renegotiations, those provisions have yet to gain prominence in sovereign debt documentation. For example, according to the IMF, as of 2018, the stock of outstanding international bonds without those provisions amounted to almost 61%[109]. At the same

---

[99] See Stolper and Dougherty, *Collective*… Op. Cit., p. 239 and Gelpern, Heller and Setser, *Count*… Op. Cit., p. 1.
[100] Zandstra, *New Aggregated*… Op. Cit., p. 191.
[101] It is important to note that, under the third generation of modification provisions, the state can decide which type of mechanism (either series-by-series, two-limb or single-limb aggregation provisions) to apply to bondholders of different series. This provides the debtor with the flexibility necessary to restructure different series with different conditions and maturity structures. See Zandstra, *New Aggregated*… Op. Cit., p. 196.
[102] Zandstra, *New Aggregated*… Op. Cit., p, 194.
[103] See Gelpern, Heller and Setser, *Count*… Op. Cit., p. 13.
[104] See Stolper and Dougherty, *Collective*… Op. Cit., pp. 240-241.
[105] Gelpern, Heller and Setser, *Count*… Op. Cit., p. 2.
[106] See Guzman and Stiglitz, *Creating*… Op. Cit., p. 11.
[107] See, for example, Lee Buchheit and Mitu Gulati, *Sovereign Bonds and the Collective Will*, 51 Emory Law Journal 4 (2002) p. 1344.
[108] See Schwarcz, *Idiot's Guide*… Op. Cit., p. 1203-1204.
[109] See International Monetary Fund, *Fourth Progress Report on Inclusion of Enhanced Contractual Provisions in International Sovereign Bond Contracts* (2019), available at https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/03/21/Fourth-Progress-Report-on-Inclusion-of-Enhanced-Contractual-Provisions-in-International-46671 [last accessed

time, as previously indicated, bonds featuring both first- and second-generation CACs also lack robust aggregation provisions allowing for a comprehensive renegotiation modifying all outstanding instruments[110]. Consequently, it is feasible that blocking minorities may impede restructuring at certain series levels for those bonds[111]. Moreover, any kind of "modification" provision (including third-generation CACs) may stop short of solving the holdout problem[112]. For example, under US law, if holdouts are able to obtain a judgment before the restructuring vote is conducted, their claims will not be legally affected by it[113].

At the same time, according to the "incremental approach" literature, contractual solutions may not be sufficient to allow for domestic and international courts and tribunals to pay due consideration to the other interests at stake in debt renegotiations. According to that literature, there is a "global public interest" in ensuring that human rights are respected in that context, an interest which cannot be satisfied by circumscribing debt disputes to contractual solutions[114].

All in all, while the statutory approach was unsuccessful due to a lack of political support, the contractual approach may not be sufficient to resolve the problems affecting sovereign debt restructurings[115].

3.3. An Approach Based on Principles: The "Incremental" Approach

Usually, both the statutory and the market approaches are considered in dichotomous terms by the scholarship[116]. Thus, advocates of each strategy tend to regard the other as inconsistent, emphasizing the relative advantages of their preferred method, and the limitations of the other. However, as Yuefen Li puts it, both alternatives "(…) do not

11.12.2021], p. 7. For the IMF, the category of "international" sovereign bonds refers to instruments governed by a law different than that of the issuer. See Id., p. 3.

[110] See Buchheit et al., *Revisiting*… Op. Cit., p. 19,

[111] Buchheit and Gulati, *Sovereign Bonds*… Op. Cit., p. 1344.

[112] For example, restructurings featuring a reduced universe of outstanding instruments can also be targeted by investors attempting to acquire a blocking minority position. See Li, *The Long*… Op. Cit., p. 334.

[113] This is a consequence of the "merger" doctrine under US law. See International Law Association, *International Monetary Law*, Berlin Conference (2004), available at https://www.mocomila.org/publication/2004-mocomila-berlin-report.pdf [last accessed 24.3.2020]. See also Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 Georgetown Journal of International Law 2 (2005), pp. 322-323 and Hayk Kupelyants, *Sovereign Defaults Before Domestic Courts*. Oxford University Press (2018), pp. 83-85. A detailed discussion of this issue is provided in *Chapter 4*.

[114] See Juan Pablo Bohoslavsky and Matthias Goldmann, *An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law,* 41 The Yale Journal of International Law Online 2 (2016), p. 36.

[115] See Li, *The Long*… Op. Cit., pp. 334-335; Schwarcz, *Sovereign Debt*… Op. Cit., pp. 107-110.

[116] For a discussion of this issue, see Schwarcz, *Idiot's Guide*… Op. Cit, pp. 1191-1192.

have to be mutually exclusive"[117]. This is precisely the point put forward by scholars advocating for the "incremental approach"[118].

Considering the obstacles in the implementation of an international convention on sovereign debt restructuring and taking into account the limitations of the enhanced contractual provisions[119], scholars, NGOs and international organizations have advocated for an "incremental approach". This method relies on the progressive and continuous development of sovereign debt norms[120] and, particularly, on the identification, systematization, diffusion and construction of principles[121]. According to Juan Pablo Bohoslavsky and Matthias Goldmann, the "incremental" strategy is a "third avenue", an alternative to market and statutory proposals, complementing the current improvements made to sovereign debt documentation[122]. The overall goal of this approach is to influence and persuade stakeholders to follow best practices in the field[123] and to provide the building blocks for a future multilateral debt restructuring legal framework[124].

Crucially, the "incremental" approach has proved powerful enough to motivate two important "soft law"[125] documents: The "United Nations Conference on Trade and

[117] Li, *The Long March*… Op. Cit., pp. 336-337.
[118] See Juan Pablo Bohoslavsky and Matthias Goldmann, *Guest Editors' Foreword*, 41 The Yale Journal of International Law 2 (2016), pp. 9-10.
[119] See Bohoslavsky and Goldmann, *An Incremental*… Op. Cit., pp. 34-37.
[120] See Bohoslavsky and Goldmann, *Guest Editors'*… Op. Cit., p. 9 and Régis Bismuth, *Setting the Scope and the Limits to the Incremental Approach to Sovereign Debt Restructurings*, available at https://voelkerrechtsblog.org/de/setting-the-scope-of-and-the-limits-to-the-incremental-approach-to-sovereign-debt-restructurings/ [last accessed 28.07.2021].
[121] In the words of Matthias Goldmann this "(…) strategy (…) seeks the incremental improvement of the current framework [governing sovereign insolvency] through legal principles". Matthias Goldmann, *Putting your Faith in Good Faith: A Principled Strategy for Smoother Sovereign Debt Workouts*, 41 The Yale Journal of International Law 2 (2016), p. 118. See also Anna Gelpern, Hard, Soft and Embedded: Implementing Principles on Promoting Responsible Sovereign Lending and Borrowing in Carlos Espósito, Yuefen Li and Juan Pablo Bohoslavsky (Eds.) *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013), p. 348.
[122] See Bohoslavsky and Goldmann, *An Incremental*… Op. Cit., p. 15. See also Matthias Goldmann, *Necessity and Feasibility of a Standstill Rule for Sovereign Debt Workouts* (2014), available at https://unctad.org/en/PublicationsLibrary/gdsddf2014misc4_en.pdf [last accessed 19.3.2020], p. 12.
[123] See Stephanie Blankenburg and Richard Kozul-Wright, *Preface, Sovereign Debt Restructurings in the Contemporary Global Economy: The UNCTAD Approach*, 41 The Yale Journal of International Law 2 (2016), p. 7 and Bismuth, *Setting the Scope*… Op. Cit.
[124] See Li, *The Long*… Op. Cit., pp. 340-341.
[125] Although formally both documents have a "soft law" character, some of the principles included in them can be considered as belonging to customary international law and to "general principles" in the sense of Art. 38 (1)(c) of the Statute of the International Court of Justice. See, for example, Bohoslavsky and Espósito, *Principles Matter*… Op. Cit., pp. 75-76 and Matthias Goldmann, On the Comparative Foundations of Principles in International Law: The Move Towards Rules and Transparency in Fiscal Policy as Examples in Carlos Espósito, Yuefen Li and Juan Pablo Bohoslavsky (Eds.) *Sovereign Financing and International Law: The UNCTAD*

Development Principles on Responsible Sovereign Lending and Borrowing" (2012; henceforth, the "UNCTAD Principles")[126] and the United Nations "Basic Principles on Sovereign Debt Restructuring Processes" (2015; henceforth "UN Principles")[127], the latter being approved by resolution of the United Nations General Assembly. At the same time, it also inspired several scholarly articles, working papers and policy documents, the most important one being the UNCTAD "Sovereign Debt Workouts: Going Forward Roadmap and Guide" (2015; henceforth, the "UNCTAD Roadmap")[128].

Let me begin with a brief discussion of the "UNCTAD Principles". In 2009, with the support of the government of Norway, UNCTAD commenced with its work on principles[129]. In the process, UNCTAD enlisted the participation of NGOs, bond investors, other international organizations and the Paris Club[130]. According to the preamble of the document, the "UNCTAD Principles" do not intend to create new rights or obligations. On the contrary, its main goal is to identify, harmonize, systematize and elaborate on the implications of principles and best practices in the field of sovereign insolvency[131]. Thus, the document attempts to persuade stakeholders[132], establish a degree of consensus among them[133], contribute to a cultural change[134] and fill a normative gap[135].

Particularly, the final version of the "UNCTAD Principles" includes a set of 15 principles, which comprehensively address sovereign indebtedness[136]. These principles

---

Principles on Responsible Sovereign Lending and Borrowing. Oxford University Press (2013), pp. 113-114.

[126] See United Nations Conference on Trade and Development (UNCTAD), *Principles on Promoting Responsible Sovereign Lending and Borrowing* (2012), available at https://unctad.org/system/files/official-document/gdsddf2012misc1_en.pdf [last accessed 29.07.2021].

[127] See United Nations General Assembly resolution 69/139, Basic Principles on Sovereign Debt Restructuring Processes, A/RES/69/319 (10 September 2015).

[128] See United Nations Conference on Trade and Development (UNCTAD), *Sovereign Debt Workouts: Going Forward. Roadmap and Guide* (2015), available at https://unctad.org/system/files/official-document/gdsddf2015misc1_en.pdf [last accessed 29.07.2021].

[129] See Carlos Espósito, Yuefen Li and Juan Pablo Bohoslavsky, Introduction: The Search for Common Principles in Carlos Espósito, Yuefen Li and Juan Pablo Bohoslavsky (eds.) *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013), p. 3. However, it should be noted that UNCTAD has called for the adoption of principles addressing sovereign debt related problems since 1977. See Blankenburg and Kozul-Wright, *Sovereign Debt*… Op. Cit., p. 4.

[130] See, Espósito, Li and Bohoslavsky, *Introduction*… Op. Cit., p. 7.

[131] See UNCTAD, *Principles*… Op. Cit.

[132] See Bohoslavsky and Espósito, *Principles Matter*… Op. Cit., pp. 80-81.

[133] See Bohoslavsky and Goldman, *An Incremental*… Op. Cit., p. 39.

[134] See Espósito, Li and Bohoslavsky, *Introduction*… Op. Cit., p. 11.

[135] Id., p. 6.

[136] The document considers the following principles: On the side of the "Responsibilities" of lenders it includes: "agency", "informed decisions", "due authorization", "responsible credit decisions", "project financing", "international cooperation" and "debt restructurings". Regarding the "Responsibilities" of sovereign borrowers, it considers: "agency", "binding agreements", "transparency", "disclosure and publication", "project financing", "adequate management and

are divided into "responsibilities" of lenders and borrowers. Of great import to this *Thesis*, the document considers two principles which directly address sovereign debt restructuring. In short, said provisions require creditors to act in good faith in the context of debt renegotiation[137] and highlight that, if unavoidable, debt restructurings "should be undertaken promptly, efficiently and fairly"[138]. Furthermore, it also includes a more detailed account of both principles under the rubric of "implications". Notably, said implications put forward two crucial notions: Regarding creditors' duty to act in good faith, the document defines what qualifies as abusive behavior. As for the manner in which restructurings are to be conducted, it stresses that they "should be proportional to the sovereign's need and all stakeholders (including citizens) should share an equitable burden of adjustment and/or losses"[139].

After the publication of the "UNCTAD Principles", said intergovernmental organization continued its work and, in 2015, published its "Roadmap" on the subject[140]. As with the "UNCTAD principles", the "Roadmap" identifies several best practices in sovereign debt workouts for mitigating the problems previously discussed[141]. Although the document is not legally binding per se, several of the principles it outlines can be considered as grounded in proper sources of international law[142]. The "Roadmap" considers five principles, including legitimacy, impartiality, transparency, good faith and sustainability[143]. Crucially, the document indicates that, as a corollary of the principle of good faith, "a stay on enforcement litigation by non-cooperative creditors" should be imposed[144]. By the same token, the "Roadmap" also suggests that performance of "abusive creditor holdout'" claims should be refused, and that recoveries should be allowed up to the amount received by consenting creditors[145]. Of note, both "corollaries" are intended to solve the collective action problems in this context. Furthermore, the document recommends the enhancement of contractual clauses along its lines[146]. It also suggests the creation of an international forum (i.e., a "Sovereign Debt Workout Institution") with the mandate of mediating and arbitrating debt restructurings[147]. Finally, the "Roadmap" indicates that domestic and international courts and tribunals could make use of the principles contained therein while adjudicating sovereign debt disputes[148].

---

monitoring", "avoiding incidences and over-borrowing" and "restructuring". See UNCTAD, *Principles*… Op. Cit.

[137] See Principle 7, Id.

[138] See Principle 15, Id.

[139] See implications to Principles 7 and 15. Id.

[140] UNCTAD, *Sovereign*… Op. Cit.

[141] See Id., p. 15.

[142] See Id., pp. 15 et seq.

[143] Id., p. 4.

[144] Id., p. 23 and pp. 58-59.

[145] Id., p. 23 and p. 59. Goldmann advances a similar idea in the context of the "stay". See, Goldmann, *Necessity*… Op. Cit., pp. 10-11.

[146] UNCTAD, *Sovereign*… Op. Cit., p. 61.

[147] Id., p. 62.

[148] Id., p. 61.

Moreover, it is worth mentioning that the work conducted in the context of the "Roadmap" and of the "UNCTAD Principles"[149] served as the basis for the "UN Principles"[150], approved by a resolution of the General Assembly of the United Nations in 2015[151]. Like the "UNCTAD Principles", the UN resolution is not legally binding[152] and attempts to address, holistically, the problems prevalent in the context of debt renegotiations[153]. In addition, the "UN Principles" purport to "guide" debt restructurings towards the benefit of all the stakeholders[154] and to serve as inspiration for the creation of a subsequent multilateral framework for the subject[155].

Of note, the UN resolution contains 9 principles[156], including the duty of debtors and borrowers to act in good faith[157], respect for human rights and the rights of creditors in the context of restructurings[158] and "majority restructuring"[159].

Crucially, all the documents previously mentioned recommend the adoption of CACs and intend to persuade different stakeholders (including domestic and international courts and tribunals) to apply the principles in sovereign debt litigation[160]. However, and despite the importance of the aforementioned documents, scholars have argued that they may stop short of solving the problems which the current practice of sovereign debt restructuring faces.

For example, according to Mauro Megliani, the legal nature of some of the principles contained in the previously mentioned documents is "uncertain" and their application in litigation would depend on the seized court[161]. Precisely for this reason, scholars writing about the "incremental approach" usually advocate for the establishment of a

---

[149] See Li, *The Long…* Op. Cit., pp. 338. See also Bohoslavsky and Goldmann, *An Incremental…* Op. Cit., p. 24.
[150] United Nations General Assembly Resolution 69/139 of 2015 on "Basic Principles on Sovereign Debt Restructuring Processes". See Guzman and Stiglitz, Creating, p. 5.
[151] See Guzman and Stiglitz, *Creating…* Op. Cit., p. 5.
[152] See Li, *The Long…* Op. Cit., pp. 337-338.
[153] See Robert Howse, Toward a Framework for Sovereign Debt Restructuring: What can Public International Law Contribute? in Martín Guzmán, Joseph Stiglitz and José Antonio Ocampo (Eds.), *Too Little Too Late: The Quest to Resolve Sovereign Debt Crises*. Columbia University Press (2016), p. 10. p. 241.
[154] See Li, *The Long …* Op. Cit., p. 340.
[155] Id., pp. 340-341.
[156] The principles included in the UN resolution are: The right of states to "design" their macroeconomic policy, good faith, transparency, impartiality, equitable treatment, sovereign immunity, legitimacy, sustainability and majority restructuring. See "UN Principles", Op. Cit.
[157] See Id., Principle 2.
[158] See Id., Principle 8.
[159] See Id., Principle 9.
[160] See Id. See UNCTAD, principle 15, implications.
[161] Mauro Megliani, *Vultures in Courts: Why the UNCTAD Principles on Responsible Financing Cannot Stop Litigation*, 28 Leiden Journal of International Law (2015), p. 862. In a similar sense see Mauro Megliani, *For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries*, 31 Leiden Journal of International Law (2018), p. 374.

binding international legal framework governing sovereign indebtedness[162]. Yet, as will be discussed later, most of them have not addressed *how* these principles can be applied in sovereign debt litigation *today*. At the same time, they have not discussed in detail how said principles may help to reconcile the interests at stake in the context of sovereign insolvency. In order to present the modest contributions which this *Thesis* seeks to offer, the next section discusses the literature on the principles relevant to sovereign debt restructurings. The gaps in the literature are also highlighted.

[162] See Juan Pablo Bohoslavsky *Responsibility for Abusive Granting of Sovereign Loans*, 14 Law and Business Review of the Americas (2008), p. 512; Goldmann, *Necessity*… Op. Cit., pp. 20-21, Goldmann, *Putting your Faith*… Op. Cit., p. 140 and Goldmann and Bohoslavsky, *An Incremental*… Op. Cit., pp. 40-41.

4. Literature Researching Principles in Sovereign Debt Restructuring

A significant portion of the existing literature has assumed the task of identifying common principles arising from domestic bankruptcy regimes for the purpose of suggesting new rules for sovereign insolvency[163]. As will be argued, the main difference between the approach taken in the existing literature and the one put forward in this *Thesis*, corresponds to this work's focus on practical application in sovereign debt litigation.

In this section, I divide the existing literature in the following manner. First, I discuss the work of scholars attempting to identify principles from domestic jurisdictions that can be extrapolated to the international sphere (i.e., purporting to identify principles as "sources" of international law). Second, I engage with the literature offering avenues for the application of those principles in the context of sovereign debt disputes. Finally, I address the research concerned with identifying principles capable of capturing the distributional conflicts prevalent in the context of sovereign insolvency. The differences between this *Thesis* and the contributions that it attempts to put forward are highlighted where appropriate.

4.1. Works Identifying "General Principles of Domestic Law" in Sovereign Insolvency and the Methodology Used for that Purpose

It is necessary to remark first upon the scholarly contributions of those who concentrate on the identification of principles as *sources* of international law (i.e., on the "general principles of law recognized by civilized nations" according to Art. 38(1)(c) of the Statute of the International Court of Justice, henceforth "GPs"). Crucially, "GPs" can be divided into "general principles originating in international relations", "general principles applicable to all kinds of legal relations" and "general principles of domestic law"[164]. The first group of contributions addressed here refer specifically to the latter type of principles, i.e., to "general principles of domestic law" (henceforth, "GPDs").

It is important to note that GPDs encompass normative propositions recognized by domestic legal systems around the world (the "recognition" requirement) which can also be extrapolated to the international sphere (the "extrapolation" requirement)[165].

---

[163] See for example, Schwarcz, *Sovereign Debt*… Op. Cit.; Paulus, *Some Thoughts*… Op. Cit.; Christopher Oechsli, *Procedural Guidelines for Renegotiating LDC Debt: An Analogy to Chapter 11 of the US Bankruptcy Reform Act*, 21 Virginia Journal of International Law (1981); August Reinisch, *The Need for an International Insolvency Procedure*, 9 World Bulletin (1993); Holger Schier, *Towards a Reorganisation System for Sovereign Debt: An International Law Perspective*. Nijhoff (2007), Patrick Bolton, *Towards*… Op. Cit. For a history of those proposals see Kathrin Berensmann and Angélique Herzberg, *International Sovereign Insolvency Procedure: A Comparative Look at Selected Proposals*, 23 Discussion Paper / Deutsches Institut für Entwicklungspolitik (2007).

[164] Thomas Kleinlein, Customary International Law and General Principles: Rethinking their Relationship in Brian Lepard (Ed.), *Reexamining Customary International Law*. Cambridge University Press (2017), pp. 134-135.

[165] For a detailed discussion including a list of authorities, see *Chapters Two*, p. 41 et seq. and *Three*, p. 119 et seq.

Particularly, the works of Juan Pablo Bohoslavsky[166], Matthias Goldmann[167] and Holger Schier[168] purport to identify the GPDs relevant in the context of sovereign insolvency from domestic legal systems. Their work inspired this *Thesis* to rely upon comparative law, functionalism and analogical reasoning for "elevating" the norms found in domestic bankruptcy regimes to the international sphere[169]. As will be examined in *Chapter Three*, this requires studying whether the "function" (i.e., the "rationale") which certain norms serve under domestic bankruptcy law also holds in the sovereign insolvency context[170].

Bohoslavsky[171] focuses on one GPD derived from a comparative analysis of domestic jurisdictions: namely, the principle of "responsibility for granting abusive loans"[172]. According to him, this principle establishes that the claims of "fraudulent"[173] creditors can be subordinated to those of "responsible" creditors[174]. After briefly discussing the similarities and differences between the domestic and the international sphere[175], he notes that the "function" of the principle also holds in the latter context[176]. Furthermore, he also posits that the application of the aforementioned principle does not require new regulations on the subject[177]. However, he does not discuss in detail how that principle

---

[166] See Juan Pablo Bohoslavsky, *Responsibility for Abusive Granting of Sovereign Loans*, 14 Law and Business Review of the Americas (2008) and Juan Pablo Bohoslavsky, *Lending and Sovereign Insolvency: A Fair and Efficient Criterion to Distribute Losses among Creditors*, 2 Goettingen Journal of International Law (2010).

[167] See Matthias Goldmann, *Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions*. A Comparative Survey Written for the United Nations Conference on Trade and Development (2012). Available at https://unctad.org/en/PublicationsLibrary/gdsddf2012misc3_en.pdf [last accessed 04.08.2019]; Goldmann, *On the Comparative*… Op. Cit., Goldmann, *Putting your Faith*… Op. Cit and Goldmann, *Necessity*… Op. Cit.

[168] See Holger Schier, *Towards*… Op. Cit.

[169] See Bohoslavsky and Espósito, *Principles Matter*… Op. Cit., pp. 77 et seq.; Goldmann, *On the Comparative*… Op. Cit., pp. 118-119; Schier, *Towards*… Op. Cit. pp. 99-100; Goldmann, *Necessity*… Op. Cit., pp. 12-14; Goldmann, *Responsible*…, Op. Cit, pp. 11-12 and Armin von Bogdandy and Matthias Goldmann, Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law in Carlos Espósito, Yuefen Li and Juan Pablo Bohoslavsky (Eds.) *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2012), p. 57.

[170] See, for example, Bohoslavsky and Espósito, *Principles Matter*… Op. Cit., pp. 77-78.

[171] Bohoslavsky *Responsibility*… Op. Cit., and Bohoslavsky *Lending*… Op. Cit.

[172] In order to show how the principle operates, Bohoslavsky also discusses the rule of inter-creditor equality (*"par conditio creditorum"*) under domestic insolvency regimes. See Bohoslavsky, *Lending*… Op. Cit., pp. 392-393.

[173] According to Bohoslavsky these creditors are those who "engage in some kind of fraudulent lending practice and", simultaneously, "grant excessive loans" to the debtor. Id., p. 396

[174] Id.

[175] See Bohoslavsky, *Responsibility*… p. 506.

[176] See Bohoslavsky, *Lending*… pp. 397-400.

[177] See Bohoslavsky, *Responsibility*… Op. Cit., p. 514 and Bohoslavsky, *Lending*… Op. Cit., pp. 408-409.

could be applied by domestic courts when the bonds in question are governed by the law of a state different from that of the issuer.

Matthias Goldmann's work is more comprehensive. For example, his first major work (a study examining the legal status of the "UNCTAD Principles") endeavors to capture a wide range of norms relevant to sovereign debt in general[178]. Accordingly, Goldmann's first paper is not limited to issues arising from debt restructuring; it addresses other aspects, such as the obligations of public officials (to act in the public interest) and of creditors (to ensure the due authorization of loans). For that reason, his work considers different branches of domestic law (including administrative law and bankruptcy law) as possible sources for extracting GPDs (through a comparative analysis).

Furthermore, his first study also identifies two principles that are discussed throughout this *Thesis*: namely, a "stay" on creditors' collection efforts and the imposition of a "cram down" on dissenting creditors' claims[179]. Nevertheless, Goldmann conditions the application of these principles in sovereign debt litigation to "the existence of a restructuring procedure" for states[180]. In this regard, he stresses that:

> *"The crucial question for the application of those general principles of law on the international level is therefore whether the various informal arrangements such as the Paris or London Clubs reach this threshold and can be considered as competent and authoritative resolution mechanisms (…)"*[181].

This point deserves further scrutiny, since it has played a crucial role in sovereign debt litigation, particularly, before German courts[182]. In the same sense as Goldmann, a group of scholars has argued that, in the absence of such an insolvency procedure for states, the application of one or two GPDs in restructurings would leave creditors devoid

---

[178] See Goldmann, *Responsible…* Op. Cit. To conduct his study, Goldmann developed a questionnaire to be answered by scholars from each of the jurisdictions under scrutiny. This questionnaire is also available online. See Matthias Goldmann, *Legal Stipulations of Sovereign Lending and Borrowing in Domestic Jurisdictions*. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1958314 [last accessed 19.11.2019].

[179] See Goldmann, *Responsible…* Op. Cit. pp. 39-40. Notably, none of these GPDs is explicitly considered by the "UNCTAD principles". See Antonis Bredimas, Anastasios Gourgourinis and Georges Pavlidis, The Legal Contours of Sovereign Debt Restructuring under the UNCTAD Principles in Espósito et al. (Eds.), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013), pp. 140-141 and pp. 142-143.

[180] Id., p. 40 and 44. Goldmann also reiterates this observation in subsequent pieces. See, for example, Goldmann, *On the Comparative…* Op. Cit., p. 133 footnote 108. In Goldmann's own words: "Principles which are contingent upon the existence of specific institutions which only exist on the domestic level may not be considered general principles". Id., p. 116 and Matthias Goldmann, *Principles in International Law as Rational Reconstructions: A Taxonomy* (2014). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442027 [last accessed 21.10.2021], pp 15-16.

[181] Goldmann, *Responsible…* Op. Cit., p. 40.

[182] See Bundesgerichtshof (Federal Court of Justice, Germany) Decision of 24 February 2015, Az.: XI ZR 193/14 paras 22 et seq. and BVerfG, (Federal Constitutional Court, Germany), Order of the Third Chamber of the Second Senate of 03 July 2019 - 2 BvR 824/15, 2 Rn. 1-45 paras 37-39. For a discussion, see *Chapter Five*, pp. 275 et seq.

of critical safeguards, such as the involvement of a third party[183]. In stark contrast with the aforementioned, this *Thesis* argues that the existence of an insolvency procedure for states is not necessary for the application of certain GPDs (i.e., the "stay" and the "cram down")[184]. This is the first difference which will be commented upon between this work and the prior literature.

In short, although this *Thesis* relies on analogical reasoning (as does Goldmann)[185] it departs from his analysis in one crucial respect. In effect, as will be discussed in *Chapters Three* and *Four*, the use of analogical reasoning to extract GPDs from domestic legal systems (the "source") to extrapolate them to the international scenario (the "target") does not require these two to be "identical"[186]. In fact, "similarity" suffices.

Furthermore, in the specific context of the comparative reasoning applied to extract GPDs, similarity between the source and the target relates to the "functions" of the norms. This is satisfied by an "extrapolation" analysis, which asserts that the function served by a legal principle in the domestic sphere also holds in the international context. Therefore, as can be noted, extrapolation does not require the existence of a fully-fledged state insolvency procedure for the application of the GPDs in sovereign debt litigation. It only requires the existence of mechanisms which can perform an equivalent function to those served by other norms or institutions (such as the bankruptcy court) under domestic insolvency regimes.

Nevertheless, it is important to mention that in subsequent works, Goldmann seems to have reformulated the aforementioned requirement. In short, he appears to argue that extrapolation does not require the existence of a fully-fledged restructuring procedure for states. However, in contrast with this *Thesis*, he indicates that principles of domestic bankruptcy regimes could be transposed to the international scenario due to the fact that, since the 1990s, sovereign debt restructurings have evolved from a "private law" to a "public law" paradigm[187]. Notably, for him and other renowned scholars, this

---

[183] See, for example, Andreas Witte, *The Greek Bond Haircut: Public and Private International Law and European Law Limits to Unilateral Sovereign Debt Restructuring*, 9 Manchester Journal of International Economic Law 3 (2012), pp. 322-323; Kupelyants, *Sovereign…* Op. Cit., p. 31 and Marc Lewyn, *Foreign Debt – Act of State Doctrine – Unilateral Deferral of Obligations by Debtor Nations is Inconsistent with United States Law and Policy: Allied Bank International v. Banco Credito Agricola de Cartago*, 3 Georgia Journal of International and Comparative Law (1985), p. 666.

[184] See *Chapter Four*, pp. 193 et seq.

[185] See, for example, Goldmann, *On the Comparative…* Op. Cit., pp. 119-120 and Goldmann, *Responsible…* Op. Cit., p. 11.

[186] See An Hertogen, *The Persuasiveness of Domestic Law Analogies in International Law*, 29 The European Journal of International Law 4 (2018), p. 1144.

[187] See Goldmann, *Putting your Faith…* Op. Cit., p. 127. See also, Matthias Goldmann, *Public and Private Authority in a Global Setting: The Example of Sovereign Debt Restructuring*, 25 Indiana Journal of Global Legal Studies 1 (2018), p. 341; von Bogdandy and Goldmann, *Sovereign Debt Restructurings…* Op. Cit., p. 41 and Bohoslavsky and Goldmann, *An Incremental…* Op. Cit., pp. 38-39.

paradigm shift shows that debt restructurings are an issue of a global concern[188] and that they ought to be characterized as exercises of international public authority[189]. In that context, he, along with other authors, highlights the role played by international organizations (such as the IMF), the Paris Club and informal creditors' venues, such as the London Club[190]. For him (and others), characterizing sovereign debt restructurings as exercises of public authority has three important consequences. First, the decisions made in that context "(…) need to conform to a minimum of procedural and substantive standards"[191]. Second, those decisions need to consider all the interests at stake (including those of citizens, states and creditors)[192]. Third, it provides the basis that allows for the extrapolation of domestic principles to the international sphere.

The last point cannot be stressed enough. What is critical for Goldmann (and others) is not that the role of certain stakeholders (such as the IMF) is functionally equivalent to that of a domestic bankruptcy court. For example, although he indicates in a paper co-authored with Arming von Bogdandy that international "ad-hoc solutions" to sovereign insolvency have "equivalent effects to those of domestic bankruptcy procedures (…)"[193], he fails to indicate precisely what those "equivalent effects" are[194]. As will be discussed in detail in *Chapter Four*, those equivalent functions need to be assessed against the ex-ante and the ex-post effects of bondholder litigation and refer to the role of international organizations in preventing moral hazard[195] and mitigating information asymmetries between creditors and debtors. Thus, for the aforementioned scholars, the main issue is that the involvement of those stakeholders in sovereign debt restructurings can be qualified as *authoritative*, as is the case with domestic bankruptcy courts[196]. To

---

[188] Goldmann, *Putting your Faith*… Op. Cit., p. 127 and Bohoslavsky and Goldmann, *An Incremental*… Op. Cit., pp. 14-15.

[189] See Goldmann, *Necessity*… Op. Cit., pp. 15-16; Bogdandy and Goldmann, *Sovereign Debt*… Op. Cit., p. 41 and Goldmann, *Putting your Faith*… Op. Cit., p. 119.

[190] See Goldmann, *Necessity*… Op. Cit., p. 16; Goldmann, *Putting your Faith*… Op. Cit., p. 128; Goldmann, *Public and Private*… Op. Cit., pp. 341-342; Goldmann, *On the comparative*… Op. Cit., p. 119; von Bogdandy and Goldmann, *Sovereign Debt*… Op. Cit., pp. 49 et seq.

[191] von Bogdandy and Goldmann, *Sovereign Debt*… Op. Cit., p. 41.

[192] Id., p. 41.

[193] See von Bogdandy and Goldmann, *Sovereign Debt*… Op. Cit, p. 57.

[194] Notably, von Bogdandy and Goldmann also indicate that certain GPDs (such as the "duty to participate in debt restructurings") may also be extrapolated to the international sphere by way of a "coincidence of purposes" between the international and the domestic contexts. In their own words: "if domestic law considers the duty to participate as an essential aspect of legitimate bankruptcy proceedings and as a prerequisite to achieve the distributive purposes of insolvency proceedings, there are good reasons to recognize this idea as a general principle of law. Essential public interests should not be left to the discretion of individual creditors or creditors' committees, but to legitimate and authoritative restructuring mechanisms". von Bogdandy and Goldmann, *Sovereign Debt*… Op. Cit., p. 57.

[195] However, it should be mentioned that in a later work, Goldmann does indicate that conditionalities may be sufficient to prevent debtor moral hazard, but he fails to discuss the issue in detail. See Goldmann, *Necessity*… Op. Cit., p. 10.

[196] See Goldmann, *Public and Private*… Op. Cit., p. 361. For example, in the view of these authors, qualifying the "stay" as a GPD is "backed by reasons of legitimacy according to which authoritative international sovereign debt restructurings lead to a stay of international and

summarize their perspective: since domestic reorganization regimes rely on the presence of the court[197], and the acts of international organizations and informal creditor venues can be considered as acts of international public authority[198], the analogy works[199].

This *Thesis* also attempts to justify the idea that the resolutions of debt crises ought to consider the interests of all the stakeholders involved, and that the involvement of international organizations is critical for the analogy to be successful. However, the difference with the previous approach is, once again, methodological. In short, a small but significant "twist" is proposed. As previously indicated, it is the functional role played by said organizations (including their role in mitigating information asymmetries between creditors and debtors and in preventing moral hazard) which allows the analogy to work. Consequently, for the approach proposed here, characterizing sovereign debt restructurings as exercises of public authority, while welcome, is not necessary.

In a subsequent publication, Goldmann focuses specifically on the status of the "stay" as a GPD[200]. He argues that the legal pedigree of the "stay" as a general principle follows from both an "inductive" and a "deductive" approach. On the one hand, under the inductive approach, the stay emerges as a GPD from a comparative study of insolvency regimes around the world[201]. Following the deductive approach, on the other hand, the "stay" attains this status as a "concretization" of the principle of good faith (which is also a GPD in its own right)[202].

According to Goldmann, the *rationale* justifying the extrapolation of the "stay" from the domestic to the international sphere corresponds – once again – to an understanding of "sovereign debt workouts as exercises of public authority"[203]. Thus, in his view, the transposition of this principle is predicated on the assumption that the imposition of such a measure in the context of sovereign insolvency would protect the "public interests" at stake[204].

---

domestic enforcement actions against sovereign debtors". von Bogdandy and Goldmann, *Sovereign Debt*… Op. Cit., pp. 64-65.

[197] See von Bogdandy and Goldmann, *Sovereign Debt*… Op. Cit., p. 57.

[198] Id., p. 66.

[199] Id., pp. 57 and p. 65.

[200] See Goldmann, *Necessity*… Op. Cit. He also discusses this principle in the previously mentioned contribution which he co-authored with Armin von Bogdandy. See von Bogdandy and Goldmann, *Sovereign Debt*… Op. Cit., pp. 64-65.

[201] See Id. p. 17. "Although domestic law might vary in some details from one legal order to the other (…) on an abstract level there is a high degree of convergence: authoritative, centralized insolvency proceedings bar individual enforcement against the debtor in default". Goldmann, *Putting your Faith*… Op. Cit., 136.

[202] Id. In yet another work, Goldmann discusses other concrete forms of the principle of good faith besides the imposition of a "stay", including the duty to negotiate, equitable burden-sharing and limitations on creditor-voting in restructurings. See Goldmann, *Putting*…. Op. Cit., p. 119.

[203] See Matthias Goldmann, *Necessity*… Op. Cit., pp. 15-16.

[204] See Id., p. 17.

From a functional perspective, Goldmann adds that the purpose this principle serves will hold in both the domestic and the international sphere, that being to ensure "(…) the orderly resolution" of insolvency "while preserving the equality of creditors"[205]. Moreover, he justifies the imposition of the "stay" in the sovereign debt restructuring scenario by stressing the deficiencies of CACs in curtailing holdout litigation[206]. At the same time, he indicates that such a measure would not necessarily entail moral hazard on the debtors' side[207] and that since litigation is driven by "vulture" funds, its effects on the sovereign debt market would be negligible[208]. However, Goldmann fails to offer a detailed analysis of each of those propositions.

Moreover, Goldmann further substantiates the extrapolation of the "stay" by providing examples of state practice (legislative and judicial) suspending enforcement against public entities in the context of insolvency[209]. Crucially, this leads him to limit the application of the "stay" to enforcement measures[210]. Finally, he concludes that the aforementioned transposition is warranted since "(…) the only fundamental normative difference between defaulting states and defaulting private entities is that the former cannot be liquidated"[211].

This *Thesis* departs from the aforementioned analysis in several respects. The first relevant difference has already been detailed and relates to the functional approach taken in this work. In effect, for this *Thesis*, characterizing sovereign debt restructurings as exercises of public authority is not necessary for the purpose of identifying, extrapolating, and applying GPDs in the context of sovereign insolvency. On the contrary, this work applies a methodology based exclusively on analogical reasoning, which requires assessing the (dis)similarities between the domestic and the international context from a functional perspective.

The second significant difference between Goldmann's contributions and this *Thesis* corresponds to the detailed functional analysis of the context from which GPDs are extracted and for which they are to be extrapolated. In stark contrast with his work, this *Thesis* puts forward a detailed discussion (based upon the law and economics literature) on what pertains to the function of the principles identified (i.e., the "stay" and the "cram down"). At the same time, it complements that discussion by addressing the effects which litigation may have in sovereign defaults and the role which international organizations may assume in that context, as previously indicated.

---

[205] See Id., p. 18 and p. 2.
[206] See Id., pp. 6-7.
[207] In his own words: "the need to ensure interim financing and the conditionalities associated with it might suffice to contain [debtor] moral hazard". Id., p. 10.
[208] See Id., p. 9.
[209] Goldmann's examples include domestic legislation regulating the insolvency of subnational public entities and the case-law granting stays before domestic courts, among others. See Id., pp. 17-19.
[210] See Id., p. 5.
[211] See von Bogdandy and Goldmann, *Sovereign Debt*… Op. Cit., pp. 64-65.

The third difference refers to the type of creditor activities to be captured by the "stay". As previously indicated, Goldmann limits them to enforcement measures. However, as will be argued in *Chapter Four*, in order to be effective, the "stay" must also necessarily be extended to litigation[212].

The final difference between Goldmann's work and this *Thesis* relates to the detailed assessment offered in this work of the (dis)similarities between domestic corporate insolvency and international sovereign insolvency. While Goldmann refers to this problem, he does not address it comprehensively.

As in the aforementioned works, Holger Schier's piece conducts a comparative study of corporate reorganization regimes belonging to different jurisdictions. From this analysis, Schier extracts several principles (including the "stay" and the "cram down")[213], discusses their rationale[214] and "adapts" them to the international context[215]. His main purpose is to suggest an international treaty on sovereign debt restructuring[216], thus focusing on the "guiding" function of principles[217].

Although the approach proposed by this *Thesis* draws upon Schier's comparative perspective[218], it departs from it on one particular point. In effect, Schier indicates that the synthesis of the different rules found under domestic bankruptcy regimes needs to be conducted by choosing the norms which can best achieve the goals of an international convention for sovereign debt restructuring[219]. Nevertheless, since the purpose of this *Thesis* is different (i.e., justifying the application of GPDs in sovereign debt litigation *today*), this research differs from Schier's in that regard. In short, this *Thesis* identifies commonalities among domestic bankruptcy regimes, discusses their "rationale", bundles those commonalities in groups of normative propositions and tests whether the rationale of said propositions also holds in the international context from a functional perspective. It does not question which rule belonging to a particular domestic insolvency regime may be the "best" for an international treaty on the subject. Rather,

---

[212] See *Chapter Four,* pp. 225 et seq.
[213] See Schier, *Towards…* Op. Cit., p. 258.
[214] See Id., pp. 116-118.
[215] See Id., p. 102 and pp. 163-165.
[216] See Id., p. 16 and p. 110. In Schier's words, "(…) general principles (…) can be used as a way to further develop 'statutory' international law by the codification of former general principles (…)". Id, p. 90. For him, the principles "(…) provide fertile suggestions for the drafting of international legislation, such as a reorganization system for sovereign debt (…)". Id., p. 163.
[217] One of the functions of GPDs is to serve as sources of inspiration for the development of international law, directing its evolution and guiding the creation of new norms of the law of nations in a particular subject. See Christina Voigt, *The Role of General Principles in International Law and Their Relationship to Treaty Law*, 31 Retfærd Årgang, (2008), p. 19. See also, Stefan Kadelbach and Thomas Kleinlein, *International Law – A Constitution for Mankind? An Attempt at a Re-Appraisal with an Analysis of Constitutional Principles*, available at https://core.ac.uk/download/pdf/14507728.pdf [last accessed 22.04.2019], pp. 31-32.
[218] Like Schier's analysis, this *Thesis* focuses on corporate reorganization regimes rather than other insolvency regimes as the source to extract GPDs from. See Schier, *Towards...* Op. Cit., p. 111.
[219] See Id., p. 164.

it directly extracts said rules and tests whether their rationale also holds in the international sphere.

Consequently, the first contribution that this *Thesis* attempts to provide corresponds to the application of a small but important "twist" in the methodology used for transposing GPDs relevant to sovereign insolvency. To be precise, unlike Goldmann's first contributions, this work argues that the extrapolation of these norms does not require the existence of a restructuring procedure for states. Furthermore, unlike the prior literature, this *Thesis* indicates that characterizing sovereign debt restructurings as exercises of international public authority is also not necessary for that purpose. It posits, instead, that what really matters is that the "functions" of the norms to be extracted from domestic insolvency regimes survive in the international context. Finally, and for the same reasons, it relies exclusively on a functional analysis and analogical reasoning for conducting the aforementioned transposition.

4.2. Prior Literature Pertaining to the Application of Principles in Sovereign Debt Litigation

One of the most important limitations of the prior literature relates to the absence of a detailed discussion regarding the application of GPDs in sovereign debt litigation before domestic courts.

First, although Goldmann indicates that the application of international law is contingent upon its reception in the legal system in question[220], he fails to discuss the issue in a comprehensive manner[221]. For example, he stresses that GPDs could be applied by US courts "by ways of the idea of comity"[222]. Although comity may be used to invoke international law in disputes brought before US courts[223], he failed to discuss the precise status of GPDs under US law (a question which needs to be answered first)[224].

---

[220] In his own words: "A matter of positive international law, states need to comply with general principles. Some constitutions incorporate general principles into the domestic legal order, either (…) directly or (…) indirectly". Goldmann, *Necessity*… Op. Cit., p. 14. In the same sense, see also Goldmann and Bohoslavsky, *An Incremental*… Op. Cit., p. 40.

[221] The same limitation can be identified in another paper together with von Bogdandy. See von Bogdandy and Goldmann, *Sovereign Debt*… Op. Cit., p. 69.

[222] Goldmann, *Necessity*… Op. Cit., p. 14. See also Goldmann, *Putting* … Op. Cit., p. 140. In order to support that statement, Goldmann quotes (generally) from a paper by Wheeler and Attaran. Wheeler and Attaran, *Declawing*… Op. Cit. Although that paper deals with the imposition of a "stay" and calls for a "cram down" of dissenting bondholders' claims, it does not discuss (in any respect) general principles of law or the relationship between international law and the US legal system. In said paper, Wheeler and Attaran only analyze the doctrine of comity (which does not necessarily refer to international law) as an avenue for substantiating defenses in favor of sovereign debtors.

[223] See, for example, Carl Marks & Co. v. Union of Soviet Socialist Republics, 665 F. Supp. 323 (S.D.N.Y. 1987).

[224] For example, this limitation has been remarked by Robert Howse. See Howse, *Toward a Framework*… Op. Cit., p. 242.

A similar shortcoming can be found in Bohoslavsky's and Schier's works. In particular, Schier's piece limits itself to the task of "adapting" GPDs to the international context[225] indicating that (…) it may still be too early for these principles to be used as a free-standing and autonomous basis for a judicial decision"[226].

Perhaps the only work that overcomes said limitation was authored by Dimitrij Euler and Giuseppe Bianco[227]. In effect, their paper is among the few that discusses in detail how a GPD could be invoked in sovereign debt litigation. Their work deals with the principle of inter-creditor equality (arguably, a GPD) in sovereign debt restructurings, which they take as given[228]. Particularly, they argue for the extrapolation of said principle, by analogy, from domestic bankruptcy regimes to the international sphere[229] and for its application in litigation. However, their analysis is limited to a single case: that of a dissenting creditor who obtains a favorable judgment in arbitration. Specifically, they argue that an indebted state could invoke the "public policy" exception in order to prevent the enforcement of the award in foreign jurisdictions[230]. According to them, this exception could be informed by GPDs such as the "par conditio creditorum" under domestic bankruptcy regimes (i.e., the "inter-creditor equality" principle). In this specific case, the principle would be violated if the seized forum allows the enforcement of an award which satisfies the claims of dissenting creditors in full, while the other creditors' claims are restructured or remain in default[231].

Consequently, the second gap in the literature that this *Thesis* aims to fill corresponds to whether the GPDs which will be identified and discussed in later *Chapters* (namely, the "stay" and the "cram down") can be applied in bondholder litigation before domestic courts. This is a significant gap indeed. The rise in holdout litigation documented in the literature[232], has reinvigorated the calls for more research targeting the "holdout"

---

[225] See Schier, *Towards*… Op. Cit., pp. 102 and p. 163. However, it is important to note that Schier does indicate that it may be possible for courts to directly apply GPDs in the context of sovereign debt litigation. See, Id., pp. 258-260. Nevertheless, as with most of the literature, he fails to discuss the issue in detail.

[226] Id., p. 163.

[227] See Dimitrij Euler and Giuseppe Bianco, *Breaking the Bond: Vulture Funds and Investment Arbitration*, 31 ASA Bulletin 3 (2013).

[228] Euler and Bianco do not follow any particular methodology in identifying the principle of inter-creditor equality. Therefore, they do not study how different jurisdictions address the treatment of creditors, they do not discuss in detail the rationale behind this principle, and they do not deal with the extrapolation requirement. See Euler and Bianco, *Breaking*… Op. Cit., p. 565.

[229] Id. pp. 569-570.

[230] A similar argument has been put forward by Mauro Megliani. However, Megliani's work does not deal directly with the application of GPDs in sovereign debt litigation. Instead, it is concerned with the extraction of a "sustainability rule" derived from both the doctrine of state of necessity and public policy. As in Euler and Bianco's proposals, Megliani addresses the avenues for preventing the enforcement of creditors' claims based on the "public policy exception". See Megliani, *For the Orphan*… Op. Cit.

[231] Id., pp. 571-572.

[232] Schumacher, Trebesch, Enderlein, *What Explains*… Op. Cit., pp. 13-17.

problem[233]. As will be indicated in *Chapter Five*, the analysis offered here is limited to two domestic jurisdictions: New York and Germany.

4.3. Previous Literature Discussing Other Norms which may be Classified as "Principles" of International Law

Finally, some of the previous literature goes beyond the discussion of principles as "proper" sources of international law, investigating other "abstract norms" (that they regard as principles) which cannot be qualified as such[234]. Despite their non-binding character, according to this literature, the identification and "formation" of these principles is critical to the "incremental approach". In fact, according to these scholars, these norms may be powerful enough to influence stakeholders towards resolving debt crises more fairly by inspiring their codification, new legislation or by helping in the interpretation of existing norms[235].

Thus, this literature develops a taxonomy of principles which goes beyond GPs and GPDs[236]. Significantly for this *Thesis*, said taxonomy contains the notion of "principles of public international law"[237]. As stated above, for the aforementioned literature, these principles need to be distinguished from "GPs" which are, by themselves, proper sources of the law of nations[238]. Crucially, this would not be the case for the "principle of public international law" according to that literature. For example, according to Bohoslavsky and Goldmann, those principles lack a domestic underpinning[239] and can be regarded as manifestations of the "(…) main structures of the international legal order"[240]. Despite lacking a legally binding character, the aforementioned scholars indicate that those principles can nevertheless guide the application of the law[241].

Methodologically, for this group of scholars, the identification (and "formation") of these principles demands a "constructive, interpretative effort"[242]. In short, they indicate that those principles can be ascertained

> *"(…) by showing that practice follows a fairly consistent normative pattern in a certain field of international law, which is consistent with other rules and principles of international law"*[243].

Through those means, Bohoslavsky and Goldmann are able to identify sovereign debt sustainability as a "principle of public international law"[244]. Particularly, they substantiate said conclusion by analyzing how debt crises have been resolved in recent

---

[233] See Trebesch, *Sovereign Debt*… Op. Cit., p. 48; Gelpern, *Sovereign Debt*… Op. Cit., pp. 45-46.
[234] See, for example, Bohoslavsky and Goldmann, *An Incremental*… Op. Cit.
[235] Id., pp. 38-42.
[236] See, for example, Matthias Goldmann, *Principles*… Op. Cit., pp. 15 et seq.
[237] See Bohoslavsky and Goldmann, *An Incremental*…Op. Cit., pp. 15-16.
[238] See Id., p. 27.
[239] Id., p. 15.
[240] Id.
[241] Id., pp., 15-16.
[242] Id., p. 16.
[243] Id.
[244] Id.

years and the declarations issued in that context by international organizations[245]. For them, this particular principle has significant consequences, since it calls for the due consideration of economic development and human rights (including economic, social and cultural rights)[246]. At the same time, this principle reflects the "paradigm shift" discussed in the last subsection, according to which sovereign workouts can be deemed of international concern[247].

There is no doubt that this literature can be considered critical for the further development of the law and the enhancement of the current practice of sovereign debt crises resolution. Nevertheless, that work suffers from the same shortcomings that affect the literature discussed in the previous subsections. For example, Bohoslavsky and Goldmann recognize that "debt sustainability" as such does not belong, at face value, to any "legal" source of international law[248]. For this reason, it is uncertain whether the principle can be successfully invoked in sovereign debt litigation.

Intrinsically connected with the last point, the category of "principles of public international law" employed by said scholars deserves closer scrutiny. Crucially, from a theoretical perspective, they disregard the distinction proposed by Robert Alexy between "principles" and "rules". According to Alexy, both types of norms can be differentiated from a "structural" point of view: on the one hand, rules "are norms that are always fulfilled or not"[249] and applied through subsumption[250]. On the other hand, "principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities", thus being only "prima facie"[251] or "optimization requirements"[252]. Particularly, Alexy indicates that principles are applied through balancing or weighing (i.e., proportionality analysis), and not through subsumption.

Instead of following the aforementioned distinction, Bohoslavsky and Goldmann tend to agree with Jürgen Habermas, who discards the "structural" differences between principles and rules[253]. Consequently, the category of "principles of public international law" put forward by said scholars comprises general rules expressing an important "(…)

[245] See Id., p. 21-27.
[246] See Id., p. 17.
[247] See Id., p. 15.
[248] See Id. p. 27.
[249] Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality*. Oxford University Press (2012), p. 10.
[250] See Robert Alexy, *On Balancing and Subsumption. A Structural Comparison.* 16 Ratio Juris 4 (2003), pp. 433-435.
[251] See Id., p. 57.
[252] See Id., p. 47.
[253] See Bohoslavsky and Espósito, *Principles Matter…* Op. Cit., p. 77. See Goldmann, *On the Comparative…* Op. Cit., pp. 114-115 and Goldman, *Principles…* Op. Cit., pp. 3-4.

element of the present international legal order"[254]. For the same reason, it does not refer to "(…) a category of norms that would be logically different from rules"[255].

This *Thesis* also differs from the previous "incremental approach" literature on that point. From the start, it follows the distinction between "rules" and "principles" posited by Alexy. Admittedly, Alexy developed that differentiation for domestic legal norms and, first and foremost, for domestic constitutional rights norms. Nevertheless, scholars have applied Alexy's theoretical contribution to the law of nations.

For example, an important group of scholars has indicated that international law norms (belonging to "proper" sources of the law of nations)[256] can be deemed as "principles" in the sense posited by Alexy[257]. Considering that and other similarities between those international norms and domestic constitutional principles[258], and following the literature, this *Thesis* refers to them as "principles of public international law" as well (henceforth, "PIL principles"). Methodologically, PIL principles are to be identified in the universe of international law norms, where, as Anne van Aaken puts it, "the legal phenomena is the empirical material"[259].

Although using the same term as the one already employed in previous "incremental approach" literature (i.e., "principles of public international law") may be confusing, it is nevertheless necessary: It expresses, accurately, the types of international legal norms which it comprises (if one follows Alexy's understanding on the subject).

Despite sharing the same "name", the differences between the aforementioned categories are significant. In short: the category used in the previous scholarship about the "incremental approach" comprises norms of an "uncertain" legal character. In contrast, the category employed here refers exclusively to legally binding norms which can be considered "optimization" requirements. As a corollary, PIL principles in the sense intended by Alexy are better suited to the task of influencing legal outcomes than the category proposed by Bohoslavsky, Goldmann and others. Crucially, PIL principles are more capable of being used *directly*, through arguments grounded in the law of nations as it stands today, in sovereign debt litigation. Precisely for those reasons, this

[254] See Bohoslavsky and Goldmann, *An Incremental…* Op. Cit., p. 15. Thus, Goldmann understands principles as "(…) just another form of rules, although of a rather abstract and general character". Goldmann, *On the Comparative…* Op. Cit., p. 115.
[255] See Id., p. 114.
[256] That is, to either treaties, customary international law or GPs.
[257] See Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 Indiana Journal of Global Studies 2 (2009); Kadelbach and Kleinlein, *International Law…* Op. Cit. and Thomas Kleinlein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, 12 German Law Journal 5 (2011).
[258] See van Aaken, *Defragmentation…* Op. Cit., p. 492. See also, Antonio Cassese, *International Law,* 2nd Ed. Oxford University Press (2005), p. 48 and p. 188 and Kadelbach and Kleinlein, *International Law…* Op. Cit., pp. 35-38.
[259] van Aaken, *Defragmentation…* Op. Cit., p. 492.

Thesis decided to deviate from the previous notable contributions to the "incremental approach" on that point.

Therefore, this *Thesis* discusses other principles of international law which, while not necessarily considered GPs, can be regarded as having a formally binding character (i.e., they rely on established sources of international law). Particularly, this *Thesis* investigates treaty norms which can be considered as "optimization requirements" and applied in the context of sovereign debt litigation before international courts and tribunals.

However, the "hard law" character of said norms and the possibility of their application in sovereign debt disputes is not the only service this understanding of PIL principles lends to the analysis conducted in this *Thesis*. In effect, the "incremental approach" scholarship has highlighted that all interests at stake in sovereign debt renegotiations need to be considered[260] and balanced somehow[261]. Crucially, the notion of PIL principles adopted in this *Thesis* is not only amenable to balancing, but also arguably the most suitable interpretation for the task[262]. Moreover, PIL principles can be regarded as the "legally binding" benchmarks against which rules pertaining to different sources (including GPDs) and measures taken in the context of debt restructurings can be measured.

Consequently, the final contribution that this *Thesis* attempts to make is to identify the PIL principles protecting the interests at stake in the context of sovereign insolvency. At the same time, it also endeavors to provide an analysis of the conditions under which the application of measures comprising GPDs (including a "stay" and a "cram down") can be considered proportional if PIL principles are used as the relevant decision criteria. By doing so, it attempts to discuss whether it would be possible to reconcile what seems to be irreconcilable: that is, the interests of creditors, citizens and states in the context of debt crises.

[260] See, Guzman and Stiglitz, *Creating*… Op. Cit., p. 9.
[261] See, for example, UNCTAD Principles, principle 15 and Gelpern, *Sovereign Debt*… Op. Cit., p. 94. In the words of Bohoslavsky and Goldmann: "this does not mean that private interests of creditors can no longer play a role in debt restructurings. Rather, they need to be balanced against the public interests reflected in sovereign debt sustainability". Bohoslavsky and Goldmann, *An Incremental*… Op. Cit., pp. 26-27.
[262] In Alexy's words: "The nature of principles implies the principle of proportionality and vice versa". Robert Alexy, *A Theory of Constitutional Rights*. Oxford University Press (2002), p. 66.

5. Research Questions, Methodology and Thesis Overview

This *Thesis* consists of seven *Chapters*, including this introduction, and attempts to answer four research questions.

The first research question addressed by this *Thesis* relates to the principles of public international law (i.e., PIL principles) relevant to the resolution of legal disputes arising from sovereign insolvency conflicts. As previously indicated, said principles correspond to international norms which can be considered functionally and structurally similar to domestic constitutional principles and which protect the interests at stake in the context of insolvency conflicts. Crucially, the resolution of insolvency conflicts usually supposes the satisfaction of one of the principles at stake, to the correlative detriment of the others. For this reason, a trade-off takes place between competing principles in that context. Consequently, this research question can be formulated in the following way:

> **RQ#1:** What are the PIL principles relevant to the resolution of legal disputes arising from insolvency conflicts?

In order to answer this question, this *Thesis* will use black letter law analysis. It will identify norms from international legal materials (particularly, international treaties, including bilateral investment treaties and human rights conventions). This research question is addressed in *Chapter Two*.

The second research question refers to the identification of certain rules of international law which may contribute to reconciling the trade-offs that states face in the context of insolvency conflicts. The rules to be identified for that purpose refer to the "general principles of law recognized by civilized nations" (i.e., "GPs"). Particularly, the literature divides GPs into "general principles originating in international relations", "general principles applicable to all kinds of legal relations" and "general principles of domestic law"[263]. It is this last set of principles ("general principles of domestic law", i.e., "GPDs") that will be the subject of this *Thesis*. Admittedly, there are several controversies regarding the content and the methodology for the identification of GPDs. However, the majority of commentators agree that they encompass normative propositions widely recognized by domestic legal systems around the world (the "recognition" requirement), which are capable of being extrapolated to the international sphere (the "extrapolation" requirement)[264].

Therefore, the second research question of this *Thesis* is:

> **RQ#2:** What are the general principles of domestic law relevant to sovereign insolvency conflicts?

The methodology to be used for answering this question will be comparative law (functional analysis) and analogical reasoning (informed by law and economics). This second research question is examined in *Chapters Three* and *Four*.

---

[263] See Thomas Kleinlein, *Customary*… Op. Cit., pp. 134-135.

[264] For a detailed discussion including a list of authorities, see *Chapters Two*, p. 64 et seq. and *Three*, p. 140 et seq.

After identifying the general principles of domestic law, this *Thesis* proceeds to discuss whether they can be applied in sovereign debt litigation. Notably, from the perspective of international courts and tribunals, the issue is straightforward. Indeed, depending on the law applicable to the dispute, international adjudicators are generally authorized to recur to GPDs in international disputes. However, the issue is not so simple from the perspective of sovereign debt litigation before domestic courts. This is a consequence of the choice of law clauses included in most sovereign bonds. In effect, as stated above, these instruments are invariably oriented toward domestic jurisdictions in their governing law clauses and not to international law. Consequently, an important issue to be addressed refers to the possibility of applying international law norms (including GPDs) in the context of sovereign debt litigation before domestic courts.

Particularly, this problem will be addressed from the perspective of two jurisdictions: New York and Germany. First, New York was selected since it is usually preferred by emergent market borrowers when issuing bonds[265]. Second, although German law is featured less prominently in sovereign debt documentation, this legal system was chosen because it features cases specifically discussing the application of GPDs in sovereign debt litigation.

Consequently, the third research question of this *Thesis* can be formulated as follows:

> **RQ#3:** Can the previously identified general principles of domestic law be applied in sovereign debt litigation before the domestic courts of New York and Germany?

The methodology to be used for answering this question will be black letter law analysis. This question is addressed in *Chapter Five*.

Finally, the last research question posited by this *Thesis* corresponds to assessing whether the GPDs previously identified can help to mitigate the trade-offs between PIL principles. Particularly, this *Thesis* will discuss the conditions under which the imposition of measures comprising the aforementioned GPDs can be considered compatible with the PIL principles protecting citizens' and creditors' interests. In other words, this *Thesis* outlines the conditions under which the different principles can be reconciled in the light of international law. Therefore, this research question can be formulated as follows:

> **RQ#4:** Can the measures comprising the previously identified general principles of domestic law help to reconcile the PIL principles at stake in sovereign insolvency conflicts?

To answer this question, I will use two variants of the so-called "optimization" accounts of proportionality analysis. First, I sketch a proportionality analysis based on Robert Alexy's methodological framework. Second, I repeat this exercise, but from the

[265] See Waibel, *Sovereign Bonds*… Op. Cit., p. 641. See also Rault, *The Legal*… Op. Cit., p. 97 and Kupelyants, *Sovereign Defaults*… Op. Cit., p. 111.

perspective of Sartor's (economic) reformulation of said procedure. This question is addressed in *Chapter Six*.

The last *Chapter*, *Chapter Seven* summarizes the findings of this *Thesis*.

CHAPTER TWO: PRINCIPLES OF PUBLIC INTERNATIONAL LAW RELEVANT FOR THE RESOLUTION OF INSOLVENCY CONFLICTS

1. Introduction

As stated in *Chapter One*, insolvency conflicts feature several competing interests that need to be considered, from the point of view of international law, including the "public interest", the property rights of bondholders and the "social" rights of the citizens of the indebted state. At face value, these interests are solely of the concern of their respective applicable national law. For example, while bondholders' claims are governed by domestic private law, citizens' entitlements are the subject-matter of domestic public law. However, since the decisions taken in the context of insolvency conflicts produce effects that surge over the borders of the indebted state, a solution based on international law also needs to be considered[266].

An international regime for the resolution of the aforementioned conflicts does not yet exist. Notwithstanding this, scholars have argued that the law of nations does address sovereign-debt related issues, such as the very notion of sovereignty, state succession, debt continuity, and the domestic enforcement of foreign awards[267].

In this *Chapter*, I identify the international norms that protect property, the "public interest" and "social" rights. Particularly, this *Chapter* poses the question of whether these norms can be considered functionally and structurally equivalent to constitutional principles. As will be shown, the norms studied here share the structure predicated of "principles" by legal argumentation, that is, they are understood as optimization or "prima facie" requirements. For this reason, these norms will be referred to as "principles of public international law" (henceforth, "PIL principles"). Particularly, as it will be discussed, this category captures a specific "norm-type".

Before discussing the PIL principles that protect bondholders', citizens' rights and the "public interest" (which are relevant for the resolution of insolvency conflicts), it is necessary to clarify the relationship this type of legal norms have with principles as a "source" of international law (the "general principles of law" according to Article 38 of the Statute of the International Court of Justice). I start by tackling this problem in section 2. Then I move on to analyze creditors' property rights (and the protection of the "public interest") under international law in section 3. In section 4, I discuss the protection of "social" rights under the law of nations. The conclusions of this *Chapter* will be presented in section 5.

[266] See, for example, Bohoslavsky and Espósito, *Principles Matter*… Op. Cit., p. 73.
[267] For a discussion of how international law addresses these issues see generally Weidemaier and Gulati, *The Relevance of Law*… Op. Cit.

2. "General Principles of Law" and "Principles of Public International Law"

"General principles of law" (henceforth, "GPs") are usually considered one of the sources of international law. As such, they have been included in the non-exhaustive and limited list of sources of Article 38 of the Statute of the International Court of Justice (henceforth "SICJ")[268] and used by international courts and tribunals when adjudicating international disputes.

However, controversies abound regarding these principles' nature, hierarchy, role in judicial practice, the methodology for their ascertainment, and even whether they should be regarded as proper sources of international law at all[269]. These discrepancies are usually understood as expressions of the broader disagreements between different schools of legal thought (particularly, between naturalism and positivism, on the one hand and naturalism and voluntarism[270], on the other). At the same time, said disagreements are enabled by the lack of a legally binding definition of these principles' content and a legally binding methodology for their identification[271], as well as by the "insufficient guidance" provided by the practice of the International Court of Justice[272].

Consequently, it is not surprising to find a wide variety of definitions of this type of legal norms in the literature on the subject, each adding or subtracting one or more of their defining characteristics and connections with other sources. For instance, while some scholars understand these principles as "obvious maxims of jurisprudence of a general

[268] Article 38 (1) (c) of the Statute of the International Court of Justice provides: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (…) c. The general principles of law recognized by civilized nations (…)". Statute of the International Court of Justice in Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, T.S. No. 993.

[269] As Johan Lammers puts it: "few things have in the past given rise to so much diversity of opinion as precisely the nature and function of these principles". Johan Lammers, General Principles of Law Recognized by Civilized Nations, in Frits Kalshoven et al. (Eds.) *Essays on the Development of the International Legal Order in Memory of Haro F. van Panhuys*. (1980), p. 53.

[270] See Jaye Ellis, *General Principles and Comparative Law*, 22 The European Journal of International Law 4 (2011), pp. 953-954.

[271] According to Alec Stone Sweet: "there is no codified statement on the content of the general principles, and not authoritative, prescribed method for identifying and applying them". See Alec Stone Sweet, *Proportionality, General Principles of Law and Investor State Arbitration: A Response to Jose Alvarez*, 46 International Law and Politics (2014), pp. 912-913. For this reason, the International Law Commission (henceforth, "ILC") decided to study this source of international law at its sixty-ninth session (2018). At the time of this writing, two Reports have been submitted to the ILC by the Special Rapporteur on the subject (Professor Marcelo Vásquez-Bermúdez). Furthermore, the Commission has received commentaries by the governments of Australia, Belarus, the Netherlands and the Russian Federation and has so far adopted five preliminary conclusions. A discussion of the current work of the ILC in this regard is provided in *Chapter Three*.

[272] See Rumiana Yotova, *Challenges in the Identification of the "General Principles of Law Recognized by Civilized Nations": The Approach of the International Court*, 3 Canadian Journal of Comparative and Contemporary Law 1 (2017), pp. 270-271.

and fundamental character"[273], others equate them with customary international rules[274]. Closely connected with the later statement, some jurists argue that GPs are norms of general validity, extracted from domestic legal systems or construed by analyzing the legal logic of international normative statements, which in either case would be the testimony of a "common legal conscience" or an "opinio juris communis"[275]. Furthermore, another author defines them as an autonomous source of international law derived from a "general consensus" which can "promote the consistency of international law"[276]. Last but not least, other scholars conceptualize this type of principles as fundamental and general norms of international law that express moral and political values that justify the legal order or other norms of international law[277].

As stated above, these discrepancies comprise the methodology that should be used to identify this specific source of international law. For one group of academics, GPs are fundamental propositions to be derived from a doctrinal understanding of law as such[278], expressing what Bing Cheng calls "the essential qualities of juridical truth itself"[279]. For others, GPs are but those norms that can be identified by means of a comparative study of different legal systems, from which they are to be extrapolated to the international scenario (a "comparative approach")[280]. Finally, a heterogenous group of scholars

[273] See International Law Being the Collected Papers of Hersch Lauterpacht, (E. Lauterpacht ed.), Volume I, The General Works, pp. 69-70, quoted by Maria Panezi, *Sources of Law in Transition: Re-visiting General Principles of International Law*, 66 Ancilla Iuris (2007), p. 69.
[274] See Tarcisio Gazzini, *General Principles of Law in the Field of Foreign Investment*, 10 The Journal of World Investment & Trade 1 (2009), p. 105.
[275] See Voigt, *The Role…* Op. Cit., p. 8.
[276] Panezi, *Sources of Law…* Op. Cit., p. 70.
[277] See Samantha Besson, General Principles in International Law – Whose Principles? in Samantha Besson and Pascal Pichonnaz (Eds.), *Principles in European and International Law*. Schulthess (2011), pp. 32-33.
[278] For a discussion of the arguments of these scholars, grouped under the rubric of "categoricists", see Christopher Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law"*, 35 Duke Journal of Comparative & International Law 5 (1994), pp. 72-73.
[279] Quoted by Id., p. 73.
[280] This view finds support in the position of Lord Phillimore, one of the members of the Committee of Jurists that drafted what today is the Statute of the International Court of Justice. See, for example, Giorgio Gaja, *"General Principles of Law",* Max Planck Encyclopedia of Public International Law, [last accessed 15.06.2019], § 3. For this group of scholars, "general principles of law" can be regarded "general principles of domestic law". In their opinion, this position is not only consistent with the preparatory work of the SICJ and with the ordinary meaning of Art. 38 (1)(c), but also allows for a differentiation between legal norms and other types of social norms, and between principles and other sources of international law. First, these scholars argue that, by having recourse to legal recognition under domestic systems as the core of principle-identification, the boundaries between legal principles and moral norms can be draw and, hence, arguments *de lege lata* and *de lege ferenda* can be distinguished. See Allain Pellet, Article 38 in Andreas Zimmermann and Christian Tams (Eds.), *The Statute of the International Court of Justice: A Commentary* (2nd Edition). Oxford University Press (2012), p. 767. Secondly, the proponents of this view stress that their position also enshrines the autonomy of principles as a source of international law and avoids the tautology inherent in identifying principles from other sources (such as treaties or custom): deriving a source of international law from another source of international law. See Besson, *General Principles…* Op. Cit., p. 42. Finally, it should also be

maintain that GPs are to be derived from domestic jurisdictions, the international legal system and, in some cases, from international relations (a "hybrid" approach)[281].

Complicating matters further, there are also disagreements within each of these fields in the debate. However, exhaustively commenting on all these differences falls beyond the scope of this *Chapter*[282]. Suffice it to say that nowadays, "comparative" and "hybrid" approaches prevail both in the doctrine and the practice of international courts and tribunals[283]. For this reason, it will be more useful to address the issue of GPs borrowing the taxonomy developed by Thomas Kleinlein[284], which considers both "comparative" and "hybrid" approaches.

---

mentioned that, for this view, this type of principles is usually derived from domestic private law. For a discussion, see André Nollkaemper and Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework,* 34 Michigan Journal of International Law (2013), pp. 398 et seq.

[281] See, for example, Kleinlein, *Customary International Law*… Op. Cit., p. 134. Johan Lammers, for instance, argues that this position is not only consistent with the language of Article 38 (1)(c) SICJ and its drafting history, but that it is also required by a teleological interpretation of that provision: since the main purpose of general principles is to prevent "non-liquet", it would not be reasonable to impair the possibility of filing gaps by circumscribing the law that an international tribunal could apply to the general principles of domestic law. See Lammers, *General Principles*… Op. Cit., p. 53. Regarding the methodology used for their identification, the "hybrid" approach also requires a process of generalization or abstraction from particular norms and/or normative propositions, which in this case, also includes the international legal order. For example, some authors stress that it is possible to derive principles from treaty and customary rules. See for example, Giorgio Gaja, *General Principles*… Op. Cit., § 24. Others posit that is more common to find them in international custom. See Gaetano Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and The System of The Sources of International Law* (1979), pp. 54-55. Yet others indicate that they can be found in unperfected custom or treaties. See Cherif Bassiouni, *A Functional Approach to "General Principles of International Law",* 11 Michigan Journal of International Law 3 (1990), pp. 768-769. Finally, other scholars propose that general principles can be extracted from similar provisions in different treaties addressing the same subject. For example, Maria Panezi argues that the "Hull formula" (requiring "prompt, adequate and effective compensation" in the case of expropriation of an investor's assets) is so widespread among International Investment Agreements, that it can be considered as a general principle of international law, although it is not a customary rule. See Panezi, *Sources of Law*… Op. Cit., p. 76-77.

[282] For a detailed discussion of these differences, including also other possible classifications of the scholarship on the "general principles of law recognized by civilized nations" see Riccardo Pisillo Mazzeschi and Alessandra Viviani, General Principles of International Law: From Rules to Values? in Riccardo Pisillo Mazzeschi, Pasquale De Sena (Eds.), *Global Justice, Human Rights and the Modernization of International Law*. Springer (2018).

[283] See Michelle Biddulph and Dwight Newman, *A Contextualized Account of General Principles of International Law*, 26 International Law Review 2 (2014), p. 298. See also Patrick Dumberry, *A Guide to General Principles of Law in International Investment Arbitration*. Oxford University Press (2020), p. 27 and Marija Dordeska, *General Principles of Law Recognized by Civilized Nations (1922-2018): The Evolution of the Third Source of International Law Through the Jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Brill Nijhoff (2020), pp. 82 et seq.

[284] See Kleinlein, *Customary International Law*… Op. Cit.

Kleinlein distinguishes three different types of GPs: general principles of domestic law (henceforth, "GPDs"), which are the norms to be identified in domestic jurisdictions through comparative analysis, general principles that have their origin in international relations; and general principles that are "applicable to all kinds of legal relations"[285]. Of particular interest to this *Thesis* is the first type of "general principles" identified by Kleinlein, i.e., GPDs, which will be discussed in the following subsections.

2.1. General Principles of Domestic Law

It should be noted that advocates of "comparative" and "hybrid" approaches agree on one crucial point: both consider GPDs as "general principles" in the sense of Article 38 (1)(c) SICJ. Therefore, both groups of scholars (i.e., those following a "comparative" and a "hybrid" understanding of GPs) tend to divide the methodology for the ascertainment of GPDs into two steps[286]. First, a comparative study of domestic legal systems concerning a specific legal question (a "point of law"[287]) is conducted. Analyzing all the domestic legal systems of the world is not considered necessary. Instead, an inquiry based on a representative sample of jurisdictions belonging to different legal traditions is considered sufficiently encompassing[288]. At this point, principles are identified "from more specific norms, or from groups of specific norms, or from the entire juridical order"[289] of the legal systems under scrutiny. Then, a process of "abstraction" and "generalization"[290] takes place, where domestic norms are "reduced to its core"[291]. This first step is part of the so-called "recognition" requirement, as will be discussed in detail in *Chapter Three*[292].

Secondly, the norm (or norms) thus identified is (are) extrapolated to the international scenario. For this, the principle as such needs to be capable of this transposition, that is, compatible with the structure, "the framework and objectives of the international legal order"[293]. For example, it would not be possible to elevate norms dependent on the existence of particular institutions of domestic jurisdictions (such as those related to parliamentary practice) to the international level[294]. In the same fashion, domestic norms contradicting the very structure of international law suffer the same fate. As Allain Pellet states: "A clear example of such an impossible transposition is given by the international principle of consent to jurisdiction: while, in the domestic sphere, the fundamental rule is that any dispute may be brought before a judge, in international

[285] See Id., pp. 134 et seq.
[286] See Gebhard Bücheler, *Proportionality in Investor-State Arbitration*. Oxford University Press (2015), pp. 32-33.
[287] Lammers, *General Principles*… Op. Cit. p. 62.
[288] Erik Bjorge, *Public Law Sources and Analogies of International Law*, 49 Victoria University of Wellington Law Review (2018), p. 537.
[289] Pisillo Mazzeschi and Viviani, *General Principles*…Op. Cit., p. 119.
[290] Brianna Gorence, *The Constructive Role of General Principles in International Arbitration*, 17 The Law and Practice of International Courts and Tribunals (2018), p. 463.
[291] Bjorge, *Public Law*… Op. Cit., p. 538.
[292] See *Chapter Three*, pp. 140 et seq.
[293] Besson, *General Principles*… Op. Cit., p. 37.
[294] See Goldmann, *Responsible*… Op. Cit., p. 8.

law, absent an express consent of the respondent State, the opposite principle prevails"[295]. This second step is part of the so-called "extrapolation" requirement[296].

2.2. The Function of Principles as "Sources" of International Law

Commentators agree that one of the functions of GPs (including GPDs) is to prevent non-liquet[297] and, therefore, to serve as gap-fillers in international adjudication[298]. The wide consensus on this point is due to the specific history of the drafting of what today is Article 38 (1)(c) SICJ, where the inclusion of general principles, along with treaties and custom, was justified on these very grounds[299]. Scholars also agree that, formally speaking, GPs are not hierarchically inferior to the other sources of international law[300]. However, the scholarship is divided regarding whether they should be applied directly or whether they should only be applied when treaties and customs are silent on a particular point of law, thus being considered of a subsidiary nature[301]. In practice, international courts and tribunals tend to apply them after resorting to treaty and customary rules[302]. Additionally, the scholarship also agrees on the interpretative function of GPs[303]. From this perspective, GPs can be used to clarify, complement and/or determine the content of other norms of international law, serving as "buys and beacons in the sea of the international legal order"[304]. Finally, scholars have also put forward another function of GPs. Considering that GPs in some cases are the expression of positivized values, they may also serve as a source of inspiration for the development of international law, directing its evolution[305] and, therefore, they "may guide the formulations of ordinary norms of international law"[306].

---

[295] Pellet, *Article 38*… Op. Cit. p. 767.

[296] See *Chapter Three*, pp. 140 et seq.

[297] Non-liquet refers to a situation in which a court cannot decide a case either due to its inability to identify an applicable norm (ontological non-liquet) or to determine the content of a norm (epistemological non-liquet). See Daniel Bodsanky, "*Non Liquet",* Max Planck Encyclopedia of Public International Law, [last accessed 15.06.2019], § 4.

[298] See, for example, Dumberry, *A Guide*… Op. Cit., p. 50.

[299] See Malcolm Shaw, *International Law* (5th Edition). Cambridge University Press (2003), pp. 92-93.

[300] See Sienho Yee, *Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases*, 7 Journal of International Dispute Settlement (2016), pp. 487-488.

[301] Arguing that general principles have a subsidiary character in relation to treaties and custom see: Gazzini, *General Principles*… Op. Cit., pp. 107-108, Panezi, *Sources of Law*… Op. Cit., p. 71 (indicating that a contradiction between the content of a general principle and treaty or customary rules is not likely to arise). Contra see, for example, Gaja, *General Principles*… Op. Ci.t, § 21-23, Yee, *Article 38*… Op. Cit., pp. 487-488, Arangio-Ruiz, *The United Nations*… Op. Cit., p. 56 and Dumberry, *General Principles*… Op. Cit., pp. 1 et seq.

[302] See Gorence, *The Constructive Role*… Op. Cit., p. 463.

[303] Bassiouni claims that "this interpretative function is the most widely recognized and applied function of 'General Principles' and the one that is evidently the most needed and useful". Bassiouni, *A Functional*… Op. Cit., pp. 776.

[304] Robert Kolb, *Principles as Sources of International Law (With Special Reference to Good Faith)*, 53 Netherlands International Law Review 1 (2006), p. 32.

[305] Voigt, *The Role*… Op. Cit., p. 19.

[306] Kadelbach and Kleinlein, *International Law*… Op. Cit., pp. 31-32.

Of note, GPs (and GPDs) have been identified and applied by international courts and tribunals. For example, according to Marija Dordeska, the International Court of Justice (and its predecessor, the Permanent Court of International Justice), relied on this source of international law in almost in 76.4 percent of their decisions between 1922 and 2018[307]. Furthermore, scholars have also identified the use of GPs (and GPDs) by international courts in sectoral regimes such as international environmental law[308] and international investment law[309].

2.3. Principles of Public International Law and their Relation to "General Principles of Domestic Law"

Having determined the concept and the methodology for the identification of "general principles of law", it is now timely to clarify their relation to the "principles of public international law", which are the main objective of this *Chapter*. For this purpose, it is first necessary to address the doctrinal understandings of principles under domestic constitutional systems, and their differences with other norms (i.e., rules).

2.3.1. Principles, Rules, Standards and Balancing

From the perspective of legal theory, principles and rules share a deontological nature. Both of them are norms, since "they both say what ought to be the case"[310]. However, their qualitative differences become evident once their structure is discussed in more detail.

While rules "are norms that are always fulfilled or not"[311] and applied through subsumption[312], principles have a more complex structure. According to Robert Alexy, "principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities"[313], thus being only "prima facie"[314] or "optimization requirements"[315]. In other words, as Jaap Hage puts it, "principles contribute to their conclusions, without guaranteeing them"[316]. Furthermore, in the context of domestic constitutional interpretation and application, principles are operationalized through balancing or weighing, not through subsumption. The former method requires the application of a set of rules embodied in the proportionality

[307] See Dordeska, *General Principles*… Op. Cit., p. 218.
[308] See, for example, Biddulph and Newmann, *A Contextualized*… Op. Cit.
[309] For example, after examining international investment case-law, Dumberry identified several GPs relied by investment tribunals including good faith, due process, the "clean hands doctrine", abuse of rights, and others. See Dumberry, *General Principles*… Op. Cit., pp. 137 et seq.
[310] Alexy, *A Theory*… Op. Cit., p. 44.
[311] Klatt and Meister, *The Constitutional*… Op. Cit., p. 10.
[312] See Alexy, *On Balancing and Subsumption. A Structural Comparison.* 16 Ratio Juris 4 (2003). Pp. 433-435.
[313] See Robert Alexy, *A Theory*… Op. Cit. Pp. 47-48.
[314] See Id., p. 57.
[315] See Id., p. 47.
[316] Jaap Hage. *Legal Logic. Its Existence, Nature and Use* (2001). Available at http://www.jaaphage.nl/pdf/legal_logic_existence_nature_use.pdf [last accessed 22.04.2019], p. 18.

principle. These rules are "suitability", "necessity" and "proportionality in the narrow sense"[317].

In a nutshell, balancing presupposes a conflict between principles or the applicability of competing principles to a specific case. Consequently, through balancing, domestic constitutional courts solve cases which involve different values embodied in constitutional principles that need to be protected. The specific relevance of balancing becomes salient in cases where a court has to decide to what extent the protection or the fulfillment of one principle (which at the same time affects another principle) is justified on the grounds of the facts of the case and of the constitution[318]. Consequently, these qualitative features underscore that "principles" are goals or objectives to be attained and not norms that are either fulfilled or not (rules)[319].

Significantly, in Alexy's view, the criterion used to distinguish between "rules" and "principles" does not refer to the abstract or specific character of those norms (i.e., it does not relate to their degree of "generality")[320]. For him, the differences between said norms are not only of a "matter of degree", but "qualitative", i.e., "structural"[321]. This "qualitative" or "structural" difference between "rules" and "principles" corresponds to the latter being "optimization" or "prima facie" requirements, as stated above.

The aforementioned consideration is critical. Alexy's differentiation between "rules" and "principles" is not the same that other scholars put forward to differentiate between "rules" and "standards". For example, the law and economics scholarship distinguish "rules" and "standards" based on their degree of "generality"[322]. Thus, for those scholars, while "rules" are "comprehensive" and "clear", standards are "unclear" and "fuzzy"[323]. However, there is an important point of contact between "standards" in the latter sense and "principles" as understood by Alexy. In effect, both rely on courts for the "practical"

[317] These are the "text-book" stages of proportionality analysis. A detailed account of proportionality as a methodology can be found in *Chapter Six*.
[318] Lars Lindahl, On Robert Alexy's Weight Formula for Weighing and Balancing, in Lars Lindahl (Ed.), *Rights: Concepts and Contexts*. Routledge (2012), p. 173.
[319] Robert Alexy stresses that, constitutional principles are also referred to as "goals" in domestic adjudication. See Robert Alexy, *A Theory…* Op. Cit. P. 45.
[320] See Alexy, *A Theory…* Op. Cit., pp. 47-48.
[321] See Id., p. 47.
[322] "Law and economics scholars call precise laws "rules", and they call imprecise laws "standards"". Robert Cooter and Thomas Ulen, *Law and Economics* (6th Ed.). Addison-Wesley (2012), p. 222. See also Louis Kaplow, *Rules versus Standards: An Economic Analysis,* 42 Duke Law Journal (1992), pp. 559-560.
[323] Hans-Bernd Schäfer, *Rules versus Standards in Rich and Poor Countries: Precise Legal Norms as Substitutes for Human Capital in Low-Income Countries*, 14 Supreme Court Economic Review (2006), p. 116. Consequently, for this scholarship, "principles" are not necessarily "optimization" requirements.

refinement of the content of the norms at stake[324] thus entailing higher adjudication "costs" than "rules"[325].

Finally, it should be mentioned that Alexy's understanding of "principles" and the use of balancing for the application and interpretation of that type of norms is open to an economic reading[326]. This issue will be discussed in detail in *Chapter Six*.

2.3.2. Principles of Public International Law

Although it has its origins in domestic constitutional adjudication, balancing as a method is not necessarily limited to domestic disputes. The very practice of international Courts and tribunals is evidence of this[327]. At the same time, scholars have asserted that balancing can also be used for the interpretation and application of the values enshrined by public international law[328]. For example, Anne van Aaken justifies the use of this methodology not only by referring to the structural similarities between some norms of international law and constitutional principles, but also by advocating its convenience as a defragmenting tool for public international law and as a means to solve the conflict of norms pertaining to its different regimes[329]. Therefore, in her view, equating certain international law norms with constitutional ones (and the consequent use of balancing for their interpretation) may contribute to reconciling the different values embedded in the international legal order.

Therefore, following the aforementioned scholars, I decided to dub those norms as "principles of public international law" (henceforth, "PIL principles"). This category deserves further clarification, since it is crucial for the purposes of this *Thesis*. As stated above, PIL principles capture a group of norms of international law that share structural similarities with domestic constitutional principles. According to the literature, these similarities are the following. First, both types of principles express the most important values of their respective *polities* (either the national or the

---

[324] See, for example, Anne van Aaken, *International Investment Law Between Commitment and Flexibility*: *A Contract Theory Analysis*, 12 Journal of International Economic Law 2 (2009), pp. 518-519.

[325] Additionally, for the law and economics scholarship, "standards" are less costly ex-ante. As Richard Posner indicates, "rules" are costlier at the time of their enactment since they require specification. See Richard Posner, *Economic Analysis of Law* (9th Ed.). Wolters Kluwer (1986), pp. 512 et seq. These insights can also be found in the economics of contracts. See Robert Scott, *The Law and Economics of Incomplete Contracts*, 2 Annual Review of Law and Social Science (2006). Crucially for the purposes of this *Chapter*, they have been applied to the economic analysis of international law. As an example of the latter, see van Aaken, *International Investment Law…* Op. Cit.

[326] See, generally, Anne van Aaken, *"Rational Choice" in Der Rechtswissenschaft: Zum Stellenwert Der Ökonomischen Theorie Im Recht*. Nomos Verlagsgesellschaft (2003).

[327] See generally, Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Columbia Journal of Transnational Law 72 (2008).

[328] See van Aaken, *Defragmentation…* Op. Cit. See also: Bücheler, *Proportionality…* Op. Cit., and Jasper Krommendijk and John Morijn, Proportional by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration in PierreMarie Dupuy et al. (Eds.). *Human Rights in International Investment Law and Arbitration*. Oxford University Press (2009), pp. 422-451.

[329] See van Aaken, *Defragmentation…* Op. Cit. pp. 485-494.

international community)[330]. Secondly, both comprise normative propositions characterized by their relative indeterminacy[331]. Thirdly, it can be argued that, as principles, both "provide the framework for the exercise of any authority", either national or international[332]. In short, as Anne van Aaken puts it, "PIL encompasses constitutional functions embedded in principles"[333] and these principles are PIL principles.

Another important similarity exists between PIL principles and their domestic constitutional counterparts. Crucially, both types of norms share the structure of principles predicated by legal argumentation. That is, they can be understood as "optimization" or "prima facie" requirements. This has several consequences. The most important one refers to the method used in their application and interpretation. As discussed above, proportionality analysis is the most suitable candidate in this regard[334].

Consequently, throughout this *Thesis*, I will call those norms of international law that are structurally and functionally equivalent to domestic constitutional principles (that is, to those international norms that can be properly described as "optimization requirements"), "principles of public international law" (i.e., "PIL principles"). As can be noted, this category refers to a group of norms of the law of nations that share that feature, thus describing a "structural" quality of international norms[335] (i.e., capturing a "norm-type")[336]. By the same token, the aforementioned category does not rely on the classification of those norms from the perspective of the doctrine of sources.

Methodologically, Anne van Aaken asserts that the identification of PIL principles can be achieved from international legal materials and from the practice of international courts and tribunals[337]. Admittedly, "(…) considerable attention is to be paid to the qualification of norms [belonging to international law] as principles"[338]. At the same time, these norms "have to be identified by formal indicators"[339]. For that reason,

---

[330] See Id., p. 492. See also, Antonio Cassese, *International Law,* (2nd ed). Oxford University Press (2005), p. 48 and p. 188.
[331] See Kadelbach and Kleinlein, *International Law*… Op. Cit., p. 35.
[332] See Id. at. p. 38.
[333] van Aaken, *Defragmentation*… Op. Cit. p. 492.
[334] See Alexy, *A Theory*… Op. Cit. Pp. 67.
[335] For this reason, this category of "principles" is different to that commonly used by an important group of international law scholars. For example, Marija Dordeska distinguishes "rules" and "principles" according to the "concrete imperatives" that a norm may carry. Thus, in her view, the distinction between "rules" and "principles" is related to their level of generality. See Dordeska, *General Principles*… Op. Cit., pp. 64 et seq.
[336] See Kleinlein, *Customary*… Op. Cit., p. 132. See also, Samantha Besson, *General Principles*… Op. Cit., pp. 26 et seq.
[337] See van Aaken, *Defragmentation*… Op. Cit., p. 492.
[338] See Kleinlein, *Judicial*… Op. Cit., p. 1161.
[339] Niels Petersen, *Customary International Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 American University Law Review 2 (2007), pp. 291-292.

following Alexy's insights, I propose a "practical" criterion[340]. Specifically, I suggest that whenever proportionality analysis is mandated by a norm of the law of nations or whenever balancing is used by international adjudicators in its interpretation or application, we can infer that the norm at stake can be considered as a PIL principle. In other words, through those means, it is possible to infer the nature of an international norm either from legal texts or from the practice of adjudicating bodies. As Robert Alexy puts it: "The nature of principles implies the principle of proportionality and vice versa"[341]. Consequently, the particular methodology to be used for ascertaining this type of norms is no other than "inductive doctrinal work"[342].

Two significant consequences follow from this. First, that "PIL principles" are an autonomous classification of the norms of international law. Therefore, they can be identified from the universe of international law norms (including treaties, customary international law, and GPs), where, as van Aaken puts it, the "legal phenomena is the empirical material"[343]. Importantly enough, the previous scholarship has indicated that some of the guarantees contained in human rights and investment treaties can be qualified as PIL principles[344]. Secondly, and for the same reason, "PIL principles" and "general principles" in the sense of Art. 38 (1)(c) SICJ do not necessarily overlap. In other words, as long as "general principles" can be regarded as "optimization requirements", they can be properly understood as PIL principles and vice versa[345].

As stated previously, the usefulness of this category relates to the reconciliation of the positivized "values" protected by international law through its different and sometimes overlapping regimes. As will be argued in the next subsection, this classification is particularly helpful in the context of insolvency conflicts and sovereign debt restructuring. Its use does not only allow the identification of legally protected interests at tension in that context, but it also entails a specific methodology for their reconciliation. Nevertheless, before proceeding, it is necessary to differentiate this category from another that shares its name, and which has been posited by the prior scholarship on sovereign insolvency.

---

[340] This criterion is inspired by Kleinlein's work. In his own words: "(…) principles can be distinguished on the bases of the distinct ways in which they are used in legal argumentation". Kleinlein, *Customary*… Op. Cit., p. 142.

[341] Alexy, *A Theory*… Op. Cit., pp. 67. In the words of Kleinlein: "In the language of principle theory, balancing is only possible where the competing norms can be considered as legal principles or optimization requirements". Kleinlein, *Judicial Lawmaking*… Op. Cit., p. 1161.

[342] van Aaken, *Defragmentation*… Op. Cit., p. 492.

[343] Id., p. 492.

[344] See Kleinlein, *Customary*… Op. Cit., p. 143. See also, Kadelbach and Kleinlein, *International Law*… Op. Cit., pp. 36-37 and van Aaken, *Defragmentation*… Op. Cit.

[345] According to Alexy: "Every norm is either a rule or a principle". Alexy, *A Theory*… Op. Cit., p. 48. In the words of Kleinlein: "Still, it is obvious that not all principles covered by Article 38(1)(c) of the Statute are optimization requirements as narrowly understood by Alexy. They do not coincide necessarily". Kleinlein, *Customary*… Op. Cit., p. 148. For example, Kleinlein indicates that good faith, a norm undisputedly captured by the SICJ's definition of "general principle", cannot be considered as a "principle" in the sense posited by Alexy. See, Id.

As indicated in *Chapter One*, the previous scholarship on an "incremental" approach to sovereign debt restructuring has also advanced the notion of "principles of public international law"[346]. Crucially, this literature also distinguishes those principles from "general principles" in the sense of Art. 38 (1)(c) SICJ. However, for them, "principles of public international law" are but manifestations of the "(…) main structures of the international legal order"[347] and lack a legally binding character[348]. At the same time, said scholars contend that those "principles" can be ascertained

> *"(…) by showing that practice follows a fairly consistent normative pattern in a certain field of international law, which is consistent with other rules and principles of international law"*[349].

Accordingly, that literature identifies the principle of "sovereign debt sustainability". Despite lacking a legally binding character, the "incremental" approach scholarship posits that principles such as the aforementioned can nevertheless guide the application of the law[350].

The work of those scholars can doubtlessly be considered critical for the further development of the law and the enhancement of the current practice of sovereign debt crises resolution. Still, I decided to depart from their work in this particular point for several reasons.

First, as stated above, the notion of "principles of public international law" advanced by those scholars does not refer to legally binding norms of the law of nations. In other words, it captures a wide array of "normative practices" which do not necessarily qualify as "proper sources" from the perspective of the international legal order. For this reason, it is uncertain whether those principles can be successfully invoked in sovereign debt litigation. This, in turn, makes the category put forward by van Aaken and others more appealing: PIL principles, as understood here, refer specifically to norms which can be *directly* applied in international adjudication. Admittedly, for that purpose, these norms need to be under the scope of the applicable law in the dispute. Despite this limitation, it is proposed here that the understanding of PIL principles followed in this *Thesis* is undoubtedly more suited to shape legal outcomes than the one advanced by the previous "incremental" approach scholarship.

Secondly, the notion of PIL principles adopted in this *Thesis* is also different from the one advanced by the previous "incremental" approach literature in what pertains to the "structure" of the norms captured through it. Crucially, from the perspective of the latter scholars, "principles" are not "qualitatively" different from rules[351]. Thus, the category

---

[346] See, for example, Bohoslavsky and Goldmann, *An Incremental Approach*… Op. Cit., pp. 15-16 and Goldmann, *Principles in International Law*… Op. Cit., pp. 15 et seq.
[347] Bohoslavsky and Goldmann, *An Incremental*…Op. Cit., pp. 15-16.
[348] Id., p. 27.
[349] Id., p. 16.
[350] Id., pp., 15-16.
[351] See Bohoslavsky and Espósito, *Principles Matter*… Op. Cit., p. 73 and p. 77. See also Goldmann, *On the Comparative*… Op. Cit., pp. 114-115 and Goldmann, *Principles in International Law*… Op. Cit., pp. 3-4.

they put forward encompasses "general" rules expressing a fundamental "element" of the contemporary international legal framework[352]. In short, for them, "principles of public of international law" cannot be deemed as "optimization" requirements[353], and their difference with other "rules" of the law of nations is merely one of degree, relating to their level of generality. In contrast, as stated above, the category adopted in this and other *Chapters* of this *Thesis* refers, exclusively, to "principles" in the sense posited by Robert Alexy.

Consequently, although using the same name as the one put forward in the previous "incremental" approach literature (i.e., "principles of public international law") may be confusing, it is nevertheless necessary: it expresses, with accuracy, the types of international legal norms which it comprises (if one follows Alexy's understanding of the subject).

2.3.3. In Search of the Principles of Public International Law Relevant to the Resolution of Insolvency Conflicts

With the purpose of identifying the PIL principles relevant to the resolution of insolvency conflicts, let me recall the general dynamics of this type of conflict. As stated in *Chapter One*[354], the most basic form of insolvency conflict comprises the tensions between an indebted state and those who have claims against its revenue, namely its creditors and citizens. On the one hand, this conflict features the specific relationship between lenders and their borrower. From this perspective, and at first sight, the state has assumed the obligation of repaying the principal and the agreed interest to its lenders, according to the terms established in their corresponding contracts. When its revenue is not sufficient to fully satisfy the claims of all its creditors, a state may be inclined either to renege its acquired obligations by defaulting on its debt or to renegotiate their terms with its creditors. Creditors may consider these alternatives an intrusion on their proprietary rights: The state should abide by its contractually stipulated obligations, and therefore must respect the terms of the instruments by re-paying both interest and principal in full. Respecting creditors' property rights has a functional value: If states could simply default on their debts, then there would be no one willing to lend to them in the first place.

On the other hand, this conflict features tensions between the state and its citizens. Just as creditors have a contractual claim against the public budget, citizens have a right to its resources arising both from domestic constitutions and international law, which is mainly satisfied through the provision of public services. If government revenue is not enough to satisfy both the claims of creditors and of citizens, the state will have to decide how to allocate its resources and thus what to prioritize in its spending[355]. If the state decides to grant priority to debt repayment, citizens' rights

[352] See Bohoslavsky and Goldmann, *An Incremental…* Op. Cit., p. 15. Thus, Goldmann understands principles as "(…) just another form of rules, although of a rather abstract and general character". Goldmann, *On the Comparative…* Op. Cit., p. 115.
[353] See Bohoslavsky and Espósito, *Principles Matter…* Op. Cit., p. 77. See also Goldmann, *On the Comparative…* Op. Cit., pp. 114-115 and Goldman, *Principles…* Op. Cit., pp. 3-4.
[354] See *Chapter One*, p. 24.
[355] See Bohoslavsky, *Debt Disputes…* Op. Cit., para 3.

could be encroached. However, protecting the provision of public services also has a functional value: Without public goods such as the enforcement of property rights, health, education or others necessary for the maintenance of social peace, no country can flourish[356].

Consequently, two different interests are at stake in the simplest form of insolvency conflicts: the interests of creditors and the interests of citizens. At the same time, creditors' interests may also clash with those of the indebted state (which can be bundled together under the notion of "public interest"). In the following section, I will analyze the norms of international law that protect these interests, inquiring whether they can be considered structurally and functionally equivalents to constitutional principles: that is, whether they can be regarded as optimization requirements. As stated above, whenever international norms are subject to proportionality, this question can be given an affirmative answer. Moreover, as will later be argued, both international human rights norms guaranteeing property rights and economic, social and cultural rights possess this structure. The same is true for some of the guarantees offered to bondholders under international investment law.

Before proceeding, however, a significant clarification is warranted. As stated above, the *application* of these PIL principles to a dispute arising from insolvency conflicts requires them to be under the scope of the respective applicable law. In certain cases, however, some of them may also be relevant to the *interpretation* of the applicable law. That issue will be discussed from the perspective of international investment law in *Chapter Six*.

[356] See Jeffrey Sachs, *Resolving the Debt Crisis of Low-Income Countries*, Brooking Papers on Economic Activity (2002), available at https://www.brookings.edu/bpea-articles/resolving-the-debt-crisis-of-low-income-countries/ [last accessed 27.08.2021], p. 4.

3. Creditors' Property Rights under International Law

As stated above, the relationship between bondholders and state-debtors is primarily contractual. Contractual claims as such are of a personal nature (*in personam* rights) and relate specifically to a promise to pay extended by the debtor to its creditors. On the debtor's part, this promise is an obligation to perform. On creditors' part, it is an economic interest that is part of their patrimony. According to Dania Thomas, during the last 30 years, the tribunals of the United States dealing with sovereign debt litigation have embraced an understanding of this relationship that identifies the sovereigns' promise to pay as the source of creditors' property rights and sees breaches of contract as damage to these rights[357].

According to Michael Waibel, the matter is not so straight-forward in international law. After reviewing the evolution of sovereign debt adjudication before international courts and tribunals, he concluded that "only limited authority lends support to the view that creditor claims are protected as a matter of international law generally"[358].

Waibel's conclusion is based on the fact that a global regime protecting property rights *in general* or protecting bondholders' interests *in particular* has not existed to this day. Indeed, although the Universal Declaration of Human Rights[359] (henceforth, "UDHR") – the only global instrument establishing a general guarantee to property – specifically recognizes this right in its Article 17[360], it does not define its scope. Hence, the UDHR fails to offer guidance concerning whether acquired rights or contractual claims, such as those of bondholders, are to be treated as falling under its definition of "property", and consequently protected under its umbrella. Even if this were the case, it would be important to note that Article 17(2) UDHR recognizes the right of states to expropriate

---

[357] See Thomas, *Sovereign Debt*… Op. Cit., pp. 454-457.

[358] Michael Waibel, *Sovereign Defaults Before International Courts and Tribunals*. Cambridge University Press (2011), p. 183. See also the discussion for contractual claims in investment law in subsection 3.3.1 of this *Chapter*.

[359] Universal Declaration of Human Rights, Dec. 8, 1948 G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). When adopted, the UDHR was not considered to be legally binding, but rather embodying "a common standard of achievement for all peoples and all nations". See *Preamble to the UDHR*, op. cit. However, current scholarship and practice suggest that some of the guarantees set out therein have been elevated to legally binding obligations, having acquired the status of customary law (and, in some cases, possessing the rank of jus cogens norms). Furthermore, a group of scholars has argued that the UDHR can be considered an authoritative interpretation of the content of the human rights provisions contained in the Charter of the United Nations, and therefore legally binding for all its members. This argument is based on the subsequent practice of UN members which specifically ascribed this character to the UDHR in the Proclamation of Tehran. For a discussion, see Mashood Baderin and Manisuli Ssenyonjo, Development of International Human Rights Law Before and After the UDHR in Mashood Baderin and Manisuli Ssenyonjo (Eds.), *International Human Rights Law Six Decades after the UDHR and Beyond*. Routledge (2016), p. 8. See also Hurst Hanum, *The Status of the Universal Declaration of Human Rights in National and International Law,* 25 Georgia Journal of International and Comparative Law (1995), p. 326. See also Steven Wheatley, *The Idea of International Human Rights Law*. Oxford University Press (2019), pp. 79-81.

[360] According to Article 17 UDHR: "(1) Everyone has the right to own property alone as well as in associating with others. (2) No one shall be arbitrarily deprived of his property". UDHR, Op. Cit.

and to interfere with private property[361], while subjecting this right to the rule of law, by precluding arbitrary deprivations.

Consequently, the search of PIL principles safeguarding the interest of bondholders needs to be carried out at regional and sectoral level. Within the universe of international conventions addressing property rights, this *Chapter* will focus on the American Convention on Human Rights (henceforth, "ACHR"), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth, "ECHR")[362], due to the fact that both extend their protection to claims of a contractual nature. Furthermore, I will also discuss the protection of bonds in the light of international investment law. Of note, as stated above, the previous scholarship has stressed that PIL principles can be identified in those areas of international law, thus making them suitable "gold mines" for this purpose[363].

3.1. The Protection of Property under the American Convention on Human Rights

Together with the American Declaration on the Rights and Duties of Man[364], the ACHR (also known as "Pact of San Jose") is the most important document of the Inter-American system of human rights. Both instruments guarantee the right to property. Indeed, in its Article XXIII, the American Declaration provides that "every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home"[365]. However, a more detailed form of protection can be found in Article 21 of the ACHR[366], which has been

---

[361] See Sebastián López, *La Propiedad y su Privación o Restricción en la Jurisprudencia de la Corte Interamericana*, 21 Revista Ius et Praxis 1 (2015), p. 533.

[362] It is important to mention that there are other regional human rights instruments guaranteeing property rights, including the African Charter of Human and People's Rights and the Arab Charter on Human Rights. See African Charter on Human and Peoples' Rights, June 27, 1981 1520 U.N.T.S. 217. (Art. 14) and Arab Charter on Human Rights May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005) (Art. 31).

[363] In the words of Kleinlein, "International human rights qualify as optimization requirements just as domestic fundamental rights in Alexy's theory". Kleinlein, *Customary…* Op. Cit., p. 143. See also, Kadelbach and Kleinlein, *International Law…* Op. Cit., pp. 36-37. For international investment law, see van Aaken, *Defragmentation…* Op. Cit.

[364] The American Declaration was adopted at the Ninth International Conference of American States in Bogotá, Colombia in 1948. Like the UDHR, this Declaration was not considered legally binding at the time of its adoption. However, (similarly regarding the opinion of scholars on the contemporary legally binding nature of the UDHR) the Inter-American Court of Human Rights has asserted that the instrument is to be read as an authoritative interpretation of the OAS Charter concerning to human rights. The United States has opposed this interpretation. See Ludovic Hennebel, *The Inter-American System for Human Rights: Operation and Achievements* (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322896 [last accessed 03.07.2019], p. 13.

[365] American Declaration on the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30-May 2, 1948.

[366] Article 21 was one of the most debated provisions during the drafting process of the ACHR. While some delegates argued for the elimination of all references to the right in the document, others stood for the specific protection of "private" property in the language of the Article. Finally,

further developed by the jurisprudence of the Inter-American Court of Human Rights (henceforth, IACtHR)[367]. Article 21 provides:

> *"1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.*
>
> *2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.*
>
> *3. Usury and any other form of exploitation of man by man shall be prohibited by law"*[368].

As is salient from this, the ACHR does not explicitly define what is to be included under this general guarantee. Additionally, it recognizes the limitations applicable to the use and enjoyment of property. It also acknowledges the right of states to expropriate privately owned assets, but it goes beyond the UDHR by subjecting these deprivations to the payment of compensation, to the "social interest" and to legality.

Regarding the concept of "property" under the Convention, the IACtHR has stressed through several concurring decisions that the guarantee extends to a wide variety of assets and proprietary interests[369]. For instance, in *Ivcher*, the Court stated:

---

a "moderate proposal" was adopted, which is the one in force to this day. For a discussion, See Thomas Antkowiak and Alejandra Gonza, *The American Convention on Human Rights, Essential Rights*. Oxford University Press (2017), p. 267 and López, *La Propiedad…* Op. Cit., p. 540.

[367] It is important to note that as of June 2019, only 22 of the 35 OAS members are parts to the ACHR. See American Convention on Human Rights "Pact of San Jose, Costa Rica" Signatories and Ratifications retrieved from http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm [last accessed 21.06.2019]. Furthermore, it is also necessary to point out that, as a product of the ACHR, the IACtHR can only exercise its contentious jurisdiction over the states that had already agreed to it. See Carlos Ayala, *El Sistema Interamericano de Promoción y protección de los Derechos Humanos*, Derechos y Libertades, Revista del Instituto Bartolome de las Casas (1998), p. 46. For a discussion regarding the interaction of the IACtHR and the Inter-American Commission on Human Rights see Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*. Cambridge University Press (2013) and Diana Contreras-Garduño, The Inter-American System of Human Rights in Anja Mihr and Mark Gibney (Eds.), *The SAGE Handbook of Human Rights*. SAGE (2014).

[368] American Convention on Human Rights "Pact of San Jose, Costa Rica", Nov. 22, 1969 S. Treaty Doc. No. 95-21;1144 U.N.T.S.123; O.A.S.T.S. No. 36.

[369] See Ivcher-Bronstein v. Peru (Merits, Reparations and Costs), Judgement February 6, 2001 (hereinafter "Ivcher"), para 122; "Five Pensioners" v. Peru (Merits, Reparations and Costs), Judgement February 28, 2003, (hereinafter, "Five Pensioners"), para 102; Chaparro Álvarez and Lapo Íñiguez v. Ecuador (Preliminary Objections, Merits, Reparations, and Costs), Judgement November 21, 2007 (hereinafter "Chaparro"), para 174; Palamara-Iribarne v. Chile (Merits, Reparations, and Costs), Judgement November 22, 2005 (hereinafter "Palamara"), para 102; Furlan and Family v. Argentina (Preliminary Objections, Merits, Reparations and Costs), Judgement August 31, 2012 (hereinafter "Furlan"), para 220; Salvador Chiriboga v. Ecuador (Preliminary Objection and Merits), Judgement May 6, 2008 (hereinafter "Chiriboga"), para 35; Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Merits, Reparations and Costs),

> *"Property" may be defined as those material objects that may be appropriated, and also any right that may form part of a person's patrimony; this concept includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value"*[370].

Consequently, the IACtHR has included under the protection of Article 21 material and intangible assets (including shares)[371], the communal property of indigenous tribes[372], pensions[373], vested or acquired rights[374], and intellectual property[375]. Although a case specifically featuring restructured sovereign bonds has not yet been submitted to the jurisdiction of the Court, it is clear that they would qualify as "property" according to the understanding the IACtHR has developed in its case-law.

However, the guarantee to property offered by the ACHR also has its limitations, which have often been stressed by the Court. For instance, in *Furlan*, the IACtHR stated:

> "(…) [I]*t is necessary to recall that the right to property is not an absolute right and, in this sense, may be subject to restrictions and limitations, insofar as such restrictions or limitations are established in the appropriate legal channel and according to the parameters established by Article 21*"[376].

In fact, while Article 21(1) provides that the use and enjoyment of property can be subordinated to the "interest of society", Article 21(2) sets out the conditions by which states need to abide in expropriation cases. These conditions require that: (i) a just compensation be paid ("compensation"), (ii) the measure be based on reasons of "public utility" or "social interest" ("social interest"*)* and that, (iii) the measure be "restricted to the cases and the forms established by law"[377] ("legality"). It is important to note, however, that the Court has not treated Paragraphs (1) and (2) of Article 21 as the embodiment of different rules, in which case only the second one (expropriation) would require compensation[378]. Consequently, in its case-law, the IACtHR has indistinctly used the terms "deprivation", "deprivation of the use and enjoyment of property"[379], "violations of the right to property"[380] and "unlawful and arbitrary" interferences with the "right to use and enjoyment" of property"[381], without analyzing them as separate

---

Judgement August 31, 2001 (hereinafter "Mayagna"), para 143 and Abrill Alosilla et al. v. Peru, (Merits, Reparations and Costs), Judgement March 4, 2011 (hereinafter "Alosilla"), para 82.

[370] *Ivcher*, para 122.

[371] Id.

[372] *Mayagna*.

[373] *Five Pensioners*.

[374] Acevedo Buendia et al. v. Peru (Preliminary Objections, Merits, Reparations and Costs), Judgement July 1, 2009.

[375] *Palamara*.

[376] *Furlan* para 220.

[377] *Palamara* para 108.

[378] See Antkowiak and Gonza, *The American…* Op. Cit., p. 274.

[379] *Ivcher* para 130.

[380] *Five Pensioners* para 121.

[381] *Chaparro* para 182.

categories[382]. By the same token, the Court has tended to apply these conditions to cases that can be regarded as "interferences" not specifically entailing deprivations of property.

Regarding the "legality" requirement, the IACtHR has taken an ambivalent approach. For instance, in *Ivcher*, the Court equated "legality" with the satisfaction of the "minimum requirements of due legal process"[383], an approach it also took in *Five Pensioners*[384]. However, in *Chiriboga*, the IACtHR stated that "it is not necessary that every cause for deprivation or restriction to the right to property be embodied in the law; but that it is essential that such law and its application respect the essential content of the right to property"[385]. Commentators have considered the latter decision as an isolated detour from the general case-law of the Court[386], but it nevertheless would have to be taken into account in the hypothetical case that the restructuring of sovereign bonds were brought to its jurisdiction.

In what pertains to "public utility" and "social interest", commentators note that the Court has not only equated both terms, but also that it has associated both of them with the notions of "general interest" and "general welfare", following closely the case-law of the European Court of Human Rights[387]. Particularly, the Court has understood the aforementioned concepts as comprising "all those legally protected interests that, for the use assigned to them, allow a better development of the democratic society"[388]. The examples to be found in this regard in the practice of the Court are closely aligned to those considered by the European Court, such as the protection of the environment and the "handling of a serious economic crisis"[389]. However, the IACtHR has insisted that even legitimate aims need to maintain a proper "balance [between] the competing interests involved"[390], thus subjecting them to a proportionality requirement[391].

Finally, regarding the payment of "just compensation", commentators note that the IACtHR has equated this notion with the "Hull Formula", requiring a prompt, adequate and effective compensation[392]. Notwithstanding this, the Court has stated that market value is only one of the factors to be considered when determining the payable amount.

---

[382] See López, *La Propiedad…* Op. Cit, pp. 566-568.
[383] *Ivcher* para 130.
[384] "Furthermore, instead of acting arbitrarily, if the State wished to give another interpretation to Decree Law No. 20530 and its related norms, in relation to the five pensioners, it should have: a) executed an administrative procedure with full respect for the appropriate guarantees; and b) it any event, given precedence to the decisions of the courts of justice over the administrative decisions". *Five Pensioners*, para 177.
[385] *Chiriboga* para 65.
[386] See Alejandra Gonza, Artículo 21: Derecho a la Propiedad Privada in Christian Steiner and Patricia Uribe (Eds.), *Convención Americana sobre Derechos Humanos: Comentario*. Konrad Adenauer Stiftung (2014), p. 510.
[387] Antkowiak and Gonza, *The American…* Op. Cit., p. 276.
[388] *Chiriboga* para 73.
[389] *Furlan* para 222.
[390] *Chiriboga* para 75.
[391] See Gonza, *Artículo 21…* Op. Cit., p. 509.
[392] See Antkowiak and Gonza, *The American…* Op. Cit., p. 275.

According to its case-law, the compensation has to be calculated trying to achieve a "fair balance between the general interest and the individual interest"[393], thus departing from the rules of general international law[394].

3.1.1. Property Protection under the American Convention on Human Rights as a Principle of Public International Law

Although the general practice of the IACtHR has been to show a "cautious" application of the principle of proportionality[395], several decisions can be found in which the Court has specifically applied it to cases involving property rights. Concretely, the IACtHR has subjected the measures restricting or depriving private property to at least two of the rules embedded in the principle of proportionality, namely, "necessity" and "proportionality in the narrow sense"[396], along with their intended aims.

First, it is useful to recall, that according to Alexy, "necessity" requires that among different measures equally suitable to achieve a goal, the one that is least restrictive for the right affected is to be chosen[397]. This rule was applied by the IACtHR, for instance, in *Chiriboga*, where it stated: "(…) in order for the State to legally satisfy a social interest and find a fair balance of an individual's interest, it must use the less costly means to damage, the least, the right to property of the person, subject-matter of the restriction"[398]. The same idea was upheld in *Chaparro*, in the context of criminal precautionary measures, where it was established that: "(…) the adoption of material precautionary measures must be justified previously by the inexistence of another type of measure that is less restrictive of the right to property"[399].

Secondly, the Court conflated necessity and proportionality in the narrow sense in *Furlan*. According to the facts of the case, Mr. Furlan – who was injured by negligence of the Argentinian army – was awarded compensatory damages against Argentina but was forced to accept a severely reduced sum in the context of the crisis suffered by the country in 2001. Considering the specific circumstances of the case, and after invoking the necessity rule, the Court went further to state that: "the non-payment of the full amount ordered by the court in favor of a vulnerable person with limited resources called for a much greater justification of the restriction to the right to property and some

[393] *Chiriboga* para 98.
[394] Antkowiak and Gonza, *The American…* Op. Cit., p. 275.
[395] See, for example, Laura Clérico, Hacia la Reconstrucción de un Modelo Integrado de Proporcionalidad a la Luz de la Jurisprudencia de la Corte Interamericana de Derechos Humanos, in Jorge Fabra and Leonardo Garcia (Eds.), *Filosofia del Derecho Constitucional: Cuestiones Fundamentales*. UNAM (2015).
[396] According to Alexy, the principle of proportionality contains three rules, namely suitability, necessity and proportionality in the narrow sense (or proportionality "stricto sensu"). Although he refers to them as "sub-principles", he recognizes that from a theoretical perspective they pertain to the domain of rules. See Alexy, *A Theory…* Op. Cit. at. pp. 66-67 footnote 84. A full account of proportionality analysis is provided in *Chapter Six*.
[397] See Alexy, *A Theory…* Op. Cit. at. pp. 67-68.
[398] *Chiriboga* para 63.
[399] *Chaparro* para 188.

type of measure to prevent such an excessive and disproportionate effect, which was not evident in this case"[400].

Hence, although through an unorthodox consideration of its elements, it can be said that the IACtHR has applied the proportionality principle while adjudicating disputes where property rights have been at stake.

Considering all the above, it is possible to infer from the practice of the Inter-American Court of Human Rights that the right to property, as guaranteed by the ACHR, can be considered as a PIL principle.

3.1.2. The Protection of Bondholders' Property Rights under the American Convention of Human Rights

According to the foregoing, it is submitted here that the claims of bondholders qualify as "property" protected by Article 21 ACHR. As has been shown, the IACtHR has consistently upheld a broad understanding of the interests that can be considered part of the guarantee to property, including rights over intangible assets. Furthermore, since the case-law of the Court has subjected deprivations and measures affecting this right to a proportionality analysis, it is possible to infer that the norm contained in Article 21 ACHR is structurally equivalent to the constitutional principles of domestic jurisdictions. Here, the right to property is not understood as an absolute right, but rather as interacting with other guarantees of the ACHR, particularly the "social interest". Consequently, this norm can be regarded as a principle of public international law.

Additionally, it is important to consider another limitation that has not yet been discussed in the practice of the Court, and that may be relevant in a case brought to it in the context of the restructuring of sovereign bonds issued by an ACHR member state. According to Article 21(3), "usury (…) shall be prohibited by law". Despite the apparently programmatic intention behind this norm, the Court may arguably justify the imposition of the more stringent limitations on the property rights of creditors who acquired bonds in the secondary market with the purpose of litigating against the issuing state. However, bondholder litigation before the IACtHR seems unlikely at the present moment.

3.2. The Protection of Property under the European Convention on Human Rights

The right to property was one of the most debated guarantees during the drafting of the European Convention for the Protection of Human Rights and Fundamental Freedoms[401] (henceforth, "ECHR")[402]. At that time, the different views among European states regarding the role property ought to play in society, as well as the standard of

[400] *Furlan* para 222.

[401] See Christian Tomuschat, The European Court of Human Rights and Investment Protection, in Christina Binder et al. (Eds.) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*. Oxford University Press (2009), p. 638.

[402] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 Europ.T.S. No. 5; 213 U.N.T.S. 221.

protection it should be granted, resulted in the omission of this guarantee in the ECHR[403]. However, this was remedied rather soon by the inclusion of the guarantee to property in Article 1 of the First Protocol to the European Convention (henceforth, Art. 1 P-1). Today the protection of property rights is the "second most invoked guarantee" of the ECHR[404]. Article 1 P-1 provides:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"*[405].

Although the first part of Art. 1 P-1 allows for the "peaceful enjoyment of possessions", the European Court of Human Rights (henceforth, ECtHR) – in an often-quoted decision – stressed that this norm guarantees "in substance (…) the right to property"[406]. Furthermore, it is worth noting that Art. 1 P-1 neither defines property nor does it accurately explain what is to be understood by "possessions". It has been the task of the ECtHR to deal with the particular instances of property rights through its case-law, adopting a broad understanding of the interests protected by Art. 1 P-1[407]. Indeed, the jurisprudence of the Court has not only highlighted that for the Convention, property or possessions have "an autonomous meaning"[408], but also that they extend to interests of different nature, including ownership over "material" [409] and "physical goods"[410], and

[403] See Theo van Banning, *The Human Right to Property*. Intersentia - Hart (2002), pp. 65-78.
[404] See Sebastián López, *Interferences with Property Under European Human Rights Law*, 24 Florida Journal of International Law (2012), p. 516 and Luzius Wildhaber and Isabelle Wildhaber, Recent Case Law on the Protection of Property in the European Convention on Human Rights, in Christina Binder et al. (Eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*. Oxford University Press (2009), p. 657.
[405] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 Europ.T.S. No. 5; 213 U.N.T.S. 221, Protocol 1.
[406] Marckx v. Belgium, Judgment June 13, 1979 (hereinafter "Marckx") para 63.
[407] See Ursula Kriebaum and Christoph Schreuer, *The Concept of Property in Human Rights Law and International Investment Law* (2007), available at https://www.univie.ac.at/intlaw/concept_property.pdf [last accessed 24.07.2019], pp. 1-2.
[408] See, for instance, Gasus Dosier-Und Fördertechnik GmbH v. The Netherlands, Judgement February 23, 1995 (hereinafter "Gasus"), para 53; Beyeler v. Italy, Judgement January 5, 2000 (hereinafter "Beyeler"), para100; Broniowski v. Poland, Judgment June 22, 2004 (hereinafter "Broniowski"), para 129.
[409] See, for instance, *Broniowski*, para 129.
[410] See, for instance, *Gasus* para 53 and *Beyeler* para 100.

claims of contractual nature, such as sovereign bonds[411], legitimate expectations[412], and, in some cases, social security claims[413].

Furthermore, the ECtHR has through its practice interpreted Art. 1 P-1 as comprising three different rules concerning interferences with property rights[414]: (i) a general rule establishing the right of peaceful enjoyment of property, (ii) a rule covering deprivations of property and their requirements and; (iii) a rule recognizing the right of states to regulate and control the use of property[415]. As a rule of thumb, the Court considers interferences related to the first rule only after determining that the measures cannot be classified either as "deprivations" (second rule) or as measures of "control" (third rule)[416]. In what follows, I discuss these rules in more detail.

Concerning the second rule, scholars agree that the ECtHR has interpreted the notion of "deprivation" restrictively[417], setting a "high-threshold"[418] for it. Indeed, the Court requires either a "total deprivation of the property" or that "no economic value" or no "possible use" of the property remains[419]. By the same token, where proprietary interest comprises several different rights, and only some but not all of them are affected by the state, the ECtHR will not consider the measure as falling under "deprivations", but rather will classify it under one of the other two rules[420]. Furthermore, it is important to highlight that the Court has not limited deprivations to direct expropriations, but also considers indirect or "de-facto" expropriations[421].

Secondly, some regulatory measures are classified by the Court under the third rule (control). In this respect, it should be noted that the ECtHR has not developed an

[411] These cases are discussed in detail in subsection 3.2.2.
[412] See, for instance, Pressos Compania Naviera S.A. and Others v. Belgium, Judgement November 20, 1995 (hereinafter "Pressos"), para 31. See also Kopecký v. Slovakia, Judgement September 28, 2004, paras 35, 52-53.
[413] See, for instance, Kjartan Ásmundsson v. Iceland, Judgment October 12, 2005, para 39.
[414] For a general discussion see, for instance, Wildhaber and Wildhaber, *Recent Case Law*… Op. Cit., p. 658.
[415] On several occasions, the Court has pointed out the difficulties of classifying a measure under any of these rules. See, for example, the sovereign debt cases discussed in subsection 3.2.2.
[416] See Sporrong and Lönnroth v. Sweden, Judgement September 23, 1982 (hereinafter "Sporrong"), para 61: "The Court must determine, before considering whether the first rule was complied with, whether the last two are applicable". See also James and Others v. The United Kingdom, Judgement February 21, 1986 (hereinafter "James"), para 37: "before inquiring whether the first general rule has been complied with, it must determine whether the last two are applicable".
[417] See, for instance, López, *Interferences*… Op. Cit., p. 514.
[418] See Markus Perkams, The Concept of Indirect Expropriation in Comparative Public Law – Searching for Light in the Dark, in Stephan Schill (Ed.), *International Investment Law and Comparative Public Law*. Oxford University Press (2010), p. 116.
[419] See Ursula Kriebaum, Is the European Court of Human Rights an Alternative to Investor-State Arbitration? in Pierre-Marie Dupuy et al. (Eds.), *Human Rights in International Investment Law and Arbitration*. Oxford University Press (2009), p. 239.
[420] See Kriebaum and Schreuer, *The Concept*… Op. Cit., pp. 16-17. See also, López, *Interferences*… Op. Cit., pp. 524-525.
[421] See Perkams, *The Concept*… Op. Cit. p. 114.

"abstract definition" of the interferences falling thereunder. However, the Court has underscored that this rule refers to measures whose degree of interference with proprietary interests is higher than those of the first rule, but lower than those set out under "deprivations"[422]. According to López, examples of interferences that have been considered under the ambit of this rule by the ECtHR include, among others, "rent-controls; planning restrictions; temporary seizure of property in criminal proceeds"[423], etc.

Thirdly, the first rule set out in Art. 1 P-1 is usually regarded as having a "residual" character and has been referred to as "other interferences" by the practice of the ECtHR[424]. As with the third rule, neither commentators nor the Court have provided a general definition capable of encompassing all the measures that can be classified under this rule[425]. According to them, examples of interferences falling under this category are the annulment of arbitral awards[426] and rent controls[427]. Furthermore, it is important to note that the Court has used this rule to analyze governments' compliance with the Convention in cases involving sovereign bonds[428].

3.2.1. Standards of Property Protection under the ECHR

Despite of their differences, the Court has stressed that the three rules are not "unconnected", since the second and the third are "particular instances of interference with the right to peaceful enjoyment of property" established by first one[429]. The conceptual unity underlying the protection of "possessions" under the ECHR is one of the reasons why the ECtHR has subjected all three instances of interference to a common (minimum) set of requirements for assessing the conduct of a state: lawfulness, legitimate aim and proportionality[430].

---

[422] See López, *Interferences*… Op. Cit., p. 535.
[423] Id., p. 533.
[424] Id., p. 542.
[425] See Perkams, *The Concept*… Op. Cit. p. 119.
[426] Id.
[427] See William Schabas, *The European Convention on Human Rights: A Commentary*. Oxford University Press (2015), p. 973.
[428] See subsection 3.2.2. below.
[429] *Broniowski* para 134.
[430] Bertrand argues that the Court applies these requirements only to measures falling under the categories of deprivations or controls of the use of property. See Frederic Bertrand, *The Human Right to Property in International Investment* Law, 24 Appeal 45 (2019), p. 70. However, it is not uncommon to find cases that, although classified under the first rule, are nevertheless subjected to these three conditions by the Court. See notably, *Broniowski* paras 134 and 136. See also, Malysh and Others v. Russia, Judgement February 1, 2010 (hereinafter "Malysh") paras 72 and 76; Mamatas and Others v. Greece, Judgement July 21, 2016 (hereinafter "Mamatas"), paras 94 and 96; Tronin v. Russia, Judgement March 18, 2010 (hereinafter "Tronin"), paras 50 and 53, etc. Furthermore, Tomuschat stresses that the Court has required these three conditions in all kinds of cases. See Tomuschat, *The European*… Op. Cit. pp. 647-649. López argues that the proportionality test has been applied by the Court to all the rules. See López, *Interferences*… Op. Cit., p. 521.

First, commentators note that lawfulness demands that the interference under consideration should be established by the domestic law of the relevant state[431]. However, the mere existence of a law authorizing such interference is not considered sufficient. The practice of the Court also requires that the regulations at stake be "compatible with the rule of law"[432], that is, that the law imposing the measure "must be sufficiently clear in its terms"[433], "accessible"[434] and not applied in a discriminatory manner[435].

Secondly, a legitimate aim requires that interferences with property rights pursue either the public or the general interest. According to López, the Court has equated both notions through its case-law[436]. Although a general definition of these concepts cannot be found in the decisions of the ECtHR, examples of these aims include "the maintenance of economic stability"[437], "defining budgetary priorities in terms of favouring expenditure on pressing social issues"[438], "the control by the state of the market in works of art" [439] ending "illegal sales" [440] of land, "the need to protect the state's financial interests" [441], and "the need to protect the forest and archaeological sites"[442]. As is apparent from this, the Court has interpreted public and general interest in a broad manner[443], granting a wide margin of appreciation to states when defining its scope. Furthermore, the ECtHR has stressed that government officials are better positioned than supra-national judges to assess and define which aims are to be pursued through acts or omissions interfering with property rights[444], and thus to determine specifically "what is in the public interest"[445]. This explains why the ECtHR would in principle not question whether the measure at stake is aimed at the public interest "unless (…) is manifestly without reasonable foundation"[446].

Finally, the Court has also subjected measures affecting property rights to a proportionality requirement. In order to be justified in the light of the Convention, the ECtHR requires that any such measure maintain adequate equilibria (a "fair balance") between the different interests involved, particularly the general interest and the

---

[431] Tomuschat, *The European*… Op. Cit., p. 648.
[432] Malone v. The United Kingdom, Judgement August 2, 1984 (hereinafter "Malone"), para 67.
[433] Id.
[434] Lithgow and Others v. The United Kingdom, Judgement July 8, 1986, para 40.
[435] See Mamatas para 100.
[436] See López, *Interferences*… Op. Cit., p. 521.
[437] See *Mamatas* para 103.
[438] See *Tronin* para 57, Lobanov v. Russia, Judgement December 2, 2010 (hereinafter "Lobanov"), para 50, *Malysh* para 80, SPK Dimskiy v. Russia, Judgement March 18, 2010 (hereinafter "*SPK* Dimskiy"), para 66.
[439] See *Beyeler* para 112.
[440] See the Holy Monasteries v. Greece, Judgement December 9, 1994, para 69.
[441] *Pressos* para 36.
[442] Former King of Greece and Others v. Greece, Judgment November 23, 2000 (hereinafter "King"), para 88.
[443] "(…) the notion of "public interest is necessarily extensive". *Broniowski* para 149.
[444] See, for instance, *Broniowski* para 149.
[445] *King* para 87, quotation marks omitted.
[446] See *Broniowski* para 149.

interest of those being affected by the measures. Furthermore, this requirement according to the Court also demands that the aim of the law whereby the measure is implemented reach a "reasonable relationship of proportionality" with its means[447]. In this regard, the ECtHR has also granted a wide margin of discretion to states[448].

It is important to stress that the aforementioned conditions are only a "minimum" threshold to be met by states when interfering with the peaceful enjoyment of property. This is particularly true for the case of deprivations, where Art. 1 P-1 also requires that the measure be subjected to "the general principles of international law". The expression has been equated with the Hull formula, requiring for prompt, adequate and effective compensation in the case of expropriation[449]. Notwithstanding some disagreements, "adequate" compensation has been understood in investment litigation as the "fair market value" of the expropriated property, which corresponds to the "hypothetical price agreed between hypothetical willing buyers and sellers at the valuation date"[450]. At face value, it may appear that "adequate" compensation should be granted to anyone affected by expropriation. However, this has not been the criterion employed by the Court, who has underscored that this standard of treatment is only required for deprivations affecting non-nationals[451]. When the affected person is a national of the state implementing the measure, the ECtHR assesses the payable amount in order to maintain a fair balance between the proprietor's and the community's interests. Consequently, the Court usually requires that the payable amount be "reasonably related to the value of the property taken" which can be less than its "full market value"[452]. However, the ECtHR has not yet used this distinction in practice, since it "has never found that an expropriation of a foreigner had occurred"[453].

Furthermore, it is important to recall that the key difference between these rules (i.e., "deprivations", "control" and "other interferences") resides in the fact that compensation is only required in cases of unlawful or unjustified deprivations of property[454]. Another relevant difference relates to the margin of appreciation granted to states by the Convention. According to Kriebaum this margin is wider in cases of "control" and "other

---

[447] See notably, *James*: "Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized", para 50.

[448] See López, *Interferences*… Op. Cit., p. 522.

[449] To this day, there is still disagreement between developed and developing countries regarding the status of the Hull formula under international law. While developed nations argue that it is included under the minimum standard of treatment and ought to be granted by states to non-nationals, developing states claim that it is not. For a discussion, see Hollin Dickerson, "*Minimum Standards"*, Max Planck Encyclopedia of Public International Law, [last accessed 15.06.2019].

[450] Irmgard Marboe, *Damages in Investor-State Arbitration: Current Issues and Challenges*, 2 International Investment Law and Arbitration 1 (2018), p. 24.

[451] See, for instance, *James* paras 59 et seq.

[452] See López, *Interferences*… Op. Cit., p. 534.

[453] Kriebaum, *Is the European*… Op. Cit. p. 241.

[454] See Id., p. 240 and López, *Interferences*… Op. Cit., pp. 522-523.

interferences" than in cases of expropriation[455]. However, the Convention does not leave those affected unprotected, in the cases of measures falling under "control" or "other interferences". Indeed, such measures can trigger the obligation of reparation by the state, provided that they are not justified in the light of the Convention. In Kriebaum's view, in this point the ECHR is not different from general international law, since it follows the principle set out in the Chorzow Factory case, according to which reparation "should aim at putting the applicant (…) in the position in which, it would have been had the violation not occurred"[456]. Considering the wide margin of appreciation granted to states in relation to "control" and "other interferences", commentators have stressed the difficulties in finding a corresponding breach[457], and some of them even regard the duty to repair as highly exceptional[458].

Having discussed the ECHR's guarantee to property and the conditions under which the interference with "possessions" may be justified, we can now turn to the question of whether sovereign bonds can be said to be protected under Art. 1 P-1. For this purpose, we will focus on the ECtHR's case-law on the subject.

3.2.2. Sovereign Bonds Before the European Court of Human Rights

Several cases have been brought to the ECtHR involving government securities, which can be classified in three groups.

The first group features several applications against Russia brought by its citizens concerning a peculiar type of security known as "commodity bond". These securities were distributed among producers during the transition from a planned to a market economy and were intended to encourage them to sell their output to the state by granting them the right to purchase consumer-goods with a priority. Some of these securities were never exchanged by their holders, and the Russian government failed to implement the legislation necessary for their redemption.

The second group of cases was also brought to the Court against the Russian Federation. In contrast with the first group, the cases included here specifically feature sovereign bonds (denominated "state premium loan bonds") issued by the USSR in 1982. Although the legislation necessary for the redemption of these securities was implemented, the successor state (Russia) suspended its application indefinitely.

Finally, as will be explained in subsection 3.2.2.3, I reserve a specific category for the most important case involving sovereign bonds brought to the consideration of the ECtHR, namely Mamatas vs. Greece.

[455] Kriebaum, *Is the European*… Op. Cit. pp. 242-243. Perkams, *The Concept*… Op. Cit.
[456] Kriebaum, *Is the European*… Op. Cit. p. 243. López, *Interferences*… Op. Cit., pp. 522-523.
[457] See López, *Interferences*… Op. Cit., p. 536.
[458] See Perkams, *The Concept*… Op. Cit., p. 118.

3.2.2.1. Agricultural "Commodity Bonds"

As stated above, this group of cases was brought to the Court against the Russian Federation[459], and featured a particular type of "commodity bond" issued by the former Russian Federative Soviet Republic in 1990. The instruments in question were commodity bonds distributed among agricultural producers (the "Urozhay-90" bonds) to encourage them to sell their harvest to the state. In return, their holders received a priority right to buy goods in high demand, limited to a maximum price specified on the face of the bond[460]. Although not constituting legal tender, Russia allowed the securities to be freely exchanged in the market[461]. In 1995, the government recognized the Urozhay-90 bonds as forming part of its internal debt[462], but failed to implement a legal framework for their settlement until 2009[463]. For this reason, several holders of these bonds presented their applications to the ECtHR.

In these cases, the Court employed its broad understanding of property. Although highlighting the peculiar nature of the assets at stake, the ECtHR concluded that the Urozhay-90 bonds qualified as "possessions" according to the Convention, since Russia recognized them as part of its internal debt[464], thus entitling their holders to "some form of compensation"[465].

Furthermore, the Court noted the difficulties involved in specifying the type of rule applicable to these cases[466] ("deprivation", "control" or "other interferences"), but decided to treat the measures in question under "other interferences"[467], applying the minimum requirements analyzed in subsection 3.2.1[468]. Particularly, the ECtHR applied the requirements of legitimate aim and proportionality stating:

> *"While the Court agrees that the radical reform of Russia's political and economic system, as well as the state of the country's finances, may have justified stringent financial limitations on rights of a purely pecuniary nature, it finds that the Russian Government were not able to adduce satisfactory grounds justifying, in terms of Article 1 of Protocol No. 1, the continuous failure over many years to implement an entitlement conferred on the applicants by Russian legislation"*[469].

Hence, the ECtHR explicitly recognized that "defining budgetary priorities in terms of favouring expenditure on pressing social issues" in the context of an economic crisis[470]

---

[459] These cases are: Malysh and Others v. Russia, Judgement February 1, 2010 (hereinafter "Malysh"), SPK Dimskiy v. Russia, Judgement March 18, 2010 (hereinafter "SPK Dimskiy") and Tronin v. Russia, Judgement March 18, 2010 (hereinafter "Tronin").
[460] See *Malysh* para 10, *SPK Dimskiy* para 9, *Tronin* para 9.
[461] See *Malysh* para 11, *SPK Dimskiy* para 10, *Tronin* para 10.
[462] See *Malysh* para 14, *SPK Dimskiy* para 13, *Tronin* para 13.
[463] See *Malysh* para 17, *SPK Dimskiy* para 16, *Tronin* para 16.
[464] See *Malysh* para 67, *SPK Dimskiy* para 53, *Tronin* para 44.
[465] See *Malysh* para 69, *SPK Dimskiy* para 57, *Tronin* para 48.
[466] See *Malysh* para 72, *SPK Dimskiy* para 59, *Tronin* para 50.
[467] See *Malysh* para 73, SPK *Dimskiy* para 59, *Tronin* para 50.
[468] See *Malysh* para 76, SPK *Dimskiy* para 62, *Tronin* para 53.
[469] See *Malysh* para 83, *SPK Dimskiy* para 69, *Tronin* para 60.
[470] See *Malysh* para 80, *SPK Dimskiy* para 66, *Tronin* para 57.

is a legitimate aim for the Convention. Furthermore, it treated the guarantee to property as an optimization requirement, (that is, as a normative proposition "to be realized to the greatest extent possible"[471]), which, when applied to claims of a "purely pecuniary nature", can be limited in the context of economic and political turmoil. However, the Court concluded that the Russian government had not been able to justify its sustained failure to settle the bonds after the economic and political conditions improved in the country, thus finding a violation of Art. 1 P-1[472].

3.2.2.2. Cases of "State Premium Loan Bonds"

As stated above, the cases belonging to this group were also brought to the Court against the Russian Federation[473]. In contrast with the first group, these cases specifically relate to sovereign bonds (denominated "state premium loan bonds"), issued by the USSR in 1982. Although the legislation necessary for the redemption of these securities was implemented in the year 2000, Russia indefinitely suspended its application. For this reason, the bondholders presented their application to the ECtHR.

As was the case for the first group under consideration, the Court found in *Lobanov* that debts and bonds "can also be regarded as "property rights", and thus as "possessions" for the purposes of (…)" Art. 1 P-1[474]. In *Andreyeva*, it characterized the interest of the bondholders as a "legitimate expectation of having those promissory notes redeemed at some point"[475]. Furthermore, the Court considered in these cases that the handling of economic crises is a legitimate aim that may justify measures affecting property rights[476]. Consistent with the criterion employed for the first group, the Court concluded that the government's failure to implement the legislation necessary to settle the debts was no longer justified in times of economic recovery, and that therefore it did not pass the fair-balance test[477]. Finally, although pecuniary damages were awarded to all applicants[478], the Court only discussed the methodology for its assessment in *Lobanov*[479].

---

[471] See Alexy, *A Theory*… Op. Cit. Pp. 47-48.

[472] See *Malysh* paras 83, 85 and 86, *SPK Dimskiy* paras 69, 71 and 72, *Tronin* paras 60, 62 and 63. It is also important to mention that, since the government implemented the law to settle the bonds in 2009, the ECtHR declined to grant pecuniary damages to the applicants, stating that they ought to file an application with the competent Russian authorities. See *Malysh* para 90, *SPK Dimskiy* para 81, *Tronin* para 67.

[473] These cases are: Lobanov v. Russia, Judgement December 2, 2010 (hereinafter "Lobanov"); Fomin and Others v. Russia, Judgement February 26, 2013 (hereinafter "Fomin"); Andreyeva v. Russia, Judgement April 10, 2012 (hereinafter "Andreyeva").

[474] *Lobanov*, para 32. In the same sense, *Fomin* para 25.

[475] *Andreyeva*, para 19.

[476] *Lobanov*, para 32, *Fomin* para 25, *Andreyeva*, para 20.

[477] *Lobanov*, paras 52-54, *Fomin* para 28-30, *Andreyeva*, para 20-22.

[478] Lobanov v. Russia, Judgement (Just Satisfaction) February 14, 2012, para 16, *Fomin* para 305, *Andreyeva* para 28.

[479] Lobanov v. Russia, Judgement (Just Satisfaction) February 14, 2012, para 16.

3.2.2.3. The Greek Restructuring Before the European Court of Human Rights: Mamatas vs. Greece

Mamatas[480] is probably the most important case dealing with sovereign bonds that has been submitted to the ECtHR. In contrast with the previously analyzed cases, *Mamatas* featured a dispute that arose from measures specifically related to the restructuring of sovereign bonds. Indeed, while all the cases against the Russian Federation concerned mainly omissions by the government (lack of regulation for the settlement of the debts), *Mamatas* involved the imposition of specific regulatory measures affecting the interests of holders of Greek securities.

The facts of the case can be summarized as follows[481]. In *Mamatas*, 6,320 Greek nationals filed an application at the ECtHR claiming that their government had either expropriated their property ("de facto") or interfered with the peaceful enjoyment of their possessions. The controversies had their origins in the enactment of Law 4050/2012 of February 23, 2012, which, in practice, retroactively altered the terms of domestic Greek bonds[482]. By means of this law, the government implemented a voting procedure directed at its domestic bondholders. This procedure sought to modify the obligations established in the corresponding instruments, emulating a well-known contractual provision inserted in modern bond-indentures, i.e., Collective Action Clauses (henceforth, "CACs)". As discussed in *Chapter One*[483], CACs are aimed at solving "anti-commons" problems among creditors. They enable a qualified majority of creditors to bind the entire group (including dissenters) to a restructuring proposal. In this case, Greece offered its domestic bondholders new bonds in exchange for the old ones, reducing their nominal value by 53.5%. The offer was accepted by the majority of bondholders. After unsuccessful litigation against the state under its domestic courts, a group of dissenting creditors brought the case to the ECtHR[484].

After stating the arguments of the parties, the Court reaffirmed its broad interpretation of what is to be understood by "possessions" and "property" for Art. 1 P-1[485]. In consonance with its previous case-law, it concluded that the securities held by the applicants qualified as "possessions", since they entitled them to redeem at maturity a "monetary claim against the state of an amount equivalent to the nominal value of their bonds"[486]. Afterwards, the Court discussed the nature of the interferences with their proprietary rights by means of Law No. 4050/2012.

In the opinion of the Court, the measures imposed by the Greek government were not "deprivations"[487]. Although it did not provide detailed reasons for this, the resolution

[480] Mamatas and Others v. Greece, Judgement July 21, 2016 (hereinafter "Mamatas").
[481] See *Mamatas* paras 15, 20 22, 26-45 and 56.
[482] The term "domestic Greek bonds" refers to bonds governed by the law of Greece.
[483] See *Chapter One,* pp. 14 et seq.
[484] It is important to note that a group of applicants did not challenge Law 4050/2012 under Greek municipal courts. For that reason, the ECtHR declared their applications inadmissible. See *Mamatas* paras 58-66.
[485] See *Mamatas* paras 86-87.
[486] See Id., para 90.
[487] See Id., para 27.

was consistent with its case-law concerning the second rule. As was previously mentioned, the ECtHR had interpreted this rule restrictively, requiring a "complete deprivation" for its application. This was not the case in *Mamatas*, where the applicants remained in possession of (discounted) securities. Hence, the Court classified the Greek government's measures under "other interferences", as in the Russian cases. However, it insisted that even if this rule was applied, the implemented measures needed to conform to the conditions of lawfulness, legitimate aim and proportionality[488].

First, regarding lawfulness, the ECtHR stressed that the measures were implemented by law and that their conditions were "accessible to the applicants", establishing predictable consequences and applied equally to all domestic bondholders. The Court took particular notice of the mechanism established in the law, that required the voluntary participation of creditors. Hence, it concluded that the interferences in question were lawful in the light of the Convention[489].

Secondly, the Court found that the interferences pursued the public interest. Consistent with its case-law in Russian cases, the ECtHR declared that the maintenance of economic stability satisfied the legitimate aim requirement. Interestingly, the Court explicitly stated that debt restructuring was one of these legitimate aims[490].

Thirdly, the ECtHR discussed in detail the proportionality of the measures. In this regard, it started by indicating that the reduction in the nominal value of the applicants' securities was not disproportionate. According to the Court, the "true" value of the bonds included in the exchange had already been downgraded by the market due to the deteriorated financial conditions of the Greek economy. Furthermore, it also considered a counterfactual scenario where the obligations of the government had not been restructured and put forward that by August 2015 the country would have defaulted[491]. Then, the Court moved on to discuss the specific nature of the voting procedure. Although it acknowledged that it was imposed unilaterally by the government, the ECtHR noted that CACs were not uncommon in the credit market. Furthermore, it stressed the risky nature of the transactions related to sovereign bonds, stating that the applicants should have been aware of it. Particularly, the Court affirmed the proportionality of the measure by noting that the applicants (dissenting bondholders themselves) could have anticipated the result of the exchange offer and sold their bonds before the activation of the voting procedure. Additionally, the Court stressed the relationship between means and ends: The imposition of CACs was necessary to avoid default. According to the ECtHR, without the supermajority voting procedure, the whole operation could have been jeopardized leading to higher losses shared by a greater number of bondholders[492].

[488] See Id., para 96.
[489] See Id., paras 98-100.
[490] See Id., paras 101-105.
[491] See Id., paras 107-112.
[492] See Id., paras 113-118.

Finally, stressing the wide margin of appreciation the Convention grants to states in such matters[493], the Court concluded that a fair balance between the different interests at stake had been maintained and that consequently the measures imposed by the Greek government were justified in the light of the ECHR[494].

Although this *Chapter* specifically deals with the right to property, it is worth mentioning a point relating to another guarantee of the Convention adduced by the applicants in *Mamatas*. They claimed that the government had violated Article 14 of the ECHR (prohibition of discrimination) by failing to offer different conditions for differentially situated bondholders[495]. Particularly, they argued that they deserved to be treated preferentially vis-à-vis institutional investors and other professional market participants[496]. They maintained that their specific characteristics (natural persons without the expertise of other bondholders and with small investments in Greek securities) entitled them to be exempted from the exchange offer[497]. In this regard, the ECtHR also sided with Greece. First, it pointed out the difficulties associated with finding the holders of Greek bonds and determining the relevant differences among them[498]. Secondly, the Court considered the complications of establishing a valid criterion for distinguishing between different kinds of creditors. It stressed that most categories proposed by applicants (natural vs. legal persons; small vs. large investors) overlapped and thus, its application for establishing differences among creditors would have unfair outcomes. In the words of the Court: "It would not be fair to exclude from the operation a natural personal who invested 100,000 EUR while including a company that invested a much lower amount, being the only reason for this that the latter is a corporation"[499]. Thirdly, it observed that granting preferential treatment to some creditors or categories of creditors would have caused the transfer of titles to them, increasing the losses of non-exempted bondholders. Since the exchange offer depended on the acceptance of the latter, the Court reasoned that preferential treatment among domestic bondholders would have endangered the entire operation[500]. Finally, the ECtHR added that differentiating among creditors would have slowed the process, which could in turn have impeded the successful restructuring of the liabilities[501]. For these reasons, the Court dismissed the applicants' claims for discrimination[502].

3.2.2.4. Proportionality and Property Protection in Sovereign Bonds Cases before the European Court of Human Rights

As has been shown, the claims of bondholders qualify as "property" guaranteed by Art. 1 P-1 of the ECHR. Through its case-law, and by consistently maintaining a broad understanding of "possessions", the ECtHR has held in several decisions that

[493] See Id., para 120.
[494] See Id., paras 119-120.
[495] See Id., paras 121 and 124.
[496] See Id., para 124.
[497] See Id., para 124.
[498] See Id., para 136.
[499] See Id., para 137.
[500] See Id., para 138.
[501] See Id., para 139.
[502] See Id., paras 141-142.

government securities are protected by the European Convention. Furthermore, the application of the "fair-balance" test (and therefore, of the principle of proportionality) serves as a justification to consider the protection of bondholders' property rights as a "prima facie requirement" in the sense developed by Alexy. Consequently, in the case of Europe, it is possible to infer that the protection of bondholders' interests can be regarded as a PIL principle, as was the case with the American Convention of Human Rights.

3.2.3. The Protection of Sovereign Bonds by the American and European Conventions on Human Rights

For all the above, it can be concluded that creditors' interests are protected under the American and European Conventions on Human Rights. Particularly, sovereign bonds qualify as "property" (pecuniary claims being part of a person's patrimony) or as "possessions" (either entitling their holders to obtain compensation or expressing their legitimate expectation of re-payment) under both regimes. However, property protection is not absolute under either of them. As previously discussed, both Conventions establish limitations to which property may be subjected. In applying such limitations, the respective Courts have treated the right to property as a "prima facie requirement", which interacts with other guarantees of their Conventions and the "general interest" through the application of the principle of proportionality. For these reasons, at least at the American and European level, it is possible to infer that the protection of creditors' property rights can be regarded as a PIL principle.

3.3. The Protection of Bondholders' Interests Under International Investment Law

In this subsection, I address the international investment law guarantees that can potentially be breached in the context of insolvency conflicts and discuss whether those guarantees can be considered PIL principles. However, there is one point that must be considered first. In effect, the application of the guarantees offered by international investment law to bondholders is contingent on sovereign bonds being covered by the umbrella of protection of the former. As will be shown, this issue has sparked a heated debate both in international courts and tribunals, as well as in academia.

The most important disagreement in this regard pertains to the meaning of "investment", which is the object of protection of the regime. Furthermore, the controversy also extends to the specific relationship between the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (which establishes a procedural framework and a forum for the protection of investments, henceforth the "ICSID Convention")[503] and bilateral investment treaties (henceforth "BITs", which outline the standards of protection granted to this type of economic activity)[504].

[503] See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

[504] International investment law protects "investments" through a network of international agreements. Those instruments include substantive guarantees offered to foreign investors and provide for international dispute settlement through arbitration. The most used rules for

In the next subsections I proceed in two steps. First, I start by discussing whether sovereign bonds can be considered regarded as protected under international investment law (subsection 3.3.1). However, it should be noted that resolving the discrepancies in this regard falls beyond the scope of this *Chapter*. Therefore, that discussion is provided for the purpose of justifying that, although inconclusive, sovereign bonds may be considered protected by this regime. Secondly, I analyze the investment guarantees which can potentially be breached in the context of insolvency conflicts and discuss if those guarantees can be considered PIL principles (subsection 3.3.2).

3.3.1. Sovereign Bonds as "Investments"

Commentators and tribunals have developed different strategies for determining whether sovereign bonds are "investments" for the purposes of international investment law. Before discussing these positions in detail, it is important to note that Article 25(1) of the ICSID Convention limits the subject-matter jurisdiction of the Centre to "legal disputes arising directly out of an investment"[505], but omits the definition of the term. At the same time, BITs usually include detailed lists of the "assets" to be considered as investments. Hence, most disagreements pertain not only to the definition of the term but also to the relationship between BITs and the ICSID Convention.

The coordinates of this debate can be drawn by referencing an influential paper by Michael Waibel[506]. Waibel was the first scholar to tackle these problems in detail, even before the first jurisdictional decision involving restructured sovereign bonds was

---

international investment arbitration are those included in the "ICSID" Convention and in the United Nations Commission on International Trade Law Arbitration Rules (henceforth, "UNCITRAL"). See UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf [last accessed 27.08.2021]. Crucially, the ICSID Convention also establishes a particular forum for investment disputes (the "International Centre for Settlement of Investment Disputes", henceforth, "Centre"). See van Aaken, *International Investment Law…* Op. Cit., p. 513. In most cases, international investment agreements grant investors the possibility of choosing between arbitration before the Centre or pursuant to the rules of UNCITRAL. See Stratos Pahis, *Investment Misconceived: The Investment-Commerce Distinction in International Investment Law*, 45 The Yale Journal of International Law 1 (2020), p. 76.

[505] Art. 25(1) "ICSID Convention", Op. Cit. In principle, the jurisdictional requirements established in the ICSID Convention are not applicable to arbitrations pursuant to other fora and rules (such as UNCITRAL). See Stephen Jagusch and Jeffrey Sullivan, A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern, in Michael Waibel et al. (Eds.), *The Backlash Against Investment Arbitration*. Kluwer Law (2010), pp. 85-86. Nevertheless, tribunals adjudicating pursuant to UNCITRAL Arbitration Rules have imported the notion of "investment" from ICSID tribunals' case-law. See Laura Halonen, *Bridging the Gap in the Notion of "Investment" between ICSID and UNCITRAL Arbitrations: Note on the Award Rendered under the Bilateral Investment Treaty between Switzerland and Uzbekistan (Romak SA v. Uzbekistan)*, 29 Asa Bulletin 2 (2011) and Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law*. Kluwer Law (2017), p. 147.

[506] See Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 The American Journal of International Law (2007).

rendered by an ICSID tribunal. According to him, ICSID tribunals tend to conduct a "double review" to determine their jurisdiction over legal disputes between investors and states. He points out that tribunals will first analyze whether the dispute satisfies the requirement of Article 25(1) and then whether it falls under the definition of the relevant bilateral agreement[507]. According to him, the first step is critical. Indeed, although he points out that the Convention is silent regarding its definition, he claims that the term nevertheless has an "objective" or "multilateral meaning", which cannot be altered by bilateral instruments. However, elucidating the content of this notion is not straightforward. He stresses that not only the "ordinary meaning" of the term is ambiguous but also that obscurities persist after examining the *travaux* of the ICSID Convention concerning whether the concept can be extended to encompass sovereign bonds[508]. Hence, he suggests the alternative of equating the "multilateral meaning" of the term to an "objective core" developed by the ICSID case-law[509]. This "objective core" corresponds to a set of typical elements that are generally present in investments and have been systematized by the jurisprudence of ICSID tribunals (particularly, by the Salini tribunal[510], which came to be known as the "Salini test")[511]. These typical features include a contribution to the development of the host state, a particular duration, the sharing of a risk, a territorial link and an "association with a commercial undertaking"[512].

In what follows I discuss the case-law and the arguments of commentators that support the view that sovereign bonds are (or can be) protected by the international investment regime. Then, I discuss the arguments of those who hold the contrary opinion. At this point it is important to stress that none of the cases discussed here reached the merits' stage, featuring only decisions on jurisdiction[513].

---

[507] Id., p. 718.
[508] Id., pp. 719-720.
[509] Id., p. 723.
[510] See Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, para 52.
[511] Waibel, *Opening Pandora's…* Op. Cit., p. 723.
[512] Id.
[513] First, in the "Poštová" case (i.e., Poštová Banka A.S and Istrokapital SE v. The Hellenic Republic, ICSID Case No. ARB/13/8 (2015)), the tribunal dismissed the claims on the grounds of lack of jurisdiction. Secondly, the Abaclat case (i.e., Abaclat and others v. The Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5 (2011), Majority Decision) was settled. Thirdly, both the "Ambiente" (i.e., Ambiente Ufficio S.P.A. and Others v. The Argentine Republic, ICSID Case No. ARB/08/9 (2013)) and the "Alemanni" (i.e., Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8 (2014)), were "discontinued for failure to pay the fees of the tribunal". See Matthias Goldmann, Foreign Investment, Sovereign Debt, and Human Rights in Ilias Bantekas and Cephas Lumina (Eds.), *Sovereign Debt and Human Rights*. Oxford University Press (2018), pp. 132-133. See also Stephen Kim Park and Tim Samples, *Tribunalizing Sovereign Debt: Argentina's Experience with Investor-State Dispute Settlement*, 50 Vanderbilt Journal of Transnational Law (2017), pp. 1053-1054.

3.3.1.1. Sovereign Bonds Qualify or Can Qualify as "Investments": The Majority Votes in Abaclat and Ambiente

The majority votes in *Abaclat*[514], *Ambiente*[515] and *Alemanni*[516] diverged from Waibel's analysis, upholding a "subjective" understanding of "investments". Particularly, in *Abaclat* the majority applied different criteria[517], all leading in its opinion to the same conclusion: that sovereign bonds qualified as "investments". The overall analysis of the tribunal was determined by one key finding: In its view, the list of assets provided by the BIT in question encompassed sovereign bonds[518]. Since in its opinion the express agreement of the parties was to protect government securities through the BIT, the tribunal dismissed the application of the Salini criteria, which could potentially exclude them from this protection[519]. To determine that an economic activity qualified as an investment, the tribunal stated that only one requirement was critical: that a "contribution" be made. For the majority, the mere purchase of bonds by the claimants is sufficient proof of said contribution, leading to the conclusion that government securities are indeed protected by the ICSID Convention[520]. Finally, the tribunal also discussed whether its conclusion was consistent with the "objective meaning" of the term "investment". Citing the award in Romak S.A. v. Uzbekistan, the tribunal added one additional criterion to the "contribution" requirement, namely risk. Since – in its opinion – government securities also involve a type of risk (i.e., default), the majority maintained once more that sovereign bonds qualified as investments both from the perspective of the ICSID Convention and the Argentina-Italy BIT (which was the relevant treaty at stake)[521].

The majority in *Ambiente* analyzed in more detail the "objective core" of the ICSID Convention regarding the definition of investments. It agreed on the surface with

---

[514] Abaclat and others v. The Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5 (2011), Majority Decision (here referred to as "Abaclat").

[515] Ambiente Ufficio S.P.A. and Others v. The Argentine Republic, ICSID Case No. ARB/08/9 (2013), Majority Decision (here referred to as "Ambiente").

[516] Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8 (2014) (here referred to as "Alemanni"). The tribunal in *Alemanni* did not address these questions in detail. It simply stated its agreement with the majority votes in *Abaclat* and *Ambiente*. See *Alemanni* para 296.

[517] It is important to mention that the *Abaclat* majority re-interpreted the "double-barreled" test by pointing out that both the ICSID Convention and the relevant BIT addressed investment from different perspectives: While the Convention considered investments from the point of view of their "contribution", the relevant bilateral treaty did the same regarding their "fruits". Therefore, in the opinion of *Abaclat's* majority, a specific activity needed to conform both to the requirements of the relevant BIT and the Convention to be considered an "investment". See *Abaclat* paras 350-351.

[518] Id., paras 352-361.

[519] In the words of the majority in *Abaclat*: "(…) there would be an investment, which Argentina and Italy wanted to protect and to submit to ICSID arbitration, but it could not be given any protection because – from the perspective of the contribution – the investment does not meet certain criteria". *Abaclat* para 364. Additionally, the tribunal also stressed that the Salini criteria were not included in the ICSID Convention.

[520] Id., paras 356-366.

[521] Id., paras 370-371.

Waibel on the boundaries set out in Article 25(1) of the aforementioned instrument. According to the tribunal, the parties could not alter by the means of bilateral agreements the specific meaning of the term "investment" established by the Convention[522]. Therefore, the key issue for the majority was to determine what was to be understood by said notion. This task required the use of the "general rule" of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties (henceforth, "VCLT")[523], which provides that a treaty needs to be interpreted: (i) in good faith, (ii) in accordance with the ordinary meaning of the terms to be interpreted, (iii) in their context, and (iv) taking into account its object and purpose[524].

Notably, the *Ambiente* tribunal omitted all references to "good faith" and started by analyzing the "ordinary meaning" of the word "investment". Also departing from Waibel's analysis, the majority found that the ordinary usage of the term was broad enough to encompass sovereign bonds[525]. Regarding context, the tribunal stressed that the notion ought to be interpreted along with other provisions of the BIT and of the ICSID Convention. Particularly, the majority invoked Art. 25(4) of said instrument, which allows member states to withdraw from the jurisdiction of the Center some types of disputes[526]. Hence, in the opinion of the tribunal a broad understanding of the term "investment" ought to be preferred to a narrow one, since state parties are able to limit the disputes taken to the Centre[527]. Furthermore, the tribunal recognized that an analysis of the object and purpose of the ICSID Convention could favor both a broad and a narrow understanding of the notion at stake. However, it agreed with the majority in *Abaclat* by affirming that, since Italy and Argentina agreed in their BIT that sovereign bonds were considered "investments", it would be consistent with the objectives of both the treaty and the Convention to grant protection to this kind of asset[528]. For these

[522] According to the majority: "(…) the existence of an "investment" within the meaning of Art. 25 ICSID Convention is a mandatory requirement for the jurisdiction of the Centre, with a request for arbitration transcending these limits leading to the dismissal of the case" (*Ambiente* para 439).

[523] Id., paras 442-474. In this regard, the majority started by resorting to the history of the ICSID Convention, departing from the rules of Art. 31 VCLT. *Ambiente* majority paras 448-454. According to these rules, the *travaux* should only be employed when ambiguities or obscurities in language remain after the application of the general rules of interpretation. The dissenting vote criticized this rather "heterodox" turn in detail. See Ambiente Ufficio S.P.A. and Others v. The Argentine Republic, ICSID Case No. ARB/08/9 (2013), Dissenting Opinion Santiago Torres Bernárdez (hereinafter "Ambiente Dissent"), paras 210 et. seq.

[524] See Art. 31 VCLT. It is important to mention that the tribunal also briefly discussed the subsequent practice of states (with inconclusive findings) and case-law. See *Ambiente* paras 464-469.

[525] *Ambiente*, para 456.

[526] Article 25 (4) of the ICSID Convention provides: "(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)".

[527] *Ambiente* para 457.

[528] Id., paras 458-460 and 463.

reasons, the tribunal sided with the claimants and upheld the criterion set out by the *Abaclat* tribunal: Sovereign bonds can be considered as "investments" for the effects of Article 25(1) of the ICSID Convention[529].

However, the analysis of the majority did not stop there. The tribunal also addressed whether sovereign bonds presented the "typical" characteristics of investments by having recourse to the "Salini" test.

With this purpose, the majority first addressed the specific role of the criteria put forward in Salini. In its view, the test should not be construed as establishing additional jurisdictional requirements, but as setting "guidelines" to be applied by the interpreters "in a flexible manner"[530]. Furthermore, it highlighted that the application of the test has to assess the economic activity under scrutiny as a whole in order to determine whether it constitutes an investment or not[531]. For the tribunal, this meant that for sovereign bonds the relevant elements should be assessed at the moment of issuance, not at the moment of their circulation in the secondary market[532]. All these considerations allowed the majority to conclude that the claimants (who purchased the bonds after issuance) made a contribution to the development of the host state (although the funds never reached Argentina) for a significant amount of time (where "the duration of the bonds issued [was] that [was] relevant"[533]), and that the risk they took was no ordinary commercial risk, but a risk involving sovereign acts. Therefore, the tribunal concluded that, if applied, sovereign bonds would pass the Salini test[534].

Overall, the majorities of both tribunals upheld a "subjective" understanding of the notion of "investment". However, both attempted to justify the protection of government securities by resorting to some "objective elements" that are allegedly present in this type of transaction. Furthermore, it is important to note that it was the majority in *Ambiente* which dealt with this issue in more detail.

3.3.1.2. Sovereign Bonds Qualify or Can Qualify as "Investments": The Opinion of Commentators

A group of commentators also upholds the view that sovereign bonds are susceptible of qualifying as "investments" in the light of the ICSID Convention. Three different – but related – arguments can be identified in the literature on the subject.

The first line of reasoning starts by stressing that the parties to the ICSID Convention have an important margin of discretion in determining the types of disputes that will be submitted to the Centre[535]. Particularly, this margin of discretion would flow both from Art. 25(4) ICSID and from the fact that ICSID member states left the definition of

[529] Id., paras 471-472.
[530] Id., para 479.
[531] Id., para 482.
[532] Id., para 487.
[533] Id., para 484.
[534] Id., para 482-487.
[535] Among others, Pietro Ortolani follows this line of reasoning. See Pietro Ortolani, *Are Bondholders Investors? Sovereign Debt and Investment Arbitration after Postova*, Leiden Journal of International Law (2017), pp. 16-20.

"investment" open for "strategic reasons". According to Pietro Ortolani, the latter fact would suggest that states "entrusted future interpreters of the Convention with the task of filling the gap by relying on an evolving meaning of investment"[536]. Hence, according to him, the interpreter must not look for the intention of the parties when the ICSID Convention was concluded but to the contemporary ordinary meaning of the word[537], which in his view is "clearly"[538] broad enough to encompass sovereign bonds. By this means, the conflict between subjective and objective understandings of the term would be definitively resolved[539].

The second argument is related to this one. It rests on the premise that the parties to the ICSID Convention did not define the notion of "investment" at the time of its conclusion "because they expected it to evolve over time"[540]. Hence, as in the first argument, this reasoning suggests that the ordinary meaning of the term is to be equated with its contemporary definition and, particularly, with its current meaning in the market[541]. In this view, this meaning would concur with the definition employed by economists, which is also broad enough to encompass government securities[542].

The third line of reasoning addresses the elements of the Salini test taking into account the broad understanding of "investment" resulting from the previous argument, that is, that the ordinary meaning of "investment" concurs with the usage of market participants. Regarding the "contribution" requirement, this argument either stresses that it is impossible to assess the impact that *any* economic activity has on the host state's economic development (making the criterion irrelevant)[543], or that any purchase of sovereign bonds is actually beneficial to the issuing country. For the latter position, even bonds acquired in the secondary market will pass the contribution requirement, since their tradable and liquid nature constitutes the grounds upon which former and future issuances are built[544]. The same reasoning is also extended to the duration requirement. What needs to be analyzed is the bond's entire life cycle, from issuance to maturity, irrespective of the amount of time it was in the possession of its holder[545]. Therefore, most government securities could be regarded as long-term investments.

---

[536] Ortolani, *Are Bondholders…* Op. Cit. p. 18.
[537] Id.
[538] Id., p. 5.
[539] Id., p. 17.
[540] Michail Dekastros, *Portfolio Investment: Reconceptualising the Notion of Investment under the ICSID Convention*, 14 the Journal of World Investment & Trade (2013), p. 308.
[541] Id. p. 310.
[542] Id. In the same sense, see Michael Nolan, Frederic Sourgens and Hugh Carlson, *Leviathan on Life Support? Restructuring Sovereign Debt and International Investment Protection After Abaclat*, Yearbook on International Investment Law & Policy 2011-2012 (2013), p. 486.
[543] See Dekastros, *Portfolio…* Op. Cit. p., 313.
[544] See Ortolani, *Are bondholders…* Op. Cit., p. 21. Felipe Suescun de Roa condenses this argument in the following fashion: "For the primary market to succeed, there should be a secondary market that gives liquidity to debt instruments. Otherwise, investors would not buy such instruments from underwriters, and governments would hardly raise capital for their operations". Felipe Suescun de Roa, *Investor-State Arbitration in Sovereign Debt Restructuring: The Role of Holdouts*, 30 Journal of International Arbitration 2 (2013), p. 147.
[545] Dekastros, *Portfolio…* Op. Cit., p. 315.

Finally, regarding the risk requirement, this line of reasoning points out that both direct and portfolio investments are subject to sovereign risk (where opportunistic default is equated with expropriation)[546]. Hence, sovereign bonds would also be protected as "investments", even if an "objective" approach along the lines of the "Salini" test were to be applied.

3.3.1.3. Sovereign Bonds Do Not Qualify as "Investments": Minority Votes in Abaclat and Ambiente

The majority decisions in *Abaclat* and *Ambiente* were accompanied by dissenting votes arguing for the dismissal of the bondholders' claims on the grounds of lack of jurisdiction. In substance, both minorities feature similar criticisms to the majority decisions.

First, the dissenting votes agreed with Waibel's approach concerning the relationship between Art. 25(1) of the ICSID Convention and the corresponding BIT. According to them, the parties to a bilateral agreement are not free to alter the "core" meaning of the notion of investment considered in the Convention[547]. For the same reason, they also supported the application of the "double-review" necessary for determining the jurisdiction of an ICSID tribunal[548]. Hence, they criticized the majorities stressing that they held a "subjectivist" approach to ICSID jurisdiction[549].

Secondly, the dissenting opinions tied the "core" definition of investment to the criteria developed by the ICSID case-law, and particularly to the "Salini" test[550]. According to them, these criteria are consistent with the context, object and purpose of the ICSID Convention[551] and, particularly, with a good faith interpretation of this instrument: In *Ambiente*, the dissent explained that a good faith interpretation has to consider the ordinary meaning of the term "investment" at the moment of the conclusion of the aforementioned Convention. According to them, that notion conforms to the elements posited by the *Salini* tribunal[552].

Thirdly, both dissenting opinions concluded that sovereign bonds unconnected with commercial undertakings fail to meet the "Salini" criteria[553]. On the one hand, for the *Abaclat* minority, the key missing element was the territorial link between the bonds and Argentina. In its opinion, this element is a common feature of the investment protected by the ICSID Convention, which is derived from its object and purpose, namely, to encourage capital flows between countries[554]. On the other hand, the *Abaclat*

---

[546] See Ortolani, *Are bondholders…* Op. Cit., p. 320.
[547] See Abaclat and others v. The Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5 (2011), Dissenting Opinion Georges Abi-Saab (hereinafter "Abaclat dissent"), paras 45-47. See *Ambiente dissent* para 208.
[548] See *Abaclat dissent* paras 39, 40 and 66. See *Ambiente dissent*, para 209.
[549] See *Abaclat dissent* para 39. See *Ambiente dissent* para 194.
[550] See *Abaclat dissent* para 51. See *Ambiente dissent* paras 255-263.
[551] See *Abaclat dissent* para 46.
[552] See *Ambiente dissent*, paras 249, 251, 274, 275 and 276.
[553] See *Abaclat dissent* para 60. See also *Ambiente dissent* para 263.
[554] See *Abaclat dissent*, para 74. Furthermore, the dissenting vote also noted that this requirement flow from the Argentina-Italy BIT. *Abaclat dissent* para 75.

minority argued that the bonds at stake were not linked to Argentina based on a legal and a material analysis. In what pertains to the former, the dissent noted that the instruments had their *situs* outside the country, since they were governed by foreign law and subject to the jurisdictions of foreign tribunals[555]. Additionally, the material analysis highlighted that the bonds were not used to finance any specific productive activity in Argentinian territory and that, therefore, did not present a specific link with the country[556].

Finally, it is important to mention that the dissent in *Ambiente* took a closer look at the other "objective" criteria. Indeed, it discussed the operation comprised by the issuance and purchase of sovereign bonds as whole, with the purpose of finding whether they displayed the typical characteristics associated with the "investments" protected by the ICSID Convention. In the dissent's opinion, it was indeed true that Argentina received money in exchange of its sovereign bonds by the intermediaries (not from the Italian bondholders). However, it insisted that in order to pass the "contribution" requirement, these funds ought to be tied to an economic venture which was not the case in the dispute[557]. For the same reason, it stressed that the risk faced by the holders of Argentinian securities was not an investment risk, but merely a "commercial one". Finally, it highlighted that the securities would not pass the duration requirement. Consequently, it concluded that the bonds at stake would not qualify as investments, but as mere commercial transactions carried out outside the scope of ICSID's umbrella of protection[558].

3.3.1.4. The Decision on Jurisdiction in Poštová

In *Poštová*[559], the tribunal declined jurisdiction on Greek restructured sovereign bonds. In the case, the tribunal based its decision on the specific language of the BIT between Slovakia and Greece[560]. Although it clearly stated that its purpose was not to solve the controversies surrounding "objective" and "subjective" approaches[561], it nevertheless tackled the question of whether the bonds purchased by *Poštová* qualified as "investments" using some of the elements developed by the case-law following the "Salini" test. The tribunal discussed in detail two of these elements, namely, contribution and risk.

---

[555] See *Abaclat dissent*, paras 78-87.
[556] See *Abaclat dissent* paras 88-118.
[557] See *Ambiente dissent*, paras 179-180.
[558] See *Ambiente dissent* para 189.
[559] Poštová Banka A.S and Istrokapital SE v. The Hellenic Republic, ICSID Case No. ARB/13/8 (2015) (here referred to as "Poštová").
[560] In the case, Istrokapital SE and Poštová Banka A.S. filed a request for arbitration against the Greek government following the restructuring of its liabilities. After dismissing the claims of Istrokapital (a shareholder in Poštová), the tribunal analyzed in detail the specific language of the relevant BIT – particularly, its Art. 1 (c) – where the parties granted protection to "loans, claims to money or to any performance under contract having a financial value". According to the tribunal, Poštová – the holder of the bonds – did not have any kind of contractual relationship with Greece, since it bought the securities in the secondary market. See Id., paras 251-350.
[561] See Id., paras 351-359.

First, the tribunal noted that sovereign bonds neither entail a "contribution to an economic venture" in the host state, nor are they necessarily "linked with a process of creation of value", as investments proper are. According to the decision, on a general basis, sovereign bonds would feature a "mere process of exchange of value", unless they are connected to another economic operation[562].

Secondly, the tribunal stressed that the risk faced by bondholders was different from the risk faced by investors. Following the criterion set out in *Romak*, it maintained that holders of government securities face a "commercial" risk only (i.e., default), whereas investors proper confront both this kind of risk and an "operational risk", since their profits and losses also depend "on the failure of the economic venture concerned"[563].

Consequently, the tribunal concluded that according to the objective criteria, the bonds held by *Poštová* would not qualify as investments in the light of the ICSID Convention.

3.3.1.5. Sovereign Bonds as "Investments": Moving Forward

As has been shown, the question pertaining to whether international investment law protects sovereign bonds remains unsettled both in the scholarship and in the case-law. Furthermore, it bears repeating that no case involving restructured sovereign bonds before ICSID tribunals has reached the merits' stage[564].

Nevertheless, as stated above, resolving the discrepancies in this regard falls beyond the scope of this *Thesis*. Thus, for the purpose of moving forward, I decided to follow a pragmatic approach. This approach operates under the assumption that sovereign bonds can be considered protected by international investment law (and particularly, by the ICSID Convention).

As previously indicated, this assumption is not without merit. After all, in three of the four ICSID cases discussed above, tribunals accepted jurisdiction and thus qualified sovereign bonds as "investments". Furthermore, contemporary commentaries also point in this direction. In fact, the most recent discussions on the subject have highlighted that even government securities bought in the secondary market will qualify as such through the application of the "Salini" criteria[565]. For example, Ann Manov indicates that this can be justified when considering the bonds' life cycle as a whole[566]. From this perspective, as the previous scholarship has argued (see subsection 3.3.1.2 for details), the very existence of the secondary market enables issuers to capture funds at issuance in the first place. For this reason, bondholders having acquired the instruments from other creditors will nevertheless comply with the "contribution" requirement[567]. The

[562] Id., paras 360-365.
[563] Id., para 369.
[564] See footnote 513 above.
[565] See, for example, Stratos Pahis, *Investment Misconceived*… Op. Cit., pp. 131 et seq. See also Stratos Pahis, *The International Law and Economics of Sovereign Debt*, 115 The American Journal of International Law 2 (2020), p. 18 and Ann Manov, *Shooing the Vultures? The Case for Investment Treaty Protection of Sovereign Debt*, 37 Arbitration International (2021), pp. 349 et seq.
[566] See Manov, *Shooing*… Op. Cit., pp. 349-350.
[567] See Id., pp. 349-350.

same can be said regarding "duration". According to Manov, what needs to be "counted" for this purpose are the instruments' maturity dates, and not "the actual time held"[568] by the corresponding purchasers. Furthermore, regarding "territoriality" and "risk", she also indicates that bondholders are at the mercy of host-states, just as other investors as are[569]. Finally, she stresses that sovereign bonds also exhibit a certain "regularity of returns", through interest payments[570].

3.3.2. Investment Guarantees Protecting Bondholders' Interests

With the assumption that sovereign bonds qualify as "investments", I move forward to the second step. Here, I discuss the investment guarantees that an indebted state may breach in the context of investment litigation arising from sovereign insolvency conflicts[571] and whether those guarantees can be considered PIL principles. Importantly enough, the widespread network of international investment agreements establishes several standards of protection in favor of investors. According to commentators, the guarantees that can potentially be breached by a state in the context of a default/restructuring are the following: direct and indirect expropriation, fair and equitable treatment (henceforth, "FET"), national and most favorable nation treatment, and the "transfer of funds" provision[572]. Another important standard of treatment which

---

[568] See Id., pp. 351.

[569] See Id., pp. 349. Furthermore, Manov suggests that "investment in tangible assets is more speculative than bonds, entailing no contractual guarantees and huge market risks". Id., p. 352.

[570] See Id., p. 352.

[571] There is a vast literature on this particular issue. See, for example, Luca Boggio, *Investors and Sovereign Debt Restructurings: The Protection of Financial Property before International Courts and Arbitrators*, 15 Manchester Journal of International Economic Law (2018), pp. 135-136 and Venetia Argyropoulou, *International Arbitration and Greek Sovereign Debt: Postova Banka v. Hellenic Republic*, 19 Oregon Review of International Law (2018), pp. 187-188.

[572] See, for example, Goldmann, *Foreign Investment*… Op. Cit.; Argyropoulou, *International*… Op. Cit., Waibel, *Sovereign Defaults*… Op. Cit., p. 274; Waibel, *Opening Pandora's*… Op. Cit., p. 743, Marina Fyrigou-Koulouri, *Sovereign Debt Restructuring*, 14 Manchester Journal of International Economic Law (2017); Rachel Thrasher and Kevin Gallagher, *Mission Creep: The Emerging Role of International Investment Agreements in Sovereign Debt Restructurings*, 6 Journal of Globalization and Development 2, (2015); Alexandre Belle, *From Creditor Protection to Preventing Holdouts*. Phd thesis (2020), available at https://theses.gla.ac.uk/81619/7/2020BellePhD.pdf [last accessed 21.12.2021]; Melissa Boudreau, *Restructuring Sovereign Debt Under Local Law* (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1979238 [last accessed, 26.08.2021]; Venetia Argyropoulou, *Convergence and Divergence Between International Investment Law and Human Rights Law, in the Context of the Greek Sovereign Debt Restructuring*, 11 The Journal of Business, Entrepreneurship & The Law (2018); Alison Wirtz, *Bilateral Investment Treaties, Holdouts Investors, and their Impact on Grenada's Sovereign Debt Crisis*, 16 Chicago Journal of International Law 1 (2015), pp. 9-10; Sangwook Daniel Han and Youngjin Jung, *Sovereign Debt Restructuring under the Investor-State Dispute Regime*, 31 Journal of International Arbitration 1 (2014); Yan Ying Lee, *Policy Implication of Poštová Tribunal's Jurisdiction Over Sovereign Bonds: Bankruptcy Cram-Down and ICSID Arbitration* (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2402643 [last accessed, 26.08.2021] and Bohoslavsky, *Debt Disputes*… Op. Cit., paras 33 et seq.

may be breached in that context corresponds to the so-called "umbrella clauses". An in-depth discussion of the latter provisions can be found in *Chapter Six*[573].

Crucially for the purposes of this *Chapter*, as will be argued below, the guarantee against expropriations and the FET standard can be considered PIL principles. On several occasions, investment tribunals have treated both guarantees as "optimization requirements". In fact, as examined below, tribunals have already used proportionality analysis to determine the violation of expropriation and FET provisions, while balancing investors' interests and the host-states' "public" concerns[574]. Although recurring to proportionality in the context of expropriation is contested to a certain extent[575], the issue is less controversial for the FET standard[576]. In the following subsections I discuss each of these guarantees in turn.

3.3.2.1. The Guarantee Against Expropriation

The protection against expropriation is one of the most important guarantees offered by international investment law to foreign investors. Generally, international investment law grants investors the right to be compensated for expropriation (and expropriatory measures) under certain circumstances.

In short, international law distinguishes between "direct" and "indirect" or "de facto" expropriations[577]. Particularly, a "direct expropriation" entails "a governmental taking of the property (…)"[578] and "refers to a situation in which a state formally transfers or extinguishes an investor's title to property"[579]. "Indirect expropriations", are not as easy to identify[580], and scholars tend to stress that a "case-by-case approach is imperative"[581] in the matter. Notably, two different approaches to indirect expropriations can be found both in the scholarship and case-law: the "sole effects" and the "police powers" doctrines. Before discussing the differences between these approaches, I will address the common trends that, according to commentators, emerge from the case-law pertaining to the identification of indirect expropriations.

---

[573] See *Chapter Six*, p. 365.

[574] See Fulvio Maria Palombino, *Fair and Equitable Treatment and the Fabric of General Principles*. Springer (2018), pp. 134 et seq. and Li, *Policy*… Op. Cit., p. 29.

[575] See subsection 3.3.2.1 of this *Chapter* for details.

[576] Commentators tend to highlight that FET clauses are usually drafted in "generic terms", establishing "open-textured" provisions which invite the application of proportionality analysis to establish their scope. See, Bücheler, *Proportionality*… Op. Cit., pp. 194-197.

[577] See Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd Ed). Oxford University Press (2017), p. 380.

[578] Id., p. 360.

[579] Jonathan Bonnitcha, *Substantive Protection under Investment Treaties*, Cambridge University Press (2014); p. 230-231.

[580] Id., p. 231.

[581] Borzu Sabahi, Noah Rubins et al., *Investor-State Arbitration* (2nd Ed.), Oxford University Press (2019), p. 599. See also McLachlan, Shore and Weiniger, *International*… Op. Cit., pp. 388-389.

3.3.2.1.1. Common Trends in the Case-Law of Investment Tribunals Regarding the Identification of Indirect Expropriations

Concerning the aforementioned common trends, scholars indicate that international courts and tribunals tend to focus on the severity of an interference with property rights to determine whether an indirect taking has occurred[582]. As stated above, this element of the analysis tends to be shared by investment tribunals following both the "sole effects" and the "police powers" doctrines.

Particularly, from this perspective, finding a taking requires a "substantial deprivation"[583] of investors' interests through a measure attributable to the host state[584]. In certain cases, the deprivation has been considered only from the point of view of the (economic) value of the investment. Therefore, for those tribunals, the measure interfering with investors' interests will amount to an expropriation only if it imposes significant pecuniary losses on the claimants' side[585]. In other cases, tribunals have circumscribed the analysis to the attributes of the right to ownership (i.e., use, enjoyment, disposal and/or control). According to that criterion, an indirect taking requires the deprivation of one or more of said attributes, independent of the effects on the economic value of the investment[586]. Yet another group of awards tend to rely on an eclectic approach, combining both understandings[587].

Disagreements also exists regarding the threshold of severity which a measure needs to fulfil to be considered expropriatory. While certain tribunals and commentators equate the notion of "substantial deprivation" with that of "destruction of the investment"[588],

---

[582] See, Ursula Kriebaum and August Reinisch, "*Property, Right to, International Protection*", Oxford Public International Law, § 12.

[583] For example, the Enkev Beheer BV v. Poland tribunal indicated that: "(…) the accumulated mass of international legal materials (…), describe for indirect expropriation (…) the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or their virtual annihilation and effective neutralisation". Ekev Beheer B.V. v. Poland, PCA Case No. 2013-01, First Partial Award (2014), para 344.

[584] See Sabahi, Rubins et al., *Investor-State*…, Op. Cit., p. 602. For an extensive discussion on the issue see Bonnitcha, *Substantive*… Op. Cit., pp. 243 et seq.

[585] For example, for the Metalclad tribunal, a measure constitutes expropriation "(…) if it deprives the investor in whole or in significant part, of the use or reasonable-to-be-expected economic benefit of property (…)". Metalclad v. Mexico (Award), Case No. ARB (AF)/97/1 (2000), para 103. The same criterion was upheld by the Quiborax tribunal, which indicated that, for an expropriation to occur "(…) the State measure must have the effect of substantially depriving the investor of the economic value of its investment". Quiborax v. Bolivia (Award), ICSID Case No. ARB/06/2 (2015), para 238.

[586] See, for example, Pope & Talbot v. Canada (Interim Award) (2000), para 102; Sempra v. Argentina (Award), Case No. ARB/02/16 (2007), para 285 and Grand River vs. The United States (Award) (2011), para 154.

[587] See, for example, National Grid v. Argentina, Award (2008), para 154.

[588] "For an expropriation to exist, the investment must have been essentially destroyed". Kriebaum, *Is the European*… Op. Cit., p 237. "The essential question is therefore to establish whether the enjoyment of the property has been effectively neutralized". CMS v. Argentina (Award), Case No. ARB/01/8 (2005), para 262.

others indicate that the standard does not require a complete or absolute deprivation[589]. A similar discussion can be found regarding the duration of the measure impairing investors' interests[590]. On several occasions, investment tribunals have established that, to be considered expropriatory, a measure needs to produce "permanent" effects[591]. However, another strand of cases has considered that even "temporary" deprivations can be qualified as indirect takings[592]. In any case, as the Chemtura v. Canada tribunal indicated:

> *"The determination of whether there has been a "substantial deprivation" is a fact-sensitive exercise to be conducted in the light of the circumstances of each case"*[593].

Crucially for sovereign bonds, there is ample authority in the case-law indicating that contracts can be the subject of expropriation[594]. Nevertheless, commentators and tribunals highlight that in this regard, a mere breach of contract cannot amount to a taking[595]. On the contrary, there is agreement that finding an expropriation requires that the state act in its sovereign capacity ("acta iure imperii"), and not as any "ordinary" party to a contract would ("acta iure gestionis")[596].

Perhaps the most straightforward example of an indirect expropriation in the context of contractual rights is Revere Copper v. OPIC[597] (henceforth, "Revere"). In *Revere*, the tribunal found an expropriation of the contractual rights of the investor by the host-state (Jamaica)[598]. In the case, Jamaica imposed a tax increase, despite the specific commitments made in favor of the investor in the concession agreement expressed through a stabilization clause. In the opinion of the tribunal, said measure "substantially deprived" the investor of her "effective control" over the investment and thus, it constituted an expropriation[599].

Nevertheless, subsequent awards have not followed the *Revere* approach to the letter. For example, in CMS v. Argentina, the tribunal rejected the claim of (indirect) expropriation based on the breach of previous commitments of the host state in favor of

---

589 An expropriation demands that "(…) the deprivation alleged must be very substantial, though not necessarily complete". McLachlan, Shore and Weiniger, *International Investment…* Op. Cit., p. 377.

590 See, for example, Sabahi et al., Op. Cit., p. 602.

591 See, for example, Tecmed v. Mexico (Award), Case No. ARB (AF)/00/2 (2003), para 116.

592 See, S.D. Myers v. Canada (Partial Award) (2000), para 284; Wena Hotels v. Egypt (Award), Case No. ARB/98/4 (2002), para 99, LG&E v. Argentina (Decision on Liability), ICSID Case N° ARB/02/1 (2006), para 193.

593 Chemtura Corporation v. Government of Canada (Award), NAFTA (2010), para 249.

594 Sabahi et al., Op. Cit., p. 585. See also White Industries v. India (Final Award), (2011) paras 12.3.2 et seq.

595 See, for example, Sasson, *Substantive…* Op. Cit., pp. 117-118.

596 See Azurix v. Argentina (Award), ICSID Case No. ARB/01/12 (2006), para 315. See also Suez v. Argentina (Decision on Liability), ICSID Case No. ARB/03/19 (2010), para 154.

597 Revere Copper v. Overseas Private Investment Corporation (Award), AAA Case No. 1610013776 (1978).

598 For a summary of the case, see Andrea Ernst, "*Revere Copper Arbitral Award"*, Max Planck Encyclopedias of International Law [last accessed 16.6.2021].

599 Revere Copper v. Overseas Private Investment Corporation, Op. Cit., para 112.

the investor. Applying the "substantial deprivation" test, the tribunal found that the claimant retained its control over the investment, as well as the main attributes of its proprietary rights[600].

3.3.2.1.2. The Guarantee Against Expropriation as a Principle of Public International Law

As stated above, beyond the common trends already mentioned, two different approaches to the identification of indirect expropriations can be found both in the scholarship and in case-law: the "sole effects" and the "police powers" doctrines.

According to the "sole effects" doctrine, one or more measures can be deemed expropriatory if they produce significant negative effects from investors' perspective, regardless of their purpose[601]. For example, summarizing said doctrine, the Santa Elena v. Costa Rica tribunal indicated:

> *"Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains"*[602].

The "police powers" doctrine, for its part, is deemed to be the "majoritarian" approach in this context[603]. Under its most used formulation, it establishes that an expropriation does not arise from non-discriminatory measures imposed through general regulations that fall within the state's regulatory or "police" powers and which are implemented in pursuance of the public interest[604]. In short, measures such as these do not trigger the

---

[600] See CMS v. Argentina (Award), Case No. ARB/01/8 (2005), paras 252-264.

[601] See Ursula Kriebaum, *Human Rights of the Population of the Host State in International Investment Arbitration*, 10 The Journal of World Investment and Trade (2009), p. 699; Catharine Titi, Refining the Expropriation Clause: What Role for Proportionality? In Julien Chaisse (Ed.), *China-European Union Investment Relationships*, Elgar (2018), p. 13; Benedict Kingsbury and Stephan Schill, Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality, in Stephan Schill (Ed.), *International Investment Law and Comparative Public Law*. Oxford University Press (2010), p. 90.

[602] Compañía del Desarrollo Santa Elena S.A., v. Costa Rica (ICSID CASE No. ARB/96/1), Final Award (2000), para 72.

[603] See Kingsbury and Schill, *Public Law*… Op. Cit., pp. 90-91.

[604] In the words of the Saluka v. Czech Republic tribunal: "It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare". Importantly enough, the Saluka tribunal indicated that the doctrine forms part of customary international law. See Saluka Investments v. The Czech Republic, Partial Award (2006), para 255. For the Methanex Tribunal: "(…) as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation". Methanex v. the United States, Final Award of the Tribunal on Jurisdiction and Merits (2005), Part IV Chapter D) para 7. For a discussion, see, for example, Bücheler, *Proportionality*… Op. Cit., pp. 127 et seq. See

host-state's obligation to compensate foreign investors, at least not under the expropriation guarantee[605].

The second formulation of the "police powers" doctrine indicates that a compensable expropriation may be found if the measure is disproportionate while taking into account the regulatory purpose pursued and the negative effects on the investors' property[606]. In other words, under this approach, a measure having a significant negative effect from the perspective of investors "(…) will only amount to an expropriation if there is a lack of proportionality between the loss to the claimant and the public interest pursued by the measure"[607]. This understanding has also been called the "mitigated police powers doctrine"[608] or the "balancing structure" of expropriation[609]. Admittedly, the mitigated police powers doctrine is less recurred to by investment tribunals than the plain "police powers" one[610], and the case-law on this point is described as "far from being uniform"[611]. Nevertheless, it opens the door for proportionality analysis[612] and, consequently, it allows the interpreter to consider the guarantee against expropriation as an "optimization requirement" (i.e., as a PIL principle). Notably, in the words of the LG&E v. Argentina tribunal, one of the exponents of the mitigated police powers doctrine,

> *"In order to establish whether State measures constitute* [an] *expropriation (…), the Tribunal must balance two competing interests: the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies"*[613].

---

also Krommendijk and Morij, *Proportional…* Op. Cit., pp. 433-434; Titi, *Refining…* Op. Cit., p. 123 and Dimitris Liakopoulos, *Proportionality and Dispute Resolution Between WTO and ICSID*, 1 RECorDIP (2020), p. 47.

[605] See Kingsbury and Schill, *Public Law…* Op. Cit., pp. 90-91. In the words of the Phillip Morris v. Uruguay tribunal, the adoption of measures within the "police powers" of a host state are deemed to be "(…) a valid exercise of the State's police power, with the consequence of defeating the claim for expropriation (…)". Phillip Morris v. Uruguay (ICSID Case No. ARB/10/7), Award (2016), para 287.

[606] See Kingsbury and Schill, *Public Law…* Op. Cit., pp. 90-91; Henckels, *Indirect Expropriation…* Op. Cit., pp. 225-226 and Surya Subedi, *The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"*, The International Lawyer (2006), pp. 130-131.

[607] Bonnitcha, *Substantive…* Op. cit., p. 263.

[608] See Bücheler, *Proportionality…* Op. Cit., pp. 129-130 and Titi, *Refining…* Op. Cit., p. 123.

[609] See Bonnitcha, *Substantive…* Op. Cit., p. 243.

[610] See Titi, *Refining…* Op. Cit., p. 123.

[611] Bücheler, *Substantive…* Op. Cit., p. 123.

[612] See Krommendijk and Morij, *Proportional…* Op. Cit., pp. 443-444.

[613] LG&E v. Argentina, Decision on Liability, ICSID Case No. ARB/02/1, (2006), para 189. In a much-quoted part of the Award, the tribunal indicated: "With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed". Id., para 195.

As stated before, though it has not been at the forefront yet, several tribunals have explicitly endorsed the "mitigated police powers doctrine"[614] inspired by the jurisprudence of the ECtHR[615]. Importantly enough, tribunals derived the doctrine from customary international law and treaty interpretation techniques[616]. Furthermore, scholars have justified the use of proportionality as a methodology embedded in the substance of international law: In short, proportionality itself can be regarded as a "general principle of law" (more specifically, as a GPD[617]).

Nevertheless, investment tribunals' approach to proportionality in the context of expropriation has been severely criticized by the scholarship. For example, similar to their engagement with proportionality in the context of the FET standard (see subsection 3.3.2.2), investment tribunals rarely follow all the three stages posited by Alexy (i.e., suitability, necessity and proportionality "stricto sensu")[618]. At the same time, the early arbitral awards following the "mitigated police powers doctrine", failed to offer a detailed framework under which investors' interests and the public's concerns could be balanced[619]. Furthermore, though some investment tribunals have declared that balancing is necessary to determine the expropriatory nature of one or more measures, they tend to focus the analysis on the effects produced on investors' side[620]. Importantly enough, the leading case applying this version of the "police powers" doctrine (i.e., Tecmed v. Mexico) has also been accused of the latter fault[621].

Specifically, and in contrast with the "sole effects" doctrine, the "mitigated police powers" doctrine suggests dividing the expropriation inquiry into two prongs[622]. Under the first, the severity of the measure from the perspective of the investors needs to be scrutinized. This prong is embodied by the common trends previous discussed in subsection 3.3.2.1.1. As can be noted, the "sole effects" doctrine stops at this point, since

---

[614] See, for example, Id.; Continental Casualty Company v. Argentina, Award, Case No. ARB/03/9 (2008), paras 194 and 232., S.D. Myers v. Canada, Partial Award, (2000), para 255; Tecmed v. Mexico, Case No. ARB(AF)/00/2, Award (2003), paras 118-151; Azurix v. Argentina, Award, ICSID Case No. ARB/01/12 (2006), paras 311-322, El Paso v. Argentina, Award, ICSID Case No. ARB/03/15 (2011), paras 241-243; Phillip Morris v. Uruguay, Op. Cit., paras 287-307 and Archer Daniels v. Mexico, Award (2007), para 250.

[615] See, for example, Tecmed v. Mexico Op. Cit., para 122 and Phillip Morris v. Uruguay, Op. Cit., para 295. Nevertheless, commentators have warned regarding importing "directly" human rights balancing into investment treaty arbitration without considering the particularities of the regime. See, for example, Kingsbury and Schill, *Public Law…* Op. Cit., pp. 77-80 and Krommendijk and Morij, *Proportional…* Op. Cit., pp. 443-444.

[616] See, for example, Phillip Morris v. Uruguay, Op. Cit., para 290.

[617] See, for example, Kingsbury and Schill, *Public Law…* Op. Cit., p. 88.

[618] See, for many, Titi, *Refining…* Op. Cit., p. 123. Nevertheless, when they do follow the three "rules" of proportionality, tribunals tend to move in "zig zag" rather than on a straight-forward manner. See, for example, Phillip Morris v. Uruguay, Op. Cit., paras 306-307.

[619] See Henckels, *Indirect Expropriation…* Op. Cit., p. 230. Henckels mentions as examples of these early Awards S.D. Myers v. Canada and Feldman v. Mexico. See Id.

[620] For example, see the discussion regarding the LG&E award in Bonitcha, *Substantive…* Op. Cit., p. 262; in Henckels, *Indirect Expropriation…* Op. Cit., 234; and in Bücheler, *Proportionality…* Op. Cit., p. 130.

[621] See Titi, *Refining…* Op. Cit., p. 124.

[622] See Kingsbury and Schill, *Public Law…* Op. Cit., p. 92.

it focuses only on the consequences of a measure for the expropriation assessment. Under the second prong, and even in the absence of specific treaty language, the negative effects need to be balanced against the importance of the purpose of the measure[623]. Therefore, as Kingsbury and Schill put it,

> *"(…) a compensable indirect expropriation occurs only when state measures lead to disproportional restrictions of the right to property"*[624].

Nevertheless, scholars have criticized the use of proportionality for the determination of an indirect expropriation against explicit treaty language. For example, according to Gebhard Bücheler[625] and Prabhash Ranjan[626], expropriation provisions included in "old" BITs establish clear rules in favor of investors[627]. For them, said provisions rely exclusively on the "sole effects doctrine"[628]. Thus, in their opinion, expropriation provisions of this kind should be applied in an "all or nothing" fashion by investment tribunals[629]. Consequently, said provisions could not be regarded as PIL principles and proportionality could not be used for either their application or interpretation[630].

The previous objections notwithstanding, it is important to note that the "mitigated police powers" doctrine has been incorporated into modern BITs[631]. For example, the US Model BITs of 2004 and 2012 establish that the determination of an indirect expropriation is a "fact-based inquiry". Particularly, for said models, the inquiry needs to consider the negative economic impact of one or more measures on the investment, the degree to which said measure or measures interfere with investors' reasonable expectations and the character of the measure[632]. Furthermore, both models explicitly indicate that:

> *"Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such*

---

[623] See Id.
[624] Id., p. 93.
[625] See Bücheler, *Proportionality*… Op. Cit., pp. 152-153.
[626] See Prabbash Ranjan, *Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Reappraisal*, 3 Cambridge Journal of International and Comparative law 3 (2014), p. 869.
[627] As opposed to "principles" (i.e., "optimization requirements"). See, Bücheler, *Proportionality*… Op. Cit., pp. 152-153, p. 180 and 195 and Ranjan, *Using*… Op. Cit., p. 880.
[628] See Bücheler, *Proportionality*… pp. 147-148. See Ranjan, *Using*… Op. Cit., p. 869.
[629] Both scholars criticize the literature and the investment awards supportive of the contrary view. See Bücheler, *Proportionality*… Op. Cit., pp. 144 et seq and Ranjan, *Using*… Op. Cit., p. 869.
[630] See Bücheler, *Proportionality*… Op. Cit., p. 154.
[631] See, for example, Krommendijk and Morik, *Proportional*… Op. Cit., p. 434; Bücheler, *Proportionality*… Op. Cit., pp. 153 et. seq and Titi, *Refining*… Op. Cit., pp. 127 et seq.
[632] See United States, 2004 Model BIT, Annex B "Expropriation" 4 (a), available at https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf [last accessed 20.4.2021]. United States, 2012 Model BIT, Annex B "Expropriation" 4 (a), available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [last accessed 20.4.2021].

> *as public health, safety, and the environment, do not constitute indirect expropriations"*[633].

In an even more straightforward fashion, the EU-Canada Comprehensive Economic and Trade Agreement (henceforth, "CETA") provides:

> *"For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations"*[634].

According to Jonathan Bonnitcha, approaches such as that of US Model BITs not only refer tribunals to consider several factors for the determination of an indirect expropriation[635], but also to balance them[636]. More specifically, Kingsbury and Schill suggest that the US Model BITs approach "essentially incorporates a proportionality test into the application of the concept of indirect expropriation (…)"[637]. Bücheler, who discusses US model treaties, the CETA and other instruments, argues that their very language will admit proportionality as a tool for their interpretation and application[638]. Consequently, under the framework of the aforementioned BITs, the guarantee against expropriation can undoubtedly be understood as an "optimization requirement", and thus, as a PIL principle.

According to the foregoing, balancing can be recurred to when determining the expropriatory character of one or more measures under BITs expropriation provisions. Although the approach has been criticized in the case of "old" treaties, there seems to be agreement in the scholarship on what pertains to "new" ones. As a result, it is possible to infer that the guarantee against expropriation can be considered as a PIL principle.

I have thus far clarified the two prongs of the analysis in what pertains to expropriation. Nevertheless, the picture remains incomplete. In effect, as stated above, the other investment guarantee that may be invoked in the context of sovereign debt litigation before investment tribunals corresponds to the FET standard. This is the subject of the following subsection.

---

[633] Id.

[634] Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union, available at https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [last accessed 20.4.2021]. Titi mentions several other international investment treaties using a similar language to the CETA. See, Titi, Op. Cit. pp. 127-128.

[635] See Bonnitcha, *Substantive*… Op. Cit., pp. 263-264.

[636] See Id., pp. 270-271.

[637] Kingsbury and Schill, *Public Law*… Op. Cit., pp. 95-96.

[638] Bücheler, *Proportionality*… Op. Cit., p. 153.

3.3.2.2. Fair and Equitable Treatment

Characterizing the FET standard as an "optimization requirement" and consequently, as a PIL principle, is less controversial than the guarantee against expropriation[639]. Notably, there is authority in the case-law (and in the scholarship) suggesting that the determination of whether the standard has been breached should be divided into two prongs. First, the "core" elements of the standard need to be assessed, and the negative impact on investors' interests needs to be scrutinized. Second, said effects need to be put in perspective, considering the "public interest", through the application of proportionality. In this subsection I discuss the first, leaving for the next the discussion of the second.

As stated above, FET provisions are usually drafted using general language[640]. As is the case with expropriation, finding a breach of the FET standard is usually dependent on the specific circumstances of the case[641]. Setting certain controversies related to the standard aside[642], scholars and tribunals have systematized the key elements of this guarantee as follows. First, it has been posited that FET protects investors from coercion and harassment, imposing upon the host-state the obligation to act in good faith and follow due-process[643]. Second, it has also been argued that it guarantees a certain degree of stability in what pertains to the regulatory framework of the host-state and consistency regarding the host-state's government officials' representations[644]. Third, it has been indicated that the standard also protects investors' legitimate expectations[645].

---

639 Nevertheless, certain tribunals have approached the FET standard as establishing an "absolute" guarantee in favor of investors and thus, not subject to proportionality. For a critical assessment of those cases, see Henckels, *Proportionality*… Op. Cit., pp. 4-5

640 A typical formulation of the FET standard can be found on the Chile-New Zealand BIT. Article 4 of the instrument provides: "Each Contracting Party shall accord fair and equitable treatment to investments and returns made by investors of the other Contracting Party in its territory (…)". See Agreement Between the Government of New Zealand and the Government of the Republic of Chile for the Promotion and Protection of Investments.

641 See Michael Reisman et al., *Foreign Investment Disputes*: *Cases, Materials and Commentary* (2nd Ed). Kluwer (2014), p. 890.

642 The indeterminacy of FET clauses has sparked debate concerning the specific scope of the standard. In particular, the literature and the pertinent case-law have discussed whether FET offers the same, a higher or a different standard of protection than the "minimum standard of treatment of aliens" enshrined in customary international law. See, for Example, Bücheler, *Proportionality*… Op. Cit., pp. 183 et seq and Palombino, *Fair and Equitable*… Op. Cit.

643 Fyrigou, *Sovereign*… Op. Cit., pp. 363-364. Argyropoulou, *International*... Op. Cit., pp. 203-204.

644 Henckels, *Proportionality*… Op. Cit., pp. 2-3.

645 Id. "The FET standard is thus closely tied to the notion of legitimate expectations (…)". Joseph Charles Lemire v. Ukraine (Decision on Jurisdiction and Liability), ICSID Case No. Arb/06/18, para 264. See also Saluka Investments Bv v. Czech Republic (Partial Award), (2006), para 302. According to commentators, the first award articulating the notion of "legitimate expectations" and its specific connection with the FET standard was the Tecmed v. Mexico decision. See, Nikhil Teggi, *Legitimate Expectations in Investment Arbitration. At the End of its Life Cycle* 5 Indian Journal of Arbitration Law (2016), p. 66. See also Sasson, *Substantive Law*… Op. Cit., p. 120.

For the purposes of this *Chapter,* I limit the discussion of the first prong of the FET standard to two of its elements: the protection of investors' legitimate expectations and the protection from coercion and harassment[646]. I discuss both elements in the following.

First, from the perspective of investors' legitimate expectations, investment tribunals have proposed a rich (and sometimes contradictory) understanding on the subject[647]. Two of the doctrines developed in the investment case-law addressing the protection of said expectations are of particular relevance here: The "legal rights" approach and the "stability" approach.

The "legal rights" approach has been deemed as the "uncontroversial part" of the doctrine of legitimate expectations[648]. According to Jonathan Bonnitcha, this understanding of the FET standard protects, "(…) only specific, enforceable legal rights that have vested in the investor under domestic law"[649]. Importantly enough, under this approach, the expectation needs to be "fair" or "reasonable", meaning that it needs to be justified in light of the circumstances[650]. Bonnitcha quotes several decisions following this criterion, highlighting – among others –, the LG&E v. Argentina award. In the words of the LG&E tribunal:

> *"It can be said that the investor's fair expectations have the following characteristics: they are based on the conditions offered by the host State at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by the host State, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns"*[651].

---

[646] I decided to set aside other elements of the FET standards such as "due process", to simplify the analysis that follows in sections 6 and 7 of *Chapter Six.* For a discussion, see Sabahi, Rubins et al., *Investor-State*…, Op. Cit., p. 672. Nevertheless, it should be mentioned that FET violations based on the "disregard" of due process by the host-state tend to be examined on a case-by-case basis requiring bad faith, "an extreme insufficiency of action", "procedurally improper behavior" or lack of transparency. See Bonitcha, *Substantive…* Op. Cit., pp. 196-210. See also Rudolph Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 Santa Clara Journal of International Law 7 (2013), pp. 29-30.

[647] Bonnitcha classifies investment awards dealing with the notion of legitimate expectations as an element of the FET standard in four categories, including the "legal rights" approach, the "representations" approach, the "stability" approach and the "business plan" approach. See, Bonnitcha, *Substantive…* Op. Cit., pp. 169 et seq.

[648] See Florian Dupuy and Pierre-Marie Dupuy, What to Expect from Legitimate Expectations? in Naasib Ziadé et al., (Eds.) *Festschrift Ahmed Sadek El-Kosheri*, Kluwer (2015), pp. 289-290.

[649] Bonnitcha, *Substantive…* Op. Cit., p. 170. See also Jean Paul Dechamps and Pablo Jaroslavsky, Fair and Equitable Treatment under BITs with Argentina, in Fabricio Fortese (Ed.), *Arbitration in Argentina*. Kluwer (2020), pp. 598-599 and Teggi, *Legitimate…* Op. Cit., pp. 71-72.

[650] See Bonnitcha, *Substantive…* Op. Cit., p. 172.

[651] LG&E v. Argentina (Decision on Liability), ICSID Case N° ARB/02/1 (2006), para 130.

At the same time, the "stability" approach is not exempt from criticisms[652]. According to Bonnitcha, this understanding of the FET standard protects investors' expectations arising from the "general regulations in force at the time the investment was made"[653]. Again, Bonnitcha quotes several awards following this view, where the assessment of the role of said regulations is made from the perspective of the claimants' decision to invest[654].

Second, investment tribunals have indicated that protection from coercion and harassment is also key component of the FET guarantee[655]. For the purposes of this *Thesis*, it is important to note that for a significant group of cases, a "forceful" renegotiation of contracts can be considered evidence of coercion. For example, according to the National Grid v. Argentina tribunal, the respondent state breached the FET guarantee when it required the claimant to renounce its legal remedies as a condition of renegotiating the contract (an important component of the investment)[656]. In another case against Argentina, the tribunal found a breach of the standard, noting that the renegotiation of the investor's concession was conducted under the "unilateral" conditions put forward by the host state, curtailing her contractual freedom[657].

Importantly enough, tribunals that indicate that the FET standard entails an obligation of proportionality tend to highlight, explicitly in the first prong of the discussion, the intensity of the interference on investors' interests of the measure under scrutiny[658].

Finally, it is important to note that – as in the case of expropriation provisions – a breach of the FET standard requires that the measure under scrutiny be imposed by the state in its sovereign capacity[659]. Consequently, the distinction between "acta iure imperii" and "acta iure gestioniis" is also capital in this regard[660]. This difference is of particular relevance in the case of sovereign debt litigation, since as previously indicated, not all breaches of contract will be considered treaty breaches. By the same token, a FET claim will have to rely on the "sovereign" conduct of the state to be successful[661]. Notably, this

---

[652] See Bonnitcha, *Substantive…* Op. Cit., p. 184.
[653] Id., p. 189.
[654] Id., pp. 189-190.
[655] See, for example, Bayindir v. Pakistan (Award), ICISD Case No. ARB/03/29 (2009), para 178.
[656] See, National Grid v. Argentina (Award) (2008), paras 179-180.
[657] See, Suez and Vivendi v. Argentina (Decision on Liability) ICSID Case No. ARB/03/19 (2010) paras 239-243.
[658] See, for example, Urbaser v. Argentina (Award) ICSID Case No. ARB/07/26 (2016), paras 629 and 632.
[659] See, Impregilo v. Argentina (Award), (ICSID CASE No. ARB/07/17), para 297; Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6 (Award), 2003, para 51. For sovereign bonds, see Abaclat, Op. Cit., paras 324-325.
[660] See Bonnitcha, *Substantive…* Op. Cit., pp. 183-184. See also Dechamps and Jaroslavsky, *Fair and Equitable…* Op. Cit., p. 599; see also Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*. Wolters Kluwer (2009), pp. 439-440; Teggi, *Fair and…*Op. Cit., pp. 72-73 and Alexandra Diehl, *The Core Standard of International Investment Protection*. Kluwer Law International (2012), pp. 380-381.
[661] See Waibel *Sovereign Defaults…* Op. Cit., pp. 293-294 and Waibel, *Opening Pandora's…* Op. Cit., p. 751.

will be true even if one considers – as the Noble Ventures tribunal did – that the state's "obligation to observe contractual obligations towards the investor"[662] is one of the elements of the FET standard.

3.3.2.2.1. Fair and Equitable Treatment and Proportionality

Under the second prong of the analysis, proportionality needs to be applied in order to determine whether the FET standard has been breached[663]. As for the case of expropriation under the "mitigated police powers" doctrine, a FET violation can only be determined after balancing is concluded[664]. In other words, establishing a breach of the FET standard entails an assessment of whether the host-state has acted maintaining an adequate equilibrium between investors' rights and the "public" interest[665].

However, as is the case in the context of expropriation, investment tribunals have not developed a fully sophisticated approach to proportionality in the context of the FET standard[666]. In this regard, scholars have noted that several decisions have indicated that the standard entails an obligation of proportionality while disregarding a detailed elaboration of the test[667]. Additionally, the literature has also highlighted that decisions relying more specifically on proportionality tend to neglect one or more of its stages[668]. For example, some decisions have limited the inquiry to "suitability" and "proportionality stricto sensu", neglecting the "necessity" test[669], whereas others have relied exclusively on the latter[670] or circumscribed the analysis to proportionality "stricto sensu"[671].

Nevertheless, in its most developed form, balancing can be traced through the decisions rendered by the Occidental v. Ecuador (II) (henceforth, "Occidental II")[672] and Glamis v. the United States (henceforth, "Glamis")[673] tribunals.

---

[662] Noble Ventures v. Romania (Award), ICSID Case No. ARB/01/11 (2005), para 182. "The Media Council breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest". CME v. Czech Republic (Partial Award), (2001), Para 611.

[663] Scholars have highlighted that PA can and has been used to specify the content of the doctrine of legitimate expectations. See, Palombino, *Fair and Equitable*… Op. Cit., p. 136.

[664] "The very concept of fairness implies a balance of interests". Henckels, *Proportionality*… Op. Cit., pp. 5-6.

[665] See Bücheler, *Proportionality*… Op. Cit., p. 193.

[666] The most notable exceptions being Glamis vs. the United States (Award), (2009) and Occidental v. Ecuador (II), (Award) (ICSID Case No. ARB/06/11) (2012).

[667] See Continental v. Argentina (Award), CASE No. ARB/03/9 (2008), para 227; MTD v. Chile (Award), Case No. ARB/01/7 (2004) para 109; El Paso v. Argentina (Award), ICSID Case No. ARB/03/15 (2011), para 373.

[668] See, for example, Bonnitcha, *Substantive*… Op. Cit., p. 225.

[669] See Saluka v. Czech Republic (Partial Award) (2006), para 307.

[670] See, for example, Middle East Cement v. Egypt (Award), ARB/99/6 (2002), para 143. Indicating that this case follows the necessity test, see Palombino, *Fair*… Op. Cit., p. 138.

[671] See, for example, EDF v. Romania (Award), ICSID Case No. ARB/05/13 (2009), para 293.

[672] See Occidental v. Ecuador (II) (ICSID Case No. ARB/06/11) (Award) (2012). Discussing the case, see Bonnitcha, pp. 225-226. See also, Palombino, *Fair*… Op. Cit., pp. 139-140.

[673] See Glamis Gold v. United States (Award), UNCITRAL (2009).

The facts of the *Occidental II* case can be summarized as follows. Ecuador terminated a concession contract with the investor, in accordance with the terms of said instrument and with those of the legislation in force when the agreement was concluded. Importantly enough, those terms authorized the state to terminate the contract if the interests over the instrument were assigned to a third party. The investor did precisely this, and Ecuador exercised its right to termination. Nevertheless, by conducting its own proportionality analysis, the tribunal indicated that Ecuador breached the FET standard, since it failed to observe the proportionality principle[674].

Particularly, the *Occidental II* tribunal explicitly indicated that a breach of the FET standard can be determined through balancing. According to the tribunal, proportionality "(…) is applicable as a matter of general international law"[675] to international investment disputes. In particular, the tribunal recurred (although not always explicitly) to each of the stages of proportionality. First of all, in what pertains to suitability, it indicated that the termination of the contract was a sanction capable of incentivizing adherence to the law (the stated goal of the measure). Secondly, the tribunal also discussed the necessity test. In particular, it analyzed other alternatives to termination, which, in the view of the tribunal, were equally suitable to achieve adherence to the law, and which were less severe than termination[676]. Among these alternatives, the tribunal mentioned the payment of damages and of a fee by the investor, the renegotiation of the contract in terms more favorable to the state and a settlement including those and other conditions[677]. Finally, the tribunal proceeded to discuss "proportionality stricto sensu"[678]. In its opinion, the measure at stake failed to maintain a proper relationship between "the price paid" by the investor, her wrongdoing and the goal of the measure[679]. As can be noted, the severity of the measure (which entailed the "total" loss of the investment of the claimant) was capital for the tribunal in finding a breach of the standard.

As indicated above, *Glamis* is another relevant case where investment tribunals have recurred to proportionality in the context of FET. In the case, the investor filed a request alleging that the state of California had breached the standard through the enactment of a law. In short, said regulation imposed certain obligations on mining activities conducted on Native American sacred locations[680]. As in *Occidental II*, the *Glamis* tribunal engaged in a discussion of the three stages of proportionality. In what pertains

[674] Occidental v. Ecuador (II) (ICSID Case No. ARB/06/11) (Award) (2012), para 338 and 452.
[675] Id., Para 427.
[676] Id., paras 428-436.
[677] Id., paras 429-431.
[678] "But the overriding principle of proportionality requires that any such administrative goal must be balanced against Claimant's own interests and against the true nature and effect of the conduct being censured". Id., para 450.
[679] "The Tribunal finds that the price paid by the Claimants – total loss of an investment worth many hundreds of millions of dollars – was out of proportion to the wrongdoing alleged against OEPC, and similarly out of proportion to the importance and effectiveness of the "deterrence message" which the Respondent might have wished to send to the wider oil and gas community". Occidental v. Ecuador (II) (ICSID Case No. ARB/06/11) (Award) (2012), Para 450.
[680] Glamis Gold v. United States (Award), UNCITRAL (2009), paras 166-177.

to suitability, it indicated that the law "was rationally related to its stated purpose and reasonably drafted to address its objectives"[681]. Additionally, although it did not consider other less intrusive alternatives, it indicated that the measure was "necessary for the immediate preservation of the public general welfare"[682]. At the last stage, the *Glamis* tribunal noted that the regulation expressed a proper "compromise between the conflicting desires and needs of the various affected parties", satisfying the proportionality "stricto sensu" test[683].

Consequently, as in the context of expropriation, if balancing is used to determine the scope of the FET standard, a breach will be found when two necessary conditions are fulfilled at the same time. First, the state needs to either undermine investors' legitimate expectations or to impose a "coercive" measure affecting claimants' interests[684]. This corresponds to the "first prong" of the FET standard under this understanding. Next, and at the same time, the measure needs to be considered disproportionate. In other words, the state's actions need to fail any of the three stages of the proportionality test. This corresponds to the "second prong" of the inquiry.

Importantly enough, the aforementioned conclusion is in line with the awards applying the proportionality test to the FET standard. Notably, according to the Lemire v. Ukraine (II) tribunal:

> *"The evaluation of the State's action cannot be performed in the abstract and only with a view of protecting the investor's rights. The Tribunal must also balance other legally relevant interests, and take into consideration a number of countervailing factors, before it can establish that a violation of the FET standard (…) has actually occurred (…)"*[685].

Among those other "legally relevant interests" said tribunal considered,

> *"the State's sovereign right to pass legislation and to adopt decisions for the protection of its public interests, especially if they do not provoke a disproportionate impact on foreign investors (…)"*[686].

---

[681] Id., para 803. See also, Id., para 805.
[682] Id., para 181.
[683] Id., paras 804-805.
[684] As stated above, I set aside other considerations which have also been regarded as elements of the FET standard, including due process and good faith.
[685] Joseph Charles Lemire v. Ukraine (Decision on Jurisdiction and Liability), ICSID Case No. Arb/06/18, para 285.
[686] Id., para 285. Similarly, in the often-quoted partial award rendered in Saluka v. Czech Republic, the tribunal held that the determination of a breach of the FET standard "(…) requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other". Saluka Investments v. the Czech Republic (Partial Award) (2006), para 306. Finally, according to the Continental v. Argentina tribunal: "(…) centrality to the protected investment and impact of the changes on the operation of the foreign owned business in general including its profitability is also relevant; - good faith, absence of discrimination (generality of the measures challenged under the standard), relevance of the public interest pursued by the State, accompanying measures aimed at reducing the

3.3.3. The Guarantee Against Expropriation and the Guarantee to a Fair and Equitable Treatment as Principles of Public International Law

According to the foregoing, there is authority in the case-law suggesting that breaches of both the guarantee against expropriation (if the "mitigated police powers" doctrine is followed) and the FET standard are to be ascertained in two steps.

First, the tribunal needs to assess whether there is a "prima facie" violation of the provision (i.e., whether the "first prong" of the analysis is satisfied). If the tribunal concludes that a violation cannot be substantiated from that perspective, the inquiry will not move forward to the "second prong" (i.e., proportionality). In this scenario, the measure(s) under scrutiny will be outside of the scope of the investment standard being applied. Of note, this can serve as an important argument against the critiques put forward by commentators highlighting investment tribunals' faults regarding their engagement with balancing. As previously indicated, several decisions explicitly endorsing the application of proportionality have failed to discuss the test in detail. Although, to my knowledge, tribunals have not explicitly articulated the idea, this may be a consequence of the tribunals' assessment under the first prong. If a breach of the standard cannot be ascertained in that context (for example, if the effects of a measure on investors' interests are not significant enough to amount to an expropriation), it will be unnecessary for the tribunal to proceed to the proportionality limb.

Second, and on the contrary, if the tribunal finds that a "prima facie" violation of one of the aforementioned standards exists, the inquiry needs to proceed to the second prong (i.e., to balancing). In that context, adjudicators may discuss whether the measure is proportional, while comparing the negative effects on investors' interests and the satisfaction of the host-state's public concerns.

Consequently, since proportionality is recurred to in the application and the interpretation of the guarantee against expropriation and the FET standard in international investment law, it is possible to infer that they can be regarded as PIL principles.

3.4. Bondholders' Protection Under International Law

For all the above, it is possible to conclude that bondholders' interests are protected by international law, at least, in the American and the European regional human rights systems. Both Art. 21 of the ACHR and Art. 1 P-1 of the ECHR protecting the right to property have been interpreted as including rights of a contractual nature. In fact, the ECtHR has specifically stated that government securities in general, and sovereign bonds, in particular, can be regarded as "possessions", and are therefore, protected by the European Convention. Hence, in Europe and America, bondholders' "right to property" is protected by international law in the context of insolvency conflicts.

Likewise, there are important reasons to justify proceeding under the assumption that sovereign bonds can be considered as protected assets in the light of international investment law. As stated above, this issue has sparked a heated debate in the literature

negative impact are also to be considered in order to ascertain fairness". Continental Casualty Company v. Argentina (Award), Case No. ARB/03/9 (2008), para 261.

(and in the very practice of investment tribunals). Nevertheless, it was posited that most of the decisions previously rendered by investment tribunals, as well as the contemporary commentaries, suggest that government securities can qualify as "investments", particularly from the perspective of the ICSID Convention.

However, as has been shown, the protection of creditors' claims is not absolute, since it can be limited by other interests, as the conditions set out in the ACHR, and the ECHR demonstrate. Furthermore, the case-law of both the IACtHR and the ECtHR shows that the interactions between "property" and other interests at stake (such as the "public interest") are resolved by the application of the principle of proportionality. Crucially, a similar trend can be identified in the international investment regime. As stated above, some decisions rendered by investment tribunals tend to examine the breaches of the guarantee against expropriation and the FET standard in two steps. While the first concerns an assessment of whether there is a "prima facie" violation of the respective provision, the second one refers to the application of balancing.

Additionally, it can be also inferred that the specific nature of the norms granting property protection to bondholders is structurally equivalent to domestic constitutional principles, since they demand that this right be realized to the maximum extent possible considering the competing interests at stake in a specific case.

Therefore, I propose here that the norms protecting the proprietary interests of bondholders can be considered "principles of public international law". This means that those interests can be included as among the "goals" which sovereign debt restructuring has to pursue, at least, if and when the ACHR, the ECHR and/or international investment law are directly applicable to the merits of the corresponding dispute.

4. Citizens' Economic, Social and Cultural ("ESC") Rights

As stated before, insolvency conflicts also feature the tensions between the indebted state and its citizens. From this perspective, the tensions refer to the allocation of the scarce resources comprising the public budget[687]. Just as creditors have a (contractual) claim against these resources, citizens have a right to them, which is mainly satisfied through the provision of public services by the state. Although the enjoyment of both "civil" and "social" rights are dependent on the allocation of public resources[688], this section deals with the international protection of the latter, since their impairment can be more clearly connected with insolvency conflicts.

The general dynamics of "social" or "economic" rights enjoyment (henceforth, "ESC" or "social" rights) and sovereign debt needs to be analyzed from the outset. As the scholarship notes, the relationship between the two is "multifaceted"[689]. On one hand, government borrowing can be beneficial to the realization of ESC rights. For example, a prudent counter-cyclical fiscal policy can foster the enjoyment of these rights: Governments can borrow during recessions and repay the principal and interests during times of economic recovery[690]. In this way, budget cuts which may severely impair the provision of public services can be averted. Furthermore, responsible borrowing (and prudent spending) can also stimulate economic growth, and thus, enhance the capacity of states to meet their human rights obligations towards their citizens in the long run[691].

On the other hand, debt repayment can also jeopardize the enjoyment of ESC rights. This is why part of the scholarship presents the relationship between debt and human rights as a trade-off: When government revenues are not enough to satisfy both types of claims in full, the state finds itself forced to decide how to allocate its resources and therefore what to prioritize in its spending[692]. In this context, ESC rights may be

---

[687] "A country's ability to progressively realize economic, social and cultural rights hinges upon, in no small measure, its capacity to formulate an appropriate budget based on sound policy and participation, and to ensure its effective and efficient utilization". E/CN.4/2004/47, para 22.

[688] In the words of Stephen Holmes and Cass Sunstein: "Both the right to welfare and the right to private property have public costs. The right to freedom of contract has public costs no less than the right to health care, the right to freedom of speech no less than the right to decent housing. All rights make claims upon the public treasury". Stephen Holmes and Cass Sunstein, *The Costs of Rights: Why Liberty Depends on Taxes*. Norton & Co. (1999), p. 15.

[689] See Mary Dowell-Jones and David Kinley, *Minding the Gap of Global Finance and Human Rights*, 25 Ethics & International Affairs 2 (2011), p. 190.

[690] See Elson, Balakrishnan and Heintz, Public Finance, Maximum Available Resources and Human Rights in Aoife Nolan et al. (Eds.), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*. Hart Publishing (2014).

[691] See Cephas Lumina, Sovereign Debt and Human Rights: Making the Connection, in Ilias Bantekas and Cephas Lumina (Eds.), *Sovereign Debt and Human Rights*. Oxford University Press (2018), p. 177. See also Cephas Luminas, Report of the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, Particularly Economic, Social and Cultural Rights, *Guiding Principles on Foreign Debt and Human Rights*, A/HRC/20/23 (2011), para 3.

[692] See Juan Pablo Bohoslavsky, Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of Human Rights, *Debt Disputes, International Investment Arbitration and Human Rights*, A/72/153 (2017).

impaired either by the diversion of funds formerly destined to social spending ("redirection of funds")[693] or by the implementation of a set of policies aimed at rebalancing the public budget (including the so-called "policy conditionalities")[694]. In what follows I discuss the content of states' international obligations concerning ESC rights (subsections 4.1 and 4.2), then I analyze these obligations in the context of insolvency conflicts (subsection 4.3).

4.1. ESC Rights in International Law

In stark contrast with the right to property, international law features several global instruments protecting ESC rights. Among them, it is possible to mention the UDHR[695], the Convention on the Rights of the Child[696], and the International Covenant on Economic, Social and Cultural Rights (henceforth, "ICESCR")[697]. To a certain extent, ESC rights are also protected in the two regional systems studied for the protection of creditors' interests, namely the Inter-American and European systems[698]. However, considering that a global regime protecting citizens' entitlements exists, in what follows I will focus on the protection granted by "the most comprehensive"[699] of its instruments, i.e., the ICESCR.

---

[693] See Reinaldo Figueredo and Fantu Cheru, *Joint Report on Debt Relief and Social Investment: Linking the Heavily Indebted Poor Countris (HIPC) Initiative to the HIV/AIDS Epidemic in Africa and Nicaragua, and the Worst Forms of Child Labour Convention, 1999 (Convention No. 182) of the International Labour Organization*, E/CN.4/2000/51 (2000), para 2. See also the Reports of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights: A/HRC/11/10, para 24; A/HRC/11/10 (2009), para 38 and A/67/304 (2012), paras 1-2.

[694] See Goldmann, *Foreign Investment*… Op. Cit., pp. 130-131. See also Lumina, *Sovereign Debt*… Op. Cit., p. 177 and Sabine Michalowski, *Sovereign Debt and Social Rights: Legal Reflections on a Difficult Relationship*, 8 Human Rights Law Review 1 (2008), p. 36. In the same sense, see Figueredo and Cheru, *Joint Report*… Op. Cit., paras 34-35 and A/HRC/31/60 paras 51-52; A/HRC/34/57; Lumina, *Report*… Op. Cit., para 26 and A/HRC/46/29. There are voices in the scholarship that stand against this analysis. For instance, Arturo Porzecanski asserts that empirical studies conducted in developing countries have found that social rights expenditure was shielded during the debt crises of the 80s, and that, therefore, no trade-off exists in this regard. See Arturo Porzecanski Human Rights and Sovereign Debts in the Context of Property and Creditor Rights, in Ilias Bantekas and Cephas Lumina (Eds.), *Sovereign Debt and Human Rights*. Oxford University Press (2018), pp. 58-62.

[695] The UDHR guarantees the right to social security (Art. 22), the "indispensable" economic, social and cultural rights (Art. 22), the right to work (Art. 23), the right to an "adequate" standard of living (Art. 25) and the right to education (Art. 26). UDHR, Op. Cit.

[696] Convention on the Rights of the Child, Nov. 20, 1989 1577 U.N.T.S. 3.

[697] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

[698] Nevertheless, Colin Warbrick argues that the only ESC right protected by the ECHR is the right to education. See Colin Warbrick, Economic and Social Interests and the European Convention on Human Rights in Mashood Braderin and Robert McCorquodale, *Economic, Social and Cultural Rights in Action*. Oxford University Press (2007).

[699] Manisuli Ssenyonjo, Economic, Social and Cultural Rights: An Examination of State Obligations in Sara Joseph and Adam McBeth (Eds.), *Research Handbook on International Human Rights Law*. Elgar (2010), p. 36. See also Matthias Goldmann, *Human Rights*… Op. Cit., pp. 4-5.

4.2. The International Covenant on Economic, Social and Cultural Rights

The ICESCR includes several guarantees that can potentially be impaired in the context of insolvency conflicts, including the right to social security, the right to an adequate standard of living and the rights to health and education[700]. All these rights are to be read in connection with Art. 2(1), which is commonly considered as the "cornerstone"[701] of the instrument, setting out the "general obligations" of states towards the fulfillment of these rights[702].

With the purpose of clarifying the content of the aforementioned Article, scholars refer to the General Comments of the UN Committee on Economic, Social and Cultural Rights (henceforth, the "CESCR")[703], to the Limburg Principles on the Implementation on the ICESCR and to the Maastricht Guidelines on Violation of Economic, Social and Cultural Rights[704]. It is important to recall that none of these documents is legally binding. However, the scholarship points out that, the General Comments can be regarded as "highly persuasive"[705], "setting out interpretative positions around which State practice may unite"[706].

Particularly, the Covenant imposes three different obligations on states: to respect, to protect and to fulfill the ESC rights set out therein[707]. The third obligation is precisely the object of Article 2(1) ICESCR, which provides:

> *"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant*

---

[700] See Goldmann, *Human Rights…* Op. Cit., pp. 4-5.
[701] See Noel Villaroman, *Debt Servicing and its Adverse Impact on Economic, Social and Cultural Rights in Developing Countries*, 9 Journal of Human Rights 4 (2010), pp. 488-489.
[702] See Ssenyonjo, *Economic…* Op. Cit., p. 39.
[703] The main function of the CESCR is to monitor the implementation of the obligations contained in the ICESCR. Additionally, it publishes its opinions in what pertains to the interpretation of the provisions of the instrument ("the general comments"). At the time of writing, the CESCR has produced 24 general comments. See Committee on Economic, Social and Cultural Rights, *Monitoring the economic, social and cultural rights*, available at https://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIntro.aspx [last accessed 11.07.2019]. Additionally, it is important to mention that "no state has ever raised any formal objections to the General Comments or Statements, apparently suggesting wide acceptance of the Committee's Comments and Statements by States". Ssenyonjo, *Economic…* Op. Cit., p. 42.
[704] The Limburg Principles (1986) and the Maastricht Guidelines (1997) are documents drafted by international experts on human rights law. They provide with interpretative statements of the Articles of the ICESCR. See United Nations, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*. United Nations (2005), p. 7.
[705] Sabine Michalowski, *Sovereign Debt…* Op. Cit., p. 40.
[706] Manisuli Ssenyonjo, *Economic…* Op. Cit., p. 42. Furthermore, scholars note the "legal weight" and the "law-making" function of the General Comments of the CESCR. For a general discussion, see Hien Bui, *Human Rights Budgeting: Making Governments Accountable for Economic, Social and Cultural Rights*, 2 Human Rights Law Review (2015), pp. 113-114.
[707] See CESCR, General Comment 12: The right to Adequate Food (Art 11), UN Doc E/C.12/1999/5 (12 May1999).

by all appropriate means, including particularly the adoption of legislative measures"[708].

As is salient from this, the Covenant imposes an obligation of a "progressive" nature on states regarding the fulfillment of ESC rights. In principle, states are not required to immediately guarantee an absolute enjoyment of these rights, but rather to implement measures aimed at achieving their full realization. However, the General Comments note that the ICESCR ought to be interpreted as also establishing "immediate" obligations for state parties, including the very obligation to "take steps" toward the fulfillment of these rights[709], and the obligation "to guarantee that relevant rights will be exercised without discrimination"[710]. Furthermore, authoritative interpretations stress that state parties should also guarantee a minimum essential level of satisfaction for each right set out in the Covenant (the "minimum core obligation")[711] and abstain in principle from imposing retrogressive measures[712]. Failure to comply with any of these obligations would amount to a violation of the Covenant[713].

Additionally, through Art. 2(1), states commit to using "the maximum of [their] available resources" for the satisfaction of ESC rights. According to commentators, this part of the provision is to be understood as establishing a benchmark by which the progressive realization of ESC rights is to be measured, considering both the steps taken and the rate at which states move towards that objective[714]. Moreover, commentators point out that these resources comprise not only the public budget, but also extend to those privately owned and to those available through international assistance[715]. For this reason, human rights scholarship contends that "available resources" include the funds that may be destined for debt repayment[716]. Considering that, ultimately, it is the state who decides to either default or not, then prioritizing debt repayment over social expenditure can amount to a violation of the Covenant in certain circumstances[717]. These circumstances include the failure to guarantee a minimum essential level of enjoyment of ESC rights and the unjustified imposition of retrogressive measures. I discuss both in the following.

---

[708] ICESCR Op. Cit., Art. 2(1).
[709] See CESCR, General Comment 3: The nature of States parties' obligations (Art 2(1)), UN Doc E/1991/23 (14 December 1990), para 2. See also Limburg Principles, Op. Cit., paras 16 and 21.
[710] See CESCR, General Comment 3, Op. Cit., para 1.
[711] See CESCR, General Comment 3, Op. Cit., para 10. Limburg Principles, Op. Cit., para 25. CESCR, General Comment 13: The right to education (Art 13), UN Doc E/C.12/1999/10 (8 December 1999), para 51.
[712] General Commment 3, Op. Cit., para 9.
[713] See Michalowski, *Sovereign Debt*… Op. Cit., p. 41.
[714] See Ssenyonjo, *Economic*… Op. Cit., pp. 51-52.
[715] See Id. at., p. 52.
[716] See Villaroman, *Debt Servicing*… Op. Cit., pp. 489 et seq. See also Michalowski, *Sovereign Debt*… Op. Cit., pp. 46-50.
[717] According to Michalowski: "debt repayment made by a country which lacks sufficient funds to guarantee both servicing its sovereign debt and a minimum protection of the core of the social rights of its people always amounts to a social rights violation". Michalowski, *Sovereign Debt*… Op. Cit., p. 48.

4.2.1. The "Minimum Core" Obligation

The obligation of states to guarantee a minimum essential level of ESC rights enjoyment is a product of authoritative interpretations of the Covenant. It was first developed in 1987, in the Limburg Principles[718], and has been featured in most General Comments, starting with General Comment No. 3. Although not present in the plain language of the ICESCR, scholars assert that this obligation is "part of an interpretation of the Covenant that is essential to giving effect to the latter's object and purpose"[719], being thus consistent with the general rule of Art. 31 VCLT. Two questions arise concerning this obligation. The first refers to its nature, while the second pertains to the specific content of the essential level owed to each right.

First, as pointed out above, states are required to "immediately" satisfy the minimum essential levels of ESC rights. Through its General Comments, the CESCR has emphasized the differences between the "minimum core" obligation and those which go beyond that threshold (that is, progressive ones). For example, this is the case of General Comment No. 12 (according to which "violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger"[720]) and of General Comment No. 13 (according to which "the obligation to provide primary education for all is an immediate duty of all States parties"[721]).

Furthermore, although General Comment No. 3 introduced this notion, it also subjected it to the "maximum available resources" of the state. Specifically, this Comment underscores that members of the Convention can discharge this obligation by demonstrating that "every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations"[722]. Consequently, from the perspective of this Comment, the minimum core is defined as a "guide for prioritization" rather than as setting "an inviolable minimum"[723]. However, a subsequent document imposed more stringent standards on states, moving from a presumption to be rebutted towards a non-derogable minimum. This is the case of General Comment No. 14, which provides:

> *"*[A] *State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations (…) which are non-derogable"*[724].

Notwithstanding this, it is worth noting that most General Comments seem to follow the path set out by General Comment No. 3 in this regard. Hence, it may be argued that

---

[718] See Villaroman, *Debt Servicing…* Op. Cit., pp. 491-492.
[719] John Tasioulas, *Minimum Core Obligations: Human Rights in the Here and Now*, Research Paper, October 2017, The World Bank, p. 15.
[720] General Comment 12, Op. Cit., para 16.
[721] General Comment 13, Op. Cit., para 51.
[722] General Comment 3, Op. Cit., para 10.
[723] Ben TC Warwick, *The Minimum Core's Place in Social Rights: Fixity vs Dynamism*. Available at http://www.pol.ed.ac.uk/__data/assets/pdf_file/0003/232428/Warwick_-_summary.pdf [last accessed 12.07.2019].
[724] CESCR, General Comment 14: The right to the highest attainable standard of health (Art 12), UN Doc E/C.12/2000/4 (11 August 2000), para 47.

the general practice of the CESCR (and thus, a proper interpretation of the "minimum core" obligation) points at subjecting the "minimum core" to the availability of resources and, therefore, using it as a "guide for prioritization".

Scholars are divided on this matter, arguing in both directions[725]. Be that as it may, even an interpretation equating states' compliance with a presumption to be rebutted can be violated in the context of a debt crisis. Indeed, from this perspective, the Covenant constrains states to use all their available resources – including the funds destined for debt repayment – to attain the minimum level of ESC rights[726]. Hence, a state that fails to prioritize social spending in favor of the claims of its lenders may find itself in a difficult position to justify its conduct[727].

Secondly, the General Comments have also defined the specific "minimum level" of ESC rights enjoyment states are committed to guarantee. This has been the case for the right to food[728], the right to education[729], the right to highest attainable standard of health[730] the right to water[731], the right to intellectual property[732], the right to work[733], the right to social security[734], the right to take part in cultural life[735], and the right to just and favourable conditions of work[736]. Furthermore, human rights scholarship has also suggested the use of indicators for determining the minimum essential level for each

[725] In favor of non-derogability, see for instance Warwick, *The Minimum…* Op. Cit., p. 7 and Ssenyonjo, *Economic…* Op. Cit., p. 66. Against this interpretation see, for instance, Tasioulas, *Minimum…* Op. Cit.

[726] See Cephas Lumina, Report of the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, Particularly Economic, Social and Cultural Rights, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, A/HRC/11/10 (2009), paras 66-69.

[727] See, Villaroman, *Debt Servicing…* Op. Cit., pp. 492-493. In his own words: "When an indebted country is unable to satisfy the minimum essential levels of these rights because its finances have been severely drained by debt repayments, it violates its minimum core obligation under the ICESCR" (p. 493).

[728] General Comment 12, Op. Cit., paras 8 and 17.

[729] General Comment 13, Op. Cit., para 57.

[730] General Comment 14, Op. Cit., para 43.

[731] CESCR, General Comment 15: The right to water (Arts 11 and 12), UN Doc E/C.12/2002/11 (20 January 2003), para 37.

[732] CESCR, General Comment 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (Art 15(1)(c)), UN Doc E/C.12/GC/17 (12 January 2006), para 39.

[733] CESCR, General Comment 18: The right to work (Art 6), UN Doc E/C.12/GC/18 (6 February 2006), para 31.

[734] CESCR, General Comment 19: The right to social security, UN Doc E/C.12/GC/19 (4 February 2008), para 59.

[735] CESCR, General Comment 21: The right of everyone to take part in cultural life (Art. 15 (1)(a)), UN Doc E/C.12/GC/21 (21 December 2009), para 55.

[736] CESCR, General Comment 23: The right to just and favourable conditions of work (Art. 7), UN Doc E/C.12/GC/23 (27 April 2016), para 65.

right[737], which combined with the use of human rights budgeting contributes to clarifying states' obligations under the Covenant[738].

4.2.2. Non-Retrogression

Authoritative interpretations of the Covenant have also developed a protection against the imposition of retrogressive measures in what pertains to the enjoyment of ESC rights. Non-retrogression is a derivation from the obligation of progressive realization: Since Art. 2(1) requires states to always move forward in ESC rights enjoyment, by the same token it precludes them from moving backwards in this regard[739]. One important question concerning the obligation of non-retrogression is whether it is an absolute obligation or not. I briefly address that question in this subsection.

When approaching this subject, it is important to note that the General Comments never establish an absolute obligation of non-retrogression[740]. For the interpretative practice of the CESCR, states are authorized to downgrade the level of enjoyment of ESC rights, if they are able to provide a satisfactory justification for this[741]. However, the Comments also state that a "strong presumption of impermissibility"[742] exists in this case. Accordingly, states are required to painstakingly defend the implementation of retrogressive measures. This interpretation is consistent with Art. 4 of the ICESCR, which governs the limitations to the enjoyment of ESC rights[743]. The Article establishes that states can restrict them only when such restrictions are imposed "by law in so far

---

[737] See Katharine Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 The Yale Journal of International Law (2008), pp. 164-167. See also Tasioulas, *Minimum Core…* Op. Cit., p. 30. See also Villaroman, *Debt Services…* Op. Cit., pp. 493-494.

[738] Bui, *Human Rights…* Op. Cit., pp. 123-125.

[739] See Ssenyonjo, *Economic…* Op. Cit., pp. 50-51.

[740] The only General Comment establishing an absolute obligation of non-retrogression is General Comment No. 16, which stress that: "The adoption and undertaking of any retrogressive measures that affect the equal right of men and women to the enjoyment of all the rights set forth in the Covenant constitutes a violation of article 3". CESCR, General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art 3), UN Doc. E/C.12/2005/3 (11 August 2005), para. 42.

[741] See Ssenyonjo, *Economic…* Op. Cit., pp. 61-62. These is the also the view for scholars addressing the specific relationship between sovereign debt and human rights. See, for instance, Villaroman, *Debt Servicing…* Op. Cit., p. 496. In the context of "structural adjustment" policies see, for example, Juan Pablo Bohoslavsky, Report of the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, particularly economic, social and cultural rights, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development,* A/HRC/34/57 (2017), para 22.

[742] General Comment No. 13, Op. Cit., para 45.

[743] See, for example, Goldmann, *Human Rights…* Op. Cit., pp. 9-10 and Villaroman, *Debt Servicing…* Op. Cit., pp. 495-496. However, it should be noted that, according to Emma Scali, "(…) the CESCR has not seriously monitored the adoption of deliberately retrogressive measures by states parties and that, in the few cases where the Committee has actually engaged with measures of this kind, it has been far too permissive". Emma Scali, *Sovereign Debt and Socio-Economic Rights Beyond Crisis: The Neoliberalisation of International Law*. Cambridge University Press (2022), p. 74.

as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society"[744].

The burden of justification imposed upon states has remained along similar lines in the General Comments. For instance, regarding the right to social security, the CESCR specified that:

> *"If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party"*[745].

However, other "soft-law" instruments have enriched the elements of this burden. For instance, the Guiding Principles on Human Rights Impact Assessments of Economic Reforms[746], establish other constraints in the implementation of retrogressive measures (including temporality, legitimacy, reasonableness, a requirement of necessity, proportionality, a requirement of non-discrimination, transparency and accountability) and stress that said measures cannot affect the minimum essential levels of ESC enjoyment[747].

On the other hand, there are also other "soft-law" documents that interpret the Covenant as establishing an absolute obligation of non-retrogression. This is the case of the Maastricht Guidelines, and of the Guiding Principles on Foreign Debt and Human Rights. While for the former instrument "the adoption of any deliberately retrogressive measure that reduces the extent to which any such rights is guaranteed" amounts to a

[744] ICESCR, Op. Cit., Art. 4.

[745] General Comment No. 19, Op. Cit., para 42. This General Comment further establishes that: "The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security; an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level".

[746] Guiding Principles on Human Rights Impact Assessments of Economic Reforms, UN DOC A/HRC/40/57 (19 December 2018).

[747] See Guiding Principles on Human Rights Impact Assessments of Economic Reforms, Op. Cit., Principle 10. For a commentary addressing these requirements see Juan Pablo Bohoslavsky, Guiding Principles to Assess the Human Rights Impact of Economic Reforms? yes in Ilias Bantekas and Cephas Lumina (Eds.), *Sovereign Debt and Human Rights*. Oxford University Press (2018). Furthermore, the Statement of the CESCR on Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights, stressed this idea. See CESCR, Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights, UN DOC E/C.12/2016/1, para 4.

violation of the Covenant[748], for the latter "states have an obligation to avoid retrogressive measures" *in toto*[749].

Despite these differences, the CESCR has tended to favor the former of the two aforementioned views. Particularly, it has endorsed an understanding which subordinates the lawfulness of retrogressive measures to the satisfaction of the proportionality test (among other requirements)[750]. For example, in an Open Letter on behalf of the Committee, dated as of May 16, 2012[751], the then chairperson of the CESCR, Mr. Ariranga Pillay, highlighted that the measures implemented in the context of economic and financial crises need to be (1) temporary, (2) necessary and proportional, (3) non-discriminatory and (4) in compliance with the "minimum-core" obligation[752]. Those requirements were reiterated in a subsequent statement by the CESCR[753] and have also been mentioned in the Communications of the Committee[754].

[748] Maastricht Guidelines, Op. Cit., para 14.

[749] Guiding Principles on Foreign Debt and Human Rights, UND DOC A/HRC/C/20/23 (10 April 2011), para 19. At the same time, para 20 of the same instrument provides: "States should ensure that their rights and obligations arising from external debt, particularly the obligation to repay external debt, do not lead to the deliberate adoption of retrogressive measures".

[750] See Goldmann, *Human Rights…* Op. Cit., pp. 10-12. Notably, this understanding has been challenged by a group of scholars. According to them, subjecting the lawfulness of retrogressive measures to proportionality has *de facto* "neoliberalized" compliance with the ICESCR. For example, according to Emma Scali, this entails that the CESCR has embraced an understanding "mirroring" the "derogation regimes" of other Human Rights treaties (including those of the ACHR and the ECHR). In particular, Scali indicates that through these means, the Committee has attempted "(…) at reconciling austerity with socio-economic rights, by accommodating the requirements of ESR [economic and social rights], notability the prohibition of retrogression, to neoliberal market imperatives, rather than the other way around". Scali, *Sovereign Debt…* Op. Cit., 76.

[751] See Ariranga G. Pillay, Chairperson of the Committee on Economic, Social and Cultural Rights, *Open Letter Addressed to All States Parties to the International Covenant on Economic, Social and Cultural Rights*, CESCR/48th/SP/MAB/SW (May 16, 2012).

[752] See Sandra Liebenberg, *Austerity in the Midst of a Pandemic: Pursuing Accountability Through the Socio-Economic Rights Doctrine of Non-Retrogression*, 37 South African Journal on Human Rights 2 (2021), pp. 189-190.

[753] "If the adoption of retrogressive measures is unavoidable, such measures should be necessary and proportionate, in the sense that the adoption of any other policy or failure to act would be more detrimental to economic, social and cultural rights. They should remain in place only insofar as they are necessary; they should not result in discrimination; they should mitigate inequalities that can grow in times of crisis and ensure that the rights of disadvantaged and marginalized individuals and groups are not disproportionately affected; and they should not affect the minimum core content of the rights protected under the Covenant". CESCR, *Statement on Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights*, E/C.12/2016/1, para 4.

[754] Regarding the imposition of retrogressive measures in what pertains to the right to housing, see CESCR, Mohamed Ben Djazia and Naouel Bellili v. Spain, Communication No. 5 (2015), U.N. Doc. E/C.12/61/D/5/2015 (2017), para 17.6. For a discussion, see Liebenberg, *Austerity…* Op. Cit., pp. 189-190.

Consequently, if the CESCR interpretation is followed, it is possible to infer that "social" rights can be regarded as PIL principles in what pertains to non-retrogression[755].

4.3. The Impairment of ESC rights in the Context of Insolvency Conflicts: Diversion of Funds and Policy Conditionalities

As stated above, ESC rights may be impaired in the context of insolvency conflicts either by the diversion of funds destined to social spending ("redirection of funds") or by the imposition of policies aimed at rebalancing the public budget (including the so-called "policy conditionalities")[756]. Since the general dynamics pertaining to "redirection of funds" have already been discussed, I will now briefly describe policy conditionalities.

Particularly, "policy conditionalities" refer to the requirements proposed by international financial institutions (such as the International Monetary Fund, henceforth "IMF", or the World Bank) on states requesting their financial assistance in periods of economic distress[757]. By accepting these conditionalities, governments are expected to revise and change their policies, including specific targets directed at debt repayment[758]. Furthermore, conditionalities usually include requirements aimed at diminishing the levels of public spending ("fiscal consolidation")[759], as well as "structural adjustment programs" embodied by policy shifts towards privatizations, trade and financial liberalization and deregulation[760].

According to the IMF, the main objective of conditional lending is to adjust the economic policies of the state with the purpose of solving the problems which led it to financial distress[761], and thus foster economic growth[762]. However, there is no agreement in the literature concerning whether these policies actually lead to prosperity in the long

---

[755] Also indicating that "social" rights are subjected to the proportionality test, see, for example, Goldmann, *Human Rights*… Op. Cit., pp. 9-12 and Liebenberg, *Austerity*… Op. Cit., pp. 189-190.
[756] In view of this, the Human Rights Council proposed a set of guiding principles for assessing the human rights impacts of economic policies. See, for example, A/HRC/37/54 and A/HRC/40/57.
[757] See Thomas Stubbs and Alexander Kentikelenis, Conditionality and Sovereign Debt: An Overview of Human Rights Implications, in Ilias Bantekas and Cephas Lumina (Eds*.), Sovereign Debt and Human Rights*. Oxford University Press (2018), p. 359. It is important to mention that conditionalities are not restricted to the practice of the IMF and the World Bank but extends also to states and to the World Trade Organization. See, Cesare Pinelli, "*Conditionality",* Max Planck Encyclopedia of Public International Law [last accessed 30.07.2019].
[758] See Goldmann, *Human Rights*… Op. Cit., pp. 5-6.
[759] See Lumina, *Sovereign debt*… Op. Cit., pp. 179-180.
[760] See Sabine Schlemmer-Schulte, International Monetary Fund, "*Structural Adjustment Programme (SAP)",* Max Planck Encyclopedia of Public International Law, [last accessed 15.06.2019], § 4. In the case of IMF conditionalities, government produce "Letters of Intent" and "Memoranda of Understandings" which comprise the policies at stake. These documents are latter reviewed by the executive board, which decides whether to provide a loan or not. See Goldmann, *Human Rights*… Op. Cit., p. 6. Furthermore, it is important to note that the IMF maintains a repository of these documents in its "Country's Policy Intentions Documents" available at https://www.imf.org/en/Publications/CPID [last accessed 14.07.2019].
[761] See International Monetary Fund, Factsheet: IMF Lending, available at https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality accessed 14.07.2019].
[762] See Luminas, *Sovereign Debt*… Op. Cit., p. 180.

run[763]. Be that as it may, the key issue to consider in this regard is that, in the short term, conditionalities can impair the enjoyment of ESC rights[764]. For this reason, short-term effects need to be considered in the light of the obligations of the ICESCR.

4.3.1. Interactions with the "Minimum Core" Obligation

As stated above, Art. 2(1) ICESCR compels states to use their "maximum available resources" to guarantee the enjoyment of ESC rights, including the funds which may be used for debt repayment. The "minimum core obligation" interacts with debt repayment and conditionalities on different manners, depending on the interpretation followed. However, both interpretations seem to lead to the same conclusion in the end.

If the "minimum core" obligation is interpreted as establishing a "non-derogable" standard of ESC rights enjoyment (as under General Comment No. 14) the state will be found in violation if it downgrades the guaranteed level below the threshold established in the Covenant, regardless of the macroeconomic conditions it might be under. Hence, from the perspective of this interpretation, the state will be obliged to employ all its resources (including those destined for debt re-payment) to satisfy the minimum essential level of ESC rights enjoyment. Accordingly, a state redirecting funds to satisfy the claims of bondholders or agreeing to conditionalities below the minimum guaranteed in the ICESCR, would be violating the Covenant[765]. For the same reason, the state would be expected either to default on its debt or to re-negotiate it to the extent that is compatible with the "minimum core". Therefore, debt restructuring could be viewed as a duty imposed on insolvent states in the context of debt crises[766].

On the other hand, assuming that the "minimum core" obligation establishes a "guide to prioritization", the state will have the burden of proving that "every effort has been made" to satisfy the minimum essential level of ESC rights enjoyment. Consequently, it may be argued that among the efforts considered in this regard are those pertaining to debt restructuring and to the negotiation of conditionalities. As with the previous interpretation, in order to discharge this obligation, the state will be required to

[763] See Id. See also, Goldmann, *Human Rights*… Op. Cit., pp. 6-7 and A/HRC/23/37, para 43.
[764] Neither "fiscal consolidation" nor "structural adjustment programs" necessarily impair the enjoyment of ESC rights whithin the indebted state. As Bohoslavsky argues, budget cuts if accompanied by an appropriate set of policies can also have the opposite effect by channeling funds where they are need most. See Bohoslavsky, *Guiding Principles*… Op. Cit., 407. Calling for a consideration of human rights in the implementation of conditionalities, see, for example, the Reports of the Independent Experts on the Effects of Structural Adjustment Policies and Foreign Debt on the Full Enjoyment of all Human Rights, Particularly Economic, Social and Cultural Rights: E/CN.4/1999/50; E/CN.4/2004/47, para 25; E/CN.4/2005/42 paras 19-24; E/CN.4/2006/46, paras 19 et seq; A/HRC/4/10; A/HRC/7/9, paras 31 et seq and A/HRC/11/10, paras 43 et seq., A/HRC/7/9.
[765] See Sabine Michalowski, *Sovereign Debt*… Op. Cit., p. 37 and p. 45. See also, Cephas Lumina, *Sovereign Debt*… Op. Cit., p. 177. See also Ilias Bantekas and Cephas Lumina, Sovereign Debt and Human Rights: An Introduction in Ilias Bantekas and Cephas Lumina (Eds.), *Sovereign Debt and Human Rights*. Oxford University Press (2018), p. 4.
[766] See Guiding Principles on Foreign Debt and Human Rights, Op. Cit., paras 17-18.

restructure its debt (or to default) and to implement budget-cuts to the extent that the remaining funds are sufficient to satisfy the minimum level of ESC rights enjoyment.

4.3.2. Interactions with the Non-Retrogression: ESC Rights beyond the Minimum Core as "Optimization Requirements"

Both the redirection of funds and the imposition of budget cuts can downgrade the level of ESC rights enjoyment within the indebted state. Provided that the "minimum level" is satisfied, then the non-retrogression obligation applies[767]. As stated above, this obligation gives more leeway to states than the one pertaining to the "minimum core". In this case, the state assumes the burden of proving that every measure complies with the criteria developed in the General Comments and with the conditions set out in the Covenant which, according to the CESCR, include suitability and proportionality. As can be noted, those conditions are more flexible than the justification demanded by the "minimum core" obligation.

For these reasons, non-retrogression neither necessarily demands the indebted state to restructure its debt nor does it compel it to default. However, as an instrument of debt management, it will be considered as one of the "alternatives" available to the state when downgrading the level of enjoyment of ESC rights. Additionally, since conditionalities usually require certain levels of debt repayment, the state will have the burden of justifying these targets alongside the corresponding cuts on public expenditures.

Furthermore, beyond the "minimum core", and if the understanding of the CESCR on the matter is followed, the requirements included in the Comments for retrogressive measures in the context of insolvency conflicts define the structure of ESC rights as optimization requirements: They ought to be realized to the greatest extent possible. In short, if the "minimum core" is respected, the assessment of whether a retrogressive measure violates the ICESCR or not requires the application of the proportionality principle. Therefore, if and when the "minimum core" is respected, "social" rights can be regarded as PIL principles.

[767] See Goldmann, *Human Rights*… Op. Cit., pp. 9 et seq.

5. Conclusions

In this *Chapter*, it has been argued that even the most basic form of insolvency conflict features the competing interests of bondholders and of the citizens of the indebted state. It has also been argued that these interests are protected by international norms, which are functionally and structurally equivalent to the principles guaranteed by domestic constitutions. For this reason, and following a distinguished group of scholars, this *Thesis* dubbed these norms "principles of public international law" (i.e., "PIL principles").

First, it has been shown that both the American and European Conventions on Human Rights protect the interests of bondholders as property rights. Indeed, the Courts in charge of interpreting and applying these international instruments have developed a wide notion of what is to be understood by "property" or by "possessions", extending them to claims of a contractual nature and, therefore, also to sovereign bonds. As has been argued, this is particularly true in the case of the European Court of Human Rights which has dealt with this matter on several occasions.

The situation is not as clear under international investment law, where the issue of whether sovereign bonds qualify as "investments" remains rather controversial, both in tribunals and in the scholarly literature. Nevertheless, it was posited that there are several reasons that justify proceeding under the assumption that government securities can be regarded as protected assets under the international investment regime. In this context, and following the literature, I highlighted two guarantees protecting bondholders' interests which can be impaired in the context of insolvency conflicts: the protection against expropriation and the Fair and Equitable Treatment standard.

Furthermore, it has also been stressed that the protection granted to bondholders under the American and the European Convention on Human Rights and international investment law is not absolute. On the one hand, the aforementioned Human Rights Conventions specifically establish the limitations to which property may be subjected. In applying these limitations, the respective Courts have treated the right to property as a "prima facie requirement" that interacts with the other guarantees in the Conventions and with the "general" or the "social interest". Additionally, both Courts have operationalized these interactions by applying the principle of proportionality. On the other hand, the investment case-law has developed certain doctrines according to which foreign investors' interests can be lawfully interfered with on the grounds of the host-states' "public" concerns. Likewise, international investment tribunals have also treated certain investment guarantees (particularly the protection against expropriation and the FET standard) as "optimization" requirements through the application of balancing.

Secondly, it has been stated that citizens' interests are protected by a global instrument, namely the International Covenant on Economic, Social and Cultural Rights. For this reason, I decided to analyze this Covenant instead of resorting to the specific guarantees included in the previously mentioned regional treaties. In this context, I argued that the obligation of non-retrogression derived from the Covenant can also be regarded as a PIL

principle, since it can be subjected to limitations in its interaction with other norms included in the instrument and since authoritative interpretations thereof allow for retrogressive measures to the extent that they are proportional, among other requirements.

Consequently, it is possible to infer that both bondholders' property rights and citizens' "social" rights can be considered "PIL principles" relevant to the resolution of insolvency conflicts. Hence, from the perspective of international law, they can be considered as goals or objectives to be attained rather than norms that are either fulfilled or not in absolute terms (rules). Taking this into account, the relationship between these interests can be construed as involving a potential trade-off between goals: While in some cases the protection of citizens' "social" rights (or of the "public interest") will demand restructuring the debt (by modifying the most important contractual obligations of the bonds), the protection of bondholders' property rights will require contractual stability and, therefore, debt repayment in the previously agreed terms. Under certain circumstances, it might not be possible for a state to fully satisfy its citizens' "social" rights (or to assure the "public interest") without encroaching upon the property rights of bondholders. Moreover, under the same circumstances, it might not be possible to respect property rights without impairing the enjoyment of "social" rights (or without affecting the "public interest"). Notably, and as stated above, in order to be properly deployed in particular cases, these principles need to fall within the scope of the applicable law to the corresponding disputes.

The question that now presents itself to us is how these different interests can be reconciled in the light of public international law, as well as how these trade-offs could be mitigated. In the following *Chapter*, I will take the first steps towards answering these questions, by identifying the "general principles of domestic law" arising from domestic bankruptcy regimes.

CHAPTER THREE: GENERAL PRINCIPLES OF DOMESTIC LAW APPLICABLE TO SOVEREIGN DEBT RESTRUCTURING. PART ONE

1. Introduction

At face value, international law provides little guidance concerning the issue of sovereign indebtedness. Although it addresses related questions (such as the very notion of sovereignty, debt continuity and the enforcement of foreign awards)[768], most of the consequences of defaults and the avenues for debt restructuring are the matter of private contracts and, therefore, usually governed by domestic law. Hence, despite the fact that insolvency procedures for states have been discussed, at least, since the times of Adam Smith[769], an international treaty on the subject has not been concluded to this day.

However, international conventions are but one of the sources of international law. Custom and general principles of law are also instrumental in creating valid international legal obligations[770] and have the status of proper sources of the law of nations[771]. As discussed in *Chapter Two*, there are several controversies regarding the content and the methodology for the identification of general principles. Despite these disagreements, the majority of the scholarship (and, to some extent, the practice of international courts and tribunals) agrees on one fundamental point[772]: general principles of law include normative propositions widely recognized by domestic legal systems around the world which are capable of being extrapolated to the international sphere[773]. For this reason and considering that there are other principles originating in the international scenario, I followed the academic convention and referred to the aforementioned normative propositions as "general principles of domestic law" (henceforth, "GPDs").

Therefore, in order to fully explore the solutions that international law provides for sovereign insolvency (and, thus, for sovereign debt restructuring), it is necessary to investigate the GPDs which can be applied in this context. This requires analyzing

---

[768] See Weidemaier and Gulati, *The Relevance*… Op. Cit.

[769] See Kunibert Raffer, Debts, Human Rights, and the Rule of Law in in Martín Guzmán, Joseph Stiglitz and José Antonio Ocampo (Eds.), *Too Little Too Late: The Quest to Resolve Sovereign Debt Crises*. Columbia University Press (2016), p. 253.

[770] For a discussion of the sources of international law, see Samantha Besson, Theorizing the Sources of International Law in Samantha Besson and John Tasioulas (Eds.), *The Philosophy of International Law*. Oxford University Press (2010).

[771] Article 38 (1)(c) of the Statute of the International Court of Justice provides: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (…) c. The general principles of law recognized by civilized nations (…)". Statute of the International Court of Justice in Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, T.S. No. 993.

[772] *Contra* see Ellis, *General Principles*… Op. Cit. and Jean d'Aspremont, What Was Not Meant to Be: General Principles of Law as a Source of International Law in Global Justice, in Riccardo Pisillo Mazzeschi and Pasquale De Sena (Eds.) *Human Rights and the Modernization of International Law*. Springer (2019).

[773] For a discussion, see *Chapter Two*.

whether there is a common understanding among different jurisdictions while dealing with a specific problem, namely that of an insolvent debtor who cannot fully satisfy the claims of its multiple creditors[774]. Additionally, if such common understanding exists, this endeavor also demands to determine whether it can be elevated (i.e., "extrapolated") to the international scenario. Notably, both elements are required to establish that one or more normative propositions can be considered GPDs.

As discussed in *Chapter One*, scholars have analyzed in detail the benefits that a bankruptcy-like procedure may have for sovereign debt renegotiation[775], and have found inspiration in the most prominent corporate reorganization regimes of the world (such as Chapter 11 of the United States) for the purposes of suggesting new rules on the subject of state insolvency[776]. At the same time, the previous scholarship has also taken the task of identifying GPDs by the means of a comparative study of domestic jurisdictions[777]. The most important contributions in this regard are those of Holger Schier[778], Juan Pablo Bohoslavsky[779] and Matthias Goldmann[780]. As indicated in the aforementioned *Chapter*, their work inspired this *Thesis* to rely on comparative law, functionalism and analogical reasoning for "elevating" the norms found in domestic bankruptcy regimes to the international sphere. I have already presented a detailed analysis of those contributions in *Chapter One*, and there is no need to repeat it here. Nevertheless, it is worth recalling the main differences between those works and this *Thesis* and the modest contribution which this and the next *Chapter* attempt to put forward.

First, one important limitation of the previous scholarship refers to the lack of a comprehensive functional analysis applied when extrapolating domestic insolvency norms to the international sphere. For example, Goldmann's notable contributions justify said extrapolation, first and foremost, by qualifying sovereign debt restructurings as exercises of public authority[781]. Furthermore, although he does

[774] In the same sense, see Bohoslavsky and Espósito, *Principles Matter*… Op. Cit., pp. 78-79 and Bohoslavsky, *Responsibility*… Op. Cit., p. 506.
[775] For a detailed discussion of the different proposals see Berensmann and Herzberg, *International Sovereign*… Op. Cit.
[776] See, for example, Steven Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy*… Op. Cit. and Paulus, *Some Thoughts*… Op. Cit.
[777] "The idea that general principles of international law can play an important role in constructing the legal framework for sovereigns acting in the area of international finance is hardly a new one". Schier, *Towards*… Op. Cit., p. 109. Similarly, see Bohoslavsky and Espósito, *Principles*… Op. Cit., p. 79.
[778] See Schier, *Towards*… Op. Cit.
[779] See Bohoslavsky, Responsibility… Op. Cit. and Bohoslavsky, *Lending and Sovereign Insolvency*… Op. Cit.
[780] See Goldmann, *Responsible*… Op. Cit.; Goldmann, *On the Comparative*… Op. Cit.; von Bogdandy and Goldmann, *Sovereign Debt*… Op. Cit.; Goldmann, *Necessity*… Op. Cit., and Goldmann, *Putting your Faith*… Op. Cit.
[781] See Goldmann, *Necessity*… Op. Cit., pp. 15-16; von Bogdandy and Goldmann, *Sovereign Debt*… Op. Cit., p. 41 and Goldmann, *Putting your Faith*… Op. Cit., p. 119.

provide certain arguments pertaining to the functions of the principles identified[782], he fails to address those issues in detail.

Second, although the study conducted in this, and the next *Chapter* relies on Schier's comparative analysis, it differs from his work in one significant aspect. In effect, Schier indicates that the extrapolation of the norms derived from a comparative study of domestic insolvency regimes is to be done by choosing the norms which can best achieve the goals of an international convention for sovereign debt restructuring[783]. In contrast, the methodology used for transposing the aforementioned norms to the international sphere in this *Thesis* is based upon a different understanding[784]. The methodology chosen conforms to one of the main goals of this work. As indicated in *Chapter One*, that goal corresponds to justifying the application of principles in sovereign debt litigation *today*. Hence, the analysis proposed here does not intend to wait until *tomorrow* (i.e., the time when an international convention on the subject is in force) for the use of the norms belonging to this particular source of the law of nations.

Consequently, the modest contribution which this and the next *Chapter* attempt to make rests on the application of a small but important "twist" in the methodology used for transposing GPDs relevant to sovereign insolvency. Specifically, these *Chapters* argue that what really matters for that purpose is that the "functions" of the norms derived from domestic insolvency regimes survive in the international context. Furthermore, these *Chapters* rely exclusively on a functional analysis and analogical reasoning for conducting the aforementioned transposition.

Before proceeding, it is worth noting that identifying GPDs in this way may be of critical importance, since, as a proper source of international law, international courts and tribunals are authorized to apply them while deciding on a case[785]. Additionally, GPDs can also be used for clarifying, complementing and determining the content of other norms in international adjudication[786]. Moreover, as will be discussed in *Chapter Five*, GPDs can also play a significant role in sovereign debt litigation before domestic courts, provided that the domestic jurisdiction involved considers international law to be under the umbrella of the applicable law. Consequently, the identification of these principles is relevant to sovereign debt restructuring disputes in the international and domestic spheres.

In order to identify the GPDs applicable to sovereign debt restructuring, I first clarify the methodology to be used for that purpose (section 2). Afterwards, I conduct a comparative survey of five different jurisdictions (section 3). This section in particular is aimed at capturing the commonalities between different legal systems in what pertains to corporate reorganizations. Additionally, I also discuss the law and economics

[782] See *Chapter One*, pp. 25 et seq.
[783] See Schier, *Towards…* Op. Cit., p. 164.
[784] See section 2 of this *Chapter*.
[785] For a discussion (including a list of authorities and relevant cases) see *Chapter Two*, p. 46.
[786] Bassiouni notes that "this interpretative function is the most widely recognized and applied function of 'General Principles' and the one that is evidently the most needed and useful". Bassiouni, *A Functional Approach…* Op. Cit., p. 776.

literature which helps to shed some light on the "rationale" underlying the most important norms found in domestic corporate reorganization regimes. Taking into account these explanations, I build three groups of normative propositions (section 4). Moreover, I also examine whether these normative propositions are compatible with the values embedded in international law (section 5). Finally, I present the conclusions of this *Chapter* (section 6). It is the subject of the next *Chapter* (*Chapter Four*) to analyze whether the rationale justifying the normative propositions thus established also holds in the case of sovereign debt restructuring.

2. General Principles of Domestic Law: Methodological Remarks

As indicated previously, the majority of the scholarship is in agreement that GPDs refer to normative propositions widely recognized by domestic jurisdictions[787] which can be extrapolated to the international sphere[788]. Nevertheless, the methodology to be used for the identification of norms belonging to this source of the law of nations remains underdeveloped in the case-law of international courts and tribunals[789].

For example, Marija Dordeska highlights that the International Court of Justice (henceforth, "ICJ") has employed a "freestyle approach" when it comes to ascertaining these norms[790]. According to her, the ICJ tends to limit itself by referring to its own jurisprudence for that purpose[791], neglecting a detailed discussion on how a GPD can be identified[792]. The same can be said for the practice of international investment tribunals. In this regard, Patrick Dumberry notes that those tribunals usually affirm the existence of a GPD without following any particular method[793].

Despite adjudicators' lack of methodological rigor, most of the literature seems to agree in that the identification of the norms belonging to this source of the law of nations is to

---

[787] "General principles of law require a certain level of recognition and consensus". Hulley Enterprises Limited v. The Russian Federation, Final Award, PCA Case No. AA 226 (2014), para 1359. See also, Goldmann, *Responsible*… Op. Cit., p. 12.

[788] "(…) "General principles" are rules largely applied in *foro domestico*, in private or public, substantive or procedural matters, provided that, after adaptation, they are suitable for application on the level of public international law". El Paso Energy International Company v. The Argentine Republic, Award, ICSID Case No. ARB/03/15 (2011), para 622. "Allgemeine Rechtsgrundsätze sind anerkannte Rechtsprinzipien, die übereinstimmend in den innerstaatlichen Rechtsordnungen zu finden und auf den zwischenstaatlichen Verkehr übertragbar sind (…)". ["General principles of law are recognized principles of law which are found concordantly in domestic legal systems, and which are transferable to interstate relationships (…)". BVerfG (Federal Constitutional Court, Germany), Decision of the Second Chamber of the Second Senate of September 4, 2008, 2 BvR 1475/07, para 20 [own translation].

[789] For this reason, the International Law Commission (henceforth, "ILC") decided to study this source of international law at its sixty-ninth session (2018). At the time of this writing, two Reports have been submitted to the ILC by the Special Rapporteur on the subject (Professor Marcelo Vásquez-Bermúdez). Furthermore, the Commission has received commentaries by the governments of Australia, Belarus, the Netherlands and the Russian Federation and has so far adopted five preliminary conclusions. Since the work of the ILC in this regard is ongoing, I only refer in what follows to the reports drafted by Professor Marcelo Vásquez-Bermúdez. An overview of this process is available at the webpage of the ILC. See ILC, *Analytical Guide to the Work of the International Law Commission: General Principles of Law*, available at https://legal.un.org/ilc/guide/1_15.shtml [last accessed 10.10.2021].

[790] See Dordeska, *General*… Op. Cit., pp. 489-490. In the words of Carlos Fuentes: "As the Court has not elaborated on its methodology for identifying general principles, this is a matter open to speculation". Carlos Fuentes, *Normative Plurality in International Law: A Theory of the Determination of the Applicable Rules*. Springer (2016), p. 71.

[791] See Dordeska, *General*… Op. Cit., p. 199.

[792] Nevertheless, scholars stress that in some separate opinions, ICJ judges have applied certain methodological steps for that purpose. See Dumberry, *A Guide*… Op. Cit., pp. 103-104 and Miles Jackson, *State Instigation in International Law: A General Principle Transposed*, 30 The European Journal of International Law 2 (2019), p. 399.

[793] See Dumberry, *A Guide*… Op. Cit., p. 8.

be done in two steps[794]. First, it is necessary to verify whether the principle is considered by domestic jurisdictions (the "recognition" requirement). Secondly, it is required to assess whether the principle is capable of being elevated (i.e., "extrapolated" or "transposed") from the domestic to the international sphere (the "extrapolation" requirement). Both requirements have a critical consequence: GPDs are different from "feelings of justice or equity", and, therefore, their existence "must be proven and not presumed"[795]. In the following subsections, I discuss both requirements in detail.

2.1. The "Recognition" Requirement

Let me begin by addressing the "recognition" requirement. According to the scholarship, this part of the assessment involves a comparative analysis of different jurisdictions[796]. This step is usually known as the "bottom-up" approach[797]. At this stage, the issue is to determine whether the legal systems in question present a common understanding in a particular point of law which can then be formalized as one or more normative propositions[798].

Crucially, the "recognition" requirement can be subdivided into three parts. First, the methodological framework under which the comparative survey is to be attempted should be chosen (subsection 2.1.1). Second, it is vital to indicate the domestic legal systems over which the comparative inquiry is to be conducted (subsection 2.1.2). Third,

---

[794] See Marcelo Vásquez-Bermúdez, *First Report on General Principles of Law*, International Law Commission (A/CN.4/732) (2019), p. 8; Marcelo Vásquez-Bermúdez, *Second Report on General Principles of Law*, International Law Commission (A/CN.4/741) (2020), p. 6; Gebhard Bücheler, *Proportionality in Investor-State Arbitration*. Oxford University Press (2015), p. 67; Olufemi Elias and Chin Lim, *General Principles of Law, Soft Law and the Identification of International Law*, XXVIII Netherlands Yearbook of International Law (1997), pp. 23-24; Fabian Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*. Martinus Nijhoff Publishers (2008), pp. 45 et seq.; Jackson, *State*… Op. Cit., p. 407 and Yee, *Article 38*… Op. Cit., p. 490. Some scholars add a further step: to reduce the norm or norms identified in domestic jurisdictions to their "core", by means of which a "common" principle" can be identified. Nevertheless, this step is also part of the first step of the majoritarian approach followed here. For a discussion of this perspective see Dumberry, *A Guide*… Op. Cit.; Jaye Ellis, *General Principles and Comparative Law*, 22 The European Journal of International Law 4 (2011), p., 954; Fuentes, *Normative*… Op. Cit., pp. 69-70 and Charles Kotuby and Luke Sobota, *General Principles of Law and International Due Process*. Oxford University Press (2017), pp. 18-19.

[795] Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary*. Cambridge University Press (2009), p. 610 para 182. In the same sense, see Dumberry, *A Guide*… Op. Cit., p. 102.

[796] See Bassiouni, *A Functional*… Op. Cit., p. 773. See also Allain Pellet, Article 38 in Andreas Zimmermann and Christian Tams (Eds.), *The Statute of the International Court of Justice: A Commentary*, 2nd Edition. Oxford University Press (2012), p. 770; Gazzini, *General*… Op. Cit., p. 107; Uwe Kischel, *Comparative Law*. Oxford University Press (2019), pp. 83-84; Dumberry, *A Guide*… Op. Cit., pp. 101-102 and Vásquez-Bermúdez, *Second Report*… Op. Cit., p. 7.

[797] Gorence, *The Constructive*… Op. Cit., pp. 463-464.

[798] See, for example, Johan Lammers, General Principles of Law Recognized by Civilized Nations in Frits Kalshoven et al. (Eds), *Essays on the Development of the International Legal Order*. Brill (1980), p. 62. In the words of Special Rapporteur Vásquez-Bermúdez, this step "(…) serves to demonstrate the general recognition of a legal principle by the community of nations, and what the essential content of that principle is". Vásquez-Bermúdez, *Second Report*… Op. Cit., p. 22.

it is necessary to determine whether the legal systems thus selected possess a common understanding of the legal problem at stake (subsection 2.1.3).

2.1.1. Comparative Law Methodology

In what pertains to the first part, scholars tend to agree in that the methodological framework used to compare different legal systems (and thus, for identifying "common" principles) should be comparative law[799]. It is worth mentioning that, among the many methods of comparative law[800], "functionalism" tends to be preferred[801].

According to its most influential account (developed by Konrad Zweigert and Hein Kötz), functionalism starts from an understanding of law as an instrument for organizing social life[802]. From this perspective, legal norms and institutions can be viewed as responses or solutions to "practical problems" or "social needs".

Considering that comparisons are made against an "invariant element" (i.e., "we compare with regard to something")[803], Zweigert and Kötz propose using "social problems" as that element. Thus, those problems take on the role of "tertia comparationis", guaranteeing commensurability between institutions belonging to different jurisdictions, and thereby allowing for comparative analysis[804]. Crucially, functionalism assumes that those "problems" are shared among domestic jurisdictions[805].

Therefore, functionalism can be used for comparing the ways in which different legal systems solve a particular problem, identifying similarities and dissimilarities between them.

---

[799] See Kleinlein, *Customary International Law*… Op. Cit., p. 134; Bjorge, *Public Law*… Op. Cit., p. 537; Rumiana Yotova, *Challenges in the Identification of the "General Principles of Law Recognized by Civilized Nations": The Approach of the International Court*, 3 Canadian Journal of Comparative and Contemporary Law 1, (2017); Yee, *Article 38*… Op. Cit., p. 490; Bassiouni, *A Functional*… Op. Cit., p. 773; Gorence, *The Constructive*… Op. Cit., p. 463 and Pellet, *Article 38*… Op. Cit., pp. 769-770. In the context of the identification of GPDs applicable to sovereign insolvency, see, for example, Schier, *Towards*… Op. Cit., p. 94; Goldmann, *On the Comparative*… Op. Cit., p. 116 and Goldmann, *Necessity*… Op. Cit., 57.

[800] For a discussion of the methods of comparative law, see generally Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method*. Hart Publishing (2014).

[801] Criticizing this methodological choice, see Ellis, *General Principles*… Op. Cit., p. 959.

[802] "Law is 'social engineering', and legal science is a social science. Comparative lawyers recognize this: it is, indeed, the intellectual and methodological starting-point of their discipline". Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*. Oxford University Press (2011), p. 45.

[803] Ralf Michaels, The Functional Method of Comparative Law in Mathias Reimann and Reinhard Zimmermann (Eds.), *The Oxford Handbook of Comparative Law*. Oxford University Press (2006), pp. 372-373.

[804] "Incomparable cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function". Zweigert and Kötz, *Introduction*… Op. Cit., p. 34.

[805] See van Aaken, *"Rational Choice"*… Op. Cit., p. 136. See also Ellis, *General Principles*… Op. Cit., p. 959.

Notably, as Anne van Aaken asserts, the functional method can benefit from economics at this stage[806]. According to her, economic models depicting typical "social" problems (i.e., the "ideal types of the positive economic theory of law"[807]) can be used as "tertium comparationis", i.e., as "categories of thought that stand outside the legal systems being compared"[808]. From this perspective, economic analysis offers comparatists both a standardized framework of analysis and uniform terms which can be deployed and used for that purpose[809]. She exemplifies this potential with one particular "ideal type": the "principal-agent" problem[810]. She posits that this category puts forward a problem-type, which may arise in "(…) organizations ranging from an association to a democratic polity"[811].

Nevertheless, she warns comparatists about the indiscriminate use of economic models: "the economic theory of law" does not "provides a conceptual grid for all social problems"[812]. In this regard, she names certain areas of private law (family, inheritance, and personal law)[813]. Furthermore, she also stresses that economic concepts are more apt for the task in the context of the law of obligations and property[814].

Considering van Aaken's warnings, and as will be argued latter (subsection 2.1.3), economic models can also be used to describe the "function" of the norms being compared, when appropriate. Although this notion is not always used consistently in the literature[815], scholars tend to consider that the "function" refers to the specific nexus between normative solutions to a "common problem"[816] (the aforementioned "tertium comparationis").

---

[806] For a discussion of the relationship between economics and comparative law in general, and between economics and functionalism in particular, see Mathias Reimann, Comparative Law and Economic Analysis of Law, in Mathias Reimann and Reinhard Zimmermann (Eds.), *The Oxford Handbook of Comparative Law*. Oxford University Press (2006); Kischel, *Comparative…* Op. Cit., p. 114 et seq.; Hein Kötz, Comparative Law: A Veteran's View in Katharina Boele-Woelki and Diego Fernandez (Eds.), *The Past, Present and Future of Comparative Law*. Springer (2017), pp. 28-29 and Samuel, *An Introduction…* Op. Cit., p. 77.

[807] van Aaken, *Rational Choice…* Op. Cit., p. 144. [own translation].

[808] Id., pp. 140-141 [own translation]. See also Anne van Aaken, Vom Nutzen der Ökonomischen Theorie des Rechts für die Rechtsvergleichung in Brigitta Jud et al. (Eds), *Prinzipien des Privatrechts und Rechtsvereinheitlichung*- Wiener Tagung 13-16, September 2000. *Jahrbuch Junger Zivilrechtswissenschaftler* 2000. Boorberg-Verlag (2001), p. 148. In a similar sense, see Samuel, *An Introduction…* Op. Cit., p. 77.

[809] van Aaken, *Rational Choice…* Op. Cit., p. 136 and 162.

[810] Id., pp. 143-144.

[811] Id., p. 143. [own translation].

[812] Id., p. 145. [own translation].

[813] Id.

[814] Id.

[815] According to van Aaken, the very notion of "function" in comparative law is ambiguous: "On the one hand, it means the purpose which is to be achieved by a legal norm. On the other hand, it means the social effects of the law". van Aaken, "*Rational Choice"…* Op. Cit., p. 135 [own translation].

[816] Authors provide several concurring definitions of "function" under functionalism: "Those real or potential conflict situations which the rules under examination are intended to regulate". George Mousourakis, *Comparability, Functionalism and the Scope of Comparative Law*, 41 Hosei

Admittedly, a norm may have more than a single function[817]. In other words, a norm may be seen as a response to different problems, offering several concurring (or even competing) solutions[818]. However, this is not an unsurmountable impediment for functionalism[819], if we consider the latter – as Ralf Michaels does – as an "argumentative, purpose-oriented discipline"[820].

Thus, from Michaels' perspective, the "function" of a norm is one of its several plausible interpretations, which means that the norm is being interpreted as "performing a function"[821]. This is the reason why the "function" does not need to be proven. What is required, instead, is to convincingly construct the nexus between the "problem" and the "solution" "as a way of understanding"[822].

Through these means, the "tertium comparationis" is posited, "functional equivalents" are established, and the analyst can continue with her comparative endeavor[823].

2.1.2. Determining the Legal Systems to be Studied

The second part of the "recognition" requirement corresponds to determining the legal systems from which GPDs are to be extracted.

The literature diverges on this point. On the one hand, a group of scholars indicate that the comparative inquiry should be restricted to democratic states only[824]. On the other hand, others indicate that this limitation is not necessary. This discrepancy stems from the wording of Art. 38 (1)(c) of the Statute of the International Court of Justice (henceforth, "SICJ") which refers to the principles recognized by "civilized nations"[825]. Nevertheless, the prevailing view is that the aforementioned term has little relevance in the contemporary practice. For that reason, the majority of the literature indicates that it should not have any particular consequence in what pertains to the selection of the jurisdictions to be studied[826]. This is a consequence of the fundamental principle of

Riron 1 (2008), pp. 13-14. For Brand the function is the "social purpose" of a normative proposition. See Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 Brooklyn Journal of International Law 2 (2007), p. 409. For Ralf Michales, "functions are relations between institutions and problems". Michaels, *The Functional*… Op. Cit., p. 366.

[817] See Kischel, *Comparative Law*… Op. Cit., p. 90 and Ellis, *General Principles*… Op. Cit., pp. 959-960.

[818] See Michaels, *The Functional*… Op. Cit., p. 387.

[819] Kischell, *Comparative Law*… Op. Cit., pp. 167-168.

[820] Michaels, *The Functional*… Op. Cit., p. 371.

[821] Id.

[822] Id.

[823] See Id., p. 374.

[824] See, for example, Besson, *General Principles*… Op. Cit., pp. 37-38.

[825] Statute of the International Court of Justice in Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, T.S. No. 993.

[826] See Gideon Boas, *Public international law: Contemporary Principles and Perspectives*. Edward Elgar Publishing (2012), p. 105 and Pellet, *Article 38*… Op. Cit., p. 769.

sovereign equality recognized in the Charter of the United Nations[827]. In short, and as Dumberry puts it: "(…) all states are equal and considered to be 'civilized'"[828].

Moreover, there is wide agreement in the literature that the comparative analysis conducted to identify GPDs does not necessarily require a comparison of laws in all states around the world[829]. Instead, an inquiry based on a sample of different jurisdictions is considered sufficiently encompassing[830], provided the countries analyzed (i) be representative of the international community (featuring states belonging to all or several of the different legal families or legal traditions of the world[831], while observing an adequate geographical balance[832]), (ii) capture the "most developed" legal systems for the point of law being studied[833], and (iii) include states that may be subject to a controversy on a specific issue[834].

2.1.3. A "Common" Understanding in a Particular Point of Law

The third and final part of the "recognition" requirement refers specifically to the identification of the "common" normative propositions. This entails an assessment of whether there is a common understanding among different jurisdictions while dealing with the "social problem" previously defined. Notably, this step can also be divided into several parts, including: (a) determining the particular norms which will be studied for

[827] See Dumberry, *A Guide*… Op. Cit., p. 100; Bassiouni, *A Functional*… Op. Cit., p. 789 and Vásquez-Bermúdez, *First Report*… Op. Cit., pp. 53-55.
[828] Dumberry, *A Guide*… Op. Cit., p. 100.
[829] See Besson, *General*… Op. Cit., pp. 36-37
[830] See Bjorge, *Public Law*… Op. Cit., p. 537; Vásquez-Bermúdez, *Second Report*… Op. Cit., pp. 27-28 and Jackson, *State Instigation*… Op. Cit., pp. 400-401.
[831] In this point, scholars follow closely the "macro-comparative" literature in comparative law. This literature deals with comparisons "among entire legal systems, or families of legal systems". Mousourakis, *Comparability*… Op. Cit., p. 7. For this specific branch of comparative law, domestic legal systems of the world can be classified into a relatively discrete number of "ideal types". See Patrick Glenn, Aims of Comparative Law, in Jan M. Smits (Ed.) *Elgar Encyclopedia of Comparative Law*. Elgar (2012), p. 60.
[832] The scholarship advice to avoid overrepresentation of western European countries in order to guarantee that the principles being identified are genuinely recognized by "the community of nations". For this purpose, the literature recommends maintaining an "equitable geographical distribution" in the selection of the jurisdictions to be studied. See Raimondo, *General*… Op. Cit., pp. 55-56.
[833] The literature underscores the need to include in the sample the legal systems which are the most "mature" or the "most developed" in what pertains to the point of law being studied. See Michael Nolan and Frederic Sourgens, *Issues of Proof of General Principles of Law in International Arbitration*, 3 World Arbitration & Mediation Review 4-5 (2009), pp. 509-510 and Raimondo, *General*… Op. Cit., p. 56. Although as explained by Zweigert and Kötz this may also have a "representativeness" inclination (since most "mature legal systems are often adopted or extensively imitated by others"), Zweigert and Kötz, *Introduction*… Op. Cit., pp. 40-41, this recommendation seems to have its case on the search for the "better solution" or "better law" for the problem at hand. See Nolan and Sourgens, *Issues of Proof*… Op. Cit., p. 510.
[834] In this context, the literature advice to include in the sample the law of states that may have a nexus with the dispute to which the principles may be applied to. See Nolan and Sourgens, *Issues of Proof*… Op. Cit., pp. 509-510.

this purpose, (b) identifying their "ratio" and (c) assessing the commonalities among them.

First, in what pertains to the determination of the norms to be studied, the literature disagrees. For one group of commentators, GPDs can only be identified from domestic norms of a "wide-ranging"[835] or indeterminate scope[836]. In the view of this scholarship, only norms that are "more abstract" than rules can be considered for this purpose[837]. For others, the inquiry is not limited to "general" or abstract norms, but it can also encompass specific and even "technical" rules[838]. Notably, this second understanding has been endorsed by international courts and tribunals[839]. For example, according to Dordeska, the "general principles" identified through the jurisprudence of the ICJ considers both "abstract" and "specific" norms[840]. The same can be said for the practice of international investment tribunals[841]. For those reasons, the discussion that follows in this and in the next *Chapter* considers that GPDs can be extracted from and include both "narrow" and "broad" types of norms.

Second, there is agreement in the scholarship that the comparative analysis conducted to identify GPDs is not concerned with textual or historical similarities between norms belonging to different legal systems[842]. On the contrary, according to commentators, this endeavor is aimed at grasping the "ratio legis"[843] or the "rationale"[844] behind those norms.

Of note, the "ratio" can be understood as the "purpose" of the norm or norms at stake[845]. For legal scholars, the determination of this "purpose" is a matter of interpretation[846]

---

[835] See Pellet, *Article 38*… Op. Cit., p. 767.
[836] See Voigt, *The Role*… Op. Cit., p. 9.
[837] See Yotova, *Challenges*… Op. Cit., pp. 278-280 and Kotuby and Sobota, *General Principles*… Op. Cit., p. 19.
[838] See Patrick Dumberry, *A Guide*… Op. Cit., pp. 124-125. In a similar sense see Vásquez-Bermúdez, *First Report*… Op. Cit., pp. 46 et seq. Holger Schier, who identifies several GPDs applicable for sovereign debt restructuring shares this view. In his opinion: "The existence of a general principle does not require the generality of the legal idea underlying a legal rule, but rather the generality of its application". Schier, *Towards*… Op. Cit., pp. 101-102.
[839] "The opinions of courts do not draw a distinction between broad and narrow legal principles". Bassiouni, *A Functional*… Op. Cit., p. 812.
[840] See Dordeska, *General Principles*… Op. Cit., pp. 63 et seq. In her own words: "In fact, general principles are predominantly composed of "rules" and not "principles"". Id., p. 71.
[841] See, for example, El Paso v. Argentina, Op. Cit., para 622.
[842] See Goldmann, *Responsible*… Op. Cit., p. 10.
[843] See Raimondo, *General Principles*… Op. Cit., p. 49 and Dumberry, *A Guide*… Op. Cit., pp. 122-123.
[844] See Nolan and Sourgens, *Issues of Proof*… Op. Cit., p. 519 and Goldman, *Necessity*… Op. Cit., p. 14.
[845] See Damiano Canale and Giovanni Tuzet, *What is the Reason for this Rule? An Inferential Account of the Ratio Legis*, 24 Argumentation (2010), p. 197 and Maciej Dybowski, Articulating Ratio Legis and Practical Reasoning in Verena Klappstein and Maciej Dybowski, *Ratio Legis: Philosophical and Theorical Perspective*. Springer (2018).
[846] See Canale and Tuzet, *What is*… Op. Cit., p. 202.

(particularly, of teleological or "purposive" interpretation)[847]. Furthermore, the "ratio" can be identified from two different perspectives[848]. On the one hand, it can be grasped by addressing the "subjective" intentions of the legislator. On the other hand, it can be captured by considering the "social" purpose of the norm (or of the group of norms) instead[849].

Let me focus, specifically, on the "social" purpose of the norm. As can be noted, this notion is connected to that of "function" developed by functionalism. From this perspective, a norm's "ratio" corresponds to its "function". As stated above, the "function" of a norm (or group of norms) refers to the connection between a "solution" and a "problem". As it is true for comparative endeavors, a norm may have more than one "function", and thus, more than one "ratio"[850]. This is why scholars indicate that the "way in which the ratio legis is inferred can be highly controversial"[851]. Nevertheless, it can be posited that the way out of this conundrum is the same in both cases: Asserting the "function" is an argumentative effort, both for the purposes of comparing legal systems and for the task of capturing the "ratio" of the norms being compared[852].

For the same reason, economics can also aid the interpreter in the construction of one or more norms' "ratio". As is the case for the "tertia comparationis", the economic science offers "ideal types" here as well, which can be employed for proposing and defining the "social" problem at stake. However, the previously noted caveats put forward by van Aaken apply here too, with significant force. In short: not all "social" problems can be correctly understood from the perspective of economic models and, therefore, economics may not be able to help the interpreter in all circumstances for the purpose of construing a norms' "ratio". By way of an example, most human rights norms cannot be adequately explained through those means[853].

Hence, the "social purpose", and therefore the "ratio legis" of a norm or group of norms, can be understood as the problem-solution nexus. In other words, when we ask about the "purpose" of a norm or group of norms (which is the issue at stake in the identification of GPDs), we ask whether domestic jurisdictions provide a *similar* answer to a *common* problem. From this perspective, it is the conjunction of both (the "problem" and the "answer") that can give us the "ratio".

The final stage of the "recognition" requirement corresponds to the comparison of the legal systems under scrutiny. If different jurisdictions offer similar solutions to similar problems (hence sharing an underlying rationale), one or more common normative

[847] See Lewis Kornhauser, Choosing Ends and Choosing Means: Teleological Reasoning in Law in Colin Aitken et al. (Eds.), *Handbook of Legal Reasoning and Argumentation*. Springer (2018), p. 401 and pp. 405-406.
[848] See Canale and Tuzet, *What is*… Op. Cit., p. 202.
[849] See Id., p. 202.
[850] Discussing this issue from the perspective of GPDs, see Ellis, *General Principles*… Op. Cit., pp. 959-960.
[851] Canale Tuzet, *What is*… Op. Cit., p. 207.
[852] Nevertheless, it is worth mentioning that Kornhauser seems to suggest that the function needs to be proven. See, Kornhauser, *Choosing Ends*… Op. Cit., p. 401.
[853] I am grateful to professor van Aaken for stressing this point.

propositions can be built. Those propositions encompass the normative solutions and the problems they respond to, which need to be subjected to the next stage of the analysis: the "extrapolation" requirement.

2.2. The "Extrapolation" Requirement

As stated above, the second step for identifying GPDs corresponds to "extrapolation" analysis. This requirement adds one further implication: Not all legal norms that may be found in domestic legal systems can be elevated to govern the conduct of states. Special Rapporteur Vásquez-Bermúdez notes that the scholarship tends to refer to this assessment "(…) albeit in broad terms and often without entering into the details of what it precisely entails"[854].

For example, it seems to be generally agreed that "extrapolation" requirement consists of determining if the principle can be "elevated"[855], "transitioned"[856], "transposed"[857], "applied"[858], or if it is "suitable"[859] for being applied in international law. Considering the differences between the domestic and international spheres, some scholars also indicate that "extrapolation" entails that any principle arrived at by this method needs to be "adapted"[860], "transformed"[861] or "modified" to "suit the particularities" of the international legal order[862]. However, these doctrinal constructs tell us little about how the "extrapolation" analysis itself is to be conducted. Fortunately, a part of the scholarship has made several suggestions to that end.

The first methodological recommendation in this regard refers to conducting a "compatibility test"[863]. Under this test, one needs to determine if the normative propositions previously identified are compatible with "the framework and objective of

---

[854] Vásquez-Bermúdez, *Second Report*… Op. Cit., p. 23.
[855] See Dordeska, *General Principles*… Op. Cit., p. 114.
[856] See Nolan and Sourgens, *Issues of Proof*… Op. Cit.; Dumberry, *A Guide*… Op. Cit., p. 96 and Yotova, *Challenges*… Op. Cit., p. 273.
[857] See Pellet, *Article 38*… Op. Cit., p. 766 and Jackson, *State Instigation*… Op. Cit., p. 399.
[858] See Vásquez-Bermúdez, *First Report*… Op. Cit., p. 51. See also James Crawford, *Brownlie's Principles of Public International Law* (8th Edition). Oxford University Press (2012), p. 16.
[859] Elias and Lin, *General Principles*… Op. Cit., p. 23.
[860] Gorence, *The Constructive*… Op. Cit., pp. 463-464; Gazzini, *General*… Op. Cit., p. 107; Raimondo, *General Principles*… Op. Cit., p. 59 and El paso v. Argentina, op cit.
[861] Bjorge, *Public*… Op. Cit., pp. 38-539; Dumberry, *A Guide*… Op. Cit., pp. 128-129.
[862] See Kotuby and Sobota, *General Principles*… Op. Cit., pp. 18-27 and Michelle Biddulph and Dwight Newman, *A Contextualized Account of General Principles of International Law*, 26 International Law Review 2 (2014), p. 299. According to Boas: "(…) a principle may not, by its nature, be translatable into international law, at least without adjustment". Boas, *Public International Law*… Op. Cit., p. 106. Nevertheless, the practice of international courts and tribunals is not consistent in this regard. For a discussion, see Vásquez-Bermúdez, *First Report*… Op. Cit., p. 66.
[863] See Besson, *General Principles*… Op. Cit., p. 37; Giorgio Gaja, General Principles in the Jurisprudence of the ICJ in Mads Andenas et al. (Eds.), *General Principles and the Coherence of International Law*. Brill (2019), p. 39; Vásquez Bermúdez, *Second Report*… Op. Cit., pp. 23 et seq; Pellet, *Article 38*… Op. Cit., pp. 767 et seq; Gorence, *The Constructive*… Op. Cit., p. 489 and Bjorge, *Public Law*… Op. Cit., pp. 538-539.

the international legal order"[864]. Specifically, "compatibility" is to be measured against both existing rules[865] and "fundamental principles"[866] of international law. State practice and the decisions of international courts and tribunals have also been mentioned as relevant benchmarks in this regard[867]. Special Rapporteur Vásquez-Bermúdez indicates that this part of the "extrapolation" analysis is intended to ensure that the principle is "(…) capable of existing within the broader framework of international law"[868]. Therefore, the application of this test makes salient that it would not be possible to elevate domestic norms contradicting the very structure of international law to the international level[869].

The second methodological recommendation in the context of the "extrapolation requirement" refers to the deployment of analogical reasoning[870]. Specifically, scholars note that international courts and tribunals tend to recur to analogies when importing norms from domestic legal systems[871]. In this context, an argument from analogy applies a conclusion drawn from a "source" (in this case, domestic jurisdictions) to a "target" (here, international law) on the basis that the two can be considered "relevantly similar"[872].

---

[864] Besson, *General Principles*… Op. Cit., p. 37.

[865] Gaja, *General Principles*… Op. Cit., p. 39. Gorence indicates that the norms against which the "compatibility" of the principle is being measured need to be codified. See Gorence, *The Constructive*… Op. Cit., p. 489. Vásquez-Bermúdez indicates that treaty-norms can be used for this purpose. See Vásquez-Bermúdez, *Second Report*, p. 32.

[866] Vásquez-Bermúdez, *Second Report*… Op. Cit., p. 23. According to Vásquez-Bermúdez, these principles "(…) include (…) the principle of sovereignty, the notion of territorial sovereignty, the basic concept of continental shelf entitlement, and the principles set out in the Friendly Relations Declaration". Id., p. 26. According to Dordeska, this particular test was also applied by the PCIJ in the "Mavrommatis" case. See Dordeska, *General Principles*… Op. Cit., pp. 200-201 and Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. B) Np. 3 (Aug. 30), p. 16.

[867] See Bücheler, *Proportionality*… Op. Cit., p. 67. Commenting on this issue from the perspective of GPDs applicable to sovereign insolvency, see, for example, Goldmann, *Necessity*… Op. Cit., pp. 17-19 and Goldmann, *Responsible*… Op. Cit., p. 12.

[868] Vásquez-Bermúdez, *Second Report*… Op. Cit., p. 23.

[869] In the words of Allain Pellet: "A clear example of such an impossible transposition is given by the international principle of consent to jurisdiction: while, in the domestic sphere, the fundamental rule is that any dispute may be brought before a judge, in international law, absent an express consent of the respondent State, the opposite principle prevails". See Pellet, *Article 38*… Op. Cit., p. 767. See also Goldmann, *Responsible*… Op. Cit., p. 8.

[870] See Dumberry, *A Guide*… Op. Cit., p. 95 and Raimondo, *General Principles*… Op. Cit., pp 58-59. Discussing this in the context of GPDs applicable to sovereign insolvency see, for example, Bohoslavsky and Espósito, *Principles Matter*… Op. Cit., pp. 77 et seq; Goldmann, *Responsible*… Op. Cit., p. 12 and Goldmann, *On the Comparative*… Op. Cit., p. 120.

[871] See, for example, Crawford, *Brownlie*'s… Op. Cit., p. 16 and Aust, pp. 54-55. Yotova indicates that analogical reasoning has played a significant role in the dissenting opinions of the ICJ dealing with GPDs. See Yotova, *Challenges*… Op. Cit., p. 317.

[872] See Canale and Tuzet, *What is*… Op. Cit., p. 199; Jefferson White, Analogical Reasoning in Dennis Patterson (Ed.), *A Companion to Philosophy of Law and Legal Theory* (2nd Edition). Wiley Blackwell (2010), p. 572; Ann Hertogen, *The Persuasiveness of Domestic Law Analogies in Internationa Law*, 29 European Journal of International Law 4 (2018), p. 1127; Bartosz Brozek,

Of note, a group of scholars warns of the unrestricted use of this type of reasoning for the purpose of elevating domestic principles to the international level[873]. As one commentator puts it: "(…) the general development of international law is a never-ending battle for control of analogy"[874].

Consequently, commentators often mention that the differences between the domestic and international spheres may preclude the possibility of "extrapolation" in certain cases[875]. The most often noted dissimilarities between the domestic and international spheres revolve around the "decentralized" structure of the latter, which entails the "absence of a central organ with legislative authority"[876], the "lack of a universally compulsory judicial tribunal"[877] and the "special status of states as subjects of international law"[878]. Notably, similar warnings have been made by international judges and arbitrators[879].

Consequently, any attempt to "extrapolate" domestic principles to the international level needs to account for these differences. What matters at this point, however, is that the success the analogy does not require "identity" between the "source" and the

Analogical Arguments in Giorgio Bongiovanni et al. (Eds), *Handbook of Legal Reasoning and Argumentation*. Springer (2018), pp. 368 et seq. Following Robert Alexy, Ann Hertogen highlights that the logical structure of an argument from analogy is the following: "(i) If A then B; ii) If C is similar to A; iii) Therefore, if C then B". Hertogen, *The Persuasiveness*… Op. Cit., p. 1133 footnote 36.

[873] See Bjorge, *Public Law*… Op. Cit., p. 540; Dumbery, *A Guide*… Op. Cit., pp. 130-131 and Giorgio Gaja, "*General Principles of Law",* Max Planck Encyclopedia of Public International Law, [last accessed 15.06.2019], §7.

[874] Martins Paparinskis attributes this proposition to Vaughan Lowe. See Martins Paparinskis, Analogies and Other Regimes of International Law in Zachary Douglas et al. (Eds.), *The Foundations of International Investment Law: Bringing Theory into Practice*. Oxford University Press (2014), p. 74.

[875] See Vásquez-Bermúdez, *Second Report*… Op. Cit., p. 22 and Dumbery, *A Guide*… Op. Cit., pp. 130-131.

[876] Bjorge, *Public Law*… Op. Cit., p. 539. See also Gaja, *General Principles*… Op. Cit., §7.

[877] Raimondo, *General Principles*… Op. Cit., p. 61.

[878] Id., p. 63. See also, Dumberry, *A Guide*… Op. Cit., pp. 130-131.

[879] Considering these differences, Sir Arnold McNair highlighted in its often-quoted Separate Opinion in the International Status of South West Africa case that "the way in which international law borrows from this source [i.e., "general principles"] is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules". Advisory Opinion, ICJ Rep 1950 128, International Court of Justice, p. 148. In a similar sense, Judge Gerald Fitzmaurice indicated in his Separate Opinion in the Barcelona Traction case: "it is scarcely less important to bear in mind that conditions in the international field are sometimes very different from what they are in the domestic, and that rules which these latter conditions fully justify may be less capable of vindication if strictly applied when transposed on to the international level". Case Concerning the Barcelona Traction, Light and Power Company Limited, Judgement 5 February 1970, Second Phase, ICJ Report 1970 337, International Court of Justice, p. 67.

"target"; "similarity" suffices[880]. As Johan Lammers puts it, the application of norms extracted from domestic legal systems in international law involves:

> *"(…) that the national situations to which the principle initially applied, and the interstate situations to which they are to be applied, are sufficiently similar to justify the application of those principles at the international level"*[881].

At this point, two crucial questions arise. First, how do we know that the "source" and the "target" are "sufficiently" or "relevantly" similar for the purposes of identifying GPDs? Secondly, which properties are to be considered for the purposes of this "similarity" assessment?[882]. Admittedly, these are complex problems[883]. For example, in what pertains to the first question, Fabián Raimondo offers no criteria other than the "experience" of adjudicators and the "circumstances of the case"[884]. At the same time, in answering the second question, Special Rapporteur Vásquez-Bermúdez suggests that "(…) conditions [must] exist for the adequate application of the principle in the international legal system"[885].

None of these answers is entirely satisfactory for the purposes of elevating domestic principles to the international level. On the one hand, Raimondo's suggestion does not offer any particular guidance in that regard. On the other hand, Vásquez-Bermúdez's seems to be correct upon initial reading. However, it remains incomplete, since the analyst is still deprived of concrete tools to judge which "conditions" need to "exist" in the international sphere warranting "extrapolation".

It is submitted here that Michael Nolan and Frederic Sourgens's can be considered the most adequate proposal in this regard. According to these authors, the differences and similarities between the domestic and international legal order are to be assessed from a functional perspective. Thus, in their view, the "significancy" of the (dis)similarities between both spheres[886] and the relevant "properties" to be considered in this context are related to the "functions" which the norms serve under domestic law and the

---

[880] "(…) analogy does not require that institutions be identical". Raimondo, *General Principles*… Op. Cit., p. 70. In a similar sense, see Hertogen… *The Persuasiveness*… Op. Cit., p. 1133.

[881] Lammers, *General Principles*… Op. Cit., p. 62. In the same sense, see Raimondo, *General Principles*… Op. Cit., pp. 58-59 and p. 70. "General principles of law derived from national legal systems are suitable for application in international law insofar as there is a relevant analogy between national and international law on a particular legal issue". Id., p. 70.

[882] As Jefferson White notes, it is necessary to "(…) individuate the properties to which the similarity claim refers" since "any two objects are alike in an infinite number of respects". White, *Analogical Reasoning*… Op. Cit., pp. 572-573.

[883] "There are no criteria specifying how much or what kind of similarity is sufficient to uphold analogies in general or a particular analogy". Raimondo, *General Principles*… Op. Cit., p. 59.

[884] Id.

[885] Vásquez-Bermúdez, *Second Report*… Op. Cit., p. 23. Similarly, Matthias Goldmann (whose work served as inspiration for this *Thesis*) indicates that it would not be possible to elevate norms dependent on the existence of particular institutions of municipal jurisdictions (such as those related to parliamentary practice) to the international level. See Goldman, *Responsible*… Op. Cit., p. 8.

[886] In their own words: "the [domestic] principle needs to be practically relevant to the question of international law at bar". Nolan and Sourgens, *Issues of Proof*… Op. Cit., p. 522.

"functions" that they may assume once transposed to international law[887]. Notably, this is typical in the deployment of arguments from analogy. In that context, the criteria to assess the "relevance" of the (dis)similarities are given by the "ratio legis" of the norms in question[888] which, as previously stated, can be equated to their "functions".

Therefore, the appropriateness of the analogy is to be assessed from a functional perspective. Following from this point of view, "appropriateness" relates to a particular condition: that the problem-solution nexus (i.e., the "function" of the norms to be extrapolated) hold in the international context. This can be divided into two sub-conditions: (a) that the international and domestic sphere share a similar problem which can be solved at the international level through the norms extracted from domestic jurisdictions, and that (b) the similarities between the domestic and international sphere are significant enough to render the analogy plausible.

Crucially, this refinement of the methodology to be used for the purpose of "extrapolating" domestic norms into the international realm makes the case for the application of GPDs stronger. For example, Jaye Ellis criticizes the way in which the scholarship has proposed to identify and transpose these norms on several grounds[889]. One of her most important objections relates to the problems that may arise in the process of transplanting a principle from the national to the international context. According to her, since norms are context-dependent, a norm which may have a particular effect in a domestic context may have very different effects in an international scenario[890]. As can be noted, Nolan and Sourgens's suggestions mitigate these risks. For them, "transposability" depends on the survival of the "function" of the norms once elevated to the international sphere. As stated above, this requires justification through analogical reasoning and functional analysis.

2.3. The Methodology to be Used for the Identification of General Principles of Domestic Law

The methodology to be employed in this *Thesis* for the identification of GPDs applicable to sovereign insolvency can be summarized as follows:

The first step (i.e., satisfying the "recognition" requirement) is to verify whether a principle can be found in a representative sample of domestic jurisdictions. This requires analyzing whether those legal systems exhibit a common understanding on a particular point of law. At this stage, "functionalism" can be employed to guarantee the commensurability of the norms belonging to different jurisdictions. For that purpose, "tertia comparationis" can be defined, in some cases, with the help of economics. Furthermore, in certain contexts, economics can also help to define the "function" of the norms at stake. If the "function" is understood as the problem-solution nexus, economic models can also be relied upon to capture the "social purpose" of one or more norms, and

[887] "(…) the functional relevance of the principle to the question at bar is facially obvious". Id., p. 522.
[888] See Canale and Tuzet, *What is*… Op. Cit., pp. 197-198. In their own words: "(…) the relevant property is not relevant per se but only in the light of the ratio". Id., p. 199.
[889] See Ellis, *General Principles*… Op. Cit., pp. 958 et seq.
[890] See, Id., p. 967.

thus, in the construction of their "rationale". If, after comparison, domestic jurisdictions provide a *similar* answer to a *common* problem (therefore sharing a common "rationale"), one or more common normative propositions can be built. Those propositions encompass the normative solutions and the problems to which they respond.

The second step is to assess whether the normative propositions thus built are capable of being elevated from the domestic to the international sphere (the "extrapolation" requirement). This step can be divided into several parts. First, a "compatibility test" is to be performed. According to this test, only normative propositions which do not contradict the structure, the principles and the rules of international law can be considered as suitable candidates for being transposed. Secondly, the analyst needs to recur to analogical reasoning. At this stage, one needs to account for the (dis)similarities between the domestic (the "source") and international sphere (the "target"). Particularly, a successful argument ought to justify that, in what pertains to the problem at stake, both spheres are "relevantly" or "sufficiently" similar. From this perspective, what is significant is that the "function" of the domestic norms previously extracted holds in the international context. Two sub-conditions follow from this: (a) that the international and domestic sphere share a similar problem which can be solved at the international level through the norms extracted from domestic jurisdictions, and that (b) the similarities between the domestic and international sphere are significant enough to render the analogy plausible.

3. A Comparative Survey of Domestic Corporate Reorganization Regimes

In this section, I take the first steps towards justifying the GPDs in the context of sovereign debt restructuring. Concretely, I start by addressing the selection of countries to be studied (subsection 3.1), then I will determine which institutions within those countries will be compared (subsection 3.2), and I will finally conduct a brief comparative survey stressing the commonalities among them (subsection 3.3).

3.1. Building a Sample of Domestic Jurisdictions

Considering the criteria discussed in subsection 2.1.2, I decided to study the following domestic jurisdictions[891]: Argentina, China, Germany, the United States and the United Kingdom. As can be noted, this sample features countries of North and South America, Europe and Asia, thus achieving an adequate degree of geographical diversity. Furthermore, it also captures different "legal families" (featuring countries classified as belonging to Civil, Common, Far Eastern and Germanic Law)[892], thus guaranteeing an appropriate degree of representativeness in this regard[893].

Additionally, this sample is also aimed at featuring the "most developed" jurisdictions in what pertains to corporate insolvency. With this purpose in mind, I checked the quality of the insolvency legislations of each state in the sample against the "Resolving Insolvency Ranking" developed by the World Bank's *Doing Business Report*[894]. From this perspective, the selection of Germany (ranked #4), the United States (ranked #3) and the United Kingdom (ranked #14) enables us to consider the leading jurisdictions in the area of corporate insolvency.

Finally, the sample was also built considering the controversy criterion. Let me recall that this criterion allows for the inclusion of states in the sample that may be subjected

---

[891] Although the work of Schier also features the United Kingdom, Germany and Argentina among the countries studied (it also includes France and Indonesia), the main differences with this *Chapter* belong to the criteria used to the selection of these countries. Particularly, Schier only addresses representativeness from the point of view of legal families. See Schier, *Towards a Reorganisation…* Op. Cit., pp. 112-121.

[892] I follow here the taxonomy developed by Zweigert and Kötz. See Jaako Husa, Legal Families, in Jan M. Smits (Ed.) *Elgar Encyclopedia of Comparative Law*. Elgar (2012), p. 387. It is important to note that the macro-comparative literature considers other taxonomies as well. The most similar to the one proposed by Zweigert and Kötz is the one developed by JuriGlobe which – at difference with the one previously mentioned – classifies China as a "mixed legal system" featuring elements of Civil and Customary Law instead as belonging to "Far Eastern Law". See JuriGlobe – World Legal Systems Research Group, available at http://www.juriglobe.ca/eng/ [last accessed 02.11.2019].

[893] It is noteworthy that this sample is even more representative taking into account more recent taxonomies, such as the one developed by Mathias Siems. Siems classifies the legal systems of the world in four categories including "European Legal Culture", "Mixed Legal Systems", "Rule by Law" and "Weak Law in Transition countries". The sample of countries selected covers all those categories. See Mathias Siems, *Varieties of Legal Systems: Towards a New Global Taxonomy*, 12 Journal of Institutional Economics 3 (2016).

[894] The World Bank build this ranking by sorting insolvency legislations according to creditors' recovery rates and to the overall strength of their systems. See World Bank, Resolving Insolvency Methodology, available at: https://www.doingbusiness.org/en/methodology/resolving-insolvency [last accessed 14.09.2019].

to or whose law may be taken into account in the context of a legal dispute on the issue at stake, in this case, sovereign debt restructuring. The United States, the United Kingdom and Germany are among the financial centers of the world and thus, most of the sovereign bonds are governed by their domestic law[895]. A similar reason motivated the inclusion of China, which has acquired an important position as an official international lender[896]. Naturally, this is not to say that foreign sovereign debtors are allowed to file for bankruptcy protection under those jurisdictions (because they are not). However, examining how those countries deal with corporate insolvency serves as a point of departure for the construction of the GPDs applicable to sovereign insolvency in the international scenario. Finally, Argentina was also included in view of its prominence in sovereign debt litigation on the side of debtors.

The following table summarizes the criteria discussed in this subsection.

Country	Legal Family	Insolvency Ranking	Region	Dispute-Nexus
Argentina	Civil Law	104	LAC	Default/Restructuring
China	Far Eastern	61	Asia	Emergent Official Lender
Germany	Germanic Law	4	Europe	Financial Center
England	Common Law	14	Europe	Financial Center
United States	Common Law	3	North America	Financial Center

Table 1: Main Characteristics of the Jurisdictions Studied.

3.2. Determining the Institutions and the Legal Norms to be Compared

As previously indicated, a preliminary task is required before conducting the comparative survey: to determine which legal norms and institutions from the selected jurisdictions will serve as the "empirical material" for the study. For this purpose, I posed the following "functional-institutional" question: Which institutions within the domestic legal systems under scrutiny perform an "equivalent function"[897] when a debtor cannot fully satisfy the claims of its creditors? In other words, it is necessary to determine first which institutions serve as a "collective response to a debtor's general

[895] According to the IMF, as of 2015, from the total stock of outstanding sovereign bonds issued in the world and which are governed by foreign law, a 50 percent are governed by New York law and a 46 percent are governed by English law. See International Monetary Fund, *Progress Report on Inclusion of Enhanced Contractual Provisions in International Sovereign Bond Contracts* (2015). Available at https://www.imf.org/external/np/pp/eng/2015/091715.pdf [last accessed 14.09.2019].

[896] According to a study conducted by Sebastian Horn et al., "the government of China holds more than five trillion USD of debt towards the rest of the world (6% of world GDP), up from less than 500 billion in the early 2000s (1% of the world GPD)". Sebastian Horn, Carmen Reinhart and Cristoph Trebesch, *China's Overseas Lending, Kiel Working Paper* (2019). Available at: https://www.ifw-kiel.de/fileadmin/Dateiverwaltung/IfW-Publications/Christoph_Trebesch/KWP_2132.pdf [last accessed 14.09.2019].

[897] In the words of Esin Örücü, "the functional-institutional approach [to comparative law] answers the question 'which institutions in system B performs an equivalent function to the one under survey in system A?". Esin Örücü, Methodology of Comparative Law, in Jan M. Smits (Ed.) *Elgar Encyclopedia of Comparative Law*. Elgar (2012), p. 443.

default"[898]. The answer to this question lies in insolvency law and in insolvency proceedings.

It is usually acknowledged that domestic legal systems offer two "main types" of insolvency proceedings for corporations: liquidation and reorganization[899]. Liquidation proceedings involve the realization of the assets of the debtor to repay its creditors in a pre-defined order[900], and entail its dissolution as a legal entity[901]. On the other hand, reorganizations, are aimed at rehabilitating the distressed company (when possible) by the means of an arrangement (usually termed "restructuring plan") negotiated between the debtor and its creditors. Under reorganization proceedings, the debtor is not necessarily dissolved[902]. Furthermore, it is also important to note that some of the legal systems under study also establish insolvency proceedings for individuals and for sub-national public entities (such as municipal and regional governments).

From all those different types of insolvency regimes (namely, corporate liquidation and reorganization, individual insolvency and insolvency proceedings for public entities such as municipalities), I decided to limit this study to corporate reorganization law[903], based on the following reasons. First, investigating liquidation proceedings was discarded in view of the "extrapolation" requirement. As was previously mentioned, "extrapolation" demands that the normative propositions extracted from a comparative survey be compatible with the structure of international law and the values embedded in it. As may have been noted, it is practically impossible to consider selling off all the

---

[898] Jay Lawrence Westbrook et al., *A Global View of Business Insolvency Systems*. Martinus Nijhoff (2010), p. 3. Similarly, see Bohoslavsky and Espósito, *Principles*… Op. Cit., pp. 78-79 and Bohoslavsky, *Responsibility*... Op. Cit., p. 506.

[899] Westbrook et al., *A Global*... Op. Cit., p. 26.

[900] See Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd Edition). Cambridge University Press (2009), pp. 22-23.

[901] Westbrook et al., *A Global*… Op. Cit., p. 30.

[902] As Rolef de Wejis explains, reorganization proceedings can also involve, in certain jurisdictions and under specific conditions, the dissolution of the company as a legal entity. However, there seems to be an agreement in that "restructuring" and "reorganization" proceedings are aimed at saving the company from liquidation. See Rolef de Wejis, *Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool & Anticommons*, International Insolvency Institute Twelfth Annual International Insolvency Conference (2012), p. 6. Note also that the same consensus is expressed by Art. 2(2) of the Proposal for a Restructuring Directive by the European Union. See European Commission, Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU COM (2016) 723 final.

[903] Also choosing corporate reorganization regimes for the purposes of identifying GPDs see: Schier, *Towards*… Op. Cit., p. 111 and Bohoslavsky, *Responsibility*… Op. Cit., p. 506 and Bohoslavsky and Espósito, *Principles Matter*… Op. Cit., pp. 84-85. It is worth mentioning that, in some of his works, Goldmann tends to refer to the source (from which GPDs are to be identified) as "domestic bankruptcy laws" and "domestic insolvency laws" without properly distinguishing between reorganization and liquidation procedures. See, for example, Goldmann, *Putting your Faith*… Op. Cit., p.131 and Goldmann, *Responsible*… Op. Cit., pp. 39-40.

assets of a country if it becomes insolvent or defaults on its debts[904] (particularly, bearing in mind that the "main asset" of a state is its population), let alone dissolving it as a legal entity[905]. Hence, the norms flowing from liquidation regimes (and the common normative propositions underlying those rules) will not be considered in this survey[906].

Secondly, I decided to avoid studying individual bankruptcy proceedings due to their extensive focus on one specific issue: procuring debt relief for the debtor[907]. Although this rationale may play an important part in sovereign insolvency, the purpose of sovereign debt restructuring cannot be adequately addressed through this lens.

Thirdly, I also decided to discard a comparative study of insolvency proceedings for sub-national entities since only a limited number of countries provide comprehensive regulations in this regard[908]. Although unanimity among domestic jurisdictions is not

---

[904] In the words of Robert Rasmussen: "(…) all acknowledge the fact that nations cannot be liquidated in the way that business can". Robert Rasmussen, *Integrating a Theory of the State into Sovereign Debt Restructuring* 22 Vanderbilt University Law School Law & Economics Working Paper Number 04-16 (2004), p. 7. See also Paulus, *Some Thoughts…* Op. Cit., p. 541. Schier, who also relies in a comparison of domestic corporate reorganization regimes for extracting GPDs applicable to sovereign debt restructuring indicates: "Liquidation and distribution of a people's government is out of the question". Schier, *Towards…* Op. Cit., p. 111.

[905] Traditionally, international law has maintained that a state ceases to exist when one or more of the "classical" elements of statehood (namely, population, territory or government) disappear "in fact". For a discussion, see for example, Pablo Moscoso de la Cuba, *The Statehood of "Collapsed" States in Public International law*, 29 Agenda Internacional (2011). However, extinction is not automatic. Therefore, in some cases, even the disappearance of all the aforementioned elements at the same time may not lead to its legal disappearance. See James Crawford, *The Creation of States in International Law* (Second Edition). Oxford University Press (2007), pp. 700-701. Furthermore, the law of nations considers state extinction as an "exception" against which there is a "strong presumption". See, Ineta Zieme, "*State, Extinction of",* Max Planck Encyclopedia of Public International Law, [last accessed 15.06.2019], § 2.

[906] Also taking this approach see, for example, Schier, *Towards…* Op. Cit., p. 111; Bohoslavsky and Espósito, *Principles Matter…* Op. Cit., p. 84; von Bogdandy and Goldmann, *Sovereign Debt…* Op. Cit., pp. 64-65 and Bohoslavsky, *Responsibility…* Op. Cit., p. 506.

[907] Jan-Ocko Heuer summarizes the objectives of individual insolvency law in the following fashion: "In the current wave of consumer insolvency legislation, the debt discharge has been almost universally accepted as the primary aim of personal bankruptcy. By contrast, the other aim of bankruptcy – i.e., providing a coercive and collective mechanism to resolve the common-pool problem than an insolvent debtor's assets are usually insufficient to cover all creditor claims – is often of little practical relevance in proceedings involving consumer debtors, because in the majority of cases there are no assets (and earnings) available for distribution among creditors". Jan-Ocko Heuer, Consumer Insolvency Proceedings in Europe: An Introduction to Consumer Over-Indebtedness and Debt Relief, in Thomas Kadner, Juris Bojārs and Veronica Sajadova (Eds.), *A Guide to Consumer Insolvency Proceedings in Europe*. Elgar (2019), p. 9.

[908] "Only few countries provide regulations that deal with sub-national insolvencies". Katharina Herold, *Insolvency Frameworks for Sub-National Governments*, OECD Working Papers on Fiscal Federalism No. 23 (2018), p. 13. Available at https://www.oecd-ilibrary.org/taxation/insolvency-frameworks-for-sub-national-governments_f9874122-en [last accessed 16.09.2019]. See also Lili Lu and Michael Waibel, *Sub-national Insolvency: Cross-Country Experiences and Lessons*, World Bank Policy Research Working Paper 4496 (2008). Available at http://documents.worldbank.org/curated/en/332531468161672312/pdf/wps4496.pdf [last accessed 16.09.2019].

required for ascertaining the existence of a GPD, it seems that a solid consensus susceptible of extrapolation to the international scenario has not yet been reached.

Finally, as some of the prior literature has done[909], I decided to focus exclusively on corporate reorganization law, due to its similarities with the current practice of sovereign debt restructuring and its prima-facie compliance with the first element of the "extrapolation" requirement. Particularly, both sovereign debt restructuring, and corporate reorganization share an essential point: The obligations at stake are renegotiated with the purpose of rehabilitating the debtor. Furthermore, all the consulted reorganization regimes consider at least the possibility that the company's management remain in control of the business: a feature which makes them compatible with the values embedded in public international law (see section 5). Nevertheless, and as will be discussed in the following *Chapter*, this is not equivalent to saying that the analogy is perfect, especially bearing in mind that corporate restructurings always take place in the shadow of the enterprises' liquidation, which does not apply in the sovereign debt context.

The following table summarizes the reasons justifying the selection of corporate reorganization law as the basis for this study.

Insolvency Regime	Reasons
Corporate Liquidation	Not compatible with International Law.
Corporate Reorganization	Prima facie compatible with International Law.
Individual Insolvency	Focuses primarily on debt relief, which is not the only goal of sovereign debt restructuring.
Sub-national insolvency	Does not meet the recognition requirement.

Table 2: Reasons Justifying the Selection of Corporate Reorganization Regimes.

3.3. The Comparative Survey

As stated before, the comparative survey conducted in this subsection specifically refers to legislation regulating corporate reorganization. In this regard, it is important to mention that all the consulted jurisdictions offer one or more reorganization frameworks[910]. The Argentine Bankruptcy Law[911] (henceforth, "ABL"), for example, features one reorganization proceeding where the role of the court is particularly important (the "Concurso Preventivo", henceforth "Concurso") and one which features less court intervention ("Acuerdo Preventivo Extrajudicial"). Additionally, the

[909] See footnote 903 above.

[910] This survey does not deal specifically with the reforms introduced in the jurisdictions studied during the COVID-19 Pandemic. An outline of such modifications can be found in Antonia Menezes and Akvile Gropper, *Overview of Insolvency and Debt Restructuring Reforms in Response to the COVID-19 Pandemic and Past Financial Crises: Lessons for Emerging Markets*, in COVID-19 Notes: Finance Series, World Bank (2021), available at https://openknowledge.worldbank.org/handle/10986/35425 [last accessed 10.10.2021]. Nevertheless, some of the major changes are noted for UK and German law.

[911] Argentine Bankruptcy Law ("Ley de Concursos y Quiebras") Law No. 24522, available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/25379/texact.htm [last accessed 04.11.2019].

Enterprise Bankruptcy Law of the People's Republic of China[912] (henceforth, "EBL") establishes two different proceedings supervised by the court: Reorganization and Composition. Furthermore, the German Insolvency Code[913] (hereinafter, "InsO") establishes one reorganization proceeding (the Insolvency Plan) with different alternatives including "self-administration" and the "protective umbrella procedure" (also known as the "ESUG" procedure). Chapter 11 of the Bankruptcy Code of the United States[914] (hereinafter "Chapter 11") features a "flexible" restructuring framework including "pre-packs", "pre-negotiated" and "free-fall" reorganizations[915]. Finally, under the law of the United Kingdom (henceforth, "UK") there are three alternatives for the reorganization of corporations including Company Voluntary Arrangements (henceforth, CVAs)[916], Schemes of Arrangements (henceforth, "Schemes")[917] and Administration[918].

The following table summarizes the different corporate reorganization regimes to be studied.

Country	Restructuring Proceeding 1	Restructuring Proceeding 2	Restructuring Proceeding 3
Argentina	"Concurso Preventivo"	"Acuerdo Preventivo Extrajudicial"	
China	"Reorganization"	"Composition"	
Germany	"Insolvency Plan"	"Self-Administration"	"ESUG"
England	"Administration"	"CVAs"	"Schemes of Arrangement"
United States	"Chapter 11"		

Table 3: Summary of Corporate Reorganization Proceedings.

In what follows, I will organize the discussion of these jurisdictions in five different points: (i) the initiation of proceedings, (ii) the initiative to present a restructuring plan, (iii) the possibility that the debtor remains in control of the company's operations, (iv) the imposition of a ban on enforcement actions against the debtor's property and (v) the acceptance of a restructuring proposal by creditors' majority vote.

---

[912] Enterprise Bankruptcy Law of the People's Republic of China, translated by the Bankruptcy Law and Restructuring Research Center of China University of Politics and Law, published in 17 International Insolvency Review, no. 1 (2008).

[913] German Insolvency Code ("Insolvenzordnung" – InsO) of 5 October 1994 (Federal Law Gazette I Page 2866), as last amended 29 December 2016, translated by Schultze & Braun, available at http://www.schubrapp.com/index.php?lang=en#home [last accessed 04.11.2019].

[914] Bankruptcy Code of the United States ("Title 11 of the United States Code"), available at https://www.law.cornell.edu/uscode/text/11 [last accessed 04.11.2019].

[915] According to Rachel Ehrlich et al., while in "pre-packaged" reorganizations the debtor files a restructuring plan previously accepted by creditors to the court, in "pre-negotiated" reorganizations the plan is filed accompanied by an agreement (of creditors) supporting the measures proposed which needs to be voted as a "normal restructuring". Finally, in "freefalls", there is no previous negotiation, and the parties enter the proceeding to bargain. See Rachel Ehrlich Albanese and Dienna Ching Corrado, *US-Chapter 11*, The Restructuring Review of the Americas: A Global Restructuring Review Special Report (2019), p. 26.

[916] Insolvency Act (1986) United Kingdom. Sections 1-7.

[917] Schemes of Arrangement are regulated outside the bankruptcy code, in the Company Act (2006). See Company Act (2006), sections 895-901.

[918] See Insolvency Act (1986) Schedule B1 para 1-116.

These points were taken from the comparative literature on corporate reorganization[919] and from the scholarship discussing new rules for the regulation of sovereign debt restructuring[920]. Particularly, commentators have identified the aforementioned points as critical aspects to be considered while conducting a comparative analysis of corporate insolvency law[921], as well as being of special relevance for the case of sovereign debt restructuring[922]. Furthermore, they have also been highlighted as potential "common points" of agreement among domestic jurisdictions for the purposes of identifying GPDs[923]. It is therefore important to state that two points of study often considered by the literature will not be included in the analysis, namely the priority granted to post-petition finance and the equal treatment of creditors (or "pari passu" treatment).

First, although granting priority to "new money" for the state in the context of restructuring may be of critical importance, just as it is in the context of corporate reorganization, I decided to exclude this point from the analysis given that this alternative is only provided for in two countries of the sample (namely in the United States and, to a certain extent, in Germany[924]). Consequently, elevating this proposition to the international forum will not be possible since it will fail the "recognition" requirement. However, it is important to note that sovereign-debt market participants seem to have "filled" this void by explicitly recognizing (in practice) that the loans granted by International Financial Institutions (such as the International Monetary Fund) should be given preferential treatment vis-à-vis private creditors[925].

---

[919] See Westbrook et al., *A Global*… Op. Cit.

[920] See Christoph Paulus, *How Could the General Principles of National Insolvency Law Contribute to the Development of a State Insolvency Regime?* 21 Zeitschrift für das gesamte Insolvenzrecht 1-2 (2018). See also Bolton, *Toward a Statutory*… Op. Cit. See also, Schier, *Towards*… Op. Cit., p. 157. See also International Law Association (Sovereign Insolvency Study Group), *State Insolvency: Options for the Way Forward*, The Hague Conference (2010), available at https://www.ila-hq.org/index.php/study-groups?study-groupsID=44 [last accessed 20.11.2019] and Berensmann and Herzberg, *International Sovereign*… Op. Cit.

[921] See Horst Eidenmüller, *Comparative Corporate Insolvency Law* (2016). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799863 [last accessed 04.11.2019].

[922] See Bolton, *Toward a Statutory*… Op. Cit.

[923] See, for example, Schier, *Towards*… Op. Cit., p. 157 and Goldmann, *Responsible*… Op. Cit., pp. 39-40.

[924] Priority to post-petition financing is granted in the US pursuant to section 364 Chapter 11 USC. For a discussion, see Lemma Senbet and Tracy Yue Wang, *Corporate Financial Distress and Bankruptcy: A Survey*, 5 Foundations and Trends in Finance 4 (2010), p. 251. See also, Gerard McCormack, *Corporate Rescue Law: An Anglo-American Perspective*. Elgar (2008), p. 85. To a certain extent, this possibility is also recognized by German insolvency law pursuant to section 264 InsO. For a discussion, see Tsvetan Petrov, *Harmonising Restructuring Law in Europe: A Comparative Analysis of the Legislative Impact of the Proposed Restructuring Directive on Insolvency Law in the UK and Germany*, 3 Anglo-German Law Journal (2017), p. 15. See also, Eidenmüller, *Comparative Corporate*… Op. Cit., p. 23. However, this alternative is not considered under Chinese, Argentinian and UK insolvency law.

[925] Notably, for example, this was the position of the most recalcitrant holdout creditors involved in the litigation against Argentina. See Joint Response Brief of Plaintiffs-Appellees NML Capital, LTD., Olifant Fund, LTD., and Varela Et Al. v. Republic of Argentina, pp. 39-40.

Secondly, I decided not to study the equal treatment of creditors standard, since scholars have questioned even whether it can be considered a principle under domestic jurisdictions at all (particularly, in the case of the United States[926] and the United Kingdom[927]). In this respect, some scholars have argued that "(…) equality on bankruptcy (…) is a mere metaphysical illusion and that the reality is rather different"[928]. Although other countries of the sample (particularly, Germany) present a strong commitment to the "pari passu" doctrine, the lack of agreement among jurisdictions on this specific point of law determines that the standard fails the recognition requirement, as with the priority of post-petition financing[929].

3.3.1. The Initiation of Reorganization Procedures

While all studied jurisdictions establish that debtors can voluntarily apply for the initiation of reorganization proceedings ("voluntary restructurings"), they diverge concerning their application assessment criteria and whether "involuntary" restructurings (i.e., restructurings initiated by creditors) are admissible. In the case of Argentina, it is the debtor's prerogative to file for "Concursos"[930], and the ABL requires that the indebted company be in "cessation of payments" and have not been subjected to restructuring proceedings over the last year[931]. In the same way, in Germany only the debtor may apply for self-administration and ESUG procedures[932]. Particularly, the law establishes three conditions for admitting ESUG applications[933]. Firstly, the financial problems of the company in question have to be related to "imminent illiquidity" or "overindebtedness" but not to "illiquidity"[934]. Secondly, the company's rescue needs to be feasible (in the words of the InsO, "the planned restructuring [should] not clearly lack any prospect of success"). Thirdly, the debtor is required to provide a statement by a qualified insolvency practitioner certifying that the first two conditions are met.

Chinese Law authorizes debtors and creditors to file for Reorganization[935]. If the debtor applies for this proceeding, the law requires that the company be either (i) "unable to

---

926 For a discussion of the principle under US bankruptcy law see David Skeel, *The Empty Idea of "Equality of Creditors"*, 166 University of Pennsylvania Law Review (2018).

927 For a discussion of the principle under UK insolvency law see Rizwaan Jameel Mokal, *Priority as a Pathology: The Pari Passu Myth*, 60 The Cambridge Law Journal (2001).

928 Philip Wood, *The Bankruptcy Ladder of Priorities and the Inequalities of Life*, 40 Hofstra Law Review (2014), p. 93.

929 It is worth mentioning, however, that the "pari passu" rule (as featured in sovereign bonds) is discussed in detail in *Chapter Four*.

930 See Adolfo Rouillon, *Rules of International Private Law, Priorities on Insolvency and the Competing Rights of Foreign and Domestic Creditors, under the Argentine Bankruptcy Law No 24522*, available at https://www.iiiglobal.org/sites/default/files/13-_RULES%20OF%20INTERNATIONAL%20PRIVATE%20LAW.pdf [last accessed 04.11.2019], p. 4.

931 See ABL, arts. 1 and 5.

932 However, it is important to note that creditors are authorized to present an application for opening the general insolvency procedure. See InsO, section 14.

933 See InsO, section 270 (b)(1).

934 See InsO sections 17, 18 and 19.

935 See EBL art. 7.

pay off debts falling due" while not having enough assets to meet its creditor's claims or while "obviously lack[ing]" liquidity" or that; (ii) it be "obviously likely to become insolvent"[936]. UK Administration also allows both for voluntary and involuntary restructurings, and in cases where the administrator is appointed by the court, the law requires that the company be insolvent or likely to become insolvent and that the proceeding may reasonably achieve its purposes[937]. In the same way, US Chapter 11 allows both creditors and debtors to initiate a reorganization proceeding[938], although most US restructurings are initiated by debtors' voluntary applications[939]. However, the main difference to previous cases is that under voluntary restructurings insolvency is not required[940].

3.3.2. The Initiative to Present the Restructuring Plan

As previously stated, reorganization proceedings are aimed at modifying the structure of the liabilities of an indebted company. For this purpose, creditors and debtors are supposed to negotiate different conditions which may help the company's rehabilitation. These conditions are presented to the court (in the form of a restructuring proposal) and subjected to creditors' vote. All the studied jurisdictions grant the debtor the possibility of drafting this proposal. The differences among the consulted regimes lie in whether creditors can also prepare their own plans. First, under the Argentinian "Concursos"[941] and US Chapter 11[942], both debtors and creditors are allowed to file their restructuring proposals. Furthermore, under those regimes, debtors are granted an "exclusivity period", during which they can define the conditions of the restructuring plan. On the other hand, under UK Administration[943], Chinese Reorganization[944] and the German InsO[945], creditors are deprived of this possibility, placing the prerogative on the company's side (or on its administrator, depending on the specific regime).

---

[936] EBL art. 2.

[937] See Insolvency Act (1986), Schedule B, para 11. See Hamish Anderson, *An Introduction to Corporate Insolvency Law*, 1 Plymouth Law and Criminal Justice Review (2016), p. 33.

[938] See Title 11 USC, Chapter 11, paras 301-303.

[939] See Senbet and Wang, *Corporate…* Op. Cit., p. 248. According to Gerard McCormack, creditors filing for involuntary restructurings face the risk of being subjected to cost-recovery by the debtor if the statutory requirements for the commencement of a Chapter 11 case are not met and to punitive damages if the petition has been filed in bad faith. This may help to explain why voluntary restructurings are more common in the US. See McCormack, *Corporate…* Op. Cit., p. 70.

[940] "There is no formal requirement that the company should be 'insolvent' and companies sometimes make use of Chapter 11 for strategic reasons". McCormack, *Corporate…* Op. Cit., p. 78.

[941] See ABL, art. 43 (1).

[942] See Title 11 USC, Chapter 11, para 1121.

[943] See Insolvency Act Schedule B, para 49(4) and (5).

[944] See EBL section 80.

[945] For the specific case of the ESUG procedure see Reinhard Bork, *Debt Restructuring in Germany*, 15 European Company and Financial Law Review 3 (2018). See also Tsvetan Petrov, *Harmonising Restructuring Law in Europe: A Comparative Analysis of the Legislative Impact of the Proposed Restructuring Directive on Insolvency Law in the UK and Germany*, 3 Anglo-German Law Journal (2017).

3.3.3. The Debtor Remains in the Administration of the Company

At least one of the restructuring tools offered by all the surveyed domestic jurisdictions establishes the possibility that the debtor remains in control of its business (usually referred to as the "debtor-in-possession" regime, henceforth "DIP"). The differences in this point lie in their degree of inclination in favor of or against the pre-petition (incumbent) management. Argentina's "Concursos" and the United States' Chapter 11 trust the capability of the debtor to keep managing its business the most. In both cases, excluding qualified circumstances[946], current management remains in control of the company[947], serving as the default position. The same is not true for the cases of China and Germany. On the one hand, while both Chinese restructuring frameworks (namely, Reorganization and Composition) allow the debtor to remain in control of the enterprise, they require an application by the debtor that needs to be accepted by the court[948] (which is granted with wide discretion in this regard[949]) in which case the debtor is subjected to the supervision of a third party (the administrator)[950]. It is important to state that Chinese courts have shown reluctance to grant the aforementioned authorization, preferring reorganizations commanded by an external insolvency practitioner[951]. Likewise, German debtors are required to apply for remaining in control of their company, a request that is analyzed by the court considering the interests of creditors[952]. In the case that the application is accepted, as in Chinese Reorganizations, the debtor will be monitored by an external party known as the "Custodian" or "Supervisor"[953]. Finally, under UK law, the debtor may stay in control of the operations only in cases where a CVA or a Scheme is being implemented, provided that the company is not under Administration[954].

---

946 In the case of the United States, these qualified circumstances include "fraud, dishonesty, incompetence [and] (…), gross mismanagement. Title 11 USC, Chapter 11, para 1104(a). Article 17(2) of the ABL contemplates similar grounds.

947 For the case of the United States, pursuant to para 1107(a) Title 11 USC, Chapter 11, it is the debtor who remains in control of the company. Article 15 of the ABL includes a similar provision. However, in the latter case, the debtor is subject to the surveillance of the receiver who is appointed by the court. See Fernando Hernandez, *Argentina*, The Restructuring Review of the Americas: A Global Restructuring Review Special Report (2019).

948 See EBL sections 73 and 95.

949 See Yujia Jiang, *The Curios Case of Inactive Bankruptcy Practice in China: A Comparative Study of U.S. and Chines Bankruptcy Law*, 34 Northwestern Journal of International Law & Business 3 (2014).

950 See EBL section 73.

951 According to Steele et al., DIP authorizations do not reach a twenty percent of restructurings in China. See Stacey Steele, Andrew Godwin et al., *Trends and Developments in Chinese Insolvency Law: The First Decade of the PRC Enterprise Bankruptcy Law*, 20 The American Journal of Comparative Law (2018), pp. 15-16. For this reason, it is the administrator the one who "dominates" reorganization proceedings in that country. See Jiang, *The Curious…* Op. Cit., p. 574.

952 Pursuant to section 270(2)(2) InsO, the authorization of the court requires that "no circumstances are known which suggest that the order will result in prejudice to the creditors".

953 See InsO section 270(c).

954 Insolvency Act (1986), Schedule B para 64(1): "A company in administration or an officer of a company in administration may not exercise a management power without the consent of the administrator". See also Rodrigo Olivares-Caminal et al., *Debt Restructuring*. Oxford (2011), p.

3.3.4. The Imposition of a Ban on Enforcement Actions against the Debtor's Property

All selected jurisdictions impose a ban on enforcement actions against the debtor's property (usually known as a "stay" or "moratorium"). Nevertheless, they diverge concerning whether this "cease fire" applies automatically, whether it needs to be applied for and ordered by the Court, and whether it only extends to unsecured interests or also affects secured creditors.

Both under US Chapter 11 and under UK Administration, the "stay" is imposed after the application has been filed by the debtor and affects secured and unsecured creditors. Particularly, the United States regime features the most protective design in this regard. Under Chapter 11[955], the enforcement ban applies automatically (as soon as a reorganization application has been filed), precluding the commencement and suspending the continuation and enforcement of all the proceedings against the debtor (including administrative ones)[956]. The "stay" extends to secured creditors as well as unsecured ones[957], and reaches assets located outside the US[958]. Under UK law, a ban on enforcement is not imposed under Schemes[959] or under CVAs[960]. However, the company can be granted this protection if, while implementing Schemes or CVAs, it is also under administration[961]. As stated above, as in Chapter 11's stay, the UK's moratorium under Administration proceedings applies automatically (since the application for administration is filed), extending for the whole period during which the company is under this type of proceeding[962], and also extends to secured creditors'

130. Richard Bussell, Rebecca Jarvis and Jo Windsor, *England & Wales*, The European, Middle Eastern and African Restructuring Review (2018), p. 12. Jennifer Payne, *Debt Restructuring in the UK,* 15 European Company and Financial Law Review, De Gruyter 3 (2018), p. 15.

[955] The moratorium imposed by Chapter 11 has been considered as "one of the fundamental debtor protections provided by" US law. HR Rep No 595, 95th Cong, 1st Sess 340 (1977). Quoted by Wai Yee Wan and Gerald McCormack, *Transplanting Chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges*, Journal of Corporate Law Studies (2018), p. 14.

[956] Title 11 USC, Chapter 11, para 362(a).

[957] See Albanese and Corrado, *US-Chapter 11*… Op. Cit., p. 27.

[958] Michelle Seider, Adam Goldberg and Christian Adams, Maximizing Enterprise Value and Minimizing "Hold Up Value": Reorganizations in the United States under Chapter 11 of the US Bankruptcy Code in Tarek Hajjiri and Adrian Cohen (Eds.), *Global Insolvency and Bankruptcy Practice for Sustainable Economic Development: vol 2*. Palgrave (2016), p. 86.

[959] See Payne, *Debt Restructuring*… Op. Cit., pp. 12-13. Therefore, while a scheme of arrangement is being negotiated "all creditors are free to pursue their claims". Bussell, Jarvis and Windsor, *England & Wales*… Op. Cit., p. 20.

[960] However, a "stay" is considered for CVAs only for the case of small companies. See Bussell, Jarvis and Windsor, *England & Wales*… Op. Cit., p. 18.

[961] See Peter Walton, *Company Voluntary Arrangements: Evaluating Success and Failure*. Available at: https://www.icaew.com/-/media/corporate/archive/files/technical/insolvency/publications/cvas-evaluating-success-and-failure.ashx [last accessed 04.011.2019], p. 8.

[962] See Finch, *Corporate Insolvency*… Op. Cit., p. 385. See also Peter Totty, Gabriel Moss and Nick Segal, *Insolvency: Vol. 1*. Sweet & Maxwell (2019), p. 127 and Ian Fletcher, *The Law of Insolvency* (5th Edition). Sweet & Maxwell (2017), p. 175.

enforcement actions[963]. An automatic enforcement ban is also imposed under Argentinian "Concursos"[964], but its effects are limited exclusively to unsecured creditors[965]. However, under exceptional circumstances, the court can extend the effects of the "stay" to secured creditors for a maximum of 90 days[966].

On the other side of the spectrum, under Chinese legislation the "stay" needs to be specifically requested by the debtor in the context of the Reorganization proceeding[967] (and hence, does not apply automatically after filing for insolvency[968]), also affecting secured creditors. The same is true for Germany, where there is no automatic moratorium under the ESUG procedure. Pursuant to sections 270(b)(2) and 21 of the InsO, the Court is authorized to impose a ban on enforcement actions affecting both secured and unsecured creditors provided that the debtor applies for it[969].

3.3.5. The Acceptance of a Restructuring Proposal by Majority Vote

As previously stated, the success of restructuring proceedings depends on the creditors' consent to a proposal (a "plan") which aims to rehabilitate the debtor's business by modifying the structure of its liabilities. In that context, creditors are required to either reject or accept the plan by voting on their respective classes. In order to facilitate an agreement, the studied jurisdictions establish mechanisms by means of which dissenting creditors can be bound to a restructuring proposal. However, there is divergence in what pertains to the specific device used. While US Chapter 11, Argentinian "Concurso" and "Acuerdo", Chinese Reorganization and the German Insolvency Plan consider that dissenting creditors within a class are bound by the decision of the majority of that class[970], all of those proceedings also provide for the possibility of a "cross-class cram down" (meaning that a plan can be passed even against

[963] See Anderson, *An Introduction*… Op. Cit., p. 33.

[964] The "stay" does not apply under "Acuerdo Preventivo Extrajudicial". See Richard Cooper, Adam Brenneman and Jessica McBride, *A New World for LatAm Creditors: Insolvency Reform in Latin America*, Pratt's Journal of Bankruptcy Law (2015), p. 192.

[965] Article 21 ABL.

[966] Article 24 ABL. For a discussion, see Fernando Hernandez, *Secured Credits in Insolvency Proceedings in Argentina*, 9 Insolvency and Restructuring International 1 (2015), p. 22.

[967] The stay is not applicable under Composition Proceedings. See EBL section 96(2).

[968] See Jiang, *The Curios*… Op. Cit., pp. 570-572. It is important to note that the ban on enforcement only applies from the moment of the Court's order, serving thus as its "triggering event". See Steven Arsenault, *The Westernization of Chinese Bankruptcy: An Examination of China's New Corporate Bankruptcy Law Through the Lens of the UNCITRAL Legislative Guide to Insolvency Law*, 27 Penn State International Law Review 1 (2008), pp. 50-51. See EBL sections 19 and 20.

[969] See Bork, *Debt Restructuring*… Op. Cit., p. 508. See also Petrov, *Harmonising* …, Op. Cit., p. 150.

[970] In the case of Argentina (art. 45 ABL), Chinese Reorganizations (Section 84 (2) EBL) and Chapter 11 Restructurings (para 1126 (c) Title 11 USC), the plan is deemed to be approved by a class if at least the majority of the voting creditors of that class representing two thirds of the claims corresponding to that class manifest their acquiescence to it. In the case of Germany, the InsO also requires a majority of voting creditors, but only requires that these creditors represent just more than the half of the claims corresponding to that specific lass. See InsO section 244.

the negative of entire dissenting classes)[971]. The "cross-class cram down" requires an authorization by the court, who will ensure that the conditions required in each legislation are met. Furthermore, all of those jurisdictions share two particular requirements for the approval of the plan. The first is that creditors be treated equally, respecting the priorities established by statute. The second is known in the US as the "best interest of creditors'" or "liquidation" test[972]. According to this criterion, the court will only authorize a plan where dissenting creditors receive at least the same amount that they would earn if the company were liquidated[973]. Unlike the previously discussed jurisdictions, before its last modification, UK insolvency law did not feature a "cross-class cram down", and majority voting only bound creditors within a class[974]. However, it should be mentioned that amidst the COVID-19 pandemic, significant changes were made to UK law, and now a "cross-class cram down" is considered through a specific tool: the "restructuring plan"[975].

---

[971] ABL art. 52, EBL section 87, InsO section 245, section 1129(b) Chapter 11 Title 11 USC. Notably, amidst the COVID-19 pandemic, Germany introduced a new restructuring procedure (and a set of new restructuring "tools") through the Statute on the Stabilisation and Restructuring Framework for Enterprises Act. This procedure considers a "cross-class cram down" as well. For a discussion, see Cristoph Paulus, *The New German Preventive Restructuring Framework* (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3849428 [last accessed 10.10.2021], p. 7. See also Sidley, *German Stabilization and Restructuring Framework – the "German Scheme"* (2021), available at https://www.sidley.com/en/insights/newsupdates/2021/01/german-stabilization-and-restructuring-framework-the-german-scheme [last accessed 10.20.2021].

[972] See Gregory Germain, *Bankruptcy Law and Practice* (Third Edition). CALI (2018), p. 370.

[973] See ABL art. 52, EBL section 87, InsO section 245.

[974] According to Jennifer Payne, under CVAs, a form of "cram down" is considered by the legislation. In that case, the restructuring will be implemented if it is approved by a 75 percent all creditors entitled to vote. However, said agreement does not bind secured creditors. At the same time, Payne indicates that under Schemes, a plan can only be imposed on dissenting creditors within a class. See Jennifer Payne, *Debt Restructuring in the UK,* 15 European Company and Financial Law Review 3 (2018), pp. 452-454. See also Company Act (2006), section 899(1) and Nicolaes Tollenaar, *Pre-Insolvency Proceedings: A Normative Foundation and Framework*. Oxford (2019), pp. 164-170.

[975] In June 2020, the UK government enacted the Corporate Insolvency and Government Act in (henceforth, "CIGA"). CIGA complemented the UK's existing insolvency regime by introducing several "tools", including the so-called "restructuring plan". The "restructuring plan" introduced, for the first time, a "cross-class cram down" provision in UK law. For a discussion of the main features of the CIGA see Jennifer Payne, *An Assessment of the UK Restructuring Moratorium* (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3759730 [last accessed 10.10.2021]; Adam Gallagher et al., *Is the New U.K. Restructuring Plan a Viable Alternative to Chapter 11?* (2021), available at https://www.lexology.com/library/detail.aspx?g=f426b849-e055-4eda-8ca8-f98d0bddd0dd [last accessed 10.10.2021]; Howard Morris and Jai Mudhar, *Less Scheming: Cross-Class Cram-Downs Are Out in the Open for All To See* (2021) available at https://www.mofo.com/resources/insights/210201-less-scheming-cross-class.html [last accessed 10.10.2021] and Hetal Doshi and Yashasvi Jain, *The Insolvency and Bankruptcy Framework and Principle of Business Efficacy across Different Jurisdictions in the COVID Era*, 42 Business Law Review 1 (2021).

3.4. Commonalities among the Studied Jurisdictions

As can be noted, all the studied jurisdictions present several grounds of agreement and divergence in what pertains to corporate reorganization. First, all of them consider "voluntary restructurings", while "involuntary" petitions are only accepted under Chinese Reorganization, UK's Administration and Chapter 11 of the US. Secondly, only Argentinian "Concursos" and US Chapter 11 allow creditors to file their restructuring proposals. In the other cases, it is the specific concern of the debtor (or the administrator) to draft the plan to be submitted for the creditors' consideration. Thirdly, all the studied jurisdictions consider the possibility that the debtor remains in control of the company. However, they diverge concerning whether this is the default rule (Argentina's "Concursos" and US Chapter 11) or whether it needs to be applied for and authorized by the court (China's Reorganization and the German Self-Administration and ESUG procedures). Fourthly, while in all the consulted legal systems a ban on enforcement actions can be imposed, they diverge on whether this stay applies automatically (Argentina's "Concursos", UK's Administration and US Chapter 11) or whether it needs to be requested (China's Reorganization and Germany's ESUG procedure). Fifthly, under all studied legal systems, dissenting creditors can be bound to a restructuring proposal if the required majorities within the class are achieved. Finally, all consider the possibility of a "cross-class cram down" (in the case of the UK, this alternative was implemented with the last modification introduced through the CIGA in 2020).

The next table summarizes the commonalities found:

Point	Argentina	China	Germany	US	UK
Initiation	Vol.	Vol/Invol.	Vol.	Vol/Invol	Vol/Invol.
Proposal	D/C	D	D.	D/C	D
DIP	Default	Application	Application.	Default	CVA/Scheme
Stay	Automatic	Application	Application (ESUG)	Automatic	Automatic (Admin)
Majority Vote	Y	Y	Y	Y	Y
Cram-Down	Y	Y	Y	Y	Y (last modification, 2020)

Table 4: Comparison of the Jurisdictions in Different Points of Interest[976].

4. Functional Explanations of the Commonalities Previously Identified and the Common Normative Propositions Extracted from Corporate Reorganization Regimes

As previously indicated (section 2), finding commonalities among different jurisdictions through a comparative survey does not suffice to prove the existence of a GPD. For this, a further step is required, which consists in identifying the "rationale" behind the common norms thus found. Admittedly, this is not an easy task. For the case of corporate insolvency, for example, there are several theories that endeavor to explain its particularities, and some scholars have even asserted that this quest is "doomed from the start"[977]. In order to shed some light on this issue, I will follow the law and economics

[976] "Y" stands for "yes", "N" for "no", "D" for "debtor" and "C" for "creditors.

[977] In the words of David Gray Carlson: "The whole idea of finding a deep structure in a complicated, historic artifacts such as the Bankruptcy Code was doomed from the start.

literature which has posited a set of hypotheses concerning the "ratio" underlying corporate reorganization regimes. In particular, for the purpose of the identification of GPDs, I will proceed under the assumption that the explanations offered by that literature provide a set of plausible interpretations of the "social purpose" of these norms[978].

4.1. Functional Explanations of Bankruptcy

According to the law and economics literature on the subject, the main goal of insolvency law is to maximize creditors' returns when a debtor becomes insolvent (ex-post)[979]. The achievement of this goal is relevant not only for creditors but also for debtors. Particularly, if this condition is met, the cost of capital will be reduced, since creditors will be willing to lend at lower interest rates (ex-ante)[980]. From the perspective of the most prominent explanations, insolvency law contributes to maximizing creditors' recoveries by providing a collective and compulsory framework for debt collection (in the case of liquidation)[981] and for debt restructuring (in the case of corporate reorganization). This collective framework increases the payoffs for creditors by preventing risk shifting, and by solving two different collective action problems creditors may face when a debtor becomes insolvent: The "Common Pool" and the "Anti-Commons" problems[982].

Considering the tens of thousands of congressmen, judges and lawyers who have contributed to the content of bankruptcy law, it would have been a miracle if all of them were driven by the same ethical impulse every time a legislative decision was made. Legal texts are situated in history, and just as historical explanation is infinitely complex, so should we expect jurisprudential explanations to be infinitely complex, based on entropy, anomie, conflict, and confusion, as well as the dictates of logic and reason". David Gray Carlson, *Philosophy in Bankruptcy: The Logic and Limits of Bankruptcy Law by Thomas H. Jackson*, 85 Michigan Law Review 5/6 (1987), p. 1389.

[978] This assumption is justified since the explanations provided in this section have been typically endorsed by the comparative law scholarship discussing insolvency regimes around the world. See generally Westbrook et al., *A Global View…* Op. Cit.

[979] Francisco Cabrillo and Ben Depoorter, Bankruptcy Proceedings, in Boudewijn Bouckaert and Gerrit De Geest *Encyclopedia of Law and Economics: Vol V.* Elgar (2000), p. 264.

[980] Hence, according to Michelle White, "one objective of bankruptcy is to repay creditors enough that credit remains available on reasonable terms". Michelle White, Bankruptcy Law in Mitchell Polinsky and Steven Shavell (Eds.), *Handbook of Law and Economics*. Elsevier (2007), p. 1018. See also Alan Schwartz, *A Contract Theory Approach to Business Bankruptcy*, 107 The Yale Law Journal (1998), p. 1814 and John Armour, *The Law and Economics of Corporate Insolvency: A Review*, ESRC Centre for Business Research, University of Cambridge Working Paper No. 197, p. 15.

[981] See Thomas Jackson, *The Logic and Limits of Bankruptcy Law*. Harvard University Press (1986), pp. 3-5.

[982] See de Wejis, *Harmonisation…* Op. Cit.; Michael Schillig, *Corporate Insolvency Law in the Twenty-First Century: State Imposed or Market Based?* 14 Journal of Corporate Law Studies 1 (2014); Federico Mucciarelli, *Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension*, 14 European Business Organization Law Review (2013).

4.1.1. Insolvency Law Encourages Early Applications and Discourages Risk-Shifting Behavior

Insolvency law aims to achieve the appropriate ex-ante incentives to avoid debtors' risk-shifting behavior and to encourage early bankruptcy applications[983]. When insolvency approaches, the debtor may be prone to engage in risky projects, which would otherwise not be pursued[984]. Particularly, considering that it has "nothing to lose" if bankruptcy is declared, the debtor may be inclined to gamble with the purpose of remaining in business, producing even more damage to the company's finance if those projects fail. Furthermore, other circumstances affecting the company's management (such as job losses and reputational damages) may reduce the likelihood that the debtor files for reorganization in the appropriate moment[985].

With the purpose of solving these problems, insolvency law provides rewards and sanctions for the pre-petition management and shareholders. Particularly, granting the debtor the initiative to file and draft a restructuring proposal and leaving him in control of the enterprise (the "DIP" regime) are devices usually explained as "carrots" that encourage early reorganization applications and thus avoid risk-shifting behavior[986]. As previously stated, this kind of device can be found under Argentinian "Concursos", US Chapter 11, Chinese Reorganization and German Self-Administration and ESUG procedures[987].

Additionally, maintaining pre-petition management in control of the company's assets has also been explained as an ex-post maximization of creditors' payoffs. According to the literature, since current management may have a deeper knowledge of the company and its operations, their maintenance in the administration of the enterprise will be preferred to them being replaced by an insolvency practitioner[988].

4.1.2. Common Pool Problems and the Ban on Enforcement Actions by Creditors

The classical theory that explains the role of corporate insolvency law is the creditor's bargain heuristic, developed during the 1980s mainly by Thomas Jackson and Douglas Baird. According to this theory, bankruptcy law establishes a collective system aimed

[983] See Eidenmüller, *Comparative…* Op. Cit., p. 8.
[984] See Jaka Cepec and Mitja Kovac, *Carrots and Sticks as Incentive Mechanism for the Optimal Initiation of Insolvency Proceedings*, 7 DANUBE: Law and Economics Review 2 (2016), p. 83.
[985] Id.
[986] Id., p. 85.
[987] It is important to note that severe "sticks" are also in place. For example, in Germany, pursuant to section 15a of the InsO, managers can face criminal liability if they fail to file for insolvency within three weeks from the moment on which the company is illiquid or overindebted.
[988] In the words of Richard Posner: "The reason for giving this right to management is that only management, and not a committee of creditors or a trustee, auctioneer, or venture capitalist or other acquirer has the know-how to continue the firm in operation, as distinct from reviving it (maybe) after an interruption for a change in control". Richard Posner, Foreword in Jagdeep Bhandari & Lawrence Weiss (Eds.), *Corporate Bankruptcy: Economic and Legal Perspectives*. Cambridge University Press (1996), pp. xi-xii.

at solving a "prisoner's dilemma" or "common pool"[989] problem among creditors. From the perspective of this theory, the assets of an insolvent debtor can be equated with other common pool resources (henceforth, "CPRs"), such as fisheries[990], where the appropriation of goods by a single creditor leads to a reduction in the overall quantity available to others[991], thus producing an appropriation externality[992]. It is useful to recall that what is specific of "common pool" problems is the combination of two different property regimes: On the one hand, agents are free to access the CPR, making them of common ownership; while, on the other, they are also allowed to keep the proceeds of their activities for themselves making them of private ownership[993]. Authors writing within this tradition note the similar structure of CPRs and general debt collection law. Since in the absence of bankruptcy protection creditors are entitled to seize the assets of their debtor for the private satisfaction of their claims, their own self-interest may produce sub-optimal outcomes from the perspective of creditors as a group.

In a nutshell, they posit that, in the absence of a bankruptcy procedure, creditors may compete with each other in order to be the first to obtain their debtor's assets[994] (that is, to appropriate the CPRs). This "race to the courthouse"[995] may lead to an inefficient piece meal liquidation of the debtor's estate, destroying the value that the assets could have if sold together (in the event of liquidation) or if the debtor business were reorganized[996]. Furthermore, knowing beforehand that the debtor's insolvency reduces their chances of being paid, creditors may incur wasteful monitoring costs with the purpose of recovering their claims[997]. Therefore, according to this theory, domestic insolvency law protects the interests of creditors as a group against their individual impulses, by imposing a "stay" on their collection efforts against the property of their debtor. In so doing, bankruptcy law contributes to maximizing the assets at stake, by: (i) avoiding its inefficient piece meal liquidation, (ii) reducing wasteful monitoring costs and (iii) effectively increasing the payoffs of claimants[998].

Consequently, the creditor's bargain heuristic explains the imposition of a "stay" as a device aimed at solving a "common pool" problem among the creditors of an insolvent debtor. As stated above, all studied jurisdictions consider the "stay" on creditors' collection efforts, both under liquidation and reorganization proceedings.

---

[989] See Jackson, *The Logic…* Op. Cit., pp. 13-14.
[990] Id.
[991] Elinor Ostrom, Roy Gardner and James Walker. *Rules, Games and Common-Pool Resource Problems*. Michigan (1994), pp. 9-10.
[992] See Id., pp. 10-11.
[993] In the words of Lee Anne Fennell, "It is not, then, the commonly owned land alone that produces the (…) dilemma; it is instead the mix of individual and common ownership". Lee Anne Fennell, Commons, Anticommons, Semicommons in Kenneth Ayotte and Henry Smith (Eds.), *Research Handbook on the Economics of Property Law*. Elgar (2011), p.16.
[994] Douglas Baird, A World Without Bankruptcy in Jadgeep Bhandari et al. (Eds.). *Corporate Bankruptcy: Economic and Legal Perspectives*. Cambridge University Press (1996), pp. 183-184.
[995] See Jackson, *The Logic…* Op. Cit., p. 14.
[996] Id.
[997] Id., pp. 15-16.
[998] Id., p. 15.

4.1.3. Anti-Commons Problems: Majority Voting and the "Cram Down"

The "common pool" explanation has been complemented by another one which bears relevance to the specific case of corporate reorganization. As stated before, reorganizations are aimed at rehabilitating the distressed company (when possible) by means of an arrangement (usually denominated "restructuring plan") accepted by creditors. The economic rationale for corporate reorganizations is akin to the very existence of general bankruptcy law: it is justified in cases where creditors' returns are greater than the payoffs that they would receive under liquidation[999]. However, even in cases where creditors as a group would be better off through the implementation of a restructuring plan, some of them may withhold their consent demanding a better deal for themselves, thus trying to capture the reorganization surplus[1000]. The strategic behavior of creditors may preclude the possibility of a successful restructuring. Consequently, if unanimous consent were required for the approval of a plan, several (otherwise) feasible restructurings will not be conducted, leading to the "underuse"[1001] of this mechanism and leaving both debtors and creditors worse off.

The collective conundrum faced by creditors in this context resembles another specific type of collective action problem, namely the anti-commons problem[1002]. Anti-commons problems arise where several agents are granted with the individual prerogative to veto the use of a resource by others[1003] (or where, to use a resource, an agent is required to obtain permission of others)[1004]. Since some of these agents may act strategically to withdraw their permission (or to veto) for the use of the resource (by holding out) an otherwise value-enhancing transaction (from the perspective of the agents as a group) involving the use of this resource will be obstructed[1005]. Hence, instead of overuse (as in common pool problems), anti-commons problems may lead to the resource being underused[1006].

Considering this problem, all the jurisdictions consulted in the study conducted in this *Chapter* include mechanisms destined to discipline holdouts by providing a collective framework for inter-creditor coordination. The first mechanism that comes into play is the one already discussed for the case of the "common pool" problem: the ban on enforcement actions by creditors. By means of that device, creditors cannot pursue their claims in the non-bankruptcy forum. This provides an important incentive for creditors'

---

[999] Meaning that the value of the company as a going concern exceeds the value of its piece-meal liquidation. See Horst Eidenmüller, *Trading in Time of Crisis: Formal Insolvency Proceedings, Workouts and the Incentives for Shareholders/Managers*, 7 European Business Organization Law Review (2006), p. 241.

[1000] See de Wejis, *Harmonisation*…Op. Cit., p. 9.

[1001] Id.

[1002] See Id. See also Schillig, *Corporate*… Op. Cit. and Mucciarelli, *Not Just*… Op. Cit.

[1003] According to the classical definition of Michael Heller, "owners in an anticommons regime must reach some agreement among themselves for the object to be used". Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harvard Law Review 3 (1998), p. 670.

[1004] Fennell, *Commons*… Op. Cit., p. 41.

[1005] Id.

[1006] Heller, *The Tragedy*… Op. Cit., p. 624.

cooperation in the context of debt renegotiation[1007]. The second mechanism contemplated refers to majority voting within a particular class of creditors. As previously stated, most of the corporate reorganization regimes belonging to the consulted legal systems order that creditors be divided into different classes for voting purposes. In this context, a majority of creditors can bind the entire class to a restructuring proposal. The third and final device considered by the studied jurisdictions refer to the possibility of a "cross-class cram down", which may be imposed by the court. This alternative is available under the US Chapter 11, the Argentinian "Concurso", the Chinese Reorganization and the German Insolvency Plan (and under UK law, by means of its latest modification). If the conditions specified in each legislation are met, entire dissenting classes of creditors (where a majority was not reached) can be bound to a restructuring agreement.

Consequently, although some degree of dissent among creditors is unavoidable during a restructuring process, the studied jurisdictions aim to facilitate reaching an agreement by providing for the possibility of majority vote and cram down.

4.2. Common Normative Propositions Extracted from Corporate Reorganization Regimes and the Corresponding Functional Explanations

Having conducted a comparative survey of corporate reorganization regimes under five jurisdictions and discussed the rationale behind the norms relevant to this study, it is now possible to formalize the commonalities found as normative propositions. These propositions will be subjected to the "compatibility test" (the first part of the "extrapolation" analysis) in the next section.

First Group of Normative Propositions: *The debtor is granted the initiative to file and draft a reorganization proposal with the purpose of encouraging early restructurings. The same is true for the possibility that the debtor remains in control of the business. This last possibility is also explained by the fact that pre-petition management may be better suited to conduct the business successfully than external third parties, achieving a better ex-post result both for creditors and the debtor.*

Second Group of Normative Propositions: *A ban on enforcement activities of creditors is imposed under reorganization. This stay is aimed at solving common-pool and anti-commons problems. On the one hand, this stay avoids an inefficient piece meal liquidation of the debtor's property. On the other hand, it also enhances creditors' cooperation in the reorganization forum. Furthermore, the "stay" also serves as an important incentive for early reorganizations.*

Third Group of Normative Propositions. *Restructuring plans do not require the consent of every single creditor. Instead, a majority of creditors can bind dissenting creditors to a restructuring proposal. In the case that creditors are divided into different classes for voting purposes, and that there are classes that do not agree to a proposal, the plan can be imposed regardless of this circumstance, provided that the collective interests of creditors are protected. This "majoritarian vote" device is aimed at solving anti-*

[1007] Considering that the "stay" also plays an important role in solving anti-commons problems, See Eidenmüller, *Comparative Corporate*… Op. Cit., p. 5.

commons problems that could be even more severe if the consent of every creditor was required to approve the restructuring plan.

5. Extrapolating the Common Normative Propositions to Sovereign Debt Restructuring: The "Compatibility" Test

As previously stated, GPDs refer to common normative propositions which can be elevated to the international scenario. For this purpose, these propositions need to be compatible with the values embedded in the international legal order. Furthermore, considering that these common normative propositions refer to the "rationale" behind the rules and institutions from which they are extracted, it also has to be demonstrated that the problem-solution nexus at stake in the domestic context (the "function" of the norms) also holds in the international scenario. In this section, I tackle the first problem (i.e., compatibility with the international legal order). The functional analysis will be conducted in the next *Chapter*.

Before proceeding, it will be useful to recall the basic dynamics of sovereign debt restructuring and the insolvency conflict at stake in this type of operations, which will serve as the context for the "compatibility" analysis.

As stated in *Chapter Two*, the most basic form of insolvency conflict comprises the tensions between an indebted state and those who have claims against its revenue, namely its creditors and citizens[1008]. When the government's revenues are not enough to fully satisfy both claims at the same time, these liabilities are usually renegotiated. The renegotiation between creditors and the state takes the form of sovereign debt restructuring, which usually entails the provision of debt relief by creditors in favor of the debtor through debt rescheduling, debt reduction or both[1009].

The specific mechanism used to restructure the claims of creditors depends on the nature of the debt[1010]. In most cases, this debt is acquired by means of private contracts (bonds) governed by the domestic law of one of the financial centers of the world. The terms of the contract and the provisions of the corresponding law set the alternatives for the modification of the liabilities. The most common mechanism used for restructurings are the exchange of old debt instruments for new ones containing longer maturities, a different interest rate or a discount on the principal (also called a "haircut") or by the voluntary modification of the same key terms of the contracts[1011]. Consequently, as can be noted, this type of operation has several similarities with corporate reorganizations.

5.1. The Compatibility of the First Group of Normative Propositions: The Debtor's Initiative to File and Draft a Restructuring Proposal and the "Debtor in Possession"

The first group of normative propositions under examination refers to the debtor's prerogatives. As previously stated, under most of the studied jurisdictions the debtor is

[1008] See *Chapter Two*, pp. 53-54.
[1009] Das, et al., *Sovereign Debt Restructurings*… Op. Cit., p. 8.
[1010] See *Chapter One*, pp. 4 et seq.
[1011] Id.

granted the initiative to start the restructuring proceedings and to draft a restructuring proposal. Furthermore, the studied jurisdictions also consider the possibility that the debtor remains in control of its business (the "DIP" regime).

When transposed to the international scenario, this first group of normative propositions is not only compatible with the values embedded in international law, but it seems to be the only alternative that can be accepted by the contemporary international order[1012].

Particularly, it is important to recall that sovereign debt restructurings are usually conducted when the state's revenues are not sufficient to satisfy both the claims of creditors and of citizens. In that context, the state has to decide how to allocate its resources and thus what to prioritize in its spending. Therefore, any restructuring proposal (and the decision of initiating a restructuring) necessarily demands that sensible determinations be taken (which are of a political nature), and those sensible determinations can only be taken – under international law – by the state[1013].

The previous statement flows from the very notion of sovereignty[1014], which is expressed through different principles of international law, including sovereign equality of states[1015], non-intervention[1016] and self-determination[1017]. Specifically, the right to self-determination implies that the citizens of a state are free to decide the type of government, as well as "to pursue a process of economic development which is free from unwanted intrusion or interference from outside actors"[1018]. Furthermore, considering these basic principles (and the notion of the *domaine réservé*[1019]) some scholars have

---

[1012] In a similar sense, see for example, Bohoslavsky, *Responsibility*… Op. Cit., p. 506; Bredimas, Gourgourinis and Pavlidis, *The Legal Contours*… Op. Cit., p. 139 and Schier, *Towards*… Op. Cit., pp. 175-176.

[1013] For a discussion specifically concerned with debt servicing and conditionalities, see Noel Villaroman, *The Loss of Sovereignty: How International Debt Relief Mechanism Undermine Economic Self-Determination*, 2 Journal of Politics and Law 4 (2009) and Ilias Bantekas, Sovereign Debt and Self-Determination in Ilias Bantekas and Cephas Lumina (Eds.), *Sovereign Debt and Human Rights*. Oxford University Press (2018).

[1014] See Samantha Besson, "*Sovereignty",* Max Planck Encyclopedia of Public International Law, [last accessed 15.06.2019].

[1015] Recognized by Art. 2(1) of the UN Charter. Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, T.S. No. 993.

[1016] Recognized by Art. 2(4) and (7) of the UN Charter and by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV), available at: https://www.refworld.org/docid/3dda1f104.html [last accessed 5.11.2019].

[1017] Recognized by Art. 2(1) of the UN Charter and Art. 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. International Covenant on Civil and Political Rights, Dec.16,1966, 999 U.N.T.S. 3.

[1018] Villaroman, *The Loss*… Op. Cit., p. 8.

[1019] See Katja S Ziegler, "*Domaine Réservé",* Max Planck Encyclopedia of Public International Law [last accessed 5.11.2019].

argued that under current international law states are the sole holders of the decision (a "right") of renegotiating their debts or not[1020], although this "right" is tempered in practice by the conditions required for accessing the funds of the International Financial Institutions in the context of a restructuring[1021].

As can be noted, the aforementioned set of basic principles not only demands that the restructuring be initiated and that its conditions be drafted by the state but also that the debtor "remain" in control of its operations[1022]. Hence, any alternative considering removing the state (or government officials) from the administration of its internal affairs due to sovereign debt restructuring will not pass the compatibility requirement.

5.2. The Compatibility of the Second and Third Group of Normative Propositions: State Practice and Creditors' Property Rights in the Light of International Law

The second and third groups of normative propositions (namely, the imposition of a "stay" and the "cram down") are also compatible with the values embedded in international law. The first evidence of compatibility is that recent practice tends to include contractual provisions that emulate them[1023]. Secondly, even in the cases where these types of provisions are absent in sovereign bonds, these normative propositions will nevertheless be *prima facie* compatible with international law, considering both the interests of creditors and of the state.

5.2.1. First Evidence of Compatibility: Collective Action Clauses

As discussed in *Chapter One*[1024], some sovereign bonds include clauses aiming at emulating the second and third group of previously identified normative propositions. These contractual provisions are usually grouped under the name of "Collective Action Clauses" (henceforth, "CACs"). Two types of CACs are particularly similar to the normative propositions under study. The first one is collective acceleration clauses (also known as "majority enforcement provisions"[1025]). This type of provision is intended to

[1020] Vassilis Paliouras posits that under current international law there is a right vested on states to restructure their debts. This right is of an exclusive "jurisdictional" nature, meaning that states cannot decide the substantive aspects of the operations (i.e., the amount of debt relief which will be actually granted by creditors). Consequently, the scope of the right is circumscribed to the decision of restructuring or not. In the words of Paliouras: "This right is understood as the authority vested to states to decide as a matter of sovereign prerogative on whether to negotiate the rescheduling or reduction of their creditors' claims. The right is further conceived as consisting of both a positive and a negative aspect: it encompasses not only the right to engage in sovereign debt restructuring, but importantly the right to abstain from doing so". Vassilis Paliouras, *The Right to Restructure Sovereign Debt*, 20 Journal of International Economic Law (2017), p. 116.

[1021] See Id., pp. 121-133.

[1022] Furthermore, this has been the usual position among those scholars who take inspiration from domestic insolvency systems for designing rules for sovereign debt restructuring. See, for example, Schwarcz, *Sovereign Debt…* Op. Cit., p. 982. See also, Paulus, *Some Thoughts…* Op. Cit., p. 544.

[1023] Also noting this practice as evidence of compatibility in the context of GPDs (particularly, for majority voting) see Goldmann, *Responsible…* Op. Cit., p. 41.

[1024] See *Chapter One*, p. 16.

[1025] See Das et al., *Sovereign Debt…* Op. Cit., pp. 43-44.

subordinate creditors' individual actions against the debtor (either in the acceleration of the full amount of the debt or by the commencement of litigation against the debtor) to the approval of a specific number of bondholders[1026]. Therefore, as is the case with the "stay" under domestic reorganization regimes, majority enforcement provisions provide for a "cease fire" among creditors in what pertains to litigation against the debtor. However, the specific difference between these two devices lies in that, under collective acceleration clauses, enforcement and/or litigation can be authorized by a certain number of bondholders, while under domestic reorganization regimes the "stay" is statutorily imposed.

The second type of CAC which is of interest to this analysis is "aggregation" or "single-limb aggregated collective action clauses"[1027]. By means of this type of clause, a majority vote across series of bonds can bind all bondholders, including dissenting bond series, where the vote in favor of the restructuring failed[1028]. As can be noted, this type of clause aims to emulate the third group of normative propositions, granting binding power to majority votes and allowing for this possibility among different classes of bondholders.

Both collective acceleration and aggregation clauses can contribute to solving some of the problems that may arise in the context of sovereign debt restructuring. However, as indicated in *Chapter One*, their main limitation flows from their nature. Since they are contractual provisions that need to be specifically included in bond indentures to be applicable, the achievement of their purpose (coordinating creditors' action) requires some degree of homogeneity in the language of the indentures, and that they be present in all or in the vast majority of the debt instruments of the state facing insolvency[1029]. However, the specific recognition of these mechanisms under current lending practices serves as the first evidence of the compatibility of the second and third groups of normative propositions with international law[1030].

5.2.2. Second Evidence of Compatibility: Bondholders' Property Rights and the "General Interest"

Even in the hypothetical case where the loans granted to sovereigns did not establish a ban on enforcement or a mechanism providing for a majority vote, both normative propositions could nevertheless be considered to be *"prima facie"* compatible with the values embedded in international law and could thus legitimately be imposed retroactively (ex-post)[1031].

In this respect, it is useful to recall that creditors' claims are of a personal nature (*in personam rights*) and specifically relate to a promise to pay extended by the debtor to its creditors. On the debtor's part, this promise is an obligation to perform. On creditors'

[1026] Id. See also, Mitu Gulati and Mark Weidemaier, *A People's history of Collective Action Clauses*, 54 Virginia Journal of International Law (2013), pp. 53-54.
[1027] Gelpern, Heller and Setser, *Count the Limbs*… Op. Cit., p. 13.
[1028] Id.
[1029] See Das et al., *Sovereign Debt*… Op. Cit., pp. 48.
[1030] In the same sense, see Matthias Goldmann, *Responsible*… Op. Cit., p. 41.
[1031] A detailed discussion is presented in *Chapter Six*, where a proportionality analysis of the GPDs as "measures" will be sketched out.

part, it is an economic interest. Under international law, as discussed in *Chapter Two*[1032], this economic interest is protected by the guarantee to property under Human Rights Conventions such as the American and European Conventions of Human Rights. At the same time, the aforementioned economic interest can also be considered protected by the standards of treatment offered by international investment law, provided that sovereign bonds qualify as covered assets.

Nevertheless, creditors' rights can be restricted both from the perspective of the aforementioned Conventions and of international investment law. This limitation can be based on the "public" or "general interest", in the form of the imposition of an ex-post modification to the terms of creditors' bonds to include CACs. This was precisely the case in Mamatas v. Greece, the most important sovereign bonds dispute submitted to the European Court of Human Rights (henceforth, "ECtHR")[1033]. In this case, through the means of Law 4050/2012 of February 23, 2012, the Greek Government retroactively altered the terms of its domestic bonds by including in them a majority restructuring provision. Afterwards, it obtained the consent of the required majority of creditors reducing the nominal value of the instruments by 53.5%. Taking into account the particular conditions of the case and arguing that the retroactive imposition of CACs complied with the proportionality requirement, the ECtHR ruled in favor of Greece.

Consequently, as can be noted, even an ex-post unilateral modification of the terms of the contracts to include majority voting not previously contemplated is considered acceptable in light of the values embedded in international law. This is particularly true in the case of the right to property as guaranteed in the American and European Human Rights Conventions. A similar conclusion can be reached in the context of international investment law, a matter which is discussed in detail in *Chapter Six*.

[1032] See *Chapter Two*, pp. 55 et seq.
[1033] See Mamatas and Others v. Greece, Judgement July 21, 2016. This case is discussed in detail in *Chapter Two*, pp. 90 et seq.

6. Conclusions

As previously stated, GPDs refer to common normative propositions which are capable of being elevated to the international scenario. In this *Chapter*, I conducted a comparative study of the corporate reorganization regimes in five jurisdictions, namely Argentina, China, Germany, the United States and the United Kingdom. By means of this comparative study and following the previous literature on GPDs applicable to sovereign debt restructuring, I extracted three groups of normative propositions, including the prerogatives of the debtor (first group), the imposition of a stay on creditors' collection efforts (second group) and majority voting mechanisms (third group). After addressing the function these propositions serve within corporate reorganization regimes (following the law and economics literature), I was able to determine that they are compatible with the values embedded in international law.

However, it is not yet possible to assert that these normative propositions can be considered "general principles of domestic law". In order to do this, it is necessary to analyze whether the problem-solution nexus at stake in the domestic context (namely, the "function" of the norms) also holds in the international scenario. This will be the subject of the next *Chapter*.

CHAPTER FOUR: GENERAL PRINCIPLES OF DOMESTIC LAW APPLICABLE TO SOVEREIGN DEBT RESTRUCTURING. PART TWO

1. Introduction

Both corporate reorganizations and sovereign debt restructurings share one fundamental point: the obligations at stake are renegotiated with the purpose of rehabilitating the debtor. However, while the debt owed by insolvent corporations is renegotiated through a collective, all-encompassing, and compulsory framework imposed by statute, sovereign debt restructurings are conducted in a decentralized manner, without a systematic regulation (neither domestic nor international) addressing all the liabilities and the interests at stake[1034]. This is not to say that state indebtedness exists on a legal vacuum. Just the opposite, the restructurings of states' debts are performed according to the laws from different jurisdictions which govern the contracts (bonds) at stake.

Therefore, the terms of those bonds and the provisions of the corresponding laws establish the options for the modification of the liabilities at stake and the consequences of a state's default. The most common mechanisms used in restructurings are bond-exchanges (where "old" instruments are exchanged for "new" ones containing longer maturities, a different interest rate or a discount on the principal) and bond-modifications (where the same key terms of the contracts are altered)[1035].

Notwithstanding the significance of the language of the contracts and of the domestic law governing them, it is relevant to note that international law is not completely silent on the issue of sovereign indebtedness and sovereign debt renegotiation. As indicated in *Chapter Three*[1036], besides treaties and custom, a specific source of international law has the potential of being applied in this context.

The source previously indicated refers to the "general principles of law"[1037]. The literature divides these principles into "general principles originating in international relations", "general principles applicable to all kinds of legal relations" and "general principles of domestic law"[1038]. It is this last set of principles ("general principles of domestic law", henceforth "GPDs") that will be the subject of this *Chapter*. Although there are several controversies regarding the content and the methodology for the identification of GPDs, the majority of commentators agree that they encompass

---

[1034] See, for example, International Law Association, Sovereign Insolvency Study Group, *State Insolvency: Options for the Way Forward*, Presented at The Hague Conference (August 2010), available at https://www.ila-hq.org/index.php/study-groups [last accessed 27.2.2020].
[1035] See Das et al., *Sovereign Debt Restructurings*… Op. Cit., p. 8.
[1036] See *Chapter Three*, p. 115.
[1037] Article 38 (1) (c) of the Statute of the International Court of Justice specifically recognizes the general principles of domestic law as a source of international law and provides: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (…) c. The general principles of law recognized by civilized nations (…)". Statute of the International Court of Justice in Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, T.S. No. 993.
[1038] See Kleinlein, *Customary International Law*… Op. Cit., p. 134.

normative propositions widely recognized by domestic legal systems around the world (the "recognition" requirement) which are capable of being extrapolated to the international sphere (the "extrapolation" requirement)[1039].

In the previous *Chapter*, I took the initial steps towards identifying the GPDs applicable to sovereign debt restructuring. First, in order to tackle the "recognition" requirement, I conducted a comparative survey of five jurisdictions (Argentina, China, Germany, the United States and the United Kingdom). There, I decided to focus the analysis of domestic corporate reorganization frameworks (instead of other branches of insolvency law) due to their similarities with sovereign debt restructuring and to their *"prima facie"* compatibility with the international legal order. Particularly, I inquired into whether a common understanding among those jurisdictions exists in what pertains to corporate reorganization and reviewed the literature on the economic rationale of their critical aspects. From that analysis, I extracted three groups of normative propositions which have the potential of being elevated to the status of GPDs applicable to sovereign debt restructuring. These normative propositions are summarized in the following table:

	Description	Economic Rationale
First Group of Normative Propositions	The debtor files and drafts a reorganization proposal and remains in control of the business (also referred to as the debtor-in-possession or "DIP").	Encourages early reorganization, prevents risk-shifting and maximizes ex-post payoffs.
Second Group of Normative Propositions	A ban on enforcement activities is imposed upon creditors (also referred to as the "stay").	Solves common-pool and anti-commons problems. Avoids inefficient piece-meal liquidation of debtor's property and enhances creditors' cooperation in the reorganization forum.
Third Group of Normative Propositions	The approval of restructuring plans does not require the consent of every single creditor. Instead, a majority of creditors can bind dissenting creditors to a restructuring proposal (also referred to as a "cram down")	Solves anti-commons problems in debt renegotiations.

Table 5: Summary of the Normative Propositions Extracted from Domestic Corporate Reorganization Regimes in Chapter Three.

Second, in order to address the "extrapolation" requirement, I examined whether those normative propositions are compatible with the values embedded in the international legal order (including other principles of international law such as sovereign equality and the protection of property rights). I concluded that they are. This *Chapter* deals with the second task demanded by the "extrapolation requirement". As previously indicated, this task entails an assessment of the (dis)similarities between the domestic and international spheres[1040]. Specifically, it relates to verifying whether the "functions" (i.e., the "problem-solution nexus") which the previously mentioned normative propositions serve under corporate reorganizations regimes also hold in the sovereign debt restructuring context. Two sub-conditions need to be fulfilled for this purpose: (a) that the international and the domestic sphere share a similar problem which can be

[1039] For a detailed discussion including a list of authorities, see *Chapters Two*, p. 42 et seq. and *Three*, p. 119 et seq.

[1040] This is a common feature of international law analogies drawn from domestic law. For a general discussion, see Hertogen, *The Persuasiveness…* Op. Cit.

solved at the international level through the norms extracted from domestic jurisdictions, and that (b) the similarities between the domestic and international sphere are significant enough to render the analogy plausible.

As stated before, this is the last step needed to satisfy the "extrapolation" requirement and to prove that these normative propositions can be considered as genuine GPDs and thus, as part of the international legal framework.

However, it is important to mention that asserting that one or more normative propositions are GPDs does not guarantee their application neither by domestic nor by international courts and tribunals. This has been recognized by the previous literature attempting to extract GPDs from domestic corporate reorganization regimes. Particularly, the literature has either used these principles as an inspiration for suggesting an international treaty on the subject of sovereign debt restructuring[1041] or has conditioned its application to the existence of a framework along those lines[1042]. By contrast, one of the main goals of this *Thesis* is to discuss the conditions under which the normative propositions being studied can be applied in sovereign debt litigation *today*, a problem to which I turn in the next *Chapter*.

This *Chapter* is structured as follows. First, I start by comparing states and corporations from a broad perspective (section 2). Then, I discuss the dissimilarities between both entities in what specifically pertains to insolvency and debt renegotiations. Notably, I discuss the difficulties involved in determining states' insolvency vis-à-vis corporations' (subsection 2.1), the impossibility of liquidating states as legal entities (subsection 2.2), the relatively weak nature of sovereigns' commitments (subsection 2.3), the differences in control devices under restructurings and reorganizations (subsection 2.4) and the dissimilarities in what refers to renegotiation mechanisms (subsection 2.5). Additionally, I evaluate those differences from a functional perspective (section 3). This section discusses whether there are significant similarities between the domestic and the international sphere which make the analogy plausible and which, in turn, justify the application of each group of normative propositions to sovereign debt restructuring. At the same time, it also analyzes if the international and the domestic contexts share similar problems which can be solved through the normative propositions previously mentioned. Here I discuss each those propositions, including the first group (drafting and "DIP", subsection 3.1), the second (the "stay", subsection 3.2) and the third one ("cram down", subsection 3.3). Finally, I present the conclusions of this study (section 4).

2. Comparing Corporate and Sovereign Insolvency

There are profound differences between states and corporations[1043]. I first discuss these differences from a broad perspective (identifying the most notable characteristics of both

[1041] See, for example, Schier, *Towards…* Op. Cit., p. 16 and p. 110.

[1042] See, for example, Goldmann, *On the Comparative…* Op. Cit., p. 133 footnote 108. But see Goldmann's subsequent works discussed in *Chapter One*, pp. 25 et seq.

[1043] In this comparison, by "corporations" I understand, exclusively, joint-stock companies and other business enterprises which share their main features (see footnote 1046 below). I chose to refer only to that type of entities since it is the most common form of organization for large-scale

type of entities). Then, I discuss the relevant dissimilarities of both entities from the perspective of insolvency and debt renegotiation.

Scholars commenting on the differences between states and corporations from a broad perspective usually refer to the dissimilarities between both types of entities in what pertains to: (i) their defining characteristics and nature, (ii) the ends that they pursue, (iii) their constituencies and (iv) their governance structures[1044].

First, the most important difference between corporations and states relates to their defining characteristics and, hence, to their nature. On the one hand, states are fictional sovereign entities with an undetermined lifespan characterized by a permanent population, a defined territory and by the capacity to enter into relations with other states[1045]. On the other hand, corporations are voluntary associations which, at their core, share several attributes including legal personality, limited liability, share-transferability, a delegated management with a board structure and ownership by investors[1046].

Secondly, states and corporations are also different from the perspective of the objectives that they pursue. Particularly, political theory justifies the existence of the state on the grounds of the wellbeing of its citizens. In other words, the primary mandate of the state (and thus, that of government officials) is to maximize the welfare of its

business firms in market economies. See John Armour et al., What Is Corporate Law? in Reinier Kraakman et al. (Eds.), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd Edition). Oxford University Press (2017), p. 1.

1044 See, for example, Anna Gelpern, *Bankruptcy Backwards: The Problem of Quasi-Sovereign Debt*, 121 Yale Journal of International Law 4 (2012), p. 898. Other differences stressed by commentators refer to the numbers of these entities (i.e., while corporations are many, states are few), to their capital structure (while states issue unsecured debt corporations borrow in both secured and unsecured terms), etc. See International Law Association, *State Insolvency…* Op. Cit., pp. 19-20; Jonathan Thomas, *Bankruptcy Proceedings for Sovereign State Insolvency and their Effect on Capital Flows*, 13 International Review of Economics and Finance (2004), p. 344; Michelle White, *Sovereigns in Distress: Do They Need Bankruptcy?* 1 Brookings Papers on Economic Activity (2002), p. 13 and Megliani, *Sovereign Debt…* Op. Cit., p. 68.

1045 These are the "classical" elements of statehood as recognized under Article 1 of the Montevideo Convention (1933). See Montevideo Convention on the Rights and Duties of States, December 26, 1933, 165 L.N.T.S. No. 19. Nevertheless, it should be mentioned that the contemporary consensus highlights five principles defining "the core of the concept of statehood", which, "as a matter of interpretation the term "state" in any treaty or other instrument prima facie refer to states having these attributes". Those attributes include: (1) "states have plenary competence to perform acts (…) in the international sphere"; (2) "states are exclusively competent with respect to their internal affairs (…)"; (3) "states are not subject to compulsory international process, jurisdiction, or settlement without their consent (…)"; (4) "(…) states are regarded as 'equal' (…)" under international law and; (5) "derogation from these principles will not be presumed (…)". See James Crawford, "*State"*, Max Planck Encyclopedia of Public International Law, [last accessed 29.10.2019], Section B.

1046 These are the "core" characteristics of corporations identified by Armour et al. from a functional perspective. See Armour et al., *What Is*... Op. Cit., pp. 5 et seq.

population[1047]. On their part, corporations are investment vehicles pursuing the maximization of shareholders' wealth[1048].

Thirdly, both corporations and states feature different constituencies. Particularly, the state's citizens are not its shareholders. On the contrary, citizens are bonded to their respective state based on public and not in private law (as shareholders are). This difference reflects in shareholders' ability to enter and exit the corporation on a voluntary basis[1049]. Furthermore, citizenship tends to be based on "tacit" rather than on "explicit" consent[1050].

The last important difference between these actors refers to their divergent governance structures. Although both entities are administered by agents (government officials in the case of states, and managers and directors in the case of corporations)[1051], the

[1047] See Jedediah Purdy and Kimberly Fielding, *Sovereigns, Trustees, Guardians: Private-law Concepts and the Limits of Legitimate State Power*, 70 Law and Contemporary Problems 165 (2007), p. 210; Helene Landemore and Isabelle Ferreras, *In Defense of Workplace Democracy: Towards a Justification of the Firm-State Analogy*, 44 Political Theory 1 (2016), p. 59 and Robert Rasmussen, *Integrating a Theory of the State into Sovereign Debt Restructuring*, Vanderbilt University Law Scholl Law & Economics: Working Paper Number 04-16 (2004), pp. 18-19.

[1048] See Rasmussen, *Integrating…* Op. Cit., pp. 18-19. Furthermore, scholars justify the focus of corporate law on enhancing shareholders' value as a means towards the maximization of overall social welfare. See Armour et al., *The Anatomy…* Op. Cit. However, it should be mentioned that there are certain voices which have suggested to expand the goals of corporations. Thus, from said perspective, those legal entities ought to commit themselves not only to shareholders, but to all relevant stakeholders. Particularly, the "Business Roundtable" (a non-profit US organization) has stressed that "business leaders should commit to balancing the needs of shareholders with customers, employees, suppliers and local communities". See Jena McGregor, *Group of CEOs says maximizing shareholder profits no long can be the primary goal of corporations* (2019), the Washington Post, available at https://www.washingtonpost.com/business/2019/08/19/lobbying-group-powerful-ceos-is-rethinking-how-it-defines-corporations-purpose/ [last accessed 29.10.2021]. See also, Business Round Table, *Statement on the Purpose of a Corporation* (2019) available at https://opportunity.businessroundtable.org/ourcommitment/ [last accessed 29.10.2021].

[1049] However, it should be noted that this last difference seems to be of a matter of degree rather than one of kind. For example, although not explicitly recognized by any international agreement, the "right to renounce citizenship" may be considered as a rule of customary international law. For a discussion of the latter point, see Savannah Price, *The Right to Renounce Citizenship*, 42 Fordham International Law Journal 5 (2019). Consequently, and to a certain extent, citizenship could also be considered from a "voluntary" point of view, at least from the perspective of the individual concerned.

[1050] See Rasmussen, *Integrating…* Op. Cit. 18 and Landemore and Ferreras, *In Defense…* Op. Cit., pp. 66-68.

[1051] Under international law, that government officials act as agents of the state or of its citizens (the principals) is the very foundation of the continuity of a state's commitments (including debt continuity). See Allan Sykes and Eric Posner, *Economic Foundations of International Law*. Harvard University Press (2013), pp. 43-44. Furthermore, characterizing the relationship between citizens and states as that of a principal and an agent has been prevalent among scholars discussing the odious debt doctrine. For example, Odette Lienau distinguishes two notions of sovereignty in political theory which serve as the basis for understanding the relationship in this manner. These paradigms are "popular democracy" and "sovereign authorization" (this last one, only for the case of democracies). See Odette Lienau, *Rethinking*

mechanisms in place for disciplining the agents in the case of corporations are more robust than in the case of states[1052]. According to Robert Rasmussen, the status of shareholders as residual claimants and risk-bearers of the enterprise makes them more prone to monitor and control responsibly the performance of their agents - the board and management-, thus aligning (to a certain extent) the interests of the later with those of the former[1053]. In contrast, monitoring and controlling mechanisms (even in well-functioning democracies) are more diffuse in the case of states due to citizens' divergent and multifaceted concerns and due to the cyclic structure of the electoral process[1054].

The following table summarizes these dissimilarities:

	States	Corporations
Nature	Sovereign entities with undefined lifespan.	Voluntary associations
Ends	Welfare of its population.	"Investment vehicles", mainly pursuing the maximization of shareholder's wealth.
Constituencies	Citizens.	Shareholders.
Governance Structure	Principal agent relationship with weaker control mechanisms	Principal agent relationship with stronger control mechanisms.

Table 6: Summary of the Main Differences Between States and Corporations from a Broad Perspective.

All these differences, combined with the lack of a bankruptcy proceeding specifically designed for states, involve particular divergences between corporations and states in what pertains to insolvency and debt renegotiation. In the next subsections, I discuss the most salient ones, including: (a) the difficulties involved in determining a state's insolvency, (b) the impossibility of a state's liquidation, (c) the relatively weak nature of sovereigns' commitments, (d) the differences in control devices under insolvency and (e) the dissimilarities in what relates to renegotiation mechanisms[1055].

2.1. Difficulties Involved in Determining States' Insolvency

The first important difference between states and corporations in this respect refers to the determination of insolvency. Domestic bankruptcy law usually employs either one of two standards for the commencement of bankruptcy proceedings, and thus, as an

Sovereign Debt: Politics, Reputation and Legitimacy in Modern Finance. Harvard University Press (2014), pp. 36-46. See also, Cristian Dimitriu, *Are States Entitled to Default on the Sovereign Debts Incurred by Governments in the Past?* Ethical Perspectives (2015), p. 17. Finally, in the words of Buchheit, Gulati and Thompson: "viewing the people of a country as the principal, and the government as the agent, is more than just a metaphor; it is how American political philosophy and America legal theory have frequently viewed the governmental relationship". Lee Buchheit, Mitu Gulati and Robert Thompson, *The Dilemma of Odious Debts*, 56 Duke Law Journal (2007), pp. 1238-1239.

[1052] See Rasmussen, *Integrating…* Op. Cit. However, it should be mentioned that some corporations have adopted special structures that can undermine shareholders' ability to police boards and managers. For a general discussion of the "manager-shareholder conflict" and of the conflict between minority and majority shareholders, see Kraakman et al., *The Anatomy…* Op. Cit., Chapters Three and Four.

[1053] Rasmussen, *Integrating…* Op. Cit., pp. 19-21.

[1054] See Gelpern, *Bankruptcy…* Op. Cit., p. 907. Discussing this point when comparing state and corporate responsibility see Posner and Sykes, *The Economic…* Op. Cit., pp. 116-117.

[1055] Notably, some of these differences have also been mentioned by the previous scholarship identifying GPDs applicable to sovereign debt restructuring. See, for example, Bohoslavsky, *Responsibility…* Op. Cit., p. 506 and Bohoslavsky, *Lending…* Op. Cit., pp. 406-407.

indicator of a debtor's insolvency[1056]. The first one (the "liquidity" or "cash-flow" test) refers to the debtor's inability to service its obligations as they fall due[1057]. The second one (the "balance sheet" test) compares the liabilities of the corporation with its assets: If liabilities exceed assets, then creditors are usually authorized to force the debtor into bankruptcy and the company can be considered insolvent[1058].

In the case of states, neither bonds nor domestic law governing transactions define the specific benchmark to be used to assess the solvency of the state. In the sovereign context, insolvency is more difficult to determine than in the case of corporations. The balance-sheet test tends to be discarded due to the complications associated with the realization[1059] and valuation[1060] of the property of the state. For example, most of the non-financial assets of governments consist of land and buildings whose market value may not capture their patrimonial value and, at the same time, may fluctuate downwards in the periods during which their realization would be sought (that is, when the state is facing financial distress)[1061]. Furthermore, in highly indebted nations, both non-financial and financial assets will usually be insufficient to cover all the liabilities at stake[1062].

Hence, in practice, a yardstick akin to the cash-flow test tends to be applied to determine whether a state is insolvent or not[1063]. The concept developed for this purpose is "debt sustainability" which is based on the state's future earning capacity[1064] and therefore, is an "inherently forward-looking concept"[1065]. According to this criterion, a state is considered insolvent (and its debt is considered unsustainable) when its future primary

[1056] Notably, the Bankruptcy Law of the United States does not require the insolvency of the debtor for the commencement of reorganization proceedings. See McCormack, *Corporate*… Op. Cit., p. 78.
[1057] See UNCITRAL, *Legislative Guide on Insolvency Law*. United Nations (2005), pp. 45-46. See also, The World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Right Systems*. The World Bank (2016), p. 8.
[1058] Id.
[1059] Juanita Calitz, *An Overview of Certain Aspects Regarding the Regulation of Sovereign Insolvency Law*, 45 De Jure 329 (2012), p.335.
[1060] See Carlo Cottarelli, *What We Owe: Truths, Myths and Lies About Public Debt*. The Brookings Institution (2017), p. 118 et seq.
[1061] See Xavier Debrun et al., Debt Sustainability, in Ali Abbas et al., *Sovereign Debt: A Guide for Economists and Practitioners*. Oxford University Press (2020), p. 184. See also Cottarelli, *What We Owe*… Op. Cit., pp. 119-122.
[1062] See Cottarelli, *What We Owe*… Op. Cit., pp. 122-123.
[1063] See Gelpern, *Bankruptcy*… Op. Cit., p. 906; Calitz, *An Overview*… Op. Cit., p. 335 and Goldmann, *Responsible*… Op. Cit., p. 38. Although using this criterion is the consensus within the sovereign debt community, an English court suggested that the proper yardstick to measure a country's insolvency is the balance sheet test. See FG Hemisphere Associates LLC v. Congo, 2005 [EWHC] 3103 (Comm), 2005 WL 3767836, p. 5.
[1064] See Buchheit et al., *The Restructuring Process*… Op. Cit., p. 330.
[1065] Debrun et al., *Debt Sustainability*… Op. Cit., p. 151.

surpluses (considering the implementation of the maximum realistic domestic adjustment) will be insufficient to pay its debts in full[1066].

However, although there is consensus on using debt unsustainability as akin to corporate insolvency for the sovereign context, it is important to note that there are more uncertainties involved in the later than in the former[1067]. Particularly, sustainability analysis depends on controversial assumptions about (i) the evolution of the economic fundamentals of the country and (ii) about the domestic political context which enables to consider the imposition of adjustment measures as "politically feasible".

Although the indebted government may be incapable of predicting with accuracy the evolution of its economic conditions, it is certainly better suited than creditors to assess the maximum level of adjustment from a political perspective. Hence, the state has an "advantage" over creditors in what relates to the evaluation of its capacity to repay, a situation that points out the asymmetries of information between creditors and debtors in debt renegotiations[1068]. For these reasons, determining when a default is a consequence of the state's inability to pay (that is, a consequence of an unsustainable debt burden) or unwillingness to pay (that is, a fruit of debtor's opportunism) is more difficult for creditors[1069]. The same is true for the purposes of determining how much debt relief is needed in a particular restructuring[1070]. As it will be discussed later (see subsections 2.4 and 3.2.2.3) these asymmetries of information can be ameliorated, to a certain extent, by the involvement of International Organizations in sovereign debt renegotiations.

2.2. The Impossibility of Liquidating the State as a Legal Entity

The second important dissimilarity between states and corporations from the perspective of insolvency refers to the impossibility of states' liquidation. It is important to note that the liquidation of a corporation involves the realization of its assets to repay its creditors in a pre-defined order[1071] and that it entails its dissolution as a legal entity[1072]. Liquidation can be seen as the alternative of last resort of domestic bankruptcy regimes when the enterprise becomes insolvent and coexists with

---

[1066] See Das et al., *Sovereign Debt*… p. 67. See also, International Monetary Fund, *Modernizing the Framework for Fiscal Policy and Public Debt Sustainability Analysis* (2011), available at https://www.imf.org/external/np/pp/eng/2011/080511.pdf [last accessed 24.02.2020], p. 5. See also Megliani, *Sovereign Debt*… Op. Cit., pp. 3-4.

[1067] One important obstacle refers to distinguishing between "illiquidity" and "insolvency" in the sovereign debt context. See Otaviano Canuto, Brian Pinto and Mona Prasad, *Orderly Sovereign Debt Restructuring: Missing in Action! (And Likely to Remain So)*, 29 The World Bank Research Observer 1 (2014), pp. 124-125 and Goldmann, *Responsible*… Op. Cit., 38.

[1068] See Buchheit et al., *The Restructuring*…, pp. 328-329.

[1069] See Choi, Gulati and Posner, *The Evolution*… Op. Cit., pp. 132-134 and p. 137. See also, Natalie Turchi, *Restructuring a Sovereign Bond Pari Passu Work-Around: Can Holdout Creditors Ever Have Equal Treatment?* 83 Fordham Law Review 4 (2015), p. 2181. See also, Gelpern, *Bankruptcy*… Op. Cit., p. 927.

[1070] Id.

[1071] See Finch, *Corporate Insolvency Law*… Op. Cit., pp. 22-23.

[1072] See Westbrook et al., *A Global View*… Op. Cit., p. 30.

reorganization. Reorganization is another alternative provided for under bankruptcy laws which aims at rehabilitating an insolvent (but nevertheless, economically viable) business. Through reorganization a debtor and its creditors renegotiate the liabilities at stake by the means of an "arrangement" (usually denominated "restructuring plan").

From an economic perspective, both liquidation and reorganization attempt to provide the most efficient solution for a company in distress: Both forms are justified (respectively) when they increase creditors' payoffs. In consequence, the reorganization of a corporation is desirable when the company's value as a going concern exceeds its liquidation value and vice-versa[1073]. Additionally, the possibility of liquidation also plays an important role in corporate reorganizations: The debtor and its creditors negotiate against the shadow of liquidation, and consequently, both parties have incentives to agree – in principle – to a deal which maximizes the value of the business.

Finally, liquidation plays another important role in the reorganization of a corporation. As stated above, through reorganization, the liabilities of a corporation are renegotiated through a restructuring plan proposed by the debtor. Domestic insolvency regimes require creditors' approval of the plan for its implementation and divide creditors in different groups or "classes" for voting purposes[1074]. If one or more classes reject the plan, it may still be imposed through a "cross-class cram down" ordered by the Court which requires, among other conditions, the satisfaction of the "best interest of creditors" test[1075]. According to this criterion, the plan will only be authorized if dissenting creditors receive at least the same amount that they would earn if the company were in liquidation[1076]. Thus, liquidation (and particularly, liquidation value) also serves as an important benchmark in the context of debt renegotiation under reorganization regimes[1077].

As previously indicated, unlike corporations, states cannot be liquidated. Selling all the assets of a country if it becomes insolvent or dissolving it as a legal entity if it is unable to service all its liabilities is considered contrary to the values embedded in the international legal order[1078]. This explains why neither international law, nor the domestic law governing the contracts between states and their creditors consider this possibility. Furthermore, the same reasons motivated this work to exclude the normative propositions directly associated with liquidation for being considered GPDs[1079].

[1073] See, for example, Eidenmüller, *Trading*… Op. Cit., p. 241.
[1074] For a detailed discussion see *Chapter Three*, pp. 144 et seq.
[1075] This is the name which is usually given to the test under US bankruptcy law. See Germain, *Bankruptcy Law*… Op. Cit., p. 370.
[1076] This test is featured by all the reorganization regimes studied in the previous *Chapter* which consider the "cram down". See *Chapter Three*, pp. 144-146.
[1077] See Daniel Tarullo, *Rules, Discretion, And Authority in International Financial Reform,* Journal of International Economic Law (2001), p. 634.
[1078] See *Chapter Three*, pp. 134-137.
[1079] See Id.

Consequently, sovereign debt restructurings are conducted without the threat of this alternative of last resort (not even as a relevant benchmark to be used in debt renegotiation) and assuming the continued existence of the state as a legal entity. However, although weak when compared to the case of corporations, sovereigns face several disciplining mechanisms when borrowing which can play an important part during debt renegotiations, as discussed in the next subsection.

2.3. The Relatively Weak Nature of Sovereigns' Commitments

The third (and one of the most commonly stressed) difference between corporate and sovereign debt refers to the relatively weak legal enforcement of the later in comparison to the former[1080]. Hence, it is usually posited that while creditors of a corporation can make use of the court system and of public organs to pursue, attach, and execute the assets of their debtors (and even to force them into liquidation) the same does not hold for the creditors of a state. As has been already indicated[1081], there is neither a bankruptcy regime for sovereigns, nor a supranational enforcement authority which can effectively compel a defaulting state to repay its debts. Therefore, an important part of the scholarship focuses on other mechanisms which are capable of imposing costs on states to explain both sovereign repayment and the very existence of the sovereign debt market[1082].

However, although limited, legal measures are still capable of imposing costs on defaulting states. The effectiveness of these measures depends on different factors. Here, I discuss two in particular: (a) the law governing transactions, sovereign

[1080] See, for example, Gelpern, *Bankruptcy…* Op. Cit., p. 898; Calitz, *An Overview…* Op. Cit., pp. 333-334 and Committee on International Economic Policy and Reform, *Revisiting Sovereign Bankruptcy*. Brookings (2013), p. 5.

[1081] See *Chapter One*, pp. 1 et seq.

[1082] As it is frequently stressed by scholars, if there weren't costs associated with defaults, states will tend to act opportunistically, and would default on the debt acquired. Thus, anticipating default, creditors will not be willing to lend them in the first place and the sovereign debt market could not possibly exist. The most prominent costs associated with default in the literature are the following: (i) reputational costs (leading to exclusion from market access or to increases in borrowing costs), (ii) spillover effects in the debtor's economy (affecting output, value of local firms and domestic enterprises which depend on the access of international credit) and (iii) punishment against government officials who default by domestic interest groups pressuring for maintaining access to international markets. For a summary of the literature see Sturzenegger and Zettelmeyer, *Debt Defaults…* Op. Cit., pp. 48 et seq.; Das et al., *Sovereign…* Op. Cit., pp. 60 et seq.; Cottarelli, *What We Owe…* Op. Cit., pp. 92 et seq. For a relatively recent study of reputational concerns see Juan Cruces and Cristoph Trebesch, *Sovereign Defaults: The Price of Haircuts*, 5 American Economic Journal: Macroeconomics 3 (2013) (finding that the size of creditors' losses after default/restructurings is strongly correlated to the duration of a state's market exclusion and to the increase of its borrowing costs on international markets). For a discussion on the mechanisms incentivizing repayment from a political economy perspective see Jerome Roos, *Why Not Default? The Political Economy of Sovereign Debt*. Princeton University Press (2019) (arguing that domestic interest groups who benefit the most from access to international capital markets tend to pressure the government officials in favor of debt repayment).

immunity and the location of the state's assets and (b) other clauses included in sovereign bonds (particularly, the "pari passu" clause).

2.3.1. The Law Governing Transactions, Sovereign Immunity and the Location of the Defaulting State's Assets

As previously indicated, sovereign bonds are contracts and, as such, they reflect the bargain between the issuer and its lenders. Besides monetary terms, the choice of law and choice of jurisdiction clauses are of critical importance for creditors. By means of these clauses, the borrowing state subjects the disputes which may arise from the bonds to the courts and to the legal system of a particular jurisdiction. Frequently, the law governing the instruments and the forum selected for resolving those disputes will be either (i) that of the issuing state or (ii) that of a third state[1083].

Considering that the state has the ultimate power to amend its own legislation, to alter its own obligations and to enforce laws and regulations within its territory, the first alternative limits legal enforcement for creditors (and posits, and the same time, a commitment problem for borrowers whose legal system is not considered trustworthy enough by the market). This alternative, dubbed by commentators as "the local law advantage"[1084], allows the state not only to modify the key terms of the instruments ex-post (including clauses facilitating renegotiation or reducing the principal or interests) but also to avoid the domestic legal consequences of a default[1085] (by enacting legislation and emergency decrees or by pressuring domestic courts into inaction).

Hence, creditors can avoid those risks, and increase the effectiveness of legal enforcement, by acquiring bonds subjected to the law and courts of a third state[1086] (hereinafter, "international bonds"). In most cases, international bonds are subjected to the jurisdictions of New York and England[1087], whose legal systems tend to be

---

[1083] See Megliani, *Sovereign…* Op. Cit., pp. 189-190. Although submission to arbitration is also an alternative, it is not common in sovereign bonds. See Lorenza Mola, *Sovereign Immunity, Insolvent States and Private Bondholders: Recent National and International Case Law*, The Law and Practice of International Courts and Tribunals (2012), p. 531.

[1084] See Lee Buchheit and Mitu Gulati, *Use of the Local Law Advantage in the Restructuring of European Sovereign Bonds*, 3 University of Bologna Law Review 2 (2018). See also Yannis Manuelides, *Using the Local Law Advantage in Today's Eurozone (With Some References to the Republic of Arcadia and the Mamatas Judgement)*, 14 Capital Markets Law Journal 4 (2019), p. 470.

[1085] See Rodrigo Olivares-Caminal et al., *Debt Restructuring*. Oxford University Press (2011), p. 390.

[1086] See Choi, Gulati and Posner, *The Evolution…* Op. Cit., p.139-140. Particularly, borrowers from emergent markets are more prone to issue bonds governed by foreign jurisdictions than their developed counterparts. See Marcos Chamon, Julian Schumacher and Cristoph Trebesch, *Foreign-law Bonds: Can they Reduce Sovereign Borrowing Costs?* European Central Bank, Working Paper Series (2018), pp. 6-7.

[1087] According to the IMF, as of 2018, from the total stock of outstanding sovereign bonds issued in the world and which are governed by foreign law, a 52 percent are governed by New York Law and a 45 percent are governed by English law. See International Monetary Fund, *Fourth Progress Report on Inclusion of Enhanced Contractual Provisions in International Sovereign Bond Contracts* (2019), available at https://www.imf.org/en/Publications/Policy-

considered as sufficiently familiar for transactional lawyers and are usually perceived as fair and neutral by bond purchasers[1088].

However, even in the case of international bonds, creditors will face several obstacles when attempting to enforce their claims against a defaulting sovereign. The first obstacle is of a practical nature: most of the assets of the debtor state will be located within its borders (or will be repatriated by the state before litigation occurs)[1089] and creditors attempting to seize them will face the same problems with the domestic legal system of the borrower which were previously described for non-international bonds. Frequently, the same is true for the state's most valuable assets: taxation proceeds[1090]. The second obstacle refers to the immunity which states (and their assets) are granted under foreign jurisdictions. This second obstacle remains the "last bastion of protection"[1091] of a defaulting state.

2.3.1.1. Sovereign Immunity

Sovereign immunity is a rule under both customary international law and domestic law by the virtue of which an independent state cannot be subjected to the jurisdiction of the courts and to enforcement measures of the organs of third states without its consent[1092]. The rule is a corollary of the international law principles of inter-state

Papers/Issues/2019/03/21/Fourth-Progress-Report-on-Inclusion-of-Enhanced-Contractual-Provisions-in-International-46671 [last accessed 10.3.2020], p. 5 at footnote 9.

[1088] See Olivares, *Debt Restructuring*… Op. Cit., p. 390. See also Megliani, *Sovereign*… Op. Cit., p. 190.

[1089] See Mark Weidemaier, *Sovereign Immunity and Sovereign Debt*, University of Illinois Law Review (2014), p. 89.

[1090] See Sebastian Grund, *The Legal Consequences of Sovereign Insolvency – A Review of Creditor Litigation in Germany Following the Greek Debt Restructuring*, 24 Maastricht Journal of European and Comparative Law 3 (2017), p. 407. It is worth mentioning that developing countries tend to rely more heavily on trade taxes (tariffs) while developed countries depend more on direct taxes (including personal income, corporate profits and property taxes). See Kyle McNabb and Philippe LeMay-Boucher, *Tax Structures, Economic Growth and Development*, International Centre for Tax and Development Working Paper 22 (2014). Crucially, if certain requirements are met, taxes and royalties owed to an indebted state may be garnished for the satisfaction of their claims at the request of bondholders. See, for example, Af-Cap Inc. v. Republic of Congo, 383 F.3d 361 (5th Cir. 2004).

[1091] See Kupelyants, *Sovereign Defaults*… Op. Cit., p. 277.

[1092] Hazel Fox and Philippa Webb, *The Law of State Immunity* (Revised and Updated 3rd Edition). Oxford University Press (2015). See also Weidemaier and Gulati, *The Relevance of Law*… Op. Cit., p. 398.

equality, independence and non-intervention[1093], and has two different elements[1094]: Immunity from adjudication[1095] and immunity from execution[1096].

First, in what concerns to immunity from adjudication, it is important to note that this protection saw an important decline during the twentieth century, evolving from an "absolute"[1097] rule to the contemporaneous "restrictive" doctrine[1098]. According to the later, in order to ascertain whether a state is entitled to immunity from adjudication, it is necessary first to determine the specific nature of the activity on which the claim against the state is based, and not on its purpose[1099]. As a general rule, the acts of the state executed on its public or sovereign capacity (i.e., "acta de jure imperii") are protected from the scrutiny of domestic courts, while activities of a commercial nature (transactions which the state executes as a market player, i.e., "acta de jure gestionis") are not[1100].

[1093] See Pierre-Hugues Verdier and Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity,* International Studies Quarterly (2014), p. 17. See also Megliani, *Sovereign…* Op. Cit., pp. 391-392.

[1094] Sovereign immunity is also recognized by international agreements, particularly, by the United Nations Convention on Jurisdictional Immunities of States and Their Property (not yet entered into force) and by the European Convention on State Immunity. See Convention on Jurisdictional Immunities of States and their Property of 2 December 2004, 44 ILM 803 and The European Convention on State Immunity, 16 May 1972, CETS No. 074, 11 ILM (1972) 470. For a discussion, see Xiadong Yang, *State Immunity in International Law*. Cambridge University Press (2012), pp. 441 et seq.; Peter-Tobias Stoll, "*State Immunity"*, Max Planck Encyclopedia of Public International Law, [last accessed 29.10.2020], and August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 The European Journal of International Law 4 (2006).

[1095] Immunity from adjudication limits domestic courts' "inquiry into the claims and adjudication by means of a judgement or declaration of rights and obligations" against a sovereign state. Fox and Webb, *The Law…* Op. Cit.

[1096] Immunity from execution "restricts the enforcement powers of national courts or other organs" shielding, from attachment, the assets of a state which are located outside its borders. Kupelyants*, Sovereign Defaults…* Op. Cit., p. 289.

[1097] Under the absolute doctrine, "Courts (…) might decline jurisdiction over a lawsuit even if the sovereign had previously consented to be sued and waive its immunity". Weidemaier, *Sovereign Immunity…* Op. Cit., pp. 73-74.

[1098] In the words of Weidemaier and Gulati, under the restrictive theory of immunity, "sovereigns are presumptively not immune from suit for commercial acts". Weidemaier and Gulati, *The Relevance of Law…* Op. Cit., p. 398. For an analysis of the evolution of the customary international law on sovereign immunity, see Verdier and Voeten, *How Does…* Op. Cit. This evolution has also increased the effectiveness of creditors' remedies. See Waibel, *Sovereign Defaults…* Op. Cit., p. 121.

[1099] See George Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgements Against States and Their Instrumentalities, and Some Proposals for its Reform*, 25 Arizona Journal of International & Comparative Law 3 (2008), p. 673.

[1100] The rationale of this distinction is straight-forward: The adjudicative protection granted to states is based on their specific nature as fictional entities that coexist among each other on the international sphere on an equal footing, particularly in what respects to the exercise of acts of sovereignty (where they are free from interference from other states). However, this protection ends as soon as the state engages in the market as a private actor, where no specific act of

The restrictive doctrine of immunity from adjudication has been codified in both of the jurisdictions to which international bonds tend to be subjected to. Thus, starting in 1976, the United States enacted the Foreign Sovereign Immunities Act (henceforth, "FSIA") and, two years later, the United Kingdom adopted the State Immunity Act (henceforth, "SIA")[1101]. Under both Acts, a state is excluded from immunity from adjudication if certain exceptions apply, including cases where a state engages in commercial transactions[1102], as well as those cases where a state consents to submit itself to the jurisdiction of the forum (immunity waiver)[1103].

Particularly, both jurisdictions qualify sovereign bonds as commercial acts[1104] (regardless of the purpose behind) and their commercial nature cannot be altered ex-post by a sovereign's decisions (such as legislation establishing mandatory rescheduling) following the principle "once commercial, always commercial"[1105].

Secondly, in contrast to immunity from adjudication, immunity from execution tends to impose more stringent barriers on creditors attempting to collect from a borrowing state[1106], and it is seen as more "extensive"[1107] than the former. This rather cautious stance of legal systems towards enforcement against states' property is explained by the pronounced "intrusive" effects that this type of measures imposes on sovereigns in comparison to immunity from adjudication[1108].

Notwithstanding this, under certain conditions, creditors can access a state's assets and overcome immunity from execution. For example, the FSIA establishes two different situations for creditors aiming to attach the debtor's property located in the United States[1109]: (i) if the state has not waived its immunity from execution, creditors are only authorized to attach the assets that are used or were used "for the commercial activity

---

authority or act of sovereignty (besides the due authorization of the act by the domestic legal system of the state) is at stake. See Fox and Webb, *The Law*… Op. Cit.

[1101] See Kupelyants*, Sovereign Defaults*… Op. Cit., p. 289. For an analysis of the evolution of sovereign immunity in European jurisdictions see Reinisch, *European*… Op. Cit.

[1102] See §1605(a)(2) and §1603(d) FSIA. See also, Section 3(1)(a) SIA.

[1103] See §1605(a)(1) FSIA and Section 2 SIA.

[1104] Section 3(3)(b) SIA specifically qualifies loans "or other transaction(s) for the provision of finance" as acts of a commercial nature which captures sovereign bonds. See Kupelyants, *Sovereign*… Op. Cit., p. 282. In the US, the "landmark" case is Weltover v. Argentina where the Supreme Court of the United States stressed that, according to the FSIA, the qualification of an act of a state as a "commercial activity" is to be made in attention to its nature rather than to its purpose. Hence, for the Court, the fact that sovereign bonds are "garden-variety debt instruments" and that entail the participation of the issuing state in the market "in the manner of a private actor" determines the qualification of the issuance of these type of instruments as "commercial activities" under US law. See Republic of Argentina et. al. v. Weltover INC., et. al., 504 U.S. 607 (1992).

[1105] Kupelyants*, Sovereign Defaults*… Op. Cit., p. 283.

[1106] See Weidemaier and Gulati, *The Relevance of Law*… Op. Cit., pp. 78-79.

[1107] Turchi, *Restructuring*… Op. Cit., pp. 2137-2138.

[1108] See Fox and Webb, *The Law*… Op. Cit.

[1109] See §1610(a) (1) and (2) FSIA.

upon which the claim is based"[1110] on and, on the other hand, (ii) if the state has waived its immunity from execution, creditors can attach the commercial assets of the state regardless of the nexus with the corresponding claim[1111]. However, most legal systems establish further protections on other property of the state such as military, diplomatic and central bank assets[1112].

A final point is to be made regarding the payment or "governance" structure of other bonds of the defaulting sovereign[1113] which will be covered in more detail in subsection 2.5. Particularly, sovereign bonds are usually issued either under a fiscal agency agreement or under a trust structure (a trust indenture, when issued under New York law and a trust deed, when issued under English law)[1114]. While the fiscal agent under a fiscal agency agreement acts as "administrator" of the fiscal matters of the bonds and serves as an agent of the issuer (for example, by conducting interest and principal payment to bondholders on behalf of the issuer), the trustee acts in the interests of the bondholders and assume fiduciary duties towards them[1115]. Precisely for those reasons,

---

[1110] According to Weidemaier, "for holders of sovereign bonds, this is a problem. Because the relevant commercial activity is borrowing money, and because sovereigns quickly spend the money they borrow, few assets will meet this definition". Weidemaier, *Sovereign Immunity*… Op. Cit., pp. 80-81.

[1111] See Mark Weidemaier and Mitu Gulati, International Finance and Sovereign Debt in Francesco Parisi (Ed.), *The Oxford Handbook of Law and Economics: Volume 3: Public Law and Legal Institutions*. Oxford University Press (2017), p. 487. Furthermore, it is important to note that the case-law related to the attachment of a state's property in the US has underscored another requirement: That the property at stake be used (at the moment of attachment) for a commercial purpose. For a discussion of the relevant case-law, see for example Gregory Day, *Market Failure, Pari Passu, and the Law and Economics Approach to the Sovereign Debt Crisis,* 22 Tulane Journal of International and Comparative Law 2 (2014), p. 236. Additionally, it is worth mentioning that under the SIA a connection between the property being attached and the transaction originating the claim is not required and establishing the commercial nature of the property is considered sufficient. See Kupelyants*, Sovereign Defaults*… Op. Cit., pp. 289-293.

[1112] See Lee Buchheit, Sovereign Debt Restructuring: The Legal Context in Bank for International Settlements (Ed.), *Sovereign Risk: A World Without Risk-free Assets?* Bank Of International Settlements (2013), pp. 107-108; Olivares, *Debt Restructuring*… Op. Cit., p. 394; Megliani, *Sovereign Debt*… Op. Cit., pp. 405-406 and Dimitrij Euler, *Switzerland's Department of Foreign Affairs endorsed Federal Supreme Court decision (BGE 136 III 379) not to lift Bank of International Settlement's (BIS) immunity due to an attempt of NML Capital to freeze $300m (£186m) on Argentina's bank accounts* (2012), available at https://youngicca-blog.com/switzerlands-department-of-foreign-affairs-endorsed-federal-supreme-court-decision-bge-136-iii-379-not-to-lift-bank-of-international-settlements-bis-immunity-due-to-an-attempt-of/ [last accessed 15.10.2021].

[1113] Scholars refer to the governance structure of sovereign bonds as "the way a sovereign debtor's relations with its creditors are organized". Sonke Haseler, *Trustees versus Fiscal Agents and Default Risk in International Sovereign Bonds* (2010), available at https://mpra.ub.uni-muenchen.de/35332/1/MPRA_paper_35332.pdf [last accessed 19.3.2020], p. 4.

[1114] See Lee Buchheit, *Trustee versus Fiscal Agents for Sovereign Bonds*, 13 Capital Markets Law Journal 3 (2018), p. 410. According to IMF data, trust structures represent a 36% (in nominal principal terms) of foreign law governed bonds issued since October 2014. See International Monetary Fund, *Fourth Progress*… Op. Cit., p. 10.

[1115] See Olivares, *Debt Restructuring*… Op. Cit., pp. 395-396 and Lee Buchheit, *Trustee*... Op. Cit., p. 410.

while trust indentures concentrate most enforcement powers in the trustee, creditors whose bonds are governed by a fiscal agency agreement are free to pursue their claims against a defaulting state (this also depends on whether there are majority enforcement provisions in place, which are discussed in detail in subsections 2.5 and 3.2.1)[1116]. At the same time, however, the money in possession of fiscal agents for paying the corresponding bonds, risk to be seized by litigating creditors since some courts (particularly, in the United States) have tended to treat those funds as the issuer's commercial property[1117]. The same is not considered to be the case for the funds in possession of the trustee which are understood as bondholders' property[1118].

Consequently, if a state defaults on certain bond series and remain current in others, affected creditors can capture the funds used for the repayment of the other series of bonds if those bonds are under the structure of a fiscal agency agreement and are in possession of the fiscal agent.

2.3.1.2. Consequences of Limits to Enforcement

As all the above demonstrates, the legal measures against a defaulting sovereign are strictly limited and even committed creditors face significant obstacles while attempting to collect the money that is owed to them. This situation holds even for the cases of international bonds governed by jurisdictions following the restrictive doctrine of sovereign immunity. For those reasons, and from the perspective of creditors' collection effectors, scholars usually stress the "unenforceable"[1119] character of sovereign debt, vis-à-vis the commitments of private debtors[1120].

However, commentators also have noted that litigation is not necessarily useless for creditors and that neither is incapable of inflicting damage to a defaulting debtor. Indeed, the risk of litigation may force a state to remove its attachable assets from foreign territory and to conduct its commercial transactions in less effective manners[1121]. Furthermore, whenever the state is incapable of sheltering those assets, they remain at the disposal of the first creditors who successfully win the race to the courthouse. The same is true for the funds that the state may procure as new lending

---

[1116] See Buchheit, *Trustee…* Op. Cit., p. 413. See also, Megliani, *Sovereign Debt…* Op. Cit., p. 525. Furthermore, it is important to mention that trust structures have important differences in the US and in the UK not discussed here. For an overview, see Haseler, *Trustees…* Op. Cit., p. 5.

[1117] See Buchheit, *Trustee…* Op. Cit, p. 413.

[1118] See Id. pp. 412-413. See also, Olivares, *Debt Restructuring…* Op. Cit., p. 396.

[1119] In the words of Anna Gelpern, "sovereign debt is unenforceable". Anna Gelpern, *Contract Hope and Sovereign Redemption*, 8 Capital Markets Law Journal 2 (2013), p. 132.

[1120] See Mark Weidemaier and Anna Gelpern, *Injunctions in Sovereign Debt Litigation,* 31 Yale Journal on Regulation (2014), p. 190; Weidemaier and Gulati, *International Finance…* Op. Cit., pp. 484-485 and International Law Association, *Sovereign Insolvency…* Op. Cit., p. 2.

[1121] "The attempts to attach the property of the sovereign debtor are costly for the debtor who, to evade the risk of attachment, must conduct its trade in roundabout ways". Kupelyants, *Sovereign…*Op. Cit., p. 277. See also, Weidemaier, *Sovereign Immunity…* Op. Cit., pp. 89-90 and Julian Schumacher, Cristoph Trebesch and Henrik Enderlein, *Sovereign Defaults in Court*, CESIFO Working Papers 6931/2018 (2018), p. 8.

from the market. Since these funds will be acquired through a commercial transaction, they would be available for the satisfaction of creditors' claims.

For all those reasons, a state currently in default will be less willing to borrow in foreign jurisdictions. This phenomenon has been substantiated by a recent study conducted by Schumacher et al. The aforementioned authors found that litigation effectively impairs market access for defaulting sovereigns, preventing them from issuing new debt in the jurisdictions where suits have been filed[1122].

This latter consequence is further explained by relatively novel strategies followed by committed creditors (usually referred to as "vulture funds") who used a standard provision included in bond indentures (the "pari passu" clause) and obtained a particular legal remedy (an injunctive relief) that demonstrated to be sufficient enough to persuade defaulting states to repay. In order to show how this strategy punished defaulting sovereigns, it is necessary to discuss the clause at stake in those disputes. Afterwards, I discuss the specific remedy which prevented states from accessing capital markets using the landmark cases of the litigation against Argentina as an example.

2.3.2. Other Clauses Included in Sovereign Bonds, particularly, the "Pari Passu" Clause

As stated above, the "pari passu" clause is a standard provision of sovereign debt documentation, and it is included in the vast majority of contracts[1123]. The literal translation of this clause (from Latin to English) is straightforward: It means "in equal step"[1124]. From a broad perspective, the clause aims at preventing discrimination among creditors by debtors[1125] and it is functionally situated closely to other provisions with the same aim, such as the "negative pledge" and "sharing" clauses[1126]. However, the precise meaning of the provision has been the subject of important controversies among commentators, where its origins, opacity, ambiguity and the variations of its language have made these disagreements even more pronounced[1127].

[1122] In the words of Schumacher et al., "between 2000 and 2010, there was not a single instance in which a government facing a creditors lawsuit in London or New York also place a sovereign bond in these jurisdictions". Schumacher, Trebesch and Enderlein, *Sovereign Defaults*… Op. Cit., pp. 2-3.

[1123] Lee Buchheit and Jeremiah Pam, *The Pari Passu Clause in Sovereign Debt Instruments,* 53 Emory Law Journal (2004), p. 871; Mark Weidemaier, Robert Scott and Mitu Gulati, *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 Law & Social Inquiry, 1 (2013), p. 73. Financial Markets Law Committee, *Issue 79 – Pari Passu Clauses: Analysis of the Role, Use and Meaning of Pari Passu Clauses in Sovereign Debt Obligations as a Matter of English Law* (2005), p. 4.

[1124] Rodrigo Olivares-Caminal, *Understanding the Pari Passu Clause in Sovereign Debt Instruments: A Complex Quest*,43 The International Lawyer 3 (2008), p. 1226.

[1125] See Choi, Gulati and Posner, *The Evolution*… Op. Cit, p. 143.

[1126] For a discussion of the relationship of the Pari Passu clause with the Negative Pledge Clause from a functional perspective see Id., pp. 143-146 (arguing that while the negative pledge clause prevents the creation of security interests the pari passu clause captures other forms of discrimination, such as laws subordinating certain bond series to others).

[1127] For a discussion of the origins of the clause see Buchheit and Pam, *The Pari Passu*… Op. Cit.; Weidemaier, Scott and Gulati, *Origin Myths*… Op. Cit.; Umakanth Varottil, *Sovereign Debt Documentation: Unraveling the Pari Passu Mystery*, 7 DePaul Business & Commercial Law

With the purpose of understanding the meaning and the function of the clause, most commentators start by discussing the role that creditors' equality (the "pari passu rule") plays under domestic insolvency regimes[1128]. In a nutshell, under domestic insolvency laws, the pari passu rule mandates that creditors of the same category (for example, unsecured creditors) share the proceeds of the liquidation of the bankrupt entity in proportion to their respective claims (i.e., on a pro-rata basis)[1129]. The economic rationale of this rule is that it incentivizes creditors to pursue collectively the maximum liquidation value possible of the assets of the debtor, since the proceeds will be shared ratably between them[1130]. However, as was previously indicated, defaulting states cannot be liquidated and, therefore, commentators conclude that the pari passu clause included in bonds has to serve other purpose[1131].

The matter complicates even further considering that there are several variations in the language of pari passu clauses. The most common ones are those classified by Choi et al. as the "rank" and the "rank equally in payment" pari passu clauses[1132]. An example of the "rank" clause is the following one:

> *"The bonds and the coupons are direct, unconditional and unsecured obligations of the issuer and* ***rank and will rank at least pari passu****, without any preference among themselves, with all other outstanding, unsecured and unsubordinated obligations of the issuer, present and future"*[1133].

Journal (2008); Anna Gelpern, *Courts and Sovereigns in the Pari Passu Goldmines*, 11 Capital Markets Law Journal 2 (2016). Regarding the indeterminacy of the specific meaning of the clause, several scholars agree in that: "no one really knows what the pari passu clause means". Weidemaier, Scott and Gulati, *Origin Myths*… Op. Cit., p. 74. In the same sense, see also Anna Gelpern, *Sovereign Damage Control,* Peterson Institute for International Economics (2013), p. 3.

[1128] See, for example, Weidemaier, Scott Gulati, *Origin Myths*…Op. Cit., p. 78. See Buchheit and Pam, *The Pari Passu*… Op. Cit., p. 873. Stephen Choi, Mitu Gulati and Robert Scott, *The Black Hole problem in Commercial Boilerplate*, 67 Duke Law Journal 1 (2017), p. 26. See also Sergio Galvis, *Solving the Pari Passu Puzzle: The Market Still Knows Best*, Capital Markets Law Journal (2017), p. 5.

[1129] See Finch, *Corporate*… Op. Cit., p. 599. See also, Mokal*, Corporate Insolvency*… Op. Cit., p. 94.

[1130] See Thomas Eger, *Bankruptcy Regulations and the New German Insolvency Law from an Economic Point of View*, 11 European Journal of Law and Economics (2001), pp. 31-32. Furthermore, scholars have also stressed that the rule serves as a "fall back" provision which, when applied to unsecured creditors, save costs by avoiding a time and resource-consuming classification of claims which will usually not be paid at all. See Mokal*, Corporate*… Op. Cit., p. 125.

[1131] See Weidemaier, Scott Gulati, *Origins*… Op. Cit and Financial Markets Law Committee, *Pari Passu*… Op. Cit., p. 7.

[1132] Choi et al. identifies four different variations of pari passu clauses, including the "rank" clause, the "rank equally in payment clause", the "pay equally and ratable" clause, and the "mandatory law" version. See Choi, Gulati and Scott, *The black hole*… Op. Cit., pp. 25-29. For the purpose of this discussion, we focus on the first two since they were prominent in litigation events. See Weidemaier, Scott and Gulati, *Origins*… Op. Cit., p. 84 and Choi Gulati and Scott, *Variation*… Op. Cit., pp. 22-23.

[1133] This example was extracted from Financial Law Committee, *Pari Passu*… Op. Cit., p. 4 (emphasis added).

On the other hand, an example of the "rank equally in payment" version of the clause is featured in the prospectus of a sovereign bond issued by Chile, which reads:

> *"The bonds will* ***rank equal [pari passu] in right of payment*** *with all of Chile's present and future unsecured and unsubordinated external indebtedness"*[1134].

Despite the differences in the language, commentators have noted that both versions of the clause extend the pari passu treatment for the bonds of the same series (the "internal limb") and protect them for being subordinated to other bond series of the country (the "external limb")[1135]. Furthermore, most of the scholarship agrees on one specific interpretation of both variations of the clause (henceforth, the "narrow" or "ranking" interpretation[1136]). According to them, the pari passu clause prevents debtors of granting senior status to other creditors, that is, from lowering the rank of the protected bondholders in comparison to others either by domestic legislation or by earmarking certain assets[1137].

However, starting with the decision of the Court of Appeal in Brussels in the Elliot case[1138], some creditors attempted to expand the interpretation of the clause to capture other forms of differential treatment (henceforth, the "broad" interpretation[1139]). These creditors were previously frustrated by the absence of attachable assets to satisfy their claims[1140] and aimed at using the "broad" interpretation as another tool to compel the state to repay. Particularly, the bonds that they held included the second variation of the clause previously indicated (the "rank equally in payment" type) and were successful in persuading courts about its "proper" meaning. That being that if the debtor was not

---

[1134] See Prospectus Supplement (January 7, 2003) Republic of Chile, available at https://www.hacienda.cl/english/public-debt-office/treasury-bonds/sovereign-bonds/chile-13-legal-documents/prospectus-supplement-bonds-due-2013.html [last accessed 10.2.2020] (emphasis added).

[1135] See Rodrigo Olivares-Caminal, *The Definition of Indebtedness and the Consequent Imperiling of the Pari Passu, Negative Pledge and Cross-Default Clauses in Sovereign Debt Instruments*, 12 Capital Markets Law Journal 2 (2017), pp. 172-173. See also Financial Markets Law Committee, *Pari Passu*… Op. Cit., p. 4. See also, Olivares, *Understanding*… Op. Cit., p. 1226.

[1136] See Olivares, *The Definition*… Op. Cit., p. 173.

[1137] Buchheit and Pam, *The Pari Passu*… Op. Cit., p. 876. See also, Gelpern, *Sovereign Damage*… Op. Cit., p. 3. See also Choi, Gulati and Posner, *The Evolution*… Op. Cit., p. 146. See also Weidemaier, Scott and Gulati, *Origins*… Op. Cit., p. 74. See also Financial Markets Law Committee, *Pari Passu*… Op. Cit., pp. 7-8. See also Olivares, *Understanding*… Op. Cit., p. 1233 and Rodrigo Olivares-Caminal, *To Rank Pari Passu or Not to Rank: That is the Question in Sovereign Bonds after the Latest Episode of the Argentine Saga*, 14 Law and Business Review of the Americas (2009), p. 769 (providing a list of authorities supporting the narrow interpretation).

[1138] Elliott Associates No 2000/QR/92, Court of Appeals of Brussels, 26.09. 2000 (not published).

[1139] See Buchheit and Pam, *The Pari Passu*… Op. Cit., p. 879. Olivares, *The Definition*… Op. Cit., p. 173.

[1140] See Olivares, *Understanding*… Op. Cit., p. 1223.

able to satisfy the claims of all its creditors in full it was required to pay them (who were creditors protected by the clause) on a pro rata basis[1141].

Consequently, the broad interpretation had the potential to impair future restructurings. As stated above, sovereign debt restructurings are usually conducted by a bond exchange, where "old" instruments are swapped for "new" ones containing longer maturities, different interest rates or discounts on the principal (a "hair cut"). Creditors who accept to exchange their bonds (henceforth, "consenting creditors") are bound by the new instrument and, if the restructuring is successful, the state would usually resume payments after the operation is finalized. Creditors who refuse to participate (henceforth, "holdouts") preserve their contractual rights under the old bonds and are free to demand full repayment, as indicated in the terms of the original instruments. Hence, following the broad interpretation, a state could be prevented from making payments to consenting bondholders in full if the holdouts' claims were not satisfied in the same manner[1142].

Furthermore, the effects of the broad interpretation were enhanced by the impact of the remedy imposed by the Court in Brussels for breaching the clause: An injunction which could be applicable not only to borrowers and consenting creditors, but also to third parties managing payment transactions[1143]. Hence, starting with the Elliot case (where the court issued a restraining order prohibiting financial intermediaries processing Peru's payments to consenting creditors[1144]) the interpretation (and its remedy) proved to be persuasive enough to motivate the borrower (Peru) to settle the holdouts' claims[1145]. This was also the case in the litigation that followed Argentina's default and economic crisis of 2001.

2.3.2.1. The Pari Passu Litigation Following Argentina's Default

The Argentinian crisis of 2001 and the subsequent default on its debt sparked litigation both at domestic courts and international tribunals[1146]. In this section, I limit the discussion to the relevant cases before New York courts in what pertains to the pari passu clause and the subsequent injunctive relief granted to litigating creditors.

[1141] Olivares, *Understanding…* Op. Cit., p. 1227. See also, Choi, Gulati and Posner, *The Evolution…* Op. Cit., p. 146. Robert Cohen, *"Sometimes a Cigar is Just a Cigar": The Simple Story of Pari Passu,* 40 Fortieth Anniversary Volume 1 (2011), pp. 13-14.

[1142] See Financial Markets Law Committee, *Pari Passu…* Op. Cit., pp. 1-2 and p. 7.

[1143] This was the original interpretation of the clause and its remedies by the affidavit provided by Professor Andreas Lowenfeld in support of Elliot in Brussels. See Buchheit and Pam, *The Pari Passu…* Op. Cit., p. 878.

[1144] See Olivares, *Understanding…* Op. Cit., p. 1223.

[1145] See Buchheit and Pam, *The Pari Passu…* Op. Cit., p. 879. Furthermore, the case motivated the enactment of Law 4,765 in Belgium by the means of which Euroclear transactions were protected from attachment and injunctive orders. See Olivares, *Understanding…* Op. Cit., p. 1234. See also, and Olivares, *Debt Restructuring…* Op. Cit., p. 405.

[1146] The sovereign debt cases against Argentine filed under the auspices of the ICSID Convention are discussed extensively in *Chapter Two*, pp. 76-81.

The facts involved in these cases were the following[1147]. After the default, Argentina opened two exchange offers (in 2005, and 2010) by means of which creditors were invited to tender their old instruments for new ones with substantial modifications, including an important discount on the principal (a "haircut" of almost 70% on present value terms)[1148]. Furthermore, with the purpose of enhancing creditor participation, the Congress of Argentina passed Law No. 26,017 (usually referred to as the "Lock-law") which prohibited the executive to settle with creditors refusing to participate in the restructuring (the "holdouts")[1149] and Law No. 26,547 that prohibited the government to give more favorable conditions to holdouts than to participating bondholders if the application of the Lock-Law was suspended and a settlement was agreed upon[1150]. However, Argentina failed to persuade all creditors and the total participation rate after the final exchange of 2010 was 91.3% of the defaulted debt[1151].

While Argentina remained current on the payments of the restructured bonds, it refused to pay any amount to the holdouts (who were entitled to full payment as established in the original bonds). In this context, NML Capital and other holdouts, having failed to attach government's assets to satisfy their claims[1152], filed an amended complaint in the US District Court of New York arguing that the government had breached the pari passu clause and requested specific relief[1153]. The Court sided with the plaintiffs by following the "broad" interpretation of the clause[1154]. Furthermore, in a later decision[1155], the Court used its "equitable discretion" by enjoining Argentina from paying the consenting bondholders without making "ratable" payments to the holdouts. After appeal, the United States Court of Appeals of the 2nd Circuit affirmed the

---

[1147] For a more extensive treatment of the Pari Passu litigation against Argentina see, for example, Galvis, *The Market...* Op. Cit.

[1148] J.F. Hornbeck, *Argentina's Defaulted Sovereign Debt: Dealing with the "Holdouts",* Congressional Research Service of the US (2013), p. 5.

[1149]Article 3, Law No. 26,017, available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/100000-104999/103619/norma.htm [last accessed 11.2.2019].

[1150] Article 3 Law No. 26,547, available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/160000-164999/161317/norma.htm [last accessed 11.2.2019]. The same condition was imposed through Article 2 of Law No. 26,886, available at https://www.argentina.gob.ar/normativa/nacional/ley-26886-220129/texto [last accessed 11.2.2019].

[1151] J.F. Hornbeck, *Argentina's…* Op. Cit. p. 7.

[1152] See Weidemaier and Gelpern, *Injunctions…*, Op. Cit.

[1153] NML Capital Ltd. v. Republic of Argentina, No. 08-cv-6978 (S.D.N.Y. Dec. 7, 2011).

[1154] Id. It is worth mentioning that the bonds at stake included the second type of pari passu clauses previously mentioned. Particularly, the clause featured in these bonds reads as follows: 'The Securities will constitute (…) direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank pari passu without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness (…)". Quoted in NML Capital Ltd. v. Republic of Argentina, 699 F.3d 246 (2nd Cir. 2012).

[1155] NML Capital Ltd. v. Republic of Argentina, No. 08-cv-6978 (S.D.N.Y Feb. 23, 2012).

decision[1156], and the injunction was clarified: It was not only binding on the country, but also extended to its "agents" and to "other persons who [were] in active concert or participation" with Argentina[1157]. In other words, the effects of the injunction also reached payment intermediaries and trustees in charge of paying to the consenting bondholders who risked being in contempt if they decided to "help" the country[1158].

The injunction imposed in those cases was a "powerful"[1159] remedy in favor of the holdouts, and Argentina subsequently stopped payments to the exchange bondholders. Almost two years after the injunctions, amidst a regime change and fifteen years after the first default, the country finally reached a settlement with the majority of the holdouts (in February, 2016[1160]) and the injunctions were finally lifted[1161].

2.3.2.2. The Consequences of the Pari Passu Injunctions

It is worth mentioning that the decisions in the NML litigation sparked almost unanimous criticism from market participants (both from debtors' and creditors' sides), policy makers and scholars[1162]. Although some commentators welcomed the decisions as a simple application of the rules of interpretation of contracts under US law[1163], the vast majority of sovereign debt experts stressed that both the interpretation of the clause and the remedy granted were incorrect as a matter of law[1164].

[1156] NML Capital Ltd. v. Republic of Argentina, 699 F.3d 246 (2nd Cir. 2012) and NML Capital Ltd. v. Republic of Argentina, 727 F.3d 230 (2nd Cir. 2013). Additionally, the Supreme Court denied Argentina's writs of certiorari petition. Republic of Argentina v. NML Capital Ltd., 134 S Ct. 2819 (2014).

[1157] Id.

[1158] See Gelpern and Weidemaier, *Injunctions*… Op. Cit., pp. 191-192.

[1159] Choi Gulati and Scott, the *Black Hole Problem*… Op. Cit., p. 27.

[1160] See Daniel Bases, Richard Lough and Sarah Marsh. Argentina, lead creditors settled 14-year debt battle for $ 4.65 billion. Reuters. Retrieved from https://www.reuters.com/article/usargentina-debt-idUSKCN0W2249 [last accessed 29.11.2018].

[1161] The settlement involved almost an 85% percent of the claims in default before the injunctions were imposed. In its order, the Court stressed that with the new administration in office in Argentina "circumstances had changed so significantly as to render the injunctions inequitable and detrimental to the public interest". See, NML Capital LTD. v. Argentina No. 08-cv-6978 (S.D.N.Y. Feb. 19, 2016).

[1162] See Choi, Gulati and Scott, *Variation*… Op. Cit., p. 2. See also, Lee Buchheit and Mitu Gulati, *Restructuring Sovereign Debt after NML v Argentina*, 12 Capital Markets Law Journal 2 (2017), p. 225.

[1163] These group of scholars stressed that the interpretation of the Courts in the NML cases abided by the rules of contract interpretation of US law which favor the plain meaning of a contract as expressing the intention of parties. Hence, taking into account that the bonds at stake featured the "rank equally in payment" version of the pari passu clause, they concluded (supporting the decisions of the courts) that the intention of the parties was to give effect to the "broad" interpretation of the clause. See for instance, Cohen, *Sometimes*… Op. Cit., pp. 14-15, See also Howard Steel et al., *NML Capital v Argentina: A Lesson in Indenture Interpretation,* 8 Insolvency and Restructuring International 2 (2014), pp. 32-33.

[1164] Scholars criticizing the decisions in NML stressed that: (i) The interpretation confused the pari passu clause with a "sharing" clause which was not included in the contracts at stake and that other provisions of the same instruments "strongly suggested" that the intentions of the parties were not to be construed in the manner that the court did; (ii) the understanding of the

Additionally, commentators also stressed that the decisions were a "game changer", affecting the bargaining equilibrium between creditors and debtors by extending its effects to third parties (such as financial intermediaries)[1165]. With these decisions, the commitments of sovereign debtors would be seen as stronger by market participants, and a "pari passu" clause such as the one featured in the bonds of Argentina would serve as a signal towards prospective bond purchasers in that default is less likely when the clause is included[1166]. Consequently, for those welcoming the decisions, the provision would also enhance creditors' bargaining power while negotiating restructurings and will provide a powerful incentive against sovereigns' opportunism (ex-post)[1167]. By the same token, creditors would be willing to lend at lower interest rates, and states would benefit of the provision of cheaper credits (ex-ante)[1168]. Finally, the heightened protection of creditors granted by the clause would also enhance the value of bonds, increasing the liquidity of the secondary market[1169].

However, the majoritarian critique of the decisions stressed the costs that came with the new equilibrium. In a nutshell, it posited that the injunctions and the "broad" interpretation could severely impair future restructurings by (i) making litigation (and holding-out) more attractive than before[1170] (specially, taking into account the favorable settlement terms for the group of holdouts headed by NML[1171]), (ii) making creditor

clause and its corresponding variation in the market was aligned with the "narrow" interpretation", and this understanding was to be considered since the terms of the clause were "boilerplate" terms; (iii) the broad interpretation could be potentially used against the very litigating holdouts and entail new injunctions based on the same reasons against them and; (iv) that the broad interpretation had the potential of questioning the seniority of the funds provided by International Organizations, such as those provided by the International Monetary Fund. See Buchheit and Gulati, *Restructuring*… Op. Cit., p. 229, Galvis, *The Market*… Op. Cit., pp. 5-6; Turchi, *Restructuring*… Op. Cit., pp. 2189; Financial Markets Law Committee (2005, 2014,2015), Lachlan Burn, *Pari Passu Clauses: English Law After NML v Argentina,* 9 Capital Markets Law Journal 1 (2014), pp. 2-4, Gelpern, *Sovereign Damage*… Op. Cit., p. 4. Choi, Gulati and Scott, *Variation*… Op. Cit.

[1165] See Sergio Chodos, From the Pari Passu Discussions to the "Illegality" of Making Payments: The Case of Argentina in Martin Guzman, José Antonio Ocampo and Joseph Stiglitz (Eds.), *Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises*. Columbia University Press (2016). See also, Anna Gelpern, Ben Heller and Brad Setser *Count the Limbs: Designing Robust Aggregation Clauses in Sovereign Bonds* (2015) available at https://scholarship.law.georgetown.edu/facpub/1793/ [last accessed 19.3.2020], p. 12.

[1166] This argument has been put forward by certain practitioners in the field. See Weidemaier, Scott and Gulati, *Origins*… Op. Cit., p. 95.

[1167] See William Bratton, *Pari Passu a Distressed Sovereign's Rational Choices*, 53 Emory Law Journal (2004), p. 836. According to Wright, the drafting of clauses amenable to the broad interpretation can also be explained by creditors' uncertainties about the reform of sovereign debt contracts which were turning towards CACs during the 2000s. See Mark Wright, *The Pari Passu Clause in Sovereign Bond Contracts: Evolution or Intelligent Design?* 40 Hofstra Law Review 1 (2011), pp. 111-112.

[1168] See Bratton, *Pari Passu*…. Op. Cit., p. 839.

[1169] See Cohen, *Sometimes*… Op. Cit. pp. 2-3.

[1170] See Choi, Gulati and Posner, *The Evolution*, Op. Cit., p. 146.

[1171] See Buchheit and Gulati, *Restructuring*… Op. Cit., p. 228; Galvis, *The Market*… Op. Cit., p. 4 and Olivares, *Understanding*… Op. Cit., p. 1232.

participation less likely (considering that the injunction also punished them, by blocking payments to which they were entitled to and by exposing them to lawsuits)[1172], (iii) further affecting the access of the country to capital markets (since the injunction also affected the relationship of Argentina with financial intermediaries)[1173], (iv) risking, to a certain extent, the preferred status of the funds provided by International Financial Institutions[1174] and (v) having the potential to delay even more the decision of the country to restructure[1175].

Furthermore, the perils of the decisions of the NML cases were compounded by the questions that they left open. Particularly, neither the district court nor the Second Circuit were clear enough in what – specifically - motivated their decisions[1176]. For example, the first decision of the Court of Appeals enumerated several factors which influenced its "broad" interpretation of the clause besides the specific language of the contract at stake, but it did not specify which factors were to be considered sufficient to find a breach of the clause and to justify the imposition of an injunction on the borrower and third parties. The factors considered by the Second Circuit were: (i) that the republic had defaulted on the holdouts' bonds, (ii) that while on default on those bonds Argentina remained current on the restructured securities, and that it (iii) adopted legislation precluding the payments of the holdouts' bonds[1177]. Additionally, as remarked by Lee Buchheit and Mitu Gulati, the Second Circuit stated in a later decision that it was Argentina's "extraordinary behavior" that drove its decision, but again, it failed to distinguish which specific elements of government's conduct were to be considered critical to support the "broad" interpretation and the imposition of injunctions in future cases[1178].

Those doubts were recently resolved by several concurring decisions[1179]. These rulings determined that a breach of the pari passu clause requires more than the mere failure of the state of paying certain creditors while remaining current on others. What is necessary is an "extraordinary" behavior (such as Argentina's before the settlement of

---

[1172] See Gelpern, *Sovereign Damage*… Op. Cit., p. 10.
[1173] See Id., pp. 9-10.
[1174] See Id., pp. 10-12. The holdouts explicitly stated that they were not questioning the senior status of the funds provided by IFIs. Nevertheless, the consequences of the "broad" interpretation suggest that the funds of international organizations need to be treated within the external limb of the pari passu clause. Hence, in principle, it can be argued that those liabilities qualify as "other outstanding, unsecured and unsubordinated obligations of the issuer", since the seniority of those funds is not grounded neither in domestic nor in international law.
[1175] See Gelpern, *Sovereign Damage*… Op. Cit., p. 12.
[1176] See Day, *Market*… Op. Cit., p. 246. Choi, Gulati, Scott, *Variation*… Op. Cit., pp. 9-10.
[1177] See NML Capital Ltd. v. Republic of Argentina, 699 F.3d 246 (2nd Circ. 2012), p. 260.
[1178] See Buchheit and Gulati, *Restructuring*… Op. Cit., p. 226. See also, Lee Buchheit and Andrés de la Cruz, *The Pari Passu Fallacy – Requiescat in Pace* (2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3108862 [last accessed, 19.03.2020], p. 3.
[1179] See Export-Import Bank of the Republic of China v. Grenada, 13 Civ. 1450(HB) (S.D.N.Y. Aug, 19, 2013), White Hawthorne LLC v. Republic of Argentina, 16-cv-1042 (TPG) 16-cv-1192 (TPG) 16-cv-1436 (TPG)(S.D.N.Y. Dec 22, 2016), Ajdler v. Province of Mendoza 17-2704-cv (May 11, 2018) and Bison Bee LLC v. Republic of Argentina, 18-3542-cv (Oct 4, 2019).

2016) which allows to qualify the borrowers as "uniquely recalcitrant" debtors[1180]. According to these decisions, the elements to configure this extraordinary behavior are the ones previously discussed for Argentina, i.e., the enactment of legislation such as the "Lock Law" and the "incendiary statements" of government officials[1181].

Finally, it is important to note that soon after the injunctions were imposed by the NML courts, and amidst the market's disapproval of the decisions, the International Monetary Fund (henceforth, "IMF") and the International Capital Markets Association (henceforth, "ICMA") recommended important changes to the language of the pari passu clauses. These modifications were explicitly destined to prevent the "broad" interpretation and its corresponding injunctive relief[1182]. Most issuers followed those recommendations and by 2016, less than a ten percent of foreign bonds issued under New York Law that year included a version of the clause amenable to the "broad" interpretation[1183].

2.3.3. An Assessment of the Relatively Weak Enforcement of Sovereign Debt

As all of the above demonstrates, legal enforcement in sovereign debt is relatively weaker than in corporate debt. However, legal measures are capable of inflicting damage upon defaulting sovereigns, which in some cases can be substantial enough to persuade the state to repay[1184]. These damages depend both on legal and practical considerations.

First, the legal costs which can be imposed upon a defaulting state depend on the law governing the instruments. Creditors holding bonds subjected to the jurisdictions of third states (that is, international bonds) are in principle more protected than their counterparts holding bonds governed by the law of the issuing state due to the "local

---

[1180] Bison Bee LLC v. Republic of Argentina, 18-3542-cv (Oct 4, 2019), p. 3 and Ajdler v. Province of Mendoza 17-2704-cv (May 11, 2018), p. 7.

[1181] White Hawthorne LLC v. Republic of Argentina, 16-cv-1042 (TPG) 16-cv-1192 (TPG) 16-cv-1436 (TPG)(S.D.N.Y. Dec 22, 2016), p. 5. For example, The court in Export-Import Bank of the Republic of China v. Grenada, 13 Civ. 1450(HB) (S.D.N.Y. Aug, 19, 2013) found that mere statements indicating that holdouts will not be paid "unless resources become available to do so" will not establish liability of a state in default. Id., p. 4.

[1182] Choi, Gulati and Scott, *Variation*… Op. Cit., pp. 9-10. Buchheit and Gulati, *Restructuring*… Op. Cit., p. 225. The new text of the ICMA clause reads as follows: "The Notes are the direct, unconditional and unsecured obligations of the Issuer and rank and will rank pari passu, without preference among themselves, with all other unsecured External Indebtedness of the Issuer, from time to time outstanding, provided, however, that the Issuer shall have no obligation to effect equal or rateable payment(s) at any time with respect to any such other External Indebtedness and, in particular, shall have no obligation to pay other External Indebtedness at the same time or as a condition of paying sums due on the Notes and vice versa". International Capital Market Association: Standard Pari Passu Provision for the Terms and Conditions of Sovereign Notes (August 2014) available at https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-topics/collective-action-clauses/ [last accessed 19.3.2020].

[1183] Choi et al., *Variation*… Op. Cit., p. 26.

[1184] However, this view is open to skepticism, as discussed in subsection 3.2.2.2.

law"-risk of the later. Hence, legal measures are more capable of inflicting damage in the case of international bonds.

Furthermore, the specific terms of international bonds also matter from the perspective of enforcement. As previously noted, if the state waives its immunity from execution, creditors can seize its commercial assets located in foreign jurisdictions to satisfy their claims (otherwise, in the specific case of the US, creditors can only attach those commercial assets having a connection with their claims). The risk of seizure can impose additional costs upon the defaulting state including (a) the costs of removing attachable assets from foreign jurisdictions, (b) the costs of conducting its commercial transactions in less effective manners and (c) the costs of being excluded from debt markets in foreign jurisdictions where suits against the state are filed (since the funds procured through those means also risk being seized by creditors). Additionally, if a pari passu clause suitable for the "broad" interpretation is included in the defaulted bonds, the state risks being excluded from debt markets in most foreign jurisdiction due to the expansive effects of injunctions.

Therefore, the enforceability of sovereign debt is a matter of degree and depends on the language of the instruments. Although at the upper limit, the capability of legal measures of compelling compliance remains weaker in sovereign debt than in the corporate context, it is useful to "rate" the enforceability of sovereign bonds according to their legal features[1185]. Hence, I rate the enforceability of those instruments on a scale going from no enforcement (bonds governed by the domestic law of the issuer) to high enforceability ("international bonds" where the state has waived immunity from execution and include pari passu clauses suitable for the "broad" interpretation), including also instruments with a moderate enforceability ("international bonds" with immunity from execution waivers but without pari passu clauses) and those with low enforceability ("international bonds" without immunity from execution waivers and without pari passu clauses). The next table summarizes this scale:

Legal Terms	"Enforceability" Level
Local Law Bonds.	None
International Bonds without immunity from execution waiver and without Pari Passu Clause.	Low
International Bonds with immunity from execution waiver and without Pari Passu Clause.	Moderate
International Bonds with immunity from execution waiver and including Pari Passu Clause.	High

Table 7: Scale of "Enforceability" of Sovereign Bonds.

Secondly, legal enforceability also depends on "practical" issues, including (i) whether the state has assets located in foreign jurisdictions and on (ii) whether those assets are available for the satisfaction of creditors' claims (i.e., that they are of a commercial nature). Although in most cases the assets located abroad and which can be seized by

[1185] This scale was inspired by the grades present by Choi, Gulati and Scott for organizing the legal risks associated with different versions of Pari Passu Clauses. See Choi, Gulati and Scott, *The Black Hole…* Op. Cit., p. 29.

creditors will not be sufficient to cover all the claims of unpaid creditors[1186], they could hypothetically satisfy – at least – some of them in full. Furthermore, the risks of asset seizures are more important for those sovereigns exporting commodities through state owned enterprises[1187]. Particularly, states who depend the most on those enterprises are the ones most likely to have substantial commercial assets located abroad and are the most vulnerable to legal enforcement by creditors.

For all the above, it is now possible to substantiate the proposition that stresses that legal enforcement in sovereign debt is weaker than for the case of corporate debt with two conclusions: (1) When there are no assets available for attachment, creditors cannot use the courts to directly recover their funds but they can resort to legal measures to impose costs on defaulting sovereigns which in some cases are capable of persuading them to repay. (2) When there are assets, although they may be substantial in some cases, usually they will not be sufficient for satisfying all creditors' claims. The first creditors to attach them may get paid, leaving the rest of them in the same position as in (1).

2.4. The Differences in Control Mechanisms Under Insolvency

Another important difference between states and corporations refers to the possibility of removing the insolvent debtor from the administration of its affairs. In the case of corporations, all the domestic jurisdictions studied in *Chapter Three* consider both the possibility of maintaining and removing pre-petition management from the control of the business[1188]. When the debtor is removed from the administration of the business, it is replaced by a third-party insolvency practitioner who is put in charge of managing the company's affairs. This serves as an important safeguard protecting creditors'

[1186] See for example, Buchheit, *Sovereign Debt…* Op. Cit., p. 109 and White, *Sovereign in Distress…* Op. Cit. p. 13.

[1187] Those risks may be significant as well for states owning "special purpose" investment vehicles such as sovereign wealth funds. As Anne van Aaken asserts, the aforementioned risks refer to the circumstances under which "(…) the entity [i.e., state owned enterprises, henceforth "SOEs", or the sovereign wealth funds] and the state can be held mutually liable for each other's debt (…)". See Anne van Aaken, *Blurring Boundaries between Sovereign Acts and Commercial Activities* (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236767 [last accessed 29.10.2021], p. 8. According to her, the case-law is not uniform and the law on this matter appears to be in flux. See Id., p. 47. On the one hand, for instance, creditors in the case of the US need to prove that those enterprises act as an "alter ego" of the country. See a discussion of the landmark cases for the US in Richard Levin and Roland Pettersson, *The transfer of Venezuela's Oil Assets to a Successor Entity and Fraudulent Conveyance*, 14 Capital Markets Law Journal 4 (2019). On the other hand, according to van Aaken, in the United Kingdom, "(…) the courts will not allow a creditor to recover debts owed by a state from its SOE unless the state is in constitutional and factual control of the entity and the entity can be shown to have no separate existence from the state". van Aaken, *Blurring…* Op. Cit., pp. 27-28. See also Shu Shang and Wei Shen, *When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds in the Post Financial Crisis Era: Is There Still a Black Hole in International Law?* 31 Leiden Journal of International Law (2018).

[1188] The main differences between them refer to the default position and to whether authorization of the Court is required for that purpose. See *Chapter Three*, p. 142.

interests in the cases where the decline of the finances of the company is the product of the negligence of pre-petition management.

In contrast with corporate reorganizations, the administration of an insolvent state's affairs cannot be given to a third party[1189] (nor it entails the removal of the administration in charge of the country)[1190]. The very notion of sovereignty and the principles through which it expresses itself (including sovereign equality, non-intervention and self-determination) precludes this possibility[1191]. Although it is theoretically possible to think on a state surrendering the complete administration of its internal affairs to a third party, this possibility is not likely in the current international context.

However, during financial distress, indebted states usually adjust their policies following the recommendations of International Organizations with the purpose of procuring new loans. There, the role of the IMF, who acts as the lender of last resort, is of importance[1192]. Particularly, the IMF conditions the provision of emergency lending to states on the basis of the state's modification of previous policies, including specific targets directed at debt repayment (usually referred to as "policy conditionalities")[1193]. According to the IMF, the main objective of conditional lending is to adjust the economic policies of the state with the purpose of solving the problems which led it to financial distress[1194], and thus foster economic growth[1195]. Consequently, although the implementation of conditionalities depends entirely on the agreement of the state, international organizations do exert important influence over the fiscal policies and play a crucial role in monitoring insolvent debtors[1196]. Furthermore, and as it is going to be argued on subsection 3.2.2.3, the IMF can also prevent sovereign opportunism in the renegotiation by providing information on the appropriate amount of debt relief to be granted to the state (when it is necessary).

[1189] See International Law Association, *Sovereign Insolvency*… Op. Cit., p. 19. See also, Thomas, *Bankruptcy*… Op. Cit., p. 344 and Tarullo, *Rules*… Op. Cit., p. 636.

[1190] For example, this possibility is also excluded under Chapter 9 of US Bankruptcy Code which applies to municipalities. See Juliet Moringiello, *Goals and Governance in Municipal Bankruptcy*, 71 Washington and Lee Law Review (2014), p. 437.

[1191] Hence, I discarded the norms removing the debtor from the control of its affairs as failing the first element of the "extrapolation requirement". See *Chapter Three*, pp. 152-154.

[1192] See Rasmussen, *Integrating*… Op. Cit., p. 16.

[1193] See Thomas Stubbs and Alexander Kentikelenis, Conditionality and Sovereign Debt: An Overview of Human Rights Implications, in Ilias Bantekas and Cephas Lumina (Eds.), *Sovereign Debt and Human Rights*. Oxford University Press (2018), p. 359. See also Goldmann, *Human Rights*… Op. Cit., pp. 5-6.

[1194] See International Monetary Fund, Factsheet: IMF Lending, available at https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality [last accessed 14.07.2019].

[1195] See Luminas, *Sovereign Debt*… Op. Cit., p. 180.

[1196] Therefore, in practice, the role of the IMF is closer to the monitoring third party suggested by the early literature proposing a statutory approach to sovereign debt restructurings. For a discussion of the literature on this specific point, see Kenneth Rogoff and Jeromin Zettelmeyer, *Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001*, 49 IMF Staff Papers 3 (2002), p. 473.

2.5. The Differences in Renegotiation Mechanisms

As was already stated, while the debt of insolvent corporations is renegotiated through a collective all-encompassing and compulsory framework imposed by statute, sovereign debt restructurings are conducted in a decentralized manner, without a systematic regulation (neither domestic nor international) addressing all the liabilities and the interests at stake[1197].

Consequently, in the sovereign debt context, the mechanisms for debt renegotiation are determined by the terms of the respective contracts. For example, before 2003, most sovereign bonds issued under New York law lacked any type of provision designed to coordinate the modification of the key terms of the contracts[1198]. Restructuring those type of bonds was difficult (as the litigation against Argentina shows) since the consent of every single bondholder was required for contract amendment. Hence, while bondholders agreeing to an exchange provided debt relief to the debtor, non-participating creditors maintained their original contractual rights (as established in their old instruments) and litigated to be repaid in full (or to settle in better terms than those offered to consenting creditors). If agreeing creditors were to anticipate this situation, an entire restructuring could be jeopardized[1199].

Hence, in order to solve this "holdout" problem, bonds issued under New York from 2003 onwards started to include contractual provisions intended to coordinate creditors' activities in what pertains to debt renegotiation (i.e., "modification clauses")[1200]. Modification clauses, combined with other coordination provisions (including "majority enforcement" clauses and trustee clauses) are usually grouped under the rubric of "Collective Action Clauses" (henceforth, "CACs")[1201]. I discuss these clauses and their impact in debt hereunder.

2.5.1. Modification CACs

Modification CACs can be divided in three types: (i) series by series or "first generation" CACs; (ii) two-limb aggregated or "second generation" CACs and (iii) single-limb aggregated or "third generation" CACs[1202].

Series by series CACs are the oldest type of modification clauses. These provisions allow for the modification of the key terms of a single bond series if the consent of the majority of bondholders of that series (usually a 75% calculated over the outstanding

---

[1197] See, for example, International Law Association, *Sovereign Insolvency*… Op. Cit., p. 18 and Calitz, *An Overview*… Op. Cit., p. 335.

[1198] See Gelpern, Heller and Setser, *Count*…. Op. Cit. p. 7.

[1199] See, for example, Cristopher Wheeler and Amir Attaran, *Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigatio*n, 39 Stanford Journal of International Law (2003), p. 259.

[1200] See Weidemaier and Gulati, *A People's History*… Op. Cit., p. 70.

[1201] These are the most important types of CACs for our purposes. For a theoretical discussion distinguishing other type of CACs (including "modification clauses", "majority enforcement provisions", "bondholder committee or representative clauses" and "trustee clauses", see Bradley and Gulati, *Collective Action Clauses*… Op. Cit., pp. 17-25.

[1202] Buchheit et al., *The Restructuring*… Op. Cit., p. 354-356.

principal[1203]) is obtained. Hence, by the means of this type of CACs, a majority of bondholders of one series can bind the entire group of creditors of that series to a restructuring proposal, in the same manner that a certain percentage of creditors within a class can bind its entire class to a reorganization plan under domestic corporate reorganization[1204].

First generation CACs enhance creditors' participation in comparison to a regime which requires the unanimous consent of bondholders for modifying the key terms of the contracts. Nevertheless, a restructuring of bonds including them may still be subjected to important holdout problems. First, a restructuring can fail within a single series if holdouts control an important number of the bonds in value terms (>25%)[1205]. Secondly, sovereign debt crises usually involve several different series of bonds that need to be restructured. For this reason, if a restructuring fails in a specific series (or if creditors holding bonds of other series anticipate that the restructuring will fail in other series) they may reject the offer themselves, replicating the holdout problem across bond issuances (in a "domino" effect)[1206].

Considering the limitations of that types of CACs, the financial community developed "second generation" modification clauses ("two-limb aggregated CACs"). This type of CAC is both more encompassing and flexible than its previous version. First, second generation clauses have the power to capture different bond series for a restructuring proposal (provided that this type of clause is included in all of those series). Hence, with the use of this version of modification clauses, two or more series of bonds can be "aggregated" for voting purposes. The respective percentages vary, but the standard ICMA clause requires votes in favor of (i) bondholders representing two thirds of the total outstanding principal of all the series being affected or aggregated and of (ii) bondholders representing at least a fifty percent of the outstanding principal of each aggregated series[1207]. Secondly, these clauses are also flexible: If the restructuring fails

---

[1203] See Anna Gelpern, *How Collective Action is Changing the Sovereign Debt,* International Financial Law Review (2003), p. 20.

[1204] In particular, the success of reorganization proceedings for corporations (as in the case of sovereign debt restructurings) depends on creditors' consent to a proposal (a "plan") which aims to rehabilitate the debtor's business (when possible) by modifying its structure of liabilities. In that context, in order to facilitate an agreement, domestic corporate reorganization frameworks establish mechanisms by means of which dissenting creditors can be bound to a restructuring proposal. The first one refers to that dissenting creditors within a class are bound by the decision of the majority of that class. See *Chapter Three*, pp. 144-146.

[1205] See Gelpern, Heller and Setser, *Count…* Op. Cit., p. 13; Deborah Zandstra, *New Aggregated Collective Action Clauses and Evolution in the Restructuring of Sovereign Debt Securities,* 12 Capital Markets Law Journal 2 (2017), p. 193. Notably, this was the case of certain sovereign bonds issued under English law in the Greek restructuring. See Buchheit et al., *The Restructuring Process….* p. 354 and Clifford Chance, *New ICMA Sovereign Collective Action and Pari Passu Clauses,* Briefing Note (October 2014), p. 3.

[1206] Consequently, the effect in this case is the same as in the case of bonds without CACs.

[1207] See Antonia Stolper and Sean Dougherty, *Collective Action Clauses: How the Argentina Litigation Changed the Sovereign Debt Markets*, 12 Capital Markets Law Journal 2 (2017), p. 240. The use of "second generation" CACs became mandatory for countries of the Eurozone starting in January 2013 for bonds both governed by domestic and foreign laws and with a

within a series, and provided that the majorities are reached in others, the restructuring can still be carried out exclusively for those series approving the operation[1208].

Although "two-limb" aggregated CACs were welcomed as an important innovation for coordinating debt renegotiation, scholars stressed that the holdout risk was still important, particularly, at the series level, where consent was still being required[1209]. Therefore, after a drafting process involving government officials, market participants and sovereign debt experts, ICMA presented its "standard form Collective Action Clauses"[1210] which were also endorsed by the IMF[1211]. ICMA CACs provide a "menu" of options for sovereigns attempting to restructure their debts featuring both first- and second-generation clauses and adding one further alternative: "single-limb" aggregated or "third generation" CACs[1212].

This new generation of CACs (which represent the most "radical development"[1213] in modification clauses) concentrate voting across different series instead of assembling it on individual bonds issuances. Thus, under single-limb CACs, the terms of a restructuring are approved if the consent of bondholders representing a 75% of outstanding principal of all the affected or "aggregated" series is obtained, regardless of the negative of particular bond issuances[1214]. Consequently, third generation CACs make holding out less attractive by increasing the costs of achieving a blocking position[1215] and represent a further step towards "bridging the gap between corporate and sovereign bankruptcy"[1216].

However, this step towards more integrated collective decision making in restructurings can also increase borrowers' opportunism. Theoretically, a debtor could offer favorable

---

maturity exceeding one year. See Zandstra, *New Aggregated*… Op. Cit., pp. 186-188. See also Buchheit et al., *The Restructuring*… Op. Cit., pp. 355-356. Gelpern, Heller, Setser, *Count*… Op. Cit., p. 10. Christoph Grosse Steffen, Sebastian Grund and Julian Schumacher, *Collective Action Clauses in the Euro Area: A Law and Economic Analysis of the First Five Years,* 0 Capital Markets Law Journal 0 (2019), pp. 2-3. However, it is important to mention that the percentage required for the approval by "Euro CACs" differs from ICMA's standard at the individual series level. Indeed, while ICMA's model clause demands a fifty percent, Euro CACs require a seventy five percent. See Bradley and Gulati, *Collective*… Op. Cit., p. 7.

[1208] "In such cases, the particular hold-out series would be excluded from the restructuring, while the restructuring would still be carried out for other series so long as the two-limb voting thresholds are met". Buchheit, et al., *The Restructuring Process*… Op. Cit., p. 354.

[1209] Zandstra, *New Aggregated*… pp. 187-194. See also, Clifford, *New*… Op. Cit., p. 3.

[1210] Stolper and Dougherty, *Collective*… Op. Cit., p. 239. Gelpern, Heller Setser, *Count*… Op. Cit., p. 1.

[1211] Zandstra, *New Aggregated*… Op. Cit., p. 191.

[1212] It is important to note that, under the third generation of modification provisions, the state can decide which type of mechanism (either series-by-series, two-limb or single-limb aggregation provisions) to apply to bondholders of different series. This provides the debtor with the flexibility necessary to restructure different series with different conditions and maturity structures. See Clifford, *New*… Op. Cit., pp. 4-5. Zandstra, *New Aggregated*… Op. Cit., p. 196.

[1213] Zandstra, *New Aggregated*… Op. Cit., p, 194.

[1214] See Gelpern, Heller, Setser, *Count*… Op. Cit., p. 13. Clifford, *New*… Op. Cit., p. 3.

[1215] See Stolper and Dougherty, *Collective*… Op. Cit., pp. 240-241.

[1216] Gelpern, Heller and Setser, *Count*… Op. Cit., p. 2.

restructuring terms to certain bond series while giving detrimental terms to others. Since under third generation CACs votes are counted on an aggregated basis, nothing would prevent that a favorable vote could be obtained at the aggregate level at the expense of the coercive conditions offered to one or more particular dissenting series.

In order to prevent these type of situations, third generation CACs require that the terms offered to all the affected series be "uniformly applicable"[1217]. The "uniformly applicable" standard mandates that "after the restructuring, all noteholders [of the affected series] must hold the same instruments (or have had the option to hold the same instruments)"[1218]. Although this standard constrains sovereign favoritism it does not block all avenues for discrimination. For example, the state could offer the "same instruments" (including a uniform maturity extension of 10 years) to bondholders of different series with different maturities. This will hurt securities which are about to mature at the time of the exchange the most in net present value terms, but it would also satisfy the uniformly applicable requirement[1219]. Consequently, this requirement does not guarantee the same treatment in net present value for bondholders of different series[1220].

[1217] See Zandstra, *New Aggregated*… Op. Cit., pp. 194-195. See also Clifford, *New*… Op. Cit., p. 3. Gelpern, Heller Setser, *Count*… Op. Cit., p. 12.

[1218] Clifford, *New*… Op. Cit., p. 3. The standard form of third generation CACs drafted by ICMA defines uniformly applicable as a: "(…) modification by which holders of Bonds of all series affected by that Modification are invited to exchange, convert or substitute their Bonds on the same terms for (x) the same new instruments or other consideration or (y) new instruments or other consideration from an identical menu of instruments or other consideration". Furthermore, the same instrument indicates that this requirement would not be met if each bondholder affected is not offered the same amount of consideration per amount of principal, of interest accrued but unpaid and per amount of past due interest (respectively) as that offered to other affected bondholders. International Capital Market Association, Standard Aggregated Collective Action Clauses ("CACs") For the Terms and Conditions of Sovereign Notes Governed by New York Law, available at https://www.icmagroup.org/resources/Sovereign-Debt-Information/ p. 23 [last accessed 18.2.2020].

[1219] See Mark Weidemaier and Mitu Gulati, Argentina's [Insert Adjective Here] Debt Crisis, available at https://www.creditslips.org/creditslips/2019/10/argentinas-insert-adjective-here-debt-crisis.html#more [last accessed 18.2.2020]. However, it is important to note that the clause has not been subjected to litigation yet and, therefore, the specific meaning of the uniformly applicable requirement has still to be determined in practice. See Anna Gelpern, Imagine Riding the Ceteris Pari-bus into the Sunset ... in Argentina available at https://www.creditslips.org/creditslips/2019/11/imagine-riding-the-cetris-pari-bus-into-the-sunset-in-argentina.html [last accessed 18.02.2020].

[1220] According to the ICMA: "The current proposal provides for the same offer on the same unit of par value; it should be noted, however, that it does not seek to benchmark or equalize a similar form of NPV loss across the different series of bonds being restructured". See ICMA, Sovereign Bond Consultation Paper Supplement, June 2014 available at https://www.icmagroup.org/resources/Sovereign-Debt-Information/archived-information/ [last accessed, 18.2.2019], p. 4. See also Zandstra, *New*… Op. Cit., p. 195. Clifford, *New*… Op. Cit., p. 3.

2.5.2. Collective Acceleration and Reverse Acceleration

As stated before, combined with renegotiation-CACs, "majority enforcement provisions" and "trustee clauses" put further barriers to litigation (and hence, to holdouts) and enhance creditor participation in restructurings.

From a general perspective, it is important to mention that enforcement of sovereign debt is determined by the occurrence of an "event of default" defined in the language of the contracts. Usually, sovereign bonds include among these events: (i) payment defaults (i.e., the debtor fails to pay principal or interest after a grace period of 30 days), (ii) policy-related events (for example, loss of IMF membership), (iii) covenant defaults (i.e. breach of other provisions of the indenture, such as the "pari passu" clause) and (iv) cross-defaults (i.e. the debtor is in default of other bonds)[1221]. An event of default may lead to the acceleration of the bonds (i.e., declaring the unmatured principal and interests of the instruments due payable immediately). Acceleration, in turn, depends on (i) whether the instruments include a "collective acceleration provisions" and "reverse acceleration clauses" and on (ii) whether the bonds is issued under a trust structure.

Collective acceleration provisions are of relevance for bonds issued under fiscal agency agreements (henceforth, "FAAs"). These provisions subject bonds' acceleration to the approval of a qualified majority of bondholders (usually, they require a vote in favor of 25% of the outstanding principal of the series)[1222]. Although individual bondholders of instruments issued under FAAs including this clause are usually authorized to litigate, they can only claim the unpaid amounts (usually one or more missed interest payments)[1223]. This is an important barrier to holdouts and contributes to an incentive structure that enhances creditors' participation in restructurings. Particularly, collective acceleration clauses diminish the private gains of individual creditors if they decide to go to court and are not able to achieve the majority required to litigate for the full amount of the debt[1224].

Furthermore, collective acceleration provisions are usually complemented with "reverse acceleration clauses". These later clauses allow for the revocation of the previously declared acceleration if a qualified majority of bondholders (usually, a 50% in value terms) agree to it[1225]. Then, if the majority of creditors considers agreeing to a restructuring proposal, and a group of creditors has already accelerated their bonds, it can simply reverse the acceleration of the bonds at stake. Again, these provisions

---

[1221] See Julianne Ams et al., Sovereign Default, in Ali Abbas et al. (Eds.), *Sovereign Debt: A Guide for Economists and Practitioners*. Oxford University Press (2020), p. 279-281.

[1222] See Buchheit and Gulati, *Sovereign Bonds*… Op. Cit., p. 1330. See also, Das et al., *Sovereign*… Op. Cit., pp. 43.44.

[1223] See Weidemaier and Gulati, *A People's*… Op. Cit., p. 65.

[1224] Bradley and Gulati, *CACs for the Eurozone*… Op. Cit., p. 26. Catalin Stefanescu, *Collective Action Clauses* (2016), available at https://efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2016-Switzerland/papers/EFMA2016_0442_fullpaper.pdf [last accessed 29.10.2019], p. 15.

[1225] See Buchheit and Gulati, *Sovereign Bonds*… Op. Cit, p. 1330-1331. Weidemaier and Gulati, *A People's*… Op. Cit., p. 65.

constitute an important incentive towards creditor participation in renegotiations and as an important barrier to holdout litigation[1226].

Additionally, the "governance"[1227] or payment structure of the bonds is also important from the perspective of litigation. Bonds are issued either using the previously mentioned fiscal agency agreement, a trust indenture (under US law) or a trust deed (under English law)[1228]. While the fiscal agent under a fiscal agency agreement acts as an "administrator" of the fiscal matters of the bonds and serves as an agent of the issuer, the trustee acts in the interests of bondholders and assume fiduciary duties towards them[1229]. Although fiscal agency agreements can include either individual or collective enforcement provisions (such as majority enforcement provisions and reverse acceleration clauses)[1230], they do not centralize enforcement on the fiscal agent[1231]. In contrast with fiscal agency agreements, trust indentures and trust deeds typically concentrate most enforcement powers in the trustee[1232]. However, there are important differences depending on whether the trust is governed by English or New York Law.

For our purposes, the main difference between trust indentures and trust deeds relates to the degree of enforcement powers vested in the trustee. Under trust structures governed by English law, all enforcement rights (including commencement of litigation and acceleration) are within the domain of the trustee and creditors are only authorized to litigate against the issuer and to accelerate when (i) a specific number of bondholders instruct the trustee to act (usually a 25%) and if, at the same time, (ii) the trustee fails to initiate enforcement[1233]. In either case, all the proceeds of litigation are shared on a pro-rata basis by the bondholders of the specific series[1234]. In contrast, individual creditors holding bonds issued under trust structures governed by New York law are allowed to enforce their claims following an event of default. However, their individual enforcement rights are limited: they can only pursue to recover unpaid amounts and are not allowed to accelerate the full-face value of the debt[1235]. This later right rest within the powers of the trustee. Individual creditors are only authorized to accelerate when

---

[1226] See Bradley Gulati, *CACs*… Op. Cit., p. 28; Stefansecu, *Collective*… Op. Cit., p. 16 and Kupelyants, *Sovereign*… Op. Cit., pp. 56-57.

[1227] Scholars refer to the governance structure of sovereign bonds as "the way a sovereign debtor's relations with its creditors are organized". Haseler, *Trustees*… Op. Cit., p. 4.

[1228] See Buchheit, *Trustees* … Op. Cit., p. 410.

[1229] Olivares, *Debt Restructuring*… Op. Cit., pp. 395-396. Buchheit, *Trustees*… Op. Cit., p. 410.

[1230] Stefanescu, *Collective*… Op. Cit., p. 16. Sonke Haseler, *Individual Enforcement Rights in International Sovereign Bonds* (2008), available at https://mpra.ub.uni-muenchen.de/11518/1/MPRA_paper_11518.pdf [last accessed 19.3.2020], p. 5. Haseler, *Trustees*… Op. Cit., p. 3. Furthermore, it is important to mention that the issuer in an FAA can also appoint a trustee for the bondholders, who in turn usually takes within its powers the enforcement rights. See Haseler, *Trustees*… Op. Cit., p. 3.

[1231] See Buchheit and Gulati, *Sovereign Bonds*… Op. Cit., p. 1332. Furthermore, under fiscal agency agreements "there is no requirement for sharing the proceeds from litigation". Stefanescu, *Collective*… Op. Cit., p. 16.

[1232] Haseler, *Trustees*… Op. Cit., p. 3 and Kupelyants, *Sovereign*… Op. Cit., p. 57.

[1233] Buchheit and Gulati, *Sovereign Bonds*… Op. Cit., p. 1331. Haseler, *Trustees*… Op. Cit., p. 5.

[1234] Haseler, *Individual* … Op. Cit., p. 4.

[1235] Buchheit and Gulati, *Sovereign Bonds*… Op. Cit., pp. 1331-1332.

(i) a specific number of bondholders instruct the trustee to act (usually a 25%) and if, at the same time, (ii) the trustee fails to commence enforcement[1236]. However, at difference with English trust deeds, trust indentures do not require that litigating bondholders share the proceeds of litigation with their fellow creditors[1237].

By constraining individual litigation, majority enforcement clauses provide, in principle, powerful incentives to enhance creditors' participation in restructurings. However, under certain circumstances, they may stop short on preventing creditors' collective action problems in sovereign default and sovereign debt renegotiations[1238].

2.6. The Dissimilarities Between Corporate and Sovereign Debt from the Perspective of Insolvency: An Assessment

As all of the above shows, there are significant differences between corporate and sovereign debt in the context of insolvency. Particularly, the main dissimilarities relate to the absence of an international bankruptcy proceeding for sovereigns. As was already posited, sovereign debt restructurings are performed following the specific provisions included in the contracts governing each of the liabilities to be renegotiated instead of being subjected to a wide-encompassing framework enacted by statute. Specifically, I noted the differences in what pertains to the determination of the insolvency of corporations and states, the impossibility of liquidating the debtor as a legal entity in the sovereign context, the differences in legal enforcement, the dissimilarities in what pertains to the control mechanisms available and those related to the mechanisms at the disposal of creditors and debtors in the debt renegotiation context. The following table summarizes these differences:

	Corporations	States
Determination of Insolvency	Either the "balance-sheet" or "cash-flow" test are applied.	Debt Sustainability Analysis is conducted.
Possibility of Liquidation	Yes.	No.
Legal Enforcement	Strong.	Weaker. However, creditors can impose costs on debtors by means of litigation.
Mechanism of Control	Strong. Pre-petition management can be replaced. The court oversees the entire process.	Weaker. Incumbent government officials cannot be replaced. However, international organizations do exert important influence on a state's' policies and can provide information in what pertains to its "ability" to pay.
Renegotiation Mechanisms	Established by statute and supervised by the Bankruptcy Court.	Established by contract. The renegotiation of each instrument depends on its specific legal terms.

Table 8: Main Differences Between States and Corporations from the Perspective of Insolvency and Debt Renegotiation.

It is submitted here that despite those major differences, there are also several significant similarities that render the analogy between corporate reorganization and sovereign debt restructuring plausible. At the same time, and for the same reason, these

[1236] Id.
[1237] See Haseler, *Trustees*… Op. Cit., p. 5 and Haseler, *Individual*… Op. Cit., p. 4.
[1238] See subsection 3.3.1.1 of this *Chapter*.

differences do not necessarily question the status of GPDs of the normative propositions extracted from domestic insolvency regimes. Particularly, and as it is going to be discussed in the next section, the dissimilarities and similarities between the corporate and the sovereign insolvency context need to be evaluated by taking into account the specific circumstances of the debt restructuring at stake. First, these differences can be mitigated by the involvement of international organizations which in some instances can serve an "equivalent" (albeit not "identical") role to that of that a bankruptcy court for sovereigns. For example, by assessing the debtor's capacity to repay, international organizations (such as the IMF), can prevent debtors' moral hazard ex-post and determine the amount of debt relief necessary for the country's rehabilitation.

Secondly, depending on certain factors, the problems that may arise in sovereign debt renegotiations can be considered significantly similar to those addressed by domestic corporate reorganization regimes through the rules embodying the aforementioned normative propositions. In those contexts, said rules may also be capable of solving the aforementioned problems in the international sphere.

Consequently, if those conditions are satisfied at the same time (meaning that the similarities are significant enough and that the problem-solution nexus holds in the international context) in what pertains to one of the groups of normative propositions, we can talk of a genuine GPD.

Before moving on, it is important to mention that the analysis assessing the (dis)similarities between the international and the domestic sphere will be informed by the literature on domestic insolvency regimes, functionalism and law and economics. As stated in *Chapter Three*, the process of identification of GPDs entails grasping the "ratio legis" or the "rationale" behind the norms extracted from domestic jurisdictions[1239]. Crucially, the "ratio legis" can be understood as the "social purpose" or as the "functions" of those norms[1240]. As previously discussed, the "function" of a norm or of a group of norms refers to the specific connection between a "problem" and a "solution"[1241]. In certain contexts, the economic analysis of law can help to clarify the "ratio" by offering a "conceptual grid" amenable to define the "problems" at stake, and thus to capture the "functions" of the norms[1242]. Therefore, it can also be useful in determining whether the "function" of the norms extracted from domestic legal systems also holds in the international sphere[1243].

[1239] See Raimondo, *General Principles*… Op. Cit., p. 49; Dumberry, *A Guide*… Op. Cit., pp. 122-123 and Nolan and Sourgens, *Issues of Proof*… Op. Cit., p. 519.

[1240] For Oliver Brand the function is the "social purpose" of a normative proposition. See Brand, *Conceptual Comparisons*… Op. Cit., p. 409

[1241] "(…) functions are relations between institutions and problems". Michaels, *The Functional Method*… Op. Cit., p. 366.

[1242] See van Aaken, *"Rational Choice"*… Op. Cit., pp. 140 et seq.

[1243] However, it should be noted that it is not always possible to grasp the "ratio legis" with the help of economics. In other words, not all "social problems" can be correctly understood from the perspective of economic models. For example, most human rights norms cannot be adequately explained through those means. See *Chapter Three* pp, 124-127.

3. A Functional Perspective: Testing Whether the Three Groups of Normative Propositions Can Be Considered GPDs

In this section, I will discuss whether the three previously identified groups of normative propositions can be regarded as GPDs by completing the "extrapolation" process initiated in *Chapter Three*. To that end, I will establish whether they satisfy two further conditions: (a) that the international and domestic sphere share a similar problem which can be solved at the international level through the norms extracted from domestic jurisdictions, and that (b) the similarities between the domestic and international sphere are significant enough to render the analogy plausible. If both conditions hold, then it could be concluded that the normative propositions under scrutiny can be considered general principles of domestic law.

Before proceeding, it is useful to recall the three group of normative propositions built up in the previous *Chapter*[1244]:

First Group of Normative Propositions: *The debtor is granted the initiative to file and draft a reorganization proposal with the purpose of encouraging early restructurings. The same is true for the possibility that the debtor remains in control of the business. This last possibility is also explained by the fact that pre-petition management may be better suited to conduct the business successfully than external third parties, achieving a better ex-post result both for creditors and the debtor.*

Second Group of Normative Propositions: *A ban on enforcement activities of creditors is imposed under reorganization. This "stay" is aimed at solving common-pool and anti-commons problems. On the one hand, this "stay" avoids an inefficient piece meal liquidation of the debtor's property. On the other hand, it also enhances creditors' cooperation in the reorganization forum. Furthermore, the "stay" also serves as an important incentive for early reorganizations.*

Third Group of Normative Propositions. *Restructuring plans do not require the consent of every single creditor. Instead, a majority of creditors can bind dissenting creditors to a restructuring proposal. In the case that creditors are divided into different classes for voting purposes, and that there are classes that do not agree to a proposal, the plan can be imposed regardless of this circumstance, provided that the collective interests of creditors are protected. This "cram down" device is aimed at solving anti-commons problems that could be even more severe if the consent of all creditors was required to approve the restructuring plan.*

3.1. Discussing the First Group of Normative Propositions: The Debtor's Prerogative for Drafting a Restructuring Proposal and the Debtor-In-Possession in Sovereign Debt

As indicated in *Chapter Three*, the rules comprised by this first group of normative propositions aim at preventing debtors' risk-shifting behavior and at encouraging early bankruptcy applications[1245]. As discussed in that *Chapter*, the literature has noted that

[1244] See *Chapter Three*, pp. 151-152.

[1245] See Horst Eidenmüller, *Comparative Corporate Insolvency Law* (2017). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799863 [last accessed 04.11.2019], p. 8.

when insolvency approaches, corporate debtors may be prone to engage in risky projects, which would otherwise not be pursued[1246] (usually referred to as "the asset substitution problem"[1247]). Particularly, considering that it has "nothing more to lose" if bankruptcy is declared, the debtor may be inclined to gamble with the purpose of remaining in business ("gambling for resurrection"), producing even more damage to the company's finance if those projects fail. Furthermore, the literature has also stressed that other circumstances affecting the company's management (such as job losses and reputational damages) may reduce the likelihood that the debtor files for reorganization in the appropriate moment[1248].

With the purpose of solving those problems, this first group of normative propositions (including the "DIP" regime) serve as "carrots" destined to prevent sub-optimal actions of debtors[1249]. Here, it is important to mention that the "DIP" regime establishes rewards both at the "individual" and the "collective" level of the corporation. First, individual rewards are granted for pre-petition management (they do not necessarily lose their jobs). Secondly, collective rewards are extended to the corporations as a collective entity (i.e., shareholders and the board of directors), and they imply that the company remains managing its own affairs instead of being "intervened" by a third-party insolvency practitioner or administrator. Furthermore, the literature has also explained the "DIP" regime as being critical for the ex-post maximization of creditors' recovery, since pre-petition management may be better suited than third parties to manage the company[1250].

3.1.1. Risk-shifting and "Gambling for Resurrection" in Sovereign Debt

Risk-shifting and gambling for resurrection can also emerge in the sovereign debt scenario[1251]. The driving factor of those problem in this context are related to the political costs to which government officials are subjected to if they decide to default or restructure the debts. According to the literature, political leaders who take those decisions risk losing power due to the negative impact that those events have on the domestic economy[1252]. Here, risk-shifting and gambling for resurrection are usually

---

[1246] See Cepec and Kovac, *Carrots and Sticks*… Op. Cit., p. 83. See also Eidenmüller, *Trading*… Op. Cit., p. 243.

[1247] "When a firm faces financial distress, shareholders can gain from decisions that increase the risk of the firm sufficiently, even if they have a negative NPV. Because leverage gives shareholders an incentive to replace low-risk assets with riskier ones, this result is often referred to as the asset substitution problem. It can also lead to over-investment, as shareholders may gain if the firm undertakes negative-NPV, but sufficiently risky, projects". Jonathan Berk and Peter DeMarzo, *Corporate Finance* (4th Edition). Pearson (2017), p. 598.

[1248] See Cepec and Kovac, *Carrots and Sticks*… Op. Cit., p. 83.

[1249] Id., p. 85. It should be mentioned that domestic insolvency regimes also consider significant "sticks". See *Chapter Three*, p. 148.

[1250] See Posner, *Foreword*… Op. Cit., pp. xi-xii.

[1251] See, for example, Panizza, Sturzenegger and Zettelmeyer, *The Economics*… Op. Cit., p. 682. See also Weidemaier and Gulati, *The Relevance* … Op. Cit., p. 399 and Guzman and Stiglitz, *Creating*… Op. Cit., p. 7.

[1252] According to Borensztein and Panizza, defaulting governments between 1980-2003 saw a decrease in electoral support after the event of a 16% and, in a 50% of the episodes, the chief executive was removed from office within a year. See Eduardo Borensztein and Ugo Panizza,

explained as a consequence of the private interests of government officials: Despite acting as the agents of their citizens, political leaders may be prone to advert or postpone the declaration of defaults and restructurings in order to avoid private costs (i.e., being removed from power) even in situations where a debt-moratoria or initiating a restructuring can be deemed necessary (or optimal)[1253].

Considering that the maximum penalty that leaders face in most cases is losing power, they may be tempted – just as managers and shareholders in the corporate context – to engage in risky strategies ("gambling for resurrection") in the vicinity of insolvency. For example, they may issue new bonds[1254] or may request new loans from the IMF arguing that the predicament of the country is related to liquidity but not to insolvency[1255], thus diluting the debt previously acquired. Although this strategy is not optimal from the perspective of the domestic economy (and may also not be optimal for creditors) it can certainly be optimal for political leaders: If they succeed in avoiding a default or a restructuring they are rewarded by constituencies and remain in office. If they fail, and the economy does not recover, and are thus forced to either default or restructure, they are punished by the citizenry and lose power[1256]. The following figure illustrates this agency problem in the context of sovereign debt:

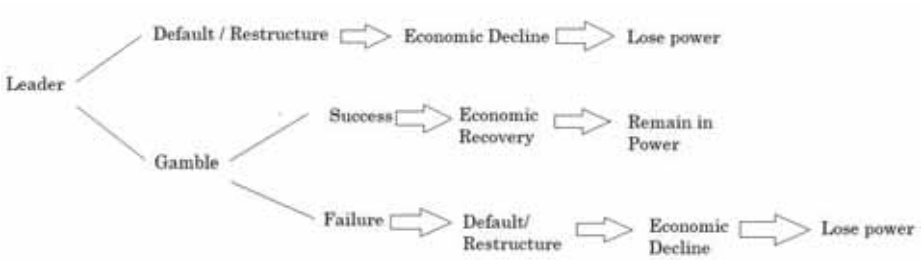

Figure 1: Risk-shifting and "Gambling for Resurrection" in the Sovereign Debt Context.

The Costs of Sovereign Default, IMF Working Paper WP/08/238 (2008), pp. 21-22. Furthermore, according to Malone, defaults increase the likelihood of removal from office (within the same year) for executives by a 24 percent. See Samuel Malone, *Sovereign Indebtedness, Default, and Gambling for Redemption*, 63 Oxford Economic Papers, (2011), p. 343.

[1253] For example, under the framework of Borensztein and Panizza, avoiding default is "socially optimal" only where the probability of economic recovery exceeds the percentual difference between the costs of defaulting "today" and those of defaulting "tomorrow". See Borensztein and Ugo, *The Costs…* Op. Cit., p. 20.

[1254] See Bolton and Skeel, *Inside the Black Box…* Op. Cit., pp. 786-787.

[1255] See Skylar Brooks, *Governing Sovereign Bankruptcy: Writing International Rules for Rewriting National Debts*. University of Waterloo Phd. Thesis (2019), pp. 74-75.

[1256] This problem has also been analyzed in the context of war. See George Downs and David Rocke, *Conflict, Agency, and Gambling for Resurrection: The Principal-Agent Problem Goes to War*, 38 American Journal of Political Science 2 (1994), pp. 374-375.

3.1.2. Assessing the Functions of the First Group of Normative Propositions in the Sovereign Debt Restructuring Context

As it can be noted, both corporations (and its managers and shareholders) and states (and its government officials) face similar problems in the vicinity of insolvency. However, it is submitted here that, despite this circumstance, the functions which the rules comprised in the first group of normative propositions serve in the corporate context does not hold in the sovereign debt scenario. This is a result of the level on which this first group of normative propositions would be applied if extrapolated to states' insolvency.

Let me recall that in *Chapter Three* I built this first group of normative propositions by extracting the common elements of domestic reorganization regimes which complied with the first test of the extrapolation requirement (that is, being compatible with the values of the international legal order). There, I argued that other alternatives (such as subjecting the state to the administration of a third-party) were irreconcilable with international law as it stands today[1257]. Furthermore, I also noted that the "DIP" regime can be considered compatible with states' sovereignty and with the international principles through which sovereignty expresses itself (particularly, sovereign equality, non-intervention and self-determination). In that context, I stressed that the principle of self-determination is of particular importance[1258]. Specifically, I noted one of the elements of the right to self-determination: that citizens of a state are free to decide the form of their government[1259]. Hence, if citizens decide to live under a democracy, they are entitled to elect their political leaders.

Those considerations provide strong reasons to limit the level on which this first group of normative propositions ought to be applied if extrapolated to states' insolvency. Specifically, if transposed, the "DIP" regime would apply to the state as a collective entity (meaning that third parties could not take control of the internal affairs of the country in the context of insolvency) and not at the "individual" level (i.e., it would not serve to maintain incumbent politicians in office after declaring a default or initiating a restructuring). As it can be noted, "shielding" political leaders from being removed from office against the will of the citizens cannot be considered acceptable from the perspective of international law, at least, for democratic states[1260]. Hence, if

[1257] However, it is important to note that a state could voluntarily subject itself to the administration of a third-party. Hence, the feasibility of the alternatives previously mentioned depends on the consent of the state.

[1258] The principle of self-determination is Recognized by Art. 2(1) of the UN Charter and Art. 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 and International Covenant on Civil and Political Rights, Dec.16,1966, 999 U.N.T.S. 3.

[1259] For a discussion of the right to self-determination in the sovereign debt context see Villaroman, *The Loss of Sovereignty*… Op. Cit.

[1260] Naturally, democratic states could implement a rule akin to this one on their domestic constitutions. However, if a rule like that is not in place, the scope of this first group of normative propositions does not reach to the "individual" interests of incumbent politicians.

extrapolated to the international level, the rules embedded in the first group of normative propositions are limited to the state as a "collective" sovereign entity.

The aforementioned conclusion confines to the point of irrelevance the capabilities of this first group of normative propositions to encourage defaults/restructurings at the optimal time. Notably, since the sanction to incumbent politicians who default or initiate restructurings is still in place, "gambling for resurrection" (and, thus, risk-shifting) is still the optimal strategy from the point of view of their individual interests.

For all of the above, although sovereign and corporate insolvency feature similar problems, the *rationale* which the first group of normative propositions finds under domestic bankruptcy regimes (i.e., solving those problems by providing incentives both at the "individual" and the "collective" level) cannot be extrapolated to the international sphere (i.e., the normative propositions are incapable of solving the problems in the international sphere).

Consequently, this first group fails the first condition indicated at the beginning of this section and thus, it cannot be considered as a proper GPD to be applied to sovereign debt restructuring. For the same reason, it is unnecessary to discuss whether they comply with the second condition previously mentioned. The next figure summarizes these considerations.

Problems solved	Corporate Reorganization	Sovereign Debt Restructuring
Preventing risk-shifting and "gambling for redemption"	The "DIP" regime and granting the debtor with the initiative of drafting and filing a restructuring proposal provides incentives both at the "individual" and "collective" level. Hence, these incentives may encourage early restructuring applications thus preventing sub-optimal actions by debtors.	If extrapolated, the "DIP" regime would only be applicable at the "collective" level (i.e., to the state as a sovereign entity and not to government officials). Hence, the "DIP" regime would not be able to prevent risk-shifting and "gambling for resurrection". The 'function" of the first group of normative propositions does not hold in the international scenario.

Table 9: The "DIP" Regime in Sovereign and Corporate Insolvency.

Nevertheless, it is important to note that denying the status of GPDs to the first group of normative propositions does not have any important consequence on the sovereign debt renegotiation context. The current practice already operates along those lines. Although government officials may be removed from office after default/restructurings, the state continues in the administration of its own domestic affairs[1261] notwithstanding the influences that international organizations (such as the IMF) may have in their policy-choices. Furthermore, it is the state who usually takes the initiative for restructuring its debt: It approaches international organizations for assistance and to its creditors for obtaining debt relief[1262]. Usually, the state will draft a restructuring

[1261] See International Law Association, *Sovereign Insolvency*… Op. Cit., p. 26.

[1262] This feature has been recognized in international litigation. For example, the tribunal in Abaclat stated that: "Currently, there exists no formal legal framework establishing precise steps to be followed by the defaulting sovereign or the creditors. Nevertheless, an informal regime has developed consisting of the following principles: (i) sovereign to signal the need of debt restructure; (ii) communication between the sovereign and the creditors; (iii) consensus and consent on the terms of the restructure; and (iv) equitable burden sharing". Abaclat and others

proposal - which would had been previously approved by the IMF -, indicating the amount of debt relief requested and the methods to be used for that purpose (for example, "haircuts" or maturity extensions)[1263]. Consequently, although the normative propositions analyzed thus far cannot be considered as proper GPDs they already form part of the informal transactional framework of the current practice of sovereign debt restructuring.

Finally, one important consequence of the foregoing is that most measures aimed at encouraging the early recognition of an unsustainable debt burden (and thus, incentivizing "optimal" default/restructurings and preventing "gambling" behavior) would have to decrease the costs of defaults/restructurings for the state, and thus, indirectly, for incumbent politicians. Among these measures it is possible to name one: staying creditors' litigation. However, a measure like this may present a trade-off: While decreasing the costs of restructuring it may also encourage sovereigns' opportunism, increasing the number of both optimal and sub-optimal defaults. I analyze those problems in the next subsection which deals with the "stay" as a general principle.

3.2. Discussing the Second Group of Normative Propositions: The Imposition of a "Stay" on Creditors' Litigation

In this subsection, I will discuss whether the second group of normative propositions (i.e., imposing a "stay" on creditors' litigation) satisfies the two conditions previously indicated. First, in order to analyze whether both sovereign and corporate restructurings feature similar problems solvable by means of a "stay" (i.e., the first condition), I will refer to the literature on the functions of this group of normative propositions under domestic regimes, and use the insights provided by law and economics concerning litigation. Secondly, with the aim of assessing whether the similarities between the domestic and the international sphere are significant for our purposes (i.e., the second condition), I will consider the preferences and incentives of indebted states in the context of defaults and restructurings.

3.2.1. The First Condition: A Race to the Courthouse in Sovereign Debt Restructuring?

As indicated in *Chapter Three*[1264], the classical theory of bankruptcy law (the "creditors' bargain" heuristic) posits that this branch of the law aims to solve a prisoner's dilemma arising among the creditors of an insolvent debtor. In a nutshell, this theory argues that individual remedies (such as asset seizure by creditors under general debt collection law) can produce sub-optimal outcomes from the perspective of creditors as a group, in the same manner that individual consumption of common pool resources can lead to inefficiencies from the point of view of all the agents involved[1265]. Particularly, the creditors' bargain heuristic maintains that, in the absence of bankruptcy protection,

---

v. The Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5 (2011), Majority Decision, p. 21.

[1263] See Buchheit, et al., *The Restructuring*… Op. Cit., p. 335. See also International Law Association, *Sovereign Insolvency*… Op. Cit., pp. 24-26.

[1264] See *Chapter Three*, pp. 148 et seq.

[1265] See Jackson, *The Logic*… pp. 13-14, Baird, *A World*… Op. Cit., pp. 183-184.

creditors may be prone to compete with each other in order to be the first to obtain the assets of the debtor. This "race to the courthouse" may lead to an inefficient piece-meal liquidation of the debtor's estate, destroying the value that the assets may have if sold together (in the event of liquidation) or if the debtor business is restructured. Therefore, according to the creditors' bargain heuristic, domestic insolvency law protects the interests of creditors as a group against their individual impulses (materialized in the race to the courthouse and the piecemeal liquidation of the debtor's assets) by imposing a "stay" on their collection efforts. Furthermore, economic theory also posits that the "stay" at the same time serves as an important incentive for creditors' cooperation in the context of corporate reorganization[1266].

The literature on the subject has concluded that the "race to the courthouse" is less likely to take place in the sovereign debt context, considering that collection remedies are weaker when compared to those in corporate debt[1267] (subsection 2.3), and the widespread use of majority enforcement provisions in sovereign bonds, which constrains individual creditors' enforcement against the issuer[1268] (subsection 2.5.2.). For these reasons, for most scholars the case for a rule analogous to the "stay" in sovereign insolvency is less forceful than under domestic bankruptcy regimes[1269]. This conclusion has been endorsed to a certain extent by domestic courts, who have been reluctant to impose stays in cases involving sovereign debt[1270].

[1266] See, for example, Eidenmüller, *Comparative*… Op. Cit., p. 5.

[1267] As Omer Kimhi puts it for the case of municipal bankruptcy in the US: "This, since piecemeal liquidation is impossible, in the municipal context the state remedies system does not create a common pool problem". Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 Yale Journal on Regulation 2 (2010), p. 371.

[1268] See, Buchheit and Gulati, *Sovereign Bonds*… Op. Cit., pp. 1347.

[1269] According to Anna Gelpern, this is also a consequence of sovereign immunity, which makes the imposition of a "stay" in the sovereign debt context superfluous. In her own words: "Immunity acts in important respects like an automatic stay on enforcement". Gelpern, *Bankruptcy*… Op. Cit., p. 901. See also Gelpern, *Sovereign Damage*… Op. Cit., p. 2. See also Bolton, *Toward a Statutory Approach*… Op. Cit., p. 20. See also Schwarcz, *Sovereign Debt Restructuring*… Op. Cit., pp. 984-985. Finally, Mathias Goldmann argues that since the implementation of modification and enforcement CACs would theoretically prevent individual enforcement, the widespread adoption of these provisions in sovereign bonds will also "obliterate the need for a standstill rule". Goldmann, *Necessity*… Op. Cit., p. 4. These considerations are in stark contrast with the early literature on sovereign debt litigation of the 1980s which stressed that cross default clauses included in loan agreements could trigger a race to the courthouse. For a summary of the early literature insisting on this specific point see Rogoff and Zettelmeyer, *Bankruptcy*… Op. Cit., pp. 480-484.

[1270] A detailed analysis of the imposition of a "stay" in sovereign debt cases will be presented in the next *Chapter*. Cursorily, among cases discussing the "stay" it is possible to mention: Pravin Banker v. Banco Popular del Peru 109 F.3d 850 (2d Cir. 1997), Lightwater v. Argentina 2003 WL 1878420, NML Capital v. Argentina Docket No. 05-1543-cv (L), Applestein v. Province of Buenos Aires 2003 WL 1990206, Applestein v. Argentina 2003 WL 22743762, Banco Cafetero v. Peru 1995 WL 494573, Credit Francais v. Sociedad Financiera de Comercio (Venezuela) 128 Misc.2d 564 and E.M. v. Argentina 2003 WL 22120745. Finally, it is noteworthy that, after the restructuring that followed the war in Iraq, the extreme circumstances of the economy of the country motivated the United Nations to pass Resolution 1483 of May 22, 2003. This resolution barred attachment and execution of the state's assets in order to enhance its economic recovery

However, as stated before, sovereign debt enforceability is a matter of degree. Hence, the more enforceable the instruments at stake are, the more compelling the reasons justifying the imposition of a stay on creditors' collection efforts will become. In cases where the state is exposed to asset seizure[1271] sovereign insolvency may feature the same type of problems as corporate insolvency in what pertains to the possibility of a race to the courthouse, even when majority enforcement provisions are included in the instruments. In those cases, the justification of a "stay" on creditors' collection efforts is stronger than in cases where all the debt stock of the debt is governed by legal terms classified as having low enforceability or none at all. Furthermore, even in cases where the state's assets are beyond bondholders' reach, a race to obtain judgments can potentially take place among creditors in order to shield themselves from a future restructuring. I will illustrate these points with two examples.

3.2.1.1. First Example: A Race to the Assets

Let me assume that a state has a debt stock composed by bonds with identical provisions, issued under fiscal agency agreements in New York including a waiver of immunity from execution and majority enforcement provisions (collective acceleration and reverse acceleration clauses). Let me also assume that the state has defaulted on interest payments to bondholders and that it has announced that it will restructure its debt. Furthermore, let me assume that the state has commercial assets located in foreign jurisdictions which, although substantial, are not sufficient to cover the claims of all bondholders.

Additionally, assuming that they seek to maximize their expected utility, creditors will initiate legal actions against the state when the expected value of their legal claims exceeds the costs of litigation[1272]. In this example, individual creditors are directly authorized to litigate only for recovering missed payments (due to collective acceleration clauses, see subsection 2.5.2 for details). It is almost certain for creditors to obtain a favorable judgment in court for those amounts (with a probability near to 1)[1273].

---

and to aid to an orderly restructuring (having effects akin to those of a stay). For a discussion, see Lee Buchheit and Mitu Gulati, *Sovereign Debt Restructuring and US Executive Power*, 14 Capital Markets Law Journal 1 (2019), pp. 116-119.

[1271] That is, when an important part of the contracts of its debt stock includes terms previously classified as having "moderate" or "high" enforceability and when it has commercial property located abroad.

[1272] In the words of Cooter and Ulen: "To file a complaint, the plaintiff must usually hire a lawyer and pay filing fees to the court. Filing a complaint creates a legal claim. To decide whether to initiate a suit, a rational plaintiff compares the cost of the complaint and the expected value of the legal claim. The expected value of the legal claim (…) depends upon what the plaintiff thinks will occur after filing a complaint". Robert Cooter and Thomas Ulen, *Law & Economics* (Sixth Edition). Pearson (2012).

[1273] "(…) where a contract unambiguously requires the defendant to make payments pursuant to its terms, and the defendant fails to make said payments, judgment must issue in favor of the plaintiff". Elliot Associates L.P. v. Republic of Peru, 12 F. Supp. 2d 328 (S.D.N.Y. 1998), p. 344.

Nevertheless, litigation would not be worthwhile due to its costs, which will usually exceed the aforementioned returns[1274].

The expected value of creditors' claims increases when they are authorized to accelerate (i.e., to declare the full face-value of the bond due and payable immediately). However, in our example, bondholders need to obtain the consent of at least a 25% (in value terms) of all bondholders holding instruments of one particular series in order to declare acceleration (due to collective acceleration clauses). Furthermore, even if acceleration is declared, it could be revoked by 50% (in value terms) of the bondholders in that series. Hence, taken together, both provisions put important obstacles to the race to the courthouse and affect individual creditors' decision to litigate[1275]. However, these obstacles will not necessarily preclude the "race" from happening under all circumstances.

Creditors who are particularly interested in litigation (henceforth, "activist creditors") can purchase the bonds in default in the secondary market. In fact, it has not been uncommon in previous restructurings for activist creditors to acquire bonds amounting to the 25% threshold required to declare acceleration[1276]. In these cases, litigation would in principle be convenient, since the expected value of activist creditors' claims (which includes the full face-value of the debt) will exceed the costs of bringing suit. However, even activists face the considerable risk of reverse acceleration, which, if triggered, would reduce the value of their claims from full repayment to the payment of interest payments in arrears[1277]. Although activists could completely insulate themselves from

[1274] In the words of Buchheit and Gulati, "most bondholders will not wish to sue just for their share of one or two missed payments". Buchheit and Gulati, *Sovereign Debt…* Op. Cit., p. 1347. Here, the total expected value of the litigation strategy would be either negative or near to zero, and creditors will not litigate. In the economic literature of torts this phenomenon is referred to as "rational apathy": "the victim remains apathetic [i.e., the "victim does not start a claim"] because the costs of the action outweigh the benefits". Louis Visscher and Alexandre Biard, *Dutch Mass Litigation from a Legal and Economic Perspective and its Relevance for France*, Rotterdam Institute of Law and Economics (RILE) Working Paper Series (2014), p. 3.

[1275] In the words of Buchheit and Gulati, "the customary requirement that holders of twenty-five percent of the bondholders in a particular issue consent to an acceleration of the unmatured principal gives a measure of protection because most bondholders will not wish to sue just for their share of one or two missed payments. Of equal importance, however, is the ability of a simple majority (in most bonds) to rescind any prior acceleration as part of a final workout. The discontented bondholder who is thinking of pursuing independent legal remedies must therefore face the possibility that, after months of expensive litigation, the sovereign debtor will reach an agreement with the majority of its bondholders, the acceleration will be reversed, and the litigant creditor will be left with a claim only for its share of any payments that remain unpaid after the settlement. This can be a powerful disincentive to the commencement of lawsuits before a restructuring has been concluded". Buchheit and Gulati, *Sovereign Debt…* Op. Cit., p. 1347.

[1276] See, for example, Goldmann, *Necessity…* Op. Cit., pp. 4-5.

[1277] Here, the expected value of the whole operation for activists is given by: EV = (Probability of acceleration not being revoked * full face value of the debt) + (Probability of acceleration being revoked * missed interest payments) – Costs of purchasing the bonds on the secondary market – Litigation Costs.

that risk by controlling >50% of the bonds of the respective series, this would diminish the payoffs of their strategy dramatically, turning it less attractive.

Nevertheless, even in the presence of reverse acceleration clauses, the activists' strategy can be successful if they obtain a judgment for the full amount of the debt before a deacceleration-vote takes place[1278]. At least under US law, having obtained a favorable judgment, litigants' claims (originating from debt contracts) are considered to be extinguished and "merged" into the judgment[1279]. For this reason, any subsequent vote by bondholders deaccelerating payments does not affect the claims of those who already obtained a favorable decision, since those claims are already extinguished[1280]. Therefore, they remain entitled to full satisfaction of principal and accrued interests, despite of the fact that other bondholders of the series voted to deaccelerate. It is important to note that this is a real possibility, since the decision to deaccelerate is usually taken when a restructuring offer is about to be (or has already been) accepted, years after the default date and the declaration of acceleration[1281]. Hence, as soon as they obtained a favorable

[1278] See Hagan, *Designing a Legal Framework*… Op. Cit., pp. 323-324 and Kupelyants, *Sovereign Defaults*… Op. Cit., pp. 83-85.

[1279] This is the "merger doctrine" of judgements under US law. See, Joseph Glannon, *Civil Procedure* (7th Edition). Wolters Kluwer (2013), p. 542.

[1280] This issue has been recently debated between experts in sovereign debt (professors Mitu Gulati and Mark Weidemaier) and was motivated by new developments in the litigation against Venezuela. While professor Gulati is more skeptical about the application of the "merger" doctrine in this context, professor Weidemaier has stated that this is the correct interpretation in the context of both modification and acceleration CACs. The detail of their arguments can be found in their respective blog posts (ordered by date of publication): Mitu Gulati, Do Judgements Trump CACs? https://www.creditslips.org/creditslips/2020/02/do-judgements-trump-cacs.html [last accessed 19.3.2020], Mark Weidemaier, Judgements > CACs https://www.creditslips.org/creditslips/2020/02/judgments-cacs.html [last accessed 19.3.2020], Mitu Gulati, Judgements, CACs and Civil Procedure Quicksand https://www.creditslips.org/creditslips/2020/02/judgements-cacs-and-civil-procedure-quicksand.html [last accessed 19.03.2020], Mark Weidemaier, Judgements > CACs!!! https://www.creditslips.org/creditslips/2020/02/judgments-cacs-1.html [last accessed 19.30.2020]. Professor's Weidemaier position has also been endorsed by previous authorities. For example, in the words of the International Law Association: "At least in the US and UK, CACs (and exit consents) appear to have no effect on bondholders that have already obtained court judgements on accelerated claims prior to a restructuring agreement, leaving these judgement creditors outside the restructuring framework". International Law Association, *International Monetary Law*, Berlin Conference (2004), available at https://www.mocomila.org/publication/2004-mocomila-berlin-report.pdf [last accessed 24.3.2020]. See also Hagan, *Designing*… Op. Cit., pp. 322-323 and Kupelyants, *Sovereign*… Op. Cit., pp. 83-85. To my knowledge, however, these arguments have not been putted to a test in sovereign debt litigation yet. The closest example which I have been able to find is that of an early case against Panama which involved the modification of a multilateral loan agreement. See Elliot Associates v. Republic of Panama 1996 WL 474173.

[1281] According to Tomz and Wright, the median length of defaults (taking the period 1970-2010) was of 6.5 years. Michael Tomz and Mark Wright, *Empirical Research on Sovereign Debt and Default*, 5 Annual Review of Economics 1 (2013), p. 12. According to Trebesch, who uses a sample of defaults ranging from 1980 to 2006, the average time in which a country was in default was of 2.5 years. Christoph Trebesch, *Delays in Sovereign Debt Restructurings. Should we Really Blame the Creditors?* (2008) available at

judgment, successful activists would be free to pursue the satisfaction of their claims on the state's available assets, without incurring deacceleration risk.

Secondly, the implementation of activists' strategies may motivate non-activist creditors to follow suit. Noting that some bond series are being accelerated (and considering that other creditors may be successful in attaching the debtors' assets for full satisfaction), bondholders of other series may enter the race, obtain judgements, and attempt to attach the state's assets located in foreign jurisdictions[1282].

In this case, just as in the domestic context, the order in which creditors would be repaid would depend on their place in the race to the property located abroad. Once all the assets of the debtor are seized by successful claimants, the remaining creditors will have little recourse to satisfy their claims but to pressure the state using the other legal and non-legal mechanisms available to them (see subsection 2.3).

Finally, this race to sovereign assets may produce the same destructive outcomes of the race to corporate assets. This will be true in cases that the assets located abroad are complementary to the economy of the debtor (for instance, if these assets serve as processing facilities for an input produced by the debtor, the output of which it exports for a profit). If these assets are liquidated by creditors, then the productive capacity of the country will decline, which will in turn lead to a smaller flow of resources to its economy and to a more protracted recovery before it can service all its obligations.

Therefore, as in the corporate context, the imposition of a stay may be beneficial for the interest of creditors as a group by preventing a race to the courthouse which may potentially end in the inefficient piece meal liquidation of the debtor's property.

3.2.1.2. Second Example: Litigation as a Shield from Restructurings

Let me now change one of the previous assumptions: The states' assets are no longer located in foreign jurisdictions and are thus beyond creditors' reach. Considered at face value, this would eliminate the prisoner's dilemma for creditors, as there are not assets to attach, and therefore no common pool to exhaust. However, under these circumstances, a race to the courthouse could still occur.

Here, the key issue to consider are the effects of the judgments in favor of creditors. As stated above, those judgments extinguish the claims of litigating creditors and protect them from subsequent events such as majority votes reversing accelerations. More importantly, however, these judgments also shield litigating creditors from other events such as those triggered by modification CACs (of any generation)[1283]. Let me recall that by means of modification CACs a supermajority of bondholders can agree to a restructuring proposal by voluntarily amending the key terms of the contracts,

---

https://www.econstor.eu/obitstream/10419/39906/1/AEL_2008_44_trebesch.pdf [last accessed 19.3.2020], p. 6.

[1282] In this case, the expected value of the strategy for non-activists creditors will be: EV = (Probability of acceleration not being revoked * full face value of the debt) + (Probability of acceleration being revoked * missed interest payments) – Costs related to agreeing with other bondholders to declare acceleration – Litigation Costs.

[1283] See footnote 1280 and accompanying text and references.

including maturity, principal and interests. This modification also binds dissenting creditors if the supermajority required by the contracts (for example, a 75% in value terms in most first-generation CACs) is reached. Hence, by triggering CACs, creditors as a group can voluntarily reduce the value of their claims and provide debt relief to the state.

However, just as in the case of reverse acceleration, creditors can avoid being bound to a restructuring agreement by accelerating and obtaining a favorable judgment before modification CACs are triggered. If they are successful, they will be entitled to full payment, while consenting creditors (if the respective majorities are reached) will receive the newly reduced amounts[1284]. Again, this produces an important incentive for potential dissenters to obtain judgments as soon as possible and, therefore, to rush to the courthouse. Thus, in a case such as this, the imposition of a "stay" could solve collective action problems among creditors, since it would prevent the premature declaration of acceleration and also enhance creditors' participation in restructurings[1285]. As stated above, this is precisely the second traditional justification in economic literature for the imposition of a "stay" under domestic bankruptcy regimes.

3.2.1.3. Preventing a Race to the Courthouse in Domestic and Sovereign Insolvency through the Imposition of a "Stay"

Consequently, assuming that the state has assets located in foreign jurisdictions, a race to the courthouse similar to those domestic bankruptcy law aims to prevent by means of a "stay" can also take place in the sovereign insolvency context. Furthermore, even if we remove the assumption concerning the attachable state's assets, a race to the courthouse (with the purpose of avoiding future restructurings) may also take place among creditors. The following table summarizes these considerations:

Problems solved	Corporate Reorganization	Sovereign Debt Restructuring
Inefficient Piece-meal Liquidation	The "stay" prevents a "race to the assets" of the debtor among creditors.	The "stay" may prevent a "race to the assets" of the debtor among creditors in cases where the state has property susceptible of being attached and its bonds include provisions with moderate or high enforceability.
Enhancing Creditors' participation in restructurings.	Creditors are bound to resolve their claims in the reorganization forum.	The "stay" may prevent a "race to obtain judgments' among creditors which could protect them from a future restructuring.

Table 10: Similarities of the Problems Solved by the "Stay" in Corporate and Sovereign Restructurings.

Therefore, the collective action problems faced by creditors of an insolvent corporation (which domestic bankruptcy law aims to solve by means of a "stay") are relevantly similar to those which can potentially emerge between creditors of an insolvent state.

[1284] Avoiding a restructuring for individual creditors is rational when the expected value of their strategy is positive. In this case the strategy's payoffs are given by: EV = (Probability of obtaining a judgement before CACs are triggered * full face-value of the bonds) + (Probability of obtaining a judgement after CACs are triggered) * (Discounted value of the bonds) – Litigation Costs.

[1285] Particularly, the "stay" in this case would reduce the probability of obtaining a judgement before CACs are triggered and would, in turn, increase the probability of obtaining a judgement after CACs are triggered reducing the Expected Value of premature litigation. For this reason, the "stay" does not need to be indefinite and ought to be imposed for a prudent period instead.

At the same time, the "stay" can also solve those problems in the sovereign debt restructuring context. Consequently, the first condition necessary for arguing that the "stay" can be considered a GPD is satisfied.

However, before proceeding, it is necessary to specify the scope of the "stay" that could solve these collective action problems among creditors of an insolvent state. For example, most commentators that favor the imposition of a "stay" in the sovereign context have tended to limit its application exclusively to enforcement measures[1286]. Hence, for them, the main objective of the "stay" is to prevent the attachment of the state's assets located abroad[1287]. Nevertheless, as discussed above, the former is but one of the justifications the "stay" has under domestic bankruptcy regimes. Another important economic reason for the stay consists in its enhancing creditor participation in reorganizations. As was previously shown, this rationale also holds for the sovereign debt restructuring context. Particularly, extending the "stay" to litigation serves to prevent strategies aimed at immunizing minoritarian groups of bondholders from subsequent restructuring agreements. Consequently, I submit here that the "stay" should prevent both attachment and litigation.

3.2.2. The Second Condition: Are the Similarities Between the Domestic and International Spheres Significant Enough to Render the Analogy Plausible?

Now it is the time to discuss the second condition necessary to assert that the "stay" can be considered a GPD. In this subsection, I analyze whether the similarities between the domestic and international sphere make the analogy plausible.

At the outset, it is important to note that there are strong arguments suggesting that the differences between both spheres cannot be reconciled. For example, according to a part of the scholarship, there are too many critical dissimilarities between sovereign debt restructuring and corporate reorganization to make the analogy reasonable[1288]. Indeed, this literature stresses that domestic insolvency laws are complex artifacts that include several provisions destined to balance both the interest of creditors and

[1286] An important exception is Kupelyants. See Kupelyants, *Sovereign Defaults*… Op. Cit., p. 85.

[1287] See, for example, Bolton and Skeel, *Inside*… Op. Cit., p. 782: "We propose in particular that the SDRM impose a stay on asset seizures, but that litigation by creditors otherwise be permitted to go forward". Id., p. 769. See also, James Haley, *Sovereign Debt Restructuring: Old Debates, New Challenges* (2014), CIGI Paper No. 32 available at https://www.cigionline.org/publications/sovereign-debt-restructuring-old-debates-new-challenges [last accessed 19.3.2020], p. 10. See also Cristoph Paulus, *Some Thoughts on an Insolvency Procedure for Countries*, 50 The American Journal of Comparative Law 3 (2002), p. 546 and 552. See also Goldmann, for whom the stay "(…) does not have to be automatic or bar litigation per se as long as it bars enforcement". Goldmann, *Necessity*… Op. Cit., p. 5.

[1288] "A logically consistent analogy requires the comparison of comparable phenomena. In the absence of a bankruptcy regime, contrasting sovereign debt with modern insolvency regimes based on insolvency statutes is like comparing apples and oranges". Kupelyants, *Sovereign*…, Op. Cit., p. 32.

debtors[1289]. Hence, for this view, transposing one or more of the elements of those frameworks to the international scenario, while disregarding the others, will be detrimental to the interests of either creditors or debtors. Particularly, in the words of one of the proponents of this scholarship, who is against the imposition of the "stay" as a GPD:

> *"If one were to extrapolate the bankruptcy regime from domestic laws, one could not cherry-pick the components of the insolvency regime favourable to the sovereign debtor"*[1290].

Additionally, this view also mentions that domestic insolvency regimes include several safeguards destined to protect the interests of creditors. The most important of those safeguards is the presence of an impartial third party (the bankruptcy court) that oversees the proceedings, that has the authority to assess the solvency of the debtor and the ultimate power of dissolving it as a legal entity[1291]. Hence, this view concludes that, without the existence of such safeguards, the domestic normative propositions could not be transposed to the international sphere due to the differences between corporate and sovereign debt and thus, the "stay" could not be applied in sovereign debt litigation[1292].

It is submitted here that, despite these important objections, there are also significant similarities between the domestic and the international sphere which render the analogy plausible, and which warrant giving the "stay" the status of GPD[1293]. First, let

---

[1289] See Andreas Witte, *The Greek Bond Haircut: Public and Private International Law and European Law Limits to Unilateral Sovereign Debt Restructuring*, 9 Manchester Journal of International Economic Law 3 (2012), pp. 322-323.

[1290] Kupelyants, *Sovereign…* Op. Cit., p. 31. However, it should be mentioned that Kupelyants does suggests the imposition of a "stay". However, he justifies this alternative from the specific perspective of the "case management powers of English courts" and not from its status as GPD. See Id., p. 35 and pp. 86 et seq.

[1291] Id., pp. 31-32. Witte, *The Greek…* Op. Cit., pp. 322-323. "Although many domestic corporate reorganization statutes allow the debtor to initiate the procedure unilaterally, such as the US Chapter 11, there are disincentives for the debtor, eg they become subject to examination, lose control of the process in whole or in part to independent insolvency administrators and are subject to intrusive court orders. It would be hard to replicate these disincentives in the case of sovereign states so that a self-induced stay would merely become a unilateral right to defeat creditors, a dramatic extension of existing immunities". International Law Association, Sovereign Bankruptcy Study Group, *Working Session Report Washington DC* (2014), p. 13. See also Bohoslavsky and Espósito, *Principles Matter…* Op. Cit., p. 85 and Bohoslavsky, *Lending…* Op. Cit., p. 402.

[1292] Kupelyants, *Sovereign…* Op. Cit., p. 31. See also, Marc Lewyn, *Foreign Debt – Act of State Doctrine – Unilateral Deferral of Obligations by Debtor Nations is Inconsistent with United States Law and Policy: Allied Bank International v. Banco Credito Agricola de Cartago*, 3 Georgia Journal of International and Comparative Law (1985), p. 666. Although Mathias Goldman also argues that the stay can be regarded as a GPD, in his first works he stresses that it cannot be directly applied in the absence of restructurings proceeding for states. See Goldmann, *On the Comparative…* Op. Cit., p. 133, footnote 108. For a discussion of those works, and of those in which he indicates that the current practice of sovereign debt crises resolution may be considered a "de facto" restructuring proceeding, see *Chapter One*, pp. 25 et seq.

[1293] It is important to note that analogical reasoning does not require identity between the source (in this case, domestic law) and the target (the international context) but only similarity.

me note that I justified the imposition of the "stay" solely on the basis of creditors' collective interests. As was posited above, a collective action problem among bondholders (akin to the one which would emerge among creditors of an insolvent debtor absent of bankruptcy protection) can potentially arise if a "stay" is not imposed. Consequently, this study was not based on a "cherry-picking" exercise destined to find and apply the most favorable elements of domestic bankruptcy law to debtors. On the contrary, it was based on the conviction that from an ex-post perspective, debt-renegotiation can be considered desirable for the majority of creditors of an insolvent state and that the "stay" can be fundamental for achieving this purpose.

Secondly, after taking into account the absence of a comprehensive bankruptcy proceeding in the sovereign debt context, the imposition of a "stay" on litigation is not necessarily detrimental to creditors' interests (and thus, the differences of both regimes are not critical): (a) if the propensity of states to default strategically on their debts is low, (b) if litigation does not provide important benefits for creditors (particularly, in what pertains to deterring opportunistic defaults) and, more importantly, (c) if there are other mechanisms in place in the practice of sovereign debt restructuring which limit debtor's opportunism (and thus provide important safeguards to creditors). I discuss each of these points further down.

3.2.2.1. The Propensity of States to Default Strategically on their Debts

One of the most important discussions in sovereign debt literature relates to whether sovereign defaults can be characterized as a consequence of a strategic decision from the debtor (where they are described as a result of the state's "unwillingness" to pay) or if they are caused by lack of resources (where they are described as a consequence of the state's "inability" to pay)[1294].

Empirical evidence suggests that most defaults occur in "bad times" (i.e., when the domestic economy of the debtor is facing a severe decline in output) and therefore that they can be regarded, on a general basis, as a genuine problem of "inability" to pay[1295] (and not as a product of sovereigns' opportunism). Particularly, scholars arguing in favor of this view stress three additional facts. First, emerging market countries (who are usually regarded as being more prone to default) have moved to self-insuring themselves against default risks since the crises of 1997 by continuously raising primary surpluses and by accumulating foreign exchange reserves[1296]. Secondly, states tend to avoid both

---

However, if the differences between source and target are "critical" the analogy can be considered "unsound". See Hertogen, *The Persuasiveness…* Op. Cit., p. 1144.

[1294] See Rieffel, *Restructuring Sovereign Debt…* Op. Cit., p. 293 and Carmen Reinhart and Kenneth Roggoff, *This Time is Different: Eight Centuries of Financial Folly*. Princeton University Press (2009), p. 51.

[1295] Uribe and Schmitt-Grohe find that "the typical country experiences a 6.5 percent contraction in output per capita in the 3 years leading up to default". Stephanie Schmitt-Grohé and Martín Uribe, *International Macroeconomics* (2014) available at http://www.columbia.edu/~mu2166/UIM/index.html [last accessed 30.10.2020], pp. 471-472. For a summary of the literature see Vivian Zhanwei Yue and Bin Wei, *Sovereign Debt Theory*, Oxford Research Encyclopedia of Economics and Finance (2019), p. 5.

[1296] See Canuto and Pinto, *Sovereign…* Op. Cit., pp. 123-124.

defaults and debt-renegotiation even when their debt-levels are clearly unsustainable (termed as the "too late" problem)[1297]. Thirdly, when states default or attempt to restructure their debts, they tend to ask for and receive less debt-relief than it would be necessary to achieve debt-sustainability, which entails the risk of confronting a subsequent restructuring or default in the near future (termed as the "too little" problem by the literature)[1298].

If sovereign defaults can be considered as a result of the state's inability to pay, litigation is not only detrimental to the interest of creditors as a group (since they may be prone to rush to the courthouse) but also its most important beneficial effect in the market (serving as a deterrent to opportunistic defaults) will be negligible[1299]. In this case, the imposition of the "stay" would not be unfavorable to creditors' interests and the differences between sovereign and corporate debt could not be regarded as critical enough for impeding its extrapolation. In other words, for this view, the absence of a bankruptcy court in the sovereign debt context would not be an impediment for the extrapolation of the "stay" from domestic to the international sphere.

3.2.2.2. The Role of Litigation Assuming the Possibility of Sovereign Opportunism

However, despite the fact that this has not been the general rule, there have been cases where sovereigns have acted opportunistically. In those cases, states have suspended payments when they were judged to have enough resources for servicing their debt (an example being the 2008 Ecuadorian debt-exchange)[1300]. Furthermore, the difficulties involved in assessing the role which pre-crisis policy choices may have as determinant of defaults complicate the differentiation of opportunistic and non-opportunistic debt moratoria (since external shocks to the economy can be magnified by domestic mismanagement)[1301]. For these reasons, defaults can also be analyzed as the outcome of a decision of the state.

Thus, considering that states have a choice in this context, the literature usually assumes that this decision is the consequence of a cost benefit analysis and model the state as a rational entity maximizing its expected utility[1302]. Under this framework, a

---

[1297] See Committee on International Economic Policy and Reform, *Revisiting*… Op. Cit., p. 2. See also, Molly Ryan, *Sovereign Bankruptcy: Why Now and Why Not in the IMF*, 82 Fordham Law Review 5 (2014), pp. 2486-2487 and Ams et al, *Sovereign*… Op. Cit., pp. 307-308.

[1298] See Ams et al., *Sovereign*… Op. Cit., pp. 309-310 and Ryan, *Sovereign*… Op. Cit., pp. 2487-2488.

[1299] "(…) deterrence can play a role only if the debtor has some discretion over the continuation of debt service. If most defaults arise out of genuine distress, then there is little scope for deterrence, except perhaps in the policies that lead up to the distress". Haseler, *Trustees*… Op. Cit., p. 7.

[1300] See, for example, Haseler, *Trustees*… Op. Cit., p. 7. See also Canuto and Pinto, *Sovereign*… Op. Cit., p. 129 footnotes 32 and 33.

[1301] See Canuto and Pinto, *Sovereign*… Op. Cit., p. 129 footnotes 32 and 33. See also Ams et al., *Sovereign Default*… Op. Cit., pp. 299-301.

[1302] This has been the standard assumption in theoretical models of sovereign debt and sovereign default. For a discussion of the literature, see for example Michael Tomz and Mark Wright, Sovereign Theft: Theory and Evidence about Sovereign Default and Expropriation, in William

state defaults on its debts when the benefits involved exceed the costs. The benefits are considered to correspond to the amounts that ought to be paid to creditors, including both principal and interests[1303]. Costs, on the other hand, include reputational damage (which will either prevent the state to borrow on foreign markets or determine that it faces increased borrowing costs if able to borrow abroad), output decline, the decrease in bilateral trade with creditors' home countries[1304] and others associated to bondholder litigation (the latter referred to in the literature as "legal" or "enforcement costs"[1305]). As it can be noted, the costs associated with the threat of litigation (i.e., "enforcement costs"), are but one among many other factors which can influence the state's decision to default[1306].

As indicated previously, the enforcement costs faced by a defaulting state increase depending on the legal terms of the bonds. If the instruments are of a "moderate" or of a "high" legal enforceability (see subsection 2.3.3) the costs which can be imposed upon states through enforcement may include (a) the costs of removing attachable assets from foreign jurisdictions, (b) the costs of having these assets seized by creditors, (c) the costs of conducting its commercial transactions in less effective manners, (d) the costs of being excluded from debt markets in foreign jurisdictions where suits against the state are filed (since the funds procured through those means also risk being seized by creditors) and (e) the costs of funding its legal defense[1307].

On this point, the literature discusses both the ex-ante and ex-post effects of creditors' litigation on the behavior of states which can therefore be influenced by the threat of "enforcement costs".

3.2.2.2.1. The Ex-ante Effects of Litigation

Considering the aforementioned factors, a part of the literature stresses that the threat of bondholder litigation serves valuable functions in the sovereign debt market from an ex-ante perspective. According to this scholarship, litigation operates as a "stick" imposed upon debtors and prevents or deters opportunistic or strategic defaults by sovereigns[1308]. From this point of view, the other default costs are not as important as the costs imposed on states by means of enforcement[1309]. In the same fashion, the threat

---

Hogan and Federico Sturzenegger (Eds.), *The Natural Resources Trap: Private Investment Without Public Commitment*. MIT Press (2012), pp. 69-70.

[1303] See Id, p. 71. In the words of Skylar Brooks: "Debt restructuring is not, of course, all bad for debtors. Debt relief can benefit heavily indebted states because it acts as a one-time transfer of resources from creditors to debtors and, more importantly, can provide the fiscal space needed to jumpstart economic growth". Skylar Brooks, *Governing…* Op. Cit., p. 75.

[1304] For a summary of the literature discussing reputational and economic costs of default see Yue and Wei, *Sovereign Debt*... Op. Cit.

[1305] Haseler, *Trustees…* Op. Cit, p. 8.

[1306] Id., p. 7.

[1307] See subsection 2.3.3 above. See also Haseler, Id., p. 8.

[1308] Fisch and Gentile, *Vultures…* Op. Cit., p. 1099. As indicated by Haseler, the deterrent effect of legal enforcement is defined by the probability of enforcement multiplied by the costs which those actions imposed upon the debtor. See Haseler, *Individual…* Op. Cit., p. 8.

[1309] See Fisch and Gentile, *Vultures…* Op. Cit., p. 1100 and Lucas Wozny, *National Anti-Vulture Funds Legislation: Belgium's Turn*, 2 Columbia Business Law Review (2017), pp. 707-708.

of litigation also encourages states to avoid fiscal policies which could lead them to default in the future[1310]. Hence, by reducing the probability of opportunistic defaults and by correcting government's incentives towards prudent fiscal policies, the threat of litigation fuels the existence of the sovereign debt market, reduces interest rates for states and injects liquidity into the secondary market[1311]. However, on the other side of the scholarship, the costs imposed by litigation may be excessive (from the perspective of the debtor) and may cause over-deterrence, i.e., causing government officials to postpone the decision to default beyond the point where there is no other motivation to default but "inability" to pay (the previously mentioned "too late" problem).

Following the reasoning of both scholarships, the imposition of a "stay" on litigation will be either detrimental or not to both the interests of creditors and debtors (depending on whether it "over-deters" the decision to default or if it prevents opportunistic defaults only). Additionally, under both positions, the absence of a bankruptcy court supervising the proceedings capable of discriminating between opportunistic and "genuine" defaults will be considered a critical difference between the domestic and the international sphere. Thus, under both views, the status of the "stay" as a GPD is questioned.

However, another part of the scholarship stresses that enforcement measures are but one of the costs assessed by states when deciding whether to default or not. Hence, the ex-ante role of litigation in deterring default and encouraging prudent fiscal policies (vis-à-vis the other costs involved, particularly, output losses[1312]) may not be as important as previously maintained and, for that reason, it has been subjected to criticism by scholars[1313]. Particularly, some commentators stress in this point how valuable reputation and a "good stance" towards the IMF are for states[1314]. Following the reasoning of this literature, since litigation may stop-short in preventing opportunistic defaults, the imposition of a "stay" will not be detrimental to creditors' interests. Here, the absence of a bankruptcy court will not be considered as a critical difference. The status of the "stay" as a GPD survives.

[1310] Fisch and Gentile, *Vultures*… Op. Cit., pp. 1048-1049. Wozny, *National*… Op. Cit., pp. 706-709.

[1311] Wozny, *National*… Op. Cit., pp. 709-710. Fisch and Gentile, *Vultures*… Op. Cit., pp. 1100-1101.

[1312] "While economic theory acknowledges a number of legal and reputational penalties, the single most important factor that makes sovereign borrowers strive to service their debt is the severe loss of economic output that usually follows a default. To a significant extent, this loss stems from the impact of a default on the domestic financial system, most notably on banks". Marco Committeri and Francesco Spadafora, *You Never Give Me Your Money? Sovereign Debt Crises, Collective Action Problems, and IMF Lending,* IMF Working Paper WP/13/20 (2013), p. 8

[1313] See Haseler, *Trustees*… Op. Cit., p. 7 and 11.

[1314] "Sovereigns are reluctant to default on their debt and do so only as a last resort because of the reputational consequences of default in the event the sovereign wishes to return to the credit markets in the future. Similarly, sovereign debtors value their membership in the IMF and its programs, so they go out of their way to repay their obligations if there is any way they can, lest the sovereign jeopardize its relationship with the IMF". Bolton and Skeel, *Inside*… Op. Cit., p. 767.

3.2.2.2.2. The Ex-post Effects of Litigation

The previously discussed considerations also extend to the ex-post effects of litigation. Assuming that "enforcement costs" are indeed significant, scholars have also argued that litigation may serve as a "check" on the terms of a restructuring[1315]. Hence, for this view, the threat of creditors' actions can motivate the state to improve exchange offers and to reduce the amount of debt relief required from creditors if it decides to restructure its debt.

The reasons behind these assertions are intuitive: litigation is more likely when the restructuring offer is less attractive for creditors (i.e., when the haircut is bigger) and vice-versa[1316]. From the perspective of the state, and assuming that its default has been a consequence of its "unwillingness" to pay, the settlement terms offered to creditors would be more favorable to them if litigation costs imposed upon the state are higher.

Although this outcome may be considered favorable for the interests of creditors as a group, the empirical evidence seems to suggest that states ask for "too little" rather than for "too much" debt relief when restructuring their debts (the "too little" problem). This entails the risk of another default or another restructuring in the future, which will expose both creditors and debtors to the same costs, once again. Furthermore, assuming that the default is a consequence of the state's inability to pay, then litigation becomes a "negative sum game" where "any expenses the sovereign incurs in the defense against enforcement action are funds that then become unavailable for debt service"[1317].

For all of the above, although litigation can increase the amounts for which the state is willing to settle the debts, this situation also exposes both creditors and debtors to a subsequent default or restructuring in the future. Hence, the convenience of imposing the "stay" from the perspective of creditors' interests is uncertain and depends on the characterization of the default (if the default can certainly be characterized as opportunistic or as a consequence of genuine distress). However, under both views, the absence of a bankruptcy court discriminating between opportunistic and non-opportunistic defaults (thus able to assess the country's capacity to repay), entails a critical difference between the domestic and the international sphere and thus questions the status of the "stay" as a general principle of domestic law.

3.2.2.3. Other Mechanisms in Place in Sovereign Debt Restructuring Safeguarding Creditors' Interests: The IMF Lending Policies

As it has been shown, a "stay" on bondholders' collection efforts can be considered detrimental to their interest assuming that (i) states can default opportunistically, (ii) that creditors cannot observe the state's real repayment ability and (iii) that the international sphere lacks safeguards for creditors akin to those incorporated in domestic insolvency regimes (particularly, the presence of a bankruptcy court). However, in certain circumstances, International Financial Institutions (particularly,

[1315] See Fisch and Gentile, *Vultures*… Op. Cit., pp. 1050-1051. Haseler, *Individual*… Op. Cit., pp. 10-11.
[1316] "(…) the better the exchange offer, the less likely it is that the debtor will have to face creditor suits". Haseler, *Individual*… Op. Cit., p. 11.
[1317] Id.

the IMF) can close those gaps through surveillance and lending[1318], thus providing important benefits to both creditors and debtors[1319].

First, if a debtor faces economic distress, it can approach the IMF to request funding based either on its "normal access limits" or on its "exceptional access policy"[1320] depending on the magnitude of the crisis. If the state is in arrears with its private creditors, the IMF will only lend when those funds are judged as "essential" for the implementation of an adjustment program and, at the same time, when it considers that the state is negotiating in "good faith" with its creditors[1321]. Hence, if the IMF decides to lend to the indebted country, it sends a "strong signal" to the market regarding the country's economic fundamentals and on the stance of the state towards its creditors[1322].

Secondly, while deciding to advance those funds, the IMF assesses the state's ability to pay (through a Debt Sustainability Analysis, henceforth "DSA") and request the state to implement policy-changes destined to boost economic growth and to generate primary surpluses (usually known as "policy conditionalities")[1323]. Furthermore, if the funds requested exceed the "normal" limits (and thus, fall under "exceptional" lending), the IMF requires that either (i) the state's debt be considered sustainable with high probability or (ii) that they be accompanied by a restructuring of the liabilities of the state important enough to reinstate debt sustainability with high probability[1324].

[1318] See James Haley, *Sovereign Debt Restructuring: Good Faith or Self-Interest?* (2017), CIGI Paper No. 150 available at https://www.cigionline.org/publications/sovereign-debt-restructuring-good-faith-or-self-interest [last accessed 19.3.2020], p. 9.

[1319] Identifying the IMF and its policies as assuming a similar role to that of a receiver or administrator see, for many, International Law Association, *Sovereign Insolvency*… Op. Cit., p. 26.

[1320] The policies of the IMF determine the conditions under which member states can request IMF's resources. Members can request resources within the boundaries of the "access limits" (related to the quota of each member) or funds beyond those limits which are governed by its "exceptional access policy". See Committeri and Spadafora, *You Never*… Op. Cit., pp. 18-20.

[1321] International Monetary Fund, Sovereign Debt Restructuring – Recent Developments and Implications for the Fund's Legal and Policy Framework (2013) available at https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Sovereign-Debt-Restructuring-Recent-Developments-and-Implications-for-the-Fund-s-Legal-and-PP4772 [last accessed 19.3.2020]. Good faith for these purposes is usually defined as comprising three elements: Early creditor-debtor engagement, sharing of relevant information and giving time to creditors' for assessing a restructuring arrangement. See Haley, *Sovereign*… Op. Cit., p. 14. However, formal consultations are not necessarily required in practice due to time pressures involved in restructurings. See, IMF, *Sovereign Debt Restructuring*… Op. Cit., pp. 10-11.

[1322] See International Monetary Fund, *Fund Policy on Lending into Arrears to Private Creditors – Further Consideration of the Good Faith Criterion* (2002) available at https://www.imf.org/external/pubs/ft/privcred/073002.pdf [last accessed 18.12.2021], p. 6.

[1323] Haley, *Sovereign*… Op. Cit., p. 12.

[1324] Id., p. 10. See also, IMF, *Sovereign*… Op. Cit., p. 8. However, scholars have noted that the IMF is not always consistent on the access to exceptional funding. Particularly, they note that the IMF provided those funds to Greece before a restructuring agreement had been concluded. See, for example, James Boughton, Skylar Brooks and Domenico Lombardi, *IMF Lending Practices and Sovereign Debt Restructuring,* CIGI Policy Brief No. 41 (2014), p. 5. For the policy shift of IMF's policies in this regard see, IMF, *Sovereign*… Op. Cit., pp. 9-10.

Consequently, by those means, the IMF can provide important information to creditors: it judges the amount of debt relief needed by the debtor and prevents sovereign opportunism in requesting excessively large haircuts[1325]. However, it is important to stress that this information is not necessarily public: indebted states can prevent the dissemination of information that they consider sensitive[1326]. Therefore, if the state decides to share the outcomes of IMF's DSAs with bondholders it can make a stronger case towards obtaining debt relief. Finally, the IMF also disciplines the debtor by exerting considerable influence over its policy-choices, particularly considering that the funds are delivered in tranches which are subjected to the fulfilment of pre-determined objectives[1327].

Hence, the practice of the IMF has created an informal "quasi-bankruptcy" process[1328], where both the interests of creditors and debtors are considered. However, this is not to say that this "system" is immune to sovereign opportunism. For example, according to Haley, the IMF is less able to exert pressure over debtors the less they need its financial assistance. In this context, Haley mentions the Argentinian default where government officials were able to pay IMF loans before schedule and proceeded with a unilateral and coercive exchange offer to creditors[1329].

Considering the foregoing, a "stay" on creditors' litigation will prove beneficial for creditors' interests without encouraging debtor's opportunism in the restructurings with IMF involvement which satisfy the following conditions[1330]: (i) The country is negotiating in good faith with creditors, (ii) A sovereign debt restructuring has been determined as being necessary by the IMF and, (iii) the country's offer is aligned with IMF's recommendations[1331]. Therefore, in these cases, the role of the IMF is akin to that of a bankruptcy court in corporate reorganizations, safeguarding both the interests of

---

[1325] "The basic logic of a debt restructuring for the creditors is simple— accept some degree of debt relief in order to enhance the collectability of the balance of the exposure. That logic, however, requires a judgment about how much debt relief will be required, in combination with fiscal adjustment and official sector support, to return the sovereign to a sustainable position. This is usually where the IMF comes in. The creditors will look to the Fund to vouchsafe (implicitly) that the amount of debt relief being requested from them is sufficient to achieve sustainability but not more than is necessary to reach that point". Buchheit et al., *The Restructuring*… Op. Cit., p. 342.

[1326] See Aitor Erce, *Sovereign Debt Restructurings and the IMF: Implications for Future Official Interventions*, Federal Reserve Bank of Dallas Working Paper No. 143 (2013), p. 15.

[1327] Stubss and Kentikeleins, *Conditionality*… Op. Cit., p. 359-360.

[1328] See Haley, *Sovereign*… Op. Cit., p. 9.

[1329] Id., p. 15.

[1330] In the words of Goldmann, "The need to ensure interim financing and the conditionalities associated with it might suffice to contain moral hazard [in part of the debtor]". Goldmann, *Necessity*… Op. Cit., p. 10.

[1331] It is important to note that previous proposals on the creation of a multilateral treaty in sovereign debt restructuring have stressed that the IMF ought to assume a role similar to that of a bankruptcy court. Particularly, one of these proposals requires that the IMF issue a "certification" that the restructuring offer is consistent with its DSA. See, for example, Megliani, *Vultures in Courts*… Op. Cit., pp. 860-681. However, it is submitted here that the same result can be obtained in practice if a state voluntarily shares this information with creditors.

creditors and debtors. Particularly, its involvement helps to prevent opportunistic defaults and, at the same time, provides critical information to creditors regarding the country's real repayment capacity. Finally, it helps to "close the gaps" in international finance thereby making corporate and sovereign debt restructuring significantly similar.

3.2.2.4. The Dissimilarities Between the Domestic and International Context Do Not Necessarily deny the Status of GPD to the "Stay"

As all of the above demonstrates, if we assume that states may act opportunistically while defaulting on their debt, the absence of a bankruptcy court for sovereign states does not necessarily render the analogy implausible neither it automatically impedes the possibility of considering the "stay" as a GPD. Particularly, the benefits that litigation provides for creditors (preventing sovereign opportunism ex-ante and ex-post) need to be balanced with the problems that it creates among them (a "race to the courthouse" to either seize the debtor's assets or to gain shelter from a restructuring deal). The following table summarizes these considerations:

Assumption	Role of Litigation	The Status of the "Stay" as a GPD
States do not act opportunistically in defaults/restructuring.	Litigation does not prevent defaults, neither it increases the amounts offered by the state in restructurings. It can be detrimental to creditors if debtors inefficiently postpone defaults and ask for less debt relief than they should.	The absence of a bankruptcy court is not considered critical. The "stay" protects creditors' collective interests and can be elevated to the status of GPD.
States can default opportunistically.	For one part of the scholarship, by increasing the costs of defaults ("enforcement costs"), the threat of litigation deters opportunistic defaults (ex-ante) and determines that the restructuring terms offered by the state are more favorable to creditors (ex-post).	In this case, imposing a "stay" without the existence of a bankruptcy court will be detrimental to both the interests of creditors and debtors. Hence, the absence of the bankruptcy court would be considered a critical difference. The stay could not be considered as a GPD.
	For another part of the scholarship, litigation may cause over-deterrence determining that states (unnecessarily) postpone defaults and restructurings.	In this case, imposing a "stay" without the existence of a bankruptcy court will be beneficial to the interests of creditors and debtors but only in those cases where defaults are the consequence of the debtor's inability to pay. However, since there is not a bankruptcy court that could discriminate between the types of default, the "stay" could not be considered a GPD. The absence of a bankruptcy court is a critical difference.
	For another part of the scholarship, "enforcement costs" are not as important as others (output decline, reputation, etc.)	In this case, imposing a "stay" without the existence of a bankruptcy court will be beneficial. The absence of a bankruptcy court is not critical.
State Attempts to Restructure with the Assistance of the IMF.	IMF observes the repayment capacity of the state and recommends the amount of debt relief that creditors should provide to the debtor. Furthermore, it discriminates between opportunistic defaults and those caused by the state's inability to pay. Here, the role of litigation is detrimental to creditors' interests.	In this case, imposing a "stay" without the existence of a bankruptcy court would be beneficial. The IMF provides an equivalent function to that of a bankruptcy court in the restructuring in which it is involved.

Furthermore, as it has been argued, the benefits of litigation decrease in the cases where the IMF is involved in the restructuring. Particularly, through its lending policies, the IMF monitors the debtor and exert and important influence on its policies. Moreover, the IMF can also discriminate between opportunistic and non-opportunistic defaults and determine the debtor's ability to repay. Taking those considerations into account, I argued that whenever a restructuring receives the endorsement of the IMF the application of the "stay" would be beneficial to both the interests of creditors and debtors, making corporate and sovereign debt restructuring relevantly similar.

3.2.2.5. The "Stay" as a General Principle of Domestic Law Susceptible to be Applied in Sovereign Debt Litigation

For all of the above, it is submitted here that the required conditions presented at the beginning of this section to consider the "stay" as a GPD are satisfied. As for the first condition, it was concluded that the problems that may arise between creditors during debt renegotiations can be found both in corporate and sovereign debt. Furthermore, it was also argued that the "stay" is capable of solving those problems in both contexts.

As for the second condition, assuming that states can act opportunistically in their decision to default, it was maintained that the absence of a bankruptcy court for sovereign debtors is not a critical difference between state and corporate insolvency if the IMF is actively involved throughout the process. What is more, it was posited that it is precisely the involvement of said international organization that helps to close the gaps between corporate and sovereign insolvency, making them "relevantly" similar.

Hence, it is possible to conclude that the second group of normative propositions comprising the "stay" can be considered a GPD and, thus, susceptible of being applied to sovereign debt cases by domestic and international courts and tribunals.

3.3. Discussing the Third Group of Normative Propositions: "Cramming-Down" Bondholders' Claims

In order to determine whether cramming-down bondholders' claims can be considered a GPD, I proceed as I did it previously in the case of the "stay".

3.3.1. The First Condition: Anti-Commons Problems in Sovereign Debt Restructuring

The rules comprised in this third group of normative propositions aim at solving "anti-commons" problems among creditors in the context of corporate reorganization[1332]. As

[1332] Anti-commons problems arise where several agents are granted with the individual prerogative to veto the use of a resource by other (or where, to use a resource, an agent is required to obtain permission of others). Since some of these agents may act strategically to withdraw their permission (or to veto) for the use of the resource (by holding out) an otherwise value-enhancing transaction (from the perspective of the agents as a group) involving the use of this resource will be obstructed. Hence, anti-commons problems may lead to the resource being underused. See Heller, *The Tragedy of the Anticommons*… Op. Cit., and Fennell, *Commons, Anticommons, Semicommons*… Op. Cit.

indicated previously, reorganizations strive for rehabilitating the distressed company (when feasible) by means of an arrangement which needs to be accepted by creditors. However, even in cases where creditors as a group would be better off through the implementation of a restructuring plan (i.e., when restructuring the company is welfare enhancing), some of them may withhold their consent demanding a better deal, thus trying to capture the reorganization surplus[1333]. As it can be noted, the strategic behavior of creditors may preclude the possibility of a successful restructuring. Consequently, if unanimous consent was required for the approval of a plan, several (otherwise) value-enhancing restructurings will not be conducted, leading to the "underuse"[1334] of this mechanism and leaving both debtors and creditors worse off.

With the purpose of solving this type of problem, corporate reorganization regimes include statutory mechanisms destined to discipline holdouts by providing a collective framework for inter-creditor coordination. The first mechanisms that comes into play is the "stay". As stated previously, the "stay" provides important incentives for creditors' cooperation in the context of debt renegotiation[1335]. The second mechanism contemplated refers to majority voting within a particular class of creditors. As stated in *Chapter Three*, the corporate reorganization regimes previously studied order that creditors be divided into different classes for voting on the restructuring proposal. In this context, a majority of creditors can bind the entire class to the restructuring plan. The third and final device considered by all those regimes refers to the possibility of a "cross-class cram down" (meaning that a plan can be passed even against the opposition of entire dissenting classes). The bankruptcy court is authorized to cram down dissenting creditors' claims if certain qualified conditions are satisfied. One of the most important of these requirements refers to the "best interest of creditors" test[1336]. According to this provision, the plan will only be approved by the court if dissenting creditors receive at least the same amount that they would earn if the company were liquidated[1337].

The majority of the literature has stressed that creditors may also face anti-commons problems in the context of sovereign debt restructuring[1338]. Indeed, as stated previously (subsection 2.5), this conviction determined the widespread adoption of contract clauses intended to solve those problems, particularly, after 2014 (when ICMA model modification CACs were presented)[1339].

[1333] See, for example, de Wejis, *Harmonisation*…Op. Cit., p. 9.
[1334] Id.
[1335] Considering that the "stay" also plays an important role in solving anti-commons problems, See Eidenmüller, *Comparative Corporate*… Op. Cit., p. 5.
[1336] This is the name which is usually given to the test under US bankruptcy law. See Germain, *Bankruptcy*… Op. Cit., p. 370.
[1337] This test is featured by all the reorganization regimes studied in the previous *Chapter* which consider the "cram down". See *Chapter Three*, p. 145.
[1338] See, for many, Wheeler and Attaran, *Declawing*… Op. Cit.
259-260 and Guzman and Stiglitz… *Creating*… Op. Cit., p. 10.
[1339] It is important to note that there is broad support among eurozone countries to include third-generation CACs as the "standard" in the region starting in 2022. As mentioned previously,

In the sovereign debt context, the second and third mechanisms for inter-creditor coordination of domestic reorganization regimes are emulated contractually, by modification-CACs. First, the second mechanism (i.e., a restructuring plan is considered approved within a class if the majority of creditors of the class accepts it) serves as the inspiration for series-by-series (also referred to as "first generation") CACs. As previously discussed in (subsection 2.5.1), a bond including that type of CAC can be modified if a qualified majority of its holders (usually, a 75% in value terms) agrees to it. Dissenting holders of instruments of that series are thus bound to the restructuring proposal.

Secondly, the third mechanism (i.e., "cramming down" entire dissenting classes) is replicated by "single-limb" CACs (also referred to as "third generation" CACs). Particularly, "single-limb" CACs concentrate voting across different series instead of assembling them on individual bond issuances (see subsection 2.5.1 for details). Thus, the key terms of instruments including "single-limb" CACs can be modified if the consent of bondholders representing a 75% of outstanding principal of all the affected series (the series whose restructuring is being sought after) is obtained, regardless of the negative of particular bond series.

As can be noted, CACs have the potential of enhancing creditors' participation in restructurings[1340]. Therefore, its use can solve anti-commons problems among creditors, making unnecessary the extrapolation of the rules which can be found in domestic corporate reorganization regimes.

Nevertheless, despite the importance of those clauses, scholars have argued that they may stop short in solving the aforementioned collective action problems[1341]. Specifically, they present the limitations to which any contractual approach to sovereign debt renegotiation is subjected to. In other words, their main weaknesses flow from their scope: CACs only cover bonded debt, excluding other liabilities which can be a considerable part of the debt stock of the indebted state (such as investment claims and trade credits)[1342].

Furthermore, and by the same token, the application of these provisions is restricted to the instruments which include them. Although the IMF has reported that CACs are becoming standard terms in new international bonds, it has also recognized that the stock of outstanding instruments without third-generation CACs amounts to almost a 61%[1343]. This is an important number indeed. The success of the restructurings to come in the near future could be impaired, again, by the materialization of holdout risks and

currently eurozone countries use "second generation" CACs. See Buchheit et al., *The Restructuring*… Op. Cit., pp. 355-356.

[1340] See International Law Association, *Report of the Sovereign Bankruptcy Study Group* (Johannesburg) (2016), p. 10.

[1341] See, for example, Haley, *Sovereign*… Op. Cit., p. 10 and Guzman and Stiglitz, *Creating*… Op. Cit., p. 5.

[1342] See, for example, Buchheit and Gulati, *Sovereign*… Op. Cit., p. 115.

[1343] See International Monetary Fund, *Fourth Progress*… Op. Cit., 7.

thus by anti-commons problems created by the legal terms of "old" bonds[1344]. I illustrate this point with an example.

3.3.1.1. An Example of Anti-Commons Problems Among Creditors Holding Instruments with Different CACs "Generations"

Let me assume that the bonds issued by an indebted state that attempts to restructure its debts include modification clauses belonging to different generations (an assumption consistent with the stock of liabilities of most emergent market borrowers). Let me also assume that the state has issued only two different types of bonds: A first type of bonds including series-by-series CACs and a second type of bonds including "single-limb" CACs. Hence, while some instruments would allow for being restructured "together" (meaning that they could be aggregated for the purpose of approving a restructuring; those featuring "single-limb" CACs), others would preclude this possibility and could only be modified on a series-by-series basis (those including first-generation CACs).

As previously noted, bonds featuring "series-by-series" CACs are harder to restructure when compared to bonds including "single-limb" modification clauses. First, bondholders of those instruments can block the restructuring of their bonds with less complications (they only need to garner the support of other creditors representing >25% of the outstanding principal of their series). Secondly, and by the same token, activists can acquire that blocking participation on them in the secondary market more easily (as has been the case in previous restructurings). Third, and more importantly, bonds with series-by-series CACs are immune to aggregation: The only way on which their key terms can be amended is by gathering enough support of their holders (75% in value terms) at the series level. Hence, the approval of a restructuring proposal in other series does not affect holders of instruments featuring first-generation CACs.

For those reasons, in our example, the restructuring is more likely to fail on the first type of bonds (i.e., those featuring "series-by-series" CACs). In the extreme case that it fails in all of them, the success of the entire operation would depend – in part – on the percentage of the debt-stock represented by these instruments vis-à-vis the percentage which bonds with "single-limb" CACs represent: The more pronounced is the share of the debt-stock occupied by bonds with series-by-series clauses the more important will be the burden of debt relief required from holders of instruments with "single-limb" CACs. As it can be noted, this will, in turn, elevate the complications involved in gathering support among bondholders of instruments with "single-limb" CACs. Even more, knowing beforehand that an important part of holders of instruments of other series will opt-out of the restructuring (and that, after litigation, they may be paid in full), holders of bonds with "single-limb" CACs may decide to renounce to restructure the debt altogether and, accordingly, may choose to pursue the full amount of their claims like the other creditors[1345]. Hence, an anti-commons problem arises again in sovereign debt restructuring, due to the limited scope of inter-creditor coordination

[1344] See, Goldmann, *Necessity*… Op. Cit., p. 5.

[1345] This strategy depends on (i) whether the bonds featuring third generation CACs are issued under a trust structure or under a fiscal agency agreement, as previously discussed and on (ii) whether a "stay" in litigation along the lines discussed in subsection 3.2.1.3 is imposed.

mechanisms and thus, to the impossibility of "cramming down" all the creditors' claims or binding all creditors to a restructuring proposal[1346].

3.3.1.2. Similar Anti-Commons Problems Among Creditors of Insolvent States and Corporations

Consequently, anti-commons problems faced by creditors of an insolvent corporation are relevantly similar to those which can potentially emerge in the sovereign insolvency context when the instruments at stake feature "old" and "new" CACs. Furthermore, a "cram down" of dissenting creditors' claims will also be able to solve that problem. Therefore, the first condition necessary for arguing that the rules comprised by the third group of normative propositions (particularly, the "cram down") can be considered GPDs is satisfied. The next figure summarizes these considerations.

Problems solved	Corporate Reorganization	Sovereign Debt Restructuring
Anti-Commons problems among creditors	Creditors are organized in different classes for the purposes of voting for a restructuring plan. If the majority of creditors approve the plan it binds the entire class. The bankruptcy court is authorized to impose the plan on dissenting classes if certain conditions are met (particularly, the court needs to verify that the "best interest of creditors test" is satisfied).	Renegotiation mechanisms are determined by the terms of the contracts. Only bonds featuring second and third-generation CACs can be modified by aggregated votes. There is no mechanism in place that allows to "cram down" dissenting bonds issuances without third generation CACs.

Table 12: Similarities of the Problems Solved by the "Cram Down" in Corporate and Sovereign Debt Restructurings.

3.3.2. The Second Condition: Are the Similarities Between the Domestic and the International Sphere Significant Enough to Render the Analogy Plausible for "Cramming Down" Dissenting Bond Series?

Now it is the time to discuss the second condition of our extrapolation analysis. As stated previously, this is the last requirement which needs to be satisfied in order to assert that this third group of normative propositions (particularly, the "cram down" of dissenting bond issuances) can be considered GPDs. This requires the examination of the differences and the similarities between the domestic and international sphere.

The objections raised in the case of the "stay" (especially those stressing the absence of bankruptcy in the sovereign debt context) apply with more strength in the context of this third group of normative propositions. Particularly, recall that the "cram down" in domestic reorganization regimes requires the satisfaction of the "best interest of creditors' test". This test demands that dissenting creditors receive at least the same amounts that they would earn if the company was liquidated. As it can be noted, since states cannot be liquidated, the "best interest of creditors' test" cannot be applied, at least directly, in the sovereign debt restructuring context.

This is an important difference and explains why the standard version of "single-limb" modification CACs (i.e., the version drafted by ICMA) does not subject its application to any condition akin to the "test". Instead, it focuses on the quality of the terms offered to

[1346] In the same sense, see Haley, *Sovereign…* Op. Cit., p. 10.

different bond series through the "uniformly applicable" requirement (see subsection 2.5.1).

Nevertheless, despite those important differences, it can be argued that the "best interest of creditors' test" can be replaced in the sovereign debt restructuring sphere by other mechanisms. I refer here to a debt sustainability analysis (henceforth, "DSA") conducted in the context of the implementation of an IMF program. The previous remarks regarding IMF involvement for the case of the "stay" apply here as well. As discussed in subsection 3.2.2.3, by the means of a DSA, the IMF defines the conditions under which debt servicing becomes feasible and determines the maximum ability to pay of the indebted economy. As a consequence, a DSA is indicative of the maximum amount of debt relief that the state can require from its bondholders. If communicated to creditors, a DSA can prevent sovereign's opportunism and ensure creditors as a group that the restructuring offer is consistent with the economic means of the country. Therefore, if the state's restructuring offer is aligned with IMF's recommendations, "holding-out" would prevent a restructuring that, if implemented, would be value-enhancing for both creditors and debtors.

Consequently, it is submitted here that the differences between the international and domestic sphere are not critical enough to deny to this third group of normative propositions (and particularly, to the "cram down"), the status of GPD if: (i) the restructuring is conducted with IMF assistance and (ii) if the country's offer is aligned with IMF's recommendations. In that context, a DSA can be considered the functional equivalent of the "best interest of creditors" test, and the involvement of the IMF makes corporate and sovereign restructuring "relevantly similar".

3.3.3 The Third Group of Normative Propositions as "GPDs"

Considering all of the above, it is submitted here that the "cram down" of dissenting bond series can be considered a GPD. First, the "cram down" would solve the same type of problems that it is intended to solve in domestic corporate reorganization regimes. Secondly, there would be significant similarities between the domestic and the international sphere rendering the analogy plausible[1347].

Nevertheless, and as it is going to be argued in the next *Chapter*, the application of this particular GPD by domestic courts in sovereign debt litigation would face several obstacles. From a legal point of view, "cramming down" dissenting bond series (which do not include third generation CACs) may be considered as an unacceptable intromission on creditors' contractual rights. Furthermore, in some cases, the application of this GPD could be unnecessary since the imposition of a "stay" could be sufficient for solving hold-out problems. Therefore, it is open to skepticism whether the status of GPD of this third group of normative propositions could be of any practical use in sovereign debt cases.

[1347] So long as (a) the IMF is involved in the operations and (b) the restructuring offer is in accordance with a DSA which has been communicated to creditors.

3.4. The Status of the Normative Propositions Studied as General Principles of Domestic Law

According to the authorities, general principles of domestic law refer to normative propositions widely recognized by domestic jurisdictions (the "recognition" requirement) which can be extrapolated to the international sphere (the "extrapolation" requirement). In the previous *Chapters*, this *Thesis* assumed the task of determining whether there are GPDs which can be applied to sovereign debt restructuring.

For this purpose, I started by tackling the "recognition requirement" in *Chapter Three*. There, I conducted a comparative survey of five different jurisdictions based on three points of interest featured by corporate reorganization regimes. I selected those points following the prior literature on comparative insolvency law and the previous scholarship discussing and identifying the GPDs of relevance for sovereign insolvency. Then, I consulted the law and economics literature on the subject in order to ascertain the "functions" which the norms grouped on those points of interest serve in the context of corporate reorganization. Finally, I formalized the common elements of those jurisdictions in three groups of normative propositions: The first one refers to the benefits presented to the debtor in order to prevent risk-shifting and gambling for resurrection and to encourage early reorganizations (particularly, the "DIP" regime). The second comprises the imposition of a "stay" with the purpose of preventing a sub-optimal piece-meal liquidation of the debtor's assets and for encouraging participation in the reorganization forum. The third refers to the subordination of dissenting groups of creditors to the will of the majority, a mechanism destined to solve anti-commons problems among claimants.

Next, I took on the first task imposed by the "extrapolation" requirement. In *Chapter Three* I tested whether the three groups of normative propositions are compatible with the values embedded in the international legal order (particularly, with other principles of international law such as sovereign equality and the protection of creditors' property rights). In that *Chapter*, I concluded that they actually are. I left to this *Chapter* the remaining part of the extrapolation analysis for each group of normative propositions. Here I discussed two new conditions, including (a) that the international and domestic sphere share a similar problem which can be solved at the international level through the norms extracted from domestic jurisdictions, and that (b) the similarities between the domestic and international sphere are significant enough to render the analogy plausible. This analysis presented the following conclusions:

First, it was noted that the agents of corporations and states may be prone to engage in "risk-shifting" and "gambling for resurrection" behavior and, thus, to postpone (sub-optimally) the recognition of financial distress. However, I argued that the functions of the rules included in the first group of normative propositions do not hold in the sovereign debt scenario. This is a result of the "level" on which those rules could be applied in each context. While those rules target the corporation both at the "individual" and "collective" level in corporate reorganizations, I stressed that their scope of application in sovereign debt restructurings could be no other than the "collective" sphere. Consequently, since those rules would not be able to insulate incumbent

politicians from being removed from power (i.e., the rules could not be applied at the "individual" level), their capability to solve the aforementioned problems will be negligible. Hence, I concluded that this first group of normative propositions fails the first condition and thus, that they cannot be considered general principles of domestic law.

Secondly, I posited that creditors of an insolvent corporation and of a state with an unsustainable debt burden may also engage in a "race to the courthouse". Additionally, I argued that the imposition of a "stay" is capable of solving those problems in both contexts. Furthermore, assuming that the state can act opportunistically, I maintained that the absence of a bankruptcy court for sovereigns is not a critical difference between the domestic and the international context if and when the IMF is actively involved throughout the process. Thus, since both conditions are satisfied, I concluded that the "stay" can be considered a general principle of domestic law.

Thirdly, I also argued that in the context of both corporate and sovereign debt restructurings, creditors can face anti-commons problems (particularly where the bonds at stake feature CACs belonging to different generations). Additionally, it was stressed that the rules comprised in the third group of normative propositions (and particularly, the "cram down") can solve those problems in sovereign debt renegotiation. Furthermore, considering the arguments in favor of the "stay", it was also posited that if the IMF is involved in the restructuring, the similarities between the domestic and international sphere are significant enough to render the analogy plausible. Consequently, I concluded that both conditions are satisfied and that the "cram down" can be considered a general principle of domestic law. However, it was also noted that the application of this principle may face several difficulties in the context of sovereign debt litigation.

For all of the above it is possible to conclude that the second (the "stay") and third (the "cram down") group of normative propositions can be considered as general principles of domestic law. The following figure summarizes the overall methodology used:

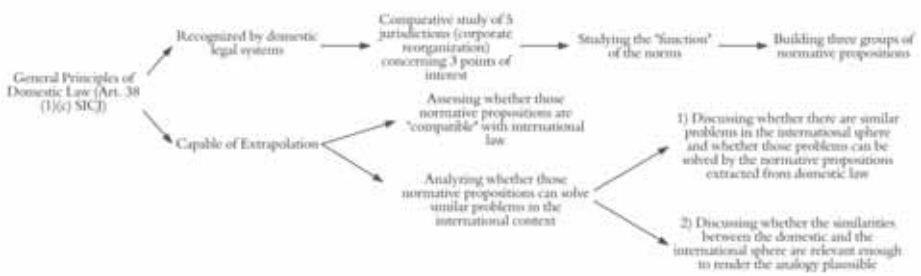

Figure 2: Summary of the Methodology Employed for Identifying GPDs.

4. Conclusions

In this *Chapter* I discussed whether the function that the three groups of normative propositions previously identified serve in the domestic context also holds in the sovereign debt restructuring sphere. I argued that in two of them (i.e., imposing a "stay" on creditors' litigation and the "cram down") that is the case.

I also argued that the similarities between the domestic and international sphere are significant enough to allow for the extrapolation of these norms from the domestic to the international context if certain conditions are fulfilled. Consequently, I concluded that both the "stay" and the "cram down" can be considered general principles of law in the sense of Art. 38 (1)(c) SICJ.

It is important to mention that those principles can solve many of the problems that the current practice of sovereign debt crises resolution faces. Particularly, their application can enhance creditors' participation (by decreasing their payoffs for litigating and holding out) and reduce the time necessary for completing the restructuring at stake. However, and as previously discussed, each restructuring event has its own features, and thus, the use of the aforementioned GPDs will depend on the circumstances of the case. Consequently, their application may not be deemed necessary in certain events where the debt stock of the country is composed of instruments with low legal enforceability or where it presents uniform bonds featuring third-generation CACs.

Furthermore, it is also worth mentioning that one possible way for applying these principles (if applied together) is to implement them consecutively. First, the "stay" would cover the entire period from the default (or the restructuring declaration) to that of the restructuring vote. Secondly, the "cram down" could be applied when the votes on the restructuring proposal fail at the individual series level. The threshold required for deeming the restructuring proposal approved by holders of bonds belonging to different series could imitate that of third-generation CACs (a 75% percent of the bonds being aggregated in value terms).

Nevertheless, and as was previously stated, asserting that one or more normative propositions are GPDs does not guarantee their application by courts in sovereign debt litigation. To this point, this *Thesis* has limited to prove that these principles do exist. In the next *Chapter*, I take the task of analyzing whether the application of these principles by certain domestic courts is feasible, as well as the conditions under which they can be used in sovereign debt litigation before said courts.

Chapter Five: Applying the General Principles of Domestic Law to Bondholder Litigation Before the Domestic Courts of New York and Germany

1. Introduction

Despite the lack of an international treaty on the subject, international law has the potential to facilitate sovereign debt workouts by enhancing creditors' participation and by reducing the time necessary for their completion. In the previous *Chapters*, this *Thesis* has identified two "principles" of the law of nations arising from domestic reorganization regimes that can serve this purpose: the imposition of a "stay" on creditors' actions and the "cram down" of dissenting bondholders' claims[1348]. Particularly, those norms belong to the "third" source of international law[1349]: i.e., to the "general principles of law recognized by civilized nations" (simply referred as "general principles")[1350].

According to the literature, "general principles" can be divided into "general principles originating in international relations", "general principles applicable to all kinds of legal relations" and "general principles of domestic law"[1351]. In this *Chapter* I refer to "general principles of law" (comprising their three different variants) as "GPs" and, specifically to "general principles of domestic law", as "GPDs". It is particularly important to note that the principles studied in this *Chapter* correspond exclusively to the latter; that is, to GPDs.

There are several controversies regarding the content and the methodology for the identification of GPDs. Nevertheless, the majority of commentators agree that GPDs

---

[1348] See *Chapters Three* and *Four*.

[1349] The concept of "sources" of international law refers to the processes by which international norms are created, modified, and annulled. See Robert Kolb, *Principles as Sources*… Op. Cit., pp. 3-4; and Besson, *Theorizing the Sources*… Op. Cit., pp. 169-170. In particular, the sources of international law "(…) constitute the criteria for the legal validity and the device by virtue of which a given norm or standard of behavior is determined to be binding upon those actors subjected to it". Samantha Besson and Jean d'Aspremont, The Sources of International Law: An Introduction, in Samantha Besson and Jean d'Aspremont (Eds.) *The Oxford Handbook of the Sources of International Law*. Oxford University Press (2017), pp. 11-12. The traditional sources of international law are those listed in Article 38(1) of the Statute of the International Court of Justice (henceforth, "SICJ"). These sources are: international agreements, customary international law and, "general principles of law". Article 38 SICJ is usually considered as "an authoritative statement of sources of international law". Johann Leiss, The Juridical Nature of General Principles, in Malgosia Fitzmaurice et al. (Eds.), *General Principles and the Coherence of International Law*. Brill Nijhoff (2019), p. 81. See also Mads Andenas and Ludovica Chiussi, Cohesion, Convergence and Coherence of International Law, in Malgosia Fitzmaurice et al. (Eds.), *General Principles and the Coherence of International Law*. Brill Nijhoff (2019), p. 11. See also James Crawford, *Brownlie's Principles of Public International Law* (8th Edition). Oxford University Press (2012), pp. 21-22.

[1350] See Article 38 (1)(c) Statute of the International Court of Justice in Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, T.S. No. 993.

[1351] See Kleinlein, *Customary International Law*… Op. Cit., p. 134.

encompass normative propositions widely recognized by domestic legal systems around the world and which can be extrapolated to the international sphere[1352].

As the "incremental approach" literature has suggested[1353], the application of these principles can complement the current trends in sovereign debt documentation. This trend is characterized by the widespread adoption of Collective Action Clauses (henceforth, "CACs"). CACs are meant to smooth out sovereign debt workouts by coordinating creditors' activities as pertains to debt renegotiation and enforcement. Therefore, for this approach, the use of a "mixed fuel"[1354] of international law combined with CACs can help to solve the most salient market failures prevalent in the renegotiation of states' debts.

Notwithstanding the promises of the application of GPs to sovereign debt restructurings, the role of international law in this context is usually considered marginal. This can be seen as a consequence of the language of sovereign bonds. To be certain, these instruments are invariably oriented to a domestic jurisdiction in their governing law clauses[1355] and not to international law[1356]. Hence, it is the chosen domestic legal system that will determine the existence and validity of the contracts, their interpretation and execution, the consequences of breaches, the extinguishing of obligations[1357] and the immunity of the issuer[1358]. Therefore, at face value, international

---

[1352] For a detailed discussion including a list of authorities, see *Chapters Two*, pp. 42 et seq. and *Three*, pp. 119 et seq.

[1353] Considering the difficulties involved in the adoption of an international treaty on sovereign debt restructuring, scholars have suggested an alternative "incremental approach". This approach considers the new developments in sovereign debt law, including the adoption of "new" contractual clauses and the reform of national legislations and intends to complement them with other normative elements, such as soft-law and GPs. In the words of Matthias Goldmann, "the incremental approach aims for a third way between statutory and contractual avenues for improving the legal framework governing sovereign debt workouts". Goldmann, *Putting your Faith…* Op. Cit., p. 117. See also Goldmann, *Necessity…* Op. Cit., p. 12. See also Bohoslavsky and Goldmann, *An Incremental…* Op. Cit., pp. 38-39.

[1354] A combination of international and domestic law (namely, a "mixed fuel") has also been suggested for environmental disputes. See Esmeralda Colombo, *Enforcing International Law in U.S. Courts: The Law of the Sea Convention at Play in Kivalina*, 23 ILSA Journal of International & Comparative Law 1 (2016).

[1355] See, Irmgard Marboe and August Reinisch, "*Contracts Between States and Foreign Private Law Persons"*, Max Planck Encyclopedia of International Law (2011), § 27.

[1356] "Sovereign bonds are always governed by some domestic law, rather than international law". Michael Waibel, Sovereign Bonds: Internationalization and Partial Privatization, in Mathias Audit and Stephan Schill (Eds.), *Transnational law of public contracts*. Bruylant (2016), p. 568. "Sovereign bonds are never governed by international law". Michael Waibel, *Eurobonds: Legal Design Features*, 12 Review of Law and Economics 3 (2016), p. 636.

[1357] See Phillip Wood, *Conflict of Laws and International Finance* (2nd Ed.). Sweet & Maxwell (2019), para 5.12. See also New York City Bar, *Governing Law in Sovereign Debt – Lessons from the Greek Crisis and Argentina Dispute of 2012* (2013). Available at https://www.nycbar.org/pdf/report/uploads/20072390-GoverningLawinSovereignDebt.pdf [last accessed 23.8.2020], pp. 3-7 and Issam Hallak, Governing Law of Sovereign Bonds and Legal Enforcement, in Robert Kolb (Ed.), *Sovereign Debt: From Safety to Default*. Wiley (2011), p. 205.

[1358] See Hallak, *Governing…* Op. Cit. p. 205.

law (and its GPDs) cannot be applied in sovereign debt litigation before domestic courts. Or can it?

Theoretically, according to the doctrine of party autonomy[1359], states could designate international law (including GPDs) as the "proper law" of the contracts[1360]. In this context, an explicit choice of international law would make international legal norms applicable to sovereign debt disputes. However, as stated before, this is not the case today. Furthermore, a shift towards this alternative seems unlikely in the near future, considering that the sovereign bond market is not particularly prone to innovations[1361]. The difficulties involved in the adoption of CACs as the "new" standard in bonds governed by New York law is a testimony to the reluctance of market participants (states, underwriters, and bond purchasers) to change the language of the contracts[1362].

[1359] The doctrine authorizes agents (subject to qualified exceptions) to choose both the governing law and the courts to which they will subject the disputes arising from their contracts. See Symeon Symeonides, *Choice of Law*. Oxford University Press (2016), p. 344. In private international law, party autonomy is an expression of the principle of freedom of contract which also applies to contracts concluded between states and private parties. See Patrick Wautelet, *International Public Contracts: Applicable Law and Dispute Resolution* (2013). Available at https://orbi.uliege.be/bitstream/2268/136404/1/Wautelet%20-%20Applicable%20Law%20(final).pdf [last accessed 24.8.2020], p. 11. Party autonomy, itself, enjoys the status of a GPD. See A.F.M. Maniruzzaman, *State Contracts in Contemporary International Law: Monists versus Dualists Controversies*, 12 European Journal of International Law 2 (2001), p. 322. Commentators usually describe the doctrine as "the cornerstone of the private law of contract". See Pietro Franzina, *Sovereign Bonds and the Conflict of Laws: A European Perspective* (2014). Available at https://publicatt.unicatt.it/handle/10807/146727 [last accessed 24.8.2020], p. 5. For an economic analysis of the doctrine see generally, Giesela Ruhl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 Berkeley Journal of International Law 3 (2006), pp. 31-34.

[1360] See Marboe and Renisch, *Contracts*… Op. Cit., § 28. See also Phillip Wood, *Conflict of Laws and International Finance* (1st Ed.). Sweet & Maxwell (2007), paras 7.42 and 7.47. By the same token, states could also make reference in their bonds to the soft-law instruments in the subject of sovereign debt restructuring. Those instruments are the UNCTAD "Principles on Promoting Responsible Sovereign Lending and Borrowing" and the "Basic Principles on Sovereign Debt Restructuring Processes" contained in the United Nations General Assembly Resolution 69/139 of 2015. See Robert Howse, Concluding Remarks in the Light of International Law, in Carlos Espósito et al. (Eds.), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013), p. 389. Additionally, states whose legal systems are chosen as the governing law of the contracts could also "unilaterally" implement legislation in accordance with those principles. See Bohoslavsky and Goldmann, *An Incremental*… Op. Cit., p. 40.

[1361] In the words of Michael Waibel: 'The economic rationale for the use of boilerplate terms is also strong. Any sovereign issuer proposing to depart from standard terms risks undermining the marketability of its bonds. Variations in the terms could dissuade potential creditors from buying the bonds, as potential creditors draw adverse inferences that the tailor-made contractual term being are to their disadvantage (negative signaling). Consequently, potential creditors are likely to either demand a risk premium to buy the bond or abstain from buying the bond altogether". Waibel, *Sovereign Bonds*… Op. Cit., p. 577.

[1362] For example, during the negotiations on the latest Argentinian exchange, it was reported that bondholders pressured the government to issue new instruments without third-generation CACs (the latest innovation on the subject). This generated criticism among scholars and

Therefore, the question is whether GPDs (as a source of international law) can be invoked and applied in sovereign debt litigation before domestic courts even when they are not selected as the governing law for the contracts. This is the subject of this *Chapter*.

Certainly, that question cannot be answered abstractly. Indeed, as will be discussed in Section 2, the relationship between international law and domestic legal systems varies in each jurisdiction. For this reason, this *Chapter* circumscribes the analysis to two legal systems whose domestic law tends to be chosen by emergent market borrowers: the United States (particularly, New York) and Germany[1363]. Although the German legal system is not as prominent as New York's in choice of law and choice of jurisdiction clauses, it was nevertheless selected due to the fact that its courts have explicitly discussed the applicability of GPs in sovereign debt litigation.

Before proceeding, it is important to mention that the application of GPDs to bondholder litigation before domestic courts entails several problems. First, the parties' decision to choose domestic rather than international law cannot be subverted[1364]. Therefore, the application of GPDs in this context depends entirely on the reception of international law within the legal system in question. Second, as stated before, the reception of international law is not homogenous across domestic legal systems. This means that courts of different jurisdictions could draw dissimilar conclusions concerning the role, nature and applicability of GPDs to particular disputes. This, in turn, could contribute to an even more pronounced fragmentation of the law on sovereign debt[1365]. Third, since the identification of GPDs requires a comparative analysis, applying them can impose a "high burden" on judges[1366]. Nevertheless, as Charles Kotuby points out, this "high

---

policymakers. See, for example, Mark Sobel, *Argentina and creditors enter new round*, OMFIF June 3, 2020. Available at https://www.omfif.org/2020/06/argentina-and-creditors-enter-new-round/ [last accessed 20.8.2020].

[1363] Bonds issued by developed countries are almost always subjected to their own law. Emerging market borrowers, for their part, are more prone to issue bonds governed by the law of a third state (henceforth, "external bonds"). See Marcos Chamon, Julian Schumacher and Cristoph Trebesch, *Foreign-law Bonds: Can they Reduce Sovereign Borrowing Costs?* European Central Bank, Working Paper Series (2018), pp. 6-7. In most cases, external bonds are governed by the laws of New York or England, while the German, Swiss and Luxembourgish legal system are featured less prominently in sovereign debt documentation. See Waibel, *Sovereign Bonds*… Op. Cit., p. 641. See also Rault, *The Legal Framework*… Op. Cit., p. 97; Kupelyants, *Sovereign Defaults*… Op. Cit., p. 111; Wautelet, *International*… Op. Cit., p. 34 and Franzina, *Sovereign Bonds*… Op. Cit., p. 9.

[1364] See Maniruzzaman, *State*… Op. Cit. p. 324. For the case of state contracts in general see also Dereck Bowett, *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 Catholic University Law Review 4 (1986), p. 392.

[1365] See Anna Gelpern, Hard, Soft, and Embedded: Implementing Principles on Promoting Responsible Sovereign Lending and Borrowing, in Carlos Espósito et al. (Eds.), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013), pp. 354-355.

[1366] See Marboe and Renisch, *Contracts*… Op. Cit., § 28. In the words of Paul Stephan: "Most observers concede that the process of selecting principles of law found in domestic legal systems for elevation into international law involves subjective judgments and under-examined

burden-problem" is also a challenge for adjudicators confronted with other sources of international law (such as customary international law)[1367] and with other international standards (such as the fair and equitable treatment standard). This *Chapter* sustains that all of those problems can be solved or, at least, mitigated.

As stated in *Chapter One*, there is a rich literature on the subject of GPDs relevant for sovereign insolvency[1368]. Nevertheless, save for a few notable exceptions, the scholarship has limited itself to the task of identifying GPDs and has not discussed in detail how said norms can be applied to sovereign debt litigation before domestic courts[1369].

For example, although Matthias Goldmann indicates that the application of international law (and of GPDs) is contingent upon the reception of international law by the legal system in question[1370], he fails to discuss the issue in detail. Regarding the United States (henceforth, "US"), he stresses that GPDs could be applied by US courts "by ways of the idea of comity"[1371]. Although comity[1372] may be used to invoke international law in disputes brought before US courts[1373], Goldmann failed to discuss the precise status of GPDs under US law (a question which must be dealt with first). To my knowledge, the only work which has attempted to address this issue is that of Dimitrij Euler and Giuseppe Bianco[1374]. However, their analysis is limited to a single

normative preferences". Paul Stephan, International Law as a Source of Law, in Francesco Parisi (Ed.), *Production of Legal Rules*. Elgar (2011), pp. 260-261.

[1367] "The process of "finding" general principles – that is, identifying the underlying legal rationale behind a particular rule and surveying its general acceptance across legal systems – is certainly no more (and probably less) discretionary than divining a customary international law". Charles Kotuby, *General Principles of Law, International Due Process, and the Modern Role of Private International Law,* 23 Duke Journal of Comparative & International Law (2013), pp. 432-433.

[1368] See *Chapter One*, pp. 23 et seq.

[1369] See Id.

[1370] In his own words: "A matter of positive international law, states need to comply with general principles. Some constitutions incorporate general principles into the domestic legal order, either (…) directly or (…) indirectly". Goldmann, *Necessity*… Op. Cit., p. 14.

[1371] Id. See also Goldmann, *Putting* … Op. Cit., p. 140. In order to support that statement, Goldmann quotes (generally) from a paper by Wheeler and Attaran. See Wheeler and Attaran, *Declawing*… Op. Cit. Although that paper deals with the imposition of a "stay" and calls for a "cram down" of dissenting bondholders' claims, it does not discuss (in any respect) general principles of law or the relationship between international law and the US legal system. In said paper, Wheeler and Attaran only analyze the doctrine of comity (which does not necessarily refer to international law) as an avenue for substantiating defenses in favor of sovereign debtors.

[1372] Comity is a doctrine applied by the courts of the US. According to the "canonical" definition of the doctrine, comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation". Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895), 163-64. Hence, comity is not directly based on international law but on the "unilateralist approaches of the forum". Megliani, *Sovereign Debt*… Op. Cit., p. 425. Therefore, comity is not necessarily related to the reception of the sources of international law in the US legal system but to the deference of the forum to acts taken in foreign jurisdictions even when they produce effects within the US.

[1373] See, for example, Carl Marks & Co. v. Union of Soviet Socialist Republics, 665 F. Supp. 323 (S.D.N.Y. 1987).

[1374] See Euler and Bianco, *Breaking the Bond*… Op. Cit.

case: that of a dissenting creditor who obtains a favorable judgment in arbitration. Specifically, they argue that an indebted state could invoke the "public policy" exception in order to prevent the enforcement of the award in foreign jurisdictions[1375]. Therefore, this *Chapter* aims to contribute to the literature by studying whether two GPDs (namely, the "stay" and the "cram down") can be applied in bondholder litigation before domestic courts. As previously stated, this contribution is limited to two jurisdictions: the United States (New York, henceforth "NY") and Germany.

This *Chapter* is structured as follows. First, I briefly discuss the relationship between international and domestic law (Section 2). Next, the *Chapter* analyzes the problem from the perspective of the United States (and particularly, New York) (Section 3). Then, the issue is discussed for the German legal system (Section 4). Finally, the conclusions of the *Chapter* are presented in Section 5.

[1375] A similar argument has been put forward by Mauro Megliani. However, Megliani's work does not deal directly with the application of GPDs in sovereign debt litigation but with the extraction of a "sustainability rule" derived both from the doctrine of state of necessity and from public policy. As with Euler's and Bianco's propositions, Megliani addresses the avenues for preventing the enforcement of creditors' claims based on the "public policy exception. See Megliani, *For the Orphan…* Op. Cit.

2. The Relationship Between International and Domestic Law

From a theoretical perspective, the relationship between international and domestic law is usually explained through two different prisms[1376]. Monism, on the one hand, purports that the domestic and the international legal order are part of a "single" legal system. Furthermore, for "internationalist" monist scholars, international law has primacy over domestic law[1377] and, therefore, any conflict between the two needs to be resolved in favor of the former[1378]. Additionally, under this perspective, international law is directly applicable under domestic legal systems[1379]. Dualism (also referred to as "pluralism"), on the other hand, indicates that both legal orders are "self-contained" and exist "independently" from each other[1380]. Furthermore, for "radical" dualist scholars, international law is incapable of derogating "contravening national law"[1381]. At the same time, from the point of view of dualism, the hierarchy of international law as well as the possibility of applying it domestically, is determined by each jurisdiction[1382].

Despite the importance of these debates, contemporary commentators usually note that, in practice, the relationship between domestic legal systems and international law is more complicated[1383]. Thus, neither of the aforementioned approaches is capable of offering an "adequate account" of how international and domestic law interact with each other[1384]. For the same reasons, legal systems around the world cannot be satisfactorily classified as strictly belonging to the constructs of either monism or dualism[1385]. Therefore, when it comes to understanding the role of international law in particular jurisdictions the scholarly consensus tends to stress that

---

[1376] See Gideon Boas, *Public International Law: Contemporary Principles and Perspectives*. Elgar (2012), pp. 119 et seq.; Dinah Shelton, Introduction in Dinah Shelton (Ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion*. Oxford University Press (2011); James Crawford, *Chance, Order, Change: The Course of International Law. General Course on Public International Law*. AIL-Pocket (2014), pp. 163 et seq. and Crawford, *Brownlie's…* Op. Cit., pp. 48 et seq.

[1377] Among monist scholars, there is another strand which calls for the superiority of domestic over international law. However, this position has remained marginal in the literature. For a brief discussion of the arguments provided by "monist" scholars see Paul Gragl, *Legal Monism: Law, Philosophy and Politics*. Oxford University Press (2018), pp. 20 et seq.

[1378] See Gragl, *Legal…* Op. Cit., pp. 23-24.

[1379] See Pierre-Marie Dupuy, "*International Law and Domestic (Municipal) Law"*. Max Planck Encyclopedia of International Law, § 13.

[1380] See Boas, *Public…* Op. Cit., p. 120.

[1381] See Gragl, *Legal…* Op. Cit., p. 36.

[1382] See Crawford, *Brownlie´s…* Op. Cit., p. 48.

[1383] Malcolm Shaw, *International Law* (5th Ed.). Cambridge University Press (2003), p. 128.

[1384] See Crawford, *Brownlie's…* Op. Cit., p. 50. See also Shelton, *Introduction…* Op. Cit., pp. 3-4 and Andreas Paulus, The Emergence of the International Community and the Divide Between International and Domestic Law, in Janne Nijman and André Nollkaemper (Eds.), *New Perspectives on the Divide Between National and International Law*. Oxford University Press (2007), p. 217 and p. 228.

[1385] Crawford, *Chance…* Op. Cit., pp. 164-165.

"monism and dualism become a matter of degree of the integration of international law into a domestic order, not of kind"[1386].

In accordance with the foregoing, the role of international law in domestic legal systems is determined by the jurisdiction in question[1387], and thus, it varies accordingly[1388]. As Crawford puts it, "(…) international law (like ultra-violet light) has to pass through the filter of a national legal system to be visible"[1389].

Therefore, the application of international norms to a contractual dispute where the choice of law clause designates a domestic legal system depends on whether the latter incorporates the former as part of its law. In these cases, "international law applies as a function of the national law itself"[1390].

Although this may appear straightforward, matters are complicated a bit further when one acknowledges that the reception of international law in domestic legal systems also varies depending on the specific source in question[1391]. In other words, sources of diverse pedigree (treaties, customs and GPs) may be received differently by national law (in terms of their status, their hierarchy and their form of incorporation) and, in some cases, some of them may not even be incorporated in the domestic legal system at all.

It is important to note that there is a significant volume of literature on the relationship between the international and domestic legal systems in relation to treaty and customary law. Nevertheless, save for notable exceptions[1392], the scholarship has tended to overlook the status and role of GPDs in domestic jurisdictions. For this reason, a specific discussion in this regard is necessary.

[1386] Paulus, *The Emergence…* Op. Cit., pp. 228-229.

[1387] "Domestic law, not international law, continues to determine the breadth of the influence of international law in the domestic legal order". Id., p. 218. In the same sense, see Gazzini, *General Principles…* Op. Cit., p. 105; Crawford, *Chance…* Op. Cit. p. 166; Dupuy, *International Law…* Op. Cit., § 46 and Peter Malanczuk, *Akehurt's Modern Introduction to International law* (7th Revised Edition). Routledge (1997), p. 65.

[1388] See Megliani, *Sovereign Debt…*, Op. Cit., p. 390. Crawford, *Change…* Op. Cit., pp. 170-171.

[1389] Crawford, *Change…* Op. Cit., 170.

[1390] Hege Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*. Oxford University Press (2013), p. 181.

[1391] "The place of international law in the domestic legal system depends on the source of the international law in question: whether it is a treaty, customary international law, a general principle of law, or derives from the decision of an international organization". Shelton, *Introduction…* Op. Cit., p. 5. See also, Anthony Aust, *Handbook of International Law*. Cambridge University Press (2005), p. 13 and Boas, *Public…* Op. Cit., p. 136.

[1392] Among those exceptions it is possible to mention the following works. For Swiss law see Odile Ammann, *Domestic Courts and the Interpretation of International Law*, Brill Nijhoff (2020). For US law, see Howard Schrader, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 Columbia Law Review (1982); Charles Kotuby, *General Principles of Law, International Due Process, and the Modern Role of Private International Law,* 23 Duke Journal of Comparative and International Law (2013); Charles Kotuby and Luke Sobota, *General Principles of Law and International Due Process.* Oxford University Press (2017) and Thomas Lee, *The Law of Nations and the Judicial Branch*, 106 The Georgetown Law Journal (2018).

In what follows, this *Chapter* analyzes whether GPDs can be invoked in disputes arising from sovereign bonds where the contracts designate New York (Section 3) and German (Section 4) law as their governing law.

3. General Principles of Domestic Law Under the Law of the United States

Both US courts[1393] and the Restatement of Foreign Relations Law of the US[1394] regard Article 38(1) of the Statute of the International Court of Justice as an authoritative determination of the sources of international law. Hence, treaties, customary international law (henceforth, "CIL") and GPs can be considered to be a part of the international legal framework from the perspective of US law[1395].

Nevertheless, the status of international law within the US domestic legal system has been the subject of important controversies among scholars[1396]. These controversies extend also to the role that each of the aforementioned sources (i.e., treaties, CIL and GPs) play in that domestic legal order. The contentious nature of the subject is one of the factors explaining the reluctance of US courts to apply international law in the disputes brought before them[1397].

In order to assess the place and relevance that GPs have under US law, it is necessary to introduce the subject by briefly discussing the role and status of international treaties and of CIL from the perspective of the US legal system.

[1393] See, for example, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), p. 881; Velez v. Sanchez, 693 F.3d 308 (2d Cir. 2012), p. 319; In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7 (E.D.N.Y. 2005), p. 131 and Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003) ("Article 38 of the Statute of the International Court of Justice serves as a convenient summary of the sources of international law (…)", p. 617. See also Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), ("In this circuit we have long recognized as authoritative the sources of international law identified in Article 38 of the Statute of the international Court of Justice (…)". p. 132. See also Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003), ("perhaps the most widely-quoted enunciation of the sources of international law is found in the Statute of the International Court of Justice (ICJ)"). p. 304.

[1394] See Restatement (Third) of the Law, the Foreign Relations Law of the United States, para 102. "Restatements [such as the Restatement of the Law in the Fields of Foreign Relations] are non-binding but influential efforts by groups of legal experts that describe the state of the law in a particular field". Curtis Bradley, *What is Foreign Relations Law?* (2017). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960694 [last accessed 26.8.2020], p. 9.

[1395] US v. Jeong 24 F.3d 706 (5th Cir. 2010) ("There are three accepted sources of international law in the United States: customary international law, international agreements, and "general principles common to the major legal systems of the world") p. 712. See also United States v. Al Bahlul, 820 F. Supp. 2d 1141 (USCMCR 2011), p. 1174.

[1396] "The relationship between the domestic US legal system and the wider legal world is very much unsettled". Paul Dubinsky, United States in Dinah Shelton (Ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion*. Oxford University Press (2011), p. 634.

[1397] In the words of Marzen: "Courts and judges (…) [in the US] have been reticent to apply international law equally alongside domestic law to decide cases and controversies". Chad Marzen, *The Application of International Law in State Courts: The Case of Florida*, 49 The University of Toledo Law Review (2018), p. 205. According to Coyle, US-judges' reticence towards international law can be explained both by their unfavorable "attitudes" and "inexperience" with respect to the international legal system. See John Coyle, *The Case for Writing International Law into the U.S. Code*, 56 Boston College Law Review (2015), pp. 435-436.

3.1. Treaties and Customary International Law Under US Law

First, it is important to note that the US Constitution refers explicitly to international treaties and confers them the status of "supreme law of the land"[1398]. This "supremacy clause" establishes that international agreements have "a similar status" as that of federal law[1399], superseding state legislation[1400].

Despite the important status of treaty-norms within the US, their applicability depends on whether the instruments which comprise them are considered to be "self-executing" or "non-self-executing"[1401]. While "self-executing" treaties can be applied directly[1402], "non-self-executing" treaties "require implementing legislation to be effective"[1403]. Although this distinction is a matter of US law, it has prompted considerable debate among scholars[1404]. Nevertheless, according to the Restatement, the distinction depends on the language of the instrument and on the "intention" of the political branches of the US[1405].

[1398] According to Section 2, Article VI of the US Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".

[1399] See Restatement (Fourth) of the Law – The Foreign Relations Law of the United States. Introductory Note.

[1400] See Crawford, *Brownlies'…* Op. Cit., p. 77. According to the Restatement "The Supremacy Clause of the Constitution makes clear that treaties are a form of supreme federal law binding on the State courts and that treaties displace contrary State and local law". Restatement (Fourth) of the Law – The Foreign Relations Law of the United States, para 308, Comment (a). For the Restatement, "This is true regardless of whether the treaty provision became effective earlier on later in time". Restatement (Fourth)… Id, Comment (b). However, it only applies to treaties which are self-executing. Id. para 309, Reporters' Notes (3).

[1401] See Shaw, *International…* Op. Cit., p. 147.

[1402] "As law of the United States, treaties are also the law of every State and, when self-executing, can be directly enforced in State and local courts". Restatement (Fourth) of the Law – The Foreign Relations Law of the United States, para 308, Comment (a).

[1403] Crawford, *Change…* Op. Cit., p. 173. "As a basic rule (…), a non-self-executing treaty which has not been the subject of implementing legislation has no status in domestic law and is not judicially enforceable". Crawford, *Brownlie's…* Op. Cit., p. 79.

[1404] See Crawford, *Change…* Op. Cit., pp. 173-174 and Crawford, *Brownlie's …* Op. Cit., pp. 77-78. In the words of Shaw: "this matter has absorbed the courts of the United States for many years, and the distinction appears to have been made upon the basis of political content". Shaw, *International…* Op. Cit., p. 147. Nevertheless, this distinction is irrelevant from the perspective of the international commitments of the US: "Whether a treaty provision is self-executing does not affect the obligation of the United States to comply with it under international law". Restatement Fourth, para 310, Comment (b).

[1405] See Restatement (Fourth), para 310.

Second, the Constitution does not deal with the status of CIL in the US legal system[1406]. Federal statutes are also silent on this matter[1407]. Despite these circumstances, US courts have applied, interpreted, and defined the content of customary international norms since "the beginning of the Republic"[1408]. In particular, the incorporation of customary international law into the US legal system is reflected in the "classic statement"[1409] contained in Justice Gray's opinion in *"The Paquete Habana"*[1410]:

> *"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations* (…)"[1411].

As is usually noted, "*The Paquete Habana"* laid down what it is now considered to be the "traditional" (or the "modern") understanding of the relationship between US and customary international law[1412]. According to this position, customary norms enjoy the

[1406] Nevertheless, the US Constitution refers to customary international law when it defines the "powers of congress". Indeed, Art. 1 Section 8 establishes that Congress "shall have power (…) to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations". Furthermore, for some scholars, the drafters referred to CIL through the expression "the (…) laws of the United States" in Article 3. See, for example, Andrea Bianchi, *International Law and US Courts: The Myth of Lohengrin Revisited*, 15 European Journal of International Law (2004), pp. 754-755.

[1407] See Dubinsky, *The United States*… Op. Cit., p. 642.

[1408] Id., p. 642. See also Louis Henkin, *International Law as the Law in the United States*, 82 Michigan Law Review (1984), p. 1557.

[1409] Crawford, *Change*… Op. Cit., p. 175.

[1410] The Paquete Habana, 175 U.S. 677, 20 S. Ct. 290, 44 L. Ed. 320 (1900). According to Thomas Lee, the statement contained in this decision "(…) was in no sense original: it was part of an unbroken Anglo-American legal tradition that preceded the American founding". Thomas Lee, *Customary International Law and U.S. Judicial Power: From the Third to the Fourth Restatements* (2020). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3629791 [last accessed 26.8.2020], p. 4.

[1411] The Paquete Habana, 175 U.S. 677, 20 S. Ct. 290, 44 L. Ed. 320 (1900), p. 700. Similar statements pre-date this decision. For example, in Hilton v. Guyot the Court indicated that: "International law (…) is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination". Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895), p. 163.

[1412] Crawford, *Brownlie's*… Op. Cit., pp. 80-81. See also, Dubinsky, *The United States*… Op. Cit., p. 642.

status of federal law[1413] (superseding state law) and are "like" common law[1414]. Furthermore, these norms can be directly applied by courts to determine a dispute and to guide the interpretation of domestic statutes[1415]. Hence, in this understanding, the application of customary norms does not require authorization by federal legislation. Furthermore, according to the Restatement, "a determination of international law [and of customary international norms] by the Supreme Court is binding on States and on State courts"[1416].

Nevertheless, the aforementioned "traditional" understanding has been the subject of important controversies among academics[1417]. Scholars opposing the "traditional" position[1418] (grouped under the rubric of "revisionism") contend that it is not only "inconsistent with democratic governance" but also risky considering the undetermined nature of customary norms[1419]. Furthermore, they also posit that from the Erie v. Tompkins[1420] decision onwards, the latitude for the application of customary international law by US judges was severely reduced[1421]. In short, for most revisionist scholars, in most of the cases, international customary norms cannot be applied directly by US courts[1422].

[1413] "It would be unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law". Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 The American Journal of International Law 4 (1939), p. 743. See also Harold Koh, *Is International Law Really State Law?* 111 Harvard Law Review 7 (1998), p. 1835. In the words of Henkin, "Since it is law not enacted by Congress, and the principles of that law are determined by judges for application in cases before them, customary international law has often been characterized as "federal common law" and has been lumped with authentic federal common law - the law made by federal judges under their constitutional power or under authority delegated by Congress", Henkin, *International Law…* Op. Cit., p. 1561. Furthermore, according to the same author: "Unlike federal common law, customary international law is not made and developed by the federal courts independently and in the exercise of their own law-making judgment. In a real sense federal courts find international law rather than make it (…)". Id., pp. 1561-1562.

[1414] See Restatement, para 111.

[1415] See Crawford, *Brownlie's…* Op. Cit., p. 81. Dubinsky, *The United…* Op. Cit., pp. 642-643.

[1416] Restatement, para 111.

[1417] See Boas, *Public…* Op. Cit., p. 142. Dubinsky, *The United…* p. 644. Crawford, *Brownlie's…* Op. Cit., p. 81.

[1418] The debate was reinvigorated by the contributions of two of the most prominent scholars of the "revisionist" position, Curtis Bradley and Jack Goldsmith. See Curtis Bradley and Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harvard Law Review 4 (1997). Additionally, it is important to mention that there are eclectic voices among the literature. See, for example, Gary Born, *Customary International Law in United States Courts*, 92 Washington Law Review 4 (2017). See also Anthony Bellia and Bradford Clark, *The Law of Nations and the United States Constitution.* Oxford University Press (2017).

[1419] See Dubinsky, *The United…* Op. Cit., p. 645.

[1420] Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

[1421] See Bianchi, *International…* Op. Cit., 755-756.

[1422] See Bradley and Goldsmith, *Customary…* Op. Cit.

In practice, although courts have been receptive of certain elements of the revisionist understanding, the debate has been resolved in favor of the "modern" position[1423]. Therefore, despite the lack of explicit recognition of customary international law in the US Constitution, norms of that nature are "treated as federal law"[1424] and not as state law[1425]. Hence, US courts are authorized to directly apply customary norms "in the absence of controlling federal statutory provisions"[1426].

3.2. General Principles Under US Law

At face value, statements such as those contained in the *"Paquete Habana"* and its progeny (i.e., "international law is part of US law") would suggest that all the sources of international law (including GPs) are automatically incorporated into US domestic law[1427]. Nevertheless, as Schrader indicates, the *"Paquete Habana"* decision dealt exclusively with one specific source of international law: Customary law[1428]. Consequently, according to that author, *"Habana"* omitted other sources, such as GPs and international agreements[1429]. For those reasons, any invocation of GPs in disputes governed by US law must be careful to look elsewhere to find appropriate grounds[1430].

Furthermore, when it comes to GPs, opacity replaces the controversies surrounding the application of the other sources of international law. As will be discussed later, there is almost no literature and only a few cases on the subject. Nevertheless, the Restatement offers some guidance in this regard and recognizes GPs as being part of international law. According to that document, GPs "may be resorted to as an independent source of law" and applied when customary or treaty law is silent[1431]. Furthermore, the Restatement also restricts GPs to GPDs (i.e., to those normative propositions widely shared in domestic legal systems around the world), discarding the other types of GPs (namely, "general principles originating in international relations" and "general

---

[1423] See, for example, Sosa v. Alvarez-Machain, 542 U.S. 692, 730, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004); Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) and Stephens v. Nat'l Distillers & Chem. Corp., 69 F.3d 1226 (2d Cir. 1995). Hugues includes a list of other contemporary cases in this regard. See Justin Hughes, *The Charming Betsy Canon, American Legal Doctrine, and Global Rule of Law* (2020). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946483 [last accessed 26.8.2020], pp. 17-18 footnote 74.

[1424] Boas, *International*… Op. Cit., p. 142.

[1425] See Henkin, *International*… Op. Cit., pp. 1559-1560.

[1426] Bianchi, *International*… Op. Cit., p. 755. See also Restatement, para 111. Reporter's Notes 3

[1427] "If "international law is part of our law," as the Supreme Court held in the famous Paquete Habana case, then one would expect that the accepted methodology of international law, as summarized in article 38 of the Statute of the International Court of Justice, would be part of our law as well". Schrader, *Custom*… Op. Cit., pp. 756-757. In the same sense, see Amici Curiae Jesner v. Arab Bank. p. 8.

[1428] See Schrader, *Custom*… Op. Cit., p. 770.

[1429] See Id., p. 759.

[1430] "There is no basis to infer that this practice also authorizes national courts or national bureaucracies to find in (…) [GPs] (…) a rule of decision that their own national law does not contain". Stephan, *International*… Op. Cit., p. 260.

[1431] Restatement (Third), para 102, Comment (l). For these reasons the Restatement notes that "general principles" are a "secondary source of law".

principles applicable to all kinds of legal relations")[1432]. However, the aforementioned document fails to discuss whether GPs can be invoked and applied in litigation before US courts.

Beyond the Restatement, it is difficult to find any guidance on the relationship of GPs with the US legal system. As indicated above, there is virtually no scholarship on the subject[1433]. Consequently, in order to assess whether the GPDs studied in this *Thesis* can be applied in litigation before New York courts, the status of this source under the US legal system needs to be clarified first. With this purpose, I will proceed to examine the practice of US courts in this regard.

Before moving forward, however, it is important to mention that studying the application of GPDs by domestic and international courts is a task fraught with several obstacles. First, from the perspective of the traditional doctrine of the sources of international law, the invocation of international principles in the legal vocabulary is not always accurate. Frequently, legal stakeholders use the expression "principles" when referring to norms which do not necessarily fall within the scope of Art. 38(1)(c) (i.e., of the "general principles of law recognized by civilized nations" as included in the Statute of the International Court of Justice, henceforth "SICJ"). For example, expressions such as "principles of international law" are often used to designate the body of norms comprised by the international legal system, and not to refer to GPs[1434].

Second, the "liberal" use of language by courts also complicates the distinction between international legal sources (particularly between CIL and GPDs) in judicial decisions[1435]. This is not only true for the practice of US courts. For example, even in the jurisprudence of the International Court of Justice (henceforth, "ICJ"), it is possible to find decisions that do not distinguish clearly between GPs and CIL[1436]. This complication is reinforced by the fact that, when deciding a case, the ICJ rarely cites Art. 38(1) of its statute (let alone mention Art. 38(1)(c) SICJ)[1437].

[1432] "The general principles are those common to national legal systems (…)". Restatement (Third), para 102, Reporters' Note (7).

[1433] For the notable exceptions see footnote 1392 above. Furthermore, distinguished scholars have not investigated the issue. See, for example, Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 International and Comparative Law Quarterly 1 (2011), footnote 19 p. 62. In particular, for the US, Thomas Lee indicates: "American lawyers today tend to bifurcate international law into only treaties and customs, ignoring the existence of general principles despite their standing as a third primary source of international law even today". Lee, *The Law…* Op. Cit., p. 1718.

[1434] See Besson, *General Principles…* Op. Cit., p. 26. Besson also indicates that the problem becomes even more acute when one recognizes that the concept of "principles" is "polysemic": "it can be used to refer (…) to a legal source, a kind of legal norm, a degree of legal normativity or a quality of legal content". Id.

[1435] "(…) due to the imprecise language courts use to refer to general principles of international law, relevant cases are not easily identifiable". Ammann, *Domestic…* Op. Cit., p. 303.

[1436] See, for example, Biddulph and Newman, *A Contextualized…* Op. Cit., p. 295. See also Shaheed Fatima, *Using International Law in Domestic Courts*. Oxford University Press (2005), pp. 46-49.

[1437] See Dordeska, *General Principles…* Op. Cit., pp. 198-199 and 203-204.

Third, and for the particular case of the US, these difficulties are compounded by the "eclectic" or "potpourri"[1438] approach taken by its courts. Indeed, when it comes to the determination of international law beyond international treaties, US courts are not always precise. For example, according to Janis, in what pertains to the application of "unwritten" international law[1439], US Courts tend to disregard the differences between customary norms and general principles[1440]. For this reason, Janis suggests that the notion of "international common law" would better describe the engagement of the courts of that country with customary international norms and GPs[1441].

Taking these obstacles into consideration, I decided to conduct a problem-oriented search of decisions rendered by US courts referring to GPs. In this respect, I employed a similar procedure to that deployed by Odile Amman (for Swiss law)[1442] and by Marija Dordeska (for the jurisprudence of the ICJ)[1443]. First, I used keywords to find relevant cases on Westlaw. Particularly, I included the following terms in the search: "general principles of international law", "principles of international law", "principles of public international law" and "international law principles". Although US courts may use those terms to refer to norms other than GPs, I considered it necessary to include them in order to find cases which would not have otherwise been featured. Second, due to the large volume of results, I decided to limit the analysis to the first 100 hits of the search related to each term[1444]. Third, I excluded the cases in which: (a) the terms were used

[1438] See Mark Janis, An introduction to international law (3rd Edition). Aspen (1999), pp. 103-104. See also Malanczuk, *Akehurt's*… Op. Cit., p. 70.

[1439] The term "unwritten international law" is used to designate both customary international law and "general principles of law". See Peter Staubach, *The Interpretation of Unwritten International Law by Domestic Judges*, in Helmut Philipp Aust and Georg Nolte (Eds.), The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence. Oxford University Press (2016).

[1440] "US Courts do not usually treat customary international law, the general principles of law, judicial decisions (…) as discrete sources of international law as might an international court. Rather, U.S. courts tend to collect together all of the evidence from these diverse sources in hopes of establishing some rule of international common law", Janis, *An Introduction*… Op. Cit., p. 103.

[1441] Id.

[1442] See Amman, *The Domestic*… Op. Cit., 302 et seq.

[1443] Marija Dordeska attempted to identify the instances of application of GPs by the ICJ (and its predecessor, the PICJ). Particularly, she built a dataset comprising the entire universe of decisions rendered by the Court between 1922 and 2018. She also assumed that if the court mentioned the word "principle" in connection to a norm in a case (even if it did so only once), it was referring to a GP. Additionally, she excluded from the sample the instances when the ICJ referred abstractly to principles without mentioning any specific legal norm. Therefore, she understood phrases such as "rules and principles of international law" and/or "principles and rules of international law" as the ICJ reliance on "international law in general". Additionally, she also excluded from the category of GPs treaty-norms referred to in the corresponding instruments as principles, but that were not identified as such by the reasoning of the ICJ. Finally, she also excluded those propositions designated as "principles" by international organizations. Following this methodology, Dordeska was able to conclude that both the PCIJ and the ICJ referred to GPs in 76.4 percent of its decisions. See Dordeska, *General Principles*… Op. Cit., pp. 204-218.

[1444] It should be noted that the term "principles of public international law" delivered only 65 results.

without further clarification and where (b) the terms were included in the literature quoted by the courts with no relevance to the discussion of the case. Fourth, I organized all the cases rendered by these searches, to determine how the terms were used from the perspective of the traditional doctrines of sources of international law. Thus, I attempted to clarify in which cases US courts specifically referred to GPs rather than other sources (such as CIL). Finally, I identified additional cases from those mentioned in the literature[1445].

I have divided the results of this examination into three groups. First, I discuss the instances in which US courts have not been particularly precise in what pertains to the notion of "principles" of international law (subsection 3.2.1). Next, I consider a group of cases where the category of "principles" has been employed in accordance with Art. 38 (1)(c) of the Statute of the International Court of Justice (subsection 3.2.2). Finally, I analyze a discrete number of cases in which international principles have been discussed in sovereign debt litigation (subsection 3.2.3).

3.2.1. The "Liberal" Use of "Principles" by US Courts

In the case-law, it is possible to note several decisions where courts have not used the category of "general principles" rigorously.

First, US courts tend to use the expression "principles of international law" to refer to the body of international norms or to international law in general[1446].

Second, US courts have also used the same expression (i.e., "principles of international law") and those of "general principles of international law" and of "principles of public international law" when referring to international norms which are not GPs from the perspective of Art. 38(1)(c) SICJ. Indeed, courts have used those expressions to refer to CIL norms in different subject areas, including consular relations[1447], the

[1445] See the bibliography for the US in footnote 1392 above.

[1446] See, for example: United States v. Maine, 475 U.S. 89, 106 S. Ct. 951, 89 L. Ed. 2d 68 (1986). After indicating that the Court had "consistently followed principles of international law in fixing the coastline of the United States" it then referred to the Convention on the Territorial Sea and Contiguous Zone. See Id., p. 951. See also State v. Dansinger, 521 A.2d 685 (Me. 1987), pp. 688-689.

[1447] See DuPree v. United States, 559 F.2d 1151 (9th Cir. 1977) (referring to the domestic case-law on the matter of the right of consuls to protect the interest of the nationals of their countries from the perspective of CIL but under the rubric of "general principles of international law": "(…) general principles of international law do not provide a means by which the Consul can overcome the obstacles to standing which he confronts in this proceeding", Id., p. 1154. See also, Re Arbulich's Estate, 248 P.2d 179 (Cal. Ct. App. 1952), pp. 192 et seq, and State v. Martinez-Rodriguez, 2001-NMSC-029, 131 N.M. 47, 33 P.3d 267, p. 274. See also Zolezzi v. Tarantola, 138 N.J. Eq. 579, 49 A.2d 482 (Ch. 1946), p. 581 (using the expression "principles of international law" as synonymous with CIL). Consular relationships are governed by the 1963 Convention of the same name and by CIL norms, not by GPs. See John O'Brien, *International Law*. Cavendish Publishing Limited (2001), pp. 423-424.

extraterritorial application of laws[1448], the determination of historic waters[1449], state immunity[1450], immunity of heads of state[1451], diplomatic immunity[1452], asylum and immigration[1453] and the standard of compensation in case of expropriation[1454].

[1448] See United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991) ("Our conclusion that extradition treaties proscribe government-sponsored kidnappings gains support from general principles of international law"), pp. 1351-1352. See also United States v. Alvarez-Machain, 971 F.2d 310 (9th Cir. 1992) (using CIL and "general principles of international law" interchangeably), p. 311; Sanders v. Cain, No. CIV.A.02-0971, 2003 WL 21920894 (E.D. La. Aug. 8, 2003), p.2 (quoting United States v. Alvarez–Machain, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992) and referring to abductions in other territories); Smith v. Foto, 285 Mich. 361, 280 N.W. 790 (1938), p. 372 (qualifying as a principle the norms that establish that "each state determines for itself the status of its citizens and may prescribe the conditions under which divorce may be granted; but no State has jurisdiction over the citizens of other States which likewise determine the status of their own citizens"); United States v. DSD Shipping, A.S., No. CR 15-00102-CG-B, 2015 WL 5444094 (S.D. Ala. Sept. 15, 2015) ("Finding the statutes in question apply extraterritorially, it is necessary to evaluate whether such application violates the general principles of international law"), p. 6; United States v. MacAllister, 160 F.3d 1304 (11th Cir. 1998), ("Prior to giving extraterritorial effect to a penal statute, we consider whether doing so would violate general principles of international law), p. 1308; Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65 (3d Cir. 1994) ("Under general principles of international law, a tribunal may prescribe laws with respect to conduct outside its territory that has or is intended to have substantial effect within its territory") (quotation marks omitted), p. 75; Goldberg v. UBS AG, 690 F. Supp. 2d 92 (E.D.N.Y. 2010), pp. 108-109 and Nat. Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981), p. 1357.

[1449] See United States v. State of Alaska, 497 F.2d 1155 (9th Cir. 1974) ("Historic bays are not defined in the Convention, and the term therefore derives its content from general principles of international law"), pp. 1157-1158 and United States v. Louisiana, 394 U.S. 11, 89 S. Ct. 773, 22 L. Ed. 2d 44 (1969), p. 808.

[1450] See Sullivan v. State of Sao Paulo, 122 F.2d 355 (2d Cir. 1941) ("It is well settled that the latter ["the states in the American union"] are immune from suit on general principles of international law in cases not covered by the Eleventh Amendment (…)", p. 359. Carl Marks & Co. v. Union of Soviet Socialist Republics, 665 F. Supp. 323 (S.D.N.Y. 1987): "Thus, it would appear that as of 1926 the Supreme Court relied on general principles of international law in immunity determinations (…)" (p. 334). Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) ("By this century, however, the judicial reliance upon general principles of international law to decide questions involving sovereign immunity began to give way to a deference to the practices and policies of the Department of State (…)", p. 670. See also Bd. Of Regents of Univ. Of Wisconsin Sys. v. Phoenix Int'l Software, Inc., 653 F.3d 448 (7th Cir. 2011) (referring to "principles of public international law"), p. 472.

[1451] See Kline v. Kaneko, 141 Misc. 2d 787, 535 N.Y.S.2d 303 (Sup. Ct. 1988) ("Under general principles of International Law, heads of state and immediate members of their families are immune from suit"), p. 788.

[1452] See United States v. Melekh, 190 F. Supp. 67 (S.D.N.Y. 1960), p. 88. See also, United States v. Enger, 472 F. Supp. 490 (D.N.J. 1978), p. 504.

[1453] See Ahmed v. Goldberg, No. CIV.A. 00-0005, 2001 WL 1842390 (D. N. Mar. I. May 11, 2001), (referring to "principles of public international law") p. 7 and Gisbert v. U.S. Atty. Gen., 988 F.2d 1437 (5th Cir. 1993) (referring to "principles of public international law"), p. 1448.

[1454] See Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981) ("We begin with the recognition that our task in determining the standard of compensation with respect to Chase's expropriation claims is to apply principles of international, not merely local, law"), pp. 887-888.

Third, and to complicate the matter even further, in some cases the confusion between GPs and CIL norms is not only terminological. Indeed, in certain decisions, US courts seem to have "redefined" the category of customary international law. Apparently, in those cases, the concept of CIL used by the courts is not completely identical to that of "international custom" contained in Art. 38(1)(a) SICJ. This is the only manner in which US courts' interpretation of "international custom" as a "source"[1455] or as a "means to proof"[1456] CIL can be understood. Furthermore, these cases also tend to indicate that GPs are among the "sources" of CIL. Therefore, for those decisions, the stringent requirements of "international custom" (i.e., state practice and opinio iuris) are usually extended to GPs. In other words, in some of those cases, although US courts have recognized that one or more normative propositions qualify as GPs, they have simultaneously tended to subordinate their application to the satisfaction of the requirements demanded for CIL norms[1457].

The assumption behind many of those judgments is that the reception of international law in the US is restricted to international agreements and CIL[1458]. Particularly, this understanding can be traced back to a strand of cases dealing with the Alien Tort Statute (henceforth, "ATS")[1459]. The ATS grants jurisdiction to US federal courts in

[1455] See Sairras v. Schleffer, No. 07-23295-CIV, 2009 WL 10708747 (S.D. Fla. Sept. 21, 2009) ("The sources of customary international law include international conventions, international custom, general principles of law recognized by civilized nations, and decisions and teachings of the most highly qualified legal scholars of the various nations"), p. 2 and Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 304-05 (S.D.N.Y. 2003) (citing Article 38 of the Statute of the International Court of Justice), p. 2. See also Doe I v. Nestle USA, Inc., 766 F.3d 1013 (9th Cir. 2014), p. 1019.

[1456] Flores v. Southern Peru Copper Corp., 414 F.3d 233 (2003) ("Article 38 embodies the understanding of States as to what sources offer competent proof of the content of customary international law. It establishes that the proper primary evidence consists only of those "conventions" (that is, treaties) that set forth "rules expressly recognized by the contesting states," id. at 1(a) (…), "international custom" insofar as it provides "evidence of a general practice accepted as law," id. at 1(b) (…), and "the general principles of law recognized by civilized nations, id. at 1(c) (…). It also establishes that acceptable secondary (or "subsidiary") sources summarizing customary international law include "judicial decisions," and the works of "the most highly qualified publicists," as that term would have been understood at the time of the Statute's drafting")", p. 251. See also, Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009), p. 175. Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377 (S.D.N.Y. 2009) ("Courts examine the following sources, listed in Article 38 of the Statute of the International Court of Justice ("ICJ Statute"), to determine the existence and substance of a CIL norm (…)"), p. 381. (Listing treaties, "international custom" and GPs). See also United States v. Hasan, 747 F. Supp. 2d 599 (E.D. Va. 2010), pp. 631-632 (quoting *Kiobel*).

[1457] See, for example, Flores v. Southern Peru Copper Corp., 414 F.3d 233 (2003), pp. 248-249.

[1458] See Id., p. 237 ("Plaintiffs claimed that defendant's conduct violates the "law of nations"—commonly referred to as "international law" or, when limited to non-treaty law, as "customary international law").

[1459] The ATS was included in the Judiciary Act of 1789 stating: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States". Quoted in Tyler Banks, *Corporate Liability under the Alien Tort Statute: The Second Circuit's Misstep Around General Principles of Law in Kiobel v. Royal Dutch Petroleum co.*, 26 Emory International Law Review 1 (2012).

cases where an alien plaintiff sues in tort for a violation of the "law of nations"[1460]. Crucially, the statute does not indicate the specific sources of international law that ought to be understood as forming part of that legal order. Nevertheless, the previously mentioned cases have tended to neglect GPs as an established source of international law. For example, in *Kiobel*[1461] the court discussed whether corporations could be held liable under the ATS. Nevertheless, in order to analyze the point, the court relied exclusively on treaties and CIL. Particularly, in what pertains to the latter, the court concluded that there are no customary rules imposing liability on corporations[1462]. Even so, it should be noted that the court did mention that corporate liability was recognized by domestic legal systems around the world[1463]. However, it failed to transpose said norms to the international level to ascertain the existence of the corresponding GPD[1464].

3.2.2. The Specific Application of General Principles by US Courts

Nevertheless, there are also instances in which US courts specifically distinguished between the two sources of unwritten international law when using expressions such as "general principles of law" and "principles of international law"[1465]. By the same token, there have also been instances where US courts have referred to particular GPs[1466] and others where US courts not only mentioned them, but also identified and applied

[1460] See Yihe Yang, *Corporate Civil Liability Under the Alien Tort Statute: The Practical Implications from Kiobel,* 40 Western State University Law Review 2 (2013).
[1461] See Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).
[1462] Id., p. 147.
[1463] See, Id., p. 141, footnote 43.
[1464] For a criticism of Kiobel and other ATS cases neglecting GPs see Banks, *Corporate Liability*… Op. Cit. See also, Brief of Amici Curiae of Comparative Law Scholars and Practitioners in Support of Petitioners, 2017 WL 2822777 and Doe v. Exxon Mobil Corp., 654 F.3d 11 (2011) ("Additionally, the Kiobel majority overlooked general principles of international law as a proper source for the content of international law"), p. 413.
[1465] See for example, E. Extension, Australasia & China Tel. Co. v. United States, 54 Ct. Cl. 108 (1919) ("This proposition must necessarily be largely based on general principles of international law, and upon the customs and usages of civilized nations as indicated in the works of jurists and commentators of recognized authority"), p. 111. Furthermore, in *Am. Int. Group*, the Court not only distinguished between CIL and GPs but also indicated that the latter also include normative propositions beyond those which can be found in domestic legal systems. Hence, according to the Court: "International custom reflects the practice of nations; general principles of law recognized by civilized nations are evidenced by the proclamations of nations individually and collectively (…)". Am. Int'l Grp., Inc. v. Islamic Republic of Iran, 493 F. Supp. 522 (D.D.C. 1980), p. 524. Therefore, US Courts' practice is not necessarily restricted to GPDs but also captures GPs originating in international legal relations. See footnote 1351 above.
[1466] In US v. Maine, the Supreme Court referred to a GP similar to that of the principle of "subsequent practice" which guides the interpretation of international treaties. In order to substantiate the principle, the Supreme Court quoted the separate opinion of Sir Gerald Fitzmaurice in the case of the Temple of Preah Vihear. See United States v. Maine, 475 U.S. 89, 106 S. Ct. 951, 89 L. Ed. 2d 68 (1986), footnote 18, p. 959. For a discussion of the principle see Yehuda Blum, *Historic Titles in International Law*. Nijhoff (1965), pp. 218-220.

them[1467]. Notably, in the cases where GPs have been applied, US courts have always used them in conjunction with a domestic statute or with a domestic principle.

The first relevant case in this regard is *U.S. v. Smith*[1468]. The statute applicable to the case directed the courts to look at the "law of nations" in order to define the "crime of piracy"[1469]. Therefore, in the case, the Supreme Court reviewed the writings of learned scholars on the matter. Notably, however, the Court did not exclusively quote the works of scholars in the fields of international and maritime law. It also referred to commentators who discussed the issue from the perspective of their own legal traditions (particularly, common and civil law)[1470]. Hence, the Court extracted the very definition of "piracy" from the normative propositions shared by nations belonging to different legal traditions and concluded that, according to the facts of the case, the conduct of the defendants fell under this scope[1471]. As can be noted, the court relied upon GPs (along with other sources of international law) in order to define "piracy".

In a second group of cases, courts have also used GPs to interpret domestic statutes that are silent on the issue of their applicability. This has been the case for US courts' interpretation of the "due process exception" contained in the variants of the Uniform Foreign Money-Judgments Recognition Act (henceforth, "UFR")[1472]. According to this exception, a foreign judgment cannot be recognized in the US if it was rendered under a judicial system which lacks "procedures compatible with the requirements of due process of law"[1473]. As previously indicated, US courts have tended to substantiate the concept of "due process" by taking recourse to GPs. For example, in its decision in *Ashenden*, Judge Posner stressed that the concept of "due process" was to be interpreted "to refer to a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers"[1474]. Similar statements can also be found in subsequent cases[1475].

Last but not least, US courts have also relied on GPs to decide cases brought before them, and not only to interpret relevant domestic statutes. In *City v. Bancec*[1476], a Cuban

---

[1467] These cases have been also discussed in the prior literature. See, for example, Kotuby, *General Principles…* Op. Cit.; Kotuby and Sobota, *General Principles…* Op. Cit and Schrader, *Custom…* Op. Cit.

[1468] United States v. Smith, 18 U.S. 153, 5 L. Ed. 57 (1820).

[1469] Id. p. 154.

[1470] Id. pp. 163-164.

[1471] Id. footnote (h), p. 163.

[1472] The Uniform Foreign-Country Money Judgments Recognition Act was drafted by the Uniform Law Commission in 1962 and revised in 2005. See Kotuby and Sobota, *General…* Op. Cit., pp. 81-82.

[1473] See Section 4,(b)(1), Uniform Foreign-Country Money Judgments Recognition Act (2005), available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=deaece0b-b7e6-1ddf-89bf-c36338d10bce [last accessed 15.7.2020].

[1474] Soc'y of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000), pp. 476-477.

[1475] See, for example, Osorio v. Dole Food Co., 665 F.Supp.2d 1307 (2009), pp. 1326-1327.

[1476] First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983), p. 2592.

government instrumentality ("Banco para el Comercio Exterior de Cuba", henceforth, "Bancec") brought suit in the US against First National City Bank (henceforth, "City") for collection on a letter of credit issued by the latter in favor of the former. City, asserting a right to setoff, counterclaimed for the value of its assets located in Cuba, which had been expropriated by the Cuban government. In the case, the Supreme Court discussed whether City could obtain the setoff regardless of the status of Bancec as a legal entity distinct and separate from the Cuban government.

In order to answer that question, the Court declined to apply the law of the place where Bancec was incorporated (Cuba). Stressing that the law of the charting State only applies to the "internal affairs" of the corporation, the Court discussed the "proper law" when the rights of third parties were at stake[1477]. In particular, after referring to *Paquete Habana*, the Court decided to apply "principles (…) common to both international law and federal common law"[1478]. From the decision, it is possible to extract two reasons justifying the application of GPs in the case: (a) that the application of GPs prevented an unfair result[1479] and (b) that the content of US law and that of GPs pointed in the same direction[1480].

Specifically, in what pertains to liability, the Court emphasized that under US law, the relationship between parent and subsidiary corporations is similar to that of government instrumentalities and their sovereigns[1481]. Furthermore, the Court indicated that both of them (namely, subsidiary corporations and government instrumentalities) are considered to be juridically distinct from their "owners" (namely, parent corporations and governments) with regard to their assets and liabilities and are thus granted with "a presumption of independent status"[1482]. Nevertheless, the Court stated that the aforementioned presumption could be rebutted under qualified circumstances. Besides US case-law, the US Supreme Court also cited the *Barcelona Traction* case[1483], which in turn identified the principle of "separate personality" (under domestic and international law) and its exceptions[1484].

Additionally, the Court indicated that the presumption of separate status between parent and subsidiary corporations could be rebutted: (a) when the entity is "extensively

[1477] Id. p. 2597.
[1478] Id. p. 2598.
[1479] "To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result". Id. (pp. 2597-2598).
[1480] Id. p. 2600.
[1481] "Thus, what the Court stated with respect to private corporations (…) is true also for governmental corporations (…)". Id. p. 2599.
[1482] Id. p. 2600.
[1483] Id, footnote 20.
[1484] Case Concerning The Barcelona Traction, Light and Power Company Ltd (Belg. v Spain), Second Phase, Judgment (1970) I.C.J. Report, pp. 38-39. It is important to mention that in the *Barcelona Traction*, the ICJ also identified the conditions under which the corporate veil could be pierced.

controlled" by its owner[1485], (b) when the application of the doctrine "would work fraud or injustice"[1486], and (c) when it would be "used to defeat an overriding public policy"[1487]. According to the Supreme Court, the circumstances of the case merited the application of the exception to the principle of separate status.

In the opinion of the Court, giving effect to the separate status of Bancec and Cuba in the case would have: (i) prevented the aggrieved party from obtaining satisfaction (since in that event it could only have asserted its claims against the Cuban government and not against Bancec) and (ii) allowed the Cuban government to recover the funds through one of its instrumentalities[1488]. For those reasons, the Court decided that City could "set off the value of its assets seized by the Cuban government against the amount sought by Bancec"[1489]. All in all, according to the Court, its decision in the case was

> *"(…) the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law"*[1490].

Finally, the most important part of the *Bancec* decision for the purposes of this *Chapter* relates to the conditions under which a government instrumentality could be held liable for the actions of its sovereign. As stated before, the Supreme Court applied by analogy the causes for "piercing the corporate veil" of private corporations to the specific relationship between a state and its instrumentalities[1491]. Therefore, the *Bancec* decision is the most complete application of a GPD by US Courts thus far: It defined the principle, it briefly referred to its recognition in domestic legal systems (by quoting the *Barcelona Traction case*), it analyzed its rationale and it extrapolated it (by analogy) to the international sphere.

3.2.2.1. Evaluation of US Court's Engagement with General Principles

As all of the above demonstrates, unlike with CIL, there are no cases explicitly indicating that GPs "are part" of US law. Despite that circumstance, and as can be noted, US courts have identified and recurred to GPs even without the authorization of

---

[1485] First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983), p. 2600.
[1486] Id. p. 2601.
[1487] Id. p. 2602.
[1488] "Giving effect to Bancec's separate juridical status in these circumstances, even though it has long been dissolved, would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank's assets —a seizure previously held by the Court of Appeals to have violated international law. We decline to adhere blindly to the corporate form where doing so would cause such an injustice". Id., p. 2603. "Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities. To hold otherwise would permit governments to avoid the requirements of international law simply by creating juridical entities whenever the need arises". Id.
[1489] Id.
[1490] Id.
[1491] Id. p. 2602.

domestic statutes. Additionally, in those cases, US courts have applied GPs in conjunction with domestic law, either as an aid to the interpretation of domestic statutes[1492] or as a means of endorsing US federal principles. Consequently, from the perspective of the US legal system, GPs seem to play an important yet subsidiary role when applied to domestic disputes with international underpinnings[1493].

It is important to note that US courts' engagement with GPs is not radically different from their engagement with treaties and customary international law. Indeed, although scholars have emphasized that one of the most important doctrines of US foreign relations law (the "Charming Betsy" doctrine) only covers treaties and CIL, similar elements of the doctrine can also be traced back to the application of GPDs by US courts.

The "Charming Betsy" is a canon of statutory construction dating back to the early years of American jurisprudence[1494]. The uniform case-law in this period led to its consolidation in the decision on the eponymous case[1495]. By means of this canon, US courts are directed to interpret domestic statutes in consonance with international legal norms where there is not a direct conflict between the two[1496]. Consequently, "where legislation is susceptible to multiple interpretations, the interpretation that does not

[1492] This "auxiliary" function of GPs under US law is also emphasized by Megliani. In his own words: GPs, "(…) may be used to interpret and supplement the governing law (in the case, New York law as the governing law of the loan agreement)". Megliani, *Vultures in Court*… Op. Cit., p. 857. Nevertheless, Megliani substantiates this statement in a footnote pointing out that this is the role assigned to the UNIDROIT principles and not by discussing the specific role of GPs in the US legal system. Id, p. 857 footnote 60.

[1493] As the Restatement (third) puts it: "General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreements, may be invoked as supplementary rules of international law where appropriate". Restatement (third), para 102 (4).

[1494] See William Dodge, *The Charming Betsy and The Paquete Habana (1804 and 1900)* (2016). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2738241 [last accessed 28.8.2020], p. 23.

[1495] Murray v. Schooner Charming Betsy, The, 6 U.S. 64, 2 L. Ed. 208 (1804).

[1496] See Hughes, *The Charming*… Op. Cit., p. 15. In the words of Dubinsky, the Charming Betsy principle "(…) instructs them [US courts] to construe US statutes and international law as consistent with one another". Dubkinsky, *The United States*… Op. Cit., p. 638. The canon tends to be identified as "one of the judiciary's best tools to defend American compliance with international law (…)". Hughes, *The Charming*… Op. Cit., pp. 2-3. In the case where a statute and a rule of international law are in direct conflict, "the later-in-time rule determine which applies". Id., p. 638. See also Shaw, *International Law*… Op. Cit., p. 147. See also, United States v. Georgescu, 723 F. Supp. 912 (E.D.N.Y. 1989): "(…) in the event of irreconcilable conflict [with international norms], the courts are bound to apply domestic law if it was passed more recently", p. 921); United States v. Weingarten, 632 F.3d 60 (2d Cir. 2011); United States v. Ahmed, 94 F. Supp. 3d 394 (E.D.N.Y. 2015); United States v. Pendleton, No. CRIM.08-111-GMS, 2009 WL 330965 (D. Del. Feb. 11, 2009). According to the Restatement, "when there is a conflict between a self-executing treaty provision and a federal statute, courts in the United States will apply whichever reflects the latest expression of the will of the U.S. political branches". Restatement Fourth, para 309 (2).

conflict with 'the law of nations' is preferred"[1497]. The authority of the canon is well-settled and "the Supreme Court has never wavered in its adherence" to it[1498].

Of note, per the Charming Betsy canon, the domestic legal norms to be "reconciled" with international ones are those which are deemed "ambiguous"[1499] or which emerge from statutes using "general words"[1500]. In some cases, nevertheless, the ambiguity of the statute in question has not been required[1501]. Furthermore, there is explicit authority on the issue that the international obligations to be reconciled with domestic norms correspond to international treaties (both self-executing and non-self-executing[1502]) and to customary international law[1503]. Since the *rationale* of the doctrine is to prevent a collision between the international obligations of the US and its domestic law, it is not far-fetched to extend the doctrine to also cover GPs. This is precisely the trend that emerges from the previous revision of US courts engagement with this "unwritten source" of international law.

Consequently, as can be noted, although US courts have not explicitly applied the Charming Betsy doctrine to GPs, they have used this source of international law to interpret domestic statutes and to substantiate a decision based on domestic legal principles.

Finally, it is also important to mention that GPs have also been discussed, although not in much depth, in sovereign debt litigation, as it will be discussed in the next subsection.

3.2.3. General Principles in Sovereign Debt Litigation

There are few sovereign debt cases where GPs have been mentioned. However, even in those cases, courts have neither discussed the GPs invoked in detail nor have they clarified the status and the relationship between GPs and US law. For example, in *National Union*[1504], the plaintiff requested the recognition of an award obtained against the People's Republic of the Congo which was rendered by a British court. In the case, the Congo opposed the recognition of the judgment based, among other reasons, on the idea that it "would be contrary to principles of equity and international law"[1505]. Nevertheless, the United States District Court for the Southern District of New York disagreed and, without paying any attention to principles of international law in its reasoning, decided to recognize the award.

[1497] United States v. Yousef, 327 F.3d 56 (2d Cir. 2003), p .92.
[1498] Hughes, *The Charming*… Op. Cit., p. 7.
[1499] See Oliva v. U.S. Dep't of Justice, 433 F.3d 229 (2d Cir. 2005), p. 235 and United States v. Ahmed, 94 F. Supp. 3d 394 (E.D.N.Y. 2015) p. 427.
[1500] See United States v. Yousef, 327 F.3d 56 (2d Cir. 2003), p .92 (quoting Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 128 (2d Cir.2001).
[1501] See Restatement, Fourth; para 309 Reporter's Notes (1).
[1502] Crawford, *Brownlie's*… Op. Cit., p. 80.
[1503] Hughes, *The Charming*… Op. Cit., p. 11.
[1504] Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. People's Republic of the Congo, 729 F. Supp. 936 (S.D.N.Y. 1989).
[1505] Id., p. 941.

Similarly, in two cases arising from the Argentinian crisis of 2001, the court did not discuss in detail the GP invoked by the defendants. Indeed, in *Applestein*[1506] and in *Lightwater*[1507], the Province of Buenos Aires and the Argentinian Government opposed creditors' motions for summary judgements by invoking the international principle of abuse of rights (a GP)[1508]. In those cases, the court addressed this defense as follows:

> [The defendant] *"(…) asserts that there is a principle of international law* [the principle of abuse of rights] *which would bar plaintiffs from suing on their bonds at a time when the issuer (…) is having a severe economic crisis. The Court finds no merit in this argument as applied in the present case. No extended discussion is necessary"*[1509].

Importantly enough, and as can be noted, the court did not exclude GPs from sovereign debt disputes altogether. On the contrary, it limited its decisions to the rejection of the application of one particular GP (namely, "abuse of rights", henceforth "AoR") to those specific cases. Furthermore, although the court did not clarify why that defense was dismissed, it can be argued that these decisions are aligned with the previous case-law on GPs, "Champerty"[1510] and sovereign defaults.

As was stated before, in the few instances in which US courts have applied GPs, they have done so in conjunction with domestic law. Therefore, from the perspective of the US legal system, the main function of GPs is to serve as an element that aids in the interpretation of domestic statutes or helps to supplement domestic legal principles. Precisely for those reasons, the court was correct in denying the application of the abuse of rights doctrine in the *Applestein* and *Lightwater* cases, as will be argued below.

3.2.3.1. The General Principle of Abuse of Rights in *Applestein* and *Lightwater*

First, it is important to mention that the doctrine of AoR is the "negative corollary" of the principle of good faith[1511]. Although the nature of the doctrine from the perspective

---

[1506] Allan Applestein Ttee FBO D.C.A. Grantor Tr. v. Province of Buenos Aires, No. 02 CIV. 1773 (TPG), 2003 WL 1990206 (S.D.N.Y. Apr. 29, 2003).

[1507] Lightwater Corp. v. Republic of Argentina, No. 02 CIV. 3804 (TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003).

[1508] The principle of abuse of rights has been explicitly incorporated in soft-law instruments such as the UNCTAD Principles (principle 7). For a discussion of the principle in the international investment context see Antonis Bredimas, Anastasios Gourgourinis and Georges Pavlidis, The Legal Contours of Sovereign Debt Restructuring under the UNTAD Principles: Antagonism and Convergence between Standards of Domestic Insolvency Law and International Investment Protection Law in Carlos Espósito et al. (Eds.), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013), pp. 148-149.

[1509] Allan Applestein Ttee FBO D.C.A. Grantor Tr. v. Province of Buenos Aires, No. 02 CIV. 1773 (TPG), 2003 WL 1990206 (S.D.N.Y. Apr. 29, 2003), p. 4. Lightwater Corp. v. Republic of Argentina, No. 02 CIV. 3804 (TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003), p. 5.

[1510] Champerty is "an ancient rule of common law that prohibits instrumental recourse to justice" considering "a range of behaviours involving the exploitation of legal action". Megliani, *Sovereign Debt…* Op. Cit., pp. 510-511.

[1511] In the words of Kotuby and Sobota: "The negative corollary of the good faith exercise of a legal entitlement is the universal prohibition on abuse of rights. This principle relates not to how

of the sources of international law has been debated in the past[1512], the most recent literature seems to agree that it can be correctly classified as a GP[1513]. As a substantive defense, AoR can be raised against lawsuits filed by plaintiffs with "unlawful intentions"[1514] or against lawsuits that are the product of the "abuse of a party's discretion"[1515]. Therefore, from the perspective of US law (and more specifically, of NY law), the doctrine of abuse of rights is particularly close to that of Champerty. At the same time, it is closely connected to the policies of the forum with regard to the rights of bondholders to enforce their claims and to participate, voluntarily, in sovereign debt workouts.

On the one hand, the decisions in *Applestein* and *Lightwater* were consistent with the previous case-law on the Champerty doctrine. This doctrine "(…) prohibits instrumental recourse to the courts of justice" such as "(…) the acquisition of a debt obligation with the sole purpose of initiating a lawsuit"[1516]. In particular, in NY, Champerty is regulated by Section 489 of the Judiciary Law of that State. The aforementioned provision prohibits the purchase of bonds and other instruments "with the intent and for the purpose of bringing an action or proceeding thereon (…)" provided that the amounts involved do not exceed five hundred thousand dollars[1517].

As can be noted, Section 489 specifies one of the aspects of the AoR doctrine. In effect, it prohibits the acquisition of debt instruments by agents in certain circumstances. Thus, the abstract requirement of the AoR doctrine (i.e., "unlawful intentions") is concretized: Champerty prohibits the acquisition of those instruments when it is done with the sole purpose of bringing suit against the debtor. For this reason, in most of the cases decided before *Applestein* and *Lightwater*, the defense was dismissed because the courts determined that bringing suit was only one of the motivations behind the purchase of the bonds (the other being that the debtor satisfy plaintiffs' claims)[1518].

---

rights are obtained (viz., by law or contract), but to how they are exercised". Kotuby and Sobota, *General…* Op. Cit., p. 107. According to Goldmann, the doctrine of abuse of rights is a "concretization" of the principle of good faith. Goldmann, *Putting…* Op. Cit., pp. 125-126.

[1512] Michael Byers, *Abuse of Rights: An Old Principle, a New Age*, 47 McGill Law Journal / Revue de Droit de McGill (2002), p. 389 and 397.

[1513] See Patrick Dumberry, *The Emergence of the Concept of 'General Principle of International Law' in Investment Arbitration Case Law*, Journal of International Dispute Settlement (2020), pp. 18-19. Additionally, commentators usually note that the doctrine was specifically mentioned as being a GP at the time where the SICJ was being drafted. See Kotuby Sobota, *General…* Op. Cit., p. 108.

[1514] See Megliani, *Sovereign…* Op. Cit., p. 448. See also Goldmann, *Putting…* Op. Cit., p. 126. In the words of Megliani, "however, to file a lawsuit is an action so permeated with discretionality that under international law it could be characterized as an abuse of rights solely when an 'unlawful intention or design can be established". Megliani, *Sovereign…* Op. Cit., p. 448.

[1515] Goldmann, *Putting…* Op. Cit., p. 126.

[1516] Megliani, *Sovereign…* Op. Cit., pp. 510-511.

[1517] Judiciary Law of the State of New York Section 489, available at https://www.nysenate.gov/legislation/laws/JUD/489 [last accessed 16.7.2020].

[1518] See Elliott Assocs., L.P. v. Republic of Panama, 975 F. Supp. 332 (S.D.N.Y. 1997) ("To the contrary, clearly there were possibilities other than litigation when Elliott purchased the loans: (i) Elliott could have retraded the loans on the market; (ii) Panama could have re-paid the loans

On the other hand, the decisions in *Applestein* and *Lightwater* that deny the application of the AoR doctrine were also aligned with the previous case-law pertaining to holdout litigation. Those decisions were particularly consistent with the policy of the forum with regard to creditors' participation in sovereign debt restructurings and, more importantly, with the contractual terms of the bonds in question.

In effect, since the decision in *Allied*[1519], US courts have frequently underscored the voluntary nature of creditors' participation in sovereign debt workouts[1520] and have

in full; and (iii) Elliott and Panama could have agreed on a discount that would still have permitted Elliott to turn a profit. The fact that Elliott was prepared to file suit if none of these possibilities materialized did not render the assignments champertous"), pp. 340-341. See also Elliott Assocs., L.P. v. Banco de la Nacion, 194 F.3d 363 (2d Cir. 1999) "(any intent on Elliott's part to bringing suit against the Debtors was "incidental and contingent" (…). It was "incidental" because, as the district court acknowledges, Elliott's "primary goal" in purchasing the debt was to be paid in full. That Elliot had to bring suit to achieve that "primary goal" was therefore "incidental" to its achievement. Elliott's suit was also "contingent" because, had the Debtors agreed to Elliott's request for the money that the district court found Elliott was owed under the Letter Agreements and the Guaranty, then there would have been no lawsuit. Elliott's intent to file suit was therefore contingent on the Debtors' refusal of that demand")", p. 379. See also Turkmani v. Republic of Bolivia, 193 F. Supp. 2d 165 (D.D.C. 2002) ("In sum, the court cannot conclude on this record that the plaintiff acquired the bonds for consideration only to engage in litigation"), p. 180. Subsequent cases were decided accordingly. See, for example, EM Ltd. v. Argentina, No. 03 CIV.2507 TPG, 2003 WL 22120745 (S.D.N.Y. Sept. 12, 2003) ("Where a bond is purchased with the intent to collect on that bond, the statute is not violated even though there is also an intention to collect by a lawsuit if necessary"), p. 3.

[1519] Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985). The *Allied* Court summarized the policy of the US towards debt restructurings as follows: "The entire strategy is grounded in the understanding that, while parties may agree to renegotiate conditions of payment, the underlying obligations to pay nevertheless remain valid and enforceable". p. 519.

[1520] See A.I. Credit Corp. v. Gov't of Jamaica, 666 F. Supp. 629 (S.D.N.Y. 1987), p. 630. See Elliott Assocs., L.P. v. Banco de la Nacion, 194 F.3d 363 (2d Cir. 1999), pp. 379-381., Turkmani v. Republic of Bolivia, 193 F. Supp. 2d 165 (D.D.C. 2002) "(…) a creditor-plaintiff has the right to withdraw from settlements or participation in voluntary debt restructuring", p. 189. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. People's Republic of the Congo, 729 F. Supp. 936 (S.D.N.Y. 1989): "Participation in international debt rescheduling agreements is voluntary; foreign governments may not unilaterally impose international debt restructuring agreements on unwilling private creditors", p. 944. Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850 (2d Cir. 1997): "First, the United States encourages participation in, and advocates the success of, IMF foreign debt resolution procedures under the Brady Plan (…). Second, the United States has a strong interest in ensuring the enforceability of valid debts under the principles of contract law, and in particular, the continuing enforceability of foreign debts owed to United States lenders (…). This second interest limits the first so that, although the United States advocates negotiations to effect debt reduction and continued lending to defaulting foreign sovereigns, it maintains that creditor participation in such negotiations should be on a strictly voluntary basis. It also requires that debts remain enforceable throughout the negotiations", p. 855. Elliott Assocs., L.P. v. Banco de la Nacion, 194 F.3d 363 (2d Cir. 1999), pp. 380-381. "But plaintiffs were completely within their rights to reject the (…) exchange offers". NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012), p. 263, footnote 15.

featured an almost invariable respect for the "sanctity of contract"[1521]. This is true even in the cases in which the debtor is "having a severe economic crisis". Therefore, US courts will abide by the provisions of sovereign bonds even under those circumstances: if the contracts provide for creditors' discretion as pertains to debt renegotiation and debt enforcement, they will respect the exercise of that discretion.

Consequently, if the instruments to be restructured lack Collective Action Clauses (henceforth, "CACs"), asserting that a creditor has abused its discretion is particularly difficult. As discussed in *Chapter Four*, CACs are contractual provisions intended to coordinate creditors' activities with regard to debt renegotiation and debt enforcement[1522]. Bonds without CACs tend to concentrate enforcement on individual creditors and, at the same time, usually require the unanimous consent of their holders for their modification. Thus, individual creditors holding bonds without CACs are not legally required to participate in debt renegotiations. Neither are they bound by the terms of a renegotiation approved by other creditors, regardless of the number of creditors agreeing to it. Additionally, they are not compelled to forbear debtors' breaches of contracts. Since – invariably – bonds lack provisions addressing economic crises, these rights can be exercised even when debtors' finances are unsound[1523]. In short, as Gathii puts it, in the case of sovereign bonds without CACs, holding out is seen

> *"*(…) *as a legitimate exercise of creditors' contractual rights rather than viewing the practice as destabilizing the cooperative adjustment of sovereign debt through restructuring"*[1524].

The aforementioned considerations carry over to the *Applestein* and *Lightwater* cases, as well. The bonds in that context, lacked CACs[1525]. Consequently, rather than exercising their discretion for unlawful purposes (the standard necessary for configuring an AoR), litigating creditors were simply exercising their most elemental right: demanding repayment. This conclusion holds even if the economic crisis faced by the debtors was to be taken into account, since the contracts lacked any contractual stipulation contemplating that possibility as an exception to performance.

[1521] See generally James Gathii, *The Sanctity of Sovereign Loan Contracts and Its Origins in Enforcement Litigation*, 38 George Washington International Law Review 251 (2006).
[1522] See *Chapter Four*, pp. 187 et seq.
[1523] "(…) where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused". 407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 244 N.E.2d 37, 41 (N.Y. 1968), p. 281.
[1524] Gathii, *The Sanctity…* Op. Cit., p. 269.
[1525] All of those instruments lacked provisions for coordinating the renegotiation of the liabilities in question. Nevertheless, some of the instruments required the approval of a 25% of bondholders for accelerating the total amount of the debt owed. At the same time, all of them permitted individual enforcement in what pertains to missed payments. The ISIN codes of the instruments in question are the following: US11942XAP06, US040114FC91, US040114FB19 and US040114AV28.

3.2.4. Interim Conclusions: General Principles in Sovereign Debt Litigation Before US Courts

According to the foregoing, although the invocation of the AoR principle failed in the *Applestein* and *Lightwater* cases, several preliminary conclusions can be put forward.

First, the decisions rendered in those cases do not exclude the application of GPs in sovereign debt litigation *in general*. Indeed, the court simply found "no merit" for accepting the AoR defense in those particular instances. Consequently, that defense could be invoked in other cases surrounded by different circumstances (for example, where the bonds at stake feature CACs).

Secondly, the opinions in *Applestein* and *Lightwater* were consistent with the previous case-law on GPs: In the US legal system, the accepted role of GPs is to aid in the interpretation of domestic laws and principles. In other words, GPs cannot replace existing statutes or precedents, and are limited to complement them. For those reasons, these decisions suggest that the possibility of the application of GPs to sovereign debt litigation needs to be assessed in particular: both as pertains to the specific merits of the case and as pertains to the specific principle being invoked. Hence, in the next subsections, I discuss whether the two GPDs previously identified in this *Thesis* (namely, the "stay" and the "cram down") can be invoked successfully before NY courts. As stated before, I decided to focus on New York law and New York courts because an important part of bonds issued by emerging market borrowers are governed by the laws and subjected to the jurisdiction of the courts of that state.

3.3. Applying the "Stay" and the "Cram down" in Disputes Before US Courts

In the previous *Chapters*, I concluded that two normative propositions widely incorporated in domestic corporate reorganization regimes can be considered as GPDs. First, I showed that levying a stay on creditors' actions while a restructuring is being negotiated (henceforth, a "stay") constitutes a GPD, even if an indebted state lacks attachable assets in foreign jurisdictions. Second, I demonstrated that binding dissenting creditors to a restructuring proposal agreed upon by a supermajority of bondholders (henceforth, a "cram down") can also be considered a GPD, even when the instruments at stake lack third-generation modification CACs.

Nevertheless, although both the "stay" and the "cram down" can be considered GPs, their application to disputes arising from sovereign bonds governed by NY, and thus, US law, depends on the role which GPs play in that legal system in general. As discussed previously, the main function of GPs under US law is to serve as a "complement" rather than as a "substitute" to domestic law (including domestic legal principles and precedents). Hence, the feasibility of applying both of those specific GPs is contingent upon whether they can be considered compatible or contrary to the domestic law of the US (and of NY). Therefore, as stated above, both GPDs need to be discussed separately. I begin by considering the feasibility of invoking the "stay" (subsection 3.3.1) and then move one to discussing that of the "cram down" (subsection 3.3.2).

3.3.1. Applying the "Stay" in Sovereign Debt Litigation Before the Courts of New York

In order to analyze the feasibility of the application of the "stay" (as a GPD) in sovereign debt litigation before NY courts, I begin by examining the relevant statute (subsection 3.3.1.1.). Next, I consider the pertinent case-law (subsection 3.3.1.2.). Finally, I discuss how a "stay" grounded in GPDs could be justified before NY courts (subsection 3.3.1.3.).

3.3.1.1. The "Stay" under NY Law

As stated above, I begin by discussing the law whose interpretation could be aided by the "stay" as a GPD. Under US law, a "stay" is a ruling or a direction by a court suspending, halting, or "freezing" a legal action or proceeding before it[1526]. Consequently, it precludes (temporarily) the exercise of parties' rights to prosecute or defend[1527]. There are several types of "stays"[1528]. This discussion is circumscribed to the "stay" as codified by section 2201 of the Civil Practice Law and Rules of the State of New York (henceforth, "CPLR")[1529]. This section provides:

> *"Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just"*[1530].

Section 2201 encompasses a "catch-all" or "general provision" by the means of which a court is explicitly authorized to halt a proceeding where it is appropriate[1531]. For this reason, scholars usually note that this section merely codifies the courts' discretionary powers on the matter[1532]. The order staying proceedings can be either "partial" or "complete" and conditioned to the fulfillment of certain requirements[1533]. Furthermore,

---

[1526] See Francis Carmody et al., *Encyclopedia of* New *York Practice with Forms*. West Group (2019), p. 6 and McKinney's Consolidated Law of New York Annotated. West (2019), p. 8.

[1527] See Practical Law Practice Note w-003-5047, *Stayin Actions in New Your State Court*. Westlaw (2020), p. 2

[1528] For a discussion of the types of "stays" contemplated in US legislation see McKinney's, *Consolidated*… Op. Cit.

[1529] "(…) the CPLR is applicable to all New York State courts exercising civil jurisdiction". McKinney's *Consolidated*… Op. Cit., p. 8.

[1530] Civil Practice Law and Rules of the State of New York, Section 2201. Available at: https://www.nysenate.gov/legislation/laws/CVP/2201 [last accessed 24.7.2020].

[1531] McKinney's *Consolidated*… Op. Cit., p. 1.

[1532] Id, p. 11. (…) a motion for a stay is addressed to the discretion of the court". Legal Information Institute, "Stay of Proceedings" available at https://www.law.cornell.edu/wex/stay_of_proceedings [last accessed 19.12.2021]. See also Carmody et al., *Encyclopedia*… Op. Cit., p.12 and p. 67. Hence, "stays" are usually considered to be among the powers of Courts to "control the order of" their business. Id., p. 7. See also, Practical Law Practice, *Staying*… Op. Cit. p. 3. For this reason, "while a court's determination is reviewable by the Appellate Division, it will not be disturbed except in case of an abuse of discretion". Carmody, et al., *Encyclopedia*… Op. Cit., p. 12.

[1533] See Practical Law Practice, *Staying*… Op. Cit., p. 2. "Thus, the grant of a stay may be conditioned upon the requesting parties' guaranty of the payment to the plaintiff of all damages which may be awarded in the action". Carmody et al., *Encyclopedia*… Op. Cit., p. 139. See also McKinney's, *Consolidated*… Op. Cit., p. 18.

it can be applied to an action (before the entry of judgment) or to the enforcement of a judgment previously rendered[1534].

It is important to mention that NY courts are generally reluctant to grant "stays"[1535]. Although "the factual circumstances that support the granting of a stay are many (…)"[1536], courts usually proceed with caution in this regard. In particular, when deciding a motion for a "stay", adjudicators will consider the benefits and costs that this measure would impose on the parties to the case, on the court, and on third parties[1537]. Hence, NY courts consider five factors:

> *"(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest"*[1538].

Finally, it is also important to mention that the "stay" can be vacated at any time. Thus, if the "stay" is no longer serving the purpose for which it was granted, the court can set aside the order imposing it and resume the continuation of the proceeding[1539].

3.3.1.2. Relevant Cases Regarding the "Stay" in Sovereign Debt Litigation

The "stay" (imposed either on a proceeding before the entry of judgment or on the enforcement of a judgment previously entered) can be justified exclusively under US domestic law or under a combination thereof with international law (the "mixed fuel"). The pertinent cases are discussed in this subsection.

[1534] Practical Law Practice, *Staying*… Op. Cit., pp. 3-4. See also McKinney's, *Consolidated*… Op. Cit., pp. 12-13.
[1535] Practical Law Practice, *Staying*… Op. Cit., p. 2.
[1536] Carmody et al., *Encyclopedia*… Op. Cit. p. 20.
[1537] Id., p. 21. A "motion to stay has the best chance for success if its purpose is to: Protect a party's rights in the litigation; promote the court's interest in an orderly and quick disposition of actions, preserve judicial resources and prevent an inequitable or inconsistent result". Practical Law Practice, *Staying*… Op. Cit., p. 2. Furthermore, besides demanding an "articulate necessity" for granting a stay, courts also require that the equities at stake are "compelling". Carmody et al, *Encyclopedia*… Op. Cit., p. 12 and 15.
[1538] Jiminez v. Credit One Bank, N.A., 377 F. Supp. 3d 324 (S.D.N.Y. 2019), p. 336. See also, Reynolds v. Time Warner Cable, Inc., 2017 WL 362025, (W.D.N.Y. Jan. 25, 2017); Fairbank Reconstruction Corp. v. Greater Omaha Packing Co., 2014 WL 693001, (W.D.N.Y. 2014) and Acton v. Intellectual Capital Mgmt., Inc., 2015 WL 9462110, (E.D.N.Y. 2015).
[1539] Carmody et al., *Encyclopedia*… Op. Cit, p. 165-166. *Consolidated*… Op. Cit., p. 19.

3.3.1.2.1. "Stays" Based Exclusively on Domestic Law Considerations

There are several cases discussing the issuance of a "stay" of proceedings based exclusively on US and NY (domestic) law[1540]. From the universe of cases in this regard, it is possible to mention those arising from the Peruvian and Argentinian debt crises[1541].

3.3.1.2.1.1. Cases Against Peru

One important group of decisions are those concerning the Peruvian debt crisis which started in the 1980s. In the *Pravin* cases, a Bank (Pravin Banker Associates) sued the Republic of Peru and Banco Popular (a bank owned by the Republic). Pravin had acquired interest in a debt (already in default) issued by Banco Popular and guaranteed by Peru. While the liquidation process of Banco Popular was ongoing[1542], and the majority of creditors agreed to participate in it, Pravin declined participation and demanded to be paid in full[1543]. Notably, the debt instruments in question (a Letter Agreement guaranteed by the Peruvian Government) lacked any clause intended to coordinate renegotiation and enforcement. Banco Popular, in turn, requested a "stay" on the proceedings (before the entry of judgment) on several occasions.

In the first *Pravin* decision[1544], the court applied the doctrine of comity[1545]. According to the court, Banco Popular's bankruptcy proceedings were orderly, fair and not detrimental to the interests of the US[1546]. In particular, the court noted that granting a "stay" in favor of the defendant while the debt-restructuring was ongoing did not abrogate plaintiff's "ability to enforce its contract rights in the future"[1547]. The court also stressed that the restructuring of the liabilities of Banco Popular was being conducted following the dictates of the IMF. Thus, the court noted that it was also in compliance with the mandates of US policy[1548]. For those reasons, the court decided to grant "a temporary delay" in the case for six months[1549].

[1540] The cases discussing the imposition of a "stay" pending appeal in sovereign debt litigation are not discussed since they are beyond the scope of this *Chapter*. See, for example, Connecticut Bank of Commerce v. Republic of Congo, 299 F.3d 378 (5th Cir. 2002), L'Europeenne de Banque v. La Republica de Venezuela, 700 F. Supp.114 (S.D.N.Y. 1988); LNC Investments, Inc. v. Republic of Nicaragua, 115 F. Supp. 2d 358 (S.D.N.Y. 2000), Walker Int'l Holdings Ltd. v. Republic of Congo, 395 F.3d 229 (5th Cir. 2004) and Plenum Fin. & Investments Ltd. v. Bank of Zambia, No. 95 CV 8350(KMW), 1995 WL 600818 (S.D.N.Y. Oct. 11, 1995).

[1541] These cases are also discussed in Megliani, *Vultures*… Op. Cit., p. 854. See also Goldmann's works previously cited.

[1542] The liquidation proceedings of Banco Popular were endorsed by the IMF.

[1543] See Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, 165 B.R. 379 (S.D.N.Y. 1994), p. 383-384.

[1544] Id.

[1545] For a criticism of the application of the comity doctrine in the *Pravin* cases see generally Wheeler and Attaran, *Declawing*… Op. Cit., pp. 268 et seq.

[1546] Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, 165 B.R. 379 (S.D.N.Y. 1994), pp. 384-388.

[1547] Id. p. 387.

[1548] Id.

[1549] Id. p. 389.

More than a year later, after indicating that the same reasoning applied, the court extended the stay for an additional 60 days[1550]. In particular, the court requested the parties to submit information pertaining to specific facts related to the liquidation of Banco Popular.

Those facts were discussed in a subsequent decision[1551], where Pravin renewed its motion for summary judgment and Banco Popular its cross-motion for a "stay". There, in order to evaluate the arguments of the parties, the court returned to comity considerations. In that context, the court emphasized that the policy of the US towards debt restructurings remained unchanged, even after the implementation of the "Brady Plan"[1552] in the late 80's: Although the US encourages private creditors' involvement in sovereign debt workouts, their participation is strictly voluntary; and, at the same time, contracts should be enforced as written[1553]. Additionally, the court noted that Pravin had declined to participate in Banco Popular's restructuring and thus lacked any instances to influence the negotiations[1554]. Furthermore, it also stressed that the proceedings were effectively suspended (to that point) for almost eighteen months[1555], a period during which Peru started to buy back its debt on the secondary market[1556]. Taking into account all these considerations, the court declined to extend the "stay" on the proceedings and decided to grant summary judgment in favor of Pravin.

The US Court of Appeals for the 2nd Circuit affirmed that decision, indicating that ruling otherwise would have: (a) conditioned Pravin's rights to the completion of an uncertain process (the debt restructuring)[1557] and, (b) converted this voluntary renegotiation process "into the equivalent of a judicially-enforced bankruptcy proceeding, for it would,

---

[1550] Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, No. 74411, 1995 WL 102840 (S.D.N.Y. Mar. 8, 1995), p. 2.

[1551] Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, 895 F. Supp. 660 (S.D.N.Y. 1995). The Court noted that: "Although the arithmetical aggregate of the two stays amounts to eight months, the actual effect of the two stays and their related motion practice has been to delay the resolution of this question for almost eighteen months". Id., p. 663.

[1552] The "Brady Plan" was a restructuring strategy promoted by the United States Treasury and announced by Secretary Nicholas Brady in 1989. The initiative attempted to resolve the "structural" debt problems of emergent market borrowers by rescheduling and, in some cases, reducing the principal of outstanding syndicated bank loans. Crucially, the implementation of the plan relied on the financial assistance of the IMF and the World Bank and featured "strong" adjustment programs. Particularly, the strategy consisted in the exchange of loans for a "menu" of different "Brady Bonds", partially guaranteed by United States Treasury bonds. Notably, the "Brady Plan" gave birth to an attractive secondary market for sovereign securities, and it is commonly regarded as the "prelude" to contemporary sovereign lending and borrowing. See Das et al., *Sovereign Debt Restructurings*… Op. Cit., p. 18; Megliani, *Sovereign*… Op. Cit., pp. 343-345 and Rieffel, *Restructuring Sovereign Debt*… Op. Cit., pp. 150 et seq.

[1553] Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, 895 F. Supp. 660 (S.D.N.Y. 1995), pp. 665-667.

[1554] Id. pp. 666-667

[1555] Id. pp. 665-672.

[1556] Id. pp. 665-673.

[1557] According to the Court, the restructuring "has no obvious (and reasonable proximate) termination date". Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850 (2d Cir. 1997), p. 855.

in effect, have prohibited the exercise of legal rights outside of the negotiations"[1558]. Nevertheless, although the court denied the "stay", it simultaneously indicated that:

> *"An argument might be made that, although summary judgment was appropriate, the circumstances of this case justified a stay of the proceedings or, in the alternative, a stay of the execution of the judgment because either stay might allow the completion of Peru's negotiations with its creditors without unduly threatening the ultimate enforceability of the debt"*[1559].

Meanwhile, another creditor of Banco Popular (Banco Cafetero), also decided to enforce its claims[1560]. Banco Cafetero had lent 5 million dollars to Banco Popular through a Deposit Agreement (guaranteed by Peru) in 1983. After the rescheduling of payments on several occasions, Banco Cafetero brought suit against the Peruvian Bank and its government. As in the *Pravin* cases, Banco Popular requested a "stay" on the proceedings (specifically, a "motion for a stay on plaintiff's motion for summary judgment"). However, the court declined to grant such a request because Banco Popular failed to show that the transaction in question was similar to those in which other creditors – such as Pravin – were involved[1561]. In particular, the court stressed that there was "no reason to delay entry into judgment" in the case, and that it could address its enforceability "at a later time"[1562].

3.3.1.2.1.2. Cases Against Argentina

Another relevant group of cases includes those that emerged from the Argentine crisis of 2001. In *Lightwater*[1563] and *Appelstein*[1564], Argentina (and the Province of Buenos Aires) also requested a "stay" on the plaintiffs' actions for summary judgments[1565]. In those cases, the main argument of the defendants was that, at the moment when plaintiffs sued them, they were "engaged in efforts to achieve a debt restructuring"[1566]. Although the court recognized this circumstance, it stressed that the results of those efforts were uncertain at the time when decisions were to be rendered[1567]. In particular,

---

[1558] Id. p. 855.
[1559] Id. p. 855-856.
[1560] Banco Cafetero (Panama) S.A. v. Republic of Peru, No. 94 CIV. 3569 (JSM), 1995 WL 494573 (S.D.N.Y. Aug. 18, 1995).
[1561] Id. p. 5.
[1562] Id.
[1563] See Lightwater Corp. v. Republic of Argentina, No. 02 CIV. 3804 (TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003) and Lightwater Corp. v. Republic of Argentina, No. 02 CIV. 3804 (TPG), 2003 WL 22037638 (S.D.N.Y. Aug. 29, 2003).
[1564] See Allan Applestein Ttee FBO D.C.A. Grantor Tr. v. Province of Buenos Aires, No. 02 CIV. 1773 (TPG), 2003 WL 1990206 (S.D.N.Y. Apr. 29, 2003) and Allan Applestein TTEE FBO D.C.A. v. Republic of Argentina, No. 02 CIV. 4124 (TPG), 2003 WL 22743762 (S.D.N.Y. Nov. 20, 2003).
[1565] Other cases against Argentina were decided in a similar fashion. See, for example, EM Ltd. v. Argentina, No. 03 CIV.2507 TPG, 2003 WL 22120745 (S.D.N.Y. Sept. 12, 2003), p. 4.
[1566] Lightwater Corp. v. Republic of Argentina, No. 02 CIV. 3804 (TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003), p. 1. See also Allan Applestein Ttee FBO D.C.A. Grantor Tr. v. Province of Buenos Aires, No. 02 CIV. 1773 (TPG), 2003 WL 1990206 (S.D.N.Y. Apr. 29, 2003), p. 1.
[1567] Lightwater Corp. v. Republic of Argentina, No. 02 CIV. 3804 (TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003), p. 2. "The Republic and the Province are making efforts to resolve the fiscal crisis, and consideration is being given to ways to restructure their debt. But no definite

Argentina and the Province of Buenos Aires based their request for a "stay" on comity considerations: They argued that they should "(…) be given an opportunity to achieve an overall debt- restructuring, which would be interfered with by piecemeal judgments in favor of individual bondholders"[1568].

After quoting the appeal judgment in Pravin, the court highlighted the difficulties involved in reconciling the strong interests of the US in (a) enforcing contracts as written, (b) maintaining creditors' participation in restructurings on a strictly voluntary basis and (c) the completion of those operations[1569]. Nevertheless, in both cases, the court declined to grant a "stay", since there was "no assurance about the success or the timing of such negotiations"[1570]. However, and at the same time, while ruling in Plaintiffs' favor, it decided to grant a "stay" on execution: for one month in *Lightwater*, and for almost three weeks in *Appelstein*[1571]. Notably, the court decided to suspend the execution of the judgments considering that there were other cases against the debtors which have not been decided yet[1572].

Other cases against Argentina also discussed measures akin to a "stay" on execution. For example, in *E.M*[1573], the United States Court of Appeals for the Second Circuit affirmed certain orders of the District Court in favor of the Republic. In the case, the court agreed to vacate a restraining notice and an order of attachment against property and bonds issued by Argentina previously obtained by the plaintiffs (led by E.M.). E.M. have declined to participate in the Argentinian restructuring and decided to enforce its claims against the Republic. At the same time, a majority of creditors was about to tender its old bonds for new ones in order to restructure their claims. In particular, the court noted that maintaining the orders in effect would severely jeopardize the restructuring which was "obviously of critical importance to the economic health of a

---

plan has been arrived at as to either the Republic or the Province, and there is no basis at present for forecasting what such a plan might be or when it might come about". Allan Applestein Ttee FBO D.C.A. Grantor Tr. v. Province of Buenos Aires, No. 02 CIV. 1773 (TPG), 2003 WL 1990206 (S.D.N.Y. Apr. 29, 2003), p. 2.

[1568] Lightwater Corp. v. Republic of Argentina, No. 02 CIV. 3804 (TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003), p. 3. Allan Applestein Ttee FBO D.C.A. Grantor Tr. v. Province of Buenos Aires, No. 02 CIV. 1773 (TPG), 2003 WL 1990206 (S.D.N.Y. Apr. 29, 2003), p. 2.

[1569] Lightwater Corp. v. Republic of Argentina, No. 02 CIV. 3804 (TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003), p. 4. Allan Applestein Ttee FBO D.C.A. Grantor Tr. v. Province of Buenos Aires, No. 02 CIV. 1773 (TPG), 2003 WL 1990206 (S.D.N.Y. Apr. 29, 2003), p. 4.

[1570] Lightwater Corp. v. Republic of Argentina, No. 02 CIV. 3804 (TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003), p. 4.

[1571] Those "stays" were further extended. See Allan Applestein TTEE FBO D.C.A. v. Republic of Argentina, No. 02 CIV. 4124 (TPG), 2003 WL 22743762 (S.D.N.Y. Nov. 20, 2003), p. 3.

[1572] "The court believes that it is not appropriate to have the three individual plaintiffs go forward with execution on their judgments until the court is better informed as to what will occur regarding other bond holders who may be pursuing their claims in class actions". Lightwater Corp. v. Republic of Argentina, No. 02 CIV. 3804 (TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003), p. 5 and Allan Applestein Ttee FBO D.C.A. Grantor Tr. v. Province of Buenos Aires, No. 02 CIV. 1773 (TPG), 2003 WL 1990206 (S.D.N.Y. Apr. 29, 2003), p. 5.

[1573] EM Ltd. v. Rep. of Argentina - 05-1525-cv (L), NML Capital v. Rep. of Argentina - 05-1543-cv (L) (May 13, 2005), lacking precedential authority.

nation"[1574]. Hence, the court decided to affirm the decision of the District Court, enabling the exchange and thus, the restructuring[1575].

A similar reasoning, albeit with a different result, can be identified in *CVI*[1576]. In *CVI*, the United States Court of Appeals reversed a previous decision by the District Court and declined to modify an attachment order against Argentina's[1577]. Almost six years after the *E.M.* decision, Argentina found itself in another bond exchange with a group of previously dissenting creditors. In the case, the Court of Appeals noted that the "new" bond-exchange affected by the attachments was not as significant as the exchange conducted in 2005. In particular, the court noted that (a) the amounts involved in the exchange were "relatively small" and that (b) the country provided no evidence pertaining to the damage that the failure of the operation would cause to its finances[1578]. Consequently, the court maintained the order.

Finally, in *NML*[1579], the United States Court of Appeals of the 2nd Circuit affirmed a previous decision rendered by the District Court imposing an injunction against Argentina in favor of a group of dissenting creditors[1580]. As in the *E.M.* decision, the court emphasized that the Republic failed to provide evidence regarding the damage that the measure would inflict on its finances[1581]. Consequently, and as can be noted, the court suggested that, had Argentina provided such evidence, it would have decided the case differently[1582]. It is also important to mention that the instruments in question here, and in the other cases previously mentioned, lacked renegotiation CACs. Thus, in the opinion of the court, since those clauses were becoming the "new standard" in bonds issued in New York, Argentina's predicament – and holdout litigation – were a matter of the past[1583].

[1574] EM, Ltd. v. Rep. of Argentina - 05-1525-cv (L), NML Capital v. Rep. of Argentina - 05-1543-cv (L) (May 13, 2005), p. 4.

[1575] "As we understand the District Court, its ultimate conclusion was that it would be an inappropriate exercise of the Court's discretionary authority to leave in place pre- and post-judgment remedies that the Court reasonably believed posed a risk to the completion of the debt restructuring. The District Court declined to use its discretionary authority in a manner that would entail such a risk, and we will not disturb the Court's exercise of its discretion". EM, Ltd. v. Rep. of Argentina - 05-1525-cv (L), NML Capital v. Rep. of Argentina - 05-1543-cv (L) (May 13, 2005), p. 4

[1576] Capital Ventures Int'l v. Republic of Argentina, 652 F.3d 266 (2d Cir. 2011).

[1577] The order affected Argentina's reversionary interest in the collateral securing certain bonds issued by the Republic.

[1578] Capital Ventures Int'l v. Republic of Argentina, 652 F.3d 266 (2d Cir. 2011), pp. 273-274. In the same sense, see Goldmann, *Necessity*… Op. Cit., p. 19.

[1579] NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012).

[1580] The injunction was imposed due to the breach of the "pari passu" clause by Argentina. For a discussion see *Chapter Four*, pp. 175 et seq.

[1581] Particularly, the court underscored that the Republic failed to provide evidence regarding its capacity to repay the holdouts (and other creditors) at the same time.

[1582] In the same sense, see Goldmann, *Necessity*… Op. Cit., p. 19.

[1583] "Nor will the district's court's judgment have the practical effect of enabling "a single creditor to thwart the implementation of an internationally supported restructuring plan (…). In any event, it is highly unlikely that in the future sovereigns will find themselves in Argentina's

3.3.1.2.2. "Stays" Grounded on a Combination of Domestic and International Law

To my knowledge, only once, in NY, has a sovereign debtor based a request for a "stay" on international law (in conjunction with US domestic law). This instance corresponds to the *Casa Express* case[1584]. There, the Bolivarian Republic of Venezuela invoked the extraordinary humanitarian, political and economic circumstances that it is undergoing as the foundation for its defense against its creditors[1585]. In the case, a group of bondholders brought suit against the Republic with the purpose of collecting on their debts. Venezuela, in turn, indicated that allowing the case to continue further would obstruct a future restructuring of its liabilities[1586].

As stated above, the Republic justified its request for a "stay" both under domestic[1587] and international law. With regard to the latter, the Republic indicated that comity allowed courts to take recourse to reasons based on international law for imposing a "stay". In particular, after quoting "*Paquete Habana"* and its progeny, Venezuela invoked the CIL doctrine of necessity. Although it recognized that necessity "may apply only in rare and exceptional" circumstances[1588], it argued that those stringent requirements were met in the case[1589]. In particular, it is important to mention that, in the sovereign debt context, a defendant invoking the necessity defense is required to prove that

> *"*(…) *suspension of payments has constituted the sole means for preserving an essential interest of the defaulting State and that the State has not contributed through its behaviour to creating the situation of necessity"*[1590].

---

predicament. Collective action clauses— which effectively eliminate the possibility of "holdout" litigation—have been included in 99% of the aggregate value of New York-law bonds issued since January 2005, including Argentina's 2005 and 2010 Exchange Bonds (…)" (internal quotation marks omitted). NML Capital, Ltd. v. Republic of Argentina, 699 F.3d 246 (2d Cir. 2012), pp. 263-264.

[1584] Casa Express Corp v. Bolivarian Republic of Venezuela (1:18-cv-11940) District Court, S.D. New York. Docket available at https://www.courtlistener.com/docket/8429471/casa-express-corp-v-bolivarian-republic-of-venezuela/ [last accessed 21.7.2020].

[1585] See Memorandum of the Bolivarian Republic of Venezuela in Response to Motion for Summary Judgment and in Support of Cross-Motion for a Stay (16/01/2020), Casa Express Corp, plaintiff, v. the Bolivarian republic of Venezuela, Defendant. Pharo Gaia fund Ltd., et al., Plaintiffs, v. the Bolivarian Republic of Venezuela, Defendant. Case Nos. 18-cv-11940 (AT) 19-cv-3123 (AT).

[1586] Id. p. 7.

[1587] Id., pp. 8-13.

[1588] Id. p. 21.

[1589] The Republic justified the satisfaction of those requirements noting the "complex humanitarian emergency" it was facing, which was compounded by the refusal of President Maduro to relinquish power (and which prevented Guaido's administration from accessing most of the Republic's resources). Id., pp. 21-22. In the words of Venezuela: "The Republic cannot, consistent with its obligations to its citizens under international law, allocate extremely limited financial resources to pay or settle financial debts while its citizens are starving and lack access to the most basic of necessities". Id., pp. 21-22.

[1590] Megliani, *Sovereign*… Op. Cit., p. 435.

Consistent with the doctrine, the Republic argued for a temporary deferral of its financial obligations and requested a "stay" on the proceedings. Notably, it indicated that this suspension should be granted in order to allow it to conduct a "consensual restructuring" of its liabilities "once the political and humanitarian crisis" which it is facing "can be abated"[1591].

Plaintiffs, in turn, opposed the motion by Venezuela. In their Reply[1592], creditors emphasized that the restructuring of Venezuelan liabilities was conditioned upon a regime change in the country. Therefore, in their view, their legal rights would be suspended indefinitely and subordinated to a "contingent and tenuous commitment"[1593]. With regard to the necessity defense, plaintiffs responded with two arguments. First, that the proper law of the contracts is US (NY) law. In their view, this would prevent any invocation of international law[1594]. As it has been previously discussed (see subsection 3.1) this argument fails to recognize the connection between US and international law, particularly, in the case of CIL doctrines such as necessity. Besides indicating that international law was not applicable to the case, plaintiffs argued that the requirements of the necessity doctrine were not met[1595].

In addition, after citing *Pravin*, plaintiffs argued that suspending entry into judgment in the case would transform the restructuring from a voluntary operation into a "judicially enforced bankruptcy proceeding". More importantly, however, plaintiffs indicated that the "stay" would give breathing space to the Republic to invoke the CACs included in some of the instruments[1596]. In effect, according to them, a favorable judgment (rendered before CACs were triggered) would insulate them from subsequent modifications of the bonds, serving as a "shield" against restructurings. As will be discussed later (subsection 3.3.1.3), this is precisely one of the grounds on which a

---

[1591] Memorandum of the Bolivarian Republic of Venezuela, Op. Cit., p. 17.

[1592] Reply Memorandum of Law in Support of Plaintiffs' Consolidated Motion for Summary Judgment and in Opposition to Venezuela's Cross-Motion to Stay 06/02/2020, Casa Express Corp, plaintiff, v. the Bolivarian republic of Venezuela, Defendant. Pharo Gaia fund Ltd., et al., Plaintiffs, v. the Bolivarian Republic of Venezuela, Defendant. Case Nos. 18-cv-11940 (AT) 19-cv-3123 (AT).

[1593] Id. p. 1. According to plaintiffs: "(…) Venezuela does not even request a stay pending any ongoing debt-restructuring process; instead, it asks for a stay pending a debt-restructuring process that it admits cannot even begin until President Guaidó seizes the levers of power in Venezuela and rebuilds its economy". Id. p. 4.

[1594] "Here, the parties have entered into private agreements that define their respective rights and obligations, and they selected New York law—not international law—to govern their disputes". Id. p. 16.

[1595] In this respect, Plaintiffs followed the doctrine as formulated by the Federal Constitutional Court of Germany on a decision rendered in 2007. As will be discussed in subsection 4.1.1, according to that Court, necessity cannot be invoked by a State against the claims of private creditors under relationships of private law.

[1596] Reply Memorandum of Law in Support of Plaintiffs' Consolidated Motion for Summary Judgment and in Opposition to Venezuela's Cross-Motion to Stay 06/02/2020, Casa Express Corp, plaintiff, v. the Bolivarian republic of Venezuela, Defendant. Pharo Gaia fund Ltd., et al., Plaintiffs, v. the Bolivarian Republic of Venezuela, Defendant. Case Nos. 18-cv-11940 (AT) 19-cv-3123 (ATS), pp. 5-6.

suspension of proceedings (before the entry into judgment) can be substantiated. Therefore, although plaintiffs indicated that they were only pursuing a declaratory judgment (and not enforcement), a decision in their favor may have produced a "rush to the courthouse". In its subsequent reply to plaintiffs' memorandum, Venezuela argued just that[1597].

Despite the dire financial situation of the Republic, and the fact that litigation can serve as a "shield" against CACs and restructurings, the court sided with the plaintiffs[1598]. First, the court discussed whether the "stay" could be justified by comity considerations[1599]. In that regard, it stressed that the suspension of proceedings requested by Venezuela would be "indefinite" in practice, lasting "until the Guaidó government takes power (....)" in the country[1600]. At the same time, the court noted that the policies of the US towards the Republic did not consider preventing litigation against it[1601]. Moreover, the court also quoted *Pravin*, highlighting the voluntary nature of creditors' participation in sovereign debt workouts[1602]. Second, the court also referred to the application of the doctrine of necessity. Nevertheless, and without any detailed discussion, the court indicated that even if the doctrine was applicable, it "(…) would not justify staying this litigation"[1603], and thus, it then proceeded to grant plaintiffs' motion for summary judgment.

Crucially, it can be argued that the main factor motivating the courts' decision is related to the political situation in Venezuela. In effect, the court stressed the uncertain date on which the restructuring was to be conducted: it could only commence once there was a regime change in the country. In short, according to the court, granting a "stay" until that (uncertain) moment would have caused significant prejudice to plaintiffs[1604].

3.3.1.2.3. Evaluation of the Cases

According to the foregoing, although US courts tend to privilege the enforcement of contracts as written, they are also attentive to the economic conditions of the debtor and

---

[1597] Reply Memorandum of the Bolivarian Republic of Venezuela in Support of Cross-Motion for a Stay 3/03/2020, pp. 2-3. In the Memorandum, the Republic also argued that this would produce an unfair advantage in favor of plaintiffs vis-à-vis other bondholders. Additionally, it also contested plaintiffs' arguments indicating that the doctrine of necessity was not applicable to claims of a private nature. Id., pp.15-17.

[1598] See Casa Express Corp v. Bolivarian Republic of Venezuela (1:18-cv-11940), District Court, S.D. New York, (30.09.2020).

[1599] "In cases where a foreign sovereign seeks a stay to facilitate the restructuring of its debts, courts must also look to the principles of international comity to determine whether a stay is warranted". Id., p. 6.

[1600] Id., p. 7.

[1601] Id., p. 8. In the words of the court: "The Executive Branch and Congress have primacy in foreign relations, and if those branches of government determine that preventing litigation against Defendant, or requiring creditors to participate in a restructuring or centralized claims process, is appropriate, they have the tools to do so (…). But so far, the political branches have not determined that United States interests require such a step". Id., p. 9.

[1602] See Id., pp. 9-10.

[1603] Id., p. 10.

[1604] See Id., p. 7.

to the success of restructurings. In this context, courts have granted "stays" both on plaintiffs' motions for summary judgments and on the execution of judgments previously entered. On some occasions, courts have also modified attachment orders producing an effect akin to that of a suspension on execution. Furthermore, the "stays" granted by courts have always been related to a pending restructuring and limited to a specific period of time[1605].

Additionally, in the only instance where a stay has been requested on the grounds of international law, it has been justified on CIL rather than GPs. Notably, in the *Casa Express* case, Venezuela invoked the doctrine of necessity in conjunction with domestic law in order to defer its payment obligations. In that case, the court rejected the Republic's request based on the fact that the measure would have entailed an indefinite suspension of creditors' rights. Nevertheless, the *Casa Express* case also involves another important issue.

As previously mentioned, plaintiffs argued that obtaining an early judgment in the case was critical for their interests. In their view, the decision rendered in their favor insulates their claims from a subsequent renegotiation affecting the bonds. Since the contracts in question included modification CACs, plaintiffs attempted to gain (and were successful in obtaining) an advantage over their fellow creditors by moving before those clauses were triggered. Therefore, having been successful, they have thus effectively frustrated the purpose of CACs. Nevertheless, it is submitted here that these are precisely the grounds on which a suspension of proceedings can be justified before NY courts with the aid of GPDs in future cases. As will be argued in the following subsection, in order to be successful, the state needs to request said measure for a limited period of time (and not indefinitely, as Venezuela did in *Casa Express*).

3.3.1.3 A "Stay" Grounded on the "Mixed Fuel": The Role of GPDs in the Suspension of Proceedings Before NY Courts

As stated before, under US law, GPs can be recurred to in order to guide the interpretation of domestic laws and principles. Thus, in this subsection, I proceed to justify the imposition of a "stay" before New York courts.

Crucially, it is submitted here that the "stay" as a GPD can be used by NY courts to interpret and give effect to the language of section 2201 CPLR previously mentioned. Let me recall that said section provides:

> *"Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just"*[1606].

First, and from a broad perspective, the aforementioned section lends itself to the application of GPDs due to its language: It confers discretion to the courts while using

[1605] In the same sense, see Mauro Megliani, *Not Only Good Faith: Staying Enforcement*, Volkerrechstsblog (2017). Available at: https://voelkerrechtsblog.org/not-only-good-faith/ [last accessed 28.8.2020].

[1606] Civil Practice Law and Rules of the State of New York, Section 2201. Available at: https://www.nysenate.gov/legislation/laws/CVP/2201 [last accessed 24.7.2020].

"general words". As stated above, NY courts have the power to suspend an action or the enforcement of a judgment "in a proper case" and "upon such terms as may be just". Courts can recur to the "stay" as a GPD to operationalize that language, as they have done in other circumstances (see subsection 3.2.2 for details). As indicated before, the role of GPDs in US (and NY) law is not that different from that of CIL and the "Charming Betsy" doctrine.

Second, and from the specific perspective of sovereign debt litigation, the "stay" as a GPD can inform courts' decisions in this regard: This GPD can aid courts in what pertains to the assessment of the five factors usually considered by them when deciding whether to grant or deny a motion for a stay under section 2201 CPLR. Additionally, it can also help to "reconcile" the strong policy interests of the US in what pertains to sovereign debt restructurings. Before proceeding, it is important to note that the arguments presented here are mainly applicable to restructurings affecting bonds featuring modification CACs (which are the contemporary standard).

3.3.1.3.1. The Rationale of the "Stay" and its Role in Informing the "Five Factors" Test

In *Chapter Four*, I concluded that the "stay" is one of the GPDs which can be extracted from domestic corporate reorganization regimes around the globe. This normative proposition can be considered a GPD since: (a) it meets the "recognition" requirement (meaning that it can be found across legal systems) and (b) it is capable of being "extrapolated" to the sovereign insolvency context.

As argued in that *Chapter*, the "stay" as a GPD serves two main purposes: (1) it prevents a destructive "race to the courthouse" and (2) it enhances creditors' participation in sovereign debt renegotiations. This *rationale* can serve to inform a court's decision to "stay" a proceeding when a state is attempting to restructure its bonds which include modification CACs.

Let me recall that, through modification CACs, a supermajority of bondholders can agree to a restructuring proposal by voluntarily amending the key terms of the contracts (including maturity, principal and interests). This modification also binds dissenting creditors if the supermajority required by the instruments (for example, a 75% in value terms of one series) is achieved. Hence, if modification CACs are used (and the respective majority is reached), creditors as a group can legally reduce the value of their claims and provide debt relief to the state.

However, as the plaintiffs in *Casa Express* argued, creditors can avoid being bound to a prospective restructuring agreement by obtaining a favorable judgment before modification CACs are triggered. If they are successful, they will be entitled to full payment, while consenting creditors (if the respective majorities are reached) will receive the newly reduced amounts. This is a consequence of the "merger" doctrine of US law. According to that doctrine, having obtained a favorable judgment, litigants' claims (originating from debt contracts) are considered to be extinguished and "merged"

into the judgment[1607]. In a nutshell, any subsequent vote by bondholders modifying the instruments does not affect the claims of those who already obtained a favorable decision, since those claims are already extinguished. This produces an important incentive for potential dissenters to obtain judgments as soon as possible and, therefore, to rush to the courthouse.

At the same time, the success of strategies such as the one previously described may motivate other bondholders to follow suit. Knowing beforehand that it is possible to avoid a reduction in the nominal value of their claims, other creditors may be inclined to recur to litigation in order to protect themselves from a future restructuring agreement. Under an extreme scenario, most of the instruments will be litigated and the renegotiation would be unsuccessful due to lack of sufficient favorable votes.

As can be noted, a suspension of creditors' legal actions would effectively solve these problems. First, it would prevent the "race to the courthouse", since creditors would be (momentarily) deprived of the advantages that a premature judgment would confer to them vis-à-vis their fellow bondholders[1608]. Second, it would enhance creditors' cooperation in debt renegotiations. In other words, the stay would reduce the probability of obtaining a judgment before CACs are triggered. In this way, it would also reduce the expected value of premature litigation. Finally, the "stay" would provide the state with the necessary "breathing space" for conducting the restructuring of its liabilities.

Furthermore, this analysis can also help in the assessment of the "five factors test" conducted by NY courts when deciding whether or not to grant a stay in sovereign debt litigation. Let me recall that NY courts take into account five factors in this regard:

> *"(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest"*[1609].

First, courts will analyze the prejudices that a suspension of legal actions would cause to litigating creditors. As stated above, if they fail to obtain a favorable judgment before CACs are triggered, they would be bound to a restructuring proposal if the respective majority is reached. Since most bond-workouts diminish the nominal value of creditors' claims, the prejudices caused to them by these operations are not to be ignored. However, as Venezuela argued in *Casa Express*, this risk would have been assumed by

---

[1607] For a discussion (including a list of authorities) see *Chapter Four*, p. 204.

[1608] A similar argument has been put forward by Kupelyants for staying litigation under English law. Nevertheless, his discussion is limited to domestic (English) law and only hints that a strategy based on the courts' "case management powers" could be followed under US law, without specifying the relevant details. Crucially, he indicates that GPDs cannot be used for these purposes. See Kupelyants, *Sovereign…* Op. Cit., p. 31, pp. 83-85 and p. 105.

[1609] Jiminez v. Credit One Bank, N.A., 377 F. Supp. 3d 324 (S.D.N.Y. 2019), p. 336. See also, Reynolds v. Time Warner Cable, Inc., 2017 WL 362025, (W.D.N.Y. Jan. 25, 2017), Fairbank Reconstruction Corp. v. Greater Omaha Packing Co., 2014 WL 693001, (W.D.N.Y. 2014) and Acton v. Intellectual Capital Mgmt., Inc., 2015 WL 9462110, (E.D.N.Y. 2015).

creditors purchasing bonds with modification CACs[1610]. Therefore, the mere materialization of a contractually defined risk (a risk which bondholders priced when the instruments were acquired) should not tip the balance in favor of litigating creditors[1611].

Second, courts would also discuss the benefits that staying the proceedings would provide to the indebted state. Although the imposition of the measure does not guarantee the success of a restructuring, it would grant the state (at least) the opportunity to renegotiate its liabilities.

Third, by suspending preemptive legal actions by bondholders, courts would also avert a wasteful use of judicial resources (i.e., all creditors attempting to avoid a prospective restructuring vote will have incentives to litigate)[1612].

Fourth, the interests of non-litigating bondholders would also be protected by this "stay". Assuming that the state's debt is unsustainable (a circumstance which can be determined through an IMF assessment), an adequate reduction of the state's liabilities (accompanied with policy reforms) would be in the best interest of creditors as a group: In this way, they would increase the country's probability of repayment and avoid (at least) some of the dead-weight losses present during a default[1613]. Therefore, imposing a "stay" with the purpose of allowing a renegotiation of the debt would at least make this alternative feasible.

Fifth, the public interest would also be served if a stay on litigation is imposed. As it follows from the sovereign debt cases where a "stay" was discussed (see subsection 3.3.1.2), the US has strong policy interests in enforcing contracts as written and maintaining creditors' participation in restructurings on a strictly voluntary basis. As can be noted, the stay proposed here would only give effect to contractual clauses previously agreed upon between the parties[1614]. Furthermore, in order to avoid transforming the renegotiation of sovereign debt into a "judicially enforced bankruptcy proceeding", the court should grant the "stay" for a specific period of time (beyond which litigation and enforcement should be allowed). From the perspective of the decision rendered in the *Casa Express* case, the last point is crucial. Finally, in order to police opportunism by debtors, the court could also condition the "stay" to the policy recommendations of the IMF: For example, if the state makes an offer which is not aligned with the Fund's suggestion, it could vacate the order granting the stay.

[1610] See Memorandum of the Bolivarian Republic of Venezuela in Response to Motion for Summary Judgment and in Support of Cross-Motion for a Stay (16/01/2020), p. 16.
[1611] Similarly, see Kupelyants, *Sovereign…* Op. Cit., p. 92.
[1612] In the same sense, according to Venezuela, "the more quickly this Court moves forward, the more cases it will attract". Memorandum of the Bolivarian Republic of Venezuela in Response to Motion for Summary Judgment and in Support of Cross-Motion for a Stay (16/01/2020), p. 12.
[1613] See Sturzenegger and Zettelmeyer, *Debt Defaults…* Op. Cit., pp. 49-51; Gulati and Braton, *Sovereign Debt Reform…* Op. Cit., pp. 18-24 and Guzman and Stiglitz, *Creating…* Op. Cit. 10.
[1614] Similarly, see Kupelyants, *Sovereign…* Op. Cit., pp. 90-91.

3.3.1.4. Conclusions Regarding the "Stay"

Due to all of the above, it is submitted here that states attempting to restructure their bonds can justify their requests for a "stay" on the grounds of the "mixed fuel" of NY law and GPDs. The "general language" employed in section 2201 CPLR, as well as the specific inclusion of modification CACs in debt instruments, makes this argument plausible.

3.3.2. Applying the "Cram Down" in Sovereign Debt Litigation

Now it is the time to discuss whether the "cram down" as a GPD can be successfully applied in sovereign debt litigation before US domestic courts. Theoretically, this GPD can be used by courts to bind creditors to a restructuring proposal even against specific contractual language on the contrary.

In order to show how this GPD would work in practice, let me recall the discussion on CACs[1615]. Sovereign bonds issued under NY law from 2003 onwards began to include modification CACs. The main purpose of these contractual provisions is to solve the "holdout" problem: Before the widespread adoption of CACs, the consent of every single bondholder was required for contract amendment[1616]. Hence, while bondholders agreeing to renegotiate provided debt relief to the debtor, non-participating creditors maintained their original contractual rights by "holding out" and litigated to be repaid in full. If agreeing creditors were to anticipate this situation, an entire restructuring could be jeopardized. Consequently, CACs are intended to coordinate creditors' activities with regard to renegotiation (henceforth, "modification CACs") and enforcement. In short, through modification CACs, a supermajority of creditors can bind even dissenting creditors to a restructuring proposal.

Modification CACs can be divided into three types: (a) series-by-series CACs, (b) two-limb and (c) single-limb aggregated CACs[1617]. The main difference between these variants pertains to the possibility of grouping different series of bonds for the purposes of implementing a restructuring deal.

Thus, while a vote under series-by-series CACs only binds creditors holding instruments pertaining to one specific series, second- and third-generation CACs allow a restructuring vote to affect multiple series of bonds. Nevertheless, there are also important differences between second- and third-generation CACs. While second-generation CACs require votes in favor both at the series and on the aggregate level, third-generation provisions concentrate voting across different series instead of concentrating it on individual bond issuances.

Due to all of the above, in the context of sovereign debt litigation, the "cram down" as a GPD becomes relevant in cases where the bonds in question feature first- and second-generation modification CACs[1618]. In other words, the language of most third-generation

---

[1615] See *Chapter Four*, pp. 187 et seq.
[1616] See, for example, Gelpern, Heller Setser, *Count*… Op. Cit. p. 7.
[1617] See Buchheit et al. *The Restructuring*… Op. Cit., pp. 354-356.
[1618] This GPD may also be of relevance where the bonds at stake lack any type of modification CACs.

CACs "obliterates" the need for the application of this GPD[1619]. Indeed, by casting the votes to a restructuring proposal on the aggregate level, this type of CAC diminishes the success of holdout strategies[1620]. Therefore, this discussion needs to be circumscribed to cases featuring bonds that include the first two versions of the clauses.

In those cases, a restructuring may fail if the state is unsuccessful in gathering enough support on each of the specific series targeted. Here, the "cram down" as a GPD could be applied by courts in order to modify the voting mechanism: From requiring a vote on each specific series, those terms could be "judicially" modified to counting the votes on an aggregate level (as third-generation CACs would). By the same token, the required supermajorities could also be "judicially" modified to emulate the standard version of third-generation CACs[1621]: Thus, courts could declare a restructuring as successful if it obtains 75% favorable votes in value terms.

Hence, the application of the "cram down" as a GPD could effectively solve anti-commons problems among bondholders in the context of sovereign debt restructuring.

Nevertheless, despite its promises, it is submitted here that this GPD cannot be invoked successfully to disputes brought before NY courts for several reasons. First, "cramming down" dissenting bond series (which do not include third-generation CACs) could be considered an unacceptable intromission on creditors' contractual rights. As stated previously, under US law, GPDs can be applied to interpret and to inform the interpretation of domestic law. There is no example in which a US court has taken recourse to GPDs to alter contractual obligations. Therefore, the "subsidiary" role of GPDs would preclude their application to cases such as these.

Second, NY courts tend to enforce contracts as written[1622]. Indeed, NY courts are particularly reluctant to alter the terms of valid contracts (negotiated between sophisticated parties) through the interpretation of the terms in question[1623]. By the

---

[1619] See Goldmann, *Necessity*… Op. Cit., p. 4.

[1620] See Antonia Stolper and Sean Dougherty, *Collective Action Clauses: How the Argentina Litigation Changed the Sovereign Debt Markets*, 12 Capital Markets Law Journal 2 (2017), pp. 240-241.

[1621] The standard version of third generation CACs corresponds to the one prepared by the International Capital Markets Association ("ICMA"). See Id., p. 239. See also Gelpern, Heller Setser, *Count*… Op. Cit., p. 1.

[1622] "A clear, complete written agreement should, as a rule, be enforced in accordance with its terms". Glenn Banks, *New York Contract Law*. Thomson/West (2019), p. 50. See also, Gregory Klass, *Interpretation and Construction in Contract Law* (2018). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913228 [last accessed 29.8.2020], p. 27. See also Choi, Gulati and Scott, *Variation in Boilerplate*… Op. Cit., p. 3 and Robert Rasmussen and Michael Simkovic, *Bounties for Errors: Market Testing Contracts*, 10 Harvard Business Law Review (2020), pp. 118-119.

[1623] See Richard Lord, *Williston on Contracts* (4th Edition). Thomson (2020), pp. 498-504. "The primary purpose and function of the court in interpreting a contract is to ascertain and give effect to the parties' intention". Id. p. 660. "The underlying canon of contract interpretation directs courts to give every term and clause in a contract a meaning under the assumption that parties have drafted terms in a contract to convey their collective purposes", Choi, Gulati and Scott, *The Black*… Op. Cit., p. 7.

same token, they have also declined to "liberally" supplement contractual provisions by means of implied covenants, such as the duty to act in good faith[1624]. This is also true for the sovereign debt case-law[1625]: In this context, courts have declined to read into the contracts terms preventing[1626] or forcing[1627] enforcement, when the language to the contrary is clear in the respective agreements[1628]. More importantly, however, NY courts have invariably declined to redraft contractual provisions in order to satisfy an abstract "instinct" of equity[1629].

[1624] For a general discussion of the issue see Charles Knapp, *Problems in Contract Law: Cases and Materials* (9th Ed.). Wolters Kluwers (2019), pp. 492 et seq. Furthermore, according to commentators, "the duties of good faith and fair dealing cannot be used to imply obligations inconsistent with other terms of the contractual relationship. Courts may not by construction add or exercise terms, nor distort the meaning of those used and thereby make a new contract for the parties, under the guise of interpreting their writing". Banks, *New York…* Op. Cit., p. 37. See, for example, Geren v. Quantum Chemical Corp., 832 F. Supp. 728 (S.D.N.Y. 1993), p. 732, Metropolitan Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504 (S.D.N.Y. 1989), p. 1057; Katz v Oak Industries Inc, 508 A 2d 873 (Del Ch 1986). For a discussion of the case of corporate bonds see David Ramos, *Can Complex Contracts Effectively Replace Bankruptcy Principles: Why Interpretation Matters*, 92 American Bankruptcy Law Journal (2018); Daniel Herrmann, *An Uneven Exchange? Developing a Fair and Efficient Approach to Exit Consents*, 66 Rutgers Law Review 3 (2014); Keegan Drake, *The Fall and Rise of the Exist Consent,* 63 Duke Law Journal (2014) and William Bratton and Adam Levitin, *The New Bond Workouts*, 166 University of Pennsylvania Law Review (2018). But see Michael Miller, *No Standing Room: How Lender Collective Action Subverts Basic Principles of Contract Interpretation*, Columbia Business Law Review (2012) (arguing that courts have crafted a doctrine of "lender collective action" in the context of syndicated loans).

[1625] For a discussion of the case law see: Lee Buchheit and Ralph Reisner, *The Effect of the Sovereign Debt Restructuring Process on Inter-Creditor Relationships*, University of Illinois Law Review (1988), Michael Gruson, *Restructuring Syndicated Loans: The Effect of Restructuring Negotiations on the Rights of the Parties to the Loan Agreement*, International Law: Revista Colombiana de Derecho Internacional 3 (2004). Arguing in favor of the use of a broad standard such as the duty to act in good faith for complementing CACs, see also, Buchheit and Gulati, *Sovereign Bonds…* Op. Cit. and Bratton and Gulati, *Sovereign Debt Reform…* Op. Cit.

[1626] See A.I. Credit Corp. v. Gov't of Jamaica, 666 F. Supp. 629 (S.D.N.Y. 1987), p. 631.

[1627] See CIBC Bank & Tr. Co. (Cayman) v. Banco Cent. do Brasil, 886 F. Supp. 1105 (S.D.N.Y. 1995). "(…) the Complaint fails to allege a breach of any covenant in connection with the steps taken to prevent acceleration. Plaintiff's allegations charge defendants with nothing more than exercising their rights under the [agreement]; such behavior is not actionable". Id., p. 1118).

[1628] There is one sovereign debt case on which the court found an implied duty among bondholders. In effect, in *Credit Francais*, the court indicated that the enforcement of the debt at stake by an individual creditor was subordinated to majority approval. See Credit Francais Int'l, S.A. v. Sociedad Financiera De Comercio, C.A., 128 Misc. 2d 564, 490 N.Y.S.2d 670 (Sup. Ct. 1985). According to Buchheit and Reisner, the court's conclusion relied exclusively on the wording of the debt agreement at stake. See Buchheit and Reisner, *The Effect…* Op. Cit., pp. 503-504.

[1629] "A court may not, of course, rewrite a contract to accord with its instinct for the dispensation of equity under the facts of a case (…); we would rapidly approach the status of paternalism if this principle were dominant" (internal quotation marks omitted). DeVanzo v. Newark Insurance, 44 A.D.2d 39, 40 (N.Y. App. Div. 1974), p. 44. "A contract is not a non-binding statement of the parties' preferences; rather, it is an attempt by market participants to allocate risks and opportunities. [The court's role] is not to redistribute these risks and opportunities as

Last but not least, and as follows from the cases studied in subsection 3.3.1.2, absent explicit contractual language to the contrary, creditors' participation in sovereign debt restructuring is viewed as strictly voluntary by US courts. For this reason, courts have departed from imposing measures forcing creditors' participation in the operations where the contracts lack renegotiation provisions[1630].

3.3.3. Conclusions Regarding the Application of the "Stay" and the "Cram Down" Under US (NY) Law

According to the foregoing, the limited role assigned to GPDs by US courts severely restricts the possibility of applying them to sovereign debt litigation. To be certain, US courts take recourse to GPDs either to interpret domestic statutes or to endorse domestic legal principles. In a nutshell, under US law, GPDs can only be used to "complement" domestic rules of decision.

Nevertheless, it was argued that the "stay" as a GPD can be used by NY courts in sovereign debt litigation to give effect to the "general words" contained in section 2201 CPLR. Indeed, the *rationale* embodied by the "stay" as a GPD can guide a court's assessment of the criteria employed to decide whether or not to suspend legal actions. Arguments supporting a "stay" grounded on GPDs are stronger whenever the bonds in litigation include CACs. In these cases, this GPD would serve not only to complement the words of the aforementioned statute, but also to give effect to the contractually bargained-for modification-provisions.

For the same reasons, I argued that the "cram down" as a GPD could not be successfully invoked in sovereign debt litigation in NY. As stated before, this GPD would not be useful when bonds feature explicit contractual language to the contrary. Since GPDs can only be used to complement domestic law, I concluded that the cram down would not be applicable to sovereign debt disputes before NY courts.

[it sees] fit, but to enforce the allocation the parties have agreed upon". Lord, *Williston*… Op. Cit., p. 498.

[1630] For example, in *Elliot,* the court criticized the district court's interpretation of section 489 of the New York Judiciary Law qualifying plaintiffs' behavior as champertous. According to the court: "The district court's statutory interpretation here would appear to be inconsistent with this analysis. Rather than furthering the reconciled goal of voluntary creditor participation and the enforcement of valid debts, the district court's interpretation of Section 489 effectively forces creditors such as Elliott to participate in an involuntary "cram-down" procedure and makes the debt instruments unenforceable in the courts once the Bank Advisory Committee has reached an "agreement in principle" in the Brady negotiations. Undermining the voluntary nature of Brady Plan participation and rendering otherwise valid debts unenforceable cannot be considered to be in New York's interest, as made plain by this court in Pravin Banker". Elliott Assocs., L.P. v. Banco de la Nacion, 194 F.3d 363 (2d Cir. 1999), p. 380.

4. General Principles in the German Legal System

In stark contrast to US law, the relationship of German and international law is far less contentious. First, the distinction between self-executing and non-self-executing treaties is also recognized by German law[1631]. At the same time, in that legal system, international agreements are not considered superior to domestic law[1632]. Notwithstanding this, the interpretation of domestic statutes by German courts is also conducted to avoid a contravention of the international obligations of the state[1633].

Second, "general principles" and customary international law are explicitly recognized in German law. In this respect, Article 25 of the Basic Law ("Grundgesetz", henceforth "GG") provides:

> *"The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the in-habitants of the federal territory"*[1634].

According to commentators[1635], and to the practice of German courts[1636], the expression "general rules of international law" in the aforementioned provision includes both CIL and GPs. Hence, the main function of Art. 25 GG is to incorporate both sources of international law into the German legal system[1637]. Additionally, GPs and CIL norms

---

[1631] See Hans-Peter Folz, Germany, in Dinah Shelton (Ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion*. Oxford University Press (2011), p. 243.

[1632] See Crawford, *Change*… Op. Cit., p. 180. According to Art. 59(2) of the Basic Law (Grundgesetz, henceforth "GG)" international agreements have rank of federal statutes. Basic Law for the Federal Republic of Germany (English translation), available at https://www.btg-bestellservice.de/pdf/80201000.pdf [last accessed 29.8.2020]. See also Folz, *Germany*… Op. Cit., p. 245. However, in some cases international agreements may attain a higher status. See, for example, BVerfG (Federal Constitutional Court), Order of the Second Senate of 15 December 2015 - 2 BvL 1/12, paras. 1-26.

[1633] See Folz, *Germany*… Op. Cit., p. 242. "However, if the will of legislature is clear and the wording of the statute unambiguous, the courts will apply the latter statute even if it is in contravention of the treaty". Id., p. 245.

[1634] Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland). English translation. Available at: https://www.btg-bestellservice.de/pdf/80201000.pdf [last accessed 29.7.2020].

[1635] See Pierre-Marie Dupuy and Knut Traisbach, *Taking International Law Seriously: On the German Approach to International Law*, EU Working Papers Law 2007/34 (2007), p. 4. See also Hillgruber, *Art. 25 GG – Völkerrecht – Bundesrecht* in Schmidt-Bleibtreu; Hofmann; Henneke (Eds.), GG Grundgesetz. Heymanns (2017), para 4. However, some non-German scholars have restricted Art. 25 GG exclusively to CIL. See, for example, Crawford, *Chance*… Op. Cit., pp. 177-178.

[1636] See, for example, BVerfG (Federal Constitutional Court), Order of the Second Senate of 08 May 2007 - 2 BvM 1/03, para 80 and BVerfG (Federal Constitutional Court), Order of the Second Chamber of the Second Senate of 04 September 2008 - 2 BvR 1475/07, para 20. See also, Bundesgerichtshof (Federal Court of Justice) Decision of 24.02.2015, Az.: XI ZR 193/14, para 14 and BVerfG (Federal Constitutional Court), Order of 03.07.2019, Az.: 2 BvR 824/15, 2 BvR 825/15 Para 31.

[1637] See, Hillgruber, *Art. 25 GG*… Op. Cit., paras 3-4.

are granted a "superior status over municipal law"[1638] and all the organs of the German state are bound to comply with the norms expressed through those sources[1639]. For those reasons, GPs and CIL norms are directly applicable within that legal system. At the same time, the organs of the German state (including courts) are forbidden to interpret and to apply domestic law "in a way that violates" the GPDs and CIL[1640].

As can be noted, the aforementioned sources of international law play a critical role in the German legal system. For this reason, Art. 100.2 GG assigns the task of ensuring uniformity on the application of GPs and CIL to the Federal Constitutional Court (the Bundesverfassungsgericht, henceforth "BVerfG")[1641] through a special "norm verification procedure". This procedure is usually described as "one of the building blocks of the openness of the Basic Law to public international law"[1642].

Following this procedure, courts are required to obtain a decision from the BVerfG when there are "objective doubts"[1643] regarding: (1) whether a general rule of international law is part of the German legal system and, (2) whether that rule or rules "create rights and duties for the individual"[1644]. Furthermore, the "general rule" in question must be of "decisive importance for the decision"[1645]. Subsequently, "after having obtained a

[1638] See Crawford, *Chance*… Op. Cit., pp. 177-178. However, there is controversy regarding the specific ranking of these international norms within the German legal system. Some commentators argue that CIL and GPs "rank between simple federal law and the Basic Law". Hillgruber, *Art. 25*… Op. Cit., para 11. Therefore, as Folz puts it, these norms "(…) enjoy a higher rank than statutes. If a statute should conflict with a norm of universal customary law, the statute would be void. However, norms of domestic constitutional law still outrank customary law". Folz, *Germany*… Op. Cit., p. 245.

[1639] See, Hillgruber, *Art. 25*… Op. Cit., para 14.

[1640] See, Id, para 16. See also Folz, *Germany*… Op. Cit., pp. 245-246.

[1641] See Müller-Terpitz, Art. *100 GG – Normenkontrolle* in Schmidt-Bleibtreu; Hofmann; Henneke (Eds.), GG Grundgesetz. Heymanns (2017), para 27.

[1642] Id. "Insofern gehört Art. 100 Abs. 2 zu den Bausteinen der Völkerrechtsoffenheit des Grundgesetzes".

[1643] In the words of the BVerfG "(…) the decision of the Federal Constitutional Court must be obtained if in a dispute, it is objectively doubtful whether a rule of international law forms part of the federal law and whether it directly creates rights and obligations for the individual (…). This presupposes that the recognizing court, when examining the question whether and to what extent a general rule of international law applies, encounters doubts that must be taken seriously, even if the court itself does not have doubts". Bundesgerichtshof (Federal Court of Justice), Decision of 24.02.2015, Az.: XI ZR 193/14, para 42. Furthermore, according to Müller-Terpitz, "such objectively serious doubts" exist "if the court would deviate from the opinion of a constitutional body, from the decision of high German, foreign or international courts or from the teachings of recognized authors of international law". Müller-Terpitz, *Art 100*… Op. Cit., para 30 (own translation).

[1644] Art. 100 para 2 GG provides: "If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court".

[1645] Müller-Terpitz, *Art 100*… Op. Cit., para 29.

decision from the Federal Constitutional Court, the original court can apply the identified norm (…) in order to decide the outcome of the original case"[1646].

4.1. General Principles in Sovereign Debt Litigation Before German Courts

Considering that GPs are both explicitly incorporated and directly applicable under the German legal system, it is not necessary to engage in a broad discussion of the case-law. I will focus, instead, on the instances in which that specific source of international law has been invoked in sovereign debt litigation before the courts of that country.

Before proceeding, it is noteworthy that German courts have decided several cases on the issue of sovereign indebtedness. Nevertheless, GPs have only been invoked in certain cases against Argentina[1647]. For that reason, I limit the discussion to the decisions rendered in those cases.

4.1.1. The Federal Constitutional Court's "Necessity" Decision

The first important – and probably the most well-known – decision was rendered in 2007 by the BVerfG[1648]. In this case, the Federal Constitutional Court discussed whether Argentina was entitled to temporarily suspend payments to private bondholders based on a "general rule of international law"[1649]. In particular, the Republic argued that the state of necessity (a CIL doctrine) was applicable to the case. First, it posited that all the requirements for the application of the doctrine were met[1650]. Second, it indicated that necessity could also be extended to relationships between

---

[1646] Folz, *Germany*… Op. Cit., p. 245.

[1647] For example, most of the cases arising from the Greek debt crisis (the other important cluster of sovereign debt litigation in Germany) focused on other aspects, particularly, on the doctrine of sovereign immunity. For a discussion of those cases, see Sebastian Grund, *The Legal Consequences of Sovereign Insolvency – A Review of Creditor Litigation in Germany Following the Greek Restructuring*, 24 Maastricht Journal of European and Comparative Law 3 (2017). For a brief discussion of the last relevant decision in this regard see Rohan Sinha, "*Once a Trader, always a State": The Federal Constitutional Court classifies Greek Debt Restructuring Measures As Acta Iure Imperii,* GPIL: German Practice in International Law, available at https://gpil.jura.uni-bonn.de/2020/07/once-a-trader-always-a-state-the-federal-constitutional-court-classifies-greek-debt-restructuring-measures-as-acta-iure-imperii/ [last accessed 8.8.2020].

[1648] BVerfG (Federal Constitutional Court), Order of the Second Senate of 08 May 2007 - 2 BvM 1/03, paras 1-95.

[1649] The specific question submitted by the Frankfurt local court was whether the doctrine of necessity excused Argentina's performance towards creditors holding sovereign bonds (i.e., contracts based on private law). See Id., para 7

[1650] Commentators have noted that Article 25 of the ILC Articles on State Responsibility is an expression of the CIL on the subject. In particular, according to scholars, the aforementioned provision recognizes the requirements of that doctrine. According to Argentina, necessity could be applied in the context of a state's economic crisis. Furthermore, the Republic argued that state insolvency was a legitimate ground to invoke the doctrine, since the economic crisis that characterizes this type of situation effectively affected a country's ability to perform its functions. Additionally, Argentina indicated that suspending payments was "the only possibility to avert" that peril and that the payment suspension satisfied a weighing of the different interests involved. Finally, in what pertains to the "causes" of the "peril", Argentina argued that "it was not possible to prove the causality of specific conduct because of the dependence of the national economy on global economic contexts". Id., para 18.

states and private parties, such as the relationships between a sovereign debtor and its bondholders[1651]. While analyzing Argentina's arguments, the Court stressed that, if its defense was successful, bondholder litigation against the Republic should be stayed "as long as (…) [the] objection applies"[1652].

First and foremost, following its continuous jurisprudence on the matter, the BVerfG indicated that the expression "general rules of international law" of Art. 25 GG covers both CIL-norms and GPs. Then, it proceeded to discuss the applicability to the case of norms belonging to both sources.

In what pertains to the doctrine of necessity, the BVerfG relied on several decisions and advisory opinions rendered by international and national courts[1653]. Additionally, it also engaged in a discussion of Art. 25 of the ILC Articles on State Responsibility and on the relevant literature on the subject[1654]. In its analysis, the Court stressed that there was no evidence in the case-law regarding the application of the doctrine to "relationships under private law involving private creditors"[1655]. It further added that the scope of Art. 25 ILC was restricted to international obligations[1656] and that the scholarship was divided on the issue[1657]. Therefore, it cautiously indicated that it was "(…) not entitled

[1651] Id., para 19.

[1652] Id., para 28. The dissenting vote agreed on this: "Regardless of all questions which may be doubtful as to the range of a general plea of necessity under international law, there is namely no doubt that this plea certainly does not have the effect of quashing the main claim as to payments obligations, but only suspends it (…)". Id., para 75.

[1653] The cases discussed by the Federal Constitutional Court are the following: *Gabčikovo-Nagymaros* (Judgment of the International Court of Justice of 25 September 1997, Gabčikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997), *Israeli Wall* (Advisory Opinion of the International Court of Justice of 9 July 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 43 International Legal Materials 2004), *M/V Saiga* (ITLOS, The M/V Saiga (No. 2) Case, 38 International Legal Materials 1999, pp. 1323 et seq), *CMS* (CMS Gas Transmission Company v. The Argentine Republic (ICSID Case No. ARB/01/8), *LG&E* (LG&E Energy Corp v. The Argentine Republic (ICSID Case No. ARB/02/1 (Decision on Liability), *Serbian Loans* ((Ruling of the Permanent International Court of Justice of 12 July 1929, Case Concerning the Payment of Various Serbian Loans issued in France, Publications of the Permanent Court of International Justice, Series A, nos. 20/21 (1929), Judgment no. 14), *Venezuelan Rail-roads* (Ruling of the Mixed Claims Commission France-Venezuela of 31 July 1905, United Nations Reports of International Arbitral Awards – UNRIAA, Vol. X, 1962, pp. 285 et seq.) and the *Russian Indemnities* (Ruling of 11 November 1912, Affaire de l'indemnité Russe, UNRIAA, Vol. XI, 1962, pp. 421 et seq.). However, according to Stephan Schill, the BVerfG ignored other critical precedents in the subject. See Stephan Schill, *Der völkerrechtliche Staatsnotstand in der Entscheidung des BVerfG zu Argentinischen Staatsanleihen – Anachronismus oder Avantgarde?* ZaöRV 68 (2008), p. 48.

[1654] The Court also referred to the expert report of Prof. Dr. August Reinisch.

[1655] BVerfG (Federal Constitutional Court), Order of the Second Senate of 08 May 2007 - 2 BvM 1/03 -, paras. 1-95, paras 33, 50. Particularly, when reviewing the international case-law, the Court noted that the doctrine was applied in reference to international obligations and not to those arising from private-law contracts between a private party and a state. See Id., paras 51, 56, 57, 58, 59, 60.

[1656] Id., para 44.

[1657] Id., para 62.

to expand an existing general rule of international law in terms of its elements"[1658]. For all those reasons, it declined to apply the doctrine in favor of Argentina.

However, and more importantly for purposes of this *Chapter*, the BVerfG also mentioned a GP which could potentially have been applied to the case. Indeed, the Court referred to the GP of "compensation between debtors and creditors"[1659]. Nevertheless, the BVerfG did not engage in a detailed discussion of this principle[1660]. Furthermore, although the Court had previously differentiated between the two unwritten sources of international law (namely, CIL and GPs) it ruled out the application of the principle in question by – apparently – confusing both. In effect, the Court declined to apply that GPD since there was no uniform state practice in that regard[1661]. As can be noted, the Court demanded one of the elements of CIL to a norm of a different nature, that is, to a norm based on GPs which instead of state practice demand "recognition" as one of their constitutive elements.

This decision was accompanied by the dissenting opinion of Judge Lübbe-Wolff. Judge Lübbe-Wolff agreed with the majority that necessity is only applicable under strict conditions and subject to judicial scrutiny[1662]. Nevertheless, she indicated that the doctrine could also be applied in private-law litigation before domestic courts.

In particular, Judge Lübbe-Wolf stressed that the relevant case-law did not distinguish between private and international obligations with regard to the application of "necessity"[1663]. On the contrary, according to her, one important lesson which could be

---

[1658] Id., para 48.

[1659] However, since the BVerfG did not elaborate on the content of said GP, its content and scope remains unclear.

[1660] For a criticism see Schill, *Der völkerrechtliche*…Op. Cit., pp. 60 et seq.

[1661] "The transferability of a legal obligation resulting from a general principle of showing consideration is also discussed in legal literature, but it too is rejected for lack of supporting documentation from state practice (…)". BVerfG (Federal Constitutional Court), Order of the Second Senate of 08 May 2007 - 2 BvM 1/03 -, paras. 1-95, para 62. Furthermore, in the words of the Court: "Were there a general legal principle according to which a debtor state could use the objection of state bankruptcy towards private creditors, state bankruptcy would have to be identifiable in examples from state practice; one would hence have to be able to recognise at least a certain congruency in the various legal systems vis-à-vis the recognition of this principle. This is, however, not the case, as the evaluation of state practice undertaken to verify customary law has revealed. A general legal principle cannot be verified absent a corresponding embodiment in actual legal practice". Id., para 63.

[1662] Id., para 73. The strict conditions under which the doctrine could be applicable in cases of sovereign insolvency are summarized by Stephan Schill. According to Schill, the debtor state needs to prove that suspending payments to bondholders "is the only way (…) to protect a vital interest from a serious and imminent danger". According to him, among those vital interests it is possible to consider "the maintenance of the security of the population or the protection of life and health". Critically, Schill stresses that the fulfilment of those conditions needs to be assessed by a third-party and not subjected to the discretion of the indebted state. See Schill, *Der völkerrechtliche*… Op. Cit., pp. 62-63.

[1663] BVerfG (Federal Constitutional Court), Order of the Second Senate of 08 May 2007 - 2 BvM 1/03, paras 73, 82, 83, 84, 89, 90, 91, 92. In what pertains to the domestic case-law, Judge Lübbe-Wolf referred to the broad application of sovereign immunity which certain Courts have employed. These cases are Corte Suprema di Cassazione, Ordinanza of 27 May 2005, R.G.N.

extracted from previous decisions corresponds to the *rationale* of the doctrine. In her view, necessity aims at protecting a fundamental interest of the state, safeguarding its ability "to carry out its essential domestic tasks"[1664]. Consequently, for the purposes of the application of the defense, it would be irrelevant whether the relationship in question is governed by international or by private domestic law[1665].

Additionally, she emphasized one fundamental point: From the perspective of the sources of international law, the doctrine of necessity would have two different underpinnings. On the one hand, from states' practice and opinion juris, it emerges as a rule of customary international law. On the other, from recognition under different legal systems, it manifests itself as a GPD[1666]. In that context, Judge Lübbe-Wolf criticized the majority's decision on demanding of GPDs the constitutive elements of CIL[1667].

Furthermore, the dissenting opinion also discussed the effects that the doctrine would produce on the legal proceedings against the debtor. Indeed, Judge Lübbe-Wolfe posited that necessity could suspend the entry into judgment both at the trial and appellate level or that it could also be invoked in order to prevent execution. Nevertheless, she indicated that:

> *"The correct answer depends heavily on an assessment of factual consequences, namely on whether tangible negative consequences for the efforts of the debtor state to remedy or avert the critical situation are to be feared if the plea of necessity were not to be accounted for before the level of execution (…)"*[1668].

As can be noted, Judge Lübbe-Wolfe's statement can be extended to substantiate the invocation of other GPDs (such as the "stay") to prevent premature litigation. As

---

6532/04, *Pravin, EM, Af-Cap* and *NML*. Thus, in her own words: "(…) protection against enforcement from the more general point of view of immunity according to US law goes beyond the standard of what is required under international law, which is relevant to German law in this respect (…)". BVerfG (Federal Constitutional Court), Order of the Second Senate of 08 May 2007 - 2 BvM 1/03, para 93.

[1664] Id., paras 83-87.

[1665] Furthermore, Judge Lübbe-Wolfe indicated that by the means of the doctrine of necessity, the indebted state asserts the defense against the forum state (in this case, Germany) and not directly against its private creditors. For this and the other previously mentioned reasons, "the plea of necessity under international law demands the same substantive legal situation from the relationship between a state and a private individual as from the relationship between one state and another". Id., para 90.

[1666] "The plea of state necessity is not only generally recognized by force of customary international law, as the Senate has presumed. It is also a general legal principle behind which generally recognized convictions lie that concern the boundaries of the enforceability of claims and the precedence of elementary common-good interests – in particular with regard to the protection of life and health (…)". Id, para 81.

[1667] "The claim of [GPs] (…) to apply under international law, including the scope of such principles' content, is not dependent on their simultaneously constituting customary international law, i.e. that these principles are verifiable according to the relevant criteria for the finding of international customary law on the basis of universal state practice (…)". Id., para 80.

[1668] Id., para 94.

previously discussed (see subsection 3.3.1.3), suspending the entry of judgment in cases featuring bonds with CACs may be critical for the success of the operations.

Finally, judge Lübbe-Wolf concluded her dissenting opinion by indicating that since necessity could not be invoked successfully to bondholder litigation before German courts, creditors would theoretically be free to execute assets not protected by sovereign immunity[1669].

4.1.2. The Principle of Good Faith in the Decision of the District Court of Frankfurt am Main

In another important case[1670], Argentina invoked both the doctrine of necessity and the principle of good faith in order to refuse payment to a group of bondholders[1671]. According to the Republic, the plaintiffs (bondholders who previously declined to participate in the exchange of 2005) were in breach of the duty to act in good faith since they were attempting to be paid in full while the rest of the creditors agreed to reduce their claims[1672].

The District Court of Frankfurt am Main rejected all of Argentina's defenses and granted judgment in favor of the plaintiffs. First, the court dismissed the application of necessity to the case on the same grounds that as BVerfG's 2007 decision[1673]. At the same time, it emphasized that the Republic was no longer under severe economic distress[1674].

Second, the court also stated that dissenting bondholders were not acting in bad faith. According to the tribunal, creditors' participation in restructurings of bonds lacking CACs was voluntary and restructuring agreements only bound creditors' consenting to it. Consequently, dissenting creditors (such as the plaintiffs) were legally authorized to pursue repayment regardless of a previously agreed restructuring[1675].

4.1.3. The "GPDs Decision" of the Federal Court of Justice

Argentina insisted on the aforementioned arguments in an appeal submitted before the Bundesgerichtshof (Federal Court of Justice)[1676]. In this case, a creditor who declined to participate in the exchanges offered by the Republic in 2005 and 2010, brought suit pursuing full repayment. Argentina relied on three GPDs to refuse performance on the bonds: (1) equal treatment of creditors, (2) "integrity of orderly insolvency

[1669] Id., para 95.
[1670] Landgericht Frankfurt am Main (District Court Frankfurt am Main), Decision of 18.03.2008 - 2-21 O 495/06, 2-21 O 495/06.
[1671] In the case Argentina also relied on other defenses, including: (1) the "exchange contracts" exception of Art. VIII 2 (b) of the IMF Agreement and, (2) prescription. The district court rejected all of the defenses and ruled in favor of the plaintiffs.
[1672] Landgericht Frankfurt am Main (District Court Frankfurt am Main), Decision of 18.03.2008 - 2-21 O 495/06, 2-21 O 495/06, para 24.
[1673] Id., paras 48, 49, 52 and 53.
[1674] Id., para 56.
[1675] Id., para 60.
[1676] Bundesgerichtshof (Federal Court of Justice) Decision of 24.02.2015, Az.: XI ZR 193/14.

proceedings"[1677] and (3) abuse of rights. In particular, Argentina invoked those principles in order to obtain a similar effect as the one that the "cram down" would produce for dissenting creditors' claims. In effect, the Republic indicated that since an overwhelming majority of its creditors had previously agreed to a restructuring proposal, dissenting creditors, such as the plaintiff, were precluded from requesting performance on their instruments[1678].

Nevertheless, the Federal Court of Justice noted that, while Argentina's argument was based on GPDs, it was pursuing a similar effect as the one that a successful invocation of the doctrine of necessity would produce. Therefore – the court reasoned – since that doctrine is not applicable to relationships under private law (such as the one between a state and its bondholders)[1679], those GPDs could not be applied to that case either[1680]. At the same time, the court discarded the existence of other customary norms with the same content[1681].

Furthermore, another reason that the court put forward against the application of the GPDs invoked by Argentina relates to the absence of a full-fledged insolvency proceeding for states[1682]. According to the Bundesgerichtshof, instead of following a "statutory approach" which would have created such a proceeding, states preferred to follow a "private-law approach" by incorporating CACs into their bonds[1683]. In particular, the court noted that those provisions apply only to the instruments which explicitly include them[1684]. Consequently, and *a contrario sensu*, the court indicated that CACs would have been unnecessary if there were "general rules of international law" with the same normative content[1685]. Furthermore, the court also noted the difficulties related to extending GPDs, such as the "cram down" to instruments lacking CACs. In the court's opinion, Argentina failed to specify how the principles would operate in practice (i.e., as CACs do). For example, the Court noted that there were doubts regarding several issues, including the matters subjected to creditors' votes, the respective quorums, voting rights and judicial review[1686].

Additionally, the Bundesgerichtshof also indicated that the principle of abuse of rights was not applicable to this case[1687]. In particular, the Republic argued that the plaintiff acted abusively (violating the principle of good faith) since it demanded a better

[1677] Id., para 20.
[1678] Id., para 4.
[1679] Id., paras 21 and 52.
[1680] See Id., paras 19, 22 and 24.
[1681] See for example, Id., paras 43 and 44.
[1682] Id., para 22. Additionally, the Court referred to the "recent" widespread adoption of CACs in sovereign debt documentation, to recent restructurings and to several documents as evidence of the inexistence of a bankruptcy procedure for states. The documents cited by the Court were the UNCTAD Principles (2012) and the United Nations General Assembly Resolution A/Res/68/304 of 9 September 2014. See, Id., paras 20 and 30.
[1683] Id., para 32.
[1684] Id., paras 33-36 and 39.
[1685] Id., paras 8 and 40.
[1686] Id., para 41.
[1687] Id., para 45.

treatment than the one received by the other creditors who participated in the exchanges[1688]. Nevertheless, the court noted, again, that the absence of an insolvency proceeding for states frustrated Argentina's argument[1689]. The court stressed that the Argentinian moratorium was not "functionally comparable" to an insolvency proceeding since it was a unilateral measure not subjected to the control and supervision of a third-party[1690]. Therefore, and as the District Court of Frankfurt am Main had previously decided, the Bundesgerichtshof indicated that absent CACs: (1) creditors' participation in restructurings is voluntary and (2) the agreements reached on those negotiations do not affect dissenting bondholders[1691]. Furthermore, in the court's view, since the amounts involved in the case were modest, there was no evidence presented regarding the damage that an unfavorable decision would produce on Argentina's finances[1692].

For all those reasons, the court rejected Argentina's arguments and dismissed the case. Nevertheless, the Republic filed a complaint to the Federal Constitutional Court. In its complaint, Argentina argued that the Bundesgerichtshof violated its constitutionals rights by failing to refer the case to the BVerfG[1693]. In this regard it is important to mention that the BVerfG is "the sole authority competent for deciding questions relating to the existence of customary international law or general principles in the German legal order"[1694].

4.1.4. The Last Decision of the Federal Constitutional Court

In its second case before the BVerfG[1695], Argentina reiterated its arguments against the holdouts. In particular, the South American country insisted on invoking certain GPDs in order to refuse performance on holdout creditors' instruments[1696]. Again, the Republic grounded its defense on the principles of abuse of rights, intercreditor equality and that of "the integrity of orderly insolvency proceedings" (all of them derived from the principle of good faith)[1697]. Besides indicating that those principles were recognized by domestic legal systems around the world[1698], Argentina, argued that those propositions could be extrapolated to the international sphere since a "decentralized system for the management of sovereign debt crises had developed in recent decades"[1699]. Furthermore, Argentina also indicated that the widespread use of CACs in sovereign debt documentation also served as a testimony to the existence of those principles[1700]. Additionally, the Republic argued that the Bundesgerichtshof failed to engage in a

[1688] Id., para 47.
[1689] Id., para 48.
[1690] Id., para 54.
[1691] Id., para 49.
[1692] Id., para 50.
[1693] On this issue, see also Müller-Terpitz, Op. Cit., para 30.
[1694] Bohoslavsky and Goldmann, *An Incremental…* Op. Cit., p. 32.
[1695] BVerfG, (Federal Constitutional Court), Order of the Third Chamber of the Second Senate of 03 July 2019 - 2 BvR 824/15, 2 Rn. 1-45.
[1696] Id., paras 1 and 2.
[1697] Id., paras 5 and 18.
[1698] Id., para 19.
[1699] Id., paras 5 and 21.
[1700] Id., para 5.

detailed discussion of those GPDs and that it limited itself to discussing necessity as a rule of customary international law instead[1701].

In its 2019 judgment, the BVerfG reaffirmed its 2007 decision regarding the inapplicability of necessity to private-law relationships[1702]. Furthermore, it also subjected the GPs invoked by Argentina to the requirements of (1) recognition and (2) extrapolation.

First, with regard to the recognition requirement, the Court noted that neither the Republic nor the expert opinions submitted by it actually proved the recognition of the principles across domestic legal systems[1703].

Secondly, following the reasoning of the Bundesgerichtshof, the BVerfG stressed that the normative propositions in question did not satisfy the extrapolation requirement. In this regard, the Court indicated that transposing principles derived from domestic insolvency law to the international sphere depended on the consolidation of an international bankruptcy procedure for states[1704]. In particular, in the Court's opinion, the Argentinian moratorium was nothing like an insolvency procedure: It was simply a unilateral measure imposed by the government[1705]. Consequently, according to the BVerfG:

> *"The principles of insolvency law asserted by the complainant form an integral part of the detailed domestic insolvency law regime, which contains procedural rules, also for the protection of minority creditors, whose compliance is monitored by a neutral court, usually by a bankruptcy court. Without a procedural framework based on the rule of law which allows for the review of decisions adversely affecting the minority [of creditors], an essential prerequisite for a*

[1701] Id., paras 22 and 25.
[1702] Id., paras 8, 9, 34 and 36.
[1703] Id., para 42.
[1704] Id., para 37. In the words of the Court: "Even if it were assumed that the specific requirements derived by the complainant from the principle of good faith – namely the equal treatment of creditors and the integrity of orderly insolvency proceedings – amounted to a principle which was generally recognized in domestic legal orders, and even if it was true that these specific requirements were recognised within the major legal families, the transfer of the principle to situations governed by international law would require at least the existence of a comprehensive set of rules governing State bankruptcy […].The specific requirements that, according to the complainant, derive from the principle of good faith with regard to insolvency law could only be applied accordingly at the level of international law if there was also an independent regulatory or supervisory authority competent to monitor compliance with these rules and capable of ensuring an equitable balancing of the interests of all affected parties". Id., para 38. [Translated by Julia Wagner, *In another Argentinian State bankruptcy case the German Federal Constitutional Court once again rejects the existence of a state of necessity as a general principle of international law*, available at https://gpil.jura.uni-bonn.de/2019/10/in-another-argentinian-state-bankruptcy-case-the-german-federal-constitutional-court-once-again-rejects-the-existence-of-a-state-of-necessity-as-a-general-principle-of-international-law/ [last accessed 10.8.2020].
[1705] BVerfG, (Federal Constitutional Court), Order of the Third Chamber of the Second Senate of 03 July 2019 - 2 BvR 824/15, 2 Rn. 1-45, para 14.

transfer [of the principle] to the level of international law is missing. It follows that it is not possible to invoke individual principles derived from insolvency law in accordance with Article 38(1)(c) of the ICJ Statute"[1706].

Additionally, the Court noted that the expert opinion of Prof. Dr. Matthias Goldmann, submitted by the Republic, also stated that impediment[1707].

Furthermore, the BVerfG indicated that the evidence presented by Argentina was unconvincing concerning the principle of abuse of rights. In this regard the Court noted the non-binding character and the lack of specificity of the "soft-law" instruments presented by the Republic[1708]. It also pointed at the lack of relevant case-law on the matter[1709].

Finally, the Court agreed with the Bundesgerichtshof with regard to the relationship between CACs and GPDs applicable to sovereign insolvency. First, it indicated that the effects of those clauses could not be extended to bonds without them[1710]. Second, the BVerfG posited that the recent widespread adoption of those provisions in sovereign debt documentation suggested the inexistence of relevant international principles on the matter[1711].

4.2. The Feasibility of Invoking the "Stay" and the "Cram down" in Litigation Involving Sovereign Bonds Governed by German Law

According to the foregoing, although GPDs are directly applicable under German law, there are no sovereign debt cases where the invocation of norms emanating from this "unwritten" source of international law have been successful. Nevertheless, and at the same time, neither the "cram down" nor the "stay" have been specifically used as a defense by indebted states against their bondholders in that jurisdiction. Before examining the feasibility of invoking those GPDs in sovereign debt litigation before German courts, it is important to outline the trends that emerge from the case-law.

First, the practice of German courts tends to be conservative regarding to the doctrine of necessity. In effect, it has circumscribed this doctrine to customary international law. The only dissenting voice seems to be the separate opinion of Judge Lübbe-Wolff. As previously discussed, Judge Lübbe-Wolff indicated that since the doctrine is recognized by different legal systems around the world, it could be also considered a GPD. This "elastic" understanding of "necessity", allowed her to argue in favor of its application to relationships governed by private law, regardless of the absence of state practice and opinio juris on the subject. Nevertheless, as stated above, despite the favorable reception among international lawyers, Judge Lübbe-Wolff's opinion has remained marginal, and

[1706] Id. para 39. Translated by Julia Wagner, *In another*… Op. Cit.
[1707] Id., para 39.
[1708] Id., para 41.
[1709] Id., para 42.
[1710] Id., para 12.
[1711] "If the general principle of law existed, as asserted by the complainant, the introduction of collective action clauses would not have been necessary, as the State in distress would in any case have had a right to refuse payment to so-called holdout creditors". Id., para 43. Translated by Julia Wagner, *In another*… Op. Cit.

courts have maintained their commitment to the decision rendered by the BVerfG in 2007.

Second, German courts have denied extending the effects of CACs to bonds lacking those provisions. As US courts have, German courts have qualified bondholders' participation in restructurings of bonds without CACs as voluntary. At the same time, they have stressed that restructuring agreements in that context only bind consenting creditors. For those reasons, German courts have indicated that dissenting creditors who litigate in order to be paid in full are not acting abusively. Nevertheless, it is important to note that the plaintiffs in the cases were not "activist" creditors, having acquired their bonds before the debtor found itself under financial distress.

Third, the (recent) widespread adoption of CACs in sovereign debt documentation has led German courts to conclude that there are not "general rules of international law" on the subject of state insolvency. Otherwise – according to the courts – those clauses would have been unnecessary. This argument is unpersuasive. It ignores one crucial point: Even if there are relevant "general rules of international law" on sovereign insolvency, they may not be applicable to a particular case. In effect, due to the specific relationship between the law governing the contracts and international law (see section 2 for details), it is entirely possible that, despite its existence, an international norm remains inapplicable in certain jurisdictions. In that context, if a jurisdiction is not particularly prone to incorporate international law in its legal system, including CACs on the respective bonds would serve as an effective alternative to enhance creditors' cooperation in the restructurings.

4.2.1. The "Cram Down" and the "Stay" Before German Courts

As previously discussed, German courts have denied the status of GPDs to certain normative propositions extracted from domestic law. Let me recall that those propositions are (1) the equal treatment of creditors, (2) the "integrity of orderly insolvency proceedings" and (3) the abuse of rights. According to the courts, those normative propositions could not be considered GPDs since they failed both the "recognition" and "extrapolation" requirements. For example, the BVerfG noted that Argentina failed to provide evidence pertaining to the recognition of those propositions across legal systems around the world.

Additionally, German courts have also stressed that those principles could not be extrapolated to the international sphere. For the courts, the absence of an international bankruptcy proceeding for states denied that possibility. In particular, courts noted that the Argentinian moratorium and its debt restructuring were different from those types of proceedings: They lacked safeguards in favor of dissenting (minority) creditors, such as the involvement of a third party[1712]. At the same time, courts also indicated that the

[1712] In the same sense, see for example Andreas Witte, *The Greek Bond…* Op. Cit., pp. 322-323, Kupelyants, *Sovereign…* Op. Cit., p. 31 and Lewyn, *Foreign Debt…* Op. Cit., p. 666. For subjecting the applicability of GPDs extracted from domestic bankruptcy regimes to the existence of an insolvency proceeding for states, see Goldmann, *On the Comparative…* Op. Cit. But see Goldmann's subsequent contributions where he argues that sovereign debt restructurings are

Republic failed to specify how those normative propositions would operate in practice. For example, for the Bundesgerichtshof, it was not clear which matters would be submitted to creditors' vote and which quorums would be necessary for reaching an agreement.

In what follows I discuss the feasibility of applying both the "cram down" (subsection 4.2.1.1) and the "stay" (subsection 4.2.1.2) to sovereign debt litigation before German courts.

4.2.1.1. The "Cram Down"

As stated above, the "cram down" has not been invoked in sovereign debt litigation in Germany. Nevertheless, apparently, the reasoning of the courts pertaining to the previously mentioned normative proposition[1713] could also be extended to this particular GPD. This would be a consequence of the effects that the application of the "cram down" would produce on bondholders' claims. Indeed, a successful defense *a la* Argentina would be indistinguishable from one based on the "cram down": A restructuring proposal agreed by a supermajority of creditors would bind all bondholders (or at least those holding instruments governed by German law). At the same time, dissenting creditors would be prevented from pursuing the payment of the full face-value of their claims. In other words: Those principles could be used as a defense to refuse performance on dissenting creditors' claims when a restructuring has been approved by a majority of bondholders. All of the above applies even in cases where the bonds in question lack renegotiation-CACs. Consequently, at face-value, the success of defenses based on the "cram down" before German courts seems to be highly unlikely[1714].

Nevertheless, it is submitted here that an argument can be made in favor of the "cram down" if the conditions referred to in *Chapter Four* are fulfilled[1715]. As it is going to be discussed, those considerations can be used by sovereign debtors in order to persuade German courts. In this respect, it is important to note that the courts of that country dismissed the existence of GPDs applicable to sovereign debt restructuring based both on the regulatory environment addressing the subject and on the specific behavior of Argentina as a debtor. Let me address both issues at the same time, starting with the second.

The Bundesgerichtshof was correct in that the Argentinian moratorium (and its subsequent restructuring) could not be considered "functionally comparable" to a bankruptcy procedure. In effect, the Argentinian exchanges of 2005 and 2010 have been commonly referred to as "unilateral" and "coercive" by the literature[1716]. In these cases,

---

conducted under the umbrella of a "de facto" insolvency proceeding for states. See *Chapter One*, pp. 25 et seq.

[1713] Meaning the reasoning pertaining to (1) the equal treatment of creditors, (2) the "integrity of orderly insolvency proceedings" and (3) the doctrine of abuse of rights.

[1714] It is important to note that the "cram down" is most relevant where a vast majority of the bonds at stake lack third generation CACs.

[1715] See *Chapter Four*, pp. 217 et seq.

[1716] See, for example, Laura Alfaro, *Sovereign Debt Restructuring: Evaluating the Impact of the Argentina Ruling*, 5 Harvard Business Law Review (2015), pp. 54-55.

the Republic presented the restructuring offers to its bondholders in a "take it or leave it" fashion: Creditors were left to decide between a significant "haircut" or nothing[1717]. It is noteworthy that Argentina was able to exert that kind of pressure on its creditors because it managed to elude the constraints usually imposed on debtors by the IMF's lending policies. In particular, the Republic achieved this privileged position by paying its IMF loans in advance. Thus, the Fund was impeded from influencing the country's policy choices, including those related to the "haircuts" it requested from creditors[1718].

Taking that argument one step further, it can be noted that the IMF's involvement in sovereign debt restructurings does provide several safeguards to creditors. As discussed in *Chapter Four*, the Fund's lending policies feature several of the main components of domestic insolvency regimes. Among these it is possible to mention its debt sustainability analysis (henceforth, "DSA") conducted in the context of the implementation of one of its programs. Through a DSA, the IMF assesses a distressed state's ability to pay, defines the conditions under which debt servicing becomes feasible, and determines the maximum ability to pay of the indebted economy[1719]. Consequently, if communicated to creditors[1720], a DSA can prevent sovereign's opportunism and ensure creditors as a group that the restructuring offer is consistent with the economic means of the country. Furthermore, the IMF can subject the access to its resources to the implementation of policy-changes destined to boost economic growth and to generate primary surpluses (usually known as "policy conditionalities")[1721]. For that reason, if the state's restructuring offer is aligned with IMF's recommendations, holding-out would prevent a restructuring that, if implemented, would be value-enhancing for both creditors and debtors.

Therefore, I concluded in *Chapter Four* that the absence of a bankruptcy court for sovereigns is not an impediment for the extrapolation of principles such as the "cram down" if and when the IMF is actively involved throughout the process. In effect, I

[1717] Id.

[1718] "In Argentina's default, the IMF was criticized by some creditors for exerting insufficient pressure on the government to improve its offer or eschew measures that created a de facto unilateral offer. However, because the authorities repaid Fund loans ahead of schedule, the IMF's leverage was minimal. In effect, the authorities immunized their negotiating strategy from considerations such as good faith. With a free hand over the terms of their debt exchange offering, the authorities were credibly able to present bondholders with a de facto take-it-or-leave-it offer". James Haley, *Sovereign Debt Restructuring: Good Faith or Self-Interest?* CIGI Papers Series (2017). Available at https://www.cigionline.org/publications/sovereign-debt-restructuring-good-faith-or-self-interest [last accessed 29.8.2020], p. 15.

[1719] Haley, *Sovereign*… Op. Cit., p. 12 and IMF, *Sovereign*… Op. Cit., p. 8. Buchheit et al, *The Restructuring*… Op. Cit., p. 342.

[1720] The information covered by a DSA is not necessarily public, and indebted states can prevent its dissemination. See Aitor Erce, *Sovereign Debt Restructurings and the IMF: Implications for Future Official Interventions*, Federal Reserve Bank of Dallas Working Paper No. 143 (2013), p. 15.

[1721] Haley, *Sovereign*… Op. Cit., p. 12.

followed important voices in the literature according to which the IMF has created, in practice, an informal "quasi-bankruptcy" process[1722].

As can be noted, the Argentinean restructuring was not "functionally comparable" to a bankruptcy proceeding. Nevertheless, this was not a consequence of the lack of (international) mechanisms equivalent to those of such a proceeding. It was the result of the failure of the Latin American country to "play by its rules".

Consequently, although the BVerfG denied the existence of an insolvency proceeding for sovereign states *in general*, it can be argued that its decision was determined by the specific circumstances of the Argentinian restructuring[1723]. If Argentina had "played by the rules" it would have been able to refer to and thus prove that there are mechanisms in international finance that are "functionally equivalent" to those provided by domestic insolvency regimes.

Nevertheless, all those considerations should be taken with a grain of salt. To be certain, the BVerfG denied the extrapolation of the normative propositions based on the inexistence of a bankruptcy procedure for states. Thus, although the behavior of Argentina may have been a part of its analysis, the conclusion of the Federal Constitutional Court seems to be based more fundamentally on the "regulatory void" concerning sovereign insolvency. This leads me to discuss this point in particular.

In *Chapter Four*, in contrast to the BVerfG, I argued that the existence of an insolvency procedure for states is not necessary for the application of the aforementioned GPD[1724]. As it was indicated there, the use of analogical reasoning to extract general principles from domestic legal systems (the "source") to be extrapolated to the international scenario (the "target") does not demand "identity" between the two[1725]. On the contrary, it only requires "similarity" between both spheres.

In the specific context of comparative reasoning applied to extract GPDs, similarity between the source and the target relates to the "functions" of the norms. This is satisfied by an "extrapolation" analysis asserting that the function that a legal principle serves in the domestic sphere also holds on the international context. Therefore, I proposed that extrapolation does not demand the existence of a full-fledged insolvency procedure for states for the application of the GPDs in sovereign debt litigation. On the contrary, it only requires the existence of mechanisms in place which can perform an

[1722] See, for example, Haley, *Good Faith*… Op. Cit., p. 9.

[1723] In a similar sense, discussing the cases against Argentina in the US, von Bogdandy and Goldmann indicate: "(…) it should be kept in mind that the US cases against Argentina address a massive, unilaterally imposed haircut on sovereign debt. It is not certain that the courts involved would come to the same conclusions in cases against a state extending an invitation to all creditors to participate in fair and transparent negotiations either directly or through representatives". von Bogdandy and Goldmann, *Sovereign Debt Restructurings*… Op. Cit., p. 68. See also, Goldmann, *Putting Your Faith*… Op. Cit., p. 139.

[1724] See *Chapter Four*, pp. 208 et seq.

[1725] See Hertogen, *The Persuasiveness*… Op. Cit. p. 1144.

equivalent function to those which other norms or institutions serve under domestic bankruptcy regimes.

As stated above, those mechanisms can be found in the lending policies of the IMF (including its DSA and the implementation of conditionalities). According to the foregoing, the IMF's involvement in debt restructurings can suffice to prevent debtors' opportunism. By the same token, the Fund's participation offers several safeguards to bondholders. Those conclusions are reinforced by the empirical evidence relating to states' preferences: In effect, the evidence suggests that most defaults (and restructurings) are a consequence of a state's inability to pay (and not a product of the strategic behavior of the debtor)[1726].

For all of those reasons, it is submitted here that the decision rendered by BVerfG in 2019 was mistaken. Instead of looking for a "full-fledged" insolvency proceeding for states, the Court should have considered the mechanisms already in place for the resolution of sovereign debt crisis. As stated above, those mechanisms are "functionally equivalent" to those provided for by domestic insolvency regimes.

However, there is another important argument against the BVerfG's reasoning: Its conclusion confines GPDs such as the "cram down" to the point of irrelevance. In effect, conditioning the application of those norms to the existence of an international treaty on sovereign insolvency would make most of them unnecessary. In other words, those normative propositions could not be applied when needed the most, i.e., when there are no international agreements on the subject.

All of the above suggest that the conclusion of the Federal Constitutional Court should be modified in a subsequent ruling on the matter. For the same reasons, it is submitted here that sovereign debtors should insist on invoking the "cram down" against holdouts, even in the cases where the bonds in question lack third generation CACs. Nevertheless, they need to be wary of the IMF's recommendations: The applicability of the "cram down" will still be subordinated to them "playing by" the "informal" rules of international finance.

4.2.1.2. The "Stay"

First of all, it is important to mention that the previous remarks concerning the possibility of applying the "cram down" regardless of the existence of an international law-based insolvency proceeding for states can also be extended to the case of the "stay". However, additional reasons call for the application of this particular GPD when the bonds in question feature CACs.

If bonds with CACs are being litigated, a sovereign debtor could also argue that the "extrapolation" requirement demanded by German courts for the application of GPDs such as the "stay" is fulfilled. In effect, modification CACs are aimed at emulating some

[1726] See, for example, Stephanie Schmitt-Grohé and Martín Uribe, *International Macroeconomics* (2014) available at http://www.columbia.edu/~mu2166/UIM/index.html [last accessed 30.10.2020], pp. 471-472; Vivian Zhanwei Yue and Bin Wei, *Sovereign Debt Theory*, Oxford Research Encyclopedia of Economics and Finance (2019), p. 5 and Canuto and Pinto, Sovereign… Op. Cit., pp. 123-124.

of the most important mechanisms provided for under domestic insolvency regimes[1727]. Thus, the debtor could stress that these provisions create a contractual multilateral forum for debt renegotiation[1728]. To be certain, this forum only captures the relationship between one state and its bondholders. Nevertheless, it may suffice to persuade the courts that at least a private-law regime has been developed by sovereigns themselves through the issuance of bonds with CACs.

Once the existence of that regime is established, the sovereign debtor could move to invoke a "stay" (grounded on GPDs) as a defense. The most critical (and most likely to succeed) use of this defense would relate to staying creditors' litigation (and not enforcement only). As discussed for the case of the US (see subsection 3.3.1.3), halting the entry of judgment can be critical for the success of a restructuring. In effect, levying a stay on those cases can prevent preemptive litigation from frustrating a restructuring that would benefit the debtor and its creditors as a group. At the same time, suspending bondholder litigation would also enhance their participation in the debt-renegotiation. As can be noted, such a measure would guarantee the ability of CACs to serve their purpose. In other words, it would merely give effect to contractual provisions previously agreed upon by the parties. Finally, in this case, as was also the case for the US, the suspension of litigation should be extended for a limited period of time.

4.3. Conclusions Regarding the Application of the "Stay" and the "Cram Down" Before German Courts

According to the foregoing, although GPDs are directly applicable under German law, sovereign debtors attempting to invoke either the "cram down" or the "stay" in that jurisdiction will face several obstacles. Nevertheless, it was submitted here that those obstacles are not insurmountable.

First, the application to both GPDs in litigation is conditional on the rectification of the last decision of the BVerfG. As previously noted, the Federal Constitutional Court subordinated the extrapolation of normative propositions extracted from domestic bankruptcy regimes to the existence of a full-fledged insolvency proceeding for states. Nevertheless, it was also argued that the Court erred in that decision.

Particularly, I posited that, far from demanding "identity" between the domestic and the international sphere (as the BVerfG seems to have required), the comparative methodology used for identifying these principles requires only "similarity" between the two. From this perspective, this condition is less stringent: It only demands that the "function" that the norms play under domestic legal systems also hold in the international sphere.

[1727] See *Chapter Four*, pp. 189 et seq.

[1728] According to Goldmann: "One could characterize the function of CACs as that of an ersatz debt restructuring mechanisms". Goldmann, *Putting your Faith…* Op. cit., p. 130. Also referring to modification-CACs as a "renegotiation forum" see Kupelyants, *Sovereign…* Op. Cit., p. 97. However, Kupelyants uses this argument for the application of a "stay" based on domestic and not on international law and only for the case of bonds governed by English law.

In the particular case of sovereign debt restructuring, it was submitted that the lending policies of the IMF are "functionally comparable" to the mechanisms destined to safeguard creditors' interests under domestic bankruptcy regimes. Indeed, the existence of those mechanisms allows the functions played by both the "stay" and the "cram down" under domestic insolvency regimes to survive their transfer from the domestic to the international scenario.

For those reasons, I argued that if the BVerfG modifies its approach for the extrapolation of those principles, both of them could be applied in sovereign debt litigation provided that the indebted country follows the recommendations of the IMF.

Second, in regard to the "stay", I argued that the widespread adoption of CACs in sovereign bonds would serve as an additional factor playing in favor of sovereign debtors. In particular, I posited that since those provisions "emulate" one of the most important features of domestic reorganization regimes (i.e., collective decision-making in debt renegotiation), the extrapolation requirement demanded by German courts (namely, the existence of an insolvency-like proceeding for states) was fulfilled. If successful, this "stay" could halt preemptive litigation and grant the indebted state with the "breathing space" needed to achieve a restructuring deal with the majority of its creditors, according to the respective CACs included on the contracts.

5. Conclusions

In this *Chapter*, I discussed whether GPDs can be applied in sovereign debt litigation before domestic courts, even when international law is not chosen as the governing law of the contracts. Since the relationship between international law and domestic legal systems varies with each jurisdiction, it was posited that this issue cannot be addressed in the abstract. For that reason, the discussion needed to be circumscribed to one or more particular jurisdictions. In that context, I decided to center the analysis on two legal systems: the United States (particularly, New York) and Germany.

For the case of the United States, it was noted that GPs are surrounded by opacity. In order to clarify the status of this source in that legal system, I conducted a problem-oriented search of decisions rendered by US courts. This search was complemented with the cases previously referred to by the (scant) literature on the subject.

The case-law showed that US courts have identified and recurred to GPs even without the authorization of domestic statutes. Furthermore, the courts of that country have also applied norms belonging to that source of international law in conjunction with domestic law. In effect, it was shown that US courts have used GPs as an aid to the interpretation of domestic statutes or as a means of endorsing domestic legal principles.

It was also indicated that US courts' engagement with GPs is not that different from their engagement with treaties and customary international law. Indeed, although scholars have emphasized that one of the most important doctrines of US foreign relations law (the "Charming Betsy" canon) only covers treaties and CIL, similar elements of the doctrine can also be traced back to US courts' engagement with GPs. In a nutshell, that doctrine directs the courts of that country to interpret domestic statutes in consonance with the international obligations of the US when there is not direct conflict between the two. I argued that the aforementioned similarities are not that surprising. The very *rationale* of the "Charming Betsy" doctrine lends to its extension to GPs.

Once the relationship of GPs to US law was clarified, I discussed whether two norms belonging to that particular source (i.e., the "stay" and the "cram down") could be applied in sovereign debt litigation before the courts of New York. I decided to center the analysis on that particular jurisdiction of the US considering that sovereign bonds issued by emerging market borrowers overwhelmingly point to New York courts as the proper forum for the resolution of disputes and to New York law as their governing law.

On the one hand, in regard to the "stay", it was submitted that this GPD can aid in the interpretation of section 2201 of the Civil Practice Law and Rules of the State of New York. Section 2201 codifies the courts' powers to halt proceedings before a decision is rendered or at the time of its execution. As previously discussed, New York courts can recur to the aforementioned GPD (i.e., the "stay") to operationalize the "general language" of that Section. Furthermore, I argued that if the bonds being litigated include CACs, the courts of New York are authorized to suspend preemptive litigation and thus enable the renegotiation of a sovereign's liabilities. In this regard, it was also

submitted that this particular application of the "stay" as a GPD would also reconcile the policy interests of the US on the subject of sovereign debt restructuring.

On the other hand, in regard to the "cram down", I circumscribed the discussion to litigation involving bonds featuring first- and second-generation CACs. In particular, I argued that the "subsidiary" role that GPDs play in the US hinders the use of the "cram down" as a defense against dissenting bondholders. In effect, I noted that "cramming down" dissenting creditors' claims against explicit contractual language would be considered an unacceptable intromission into their contractual rights. At the same time, such an alternative would also be precluded by the precedents in New York. In a word, NY courts tend to enforce valid contracts concluded between sophisticated parties as written. Finally, the same conclusion is supported by the policy of the United States towards debt restructuring: Creditors' participation in debt renegotiations is considered strictly voluntary.

In contrast to the case of the US, GPs are specifically incorporated into the German legal system by Article 25 of its Constitution. Furthermore, by means of said provision, the norms belonging to that source are directly applicable in that jurisdiction. Therefore, I focused the discussion on the cases where GPs have been invoked in sovereign debt litigation before the courts of that country.

In that regard, I noted that despite being directly applicable, there are no cases in which the invocation of GPDs has been successful before German courts in the context of sovereign debt litigation. In particular, I argued that this a consequence of the erroneous application of the methodology necessary for the identification of norms belonging to that source of international law. As it was noted, German courts have subordinated the extrapolation of insolvency principles to the international sphere to the existence of a formal international bankruptcy regime for states.

In consonance with the previous *Chapters*, I argued that the aforementioned understanding is more stringent than necessary: For a comparative law-based methodology attempting to identify GPDs, identity between the international and the domestic sphere is not necessary. On the contrary, this methodology only demands similarity between the two. It was submitted that the mechanisms in existence in international finance (particularly, those considered through the IMF's lending policies) serve an equivalent function to those considered under domestic reorganization regimes. At the same time, it was suggested that the existence of those mechanisms enables the extrapolation of domestic principles to the international sphere.

In accordance with the foregoing, I argued that the success of defenses based on the "cram down" and on the "stay" in Germany are conditioned to the reconsideration of the last decision rendered by the BVerfG in 2019. Thus, it was suggested that if the BVerfG rectifies its approach for the identification of GPDs, both of those principles would be directly applicable in that legal system. For the particular case of the "cram down", I stated that this would be true even if the bonds subjected to litigation lack CACs. For the "stay", I posited that if the bonds in question include CACs, the indebted state could also argue that those provisions serve as a contractually bargained-for "restructuring

forum". Therefore, the sovereign involved in litigation could request a suspension of litigation with the purpose of triggering CACs and to renegotiate its liabilities.

Nevertheless, it is important to note that if the BVerfG does not modify the aforementioned criterion, both the "cram down" and the "stay" will remain inapplicable in the German legal system. Consequently, the "stay" would only be successful as a defense in sovereign debt litigation before the courts of the US.

Moreover, and as a corollary of the different status of GPs in the US and in Germany, a change in the orientation of BVerfG's criteria for the identification of these norms would lead to further divergent results. In that case, both GPDs would be directly applicable and could be used by sovereign debtors against holdout creditors in Germany.

As can be noted, these results confirm scholars' warnings regarding the perils of the application of GPDs to bondholder litigation. As Anna Gelpern has stressed[1729], since the reception of international law across legal systems is heterogeneous, dissimilar outcomes of the strategies based on GPDs could lead to an even more pronounced fragmentation on the law of sovereign debt. The problem may be even more acute, considering that the role of GPDs in the other legal system to which sovereign bonds tend to be subjected to the most (i.e., English law) is yet to be determined.

Nevertheless, and to be certain, fragmentation in this area of the law is first and foremost a consequence of the lack of an international treaty addressing the issue of sovereign insolvency. Until such an international agreement enters into force, restructuring states' liabilities will remain a matter for domestic courts of different jurisdictions to handle.

Notwithstanding their lack of "unifying power", the promises of GPDs for sovereign insolvency survive. As the "incremental approach" literature has indicated, GPDs constitute an important complement to the recent trends on the issue of sovereign indebtedness, including the widespread adoption of third-generation CACs in sovereign debt documentation. As previously argued, if accepted in litigation, principles such as the "stay" can help to mitigate some of the "practical" problems of the current practice of debt renegotiation. In short, they can be used as a complement rather than a substitute of the current "private-law" approach.

GPDs, however, may be capable of offering further improvements to the current practice of sovereign debt restructuring. As stated in *Chapter Two*[1730], sovereign insolvency features several competing interests, including those of bondholders and those of the citizens of the indebted state. Crucially, the relationship between these interests can be construed as involving a potential trade-off between goals: While in some cases the protection of citizens' rights will demand restructuring the debt (by modifying the most important contractual obligations of the bonds), the protection of bondholders' property rights will require contractual stability and, therefore debt repayment (and debt renegotiation) in the previously agreed terms. Under certain circumstances, it might

[1729] See Gelpern, *Hard*… Op. Cit., pp. 354-355.
[1730] See *Chapter Two*, pp. 53 et seq.

not be possible for a state to fully satisfy its citizens' "social" rights without encroaching upon the property rights of bondholders. Moreover, under the same circumstances, it might not be possible to respect property rights without impairing the enjoyment of "social" rights.

Consequently, the question that now arises is whether the GPDs previously identified (namely the "stay" and the "cram down") can be used to reconcile those different interests and to mitigate the aforementioned trade-offs. This will be the subject of the next *Chapter*.

Chapter Six: A Proportionality Analysis of the General Principles of Domestic Law Applicable in the Context of Sovereign Insolvency

1. Introduction

As pointed out throughout this *Thesis*, sovereign debt crises can give way to insolvency conflicts. The most basic form of insolvency conflict comprises the tensions between an indebted state and those who have claims on its revenue, namely its creditors and citizens. In short, when government revenue is not enough to satisfy both the contractual claims of creditors and the "constitutionally" guaranteed interests of citizens, the state will have to decide how to allocate its resources and thus what to prioritize in its spending. On the one hand, if the state decides to grant priority to debt repayment, citizens' rights could be encroached upon. On the other hand, if the state decides to either default on the debt or to renegotiate the terms of the contracts (with specific contractual language to the contrary), creditors may see this as an intrusion on their claims, and thus, on their property rights.

If the interests of creditors and citizens are protected through constitutional principles (i.e., "values"), this type of conflicts can be approached from the perspective of balancing or weighing and solved accordingly where appropriate[1731]. This methodology is often referred to as "the proportionality test"[1732] or "proportionality analysis"[1733] (henceforth, "PA"). Through PA, courts solve cases which involve different values that need to be protected. The importance of PA becomes salient in cases where a court has to decide to what extent the respect or fulfillment of a value, which hinders the respect or fulfillment of another value, is justified on the grounds of the facts of the case and of the constitution[1734]. Furthermore, the application of PA presupposes that "values" refer to goals or objectives to be attained and not norms that are either fulfilled or not (rules)[1735].

Although it has its origins in domestic constitutional adjudication, PA is not necessarily limited to domestic disputes. The very practice of international Courts and tribunals is evidence of this[1736]. At the same time, scholars have asserted that balancing can also be used for the interpretation and application of the values enshrined by public international law[1737]. For example, Anne van Aaken justifies the use of this methodology not only by referring to the structural similarities between some norms of international law and constitutional principles, but also by advocating its convenience as a

---

[1731] Balancing presupposes a conflict between principles or the applicability of competing principles to a specific case.

[1732] Klatt and Meister, *The Constitutional Structure*… Op. Cit., p. 7.

[1733] Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Columbia Journal of Transnational Law 72 (2008).

[1734] See Lars Lindahl, On Robert Alexy's Weight Formula for Weighing and Balancing, in Lars Lindahl (Ed.), *Rights: Concepts and Contexts*. Routledge (2012), p. 173.

[1735] Robert Alexy stresses that constitutional principles are also referred to as "goals" in domestic adjudication. See Alexy, *A Theory*… Op. Cit., p. 45.

[1736] See generally, Stone Sweet and Mathews, *Proportionality*… Op. Cit.

[1737] See van Aaken, *Defragmentation*… Op. Cit. See also: Bücheler, *Proportionality*… Op. Cit. and Krommendijk and Morijn, *Proportional*… Op. Cit., pp. 422-451.

defragmenting tool for public international law and as a means to solve the conflict of norms pertaining to its different regimes[1738]. Therefore, in her view, equating this type of norms with constitutional ones (and the consequent use of balancing for their interpretation) may contribute to reconciling the different values embedded in the international legal order.

Thus, PA can be critical for reconciling the different interests in tension in insolvency conflicts. Furthermore, if applied to international law, it can also help to mitigate those tensions from the perspective of the values of the international *polity*. Nevertheless, in a significant number of the legal disputes arising from insolvency conflicts, international law would not be directly applicable. On the contrary, and on a general basis, the law governing those interests would correspond to domestic law: On the one hand, contracts binding sovereign debtors and creditors unequivocally point to a certain domestic legal system. On the other hand, the protection of citizens' entitlements is provided, first and foremost, by domestic constitutions.

Nevertheless, this is not to say that international law lacks any type of norms protecting the aforementioned interests. Indeed, the international legal framework addresses some of them. However, it does so through different, and to some extent overlapping, regimes. In short: in the cases where international law is applicable to the legal disputes arising from insolvency conflicts, different international regimes may be called upon to decide how to satisfy the different interest at stake. These (potentially) conflicting regimes include the European and the Inter-American Human Rights systems, the International Covenant on Economic, Social and Cultural Rights and, arguably, international investment law.

In *Chapter Two*, I identified several norms belonging to those regimes which may be applied in the context of a legal dispute arising from insolvency conflicts. There, building from previous scholarship, I argued that those norms can be considered functionally and structurally equivalent to constitutional principles. In particular, I posited that those norms share the structure of principles predicated by legal argumentation, that is, they are (or can be) understood as optimization or "prima facie" requirements. For that reason, I followed the literature and referred to them as "principles of public international law" (henceforth, "PIL principles"). In that context, I highlighted the PIL principles protecting citizens' ESC rights (henceforth, "social" rights) and creditors' property rights. At the same time, I stressed the protection of states' interests through the notion of the "public" or "general" interest. Arguably, some of the investment guarantees provided by Bilateral Investment Treaties (henceforth, "BITs") can also take the form of PIL principles (the most important ones being the guarantee against expropriation and the "Fair and Equitable Treatment" standard)[1739].

Furthermore, in *Chapters Three, Four* and *Five*, I identified and justified the application of two norms of international law that can be imposed either by courts or by states in

[1738] See van Aaken, *Defragmentation*… Op. Cit. pp. 485-494.

[1739] Whether sovereign bonds can be considered protected under investment law is debated in the literature. See subsection 3.2.1 of this *Chapter* for a brief summary of the discussion and *Chapter Two*, pp. 73 et seq for a full discussion (including relevant cases).

the context of sovereign insolvency. Those norms are a "stay" on creditors' litigation and a "cram down" on dissenting creditors' claims. In particular, I argued that both can be regarded as forming part of the so-called "third-source" of international law: namely of the "general principles of law recognized by civilized nations" in the sense of the Statute of the International Court of Justice (henceforth, "GPDs")[1740]. I extracted those GPDs from the domestic corporate insolvency laws of five different jurisdictions. Additionally, I posited that the application of those GPDs can contribute to facilitating sovereign debt workouts by enhancing creditors' participation and by reducing the time necessary for their completion. Importantly enough, unlike the previously mentioned PIL principles, the aforementioned GPDs cannot be qualified as "principles" from the perspective of legal theory and belong to the domain of "rules" instead[1741].

In this *Chapter*, I go a step further and discuss the conditions under which the imposition of measures comprising the aforementioned GPDs can be considered compatible with the PIL principles previously indicated. In other words, this *Chapter* intends to sketch the requirements that the implementation of the "stay" and the "cram down" need to comply with in order to reconcile the values expressed through property rights, "social" rights and the "public interest". For this purpose, I use two variants of the so-called "optimization" accounts to PA: Alexy's and Sartor's methodological contributions.

This *Chapter* is structured as follows. Section 2 presents the aforementioned "optimization" accounts to PA. As will be posited there, for said perspectives, a course of action will be considered in conformity with the constitution if it "maximizes" the "pie" of the constitutional interests at stake. In particular, Section 2 summarizes the methodologies to be used in that regard and stresses their limitations. The most important of said limitations refers to quantification and comparability in the context of (different) competing constitutional interests. It is also posited that despite said shortcomings, PA's "optimization" accounts are well suited to the task if accompanied by legal argumentation[1742]. Furthermore, Section 2 also highlights that, in most cases, quantitative proportionality analysis only serves to "illustrate" the outcome, which –again –, needs to be substantiated through legal reasoning.

Section 3 discusses the PIL principles which will serve as the "values" to be optimized in the context of sovereign insolvency conflicts. In other words, the section puts forward the "values" to be reconciled through the application of PA. Although this issue has been discussed in detail in *Chapter Two*, it nevertheless returns to the main conclusions arrived at in that regard. Particularly, it refers to the investment guarantees which may be impaired in the context of legal disputes arising from insolvency conflicts and why they can be regarded as PIL principles. In this regard, the section highlights how certain doctrines used by these tribunals suggest dividing the application of the guarantee

[1740] See, Article 38(1)(c) of the Statute of the International Court of Justice. Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, T.S. No. 993

[1741] See section 4 of this *Chapter* for details.

[1742] According to scholars, legal argumentation pertains to the domain of the "external justification" of balancing.

against expropriation and the fair and equitable treatment (henceforth, "FET") standard into two prongs: First, tribunals may assess whether there is a "prima facie" violation of the respective standards. If this is the case, adjudicators may move forward to the second prong, where the proportionality of the measures at stake would be scrutinized. As argued in *Chapter Two*, there is authority in the case-law suggesting that the proportionality judgment would be decisive in finding liability under international investment law from the perspective of the previously posited guarantees. At the same time, section 3 spells out the requirements to be complied with for the invocation of ESC rights in investment disputes.

Another important point discussed in Section 3 refers to the competing principles in the context of sovereign debt litigation before the European Court of Human Rights (henceforth "ECtHR"). In particular, it recalls that the guarantee of the "peaceful enjoyment of possessions" (protecting creditors' interests) and its limitation (i.e., the "public interest") can be considered PIL principles. Furthermore, it also stresses that proportionality is one of the requirements which states must comply with in order to avoid a violation of the European Convention on Human Rights (henceforth, "ECHR").

Section 4 takes a step forward, since discussing the interaction between principles does not suffice in the context of the application of PA. Particularly, the tensions between principles (in this case, between PIL principles) are usually expressed through concrete courses of action. For that reason, Section 4 briefly presents the measures to be featured in the analysis. Of note, the measures correspond to the previously mentioned "GPDs" (i.e., the "stay" and the "cram down"). Moreover, this section also spells out why it is necessary to subject the "GPDs" to PA. In short, following the authority in the case-law, it argues that any course of action (even one having its origins in a proper normative source as the "stay" and the "cram down" do) needs to be followed by maintaining a proper relationship between means and ends, and between the interests being promoted and demoted. Section 4 ends by presenting certain assumptions regarding the context under which both measures are implemented.

Section 5 takes a step back and presents an assessment of the "stay" and the "cram down" from the perspective of international investment law guarantees. In particular, it discusses the measures in light of the "first prong" of the expropriation and of the FET standard's inquiry. This is a critical step indeed. Otherwise, that is, if tribunals' analysis delivers the conclusion that there is no "prima facie" violation of said guarantees, there would be no need to move forward to PA. For a similar reason, Section 5 also discusses the measures from the perspective of the guarantee to property under the ECHR.

Section 6 takes stock of the foregoing and applies Alexy's PA to the measures previously mentioned. Since PA is context-dependent, this Section delivers a "sketch" of the conditions under which the "stay" and the "cram down" can be considered in compliance with the proportionality principle.

Section 7 reiterates the aforementioned process, but from the perspective of Sartor's reformulation of Alexy's understanding. Specifically, it posits several assumptions in order to operationalize the proportionality assessment, describes the variables of

interest on which it relies and provides the conditions under which the measures can be considered in compliance with the proportionality principle.

Section 8 presents the conclusions of the *Chapter*. Particularly, it spells out the conditions under which both measures can be considered proportional under the ECHR and international investment law.

Before proceeding, it is important to stress the main limitations of this *Chapter*. This piece is not intended to provide a fully-fledged PA of both GPDs. The lack of available data in this regard makes that endeavor impossible without recurring to a refined assessment of the effects of different policies that a state can implement in the context of insolvency. This would require a whole book in its own right and would in any case exceed the scope of this work.

Furthermore, the proportionality judgment is context-dependent, and it is difficult to anticipate all the relevant elements that a sovereign default or a restructuring may feature.

Consequently, though the *Chapter* sketches some of the elements on how such an endeavor should be attempted, its main objective is more modest. In effect, it merely intends to show that both the "cram down" and the "stay" can be considered proportional if certain conditions are met.

Another important limitation of this *Chapter* relates to the methodologies employed. As discussed in *Chapter Two*, the engagement of international courts and tribunals with PA is not always consistent. Therefore, the conclusions arrived at the end of this piece will be useful insofar as adjudicators apply one of the "optimization" accounts to PA discussed in the *Chapter*.

Despite its limitations, to my knowledge, this *Chapter* is the first to address, on a systematic fashion, the proportionality of the aforementioned GPDs in the context of international investment law and of the ECHR. Thus, it provides a framework in which one can think about sovereign insolvency and suggests concrete steps on how to proceed in this decision situation – for adjudicators, states and creditors alike.

2. Optimization Accounts of Proportionality

As stated above, PA can be seen as a method for the reconciliation of constitutionally protected "values". Francisco Urbina has identified two approaches to PA in the scholarship[1743]. The first understanding corresponds to the "maximization" or "optimization" account of balancing[1744]. The second, to "proportionality as unconstrained moral reasoning"[1745]. This *Chapter* concerns itself with the first variant.

In short, according to the "optimization" approach to proportionality, the constitutionality of a measure can be determined by a comparative assessment of the expected "gains" and "losses" that it produces. More specifically, expected "gains" and "losses" refer to the effects of said measure on the enjoyment of two or more constitutionally protected interests (rights, values, principles and goals). Ultimately, and after a series of steps have been taken, a measure will be deemed to be constitutional if its expected "gains" exceed the expected "losses"[1746].

As can be noted, this understanding of PA is open to an economic reading, and particularly to one using the tools of Cost-Benefit Analysis (henceforth, "CBA"). In fact, the literature has already recognized this by highlighting the similarities between the "maximization" account of PA and CBA[1747]. First, according to scholars, both approaches share a "goal-oriented structure" and the "ultimate" goal itself. In effect, both approaches strive to maximize human wellbeing[1748]. Secondly, both approaches are

---

[1743] See Francisco Urbina, *A Critique of Proportionality and Balancing*. Cambridge University Press (2017), pp. 17 et seq.

[1744] See, Id. For an examination of balancing as "optimization", see also Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 Cambridge Law Journal 1 (2006), p. 176 and Alison Young, Proportionality is Dead: Long Live Proportionality! In Huscroft et al. (Eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*. Cambridge University Press (2014), pp. 51-52.

[1745] See, Urbina, *A Critique*… Op. Cit., pp. 9-10.

[1746] See, Id., p. 35.

[1747] See, Anne van Aaken, How to Do Constitutional Law and Economics: A Methodological Proposal, in Thomas Eger et al. (Eds.), *Internationalization of the Law and its Economic Analysis*. Gabler Edition Wissenschaft (2008), pp. 658-659. See also Richard Posner, *Law, Pragmatism and Democracy*. Harvard University Press (2003), p. 362; Joel Trachtman, *Trade and… Problems, Cost-Benefit Analysis and Subsidiarity*, 9 European Journal of International Law (1998), p. 36; Aurelien Portuese, *Principle of Proportionality as Principle of Economic Efficiency*, 19 European Law Journal 5 (2013), p. 613; Giovanni Tuzet, *Alexy & Economics*, Bocconi Legal Studies Research Paper Series (2020), p. 5; Patricia Popelier, *Preliminary Comments on the Role of Courts as Regulatory Watchdogs*, 6 Legisprudence (2012), pp. 261-262; William Aceves, *Cost-Benefit Analysis and Human Rights*, 92 St. John's Law Review; Giovanni Sartor, *Doing Justice to Rights and Values: Teleological Reasoning and Proportionality*, 18 Artificial Intelligence Law (2010), p. 176. In the words of Cooter and Gilbert: "Courts can use economics to optimize competing legal values just as bankers can use economics to optimize investments". Robert Cooter and Michael Gilbert, Constitutional Law and Economics (2019) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123253 [last accessed 15.12.2021], pp. 10-11.

[1748] See, for example, van Aaken, *How to Do*… Op. Cit. Consequently, it can be stated that both can be considered welfarist approaches: Both see an alternative as preferable to another if the net benefits of the first exceed those of the latter. See Portuese, *Principle*… Op. Cit., p. 615. For CBA as a welfarist methodology, see Louis Kaplow and Steven Shavell, *Fairness versus Welfare*.

based on the notion that the analyst can (somehow) aggregate costs and benefits to decide whether a particular course of action (a project or a legislative measure) is preferable to another. Thus, both are decision-making procedures[1749], albeit with different components. Thirdly, to a certain extent, since both frameworks strive for the maximization of human well-being, it can be posited that both share efficiency-related concerns.

However, in contrast with CBA, the immediate objective of PA is to determine whether a particular course of action conforms to the constitution. Therefore, it is not surprising that PA (and its "maximization" reading) presents specificities that differentiate it from standard CBA[1750]. Particularly, for PA, guaranteed constitutional interests are not only a "proxy" for human wellbeing[1751] but also "the relevant decisive criteria"[1752] to determine whether a measure can be deemed to be constitutional or not. For that reason, for "optimization" accounts of balancing, costs and benefits correspond to the positive and negative effects of a measure on the enjoyment of constitutional interests[1753].

Furthermore, according to Anne van Aaken, this understanding of PA also reformulates the efficiency criterion of welfare economics used in standard CBA. For her, that criterion needs to be redeveloped into a "formal" category ("a formal concept of efficiency"), that

> *"(…) means the optimality of measures generally and regulations, laws and legal acts specifically with a view to a defined system of goals (the constitution) and under consideration of (legal) constraints"*[1754].

Harvard University Press (2002), pp. 35 et seq. and Richard Zerbe, *Economic Efficiency in Law and Economics*. Elgar (2001), pp. 14 et seq.

[1749] For CBA see Richard Zerbe, Cost-Benefit Analysis in Legal Decision Making in Francesco Parisi (Ed.), *The Oxford Handbook of Law and Economics: Volume 1, Methodology and Concepts*. Oxford University Press (2017), p. 357; Lewis Kornhauser, Economic Logic and Legal Logic, in Giorgio Bongiovanni et al. (Eds.), *Handbook of Legal Reasoning and Argumentation*. Springer (2018), p. 731 and Ekkehard Hofmann, Rationality, Discretion, and Decision Theory, Legal Reasoning: The Methods of Balancing (2010), p. 78.

[1750] See generally, Anne van Aaken, Normative Grundlagen der Ökonomischen Theorie im Öffentlichen Recht in Anne van Aaken and Stefanie Schmid-Lubber (Eds.), *Beitrage zur Ökonomischen Theorie im Öffentlichen Recht*. DUV (2003) and Anne van Aaken, "*Rational Choice"…* Op. Cit., pp. 288 et seq.

[1751] See generally, van Aaken, *How to Do…* Op. Cit.

[1752] Id. at. p. 657. See also, van Aaken, *"Rational Choice"…* Op. Cit., p. 315.

[1753] Instead of using consumer and producer surpluses, as standard CBA indicates. Richard Zerbe, *Cost-Benefit Analysis…* Op. Cit. See also, van Aaken, *How to Do…* Op. Cit and van Aaken, *"Rational Choice"…* Op. Cit., p. 294 and p. 308.

[1754] van Aaken, *How to Do…* Op. Cit., p. 659 and van Aaken, *"Rational Choice"…* Op. Cit., pp. 315 et seq. According to van Aaken, the "formal concept of efficiency" links jurisprudence with normative decision theory. Understood in its narrow sense, decision theory attempts to address the following question: "How can the decision-maker (…) choose from alternative courses of action (…) ensuring that the alternative chosen promises him an optimum result in the light of the goals set?". van Aaken, *"Rational Choice"…* Op. Cit., p. 296 (own translation).

Additionally, though it does not dispense with verbal argumentation, "optimization" readings of PA either use numbers[1755] or illustrate its results with the aid of numerical representations[1756]. Of note, the use of numerical expressions helps the analyst to assess the effects of the measures on the relevant values and to determine when the "constitutional pie" is maximized.

In the following subsections, I delve into two different methodologies corresponding to this type of approach to PA which will be used in this *Chapter*: Robert Alexy's rational reconstruction of balancing (subsection 2.1), and Giovanni Sartor's reformulation of PA in quantitative (economic) terms (subsection 2.2).

2.1. Alexy's Proportionality Analysis in Short

Robert Alexy's is probably the most well-known and influential theoretical account of the operation of balancing as a constitutional decision-making tool. His contribution starts from a theoretical distinction of "principles" and "rules". From his perspective, principles and rules share a deontological nature. He states that both of them are norms, since "they both say what ought to be the case"[1757]. However, he points out that their qualitative differences become salient once their structure is discussed in detail[1758].

To summarize, in Alexy's understanding, rules "are norms that are always fulfilled or not"[1759] and applied through subsumption[1760], while principles have a more complex structure. According to him, "principles are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities"[1761], thus being only "prima facie"[1762] or "optimization requirements"[1763]. Furthermore, Alexy states that in the context of domestic constitutional interpretation and application, principles are operationalized through balancing or weighing (i.e., PA), not through subsumption. Additionally, he posits that PA requires the application of a set of rules embodied in the proportionality principle.

According to Alexy, the proportionality principle contains three rules: suitability, necessity and proportionality in the narrow sense[1764]. While the first two rules

[1755] See generally, Giovanni Sartor, A Quantitative Approach to Balancing, in Giorgio Bongiovanni et al. (Eds.), *Handbook of Legal Reasoning and Argumentation*. Springer (2018).
[1756] See subsections 2.3 and 2.4 for details.
[1757] Robert Alexy, *A Theory*… Op. Cit., p. 44.
[1758] Connecting the distinction between rules and principles with economic analysis of law, see van Aaken, *"Rational Choice"*… Op. Cit., pp. 318 et seq.
[1759] Klatt and Meister, *The Constitutional*… Op. Cit., p. 10
[1760] See Alexy, *On Balancing*… Op. Cit., pp. 433-435.
[1761] See Alexy, *A Theory*… Op. Cit. pp. 47-48.
[1762] See Id., p. 57.
[1763] See Id., p. 47.
[1764] Although Alexy refers to these three rules as "sub-principles", he recognizes that, from a theoretical perspective, they belong to the domains of rules. See Alexy, *A Theory*… Op. Cit., pp. 66-67 footnote 84.

(suitability and necessity) are related to "what is factually possible"[1765], proportionality in the narrow sense refers to "what is legally possible"[1766].

Both suitability and necessity are most easily explained with an example. Let me consider a measure (either an act or a law, i.e., M_1) which is aimed at achieving some objective or fulfilling a constitutional principle (i.e., P_1). Consider also another constitutional principle (P_2), which may conflict with P_1 in the case at hand. The suitability criterion asks whether M_1 is factually capable of contributing to the realization of P_1 and, at the same time, whether M_1 conflicts with P_2. In this context, and according to Steven Greer,

> *"The principle of suitability excludes the use of means to realise any given principle (…) which are factually incapable of doing so where this would interfere with the fulfilment of any other principle"*[1767].

Let me now consider that M_1 has passed the suitability test. Let me also consider that there is another measure (i.e., M_2) that passes the suitability requirement, fulfilling P_1, but conflicting with P_2. In this context, the principle of necessity would demand the execution of the measure (either M_1 or M_2) which encroaches on P_2 the least. In the words of van Aaken,

> *"The principle of necessity covers the question of whether there are other, less intrusive means with regard to the constitutional principle in question which is equally able to achieve the stated goal of the measure"*[1768].

Finally, the principle of proportionality in the narrow sense approaches the conflict of principles through what Alexy calls "The Law of Balancing". Said law states: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other"[1769]. According to Alexy,

> *"The Law of Balancing shows that balancing can be broken down into three stages. The first stage involves establishing the degree of non-satisfaction of or detriment to the first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, in the third stage it is established whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former"*[1770].

Alexy operationalizes these three stages through the development of a two-tiered system of scales. The first group of scales is to be applied to the "degree of non-satisfaction or of detriment" or "intensity of interference" to one principle and to the

---

[1765] Id., p. 397.
[1766] Id., p. 401.
[1767] Steven Greer, *Balancing and the European Court of Human Rights: A Contribution to the Habermas Alexy Debate*, 63 The Cambridge Law Journal 2 (2004), pp. 415-416.
[1768] van Aaken, *How to Do…* Op. Cit., p. 659.
[1769] Alexy, *A Theory…* Op. Cit., p. 401.
[1770] Alexy, *On Balancing…* Op. Cit., pp. 436-437.

"importance" of satisfying another[1771]. This group of scales is composed of three grades, including light (l), moderate (m) and serious (s) degrees of detriment and importance of different competing principles[1772]. In the words of Klatt and Meister:

> *"The triadic scale can be facilitated by the use of numbers, following the geometric sequence of* 2^0*,* 2^1*,* 2^2*, namely, 1, 2, and 4. The geometrical sequence has the advantage of taking account of the fact that the power of principles increases over-proportionately with an increasing intensity of interference"*[1773].

The second scale corresponds to the reliability of the empirical assumptions taken (i.e., "reliability"). "Reliability" concerns "what the measure in question means" from the perspective of the realization and non-realization of the constitutional principles at stake[1774]. In this regard, Alexy puts forward what he calls the "epistemic law of balancing"[1775]. This law indicates:

> *"(…) the more intensive an interference in a constitutional right is, the greater must be the certainty of its underlying premises"*[1776].

Differing from the scale regarding degrees of interference/importance of competing principles, Alexy orders "reliability" on a decreasing ranking, also "illustrated" through numerical expressions. In this regard, the scale includes the following degrees: "certain or reliable" (*"r"*, 2^0=1), "maintainable or plausible" (*"p"*, $2^{-1} = \frac{1}{2}$) and "not evidently false" (*"e"*, $2^{-2} = \frac{1}{4}$)[1777].

Crucially, the aforementioned variables and scales serve as input for the development of his "weight formula", which is "an attempt to picture the structure of balancing with the help of a mathematical model"[1778].

[1771] See Id., p. 440.

[1772] In the words of Klatt and Meister: "The triadic model can easily be expanded to a double triadic model, if a finer scale is required. Nine different intensities of interferences can be distinguished (*ll, lm, ls, ml, mm, ms, sl, sm, ss*)". Klatt and Meister, *The Constitutional Structure*… Op. Cit., p. 12.

[1773] Id.

[1774] Alexy, *Constitutional Rights*, Op. Cit., p. 54. See also Alexy, *On Balancing*… Op. Cit., p. 446 and Alexy, *A Theory*… Op. Cit., p. 419 footnote 97. Julian Rivers posits that "R" expresses a probabilistic judgment in the context of balancing. Hence, he reformulates Alexy's second law of balancing as follows: "the greater the chance that one principle may be seriously infringed, the greater must be the chance that another principle is realized to a high degree". Julian Rivers, Proportionality, Discretion and the Second Law of Balancing, in George Pavlakos, *Law, Rights and Discourse: Themes from the Legal Philosophy of Robert Alexy*. Hart (2007), p. 181. Importantly enough, a distinction can be made regarding "reliability". In effect, scholars have proposed to distinguish between said variable from the perspective of the "empirical" and "normative" assumptions. In this *Chapter*, I deal only with the former. For a discussion, see Klatt and Meister, *The Constitutional*… Op. Cit., p. 11 and pp. 109 et seq.

[1775] See, Alexy, *On Balancing*… Op. Cit., p. 446.

[1776] Alexy, *A Theory*… Op. Cit., p. 419.

[1777] See Alexy, *A Theory*… Op. Cit., p. 419 footnote 97.

[1778] Klatt and Meister, *The Constitutional*… Op. Cit., p. 10.

It is well known, that, on its complete form, the weight formula compares the concrete weight ($W_{i,j}$) of two constitutional principles (P_i and P_j) in a particular case. The formula requires analyzing the intensity of the interference of the measure on one of the principles (I_i) and the importance of satisfying the competing principle (I_j). It also requires determining the abstract weight of both principles (W_i and W_j) as well as the "reliability" of the corresponding empirical assumptions made (R_i and R_j)[1779]. The formula posits basic arithmetical operations (multiplication and division) which are to be performed on the variables, and it is given by:

$$W_{i,j} = \frac{I_i * W_i * R_i}{I_j * W_j * R_j}.$$

For Alexy's account, if $W_{i,j} > 1$, then P_i takes precedence over P_j. This is another way to say that the measure under scrutiny fails the proportionality "stricto sensu" test. On the contrary, if $W_{i,j} < 1$, then the competing principle (i.e., P_j) takes precedence[1780]. In other words, the measure would be deemed proportional in that case. Finally, if $W_{i,j} = 1$, a stalemate arises between the competing principles, balancing cannot determine the outcome and the decision is discretionary[1781].

Before proceeding, it is important to stress that the formula is not intended to replace argumentation in PA. Neither does it deliver a precise outcome. Rather, according to Alexy, the results obtained through its application are nothing more than a numerical "illustration" of the process[1782]. This is an important point indeed, and I will discuss it in detail in subsections 2.3 and 2.4.

Finally, it is also important to note that scholars tend to distinguish between the "internal" and the "external" justification of balancing[1783]. On the one hand, internal justification relates to the logical structure of PA. In short, it refers to the use of the rules of arithmetic in the application of the weight formula. On the other hand, "external" justification refers to the premises of the analysis. In short, it relates to the reasons given to substantiate the values inserted in the aforementioned formula[1784].

[1779] Alexy, *On Balancing*… Op. Cit., p. 446

[1780] Alexy, *A Theory*… Op. Cit. p. 410.

[1781] See Id., and Alexy *On Balancing*… Op. Cit., p. 443. See also, Klatt and Meister, *The Constitutional*… Op. Cit., pp. 13 and 58; Matthias Klatt, *Positive Obligations under the European Convention on Human Rights*, 71 Zaörv 4 (2011), p. 700. This issue will be discussed in more detail in section 6. It is important to note that, according to Alexy, stalemate cases lead to a specific type of discretion denominated "structural discretion". See Alexy, *A Theory*… Op. Cit., pp. 394 et seq.

[1782] Alexy, *A Theory*… Op. Cit. p. 99. See also Martin Borowski, *On Apples and Oranges. Comment on Niels Petersen*, 14 German Law Journal 8 (2013), p. 1414 and Matthias Klatt and Moritz Meister, *Proportionality – A Benefit to Human Rights? Remarks on the I-CON Controversy*, 10 I-CON (2012), p. 700.

[1783] See, for example, Klatt and Meister, *Proportionality a Benefit*…, pp. 693-694.

[1784] See Id., p. 694.

2.1.1. Refinements of Alexy's Approach to Proportionality

According to the foregoing, Alexy's understanding of PA can be seen as an argumentative process "illustrated" through the use of numbers[1785]. For this reason, the weight formula is only a "heuristic tool" exemplifying the outcome to be achieved through PA. Nevertheless, his methodology still requires some form of measurement of the relevant variables in the case at hand[1786]. What is more, this measurement needs to be conducted to obtain the magnitudes and "degrees" expressed through the aforementioned scales.

However, as José Juan Moreso indicates, the weight formula does not guide the analyst on the technicalities of the use of the scales. In particular, it fails to provide any criteria to determine, for example, how serious an interference (i.e., "I_i") is. In short, according to Moreso: "we do not know how to decide if a concrete interference is slight, moderate or serious"[1787]. Importantly enough, the same can be said regarding the degree of importance of satisfying the competing principle (i.e, "I_j").

Damiano Canale and Giovanni Tuzet have undertaken the task of measuring these two variables (i.e., "I_i" and "I_j")[1788]. They provide practical insights on how argumentation should be conducted for that purpose. Since their approach is critical to a practical deployment of Alexy's methodology, I proceed to discuss it in the following subsection.

[1785] See Alexy, *Constitutional*… Op. Cit., p. 64 and Alexy, *A Theory*… Op. Cit., p. 99.

[1786] See Alec Stone Swet and Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach*. Oxford University Press (2019), p. 40.

[1787] José Juan Moreso, *Ways of Solving Conflict of Constitutional Rights: Proportionalism and Specificationism*, 25 Ratio Juris 1, (2012). p. 38. In the words of Jorge Silva Sampaio: "(…) proportionality in its narrow sense only imposes that the means must be balanced but does not say what a balanced means is or give us criteria for determining it". Jorge Silva Sampaio, Proportionality in its Narrow Sense and Measuring the Intensity of Restrictions on Fundamental Rights, in David Duarte and Jorge Silva Sampaio (Eds.), *Proportionality in Law: An Analytical Perspective*. Springer (2018), p. 82. Alexy acknowledges this, indicating that each of the values to be inserted on his weight formula need to be substantiated with the use of argumentation. In his own words: "The values that have to be substituted for the variables of the Weight Formula represent (…) propositions, for example, the proposition that the infringement with the personality right is serious. Such propositions can be justified, and, of course, they have to be justified. This can only be done by argument. Thus, the Weight Formula turns out to be an argument form of rational legal discourse". Alexy, *A Theory*…, Op. Cit., pp. 63-64.

[1788] See Damiano Canale and Giovanni Tuzet, *Can Constitutional Rights Be Weighed? On the Inferential Structure of Balancing in Legal Argumentation* (2020), Bocconi Legal Studies Research Paper No. 3658366, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3658366 [last accessed 18.05.2021]. Among other contributions in this regard, it is important to note those of Laura Clérico, *El Examen de Proporcionalidad en el Derecho Constitucional*. EUDEBA (2009); pp. 288 et seq.; Carlos Bernal Pulido, On Alexy's Weight Formula in Agustín Menéndez and Erik Eriksen (Eds.), *Arguing Fundamental Rights*. Springer (2006) and Carlos Bernal Pulido, *El Principio de Proporcionalidad y los Derechos Fundamentales*. Universidad Externado de Colombia (2014); pp. 965 et seq. and Silva Sampaio, *Proportionality*… Op. Cit.

2.1.1.1. Canale and Tuzet's Proposal: Arguments from "Comparative Consequence" and "Counter factuality"

Using the famous "Tobacco case" as an example[1789], Canale and Tuzet indicate that courts should recur to two different types of arguments to measure the aforementioned variables.

First, according to them, the severity of an interference with a principle (i.e., "I_i") can be captured through an argument "from comparative consequence". In short, they indicate that to assess the degree of interference of a measure (M_1) on a constitutional principle (P_1), it is necessary to compare the effects of M_1 on P_1 with those of other hypothetical alternatives (M_2 and M_3)[1790]. Then, the "magnitudes" put forward by the triadic scale ("light", "moderate" and "serious") ought to be assigned for each measure, correspondingly. Importantly enough, Canale and Tuzet indicate that "(…) the consequences of the alternative norms [such as M_2 and M_3] are hypothetical and need to be constructed out of hypothetical or counterfactual arguments (…)"[1791]. Crucially, in their own words:

> *"(…) in order to rank the desirability of the consequences of* (…) [a measure] *the court must outline some hypothetical* (…) [measures]*, which do not actually belong to the legal system"*[1792].

Secondly, in order to assess the degree of importance of satisfying the competing principle (P_2), Cannale and Tuzet indicate that it is necessary to recur to a "counterfactual argument". In their view, the analyst needs to estimate the negative effects that would follow if the measure imposed to satisfy P_2 (i.e., M_1) is found to be invalid. If those detrimental consequences are significant, then the importance of satisfying P_2 in the case at hand would be "serious" (and so on, and so forth)[1793].

Finally, in the last stage of proportionality (i.e., proportionality "stricto sensu") both arguments need to be connected in order to determine the constitutionality of the measure under scrutiny (i.e., M_1)[1794].

2.1.2. Conclusive Remarks Regarding Alexy's Approach to Proportionality

As stated above, this *Chapter* will use Alexy's contribution (including its aforementioned refinements by Canale and Tuzet) to assess the proportionality of certain "measures" in the context of insolvency conflicts. Certainly, it is plausible to argue that Alexy's understanding is greatly indebted to economics. Nevertheless, his proposal has been further expanded from the perspective of economic analysis. I proceed to discuss one such approach in the following subsection.

[1789] See BVerfG (Federal Constitutional Court of Germany), Decision of the Second Senate, January 22, 1997 – 2 BvR 1915/91 -, Rn. 1-70. Of note, Alexy uses the same case to introduce the triadic scale. See, for example, Alexy, *Constitutional Rights…* Op. Cit.

[1790] Canale and Tuzet, *Can Constitutional…* Op. Cit., p. 9.

[1791] Id.

[1792] Id., p. 10.

[1793] Id., p. 9.

[1794] Id.

2.2. Sartor's (Economic) Reformulation of Alexy's Methodology

There are several reformulations of Alexy's methodology which deepen his understanding from the perspective of economics. Among them, one may mention Erik Veel's[1795], Christoph Engel's[1796] and Giovanni Sartor's[1797] contributions. I limit the discussion to the latter.

As stated above, Sartor reformulates Alexy's methodology by explicitly recurring to the instruments of welfare-economics. Like Alexy, Sartor underscores that the constitutionality of a measure depends, to a certain extent, on whether it maximizes the "constitutional pie" or not. Hence, his methodology also attempts to put forward a constitutional decision rule, judging the conformity of one or more measures with the values enshrined by the constitution. However, he proposes to use quantitative reasoning for this purpose. Importantly enough, the use of numbers is not necessarily ancillary for his methodology, as discussed below.

Crucially, Sartor acknowledges from the outset the difficulties involved in the use of numerical expressions and the application of the toolbox of CBA in balancing. In particular, he notes the problems related to quantification, the assigning of numbers to the variables of interest and the deployment of the corresponding utility functions[1798]. However, he indicates that all of these obstacles can be overcome. In his view, this is feasible since a quantitative approach including both ordinal comparisons and cardinal measurement can be taken with or without exact numbers (and even without numerical expressions)[1799]. Nevertheless, Sartor also warns the analyst about the use of quantitative tools in PA: The assessment is not necessarily accurate[1800].

In particular, Sartor's methodology can be reconstructed in five steps. First, it is necessary to analyze the effects of the measure under scrutiny on the satisfaction/dissatisfaction of the relevant constitutional principles. According to him, this process is to be conducted separately for each constitutional principle. Second, those effects need to be compared with a certain level of value satisfaction/dissatisfaction. Third, they need to be transformed into utility terms. Fourth, the analyst should assign weights to the constitutional principles, following the dictates of the legal system. Finally, it is necessary to aggregate the effects of the measures on all the values at stake. As can be noted, the outcome of this process allows the analyst to assess whether the

---

[1795] See Paul-Erik Veel, *Incommensurability, Proportionality, and Rational Legal Decision-Making*, 4 Law & Ethics of Human Rights (2010).

[1796] Christoph Engel, *Besonderes Verwaltungsrecht und Ökonomische Theorie*, Preprints of the Max Planck Institute for Research and Collective Goods, No. 2011, 2 (2011), p. 19.

[1797] Sartor, *A Quantitative* Op. Cit., and Sartor, *Doing Justice…* Op. Cit.

[1798] See Sartor, *A Quantitative…* Op. Cit., 614-615. In the words of van Aaken those would correspond to "constitutional utility functions". See van Aaken, *"Rational Choice"…* Op. Cit., p. 323.

[1799] Sartor, *A Quantitative…* Op. Cit., p. 615. In fact, Sartor argues that the analyst can assess the convenience of choosing an action over another by recurring to "non-numerical" or "analogical" quantitative reasoning when needed. Through these latter means, approximate mathematical operations can be performed. At the same time, he recognizes that in certain cases, the proportionality test can make use of more precise numbers. Id., pp. 615-616.

[1800] Id., p. 617.

"measure" maximizes the principles in conflict. In what follows, I discuss each of these steps in more detail.

As stated above, for Sartor's account it is necessary first to analyze the effects of the measure under scrutiny (henceforth, "α") on the satisfaction/dissatisfaction of the constitutional values at issue. For this purpose, he states that the level of enjoyment of the constitutional principle pre- and post-α needs to be obtained. In what pertains to satisfaction pre-α, he proposes the use of different proxies, such as country-rankings[1801]. Regarding satisfaction post-α, he assumes a "deterministic framework", where α has "only one outcome", either positively (promoting) or negatively affecting (demoting) the constitutional principle at stake[1802]. Therefore, the effect of α on the enjoyment of the constitutional principle ("v") corresponds to the difference between the levels of satisfaction pre- and post-α. Sartor denominates this difference as the "realisation impact" of α on a value (i.e, $\Delta Real_v(\alpha)$).

Secondly, Sartor proposes that the "realisation impact" of α needs to be quantified from a proportional comparison with the "maximum realisation [of the principle] that is concretely available under the existing conditions"[1803]. Through these means, Sartor can "normalize" the positive/negative effects of α on the corresponding value. Sartor calls this the "proportional impact on the realisation of a value" which he expresses as:

$$\Delta PropReal_v(\alpha) = \frac{\Delta Real_v \alpha}{MaxReal_v \alpha}$$

Thirdly, Sartor posits that the same operation needs to be reiterated, but from the perspective of the utility-effects of α. Hence, according to Sartor, it is possible to express a specific level of value-satisfaction into utility terms[1804]. It is important to note that Sartor remains silent on what pertains to the specific form the utility function takes in this context. Nevertheless, he provides some hints in this regard by specifying two assumptions (which are standard in welfare economics): (a) that the "(…) relation between the realisation of a value and the corresponding utility is a monotonic function and indeed a strictly increasing one"[1805] and that (b) each level of increase in value enjoyment entails diminishing returns in utility terms (i.e., value satisfaction exhibits a diminishing marginal utility)[1806]. Therefore, the impact of α on the utility cannot be

[1801] See Id., p. 617. In the words of Sartor: "For some values (transparency, democracy, economic freedom, equality, non-discrimination, etc.), proxies are available according to various measurements, such as those that are used for ranking countries according to their levels of welfare or protection of human rights". Id.
[1802] Id., p. 619.
[1803] Id., p. 624.
[1804] For Sartor, a certain level of value satisfaction delivers a certain level of utility. He denominates this as the "Utility-quantity concerning a value". See, Id., p. 617.
[1805] See, Id., p. 619. Therefore, a greater degree of satisfaction of one value entails a greater degree of utility.
[1806] See Id., p. 619. See also Francesco Parisi, *The Language of Law and Economics*. Cambridge University Press (2013), pp. 84-85.

constant since "(…) the same change in the realisation of a value will provide less (more) utility the higher (the lower) the position of the realisation interval at issue"[1807].

Thus, what is needed is to turn the "proportional impact on the realisation of a value" into the "proportional impact on the utility by a value"[1808]. According to Sartor this corresponds to "the proportion between α's utility-impact on v and the utility provided by the maximal, reasonably achievable, realisation of v"[1809]. Sartor expresses this notion as:

$$\Delta PropUt_v(\alpha) = \frac{\Delta Ut_v\alpha}{MaxUt_v\alpha}$$

As stated above, this operation is to be performed for each of the constitutional principles which may be positively or negatively affected by α. The quantities thus obtained through these means (for each principle) "would be located in a range from 0 to 1, being proportions of the maximum achievable utility (…)"[1810].

Fourthly, Sartor indicates that the analyst needs to assign a weight to each of the principles at stake in the case at hand. According to him, by this token, it is possible to obtain "homogenous quantities for the utilities provided by the realisation of different values"[1811]. This point cannot be stressed enough. For Sartor's account, "normalizing" the realisation of the values at stake is part of a two-tiered process that, in conjunction with the assigning of weights, allows the commensuration of the effects of α on all the constitutional principles whose satisfaction is being scrutinized. Like other scholars working on PA, Sartor reiterates the idea that higher weight needs to be assigned to more important values (and vice-versa)[1812]. Furthermore, he posits that the weight assigned to each value depends on the specific legal system under which the analysis is being conducted. Once weights are assigned, Sartor proposes multiplying the weights of each value by their corresponding "proportional utility impacts". Through these means Sartor is able to arrive at the "absolute utility-impact on a value" which he expresses as:

$$\Delta Ut_v(\alpha) = \Delta PropUt_v(\alpha) * W_v$$

Fifthly, once the aforementioned operations are performed for each and every value at stake, Sartor states that it is possible to calculate the total utility reported by α. For him, the "utility of an action" (α) is none other than the sum of the "absolute utility-impacts" on each value[1813]. In other words, the utility effects of different actions (α, ß,

[1807] "Thus, for instance, a proportional loss in the realisation of revenue (or of privacy) of 1/10 determines a higher utility loss if it is the passage from 5/10 to 4/10 than if it is the passage from 9/10 to 8/10". Sartor, *A Quantitative…* Op. Cit., p. 625.
[1808] Id., p. 624.
[1809] Id.
[1810] Id., p. 625.
[1811] Id.
[1812] Id.
[1813] Id.

δ…) on different principles ($v_1, v_2, v_3, \ldots v_n$) can be added, in order to determine which action maximizes the "constitutional pie".

For Sartor, each of the aforementioned steps are critical for the purposes of a quantitative (economic) reading of PA. They allow him to further reformulate "compliance" with a norm "prescribing the respect" of a constitutional principle (which is the starting point of PA). According to Sartor, such a norm is violated by a course of action (α) if: (i) (α) demotes the constitutional principle in question[1814] and, (ii) if the total utility impact of (α) on the principle is negative[1815].

Finally, those steps provide Sartor another important service. In effect, they help him build the necessary framework for his reformulation of the three "rules" of the proportionality principle. On the one hand, for Sartor, a measure (α) will pass the suitability test if it has a positive "realisation impact" on one constitutional principle (i.e., if $\Delta Real_v(\alpha) > 0$). On the other hand, regarding the necessity test, he indicates that the measure will succeed in that regard if it is the less stringent alternative and there is no other alternative with a superior "realisation impact"[1816]. Finally, he indicates that the measure will pass the proportionality "stricto sensu" test if the sum of the measure's positive "absolute utility" impacts exceeds the sum of its negative ones[1817].

2.3. Objections (and Corresponding Responses) to Optimization Accounts of Proportionality

Despite their promise, "maximization" accounts of PA have been subjected to several criticisms. For the purposes of this *Chapter*, two of those objections are of relevance. According to a group of scholars, it would not be possible to (a) commensurate and (b) quantify the effects of a measure on two (or more) different constitutionally protected interests[1818].

In short, the first objection highlights that it is impossible to compare constitutional principles on a common scale[1819]. It points out that the analyst would not be able to assess whether the expected "gains" produced by a measure on certain "values" exceed the expected "costs" on others. From the perspective of Alexy's proposal, this objection indicates that it would not be possible to compare the degrees of interference/importance of different constitutional principles[1820]. When measured against Sartor's, it means that it would not be feasible to compare the "realisation impact" of a measure on the promotion/demotion of different values. If the criticism holds, then the rationality of PA

[1814] In the words of Sartor: "promoting means increasing (having a positive impact on) the value's level of realization and demoting means decreasing (having a negative impact on) it (…)". Id., p. 620.
[1815] Id., p. 628.
[1816] Id., pp. 628-629.
[1817] Id., p. 629.
[1818] There are several exponents of these lines of criticisms. For a summary, see Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa*. Cambridge University Press (2017).
[1819] For a discussion, see Klatt and Meister, *Proportionality*… Op. Cit., pp. 695-696 and Canale and Tuzet, *Can Constitutional*… Op. Cit., pp. 3-4.
[1820] For a discussion, see Canale and Tuzet, *Can Constitutional*… Op. Cit., pp. 3-4.

would simply "break down"[1821]. In that case, it would not be possible to rationally prefer one course of action over another[1822] and thus balancing may expose its results to "judicial arbitrariness"[1823].

The second objection is connected to the first. Particularly, it points out the problems related to the measurement of "gains" and "losses". From the perspective of Alexy's contribution, it stresses the difficulties involved in measuring the degrees of satisfaction and interference with constitutional principles. From Sartor's perspective, it highlights that value/promotion demotion cannot be adequately quantified.

Furthermore, this criticism indicates that optimizations accounts of PA, and Alexy's weight formula in particular, require cardinal and not merely ordinal scales[1824]. In this regard, it is capital to note that while ordinal scales "represent order but no further algebraic structure"[1825], cardinal scales are more demanding, reflecting specific intervals between their points[1826]. In short, as Edgar Borgatta and George Bohrnstedt put it, "ordinal scaling (…) may be thought as a form of scaling in which the interval information is lost"[1827]. Importantly, ordinal scales only allow for comparisons between their components, whereas cardinal scales allow for the possibility of other operations, such as addition and multiplication[1828].

Therefore, since PA and the weight formula – the criticism goes – require performing multiplications and divisions on the variables of interest, then it would be clear that they also require cardinal scales[1829]. The problem is that, according to critics, even enthusiasts of Alexy's methodology acknowledge that cardinal scales - capturing the fulfillment of or the interference with constitutional principles - cannot be built[1830]. Thus, for one of its critics,

---

[1821] Meaning that PA would not be able to "to provide reasons for justifying a judicial outcome". Id.

[1822] See Veel, *Incommensurability*… Op. Cit., pp. 196-197. See also Kai Moller, *Proportionality: Challenging the Critic*s, I-CON (2012), p. 721.

[1823] Canale and Tuzet, *Can Constitutional*… Op. cit., p. 5.

[1824] See, for example, Davor Šušnjar, *Proportionality, Fundamental Rights and Balancing of Powers*. Brill/Nijhoff (2010), pp. 204 et seq.

[1825] Silva Sampaio, *Proportionality*… Op. Cit., p. 91. In the context of utility theory an ordinal scale "(…) simply reflects the ordering of the agent's preferences and nothing more". See Šušnjar, *Proportionality*… Op. Cit., p. 205.

[1826] See Šušnjar, *Proportionality*… Op. Cit., p. 207. For a discussion of scales in the context of normative decision theory, see van Aaken, *"Rational Choice"*… Op. Cit., pp. 301 et seq.

[1827] Edgar Borgatta and George Bohrnstedt, *Level of Measurement: Once Over Again*, 9 Sociological Methods & Research 2 (1980), p. 154.

[1828] See Šušnjar, *Proportionality*… Op. Cit., p. 205.

[1829] "A cardinal scale is required because a calculus does not make sense with ordinal scales. Cardinal scales do not only fulfill the criteria of ordinal scales but moreover reflect the intervals between the elements of the scale and allow for mathematical operations". See Šušnjar, *Proportionality*… Op. Cit., p. 207.

[1830] Id., p. 207 and p. 219. Šušnjar further argues that the "triadic" scale developed by Alexy (referring to degrees of importance and of interference with constitutional principles) is cardinal in nature since it expresses a specific interval between each particular degree (light =1, moderate=2, serious=4). Notably, a similar problem arises in traditional welfare economics. For

> *"since there is no way to come to cardinal scales of social (constitutional) values, a constitutional theory of balancing must be designed so that it can work without them"*[1831].

Defenders of Alexy's understanding address both criticisms in the following fashion. First, they argue that it is necessary to distinguish between two types of incommensurability. On the one hand, "strong" incommensurability denies the possibility of comparison altogether, leading to the result put forward by the first critique (i.e., irrationality)[1832]. On the other hand, "weak" incommensurability simply stresses that it is difficult (or impossible) to quantify the principles at stake on a common cardinal scale[1833]. Nevertheless, "weak" incommensurability does not deny the possibility of a common metric for comparing the satisfaction/interference of constitutional principles[1834]. In effect, it allows for comparisons based on ordinal scales[1835]. Therefore, even in the presence of "weak" incommensurability, it would be possible to justify choosing one action over another based on rational grounds[1836]. From this perspective, comparison between principles in a particular case would be possible with the aid of PA[1837]. Particularly, PA would "guide us to collect reasons to prefer one (…) over the other"[1838].

Secondly, the first response also applies to the second line of criticism. According to those defending Alexy's approach, balancing only requires ordinal scales[1839]. In their

example, referring to the problems related to interpersonal comparisons of utility, Lionel Robbins indicates: "(…) it is one thing to assume that scales can be drawn up showing the order in which an individual will prefer a series of alternatives, and to compare the arrangement of one such individual scale with another. It is quite a different thing to assume that behind such arrangements lie magnitudes which themselves can be compared". Lionel Robbins, *An Essay on the Nature & Significance of Economics Science*, 2nd Edition, Revised and Extended. Macmillan & Co (1945). Digital Edition by the Mises Institute (2013), pp. 120-121. In this regard, he stresses that: "There is no way of comparing the satisfactions of different people". Id., p. 121. Finally, in the words of Susan Rose-Ackerman "(…) no one knows how to measure utility so as to permit cardinal, interpersonal comparisons. Utility is not an essence that can be measured in units like inches and pounds and compared across people". Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review*, 65 University of Miami Law Review 2 (2011), pp 341-342.

[1831] Šušnjar, *Proportionality*… Op. Cit., p. 221.

[1832] See Moller, *Proportionality*… Op. Cit., pp. 719-720.

[1833] See Canale and Tuzet, *Can Constitutional*… Op. cit., p. 4.

[1834] See Id., and Klatt and Meister, *Proportionality*… Op. Cit., p. 696. See also, van Aaken, *"Rational Choice"*… Op. Cit., pp. 305-306.

[1835] See Klatt and Meister, *Proportionality*… Op. Cit., p. 696.

[1836] See Id., pp. 697-698.

[1837] See Moller, *Proportionality*… Op. cit., pp. 720-721.

[1838] See Canale and Tuzet, *Can Constitutional*… Op. Cit., p. 4. See also Moller, *Proportionality*… Op. Cit., p. 721.

[1839] See Borowski, *On Apples*… Op. Cit., p. 1413 and Klatt and Meister, *Proportionality*… Op. Cit., p. 696.

view, this is not only due to the difficulties involved in building cardinal scales[1840], but also based on the specific nature of the weight formula and of PA itself. In fact, they indicate that said formula (and the numbers assigned to its variables) are mere "illustrations" of a rational reconstruction of PA[1841]. In other words, the formula would work as a "heuristic tool"[1842]. As Alexy puts it, "the outcome [of PA] (…) can only be *illustrated* numerically"[1843]. According to Canale and Tuzet, far from proposing a mechanical quantitative scheme for constitutional decision-making[1844], balancing would be nothing more than an "argumentative technique":

> *"The word "balancing" has a metaphorical content and makes reference to the exercise of assessing reasons in an open-ended political and moral space under ideal discursive constraints and the normative framework of a given constitution"*[1845].

Furthermore, the aforementioned criticisms can also be overcome from the perspective of Sartor's economic (quantitative) refinement of PA. As explained above, Sartor addresses the first line of criticism by taking several steps which enable the comparison of the effects of a measure on different constitutional values. According to him, this is achieved after the analyst has built the respective utility functions and normalized and assigned the corresponding weights to each of the variables of interest.

At the same time, scholars have also defended quantitative approaches to balancing such as Sartor's. In short, commentators have argued that, in certain cases, cardinal scales can also be used in constitutional adjudication. In other words, for said scholars, under particular circumstances, PA could be properly conducted "directly" through quantitative means. For example, Giovanni Tuzet argues that cardinal scales make sense when it is possible to express the satisfaction/dissatisfaction of constitutional principles in monetary terms[1846]. In those cases, the costs and benefits of the measure(s) at stake can be properly addressed quantitatively, and the instruments of CBA can be used for these purposes[1847]. Accordingly, as Klatt and Meister puts it:

[1840] If cardinal scales were required instead, "it would then be next to impossible to provide a rational justification for even a single balancing judgment". Borowski, *On Apples*… Op. Cit., p. 1413.
[1841] Id., p. 1414. See also Tuzet, *Alexy &*… Op. Cit., pp. 11-12.
[1842] See Klatt and Meister, *Proportionality*… Op. Cit., p. 700. See also, Canale and Tuzet, *Can Constitutional*… Op. Cit., pp. 5-6.
[1843] Alexy, *A Theory*… Op. Cit. p. 99. Furthermore, Alexy indicates: "The three classes of the triadic model represent a scale which attempts to systematize classifications which can be found both in everyday practice and legal argumentation. Such a three-class system is far removed from a metrification of intensities of interference and degrees of importance on a cardinal scale such as a scale from 0 to 1, and it has to be far removed, because intensities of interference and degrees of importance are not capable of metrification on such a scale". Id., p. 408.
[1844] See also Klatt and Meister, *Proportionality*… Op. Cit., p. 700.
[1845] See Canale and Tuzet, *Can Constitutional*… Op. Cit., p. 6.
[1846] Naturally, this would not always be the case. As Tuzet puts it: "Many constitutional rights and principles have moral, political and legal dimensions that are hardly reduced to monetary gains and losses". Tuzet, *Alexy &*… Op. Cit., pp. 10-11.
[1847] See Id., pp. 5-6, 10-11, 13 and 16.

> *"all rights that are linked to the monetary dimension, e.g. the right to property, are much more suitable for quantification than rights that lack this dimension"*[1848].

However, economic approaches (such as Sartor's) can find another important role in PA, even when quantification seems elusive or impossible. In effect, as with Alexy's weight formula, I submit here that Sartor's proposal can also be used as a "heuristic device" intended to illustrate balancing with the help of economics. In that context, each of the steps taken by Sartor (including the "absolute utility impact" of a measure on two or more values) can be considered auxiliary (economic) tools assisting PA.

To sum up, five important conclusions follow from this debate. First, commensurability does not rely (exclusively) on cardinal quantification. Secondly, since the deployment of cardinal scales regarding constitutional principles is difficult in most cases, balancing usually recurs to ordinal scales. Thirdly, in those cases, although the weight formula uses numbers and performs mathematical operations pertaining to the domain of cardinal scales, it serves only as an illustration of the "real thing"[1849], which corresponds to balancing as an argumentative process assessing reasons. Fourthly, the same role can be assumed by other quantitative (economic) readings of proportionality, such as Sartor's. In those cases, the instruments of CBA can also be used as "illustrations", just as the weight formula may. Fifthly, a more precise quantitative reading of proportionality (using cardinal scales) makes sense in those cases where monetary costs and benefits can be properly obtained. In that context, the direct application of approaches such as Sartor's can be considered appropriate.

2.4. Optimization Accounts of Proportionality and their Limitations

According to the foregoing, PA is a decision-making tool designed to determine the constitutionality of a measure in the light of the facts of the case and of the constitution. In particular, proportionality serves as an important tool in "constitutional rights reasoning" and "is often assigned the central task of reconciling conflicting rights, interests and values"[1850].

Among the different views of PA, it is possible to find its "maximization" or "optimization" accounts. This understanding is open to an economic reading, and particularly, to one using the tools of CBA. Thus far, I have discussed two methodologies forming part of said understanding.

First, as stated above, Robert Alexy's methodological proposal is perhaps the most influential and well-known rational reconstruction of proportionality. For him, PA is a process conformed by three stages including suitability, necessity and proportionality in the narrower sense. The latter stage can be illustrated through a simple mathematical formula (i.e., the weight formula), which considers a two-tiered system of scales. The first one refers to the degree of impairment and the degree of importance of

[1848] Klatt and Meister, *Proportionality*… Op. Cit., p. 696. See also van Aaken, *"Rational Choice"*… Op. Cit., p. 306.
[1849] See Tuzet, *Alexy*… Op. Cit., p. 12.
[1850] Klatt and Meister, *The Constitutional*… Op. Cit., p. 1.

competing constitutional principles. The second refers to the "reliability" of the empirical assumptions taken. In the last stage of PA, a measure will be deemed constitutional if the expected benefits that it produces from the perspective of one constitutional principle exceed the expected costs that it entails from the perspective of another competing principle.

Importantly enough, the weight formula exemplifies the last stage of balancing through the use of numerical expressions and mathematical operations. The limited role of the formula in balancing is a consequence of the nature of the scales proposed by Alexy. Since said scales are "ordinal" rather than "cardinal", their application cannot replace argumentation.

Secondly, Sartor's proposal deepens the connection between PA and economics. His methodology entails the comparison of the marginal effects of a measure on two or more constitutional principles. It also requires building the utility functions and the assessment of said effects from that perspective. Notably, according to him, this comparison is to be made in quantitative terms, though it does not always rely on exact numbers for said purpose.

According to the scholarship, an approach to PA based on argumentation using the weight formula as a "heuristic device" is appropriate when quantification seems elusive or impossible. The same can be said regarding Sartor's proposal. In those cases, Sartor's contribution can be given an "auxiliary" role in argumentation, exemplifying rather than replacing "verbal" PA. At the same time, readings such as Sartor's gain traction where it is possible to express the satisfaction/dissatisfaction of constitutional principles quantitatively, such as when they can be expressed in monetary terms. In those cases, the role of the toolkit of CBA can take primacy.

However, it is important to stress the limitations of PA on this point. First, PA shares many of the limitations of (standard) CBA[1851]. For this reason, even scholars who argue that balancing is a rational decision-making tool agree that "balancing does not claim (…) precision"[1852]. The same is true for its quantitative account. As previously indicated, this framework uses "countable proxies" to somehow "break down imponderable notions"[1853] such as the effect of certain measures on two or more constitutionally guaranteed principles, as does (standard) CBA in certain contexts. Therefore, it is important to acknowledge from the outset that neither PA nor its quantitative reading

[1851] According to the literature, (standard) CBA also confronts significant measurement problems. For example, in the view of Susan Rose-Ackermann, measurement difficulties abound in CBA in what pertains to valuing human life and nature, deciding the proper discount rate in certain contexts, capturing risk-preferences, etc. See Rose-Ackermann, *Putting*… Op. Cit., p. 338 and pp. 346-347. See also Susan Rose-Ackermann, *The Limits of Cost/Benefit Analysis When Disasters Loom*, 7 Global Policy 1 (2016), pp. 58-59.

[1852] Klatt and Meister, *Proportionality*… Op. Cit., p. 699.

[1853] For an elaboration on this issue see Hoffmann, *Rationality*… Op. Cit., p. 96.

claim accuracy[1854]. Secondly, as is the case with "standard" PA, its economic account "inherits" the weaknesses of its premises and assumptions[1855].

Acknowledging those limitations, in (sections 6 and 7) of this *Chapter*, I will apply both "optimization" accounts of PA to two measures which can be imposed by the state in the context of sovereign insolvency. I will use Alexy's and Sartor's approaches to illustrate the outcome of the proportionality judgment. Of note, this analysis will be conducted from the perspective of international rather than domestic law. This requires specifying the particularities of PA in the international context, as well as the definition of the "variables of interest" to be considered. I proceed to build that bridge on the following section.

[1854] In the words of Sartor: "I do not assume that it is really possible to precisely and univocally determine the quantities of utility (benefit) that are delivered by changes in the extent to which a value is realised". Giovanni Sartor, Consistency in Balancing: From Value Assessments to Factor-Based Rules, in David Duarte and Jorge Silva Sampaio (Eds.), *Proportionality in Law: An Analytical Perspective*. Springer (2018), p. 124.

[1855] "Balancing can only be precise to that degree to which the external justification of the premises may be precise. Hence, balancing inherits any weaknesses of the justification of a certain degree of interference or of the importance of the justifying principle". Klatt and Meister, *Proportionality…* Op. Cit., p. 699.

3. The "Constitutional" Principles to Be Considered in the Proportionality Analysis of Sovereign Insolvency

As stated at the beginning of this *Chapter*, insolvency conflicts feature the tension between two interests: those of creditors and those of citizens. In extreme cases, states confront two policy choices while in dire financial distress. In one scenario, they might use all their current (and future) resources and revenues to pay creditors, cutting every expenditure and raising the taxes needed for debt-service. In this case, all the burden is assumed by the citizens, particularly, those directly dependent on the provision of public services. In another scenario, states could simply repudiate or default on their bonds, transferring an important part of the burden to their creditors. In practice, states tend to move along those extremes scenarios, by restructuring their liabilities[1856], diminishing their levels of public spending ("fiscal consolidation")[1857] and, in some cases, reorienting their policies towards privatizations and deregulations (through the so-called "structural adjustment programs")[1858].

Importantly enough, states' policy choices are constrained, to a certain extent, by the values enshrined in international law. For that reason, and in consideration of the purposes of this *Chapter*, it is worth recalling the discussion regarding the PIL principles which may be applicable in the context of sovereign debt crises (subsection 3.1). These principles will serve as the "constitutional principles" or "values" whose promotion/demotion would be assessed when the PA is deployed later on. In particular, in this section I delve into these norms from the perspective of two regimes: International investment law (subsection 3.2) and the European Convention on Human Rights (subsection 3.3).

However, before proceeding, it is important to note that, in terms of PA, discussion of PIL principles does not suffice. Since the tensions between "constitutional values" (even if considered from the perspective of international law) are usually expressed through concrete courses of action (i.e., "measures"), it is also necessary to examine them in detail. I leave that discussion to the next section (section 4).

3.1. The "Values" at Stake: PIL Principles

As indicated in *Chapter Two*, there are several norms of international law which may be applicable to the legal disputes arising from insolvency conflicts. In that *Chapter*, following an important group of scholars, I argued that some of those norms can be considered functionally and structurally equivalent to domestic constitutional principles. For that reason, they can be referred to as "principles of public international law" (henceforth, "PIL principles").

[1856] See, for many, Buchheit et al., *The Restructuring*… Op. Cit., p., 342.

[1857] See Cephas Lumina, Sovereign Debt and Human Rights: Making the Connection, in Ilias Bantekas and Cephas Lumina (Eds.), *Sovereign Debt and Human Rights*. Oxford University Press (2018), pp. 179-180.

[1858] See Sabine Schlemmer-Schulte, *International Monetary Fund, Structural Adjustment Programme (SAP)*, Max Planck Encyclopedia of Public International Law, [last accessed 15.06.2019], § 4.

The category of "PIL principles" deserves further clarification. As stated above, PIL principles share structural similarities with domestic constitutional principles. According to the literature, these similarities are the following: First, both types of principles express the most important values of their respective *polities* (either the national or the international community)[1859]. Secondly, both comprise normative propositions characterized by their relative indeterminacy[1860]. Thirdly, it can be argued that, as principles, both "provide the framework for the exercise of any authority", either national or international[1861]. In short, as Anne van Aaken puts it, "PIL encompasses constitutional functions embedded in principles"[1862] and these principles are PIL principles.

That said, there is yet another important similarity between PIL principles and their domestic constitutional counterparts. In *Chapter Two*, I argued that both types of norms share the structure of principles predicated by legal argumentation, that is, they can be understood as optimization or "prima facie" requirements. This has several consequences. The most important of these refers to the method to be used for their application and interpretation. As discussed above, proportionality analysis is the most suitable candidate in this regard[1863]. Therefore, in that *Chapter* I employed a "practical" criterion for the identification of this type of norm. Particularly, I suggested that whenever PA is mandated by a norm of the law of nations or whenever it is used by international adjudicators in its interpretation or application, it is possible to talk of a PIL principle[1864]. In other words, I argued that through those means, it is possible to infer the nature of an international norm either from legal texts or from the practice of adjudicating bodies.

I have already identified the PIL principles which can be applied in the context of sovereign debt litigation. In *Chapter Two*, I highlighted those guaranteeing citizens' "social" rights, those protecting the public interest and those safeguarding creditors' property rights. Arguably, some of the investment guarantees provided by Bilateral Investment Treaties (henceforth, "BITs") can also be considered PIL principles. The most important of those guarantees correspond to the protection against expropriation and the "Fair and Equitable Treatment" standard (henceforth, "FET"). In what follows I discuss the interactions of PIL principles under two different international settings: International Investment Law and the European Convention on Human Rights (henceforth, "ECHR").

Before proceeding, it is important to mention the following caveat. The application of PIL principles to a dispute requires the application of the international norms which

---

[1859] See van Aaken, *Defragmentation*… Op. Cit., p. 492. See also, Antonio Cassese, *International Law,* 2nd. Ed. Oxford University Press (2005), p. 48 and p. 188.
[1860] See Kadelbach and Kleinlein, *International Law*… Op. Cit., p. 35.
[1861] See Id., p. 38.
[1862] van Aaken, *Defragmentation*… Op. Cit. p. 492.
[1863] Furthermore, from the perspective of legal theory, it may be well argued that PA is the only way to interpret and apply said type of norms. In Alexy's words: "The nature of principles implies the principle of proportionality and vice versa". Robert Alexy, *A Theory*…, Op. Cit., p. 66.
[1864] See *Chapter Two*, pp. 49 et seq.

express them. Of note, those norms can be applicable to these types of disputes either directly (as the governing law on the merits) or indirectly (as a function of the domestic law at stake)[1865]. To make the discussion tractable, I limit this section to those cases where the aforementioned norms are directly applicable in the context of disputes before two different fora. As stated before, I discuss the interaction of PIL principles under international investment law (subsection 3.2) and under the ECHR (subsection 3.3).

3.2. PIL Principles Under International Investment Law: The Interaction Between Investors' Property Rights and Citizens' "Social" Rights

Analyzing the interaction of PIL principles protecting creditors' and citizens' interests in the context of sovereign debt litigation before investment tribunals requires several steps. First, it is necessary to justify that sovereign bonds can be subjected to investment arbitration. Second, it is necessary to determine the investment guarantees which can potentially be breached in the context of insolvency conflicts and to discuss if those guarantees can be considered PIL principles. Third, it is necessary to discuss whether PIL principles protecting citizens' "social" rights, not specifically considered in the respective Investment Treaty, can be invoked in the dispute. Since I have already dealt with the first two steps in *Chapter Two*, I limit the exposition in their regard to highlighting the conclusions arrived at in subsections 3.2.1 and 3.2.2. Considering that I have not yet addressed the third step, I offer a detailed discussion on that account at the end of this subsection (subsection 3.2.3).

3.2.1. The First Step: Can Sovereign Bonds Be Considered as "Investments"?

With respect to the first step, it is important to note that there is a heated debate in the literature (and on the very practice of investment tribunals) regarding the status of sovereign bonds under international investment law. Particularly, there is no agreement on whether these types of assets can be subjected to the jurisdiction of the tribunals established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (henceforth, the "ICSID Convention"). The controversy arises from the lack of a precise definition of the term "investment". In fact, while Article 25(1) of the Convention limits the jurisdiction of said tribunals to the "legal disputes arising directly out of an investment"[1866] it nevertheless remains silent on what pertains to the specific meaning of the term.

I have discussed that controversy in detail in *Chapter Two*[1867]. There, I stressed that neither commentators nor tribunals have provided a definitive answer on the matter to date. In particular, I noted the heterogenous conclusions arising from the practice of investment tribunals. For example, the tribunals in the Abaclat[1868], Ambiente[1869] and

[1865] See, for example, Kjos, *Applicable Law*… Op. Cit., p. 247.
[1866] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.
[1867] See *Chapter Two*, pp. 73 et seq.
[1868] See Abaclat and others v. The Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5 (2011).
[1869] See Ambiente Ufficio S.P.A. and Others v. The Argentine Republic, ICSID Case No. ARB/08/9 (2013).

Alemani[1870] cases found jurisdiction over a dispute concerning defaulted sovereign bonds issued by Argentina, whereas the Poštová tribunal rejected jurisdiction on restructured Greek bonds, mainly due to the specific language of the BIT at issue[1871].

Nevertheless, I decided to proceed under the assumption that sovereign bonds qualify as "investments"[1872]. Though contested, this assumption also allows me to test the PA that follows in the context of investment disputes. It should be noted from the outset that this is not only an academic exercise. It may be useful in practice, if ICSID arbitration is recurred to by bondholders in the future, as it has been in the past and claimants are successful in the jurisdictional phase.

3.2.2. The Second Step: Which Investment Guarantees?

Under the assumption that sovereign bonds qualify as "investments", I may now advance to the second step. Here, I briefly review the investment guarantees included in BITs which, according to the scholarship, can potentially be breached in the context of a default/restructuring. Particularly, I limit the exposition to two of those guarantees: direct and indirect expropriation and the FET standard[1873]. I also summarize why those guarantees can be considered PIL principles.

3.2.2.1. The Guarantee Against Expropriation as a PIL Principle

As discussed in *Chapter Two*, the protection against expropriation is one of the most important guarantees offered to foreign investors by international investment law. Crucially, the law of nations distinguishes between "direct" and "indirect" or "de-facto" expropriations. The latter type of taking is difficult to identify, and investment tribunals have articulated two main understandings for that purpose: the "sole effects" and the "police powers" doctrines.

On the one hand, for the "sole effects" doctrine, a measure can be deemed expropriatory if it produces significant negative effects from the perspective of investors, regardless of the purpose of the measure[1874]. On the other hand, the "police powers" doctrine features at least two different formulations in the case-law and in scholarly writings. Under the first, the doctrine indicates that an expropriation does not arise from non-discriminatory

---

[1870] Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8 (2014).
[1871] See, Poštová Banka A.S and Istrokapital SE v. The Hellenic Republic, ICSID Case No. ARB/13/8 (2015). The Poštová tribunal explicitly stated that its purpose was not to solve the controversies surrounding the approaches proposed by the literature in order to qualify an activity as an investment. However, it tackled the question of whether the bonds purchased by the claimant qualified as such using some of the elements developed by the case-law following the "Salini" test.
[1872] The most recent commentaries on the subject have favored a broad reading of the term to encompass sovereign bonds. See, for example, the works of Stratos Pahis. Stratos Pahis, *Investment Misconceived: The Investment-Commerce Distinction in International Investment Law*, 45 The Yale Journal of International Law (2020), p. 131 and Stratos Pahis, *The International Law and Economics of Sovereign Debt*, 115 The American Journal of International Law 2 (2020), p. 18.
[1873] For a detailed discussion including a list of authorities, see *Chapter Two*, pp. 83 et seq.
[1874] See, for example, Ursula Kriebaum, *Human Rights of the Population of the Host State in International Investment Arbitration*, 10 The Journal of World Investment and Trade (2009), p. 699.

measures imposed through general regulations that fall within the state's regulatory or "police" powers and which are implemented in the pursuance of the public interest[1875]. Under the second, a measure having a significant negative effect from the perspective of investors "(…) will only amount to an expropriation if there is a lack of proportionality between the loss to the claimant and the public interest pursued by the measure"[1876]. This understanding has been denominated the "mitigated police powers doctrine"[1877].

Notably, some "new" BITs' have embraced the "mitigated police powers doctrine" and included language amenable to the use of PA for the purpose of the application and interpretation of their expropriation provisions[1878]. At the same time, although investment tribunals rarely follow all three stages posited by Alexy (i.e., suitability, necessity, and proportionality "stricto sensu"), they have considered this doctrine on several cases and thus employed PA for determining whether an expropriation has occurred[1879].

Therefore, and as discussed in detail in *Chapter Two*[1880], the "mitigated police powers doctrine" suggests dividing an expropriation inquiry into two prongs[1881]. Under the first, the severity of the measure from the perspective of the investors needs to be scrutinized. At this stage the case-law suggests that expropriations require a "substantial deprivation" of investors' interests (imposing significant pecuniary losses on the investor, depriving her of one or more attributes of the right to ownership, or a combination of the two). Crucially, investment tribunals have indicated that contracts (such as sovereign bonds) can be the subject of expropriation only if the corresponding state acts in its sovereign capacity ("acta iure imperii"). Only if the tribunal finds that a "prima facie" violation of this guarantee is verified will it proceed to the second stage.

Under the second prong, the negative effects need to be balanced against the importance of the purpose of the measure[1882]. Therefore, as Kingsbury and Schill put it,

---

[1875] See, for example, Bücheler, *Proportionality*… Op. Cit., pp. 127 et seq. A detailed discussion of this doctrine (including relevant cases) is provided in *Chapter Two*, pp. 87 et seq.
[1876] Bonnitcha, *Substantive*… Op. cit., p. 263.
[1877] See Bücheler, *Proportionality*… Op. Cit., pp. 129-130 and Titi, *Refining*… Op. Cit., p. 123.
[1878] See, for example, United States, 2004 Model BIT, Annex B "Expropriation" 4 (a), available at https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf [last accessed 20.4.2021]; United States, 2012 Model BIT, Annex B "Expropriation" 4 (a), available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [last accessed 20.4.2021] and Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union, available at https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [last accessed 20.4.2021]. Notably, Titi mentions several other international investment treaties using a similar language. See Catharine Titi, Refining the Expropriation Clause: What Role for Proportionality? In Julien Chaisse (Ed.), *China-European Union Investment Relationships*. Elgar (2018), pp. 127-128.
[1879] See *Chapter Two,* pp. 87 et seq.
[1880] See Id.
[1881] See Kingsbury and Schill, *Public Law*… Op. Cit., p. 92.
[1882] See Id.

"(…) a compensable indirect expropriation occurs only when state measures lead to disproportional restrictions of the right to property"[1883].

Accordingly, if the "mitigated police powers" doctrine is followed, tribunals will recur to PA for the application and interpretation of the guarantee against expropriation. For that reason and following the "practical" criterion previously indicated[1884], the guarantee can be understood as an "optimization requirement" and thus, as a PIL principle. Likewise, that standard of treatment can be regarded as a "value" to be considered in the analysis that follows in sections 6 and 7.

Nevertheless, according to commentators, the "mitigated police powers" doctrine also opens the door for tribunals to consider "other" values (i.e., values not explicitly referred to in the BIT) in the proportionality assessment[1885]. In this context, these "other" values may be *invited* into the dispute as the "legitimate purposes" justifying the imposition of the corresponding measure and may be featured in the balancing process[1886]. For that reason, scholars have highlighted that PA may, when applied to international investment law, be a powerful tool to structure the relationships between investors, citizens and states, as well as between the aforementioned regime and other regimes of international law[1887]. I will address this issue later in this text (section 3.2.3) after discussing the FET standard.

3.2.2.2. The FET Standard as a PIL Principle

The scholarship and the case-law of investment tribunals suggest that the assessment of a violation of the FET standard should also be divided into two prongs[1888].

First, the "core" elements of the standard need to be assessed, and the negative impact of a measure on investors' interests must be scrutinized. In this scenario, the tribunal will analyze whether there is a "prima facie" violation of the provision. For this purpose, and depending on the circumstances of the case, adjudicators will examine the host-state's conduct against the corresponding "core" elements of the FET guarantee. According to scholars, the key elements of the standard include: (a) the protection of investors' legitimate expectations, (b) the protection of investors from coercion and harassment and, (c) a guarantee to stability and consistency[1889]. At the same time, as

---

[1883] Id., p. 93.

[1884] See *Chapter Two*, pp. 50-51.

[1885] For example, Krommedijk and Morij highlight that human rights can be used to give content to the "police powers", which may be relied upon by states to impose measures affecting property rights not triggering the obligation to compensate under expropriation provisions. See Krommendijk and Morij, *Proportional*… Op. Cit., pp. 432-433.

[1886] In the words of van Aaken: "The defendant state may then not only invoke its own law, but also international non-investment law, either indirectly through the national law, or directly as a legitimate purpose against which the infringement of investors' rights must be balanced". van Aaken, *Defragmentation*… Op. Cit. p. 507.

[1887] See Kingsbury and Schill, *Public Law*… Op. Cit., p. 104.

[1888] See *Chapter Two*, pp. 92 et seq.

[1889] For a detailed account (including a list of authorities and relevant cases), see *Chapter Two*, pp. 92 et seq. Notably, as indicated in the aforementioned *Chapter*, I set aside the discussion of

with the guarantee against expropriation, only measures implemented by the state in its sovereign capacity are capable of violating the standard. Finally, for a significant group of cases, a "forceful" renegotiation of contracts can be considered evidence of coercion and may thus entail a "prima facie" violation of the FET guarantee[1890].

Next, said effects need to be put in perspective, considering the regulatory purposes of the measure under scrutiny, through the application of PA. In other words, just as in expropriation cases, establishing a breach of the FET standard entails an assessment of whether the host-state has maintained an adequate equilibrium between investors' rights and the "public" interest. However, as is the case in the context of expropriation, investment tribunals have not developed a fully sophisticated approach to balancing in the context of the FET standard. In any case, it is important to highlight that there are decisions featuring each of the stages suggested by Alexy[1891].

Since investment tribunals have applied and interpreted the FET standard through PA, I concluded in *Chapter Two* that this guarantee can be regarded as a PIL principle.

3.2.2.3. Defining the Public Interest? The Guarantee Against Expropriation, the FET Standard and Proportionality

According to the foregoing, if a tribunal understands that a "prima facie" violation of either the guarantee against expropriation or the FET standard is found, its analysis will move to the aforementioned second prong (i.e., to PA). In that context, adjudicators may discuss whether the measure under scrutiny is proportional, while comparing the negative effects on investors' interests and the satisfaction of the host-state's public concerns.

As discussed in *Chapter Two*, modern BITs usually posit several examples of said public interests, including public health, safety, and environmental concerns[1892]. Nevertheless, the PA to be deployed for finding a violation of the investment treaty at hand is not necessarily confined to its four corners. Indeed, if certain conditions are met, "public" concerns arising from norms external to the BIT at stake (henceforth, "external sources") are legally authorized to be entered into the balancing process in investment disputes.

In the following subsection, I center the discussion around one of those "external sources". The source under consideration corresponds to the International Covenant on Economic, Social and Cultural Rights (henceforth, "ICESCR")[1893]. As indicated in *Chapter Two*[1894], said instrument includes several guarantees whose protection may

---

other elements of the standard in order to simplify the discussion that follows in sections 6 and 7 of this *Chapter*.

[1890] Id.

[1891] See, for example, Glamis vs. the United States (Award), (2009) and Occidental v. Ecuador (II), (Award) (ICSID Case No. ARB/06/11) (2012).

[1892] See, for example, the US model BITs quoted in footnote 1878 above.

[1893] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

[1894] See *Chapter Two*, pp. 101 et seq.

serve as the goals justifying the measures impairing investors' rights in the context of sovereign insolvency.

3.2.3. The Third Step: PIL Principles Protecting Citizens' "Social" Rights and their Application to Investment Disputes

It is well known that the ICESCR is "the most comprehensive"[1895] international instrument protecting citizens' economic, social, and cultural rights (henceforth, "social" rights). As of April 2021, 170 countries have acceded to or ratified the instrument[1896]. Among other guarantees, the Covenant protects the right to social security, the right to an adequate standard of living and the rights to health and education. According to commentators, these guarantees can potentially be impaired in the context of sovereign insolvency[1897]. Of note, the ICESCR imposes three different obligations on states: to respect, to protect and to fulfill the "social" rights set out therein[1898].

Particularly, the obligation to fulfill includes both "forward-looking" and "immediate" obligations. Regarding those "immediate" obligations, the scholarship and the authoritative interpretations of the Covenant emphasize (i) the obligation to guarantee a minimum essential level of satisfaction of those rights (the "minimum core") and (ii) the obligation of abstaining, in principle, from imposing retrogressive measures ("non-retrogression")[1899]. Notably, the obligation of non-retrogression is not absolute. States are authorized to downgrade the level of enjoyment of ESC rights, if they are able to provide a satisfactory justification for this[1900]. For these purposes, the ICESCR requires states to comply with the conditions established in Art. 4, which according to scholars (and to several soft-law instruments as well), includes an obligation of proportionality[1901]. In short, beyond the "minimum core", the requirements for the application of retrogressive measures define the structure of "social" rights as

---

[1895] Manisuli Ssenyonjo, Economic, Social and Cultural Rights: An Examination of State Obligations in Sara Joseph and Adam McBeth (Eds.), *Research Handbook on International Human Rights Law*. Elgar (2010), p. 36.

[1896] See United Nations Treaty Collection, Chapter IV: Human Rights. 3. International Covenant on Economic, Social and Cultural Rights available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4 [last accessed 20.4.2021].

[1897] See, for example, Goldmann, *Human Rights…* Op. Cit., pp. 4-5.

[1898] See CESCR, General Comment 12: The right to Adequate Food (Art 11), UN Doc E/C.12/1999/5 (12 May1999).

[1899] See, for example, CESCR, General Comment 3: The nature of States parties' obligations (Art 2(1)), UN Doc E/1991/23 (14 December 1990), paras 9-10.

[1900] However, it is important to note that there is "strong presumption of impermissibility" regarding retrogressive measures. See CESCR, General Comment 13: The right to education (Art 13), UN Doc E/C.12/1999/10 (8 December 1999), para 45.

[1901] Certain soft-law instruments have enriched those conditions. For example, the Guiding Principles on Human Rights Impact Assessments of Economic Reforms, establish other constraints on the implementation of retrogressive measures (including temporality, legitimacy, reasonableness, necessity and proportionality). See Guiding Principles on Human Rights Impact Assessments of Economic Reforms, available at https://www.ohchr.org/Documents/Issues/IEDebt/GuidePrinciples_EN.pdf [last accessed 16.06.2021), Principle 10.

optimization requirements. For that reason, they can be properly characterized as PIL principles.

Furthermore, as stated above, if certain conditions are met, "social" rights can be recurred to while deploying the PA in the context of investment disputes. In particular, they can be relied upon under the "second prong" of the analysis for assessing a breach of expropriation and FET provisions. In that context, said rights enter the analysis as the competing goal at stake in the balancing process. The following subsection discusses the conditions under which this is legally feasible.

3.2.3.1. "Social" Rights in Investment Disputes

Commentators usually note that international investment law is not a "self-contained" regime[1902]. As stated above, PIL principles to be considered in sovereign debt litigation before investment tribunals can also be found in "external sources" and, particularly, in human rights treaties. Although said tribunals have been reluctant to recur to human rights law (including "social" rights) in the past[1903], this approach has gained traction both in the case-law[1904] and in the scholarship.

According to the literature, there are several avenues which investment tribunals can take for referring to "social" rights as "external sources" from the perspective of the BIT at stake in an investment dispute. There are two which are most frequently noted in the scholarship[1905]: The "applicable law" and the "principle of systemic integration" as considered in the customary rules on treaty interpretation codified in the Vienna Convention on the Law of Treaties (henceforth, "VCLT")[1906].

[1902] See Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?* 10 International & Comparative Law Quarterly (2011), p. 576; Bücheler, *Proportionality…* Op. Cit., pp. 97-98; Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 Journal of International Dispute Settlement 2 (2015), pp. 295-296 and Goldmann, *Foreign Investment…* Op. Cit., p. 138.

[1903] See, for example, Meshell… *Human Rights…* Op. Cit., p. 295 and Goldmann, *Foreign Investment…* Op. Cit., p. 143.

[1904] See, for example, Hesham v. Indonesia, Final Award (2014), paras 556 and 661; Rompetrol v. Rumania, ICSID Case No. ARB/06/3 Award (2013), para 172; Saur v. Argentina, Caso CIADI N° ARB/04/4, Decisión Sobre Jurisdicción y Responsabilidad (2012), para 332 and Urbaser v. Argentina, ICSID Case No. ARB/07/26, Award (2016), paras 613-624.

[1905] See for example, Simma, *Foreign Investment…* Op. Cit., p. 582; Bruno Simma and Theodore Kill, Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology in Christina Binder et al. (Eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*. Oxford University Press (2009), pp. 680-681; Johannes Fahner and Matthew Happold, *The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration*, International & Comparative Law Quarterly (2019), pp. 749-750; van Aaken, *Defragmentation…* Op. Cit, pp. 495-497 and Fabio Santacroce, *The Applicability of International Human Rights Law in International Investment Disputes*, 34 ICSID Review 1 (2018), p. 137.

[1906] Other avenues include the jurisdictional clause and "in accordance with host state law" provisions. For a discussion of the available alternatives, see Kriebaum, *Human Rights…* Op. Cit., p. 660 and Santacroce, *The Applicability…* Op. Cit., pp. 140-141. See also, Simma, *Foreign Investment…* Op. Cit., pp. 580-581; Filip Balcerzak, *Jurisdiction of Tribunals in Investor-State*

It is submitted here that the first of the aforementioned avenues is the most straightforward for the purpose of considering "external" PIL principles as competing goals in the PA to be deployed in the context of investment litigation. In such cases, the conduct of the host-state should be judged according to the law applicable to the merits (including "external sources")[1907]. For this reason, if PA is recurred to for the application of both investment and "external" PIL principles, tribunals will be authorized to balance both. The issue is not as simple for the second avenue previously mentioned (i.e., when "social" rights are not part of the applicable law and are thus merely used for interpretative purposes). I discuss both avenues in the following subsections.

3.2.3.1.1. "Social" Rights Directly Applicable to Investment Disputes

Let me begin by considering the first of the aforementioned avenues. In this context, "social" rights are under the scope of the law applicable to the dispute. Notably, the applicable law can be determined by the state-parties to the treaty at hand (through "choice of law" clauses) or, in the absence of such a choice, by the relevant arbitration rules[1908].

Most BITs, however, do not explicitly refer to human rights in their choice of law clauses[1909]. At the same time, said instruments tend to also remain silent on the issue of the law applicable to the dispute[1910]. Consequently, in most cases, the arbitration rules will be capital for the applicability of "social" rights[1911]. For example, the rules of the ICSID Convention mandate arbitrators to apply both the law of the host state and "such rules of international law as may be applicable"[1912]. Notably, the norms of international law which can be relied upon by investment tribunals are those emanating from its different sources, including treaties, customary international law and "general principles"[1913].

Arbitration and the Issue of Human Rights, 29 ICSID Review 1 (2014), p. 218; van Aaken, *Defragmentation*… Op. Cit. and Fahner and Happold, *The Human*… Op. Cit., pp. 749-750.

[1907] For a detailed discussion of the law applicable in investment arbitration, see Yas Banifatemi, The Law Applicable in Investment Treaty Arbitration, in Yannaca-Small (Ed), *Arbitration under International Investment Agreements: A Guide to the Key Issues*. Oxford University Press (2018), pp. 199-200. For an assessment of this issue from the specific perspective of "external sources" see Dafina Atanasova, International Norms: A Defence in Investment Treaty Arbitration? in Mesut Akbaba and Giancarlo Capurro (Eds.), *International Challenges in Investment Arbitration*. Routledge (2019).

[1908] See Banifatemi, *The Law Applicable*… Op. Cit., pp. 200-201.

[1909] "It is exceptional for a BIT or regional investment protection treaty to contain human rights provisions". Kriebaum, *Human Rights*… Op. Cit., 661. See also Santacroce, *The Applicability*… Op. Cit., p. 147 and Reiner and Schreuer, *Human Rights*… Op. Cit., pp. 3-4.

[1910] See Banifatemi, *The Law*… Op. Cit., pp. 199-200.

[1911] Id., pp. 200-201. See also, van Aaken, *Defragmentation*… Op. Cit., p. 495.

[1912] ICSID Convention, art. 42 (1) second sentence. Importantly enough, under ICSID rules, "the arbitrators' recourse to both the law of the host state and international law is mandatory". Banifatemi, *The Law*… Op. Cit., p. 201. Other procedural rules, such as the Arbitration Rules of the Stockholm Chamber of Commerce and the UNCITRAL Arbitration Rules, include different norms in this regard. For a discussion, see Id., pp. 200-2021.

[1913] See, for example, Tecmed v. Mexico, Op. Cit., para 116.

Therefore, through choice of law clauses (or, in their absence, through the relevant arbitration rules) human rights *are invited* to the merits of the dispute through the direct applicability of international law[1914]. As stated above, the analysis that follows in sections 6 and 7 specifically concerns the norms codified in the ICESCR. In that particular case, the least contested scenario justifying the application of "social" rights to the case depends on that instrument being "(…) directly binding upon the state parties to the investment treaty"[1915]. Alternatively, they may also come to the fore, through domestic law, if "social" rights are integrated into the law of the host-state[1916].

The consequences of the direct applicability of "social" rights to investment disputes are critical for the purposes of this *Chapter*. First of all, if "social" rights are indeed applicable to the merits, and if they have a bearing upon the facts of the case, the tribunal will be bound to apply them[1917]. Thus, if these conditions are met, the norms are to be considered as establishing rights and obligations in the case at hand, forming part of "(…) a body of law producing norms directly bearing on the substance of the dispute"[1918]. To put it bluntly: in such a case, the juridical consequences of the host-state's conduct ought to be assessed by considering both investment standards and "social" rights[1919].

For those reasons, in this context, a conflict between "social" rights norms and investment standards may most appropriately be found. Notably, according to Dafina Atanasova, we can talk of a conflict between norms when their application "(…) would lead to different results"[1920]. This may be the case if both "social" rights and investment

---

[1914] "(…) human rights, as a component of international law, are part of the applicable law" in those cases. See, Reiner and Schreuer, *Human Rights…* Op. Cit., pp. 4-5. "As part of the broader corpus of international law, international human rights law, too, should, in principle, be applicable in investment treaty disputes". Santacroce, *The Applicability…* Op. Cit., pp. 141-142. See also Dupuy and Viñuales, p. 25. See also Tecmed v. Mexico, Op. Cit., para 116. See also Eric de Brabandere, *Human Rights and International Investment Law*, Grotious Centre Working Paper Series No. 2018/075-HRL (2018), p. 17.

[1915] Santacroce, *The Applicability…* Op. Cit., p. 142. I set aside other issues, such as whether said norms entail "erga omnes" obligations, considering that they open the door for a significant debate.

[1916] As Ursula Kriebaum puts it: "human rights law can be part of the applicable law as part of international law (…)" or "as part of the local law". Kriebaum, *Human Rights…* Op. Cit., p. 661.

[1917] See Banifatemi, *The Law Applicable…* Op. Cit., pp. 199-200.

[1918] Santacroce, *The Applicability…* Op. Cit., p. 142

[1919] As a result of "social" rights being part of the applicable law. As an often-quoted passage of the commentary to the Harvard Law School Draft Convention on the Law of Treaties indicates: "(…) application is the process of determining the consequences which, according to the text, should follow in a given situation". *Comment to the Draft Convention on the Law of Treaties*, Article 19 "Interpretation of Treaties" reproduced in 29 The American Journal of International Law Supplement: Research in International Law (1935), p. 939. Dafina Atanasova indicates that in a context such as this, if "external norms" form part of the applicable law they are to be deemed "(…) part of the international framework against which the legality of the state behaviour is assessed in investment proceedings, at equal footing with the investment treaty". Atanasova, *International Norms…* Op. Cit., pp. 63-64

[1920] "To assert whether the two norms are in conflict, a tribunal must enquire whether both purport to regulate the case before it and if yes, whether applying them would lead to different

standards are simultaneously applicable to the case at hand. At the same time, if that condition is fulfilled, the interaction between PIL principles belonging to the treaty at hand and "external sources" may be successfully understood as one of competing obligations of the host-state[1921].

At this point, tribunals will have at least two different options. First, they may approach the issue in an "all or nothing fashion". Under this alternative, they will decide that either "social" rights or investment standards norms prevail in the case at hand[1922]. For this purpose, tribunals could recur to the traditional conflict resolution techniques (including the "lex specialis" and "lex posterior" maxims). Nevertheless, those techniques will most likely prove to be insufficient in cases featuring the interaction of "social" rights and investment norms[1923]. The same will be true if a hierarchical criterion is followed instead. In short: both investment standards and "social" rights tend to be considered as having an "equal" footing from the point of view of the law of nations[1924]. For those reasons, investment tribunals may turn to the second option: attempting to reconcile the PIL principles at stake through PA[1925]. From this perspective, balancing can be seen as a way of "harmonizing" both the BIT's and "external" PIL principles[1926].

Consequently, if "social" rights are directly applicable and they have a bearing on the facts of the dispute, adjudicators will have solid grounds to understand the issue as one of a conflict between norms. At the same time, and since both the BIT and the relevant

---

results. This would be the case in one of the following two scenarios: either the two norms create duties that cannot be complied with simultaneously; (…) or they create a right and a duty which contradict each other (…)". Atanasova, *International Norms…* Op. Cit., pp. 58-59.

[1921] This is the position which Bruno Simma seems to favor, although it remains unclear. See Simma, *Foreign Investment…* Op. Cit., p. 591.

[1922] This is the alternative proposed by Atanasova. See Atanasova, *International Norms…* Op. Cit., p. 59.

[1923] The inadequacy of the aforementioned maxims in this context is highlighted by Fhaner and Happold. On the one hand, both investment standards and "social" rights norms may be equally imprecise in their drafting, thus making recourse to the "lex specialis" maxim superfluous. On the other hand, derogating or suspending the application of multilateral obligations such as those arising from the ICESCR through the application of the "lex posterior" criterion would be doubtful. See Fahner and Happold, *The Human Rights…* Op. Cit., pp. 757-758. See also Atanasova, *International Norms…* Op. Cit. pp. 64-65 and Simma and Kill, *Harmonizing Investment…* Op. Cit., pp. 705-706.

[1924] See Fahner and Happold, *The Human Rights…* Op. Cit., p. 757. *Contra* see United Nations General Assembly, Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights A/63/289 (2008), paras 14-16.

[1925] See van Aaken, *Defragmentation…* Op. Cit.; Kingsbury and Schill, *Public Law…* Op. Cit., p. 88 and Caroline Henckels, *Proportionality and the Standard of Review in Fair and Equitable Treatment Claims: Balancing Stability and Consistency with the Public Interest*, Society of International Economic Law Working Paper No. 2012/27 (2012), p. 2 and pp. 5-6. However, it should be mentioned that certain scholars oppose the use of balancing in these cases, privileging one of the norms over the others. See, for example, Atanasova, *International Norms…* Op. Cit., p. 67.

[1926] Arguing that harmonization is also feasible in the context of direct application (instead of being limited to interpretation), see Fahner and Happold, *The Human Rights…* Op. Cit., pp. 749-750.

human rights treaty (in this case, the ICESCR) are applicable to the merits, tribunals could also address said conflict as one putting forward competing obligations. Finally, if adjudicators decide to rely on PA for the purposes of attempting to "reconcile" those obligations while deciding on a breach on expropriation and/or FET standards, they will be legally authorized to consider "social" rights as the competing principles in the balancing process.

3.2.3.1.2. "Social" Rights Used to Interpret Investment Standards

Now let me continue with the "principle of systemic integration". Here, the question is whether the conclusion arrived at in the last subsection holds if "social" rights norms do not fall under the scope of the law applicable to the dispute and are relied upon for interpreting the BIT at stake instead. Providing a complete answer to that question is beyond the scope of this *Chapter*. Nevertheless, in the following, I put forward some examples under which that could be considered legally feasible.

Crucially, the use of "external sources" (i.e., "external" to the treaty at hand and not directly applicable) for the purposes of interpreting the norms applicable to a dispute has been highlighted by the literature[1927]. In this regard, scholars note the role of the "principle of systemic integration" enshrined by Art. 31(3)(c) of the VCLT[1928]. In particular, said Article provides that, for the purposes of interpretation, adjudicators "shall take into account, together with the context (…) any relevant rules of international law applicable in the relations between the parties"[1929].

According to the literature, Art. 31(3)(c) VCLT can be relied upon for two different (interpretative) purposes. First, it can be used by international adjudicators to discern the meaning of particular treaty terms[1930]. Thus, it can be used for "taking into account" "external sources" (including "social" rights) to "clarify", "define"[1931] and "influence the meaning of the terms and provisions" of the BIT at stake[1932]. For example, human rights norms may be used to clarify the concept of "due process" which, as stated in *Chapter Two*[1933], tends to be featured as a component of the FET standard[1934]. Secondly, it can

---

[1927] See Simma and Kill, *Harmonizing Investment*… Op. Cit., pp. 681-682.
[1928] See van Aaken, *Defragmentation*… Op. Cit., pp. 496-497 and Santacroce, *The Applicability*… Op. Cit., p. 148.
[1929] See VCLT, art. 31(3)(c).
[1930] Simma and Kill, *Harmonizing Investment*… Op. Cit., p. 683 and Simma, *Foreign Investment*… Op. Cit., pp. 583. For example, according to Kriebaum, human rights "(…) can be of importance (…) for determining the meaning of the fair and equitable treatment standard, and of full protection and security clauses, with regard to decisions on direct or indirect expropriation or the international minimum standard". Kriebaum, *Human Rights*… Op. Cit., p. 668. For a discussion of the application of said article to the right to water in investment disputes, see Meshell… *Human Rights*…, pp. 302-303.
[1931] See Gourgourinis, *The Distinction*… Op. Cit., pp 43-44.
[1932] Kriebaum, *Human Rights*… Op. Cit., p. 668. "Against this background, systemic integration certainly makes human rights norms applicable as interpretative tools in investment treaty disputes". Santacroce, *The Applicability*… Op. Cit., p. 149.
[1933] See *Chapter Two*, p. 92.
[1934] See Santacroce, *The Applicability*… Op. Cit., pp 147-148.

also be employed to "harmonize" "*qua* interpretation"[1935], the norms applicable to the dispute (in this case, BIT provisions) with "external norms" not directly applicable (in this case, "social" rights)[1936]. The latter function of the "principle of systemic integration" is usually understood as entailing a "negative interpretative presumption" which states that "(…) the parties to a treaty did not intend to upset some other rule of international law"[1937]. From this perspective, systemic integration is deployed to achieve a "consistent" interpretation between treaty and "external" obligations[1938]. In this regard, it is worth quoting Fabio Santacroce in full:

> *"When entering into a treaty, the parties may not have intended to act inconsistent with rules and obligations that arise under other sources of international law and that are binding upon them (hence, the provisions of the relevant treaty must be interpreted consistent with any rules and obligations applying to the parties under sources of international law external to the treaty)"*[1939].

Nevertheless, two important caveats need to be considered for the application of systemic integration to investment disputes. First, the use of "external sources" for the purpose of interpretation needs to comply with the requirements put forward in Art. 31(3)(c)[1940]. According to scholars, those requirements will be fulfilled if the norms belong to any of the sources of international law[1941], provided that they "bear upon the same facts as the treaty under interpretation"[1942], and if they are, in fact, "applicable in the relations between the parties".

The last of the aforementioned conditions deserves further scrutiny. Since we are dealing with international investment law, in most cases, the treaty at issue will be a BIT. Commentators note that if the norm to be relied upon for the purposes of interpretation is found in an "external" treaty to which both parties to the BIT are also parties, the requirement would be satisfied[1943]. Applying this to the discussion of "social" rights, if both parties to the BIT are also parties to the ICESCR, tribunals can rely on

---

[1935] Simma, *Foreign Investment*… Op. Cit., pp. 584.

[1936] See Simma and Kill, *Harmonizing Investment*… Op. Cit., pp. 693-694; Simma, *Foreign Investment*… Op. Cit., pp. 583-584; Santacroce, *The Applicability*… Op. Cit., p. 149 and Fahner and Happold, *The Human Rights*… Op. Cit., p. 750.

[1937] Simma and Kill, *Harmonizing Investment*… Op. Cit., 694.

[1938] Santacroce, *The Applicability*… Op. Cit., p. 141.

[1939] Id., p. 148.

[1940] For a discussion of this point, see, for example, Dupuy and Viñuales, p. 19.

[1941] See van Aaken, *Defragmentation*… Op. Cit., pp. 497-498. See also Bücheler, *Proportionality*… Op. Cit., p. 99.

[1942] Santacroce, *The Applicability*… Op. Cit., p. 148. In the words of Bücheler: "(…) the external rule needs to relate in some way to the same subject matter as the treaty term or provision (…)". Bücheler, *Proportionality*… Op. Cit., p. 119.

[1943] "(…) if both state parties to a bilateral investment treaty conferring jurisdiction on the tribunal are also parties to a particular human rights treaty this requirement will also be fulfilled". Kriebaum, *Human Rights*… Op. Cit., pp. 667-668. See also Goldmann, *Foreign Investment*… Op. Cit., pp. 138-139; Simma and Kill, *Harmonizing*… Op. Cit., p. 706 and Fahner and Happold, *The Human Rights*… Op. Cit., pp. 750-751.

said norms for interpreting investment standards[1944]. In the case of an "external" multilateral treaty (such as the ICESCR itself), where only one party to the BIT is party to that treaty, the issue is not as straightforward. Though contested, a significant part of the scholarship indicates that even in those cases, the norm found in the external treaty can nevertheless be relied upon[1945].

The second caveat refers to the specific function of Art. 31(3)(c). According to the scholarship, the role of said Article is strictly limited to its purpose, i.e., interpretation. Therefore, as an interpretative tool, Art. 31(3)(c) authorizes adjudicators to take into account "external" norms (such as those establishing "social" rights) for the interpretation of investment standards[1946]. It does not, however, allow the interpreter to modify the existing treaty[1947] nor does it call for the direct application of the "external" norms[1948].

Consequently, an answer to the question posited at the beginning of this subsection requires addressing the conceptual differences between the "interpretation" and "application" of international norms[1949]. For example, an often-quoted passage of the

---

[1944] The "widespread participation" of states in the ICESCR makes the application through interpretation of "social rights" in investment disputes more feasible. See Simma, *Foreign Investment*… Op. Cit., pp. 586-587.

[1945] See, van Aaken, *Defragmentation*… Op. Cit., p. 498 and Bücheler, *Proportionality*… Op. Cit., pp. 115-118. Particularly, the norms of the ICESCR may be considered as "applicable between the parties" if it can be successfully argued that said convention produces *erga omnes* obligations. See Simma, *Foreign Investment*… Op. Cit., pp. 586-587. Notably, a similar issue arises in multilateral international investment agreements. In the words of van Aaken: "(…) it remains an open question, in cases of multilateral treaties, whether all the parties to the treaty also have to be party to the other treaties relied upon (the identical membership requirements) or whether Article 31(3)(c) already allows for the application of PIL relevant only to the parties in the dispute at hand, greatly enhancing its significance. Generally, the literature takes the latter, broader view". van Aaken, *Defragmentation*… Op. Cit., p. 498. Similarly, see Fahner and Happold, *The Human Rights*… Op. Cit., p. 750.

[1946] "When using Article 31(3)(c) or the customary rule that it reflects, an adjudicator is not applying another treaty but employing it as a tool with which to interpret the treaty which it is obliged to apply". Fahner and Happold, *The Human Rights*… Op. Cit., p. 750.

[1947] Art. 31(3)(c) "(…) can only be employed as a means of harmonization qua interpretation, and not for the purpose of modification, of an existing treaty". Simma, *Foreign Investment*… Op. Cit., p. 584. Art. 31 (3)(c) is only "(…) a tool of interpretation not explicitly vest with the power to modify". Simma and Kill, *Harmonizing*… Op. Cit., p. 694. Similarly, see Panos Merkouris, "*Principle of Systemic Integration"*, Max Planck Encyclopedia of International Procedural Law, § 37.

[1948] See Richard Gardiner, *Treaty Interpretation* (2nd Edition). Oxford University Press (2015), p. 320. However, it is important to note that according to Santacroce, "external norms" can nevertheless be applied on a "gap-filling basis". That said, he acknowledges that "in most cases (…) this would be difficult to establish". Santacroce, *The Applicability*… Op. Cit., pp. 150-151.

[1949] For a discussion of the differences between both processes, see Anastasios Gourgourinis, *The Distinction between Interpretation and Application of Norms in International Adjudication*, 2 Journal of International Dispute Settlement 1 (2011), pp. 32-33 and Chang-fa Lo, *Treaty Interpretation Under the Vienna Convention on the Law of Treaties: A New Round of Codification*. Springer (2017), pp. 81-82.

commentary to the Harvard Law School Draft Convention on the Law of Treaties indicates:

> *"Interpretation is the process of determining the meaning of a text; application is the process of determining the consequences which, according to the text, should follow in a given situation"*[1950].

Although there may be a "fine line" between interpretation and application, particularly when human rights are employed for interpreting investment treaties[1951], at least two consequences follow if said line is respected. On the one hand, the host-state conduct will be judged through the norms which are "applicable" to the dispute since the juridical consequences of those norms (and of no other norms) are to be considered in the case at hand[1952]. This is why the direct applicability of "social" rights to an investment dispute is the most appropriate manner in which the former can be considered by adjudicators in the balancing process assessing the breach of expropriation and FET provisions.

On the other hand, and by the same token, the conduct of the host-state cannot be assessed through "external sources" if they are relied upon, exclusively, for interpreting investment standards. In this context, a "conflict of obligations" with a direct bearing on the merits will not exist, since "social" rights norms will be beyond the scope of the applicable law[1953], at least, from the perspective of investment tribunals. Consequently, the "importation" of "social" rights into the balancing process through interpretation needs to find its justification in other grounds. In some cases, "systemic integration" may be capable of providing such a basis. There are at least three scenarios under which this may be legally feasible.

First, according to the scholarship, systemic integration may be capable of "importing" "social" rights into the balancing process for the assessment of the breach of the FET standard under certain circumstances. As discussed in *Chapter Two*, FET provisions tend to be drafted through "open textured" terms[1954]. Notably, one of the most recurrent interpretations of those provisions is that they entail the protection of investors' legitimate expectations (see subsection 3.2.2.2 above). At this point, the first function of

---

[1950] Comment to the Draft Convention on the Law of Treaties, *Article 19 "Interpretation of Treaties"* reproduced in 29 The American Journal of International Law Supplement: Research in International Law (1935), p. 939.

[1951] In the words of van Aaken: "Although a distinction has to be drawn conceptually between the direct application of other general or special norms of international law in, for example, non-human rights disputes, and the indirect interpretation of non-human rights law by considering human rights law, there might nevertheless be a fine line between applying human rights law directly or importing it through interpretation". van Aaken, *Defragmentation…* Op. Cit., p. 506.

[1952] An exception to this corresponds to the case of *jus cogens* norms.

[1953] "In principle there is a difference between reference to relevant rules of international law for the purposes of interpretation and the invocation of other rules of international law as creating a conflict precluding the execution of international obligations". Jansen Calamita, *International Human Rights and the Interpretation of International Investment Treaties: Constitutional Considerations* (2013) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284224 [last accessed 7.12.2021], p. 16. *Contra* see Bohoslavsky, *Debt Disputes…* Op. Cit., para 22.

[1954] See *Chapter Two*, pp. 92 et seq.

"systemic integration" (i.e., clarifying the meaning of treaty provisions) can be deployed to define the scope and meaning of that notion.

Particularly, scholars have proposed that "whatever expectations an investor may have had, these must have included an expectation that the State would honour its international human rights obligations"[1955]. If legitimate expectations do include the host-state's respect for its human rights obligations (including "social" rights), adjudicators would need to assess whether those obligations are complied with *as an element* of the FET standard. It is critical to consider that, in this case, human rights are not part of the law applicable to the dispute, but the obligations which they impose upon states are considered to belong to the structure of FET provisions. Of note, this will be a result of the interpretation of the BIT.

Taking the argument one step further, FET provisions can thus be read as protecting investors' interests to the point that this does not interfere with host-states' human rights obligations. For this reason, adjudicators would be required to assess the conditions under which human rights obligations are and are not violated. If the human rights obligations at stake pertain to the domain of "social" rights, and if the "minimum core" of those obligations is satisfied, adjudicators ought to conduct said assessment through PA. At the same time, since investment disciplines can be considered "retrogressive" measures from the perspective of "social" rights[1956], the balancing process should consider both the FET standard and ESC rights as the competing values at stake.

The second scenario refers to the interpretation of the so-called "Non-Precluded Measures" clauses, where similar results can be obtained. Of note, "NPM" clauses consider different welfare objectives which constitute "regulatory exceptions" to the BIT as a whole or to one or more discrete investment standards[1957]. As will be discussed in subsection 5.1.5, if the conditions set forth by a "NPM" clause are satisfied, the "very applicability" of the investment standards concerned will be barred, and a breach of the applicable BIT will not be found[1958]. Furthermore, depending on the drafting of those clauses, scholars have argued that the proper way to operationalize them is through PA. In that context, investment disciplines should be balanced against the pertinent regulatory exceptions[1959]. Crucially for the purposes of this *Chapter*, those regulatory

---

[1955] Simma and Kill, *Harmonizing Investment…* Op. Cit., p. 705. See also Dupuy and Viñuales, pp. 14-15; Ursula Kriebaum, Human Rights and International Investment Arbitration in Thomas Schultz and Federico Ortino (Eds.), *The Oxford Handbook of International Arbitration*. Oxford University Press (2020), pp. 165-167. Similarly, see van Aaken, *Defragmentation…* Op. Cit., pp. 507-508.

[1956] See Goldmann, *Foreign Investment…* Op. Cit., p. 140.

[1957] See Dimitris Liakopoulos, *Proportionality and Dispute Resolution Between WTO and ICSID*, 1 Revista Electrónica Cordobesa de Derecho Internacional Público (2020), pp. 108-109.

[1958] See William Burke-White and Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 Virginia Journal of International Law 2 (2008), pp. 386-387.

[1959] "The principle of proportionality is therefore a coherent tool for the interpretation and application of the substantive provisions contained in the treaties, in order to allow the achievement of the necessary balance". Liakopoulos, *Proportionality…* Op. Cit., p. 103.

exceptions could be interpreted by the means of the first function of "systemic integration" to include "social" rights[1960]. As Susan Karamanian puts it, "the text of some IIAs, while not explicitly mentioning human rights, includes language within which they could fit"[1961]. According to Barnali Choudhury, this could be the case for the traditional "welfare objectives" covered by "NPM" clauses, including "public order", "morality", "extreme emergency", and "national" and "security interests"[1962]. Consequently, and through "NPM" clauses operationalized *via* PA, "social" rights could be featured in the balancing process conducted for the purposes of assessing the breach of a BIT.

Finally, whether "systemic integration" allows adjudicators the "importation of" "social" rights in other cases is difficult to establish[1963]. Let me focus on only one of those cases. As stated above, the second function of "systemic integration" through interpretation is to "harmonize" treaty norms with norms belonging to "external sources". From this perspective, if the treaty has several possible interpretations, the interpretation which is "most consistent" with norms enshrined by "external sources" should be followed[1964].

Let me consider the "mitigated police powers" doctrine in the context of the guarantee against expropriation and one of its possible interactions with the first and second functions of the principle of "systemic integration". As stated above, this doctrine divides the expropriation inquiry into two prongs. Under the first, the severity of a measure from the perspective of the investors needs to be scrutinized. Under the second prong, and even in the absence of specific treaty language, the negative effects need to be balanced against the importance of the "purpose" of the measure[1965]. Crucially, the case-law tends to be permissive in what pertains to the aforementioned "purposes", including broad notions such as the "public interest"[1966] and the "social or general welfare"[1967]. If such general justifications can be considered in the balancing process[1968], there will be

[1960] See Susan Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 Lewis & Clark Law Review 2 (2013), p. 445 and Bohoslavsky, *Debt Disputes*… Op. Cit. para 22.
[1961] Susan Karamanian, *The Place*… Op. Cit., p. 442. "In these scenarios, a broad interpretation of exception provisions may be one of the few efficient means of linking investment law with broader human rights issues". Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights into International Investment Disputes,* 49 Columbia Journal of Transnational Law (2011), pp. 674-675.
[1962] See Choudhury, *Exception*… Op. Cit., pp. 689 et seq.
[1963] See Simma and Kill, *Harmonizing Investment*… Op. Cit., p. 707. The literature is not particularly precise on this point. For example, Matthias Goldmann indicates that "social" rights can be imported to the balancing process when they are "applicable". However, he does not clarify whether he refers to "application" in the sense of norms directly applicable to the merits, or to "application" as one of the conditions for the operation of Art. 31(3)(c) VCLT. See Goldmann, *Foreign Investment*… Op. Cit., p. 140.
[1964] See Santacroce, *The Applicability*… Op. Cit., p. 142.
[1965] See Kingsbury and Schill, *Public Law*… Op. Cit., pp. 92-93.
[1966] See Tecmed v. Mexico Op. Cit., para 122.
[1967] LG&E v. Argentina (Decision on Liability), ICSID Case N° ARB/02/1 (2006), para 195.
[1968] "The concept of police powers potentially encompasses a panoply of state activity". Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis*

no obstacles *prima facie* for considering "social" rights within the scope of the host-state's police powers justifying the imposition of the measure at stake[1969]. Of note, this may be achieved through the first function of the principle of "systemic integration" as in the context of "Non-Precluded Measures" clauses.

Taking the argument one step further, if the aforementioned is a *permissible* interpretation of the applicable law to the BIT (and, particularly, of "expropriation" provisions), then it would certainly be the interpretation most "consistent" with "social" rights norms. Here is where the second function of the principle "systemic integration" becomes consequential for our purposes. It indirectly endorses the results obtained through the deployment of its first function as the proper interpretation for reconciling investment and human rights obligations, even when the latter are not applicable to the merits.

3.3. PIL Principles Under the European Convention on Human Rights: The Interaction Between the Right to Property and the Public Interest

In addition to the interaction between PIL principles under international investment law, in *Chapter Two* I considered other frameworks protecting both creditors and the public interest which can be relied upon in the context of sovereign debt litigation. There, I discussed the guarantee of property (and its limitations) under both the Inter-American and European systems of Human Rights[1970].

In short, from the perspective of both the American Convention on Human Rights (henceforth, "ACHR")[1971] and the European Convention on Human Rights (henceforth, "ECHR")[1972], sovereign bonds qualify as "property" (pecuniary claims being part of a person's patrimony) or as "possessions" (either entitling their holders to obtain compensation or expressing their legitimate expectation of repayment). However, that protection is not absolute in either of these Conventions. Both establish limitations to which property may be subjected. In applying such limitations, the respective Courts have considered the right to property as a "prima facie" requirement, which interacts with other guarantees and with the "public" or "general interest" through the application of the principle of proportionality. Consequently, creditors' interests covered by the guarantee to "property" can be considered as PIL principles.

In this subsection, I limit the discussion to the interaction between the public interest and property rights under the framework provided by the ECHR. As previously indicated, this analysis acquires practical relevance when the measures imposed by an

and the Standard of Review in Investor-State Arbitration, 15 Journal of International Economic Law 1 (2012), p. 246.

[1969] See, for example, van Aaken, *Defragmentation…* Op. Cit., pp. 507-508. At the same time, this view may be further endorsed if investment tribunals afford deference in what pertains to regulatory objectives to host-states. See Henckels, *Indirect Expropriation…* Op. Cit., pp. 246-247.

[1970] See Art. 21 of the American Convention on Human and Art. 1 of the First Protocol to the Convention for the Protection on Human Rights and Fundamental Freedoms.

[1971] For a discussion of the relevant awards of the Inter-American Court of Human Rights see *Chapter Two*, pp. 56 et seq.

[1972] A detailed discussion of the pertinent cases is offered in *Chapter Two*, pp. 61 et seq.

indebted state in the context of a default/restructuring are the object of litigation before the ECtHR.

3.3.1. The Guarantee of Property Under the ECHR

As indicated in *Chapter Two*, the ECtHR has developed a rich jurisprudence regarding the right to property[1973]. In particular, the Court has noted that the ECHR protects "possessions" from interferences through three different "rules"[1974]: the first capturing "residual" cases (usually termed as "other interferences"), the second relating to measures of control and the third addressing expropriations[1975]. It is worth noting that commentators usually highlight that said "rules" encompass measures imposing different degrees of severity[1976]. Therefore, while "other interferences" comprise the least severe degree of intrusion on the right to property, measures controlling the right to property are seen as more severe, with "expropriations" being the most severe of the three. Nevertheless, it is important to bear in mind that for the ECtHR, the three "rules" are not strictly unconnected[1977]. This has important consequences, as will be discussed below. Finally, and as a rule of thumb, the Court considers interferences related to the first rule only after determining that the measures cannot be classified either as "deprivations" (second rule) or as measures of "control" (third rule)[1978].

Of note, the Court has sometimes struggled with qualifying a measure as either belonging to the third "rule" (control) or the first one (other interferences). For the same reason, in some cases it has proceeded without providing any specific categorization and gone directly to scrutinizing the conditions that the measure needs to satisfy to be aligned with the ECHR[1979]. As discussed in *Chapter Two*, in the cases concerning sovereign bonds, the court has invariably qualified the measures interfering with creditors' interests as belonging to the first rule (i.e., "other interferences")[1980].

[1973] Although the first part of Art. 1 of the First Protocol to the European Convention allows for the "peaceful enjoyment of possessions", the ECtHR, in a much-quoted decision – stressed that this norm guarantees "in substance (…) the right to property". Marckx v. Belgium, Judgment June 13, 1979, para 63.

[1974] For a general discussion see, for example, Wildhaber and Wildhaber, *Recent Case Law*… Op. Cit., p. 658. See also European Court of Human Rights, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of Property* (1st Ed). Council of Europe/European Court of Human Rights (2019), pp. 15-16. Of note, this is not to say that the three norms contained in Art. 1 P-1 are "rules" from the perspective of legal theory. In fact, those norms belong to the realm of "principles", not "rules", as has been argued in *Chapter Two*.

[1975] See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 Europ.T.S. No. 5; 213 U.N.T.S. 221, Protocol 1.

[1976] See, for example, Lopez Escarcena, *Interferences with Property*… Op. Cit., p. 535 and European Court of Human Rights, *Guide*… Op. Cit., p. 16 (concerning measures of "control").

[1977] See William Schabas, *The European Convention on Human Rights: A Commentary*. Oxford University Press (2015), p. 967.

[1978] See, for example, Sporrong and Lönnroth v. Sweden, Judgement September 23, 1982, para 61 and James and Others v. The United Kingdom, Judgement February 21, 1986, para 37.

[1979] See European Court of Human Rights, *Guide*… Op. Cit., pp. 39-40.

[1980] This is a consequence of the restrictive interpretation of the notion of expropriation by the ECtHR. See Markus Perkams, The Concept of Indirect Expropriation in Comparative Public Law – Searching for Light in the Dark, in Stephan Schill (Ed.), *International Investment Law and*

However, according to commentators, the ECtHR tends to subordinate the measures belonging to each "rule" to the same "criteria of assessment"[1981], regardless of their specific qualifications. In effect, the conceptual unity underlying the protection of "possessions" under the Convention is one of the reasons why the ECtHR has subjected all three instances of interference to a common (minimum) set of requirements for assessing the conduct of a state[1982]: lawfulness[1983], legitimate aim[1984] and proportionality. According to commentators, in practice, the proportionality test is the most important part of the assessment[1985]. Nevertheless, if the measure under scrutiny fails to comply with any of those requirements, it will be deemed incompatible with the ECHR[1986].

Additionally, the ECtHR tends to embark on the assessment of the aforementioned requirements in successive steps[1987]. First, it tends to discuss lawfulness and legitimate aim, and only if the measure complies with both, will it proceed to the proportionality limb[1988]. I have discussed each of those requirements in detail in *Chapter Two*. However, since this *Chapter* concerns itself with the application of PA to insolvency disputes, and consequently to the interaction of the public interest with property rights, a discussion of the former condition is necessary.

Comparative Public Law. Oxford University Press (2010), p. 116; Lopez, *Interferences*… Op. Cit., 514 and Ursula Kriebaum, *Is the European Court*… Op. Cit., p. 239. See, Malysh and Others v. Russia, Judgement February 1, 2010, SPK Dimskiy v. Russia, Judgement March 18, 2010, Tronin v. Russia, Judgement March 18, 2010; Lobanov v. Russia, Judgement December 2, 2010; Fomin and Others v. Russia, Judgement February 26, 2013; Andreyeva v Russia, Judgement April 10, 2012; Mamatas and Others v. Greece, Judgement July 21, 2016.

[1981] See European Court of Human Rights, *Guide*… Op. Cit., pp. 16, 17 and 23.

[1982] "The Court reiterates that an essential condition for an interference to be deemed compatible with Article 1 Protocol No. 1 is that it should be lawful". Beyeler v. Italy, para 108. See also Christian Tomuschat, *The European*… Op. Cit. pp. 647-649; Praduroux, *Property and Expropiation*… Op. Cit., pp. 177-178 and Maria Fanous and Vassilis Tzevelekos, *The Shared Territory of the ECHR and International Investment law* (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3306776 [last accessed 22.12.2021], pp. 12-13.

[1983] According to the scholarship and the practice of the Court, "lawfulness" demands that the interference under consideration be: (i) established by the domestic law of the state; (ii) "compatible with the rule of law"; (iii) "sufficiently clear in its terms"; (iv) "accessible" and (v) non-discriminatory. See the references quoted in *Chapter Two*, pp. 64 et seq.

[1984] The Court has indicated that states have a wide margin of appreciation in what pertains to the definition of the public interest. See, Benedikt Pirker, Proportionality Analysis and Models of Judicial Review. Europa Law (2013), p. 223 and Lopez, *Interferences*… Op. Cit., p. 529. "As a result of this deference to the domestic authorities' appraisal, examples of where the Court found no public interest are rare". European Court of Human Rights, *Guide*… Op. Cit., p., p. 23.

[1985] Proportionality "(…) is most often decisive for the determination of whether there has been a violation of Article 1 of Protocol No. 1". See European Court of Human Rights, *Guide*… Op. Cit., p. 16. See also Matthias Klatt, *Positive Obligations under the European Convention on Human Rights,* 71 Zaörv 4 (2011), p. 697.

[1986] See for example, Beyeler v. Italy, para 108 and Guide on Art. 1 P-1 (p. 23).

[1987] See Fanous and Tzevelekos, *The Shared*… Op. Cit., pp. 12-13.

[1988] See European Court of Human Rights, *Guide*… Op. Cit., p. 16 and p. 24.

3.3.2. The Public Interest in Sovereign Debt Litigation Before the ECtHR

As stated above, to be aligned with the ECHR, a measure interfering with property rights needs to pursue a "legitimate aim" (i.e., either the "public" or the "general interest")[1989]. A general definition of the concept cannot be found in the decisions of the ECtHR[1990]. Nevertheless, it can be said that the Court has interpreted the public and general interest in a broad manner[1991], granting a wide margin of appreciation to states when defining its scope.

For example, the ECtHR has stressed that government officials are better positioned than supra-national judges to assess and define which aims are to be pursued through acts or omissions interfering with property rights[1992], and thus to determine, specifically, "what is in the public interest"[1993]. This explains why the Court would in principle not question whether the measure at stake is aimed at the public interest "unless (…) is manifestly without reasonable foundation"[1994].

As discussed in detail in *Chapter Two*, the sovereign debt related case-law before the ECtHR delivers similar results in what pertains to the "legitimate aim" requirement[1995]. In effect, on several occasions, the Court has noted that the handling of an economic crisis is a legitimate aim that can justify measures affecting property rights[1996]. On others, it has indicated that prioritizing "pressing social issues" in the same context (at the expense of debt repayment) is aligned with the public interest[1997]. Yet in the "Mamatas" case, (discussed in subsection 5.2) the Court declared that the maintenance of economic stability satisfied the legitimate aim requirement. Crucially for the purposes of this *Chapter*, the ECtHR explicitly stated that debt restructuring was one of these legitimate aims[1998].

Consequently, handling an economic crisis, the prioritization of other expenditures (in the context of a reduced budget), the maintenance of economic stability and debt restructuring, can all be considered manifestations of the "public interest" from the ECHR's perspective. Therefore, said goals can be considered as the competing interests when assessing the proportionality of a measure impairing creditors' property rights.

[1989] According to López, the ECtHR has equated both notions through its case-law. See López, *Interferences…* Op. Cit. p. 521.
[1990] See *Chapter Two*, p. 65.
[1991] "(…) the notion of "public interest is necessarily extensive". Broniowski, Op. Cit., para 149.
[1992] See Id.
[1993] Former King of Greece and Others v. Greece, Judgment November 23, 2000, para 87.
[1994] See Broniowski, Op. Cit., para 149.
[1995] See *Chapter Two*, pp. 67 et seq.
[1996] See Lobanov, Op. Cit., para 32, Fomin, Op. Cit., para 25 and Andreyeva, Op. Cit., para 20.
[1997] See for example, See Malysh, Op. Cit., para 80, SPK Dimskiy, Op. Cit., para 66 and Tronin, Op. Cit., para 57.
[1998] See Mamatas paras 101-105.

3.3.3. The Role of Proportionality Regarding Interferences with the Right to Property Under the ECHR

According to commentators, proportionality runs through the entire normative framework of the ECHR[1999]. As a requirement to be complied with in the context of property rights' interferences, proportionality is usually understood as a test designed to prevent the affected individuals bearing an "excessive burden" while considering the general interests of the community at the same time (i.e., the "fair balance" test)[2000]. As the Guide on Article 1 of Protocol No. 1 of the Convention puts it:

> *"The purpose of the proportionality test* [under the ECHR] *is to establish first how and to what extent the applicant was restricted in the exercise of the right affected by the interference complained of and what were the adverse consequences of the restriction imposed on the exercise of the applicant's right on his/her situation. Subsequently, this impact is balanced against the importance of the public interest served by the interference"*[2001].

Additionally, it is important to note that the Convention grants states an ample "margin of appreciation", to choose the measures to be imposed, to determine the public interest involved and to assess its relative importance when contrasted with property rights[2002]. Nevertheless, the "margin of appreciation" is not absolute, and the conduct of the states is subject, to a certain extent, to the scrutiny of the Court[2003].

In what pertains to the test itself, scholars have noted that the ECtHR's overall approach tends to feature

> *"(…) a flexible, horizontal version which does not exclude measures at various stages but tries to assess in a holistic fashion whether a "fair balance" between competing interests was struck"*[2004].

Consequently, the Court does not always follow the three stages of PA (i.e., suitability, necessity and proportionality in the narrow sense)[2005]. For example, commentators have noted that the practice of the ECtHR tends to depart from Alexy's steps. Instead, the Court tends to rely on several factors[2006], including procedural issues, the "necessity test", the duration of the interference, the conduct of the applicant and the payment of compensation[2007]. As can be noted, under a "textbook" approach to PA, all factors (save

---

[1999] See, European Court of Human Rights, *Guide*… Op. Cit., p. 24. See also Pirker, *Proportionality*… Op. Cit., p. 216 and Schabas, *The European*… Op. Cit., p. 972.
[2000] See, for example, Rosenzweig v. Poland, Judgment (2005), para 48. See also European Court of Human Rights, *Guide*… Op. Cit., p. 23.
[2001] European Court of Human Rights, *Guide*… Op. Cit., p. 24.
[2002] See Lopez, *Interferences*… Op. Cit., p. 522.
[2003] See Id.
[2004] Pirker, *Proportionality*… Op. Cit., p. 222.
[2005] See Id.
[2006] See European Court of Human Rights, *Guide*… Op. Cit., pp. 24-29.
[2007] See Lopez, *Interferences*… Op. Cit., p. 522 and European Court of Human Rights, *Guide*… Op. Cit., p. 27, See also Sabrina Praduroux, Property and Expropriation: Two Concepts Revisited in the Light of the Case Law of the European Court of Human Rights and the European Court

for the "necessity test") are considered exclusively for the determination of the severity of the interference[2008], and cannot be recurred to as a "separate" proportionality criterion (as the practice of the ECtHR suggests).

Furthermore, under its "flexible" approach, the ECtHR tends to neglect one or more of the three stages of PA. For example, on certain occasions, the Court has limited the assessment to proportionality "stricto sensu"[2009]. This is not to say that the other stages are foreign to the Court's case-law. For example, the *Rosenzweig* case featured all three traditional elements of Alexy's account of PA[2010], and suitability tends to be featured (implicitly) in several cases[2011]. Additionally, the necessity test has also been featured in the practice of the Court[2012], albeit as "(…) a far cry from a strict assessment of less restrictive alternatives"[2013].

Besides the "margin of appreciation", an important difference arises between investment tribunals' and the ECtHR's engagement with PA in the context of expropriation. In effect, as previously discussed (subsection 3.2.2.1), under international investment law (if the "mitigated police powers" doctrine is followed), PA is recurred to in order to determine the existence of an indirect taking. On the contrary, under the ECHR, proportionality is one of several requirements which the Court considers in the assessment of whether there has been a violation of the Convention[2014]. In other words, and according to Bücheler, the ECtHR will review the measure under the proportionality requirement not only after considering the other conditions, but also after finding that an expropriation has taken place[2015].

Finally, it is also important to note that if the Court finds that Art. 1 P-1 has been violated, it will assess whether "just satisfaction" is appropriate, according to art. 41 of the ECHR[2016].

3.3.4. Conclusions Regarding the Interaction of the Public Interest and Property Rights under the ECtHR's Engagement with Proportionality

According to the foregoing, the right to property, as guaranteed by the ECHR, has been understood as an "optimization requirement", and therefore, as a PIL principle. Notably,

---

of Justice, 8 EPLJ 2 (2020), pp. 177-178. See Fanous and Tzevelekos, *The Shared*… Op. Cit., p. 14.

[2008] See subsection 2.1.1.1 above.

[2009] The "fair balance test" puts most of its weight on this ultimate stage". Pirker, *Proportionality*… Op. Cit., p. 228. According to Pirker this is a consequence of the "margin of appreciation", since "(…) questions of suitability and necessity" would "have already been considered by domestic courts (…)". Id., p. 225.

[2010] See Rosenzweig, Op. Cit., paras 55-64.

[2011] For a discussion, see Janneke Gerards, *How to Improve the Necessity Test of the European Court of Human Rights*, 11 International Journal of Constitutional Law 2 (2013), pp. 473 et seq.

[2012] See European Court of Human Rights, *Guide*… Op. Cit., p. 25.

[2013] Pirker, *Proportionality*… Op. Cit., p. 226.

[2014] See Fanous and Tzevelekos, *The Shared*… Op. Cit., pp. 13-14, 21, 32 and Bücheler, *Proportionality*… Op. Cit., pp. 149-150.

[2015] See Bücheler, *Proportionality*… Op. Cit., pp. 146.150 and López, *Interferences*… Op. Cit., 534.

[2016] For a discussion, see Schabas, *The European*… Op. Cit., pp. 833 et seq.

said guarantee interacts with the "public" or "general interest", the latter being one of the conditions which may justify its impairment.

Of note, in the context of sovereign debt litigation, the Court has considered several goals as legitimate manifestations of the "public interest", including the prioritization of pressing social expenditures, the maintenance of economic stability and debt restructuring.

Nevertheless, the existence of said goals does not suffice to establish that one or more measures are in conformity with the ECHR. In effect, the ECtHR requires that said measures comply with the principle of proportionality (usually termed as the "fair balance" test).

Although the Court's engagement with PA does not follow Alexy's account to the letter, it sometimes recurs to its three "textbook" stages (i.e., suitability, necessity and proportionality in the narrow sense). Crucially, states are granted a significant "margin of appreciation" in this regard.

3.4. Conclusions Regarding PIL Principles and Proportionality in the Context of Insolvency Conflicts under International Investment Law and the ECHR

Several conclusions follow from the aforementioned. First, PA can be recurred to by investment tribunals for assessing whether treaty standards (which can be regarded as PIL principles) are breached in a particular case. Second, this methodology can be regarded as a critical tool for the reconciliation of investment disciplines and PIL principles enshrined in "external sources". Third, PA can also be deployed in the context of the ECHR, for the purpose of determining whether the ECHR has been violated.

However, it is worth noting that the role of proportionality under the ECHR is different from the function that it fulfills under international investment law. In effect, from the perspective of that Convention, proportionality is one requirement (among others) with which an interference with property rights needs to comply. In that context, if the measure at stake fails the "fair balance" test, a violation of the Convention will be found. The same is not true for the expropriation guarantee provided by BITs. As discussed in *Chapter Two*, if the "mitigated police powers" doctrine is followed, PA is a tool designed to determine whether an expropriation exists. In other words, if one or more measures fail to maintain a proper relationship between investors' property rights and the competing goal at stake, and the "first prong" of the respective provision is violated, then liability would be established as a consequence of a breach of the expropriation guarantee.

Despite the aforementioned differences, an important similarity between both regimes arises. As can be noted, PA is decisive in finding a breach of both investment and ECHR's guarantees. On the one hand, proportionality can be featured under the "second prong" of expropriation and FET assessments. In this context, if the tribunal decides to use PA, this method will be critical for determining liability under the relevant BIT. On the other hand, the "fair balance" test is one requirement (among others) relied upon by the ECtHR for determining whether the European Convention has been violated or not.

For all of the above, if the conditions studied in this section are met, the PIL principles previously discussed can be regarded as the values whose promotion/demotion needs to be assessed in the context of sovereign debt litigation before international courts and tribunals. In those circumstances, PA serves two critical roles. First, as highlighted by the literature, it functions as a tool for the reconciliation of the aforementioned principles. Second, it can be deployed for the purposes of determining whether the relevant treaties have been breached.

Nevertheless, for the purposes of this *Chapter*, discussing the interaction between PIL principles does not suffice. As previously indicated, the tensions between "constitutional values" are usually expressed through concrete courses of action. For that reason, to capture how proportionality works in this context, it is also necessary to discuss the measures whose conformity with international law obligations is to be assessed. This is the subject of the next section.

4. The "Measures" at Stake: GPDs Applicable to Sovereign Insolvency

As stated before, PA presupposes the conflict between two or more guaranteed constitutional interests in a case. I have already indicated that, in the context of the legal disputes arising from insolvency conflicts, the PA analysis that follows in (sections 6 and 7) will use the previously mentioned PIL principles protecting creditors, states and citizens' entitlements as the relevant "constitutional interests". That said, there is still something missing from this picture. As I mentioned above, the tensions between competing interests tend to be expressed through one or more courses of action (decisions, choices or "measures") whose "constitutionality" is to be decided. Therefore, any PA is contingent upon one or more "measures" that need to be scrutinized from the perspective of the corresponding "constitutional" guarantees.

In the previous *Chapters*, I identified two norms of international law which can be recurred to when international law is applicable to disputes arising from insolvency conflicts. Those norms correspond to a "stay" on creditors' litigation and to a "cram down" on dissenting creditors' claims. Particularly, I argued that both of them can be regarded as forming part of the so-called "third-source" of international law: namely to the "general principles of law recognized by civilized nations" in the language of the Statute of the International Court of Justice (henceforth, "GPDs")[2017]. Furthermore, I posited that the application of those GPDs can contribute to facilitating sovereign debt workouts by enhancing creditors' participation and by reducing the time necessary for their completion.

Two important clarifications need to be mentioned before proceeding to the examination of the "stay" and the "cram down". First, it is necessary to clarify the specific nature of said norms, both from the perspective of legal theory and from the perspective of international law. Second, it is also capital to highlight the reason PA would be needed in the context of sovereign debt litigation before international courts and tribunals concerning the aforementioned GPDs.

As for the first issue, let me to return to the distinction between principles *as a source* of international law (for the purposes of this *Chapter*, "GPDs") and the norms of international law that can be regarded as "constitutional" principles (i.e., PIL principles). On the one hand, and as previously indicated, PIL principles correspond to norms of international law that are structurally and functionally equivalent to constitutional principles. In short, PIL principles are those international law norms that can be properly described as "optimization requirements". This category encompasses norms belonging to different international law sources (i.e., to treaties, custom and "GPDs"). On the other hand, "GPDs" include normative propositions widely recognized by domestic legal systems around the world and which can be extrapolated to the international sphere[2018].

[2017] For a comprehensive discussion of the subject see *Chapters Two*, pp. 42 et seq. and *Three*, pp. 119 et seq.
[2018] See Id.

While GPDs are not usually regarded as PIL principles[2019], there are some cases in which they are[2020]. Notably, neither of the GPDs studied here can be categorized as PIL principles. In effect, both the "stay" and the "cram down" can be properly regarded as "rules" rather than "principles" from the perspective of legal theory. One reason suffices for substantiating this claim. In short: Both GPDs are to be applied in an "all or nothing" fashion[2021]. In other words, we cannot talk about "degrees" of fulfillment of said norms: The "stay" is either imposed or not. The same is true for the "cram down". Consequently, said norms cannot be considered as "optimization requirements", and thus, they cannot be regarded as PIL principles.

Despite not being PIL principles, both GPDs may still play a significant role in sovereign debt litigation. This brings us to the second issue. Even if the "stay" and the "cram down" can be considered as norms belonging to the international legal framework (for this *Thesis* and scholars, to GPDs), this does not suffice. As discussed above, under the international frameworks studied, even if a measure has its origins in a proper source of law (in this case, a source of international law) it must conform with the principle of proportionality[2022]. Admittedly, the "competing goals" to be considered, and the specificities of the test to be carried out on each regime may vary. However, this does not negate the fact that any course of action needs to be followed by maintaining a proper relationship between means and ends, and between the interests being promoted and demoted.

All things considered, and this cannot be stressed enough, the PIL principles discussed in the previous section will serve as the "values" at stake when the PA is deployed in sections 6 and 7. Meanwhile, the "stay" and the "cram down" correspond to two alternative "measures" (i.e., courses of action) that either a court or a state may take in the context of insolvency conflicts. In other words, for the PA that follows, it is necessary to assess the contribution of the aforementioned GPDs to the promotion/demotion of the PIL principles previously indicated. However, before reaching that stage it is necessary to recall how those GPDs operate. For this purpose, it is necessary to first describe the main features of sovereign debt restructuring from the point of view of the contractual obligations assumed by an indebted state.

4.1. The Contractual Aspects of Sovereign Debt Renegotiation

Sovereign debt restructurings are particularly important in the context of insolvency conflicts. In short, through debt restructurings, states renegotiate their obligations with the ultimate purpose of achieving a sustainable debt burden. By these means, they obtain a certain amount of debt relief from their creditors, in the form of debt reduction (also known as a "hair cut"), debt rescheduling or both[2023]. Nowadays, states borrow

[2019] For a discussion, including a list of authorities, see *Chapter Two*, pp. 49 et seq.
[2020] This would be the case with constitutional guarantees, widely recognized by domestic constitutions around the world which, at the same time, can be extrapolated to the international sphere. See, Kleinlein, *Customary*… Op. Cit., pp. 143-144.
[2021] Specifically, both norms ought to be applied through subsumption and not through balancing.
[2022] For international investment law, see the discussion of the *Occidental II* case in *Chapter Two*, pp. 95-97. For the ECHR, see the discussion regarding proportionality above.
[2023] Das et al., *Sovereign*… Op. Cit., p. 8.

heavily from the private credit market through the issuance of bonds[2024]. For that reason, the analysis conducted in this *Chapter* (and throughout this *Thesis*) is circumscribed, specifically, to the restructuring of that type of debt (i.e., to bonded debt).

One key aspect to consider in what pertains to the restructuring of sovereign bonds is the contractual nature of the instruments. As contracts, their legal provisions matter for the purposes of renegotiation. First of all, bonds include choice of law and choice of jurisdiction clauses. Typically, those provisions point to domestic jurisdictions and domestic courts as their governing law and corresponding forum for the resolution of disputes[2025]. Consequently, international law is not always directly applicable to disputes related to sovereign bonds[2026]. Secondly, the terms of the bonds also provide for the specific alternatives available for restructurings.

Concerning the latter point, it is important to point out the collective action problems that arise between bondholders in the context of restructurings and its relationship with contract clauses. In this regard, scholars usually note that before 2003, most sovereign bonds issued under New York law lacked any type of provision designed to coordinate the modification of the key terms of the contracts[2027]. Restructuring those types of bonds was difficult since the consent of every single bondholder was required for contract amendment. Therefore, while bondholders agreeing to an exchange provided debt relief to the debtor, non-participating creditors maintained their original contractual rights by "holding out" and litigated to be repaid in full (or to settle for better terms than those offered to consenting creditors). If consenting creditors were to anticipate this situation, an entire restructuring could be jeopardized[2028].

Therefore, in order to solve this "hold-out" problem, bonds issued under New York law from 2003 onwards included contractual provisions intended to coordinate creditors' activities in what pertains to debt renegotiation (i.e., "modification clauses")[2029]. Modification clauses, combined with other coordination provisions (including "majority

[2024] In this regard, it is important to note that an indebted state may have a wide variety of creditors including other states, international organizations, trade creditors and bondholders.
[2025] Bonds issued by developed countries are almost always subjected to their own law. Emerging market borrowers, for their part, are more prone to issue bonds governed by the law of a third state (henceforth, "external bonds"). See Chamon et al., *Foreign-law Bonds*… Op. Cit., pp. 6-7. In most cases, external bonds are governed by the laws of New York or England, while the German, Swiss and Luxembourgish legal systems are featured less prominently in sovereign debt documentation. See Waibel, *Sovereign Bonds*… Op. Cit., p. 641. See also Rault*, The Legal Framework*… Op. Cit., p. 97; Kupelyants, *Sovereign Defaults*… Op. Cit., p. 111; Wautelet, *International*… Op. Cit., p. 34 and Franzina, *Sovereign Bonds*… Op. Cit., p. 9 Although submission to arbitration is also an alternative, it is not common in sovereign bonds. See Lorenza Mola, *Sovereign Immunity, Insolvent States and Private Bondholders: Recent National and International Case Law*, The Law and Practice of International Courts and Tribunals (2012), p. 531.
[2026] I have discussed this issue in detail in *Chapter Five*.
[2027] See Gelpern, Heller Setser, *Count*… Op. Cit. p. 7.
[2028] See, for example, Wheeler and Attaran, *Declawing the Vulture*… Op. Cit., p. 259.
[2029] See Weidemaier and Gulati, *A People's*… Op. Cit., p. 70.

enforcement" clauses and trustee clauses) are usually grouped under the rubric of "Collective Action Clauses" (henceforth, "CACs")[2030].

I have dealt with those clauses in detail in the previous *Chapters*[2031], and there is no need to repeat that discussion here. Nevertheless, it is worth recalling that through modification CACs, a supermajority of bondholders can agree to a restructuring proposal by voluntarily amending the key terms of the contracts (including maturity, principal and interests). This modification also binds dissenting creditors if the supermajority required by the instruments (for example, a 75% in value terms of one series) is reached. Hence, if modification CACs are used (and the respective majority is reached), creditors as a group can legally reduce the value of their claims and provide debt relief to the state.

As noted in the literature, CACs may help to solve creditors' coordination difficulties, decreasing the likelihood of success of holdout strategies in the context of restructurings[2032]. Nevertheless, the scholarship has also stressed that modification clauses may not be enough to solve those problems[2033]. In *Chapter Four*, I argued that the existence of those problems in the sovereign insolvency context made possible the extrapolation of principles of domestic bankruptcy to the international sphere (the aforementioned "GPDs"). As stated above, those GPDs correspond to the "stay" and the "cram down".

That said, we may now discuss how those GPDs operate in the context of sovereign debt restructuring.

4.2. The "Stay"

In the previous *Chapters*, I have argued that an insolvent state and its creditors face problems similar to those confronted by their corporate counterparts[2034]. In particular, I posited that in sovereign debt renegotiations, creditors can potentially engage in a race to the courthouse with the purpose of avoiding a legally binding restructuring vote[2035]. This would be true even in the cases where the bonds at stake feature modification CACs.

For example, under bonds governed by US law, creditors can prevent the restructuring of their claims if they are able to obtain a favorable judgment before modification CACs

---

[2030] These are the most important types of CACs for the purposes of this *Chapter*. For a theoretical discussion distinguishing other type of CACs (including "modification clauses", "majority enforcement provisions", "bondholder committee or representative clauses" and "trustee clauses", see Bradley and Gulati, *Collective Action Clauses*… Op. Cit., pp. 17-25.

[2031] See *Chapter Four*, pp. 187 et seq.

[2032] See International Law Association, *Report of the Sovereign Bankruptcy Study Group* (Johannesburg) (2016), p. 10.

[2033] See, for example, Haley, *Sovereign*… Op. Cit., p. 10 and Guzman and Stiglitz, *Creating*… Op. Cit., p. 5.

[2034] *Contra,* see Gelpern, B*ankruptcy Backwards*… Op. Cit., p. 901. See also Gelpern, *Sovereign Damage*… Op. Cit., p. 2. See also, Bolton, *Toward*… Op. Cit., p. 20. See also Schwarcz, *Sovereign Debt Restructuring*… Op. Cit., pp. 984-985.

[2035] See *Chapter Four*, p. 205 and *Chapter Five,* pp. 268 et seq.

are triggered. If they are successful, they would be entitled to full payment, while consenting creditors (if the respective majorities for modification CACs are reached), would only receive the newly reduced amounts. This is a consequence of the "merger" doctrine of US law. According to that doctrine, having obtained a favorable judgment, litigants' claims (originating from debt contracts) are considered to be extinguished and "merged" into the judgment[2036]. In short, any subsequent vote by bondholders modifying the instruments would not affect the claims of those who already obtained a favorable decision, since those claims would already be extinguished[2037].

The effects of the "merger" doctrine may provide important incentives for premature litigation[2038]. Knowing beforehand that it is possible to avoid a reduction in the nominal value of their claims, creditors may be inclined to recur to litigation in order to protect themselves from a future restructuring agreement. Therefore, the success of such strategies can cause other bondholders to follow suit. In an extreme scenario, most of the instruments would be litigated and the renegotiation would be unsuccessful due to lack of sufficient favorable votes.

As in corporate insolvency, I argued that a "stay" can help to ameliorate this problem. In particular, I posited that a suspension on creditors' litigation, would deprive creditors of the advantages that a premature judgment would confer them vis-à-vis their fellow bondholders[2039]. I also stated that this "stay" needs to be granted or imposed for a limited period of time, either by a court or by a state. Furthermore, a "stay" would also enhance inter-creditor cooperation in debt renegotiation. In short, it would reduce the expected value of holdout strategies (all else being equal).

For all of the above, the imposition of a "stay" has the potential to contribute to the success of sovereign debt restructurings. First of all, it can effectively prevent a "race to the courthouse", at least for a limited period of time. Secondly, and simultaneously, it can also enhance creditors' participation in debt renegotiations.

4.3. The "Cram Down"

As stated in the previous *Chapters*, domestic insolvency regimes consider different mechanisms to solve coordination problems among creditors[2040]. In particular, in *Chapter Three*, I noted that domestic corporate reorganization regimes usually mandate that creditors be divided into different classes for voting on a restructuring proposal. In that context, a majority of creditors can bind the entire class to the restructuring plan. Additionally, corporate reorganization regimes offer another possibility[2041], that of a

[2036] For a discussion (including a list of authorities) see *Chapter Four*, p. 204.
[2037] See Weidemaier, *Judgements*… Op. Cit.; International Law Association, *International Monetary Law*… Op. Cit.; Hagan, *Designing*… Op. Cit., pp. 323-324 and Kupelyants, *Sovereign Defaults*… Op. Cit., pp. 83-85.
[2038] See, for example, Kupelyants, *Sovereign Defaults*… Op. Cit., p. 85.
[2039] A similar argument has been put forward for staying litigation under English law by Kupelyants. Nevertheless, his discussion is limited to domestic (English) law. At the same time, he indicates that GPDs cannot be used for these purposes. See Kupelyants, *Sovereign*… Op. Cit., p. 31 and pp. 83-85.
[2040] See *Chapter Three*, pp. 137 et seq.
[2041] See Id.

"cross-class cram down" (meaning that a restructuring plan can be passed even against the opposition of entire dissenting classes). In that context, the bankruptcy court is authorized to "cram down" dissenting creditors' claims if certain qualified conditions are satisfied.

Following the literature on the subject, in *Chapter Four*, I argued that creditors may also face coordination problems in the context of sovereign debt restructuring[2042]. This would be true when the debt stock of a state features an important number of bonds with the "older" versions of modification CACs.

As discussed in the previous *Chapters*, the debt stock of a state usually includes bonds belonging to different series. Despite this circumstance, not all modification CACs operate aggregating different series of bonds for the purpose of debt restructuring. In other words, for some of these provisions, a restructuring vote is only capable of legally binding holders of certain series of bonds. In order to clarify this point, it is important to note that modification CACs can be divided into three types: (a) series-by-series CACs, (b) two-limb and (c) single-limb aggregated CACs[2043]. As stated previously, the main difference between these variants pertains to the possibility of grouping different series of bonds for the purposes of implementing a restructuring deal.

Particularly, while a vote under series-by-series CACs only binds creditors holding instruments pertaining to one specific series, second- and third-generation CACs allow a restructuring vote to affect multiple series of bonds. However, there are also important differences between second- and third-generation CACs. While second-generation CACs require votes in favor both at the series and on the aggregate level, third-generation provisions concentrate voting across different series instead of concentrating it on individual bond issuances.

As can be noted, bonds featuring "series-by-series" CACs are hard to restructure, when compared to instruments including "single-limb" modification provisions. First, holders of instruments including "series-by-series" CACs can block the restructuring of their bonds with fewer complications (they only need to garner the support of other creditors, usually representing >25% of the outstanding principal of their series). Second, and by the same token, creditors can acquire that blocking participation in the secondary market more easily (as has been the case in previous restructurings). Third, and most importantly, bonds with series-by-series CACs are immune to aggregation: The only way their key terms can be legally amended (according to the terms of the contracts) is by gathering enough support from their holders (usually, a 75% in value terms). Hence, the approval of a restructuring proposal in other series does not affect holders of instruments featuring "series-by-series" CACs. For that reason, and *ceteris paribus*, restructurings are more likely to fail in bonds featuring this type of modification clauses.

The aforementioned is an important problem. Although the IMF has reported that CACs are becoming standard terms in new international bonds, it has also recognized that the stock of outstanding instruments without third-generation CACs amounts to almost

[2042] See *Chapter Four*, pp. 200 et seq.
[2043] See Buchheit et al., *The Restructuring…* Op. Cit., pp. 354-356

61%[2044]. This is a significant percentage indeed. The success of the restructurings to come in the near future could be impaired, once again, by the materialization of holdout risks exacerbated by the legal terms of "old" bonds.

In such a scenario, a "cram down" would help to achieve a restructuring deal. For example, a state could pass a law retroactively including "single-limb" CACs on all its bonds governed by its domestic law. By doing this, it would secure aggregation across different series of instruments.

Alternatively, a court could directly apply this GPD: It could consider that a restructuring proposal agreed on by a supermajority of creditors would bind all bondholders (irrespective of the legal terms of the instruments). At the same time, by applying the "cram down", the court would also prevent dissenting creditors from pursuing the payment of the full face-value of their claims. In effect, it would only allow for the recovery of the same amount which consenting bondholders would have received[2045]. As a defense, this cram down could be invoked by sovereign debtors to refuse performance on dissenting creditors' claims when a restructuring has been approved by a majority of bondholders. In other words, a judicially imposed "cram down" could be applied by courts in order to modify the contractually agreed upon voting mechanism where no single-limb CACs are available. In this case, the court would amend the terms of the bonds requiring a vote on each specific series, by mandating that votes be counted on an aggregate level (as single-limb CACs would). By the same token, the required supermajorities could also be "judicially" modified to emulate the standard version of single-limb CACs: Thus, courts could declare a restructuring as successful if it obtains 75% favorable votes in value terms.

Hence, the application of the "cram down" could effectively solve coordination problems among bondholders in the context of sovereign debt restructuring. By this token, it would also increase the likelihood that a restructuring is accepted by creditors.

4.4. Assumptions Regarding the Imposition of Both the "Stay" and the "Cram Down" to Be Featured in the Discussion that Follows

Thus far, I have summarized the main characteristics of the GPDs to be featured in the PA sketched out on sections 6 and 7. However, it is difficult to move forward to that point (and to assess the conformity of the measures with the values protected by the international legal order) without making certain assumptions. For that reason, I decided to present two assumptions related to the legal context and to the specific characteristics of both measures.

[2044] See International Monetary Fund, *Fourth Progress Report on Inclusion of Enhanced Contractual Provisions in International Sovereign Bond Contracts* (2019), available at https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/03/21/Fourth-Progress-Report-on-Inclusion-of-Enhanced-Contractual-Provisions-in-International-46671 [last accessed 11.12.2021], p. 7.

[2045] See, for example, UNCTAD, *Sovereign*… Op. Cit., p. 23 and p. 59 and Goldmann, *Necessity*… Op. Cit., pp. 10-11.

On the one hand, let me assume that the bonds to be restructured with the help of the "stay" and/or the "cram down" are governed by and subjected to the law and to the courts of the issuing state. As discussed in *Chapter Four*[2046], in such cases, the state is empowered to modify its own obligations. This phenomenon has been termed as the "local-law advantage" in the literature[2047]. Notably, and as discussed in *Chapter Five*[2048], the aforementioned does not necessarily prevents the application of international law to the merits. At the same time, it does not preclude bondholders from submitting their applications to international courts and tribunals if the respective conditions are met (including personal and subject matter jurisdiction).

On the other hand, let me also assume that both measures are imposed by the state through retroactive legislation, and cannot be characterized as discriminatory[2049]. Furthermore, from the perspective of the "cram down", let me assume that said measure is imposed along the lines of the Greek "retrofit" of 2012[2050].

Finally, let me also assume that the bonds at stake feature first generation CACs only.

Said assumptions lend a significant service to the analysis that follows. First, they allow me to characterize both measures as "sovereign acts" (i.e., "acta jure imperii"). As has been discussed in the previous *Chapters*, one of the most important points to be clarified in this context refers to the "character" of the measure impairing creditors' interests[2051]. Broadly speaking, and from the specific perspective of international investment law, a violation of an investment treaty will only be found if the state acts in its sovereign capacity (i.e., "acta jure imperii") and not if it behaves as any market player would (i.e., "acta jure gestionis")[2052]. As can be noted, if the "stay" and the "cram down" are imposed through retroactive legislation there will be no doubts in this regard[2053].

[2046] See *Chapter Four*, pp. 169-170.

[2047] See Buchheit and Gulati, *Use of the Local Law*… Op. Cit. See also Manuelides, *Using the Local Law*… Op. Cit., p. 470.

[2048] See *Chapter Five*, pp. 229 et seq.

[2049] As stated before, non-discrimination is one of the requirements that the measures at stake need to comply with in order to avoid being considered expropriatory, from the perspective of the "mitigated police powers doctrine" under international investment law. See subsection 3.2.2.1.

[2050] See Section 5 for details. It is worth noting that I have already discussed the most important case arising from the Greek restructuring of 2012 in detail in *Chapter Two,* pp. 64-67 and pp. 70-72.

[2051] See, for example, *Chapter Two*, pp. 83 et seq.

[2052] See, for example, Impregilo v. Pakistan (Decision on Jurisdiction), ICSID Case No. ARB/03/3, para 260. See also, Waibel, *Sovereign Defaults*… Op. Cit., p. 280. However, it should be mentioned that this may not be the case from the perspective of certain interpretations of the so-called "umbrella" clauses. See subsection 5.1.5 for details.

[2053] For example, a similar reasoning was put forward by the Awards on Jurisdiction on ICSID bondholder litigation against Argentina. See Ambiente Ufficio v. Argentina (Decision on Jurisdiction and Admissibility), ICSID Case No. ARB/08/9 (2013), para 543 and Abaclat v. Argentina (Decision on Jurisdiction and Admissibility), ICSID Case No. ARB/07/5, para 314 (i). See also Waibel, *Opening*… Op. Cit., p. 744 and Ramon Della Torre, *Sovereign Debt*: *Defaults and Restructurings by Means of International Adjudication*, Graduate Institute of International and Development Studies. Genva (2015), pp. 56-57 and Waibel, *Sovereign Defaults*… Op. Cit., p. 279

Second, as will be discussed in detail in the following section, these assumptions allow me to simplify the analysis, particularly in what pertains to the contribution of said measures to the promotion and demotion of the competing goals at stake.

5. The "Stay" and the "Cram Down" in the Light of International Investment Law and the European Convention on Human Rights: The "First Prong" of the Analysis

As previously indicated, investment tribunals can recur to PA when determining a breach of certain treaty provisions, including the guarantee against expropriation and the FET standard. For these purposes, tribunals tend to divide the analysis into two prongs. First, they discuss whether the conduct of the host-state can be considered a *"prima facie"* violation of the respective provision. Second, if the outcome of the assessment is positive, they move forward to PA (i.e., the "second prong"). A similar, albeit not identical path has been followed by the ECtHR, where proportionality is one of the requirements to which state parties to the ECHR are subjected.

Consequently, before moving on to the PA, I discuss whether the "stay" and the "cram down" may entail a *"prima facie"* violation of the guarantees against expropriation and to fair and equitable treatment (under international investment law) and of the protection of the "peaceful enjoyment of possessions" under the ECHR. Of note, since I have made the assumption that that the imposition of both measures can undoubtedly be considered a "sovereign act", I have set aside the discussion relating to the distinction between "acta jure imperii" and "acta jure gestionis"[2054]. Meanwhile, since I have also assumed that both measures are imposed in a non-discriminatory fashion, I have set aside said discussion as well.

However, two additional points deserve clarification before we proceed. On the one hand, as indicated in section 4.4, I assumed that the "cram down" will present the same features as the Greek "retrofit" of 2012. For that reason, it is worth defining said features from the outset[2055]. First, I consider that the measure is imposed through retroactive legislation. Second, I assume that it affects only bonds governed by the domestic law of the issuer. Third, I also assume that it requests bondholders' consent to (a) amend their bonds (if a qualified supermajority is reached), and to (b) modify the financial terms of the instruments (if the same majority is obtained). Finally, I assume that it provides that the decision of the majority binds minoritarian creditors and that if the necessary majorities are obtained, the terms of the instruments are modified for all their holders. As can be noted, the discussion that follows proceeds under the assumption that the bonds at stake lack third-generation modification CACs.

[2054] Discussing this point from the perspective of the Greek "cram down" see, for example, Venetia Argyropoulou, *International Arbitration and Greek Sovereign Debt: Postova Banka v. Hellenic Republic*, 19 Oregon Review of International Law (2018), pp. 210-211; Ioannis Glinavos, *Haircut Undone? The Greek Drama and Prospects for Investment Arbitration*, Journal of International Dispute Settlement (2014), pp. 485-486; Witte, *the Greek Bond Haircut*… Op. Cit., p. 314; Patrick Wautelet, *The Greek Debt Restructuring and Property Rights: A Greek Tragedy for Investors?* (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2373891 [last accessed 22.12.2021], p. 10.

[2055] This is a summary of the most important features of the strategy followed by Greece to restructure its bonds in 2012. For a more detailed discussion, see Manuelides, *Using the Local*… Op. Cit., p. 3; Buchheit and Gulati, *How to Restructure*… Op. Cit., Boudreau, *Restructuring*… Op. Cit., p. 5; Wautelet, *The Greek Debt*… Op. Cit., p. 5 and Witte, *the Greek Bond*… Op. Cit.

On the other hand, there is another important investment guarantee which has not yet been discussed in this *Thesis* and which may prove to be crucial in the context of investment litigation against indebted states. This standard of treatment corresponds to that comprised by the so-called "umbrella clauses". Due to the significant role which those provisions may potentially play in the aforementioned scenario, I also address their interplay with the "stay" and the "cram down" at the end of the investment law subsection (subsection 5.1.5).

5.1. The "Cram Down" and the "Stay" from the Perspective of International Investment Law

As stated above, in this subsection I discuss whether both the "cram down" and the "stay" may entail a "prima facie" violation of BIT expropriation and FET provisions. At the same time, I also address the role which "umbrella clauses" may play if the aforementioned measures are imposed.

5.1.1. The "Cram Down" from the Perspective of Expropriation

I start the discussion of the expropriation guarantee with the "cram down". Let me recall that I have assumed that the "cram-down" is imposed along the lines of the Greek restructuring of 2012.

As previously indicated, tribunals have devised two main criteria for assessing whether an expropriation exists under the "first prong" of the analysis: that of pecuniary losses and that of deprivation of rights[2056]. In the following, I proceed to assess the "cram down" from both points of view.

5.1.1.1. Pecuniary Losses

I begin the exposition by addressing the first of the aforementioned criteria. From this perspective, it is important to bear in mind that if the "cram down" is successful (i.e., if the corresponding majorities are obtained), dissenting and consenting creditors would see the "nominal" value of their bonds reduced in accordance with the sovereign's offer. A diminution of the "face value" of the bonds is usually referred to as a "haircut" in the literature. Scholars discussing the relationship between sovereign debt restructuring and expropriation usually highlight that a significant "haircut" may led to a successful expropriation claim[2057]. However, the problem here lies in (a) choosing the methodology

[2056] For a detailed discussion of those criteria see *Chapter Two*, pp. 85-87. Importantly, the analysis leaves out the potential controversies related to coercion and discrimination, which scholars have discussed in detail in the context of expropriation. See, for example, Boudreau, *Restructuring*… Op. cit., and Waibel, *Opening*… Op. Cit.

[2057] In the words of Ioannis Glinavos: "Tribunals often perform a substantial deprivation test to examine the level of diminished value in a taking and would thus in this case be examining the size of the haircut in a bond exchange". Glianovs, *Haircut Undone?*... Op. Cit., p. 483. As Fyrigou puts it: "(…) in a restructuring (…), [the tribunal] (…) would probably examine the size of the haircut to conclude whether the restructuring is expropriatory". Fyrigou, *Sovereign Debt*… Op. Cit., p. 363. See, also, Thrasher et al., *Mission Creep*… Op. Cit., p. 268; Wirtz, *BITs*… Op. Cit., pp. 256-257; Robert Ziff, *The Sovereign Debtor's Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law*, 10 Richmond Journal of Global Law and Business 3 (2011), p. 365; Ellie Norton, *International Investment Arbitration and the*

to be used for assessing creditors' losses and (b) determining the significance of the "haircut" which may amount to an expropriation.

As could be expected, the methodology used for calculating creditors' losses is critical for those purposes. Of note, the literature has suggested two different ways to measure the size of the "haircuts". The first one relies on a comparison between the net present value (henceforth, "NPV") of the bonds before the measure is imposed (i.e., the "old bonds") with the NPV of the restructured bonds (i.e., the instruments issued or modified after the measure is successfully implemented; the "new bonds")[2058]. For this methodology, this is to be carried out using a common discount rate, corresponding to the "exit yield" of the "new bonds"[2059]. Notably, this technique considers that the "old bonds" retain their face value and builds upon the assumption that those instruments would have continued to be serviced after the restructuring[2060]. For example, using this methodology, scholars have estimated that the average haircut in the Argentinian restructuring (2005) was 76.8%[2061] and that of Greece (2012) oscillated between 59% and 64% (depending on the discount rate used)[2062].

However, the aforementioned methodology tends to overvalue creditors' losses[2063]. Since the "exit yield" after a restructuring is completed is lower than that what was previously accounted for, it overestimates the value of the "old bonds". For this reason, a part of the scholarship suggests another methodology. In short, this alternative relies on a comparison between the secondary market value of the "old bonds" with the NPV of the "new" ones[2064]. As is usually noted, the market value of the bonds issued by a state under financial distress will be several points below face value[2065]. Thus, since this

European Debt Crisis, 13 Chicago Journal of International Law 1 (2012), p. 295; Argyropoulou, *International Arbitration*… Op. Cit., p. 211 and Goldmann, *Foreign Investment*… Op. Cit., p. 135.

[2058] This tends to be considered as the standard approach for measuring creditors' losses in sovereign debt restructuring. See Federico Sturzenegger and Jeromin Zettelmeyer, *Haircuts: Estimating Investor Losses in Sovereign Debt Restructurings*, 1998-2005 (IMF working Paper); Sturzenegger and Zettlemyer, *Debt Defaults*… Op. Cit., pp. 88 et seq; Juan Cruces and Christoph Trebesch, *Sovereign Defaults: The Price of Haircuts*, 5 American Journal: Macroeconomics, 3 (2013) and Josefin Meyer, Carmen Reinhart and Cristoph Trebesch, *Sovereign Bonds Since Waterloo*, NBER Working Paper Series (2019).

[2059] The basic formula used for computing losses is given by: $H = 1 - \frac{NPV\ new\ debt, r_{new}}{NPV\ old\ debt, r_{new}}$. See Sturzenegger and Zettelmeyer, *Debt Defaults*… Op. Cit., p. 89.

[2060] The formula "(…) compares the present value of the new and the old debt in a hypothetical scenario in which the sovereign keeps servicing any remaining outstanding old debts on an equal basis as the newly issued debt". Meyer, Reinhart and Trebesech, *Sovereign*… Op. Cit., p. 9.

[2061] Cruces and Trebesch, *Sovereign*… Op. Cit., p. 97.

[2062] See Jeromin Zettelmeyer, Cristoph Trebesch and Mitu Gulati, *The Greek Debt Restructuring: An Autopsy*, Working Paper Series (2013), available at https://scholarship.law.duke.edu/faculty_scholarship/2660/ [last accessed 22.12.2021], p. 19

[2063] See, for example, Martín Guzman, *Análisis de la Resolución del Default de Argentina de 2001*, 12 Revista de Economía Política de Buenos Aires (2018), pp. 69 et seq.

[2064] See Id.

[2065] For example, amidst the last Argentinian restructuring, the bonds due in 6 years were being traded around 33 cents on the dollar. See Carolina Millan and Scot Squires, *"As Creditors Blast Argentina's Offer, Bond Prices Start to Rise"*. Bloomberg (20.4.2020), available at

methodology uses the secondary market price of the instruments for the assessment, if it is applied, the losses will be significantly lower than those found under the previously discussed procedure. Importantly enough, a similar criterion was used by the ECtHR in the "Mamatas" case, will later be discussed (subsection 5.2).

In short, the aforementioned methodologies will lead to different results in most cases. While the first will show substantial haircuts (if the NPV of the "old bonds" significantly exceeds the NPV of the "new" ones), the second will tend to lessen them (if the NPV of the "new bonds" is similar to the market value of the "old" ones). Of note, if the second of the aforementioned alternatives is used, it is likely that creditors' losses (i.e., the difference between the NPV of restructured bonds and the market value of the old bonds) would be considered "de minimis" (i.e., not significant enough to amount to an expropriation)[2066].

Once the size of the haircut is measured, the next problem is to determine whether it is significant enough to be considered expropriatory. This corresponds to the assessment of whether the interference can be qualified as a "substantial deprivation" of investors' property. Following the criterion of the Tokios Tokelés Tribunal, the bigger the "haircut", the greater the probability of a successful expropriation claim. In the words of said tribunal:

> *"A critical factor in the analysis of an expropriation claim is the extent of harm caused by the government's actions. For any expropriation – direct or indirect – to occur, the state must deprive the investor of a "substantial" part of the value of the investment. Although neither the relevant treaty text nor existing jurisprudence have clarified the precise degree of deprivation that will qualify as "substantial", one can reasonably infer that a diminution of 5% of the investment's value will not be enough for a finding of expropriation, while a diminution of 95% would likely be sufficient. The determination in any particular case of where along that continuum an expropriation has occurred will turn on the particular facts before the tribunal"*[2067].

Consequently, for an important number of scholars, a reduction in value such as those found using the first methodology previously indicated for the Argentinian and Greek restructurings will be "significant" enough to amount to an expropriation[2068].

All in all, and considering only pecuniary losses, it is possible for the "cram down" to be considered a "prima facie" violation of the guarantee against expropriation. This becomes more likely the bigger the haircut obtained through the imposition of the measure. Valuation methodologies will sensibly affect the outcome assessment, and tribunals will be called upon to justify the technique chosen.

---

https://www.bloomberg.com/news/articles/2020-04-20/argentina-debt-offer-panned-with-bondholders-girding-for-battle [last accessed 09.03.2021].

[2066] See Boudreau, *Restructuring*… Op. Cit., p. 20.

[2067] Tokios Tokelés v. Ukraine (Award), Case No. ARB/02/18 (2007), para 120.

[2068] See, for example, Glinavos, *Haircut Undone*… Op. Cit., pp. 483-484 and pp. 486-487.

5.1.1.2. Deprivation of One or More Attributes of the Right to Property

I continue the exposition with the second criterion recurred to by investment tribunals. As previously indicated, this standard focuses the discussion of the "first prong" of the expropriation analysis around the question of whether investors have been deprived of one or more of the attributes of the right to property.

Measured against this standard, the "cram down" may also lead to a *prima facie* violation of the expropriation guarantee. Let me recall that this measure amounts to an intromission on the terms of the original contracts: Its very purpose is to incorporate CACs retroactively into the instruments. At the same time, it deprives investors of one specific right in their "bundle": that of individually consenting to (or rejecting), the restructuring proposal[2069]. If used successfully, the measure permanently modifies the financial terms and the maturity of the obligations. As can be noted, the "cram down" dramatically exceeds the terms of the contracts, impairing creditors' rights with substantial force.

From this perspective, dissatisfied bondholders could argue that the "cram down" would amount to an indirect taking, since it would "deprive" them of a right arising from the contract. Accordingly, the "expropriation" would be a consequence of unilateral ex-post contract modification, with the "individual right" to reject a restructuring being the "deprivation" leading to a taking. For this purpose, creditors could rely on the criterion put forward by the tribunal in Revere Copper v. OPIC[2070] and other decisions discussing the expropriation of rights arising from a contract.

In the latter sense, bondholders may substantiate their request on the findings of Consortium v. Morocco[2071], where the tribunal concluded that rights arising from a contract can be subjected to expropriation. For said tribunal, it would be sufficient that the underlying contract can be qualified as an investment according to the treaty. Furthermore, they could also recur to Eureko v. Poland, where the tribunal explicitly indicated that contractual entitlements, such as the right to acquire additional shares in a company, can be expropriated[2072]. Finally, creditors may also base their claims upon

---

[2069] Under certain circumstances, together with the right to be repaid on maturity, the right to litigate, and the right to sell the instruments on the secondary market, the right to decline a restructuring can be considered among the entitlements possessed by investors against their sovereign debtor. See the cases quoted for the case-law of the ECtHR in subsection 5.2.

[2070] See Revere Copper v. Overseas Private Investment Corporation (Award), AAA Case No. 1610013776 (1978). For a discussion, see *Chapter Two*, p. 86.

[2071] See Consortium RFCC v. Royaume du Maroc, (Award) ICSID Case No. ARB/00/6 (2003): "Le Tribunal reprend la définition d'investissement donnée par le Traité et considère que des droits issus d'un contrat peuvent être l'objet de mesure d'expropriation, à partir du moment où ledit contrat a été qualifié d'investissement par le Traité lui-même. Les créances détenues par l'investisseur font partie de cet investissement" ("The Tribunal takes up the definition of investment given by the Treaty and considers that rights arising from a contract can be the object of expropriation measures, from the moment that the said contract has been qualified as an investment by the Treaty itself. The claims held by the investor are part of that investment"), (own translation), para 60.

[2072] See Eureko v. Poland (Partial Award) (2005), paras 240-241.

the findings of Saipem v. Bangladesh[2073]. In that case, the tribunal indicated that preventing enforcement of an arbitral award amounted to an expropriation[2074].

Importantly enough, a similar line of reasoning has been put forward by scholars analyzing the Greek "cram down" from the perspective of the "deprivation" of rights. In short, for a part of the scholarship, the measure can be regarded as amounting to a *"prima facie"* taking. In the words of one such author this was the case since the "cram down" led "to creditors losing contractual rights against their will (…)"[2075]. Consequently, those scholars concentrate the analysis on dissenting creditors, i.e., those who rejected the retroactive inclusion of CACs and who declined the restructuring deal. According to them, since the measure was imposed beyond the specific terms of the original contracts, it clearly deprived said investors of their rights. Furthermore, in their view, this would also be the case for consenting creditors themselves, since the renegotiation was far from "entirely voluntary"[2076]. In short, for this understanding, the "cram down" deprived creditors of control of their property[2077].

Despite the aforementioned, a counterargument could be made in this regard. In short, the state could indicate that it is doubtful whether the "right to decline a restructuring" is, by itself, capable of being expropriated according to international investment law. If it were, it would form part of those exceptional cases where a tribunal would find a "partial" expropriation[2078]. According to Ursula Kriebaum, tribunals have disagreed on whether a taking can be established where only a "discrete right" arising from a contract is abrogated. However, she proposes one criterion, among others, based on the "commercial exploitation" of the right: In her view, if the right is "capable of independent economic exploitation", the asset could be expropriated. Conversely, if it is "ancillary or supplemental to the overall investment operation and, standing alone, has no economic value" the contrary would be true[2079]. Taking this into consideration, the state could argue that it is doubtful that the "right to decline" a restructuring can be considered an asset capable of being expropriated.

However, the latter argument is not that convincing when scrutinizing the "cram down" more closely. In effect, this measure does not merely deprive creditors of the "right to decline". On the contrary, it goes even further. If successfully triggered, it may potentially modify principal, maturity, payment conditions and other elements of the contracts. Therefore, although the "right to decline" a restructuring is not "capable of

---

[2073] Saipem v. Bangladesh (Award), ICSID Case No. ARB/05/7 (2009).
[2074] Id., para 122.
[2075] Witte, *the Greek Bond…* Op. Cit., p. 314.
[2076] The most sophisticated version of the argument is presented by Wautelet. See Wautelet, *The Greek Debt…* Op. Cit., pp. 10-13.
[2077] According to Belle, the ex-post modification of Greece's domestic bonds "could be characterized as an indirect expropriation as it resulted in a loss of control of the creditor's rights over their bonds". Belle, *From Creditor…* Op. Cit., p. 108.
[2078] Ursula Kriebaum defines "partial" expropriations as takings that affect "only parts of an overall investment" such as the abrogation of one discrete right in a concession contract. See, Ursula Kriebaum, *Partial Expropriation*, 8 Journal of World Investment & Trade 1 (2007), p. 72.
[2079] Id., pp. 83-84.

independent commercial exploitation"[2080], the "cram down" may be considered as amounting to a taking since it dramatically alters the contractual equilibrium between the parties. As previously indicated, this measure relies on the retroactive insertion of clauses which were not previously bargained for. Furthermore, the "cram down" is intended to produce permanent effects. Indeed, the objective of this measure is to obtain the consent of the majority of creditors across bond series to amend the maturities, the principals and the interest rates of the instruments. Therefore, it would clearly exceed the threshold of duration required by investment tribunals for finding an expropriation.

All in all, dissatisfied bondholders would have a "prima facie" claim against the state based on the expropriation provision of the corresponding treaty under the "deprivation of rights" criterion.

5.1.2. The "Cram Down" from the Perspective of the FET Standard

Now let me continue the inquiry into the "cram down" to analyze whether it may entail a *"prima facie"* violation of the FET standard. As stated above, I limit the discussion of this prong to two the elements of the standard: the protection of investors' legitimate expectations and the protection from coercion and harassment. It is also important to recall that the protection of investors' legitimate expectations has been addressed by tribunals through two doctrines: the "legal rights" and the "stability" approaches[2081].

First, following the "legal rights" approach, a "cram down" imposed along the lines discussed here can defraud investors' legitimate expectations (and thus, breach the "first prong" of the FET standard). Let me recall that for that approach, the host-state's breach of a contractual obligation or its unilateral modification by the state is, *"prima facie"*, against the FET guarantee[2082].

[2080] See the discussion regarding this criterion for the case of the "stay" under international investment law below.

[2081] For a discussion of these doctrines, see *Chapter Two*, pp. 92 et seq.

[2082] See, LG&E v. Argentina ("the government could not rescind or modify the licenses without the consent of the licensees"), para 41, see also paras 133-134. According to the BG v. Argentina, rights arising from contracts were to be deemed as "derechos legítimamente adquiridos" ("legitimately acquired rights") and thus a core element of investors' legitimate expectations. BG v. Argentina (Final Award) (2007), paras 307 and 308. Furthermore, for the Suez v. Argentina tribunal, rights arising from a concession contract "certainly" embody investors' legitimate expectations. Suez v. Argentina, (Decision on Liability), ICSID Case No. ARB/03/19 (2010), para 231. According to the Eureko v. Poland tribunal, breach of obligations arising from a contract can also breach the FET standard. Eureko v. Poland, para 232. In the opinion of the MCI v. Ecuador tribunal, the investor was unable to prove a violation of an "enforceable obligation" assumed by the host state, thus failing on its FET claim. See MCI v. Ecuador (Award), ICSID Case No. ARB/03/6 (2007) paras 321-325. According to the Ata v. Jordan tribunal, the extinguishment of a right forming part of a contract violated the FET standard. See Ata Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan (Award), ICSID Case No. ARB/08/2 (2010), para 125. Finally, for the Continental v. Argentina tribunal: "(…) unilateral modification of contractual undertakings by governments, notably when issued in conformity with a legislative framework and aimed at obtaining financial resources from investors deserve clearly more scrutiny [from the perspective of the FET standard], in the light of the context, reasons, effects, since they generate as a rule legal rights and therefore

From the perspective of said approach, a critical question to be answered by an investment tribunal is whether the right to "individually decline" a restructuring is a "legally enforceable right". Crucially, this question needs to be answered from the point of view of the bonds' governing law. I submit here that if the bonds at stake lack third generation CACs (as previously assumed), this condition will be fulfilled. Thus, the unilateral modification of the instruments by the state (even if conducted with the agreement of a supermajority of creditors) would defraud investors' legitimate expectations.

Secondly, the same will be true if the "stability" approach is considered by the tribunal instead. In this regard, the cases identified by the literature are illuminating. According to those cases, the regulations and the legislation in force at the time the investment was made are a crucial component of investors' legitimate expectations[2083]. As can be noted, depriving creditors of the possibility of declining a restructuring offer against explicit contractual language to the contrary will alter the legal framework of their "investments". Consequently, as was the case with the "legal rights" approach, a breach of investors' legitimate expectations could also be found for the "cram down" considering the "stability" approach.

Thirdly, whether there is a breach of the "first prong" of the FET standard from the point of view of "coercion" will depend on the specific facts of the case. However, the case-law on "forceful" renegotiation of contracts is also informative in this regard. In particular, the facts relating to the claimants' contract-renegotiation in the *Suez* and *Vivendi* cases can guide this assessment[2084]. In those cases, the tribunals indicated that a "unilateral" renegotiation process, in which the investors participated "unwillingly", featuring exclusively the positions of the host-state and accompanied by measures altering the legal framework in force when the investments were made can breach the first prong of the FET guarantee[2085]. As can be noted, the implementation of the "cram down" can be considered as a "coercive" tactic, if one or more of the circumstances mentioned by the Suez and Vivendi tribunal surround the imposition of the measure.

The considerations of the tribunal in Continental Casualty v. Argentina are also informative in this regard. Of note, the tribunal considered both the "legitimate expectations" and the "coercion" dimensions of the FET standard. In the case, the tribunal found that Argentina breached the FET standard by implementing certain measures during the restructuring of a group of its securities governed by its domestic law (the "LETEs"). In short, to arrive at that conclusion the tribunal considered: (a) the

expectations of compliance (…)". Continental Casualty Company v. Argentina (Award), Case No. ARB/03/9 (2008), para 261.

[2083] In the words of the Occidental v. Ecuador (I) tribunal: "the stability of the legal and business framework is thus an essential element of fair and equitable treatment". Occidental v. Ecuador (I) (Final Award), Case No. UN 3467 (2004), para 183. Indicating that the regulatory framework in force at the time when the investment was made is a component of investors' legitimate expectations, see Enron v. Argentina (Award), ICSID Case No. ARB/01/3, (2007), paras 263-265 and Sempra v. Argentina (Award), Case No. ARB/02/16 (2007), para 303.

[2084] Suez and Vivendi v. Argentina (Decision on Liability) ICSID Case No. ARB/03/19 (2010).

[2085] Id., paras 239-243.

unilateral character of the renegotiation which required the investor to waive all her rights (the "coercion" dimension), (b) the "unilateral modification of contractual undertakings" (the "legitimate expectations" dimension) and (c) the severe losses imposed upon the investors through the measures implemented by Argentina[2086].

For all of the above, I submit that the "cram down" may amount to a "prima-facie" violation of the FET standard.

5.1.3. The "Stay" from the Perspective of Expropriation

I continue the exposition with the "stay" and the first prong of the guarantee against expropriation. I first discuss the "pecuniary losses" criterion and then move forward to the "attributes to the right to property" standard.

5.1.3.1. Pecuniary Losses

Similar considerations to those of the "cram down" also apply for the "stay" in this context. To avoid repetition, allow me to highlight that the "stay" would be either considered as amounting to an expropriation or not, depending on the significance of the economic losses which renegotiation entails. Again, the assessment will be contingent on the specific technique used for measuring the "haircuts".

However, in the context of the "stay", the sovereign may have an important argument in its favor. In effect, the state may argue that regardless of the magnitude of the economic loss suffered by creditors (if any), said consequences could not be attributed directly to it. In particular, the sovereign could argue that the "stay" merely enables a renegotiation, the latter being the cause of the restructuring and therefore of bond modification. Furthermore, assuming that instruments feature first generation CACs (and that the conditions put forward by said provisions are complied with), the sovereign may also argue that any loss will be a consequence of them, as well as of creditors' voluntary agreement[2087]. However, whether this argument will suffice for excepting the liability of the sovereign is yet to be seen.

Consequently, under this criterion, whether the "stay" may lead to a "prima facie" breach of the expropriation guarantee will depend on the magnitude of the "haircut" (the same being true for the case of the "cram down"). Nevertheless, there is at least a chance for the state to avoid liability on this point, if it successfully argues that creditors' losses cannot be attributed to the measure, but instead to the very operation of first-generation CACs.

5.1.3.2. Deprivation of One or More Attributes of the Right to Property

As previously stated, the "stay" prevents creditors' from enforcing their claims after the occurrence of an "event of default". As in the case of the "cram-down", bondholders could argue that the measure entails a "prima facie" breach of the expropriation guarantee

---

[2086] Continental Casualty Company v. Argentina (Award), Case No. ARB/03/9 (2008), paras 261 (iii), 263-266.

[2087] Thus, the argument highlights that the proximate causes of the loss correspond to the operation of CACs and not to the stay. For CACs as the cause of creditors' losses see Waibel, *Opening Pandora's*… Op. Cit., p. 737.

since it would "deprive" them of a right arising from a contract. Said right would correspond to the "right to litigate" (i.e., the "right to enforce" their claims).

Nevertheless, a state defending the "stay" may also rely on the arguments previously posited for the case of the "cram down". In particular, the sovereign could argue that the "right to litigate" is not strictly "capable of independent commercial exploitation"[2088]. At the same time, since this measure is less severe than the "cram down"[2089], I submit here that this defense will be even more solid in this context. Three additional considerations militate for such a conclusion.

First, the "stay" discussed in this *Chapter* is a temporary measure. As indicated before, it merely suspends enforcement for a limited period. In particular, the "stay" is intended to allow the sovereign debtor and its creditors to reach a mutually beneficial agreement while the measure is in force. Furthermore, the parties are expected to renegotiate the terms of the bonds during that period. Admittedly, to prevent a claim for expropriation the "stay" cannot exceed a certain threshold of duration[2090]. However, this threshold cannot be defined *a priori*. As the Azurix v. Argentina tribunal noted in this regard, "how much time is needed must be judged by the specific circumstances of each case"[2091]. It is submitted here that, if the stay is imposed for a prudent period, an expropriation claim (under the "deprivation of attributes" criterion) would likely fail.

Second, if the bonds being subjected to the "stay" include modification CACs, the measure would not necessarily constitute an intromission on the terms of the contracts. Indeed, it can be argued that the "stay" would merely give effect to modification CACs, which allow debtors and creditors to renegotiate the debt. Otherwise, i.e., absent a "stay", those clauses could not be triggered, or could not be used as effectively as previously envisioned. In other words, this measure would only enable a contractually agreed upon renegotiation mechanism otherwise prevented from operating by premature litigation[2092].

Finally, it can be argued that this measure does not deprive creditors of control of their bonds. While in force, the "stay" does not prevent creditors' from exercising other rights in their "bundle", including the right to sell their instruments on the secondary market and to decline the sovereign's restructuring offer, in accordance with the terms of the bonds.

For all of the above, an expropriation claim will likely fail for the "stay" if the only criterion being considered by the tribunal is that of "deprivation" of creditors' rights.

[2088] See the discussion regarding this criterion for the case of the "cram down" above.
[2089] See the discussion regarding the different degrees of interference that the measures entail in subsection 6.2 of this *Chapter*.
[2090] In the words of Waibel: "Postponing payment indefinitely, such as a declaration or legislation never to service a particular series of bonds in the future, could constitute expropriation". Waibel, *Opening Pandora's*… Op. Cit., p. 747.
[2091] See Azurix v. Argentina (Award), ICSID Case No. ARB/01/12 (2006), para 313.
[2092] See Kupelyants, *Sovereign*… Op. Cit., pp. 86-89.

5.1.4. The "Stay" from the Perspective of the FET Standard

Now, let me continue the scrutiny of the "stay" from the perspective of the "first prong" of the FET standard. In this context, similar arguments (to those posited for the case of the "cram down") may assist bondholders.

At first look, a "stay" implemented along the aforementioned lines can defraud investors' legitimate expectations under both the "legal rights" and the "stability" approaches. At the same time, it can also breach the "first prong" of the standard if the "coercion" dimension is considered instead. To avoid repetition, let me present one additional argument from the perspective of the "legal rights" approach. I submit here that creditors would likely succeed in their claims considering that doctrine of the FET standard if one of these two propositions regarding their instruments is true[2093]: (a) the bonds remain silent in what pertains to litigation and enforcement, but the governing law includes a general rule indicating that an aggrieved party can exercise her legal rights in the case of breach of a contract, (b) the bonds specifically grant the right to litigate to individual bondholders after the occurrence of an "event of default". In both cases, the right to litigate could be considered a "legal right" whose unilateral modification/abrogation by the state may amount to defrauding investors' legitimate expectations. Importantly enough, this would be the case even if the measure is imposed for a limited period.

5.1.5. The "Stay", the "Cram Down" and "Umbrella Clauses"

As indicated at the beginning of this section, indebted states attempting to restructure their bonds by imposing a "stay" or a "cram down" may breach a standard of treatment which has not yet been discussed. This standard corresponds to the one established through "umbrella clauses" (also referred to as "observance of undertakings" clauses). I discuss these provisions below.

As indicated in *Chapter Two*, a breach of contract does not necessarily entail the breach of an international agreement[2094]. However, "umbrella clauses" are among the avenues under which a contract violation may expose the infringing state to a breach of the applicable BIT[2095], and, correspondingly, to responsibility under international law[2096]. For example, the umbrella clause included in a BIT concluded between Chile and Austria provides:

> *"Each Contracting Party shall observe any contractual obligation it may have entered into towards an investor of the other Contracting Party with regard to investments approved by it in its territory"*[2097].

[2093] However, it is noteworthy that the aforementioned enumeration is not exhaustive.

[2094] See *Chapter Two*, p. 86.

[2095] "The view that contractual undertakings are covered by umbrella clauses is also supported by the majority of commentators". Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*. Wolters Kluwer (2009), pp. 453-454.

[2096] See Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 The Journal of World Investment & Trade 2 (2004), p. 250.

[2097] Art. 2 (4) Agreement Between the Republic of Chile and the Republic of Austria for the Promotion and Reciprocal Protection of Investment. Available at

Therefore, and according to the scholarship, these clauses "add the compliance" with contractual commitments (and in some cases, with other type of undertakings) "to the BIT's substantive standards"[2098]. Notably, investment tribunals have also embraced this understanding[2099]. For those reasons, scholars tend to agree that umbrella clauses add "an additional layer of protection" in favor of foreign investors[2100].

Against this background, it is not surprising to find scholarly commentaries indicating that these provisions may play a crucial role in the context of sovereign debt defaults and restructurings. Consequently, before proceeding to the analysis of the ECHR in this context, a brief account of the measures' interactions with umbrella clauses is in order.

According to the scholarship, sovereign debt restructurings can potentially violate umbrella clauses if they entail the breach of the corresponding contracts[2101]. *Prima facie*, this will be the case if the bonds are modified ex-post through retroactive legislation[2102] (such as the "stay" or the "cram down" considering the assumptions previously posited). In that case, the state will act on its sovereign capacity ("acta iure imperii")[2103] and will modify the terms of the bonds[2104]. Through those means – the argument goes –, a treaty violation *via* umbrella clauses through the breach of contractual commitments could be found[2105].

Nevertheless, it should be mentioned that the specific way in which umbrella clauses operate has been the subject of an intense debate both in the literature and practice of

https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/178/download [last accessed 1.12.2021].

[2098] Schreuer, *Travelling…* Op. Cit., p. 250. See also James Crawford, *Treaty and Contract in Investment Arbitration*, 24 Arbitration International 3 (2008), pp. 357-358; Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*. Nijhoff (2011), pp. 222-223 and Newcombe and Paradell, *Law…* Op. Cit., pp. 451-452.

[2099] For a discussion, see Newcombe and Paradell, *Law…* Op. Cit., pp. 452 et seq.

[2100] See Borzu Sabahi, Noah Rubins et al., *Investor-State Arbitration* (2nd Ed.). Oxford University Press (2019), p. 487.

[2101] See Waibel, *Sovereign Defaults…* Op. Cit., pp. 253-254; Wirtz, *Bilateral Investment…* Op. Cit., p. 257; Juan Pablo Bohoslavsky, *Report of the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, Particularly Economic, Social and Cultural Rights*, A/72/153 (2017), para 37; Kevin Gallagher, *Financial Crises and International Investment Agreements: The Case of Sovereign Debt Restructuring*, 3 Global Policy 3 (2012), p. 368 and Argyropoulou, *International Arbitration…* Op. Cit., pp. 213-214.

[2102] Arguing in favor of this view, see Argyropoulou, *International…* Op. Cit., pp. 213-214.

[2103] See Glinavos, *Haircut Undone?...* Op. Cit., p. 480 and Argyropoulou, *International…* Op. Cit., p. 214.

[2104] See Argyropoulou, *International…* Op. Cit., p. 214. Of note, according to Tomoko Ishikawa, this will not necessarily be the case if the bonds had included CACs. According to her: "(…) insofar as the obligations under the contract are concerned, and the debtor state implements the CAC in good faith, it is highly unlikely that the debtor state's "failure to pay" constitutes a violation of the umbrella clause". Tomoko Ishikawa, *Collective Action Clauses in Sovereign Bond Contracts and Investment Treaty Arbitrations – Approach to Reconcile the Irreconcilable*, 4 Accounting Economics and Law 2 (2014), p. 74.

[2105] See, for example, Argyropoulou, *International…* Op. Cit., p. 214.

international investment tribunals[2106]. Hence, whether the "stay" or the "cram down" would breach these clauses will largely depend on the facts of the case and how those clauses are drafted, as well as on how they operate according to investment tribunals. Let me focus exclusively on the latter issue.

Notably, while some tribunals have adopted a narrow interpretation (according to which only under limited circumstances can a contractual breach be qualified as a treaty violation)[2107], others have embraced an "expansive approach" through which umbrella clauses directly transform contract claims into treaty claims[2108]. There is another strand of cases indicating that those clauses only cover contractual breaches of the state acting in its sovereign capacity[2109]. Finally, other tribunals have indicated that the distinction between "acta iure imperii" and "acta iure gestionis" is not relevant for determining a violation of the applicable BIT *via* umbrella clauses. From this perspective, and depending on the language of the clause, almost any breach of contract would serve as a precondition capable of leading to a treaty violation. However, in this view, the proper

[2106] See Sabahi, Rubins et al., *Investor-State…* Op. Cit., p. 490; Newcombe and Paradell, *Law and Practice…* Op. Cit., pp. 438-440; Monique Sasson, *Substantive Law in Investment Treaty Arbitration* (2nd Edition). Wolters Kluwer (2017) pp. 201-202 and Kjos, *Applicable Law…* Op. Cit., p. 247. Of note, these disagreements are compounded by a crucial fact: the language of umbrella clauses included in BITs is far from being uniform. See Voss, *The Impact…* Op. Cit., p. 228. For example, Sabahi, Rubins et al. distinguish three different types of "umbrella clauses". The first one includes states' obligations to observe any "obligation" or "undertaking" related to investments. The second circumscribes the scope of the clause to obligations made "in writing". The third to restrict its application of obligations assumed through "investment agreements". See Sabahi, Rubins et al., *Investor-State…* Op. Cit., pp. 489-490.

[2107] According to James Crawford, these have been the understanding of the tribunals in: SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, Decision of the Tribunal on Objections to Jurisdiction (Case No. ARB/01/13) (2004) and Joy Mining Machinery Limited v. The Arab Republic of Egypt, Award on Jurisdiction (ICSID Case No. ARB/03/11) (2004). See Crawford, *Treaty and Contract…* Op. Cit., pp. 367-368. For a discussion of this view, see Sabahi, Rubins et al., *Investor-State…* Op. Cit., pp. 491-493 and Schreuer, *Travelling…* Op. Cit., pp. 252-253.

[2108] According to the literature this position can be found in Fedax N.V. v. The Republic of Venezuela, Award (Case No. ARB/96/3) (1998); Eureko v. Poland, Partial Award (2005) and Noble Ventures v. Romania (Award), ICSID Case No. ARB/01/11 (2005). See Crawford, *Treaty and Contract…* Op. Cit., pp. 367-368. For a discussion of this view see Sabahi, Rubins et al., *Investor-State…* Op. Cit., pp., pp. 493-494; Sasson, *Substantive…* Op. Cit., pp. 227 et seq. and Voss, *The Impact…* Op. Cit., pp. 238 et seq.

[2109] According to Crawford, this has been the understanding endorsed by investment tribunals in Pan American Energy LLC. and BP Argentina Exploration Co. v Argentina; Decision on Preliminary Objections, ICSID Case No. ARB/03/13 (2006) and in El Paso Energy International Co. v Argentina, Decision on Jurisdiction, ICSID Case No. ARB/03/15 (2006). See Crawford, *Treaty and Contract…* Op. Cit., pp. 367-368. See also Sabahi, Rubins et al., *Investor-State…* Op. Cit., pp. 500 et seq.; Sasson, *Substantive…* Op. Cit., p. 229 and Ignacio Torterola, Gary Shaw and Bethel Kassa, Opening the Umbrella: How the Argentine Economic Crisis Cases Shaped the Modern Umbrella Clause in Fabricio Fortese (Ed.), *Arbitration in Argentina*. Kluwer (2020), pp. 549 et seq.

law of the contract is to be applied in order to determine whether the contract has been breached in the first place[2110].

Crucially for the purposes of this *Chapter*, it is the latter view which tends to be favored by the majority of commentators[2111]. Thus, from that perspective, a violation of the umbrella clause requires a breach of the contracts, or the undertakings covered by said clause[2112]. At the same time, the existence, scope, and effects as well as the violation of those obligations are to be assessed through the application of the corresponding governing law[2113] (which, as I previously assumed, corresponds to the domestic law of the host state). Consequently, as Kuznetsov puts it:

> *"(…) an action by a foreign investor against a State for breach of contract only gives rise to a violation of the BIT's umbrella clause if the complained-of State measures would be recognized as a contractual breach under the domestic law that serves as the source of the obligation"*[2114].

This has significant consequences for the assessment of the "stay" and the "cram down" from the perspective of umbrella clauses. In short, and as can be noted, the imposition of those measures along the lines currently under discussion will not necessarily breach the respective bonds nor will it necessarily violate those clauses, for the following reasons.

First, as previously indicated, the law governing the bonds will be called upon to determine the scope of the obligations and whether a contractual breach has occurred in the first place. If the bonds at stake are governed by the domestic law of the issuer (as was assumed for the analysis carried out in this *Chapter*), through ex-post modifications, the state will be able to effectively amend the very terms of the instruments. Consequently, depending on the technicalities of the corresponding legal system governing law, retroactive legislation may be able to lawfully redefine the obligations contained in the instruments to the point where no contractual breach may

---

[2110] According to Crawford, this has been the position of the tribunals in: SGS Société Générale de Surveillance SA v. Republic of the Philippines, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/6 (2004) and in CMS Gas Transmission Co. v Argentine Republic, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/8 (2007). See Crawford, *Treaty and Contract*… Op. Cit., pp. 367-368. See also, Schreuer, *Travelling*… Op. Cit., p. 255.

[2111] See Schreuer, *Travelling*… Op. Cit., p. 255; Voss, *The Impact*… Op. Cit., pp. 272-275; Crawford, *Treaty and Contract*… Op. Cit., pp. 368-370 and Sasson, *Substantive*… Op. Cit., p. 240.

[2112] See Schreuer, *Travelling*… Op. Cit., p. 255.

[2113] See Newcombe and Paradell, *Law and Practice*… Op. Cit., pp. 499-451; Voss, *The Impact*… Op. Cit., pp. 274-275; Zachary Douglas, *The International Law of Investment Claims*. Cambridge University Press (2009), p. 213 and Kjos, *Applicable Law*… Op. Cit., pp. 247-252.

[2114] Andrey Kuznetsov, *The Limits of Contractual Stabilization Clauses for Protecting International Oil and Gas Investments Examined through the Prism of the Sakhalin-2 PSA: Mandatory Law, the Umbrella Clause, and the Fair and Equitable Treatment Standard*, 22 Willamette Journal of International Law and Dispute Resolution 223 (2016), pp. 251-252.

be found[2115]. Moreover, the scope of the bonds' contractual obligations may also be limited by the application of doctrines such as force majeure, rebus sic stantibus and the like[2116]. In both cases (i.e., one under which there is no breach of contract and another under which the breach is lawfully excused) the success of bondholders claiming a BIT violation *via* umbrella clauses seems unlikely[2117].

However, it should be mentioned that the aforementioned conclusion may not hold if the assumptions posited in subsection 4.4 are modified. For example, if it is assumed, instead, that the bonds are governed by the law and subject to the jurisdiction of the courts of a state different from that of the issuer, the indebted state may face prima facie liability for the breach of the corresponding umbrella clause. In that case, even if the issuing state imposes a "stay" or a "cram down", it will not be able to modify the terms of the corresponding contracts, nor to affect the legal outcomes of litigation. By the same token, since the proceedings and the scope of the obligations will be beyond the indebted state's reach (i.e., it will not be able to operate under the "local law advantage") it is most likely that litigation will continue its course, and that the quantum of the debt owed to holdouts will be calculated in accordance with the financial terms of the original bonds. To put it bluntly: In this case, the indebted state will not be able to legally amend the obligations set forth in the corresponding instruments and will have no authority over the courts exercising jurisdiction. Therefore, in that context, if non-payment (i.e., default) predates or follows the imposition of the aforementioned measures, it may be considered a breach of the respective contract and, through those means, as a potential breach of the corresponding umbrella clause[2118].

Second, if the applicable BIT includes a "Non-Precluded Measures" (henceforth, "NPM" or "exceptions") provision capturing the umbrella clause[2119], and if the conditions established in the former are met, not even unlawful breaches of contract will amount to a violation of the latter[2120]. This is a consequence of how NPM provisions operate. In

---

[2115] For example, in the words of Voss: "(…) a posterior change in legislation concerning investment contracts would not be hindered by umbrella clauses". Voss, *The Impact*… Op. Cit., pp. 274-275.

[2116] See Newcombe and Paradell, *Law and Practice*… Op. Cit., pp. 475-476.

[2117] See Id., pp. 475-476.

[2118] As a caveat, it should be mentioned that this will only be true if the state is unable of being successful in defending non-performance with the tools granted by the corresponding applicable law.

[2119] Of note, while in certain treaties NPM provisions refer to specific investment guarantees, in others they cover the totality of the agreement at stake. See Burke-White and von Staden, *Investment Protection*… Op. Cit., p. 331 and Barnali Choudhury, *Exception Provisions*… Op. Cit, pp. 687-688. According to Tobias Ackermann, who conducted a study of international investment agreements concluded between 2013 and 2017, almost 70% of the agreements under scrutiny included NPM clauses encompassing all investment standards. See Tobias Ackermann, Exception Clauses in International Investment Agreements: A Case for Systemic Integration? in Mesut Akbaba and Giancarlo Capurro (Eds.), *International Challenges in Investment Arbitration*. Routledge (2019), pp. 39-41.

[2120] See Burke-White and von Staden, *Investment Protection*… Op. Cit., pp. 386-387. "In essence, the NPM clause means that the state assumed no obligations either toward the other state party or its investors with respect to actions covered by the NPM clause". Id., pp. 388-389. In a similar

short, and as Tobias Ackermann puts it, these provisions "(…) secure states' regulatory space by allowing deviation from treaty obligations when certain interests are at play"[2121]. Of note, an example of such an NPM clause is included in the BIT between the US and Argentina which provides:

> *"This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests"*[2122].

Admittedly, NPM provisions have been the subject of intense disagreements, both in the scholarship and in the case-law[2123]. An assessment of those debates is beyond the scope of this *Chapter*. Rather, what matters for our purposes, is that a part of the scholarship has proposed the use of PA for the interpretation and application of NPM clauses drafted along the lines of the one previously cited[2124]. Particularly, Bücheler suggests using balancing for the determination of whether a measure can be deemed "necessary" for the satisfaction of the aims under the scope of NPM clauses[2125]. Thus, in his own words:

> *"Proportionality offers an appropriate analytical framework to steer the analysis. It provides for transparency by obliging arbitrators to identify the different factors that play a role in their decision and explain how they relate to each other under the particular circumstances of the relevant case. Proportionality ensures that none of the interests involved (i.e. the private property rights of the claimant and the public interest) suffers more than necessary for the benefit of the other"*[2126].

Therefore, under certain circumstances, the norms resulting from the interaction between umbrella clauses and NPM provisions can be properly characterized as PIL principles. This will be true if the NPM provision included in the applicable BIT covers

---

sense, see Bücheler, *Proportionality*… Op. Cit, p. 249. "The exceptions contained in NPM clauses preclude the very applicability of the specified substantive obligation(s) of the BIT to acts that fall within the scope of the clause. If a certain action is covered by the terms of the exception, the result is the preclusion of wrongfulness, not because a violation of a particular obligation is justified under the circumstances, but because the obligation does not apply to that action in the first place". Burke-White and von Staden, *Investment Protection*… Op. Cit., pp. 386-387.

[2121] Ackermann, *Exception Clauses*… Op. Cit., p. 38. See also Choudhury, *Exception Provisions*… Op. Cit., pp. 686-687.

[2122] Art. XI Treaty between United States of America and The Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/127/download [last accessed 2.12.2021].

[2123] For a discussion relating to the application of these provisions in the context of the litigation against Argentina see Burke-White and von Staden, *Investment Protection*… Op. Cit., pp. 314 et seq.

[2124] See Bücheler, *Proportionality*… Op. Cit, p. 229. See also Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier* (2010), available at https://digitalcommons.law.yale.edu/fss_papers/69/ [last accessed 3.12.2021].

[2125] See Bücheler, *Proportionality*… Op. Cit, p. 229.

[2126] Id., p. 243.

umbrella clauses, and if the former is drafted using a similar language to that of the example previously posited. In these cases, it may be argued that the breach of the umbrella clause should be assessed in the two steps discussed for the expropriation and FET guarantees: The first requiring a breach of the contract and the second subjecting the violation of the clause to PA. To put it bluntly, under this interpretation, a state would be able to avoid liability if it is able to succeed in the second "prong" of the analysis (i.e., if the measures can be deemed proportional).

Consequently, it is now possible to specifically address the interaction between umbrella clauses and the "stay" and the "cram down", if those measures are imposed along the lines being discussed in this *Chapter*. As previously stated, the implementation of these measures does not necessarily entail a violation of the applicable BIT *via* umbrella clauses. First, if the bonds are governed by the law of the issuer, the imposition of the "stay" and the "cram down" through retroactive legislation may redefine the scope of the obligations concerned to the point where no breach of the contracts can be ascertained. If this is the case, investors' claims based upon umbrella clauses will most likely be barred. Nevertheless, their claims related to different investment standards may survive[2127]. However, it should be mentioned that if the bonds are governed by the law of a third state and subjected to the jurisdiction of its courts, both measures may *prima facie* be capable of violating the corresponding umbrella clause if they are accompanied by a breach of the corresponding contracts (one example being non-payment in the previously agreed upon terms). Second, even if there is a breach of contract, and under certain circumstances[2128], the indebted state may be able to avoid violating the umbrella clause if it succeeds in the proportionality stage.

Nevertheless, I set aside this issue in the following sections, mainly due to space limitations. It should be noted, however, that the state can be successful in avoiding liability if it imposes a "stay" or a "cram down" even in what pertains to claims based upon umbrella clauses.

5.2. The "Cram Down" and the "Stay" from the Perspective of the ECHR

Having concluded the assessment of both measures from the perspective of international investment law, now is the time to analyze them in the light of the ECHR.

Of note, both the "stay" and the "cram down" can be considered as interfering with creditors' "peaceful enjoyment" of their "possessions". The arguments posited in the context of international investment law apply here as well. To avoid repetition, let me highlight that said measures interfere with creditors' entitlements, since they deprive them of one of the rights in their "bundle". On the one hand, the "cram down" precludes creditors from individually rejecting a restructuring deal. On the other hand, while

[2127] See Voss, *The Impact…* Op. Cit., pp. 274-275 and Newcombe and Paradell, *Law and Practice…* Op. Cit., p. 476.

[2128] These circumstances include: (1) the applicable BIT includes a NPM clause; (2) the NPM clause covers the umbrella clause either specifically or by extending to the treaty as a whole; (3) the NPM clause is drafted along the lines of art. 11 of the BIT between Argentina and the US previously cited and (4) the tribunal recurs to PA.

preventing litigation, the "stay" effectively curtails creditors rights to enforce their claims.

However, an important question to be addressed in this regard refers to the type of interference to which each measure belongs. Let me recall that the ECtHR's case-law offers a taxonomy of states' interferences with the right to property composed of three categories: "expropriations", "measures of control" and "other interferences". As previously discussed, the Court tends to regard said categories in a decreasing order of severity[2129]. Thus, while "expropriations" include the most intrusive measures, "other interferences" comprise the less severe ones, with "measures of control" encompassing those in between.

Notably, in the cases concerning sovereign bonds, the ECtHR has qualified all the measures interfering with creditors' interests as belonging to the group of "other interferences"[2130]. Crucially for the purposes of this discussion, this is also true for the "Mamatas"[2131] case, where the Court classified the Greek "retrofit" (implementing a "cram down" on dissenting creditors' claims) as belonging to the aforementioned type of interferences[2132].

Particularly, in "Mamatas", the ECtHR indicated that the retroactive modification of sovereign bonds to impose a "cram-down" across all series of domestic Greek bond issuances could not be considered an expropriation. This decision was consistent with its previous case-law concerning the ECHR's rule on expropriations. In particular, the ECtHR has interpreted this rule restrictively, requiring a "complete deprivation" for its application. This was not the case in "Mamatas", where the applicants remained in possession of their (discounted) securities.

Furthermore, the Court also indicated that the appropriate benchmark for measuring creditors' losses was not the face-value of the bonds but rather their secondary market value[2133]. Said criterion guided the court in the assessment of the severity of the "cram down" from creditors' perspective which, therefore, was not so serious as to entail an

[2129] See subsection 3.3 above.
[2130] See Id.
[2131] See Mamatas and Others v. Greece, Judgement July 21, 2016. I have already discussed this case in detail in *Chapter Two*. See, *Chapter Two*, pp. 70-72. Nevertheless, let me briefly summarize the facts of the case. In Mamatas, 6,320 Greek nationals filed an application at the ECtHR claiming that their government had either expropriated their property ("de facto" expropriation) or interfered with the peaceful enjoyment of their possessions. The controversies had their origins in the enactment of Law 4050/2012 of February 23, 2012, which, in practice, retroactively altered the terms of domestic Greek bonds. By means of this law, the government implemented a voting procedure directed at its domestic bondholders. This procedure sought to modify the obligations established in the corresponding instruments, emulating single-limb CACs. In this case, Greece offered its domestic bondholders new bonds in exchange for the old ones, reducing their nominal value by 53.5% (in face value terms). The offer was accepted by the majority of creditors. After unsuccessful litigation against the state under its domestic courts, a group of dissenting bondholders brought the case to the ECtHR. In short, through Law 4050/2012, Greece imposed a measure akin to the "cram-down".
[2132] See Mamatas, Op. Cit., paras 93-94.
[2133] Id., para 112.

expropriation or to be classified as a measure of "control". At the same time, the ECtHR also posited that bondholders maintained the right to sell their bonds on the secondary market, a circumstance which also influenced its conclusion[2134].

Of note, as it will be discussed in subsection 6.2, the "cram down" can be considered more severe than the "stay" from the perspective of creditors' interests. Thus, since the "stay" is considered to entail an intromission on bondholders' entitlements under the ECHR, said intromission needs to also be classified under the "other interferences" category by the ECtHR[2135].

Consequently, both measures may amount to an interference with creditors' peaceful enjoyment of possessions. However, and as previously discussed, this is not sufficient for finding a violation of the ECHR. Notably, said violation would be found only if the state fails to comply with certain requirements, one of them being the principle of proportionality.

5.3. Conclusions: The "Stay" and the "Cram Down" and the PIL Principles Protecting Creditors' Interests

As all of the above demonstrates, if a state imposes a "stay" or a "cram down" on its bonds governed by its domestic law and subjected to its own courts through retroactive legislation, its conduct can be qualified as a breach of the first prongs of both the "expropriation" and FET guarantees if certain conditions are met. At the same time, both measures can be classified under the residual category of "other interferences" from the perspective of the ECHR.

First, regarding expropriation from the perspective of international investment law, the conclusion would depend on the specific criterion followed by tribunals. On the one hand, if the "pecuniary losses" standard is recurred to, both measures may constitute a *"prima facie"* violation of the guarantee against expropriation if the "haircut" is significant enough. In this context, the indebted state would have a certain margin to justify the "stay" (through causation) but the same would not be true for the "cram down". On the other hand, if the "deprivation of rights" criterion is followed instead, creditors would likely succeed in their claims in what pertains to the "cram down". The same would not be necessarily true for the case of the "stay". In that context, the state would have several arguments at its disposal. The most important defenses in this regard would correspond to: (a) that the "right to litigate" is not capable of being expropriated; (b) that, in contrast with the "cram down" the "stay" interferes with creditors' rights temporarily; (c) that the measure would merely enable the operation of modification CACs and that it (d) would not deprive creditors of control of their investments.

[2134] Id., para 114. As can be noted, the "attributes" of the right to ownership criterion has also been discussed by the ECtHR in the context of sovereign debt litigation. Regarding the "right to being repaid at maturity", see, for example, Lobanov. Op. Cit., paras 33 and 45; Andreyeva, Op. Cit., 19. Regarding the right to sell the bonds on the secondary market, see, for example, Malysh, Op. Cit., para 10.

[2135] In other words, if the "cram down" is not considered severe enough to be classified as either an "expropriation" or a "measure of control"; the "stay" could not be classified as such, since this measure is less severe than the former.

Secondly, both measures can be considered as defrauding investors' legitimate expectations and/or affecting, coercively, creditors' interests.

Thirdly, the "stay" and the "cram down" may potentially violate the ECHR, since both of them entail an interference with the "peaceful enjoyment" of creditors' "possessions".

Consequently, having completed the analysis from the perspective of the first prong of investment standards, and having discussed both measures from the perspective of the ECHR, we may now move forward to the PA, which will complete the analysis. This is the subject of the following sections.

6. Application of the Proportionality Principle from Alexy's Perspective to the "Stay" and the "Cram Down" under Different Settings: International Investment Law and the European Convention on Human Rights

In this and the following section (section 7), I deploy a PA for both the "stay" and the "cram down" considering two different regimes: international investment law and the ECHR. As previously discussed, for international investment law, this corresponds to the "second prong" of expropriation and FET analysis. In short, if both measures fail the proportionality test, a breach of both guarantees can be determined[2136]. At the same time, PA also plays a critical role in the context of the ECHR. In short, given that framework, proportionality is the most important requirement which must be complied with by any measure interfering with property rights. If the conduct of the state fails to maintain a proper relationship between the "individual" and the "general interest", a violation of the ECHR will be found.

The PA that follows will be conducted from two different methodological perspectives. Notably, both techniques can be regarded as belonging to the "optimization" accounts of proportionality. In this section, I start by applying Alexy's rational reconstruction of balancing. In the next section (section 7), I continue by applying Sartor's methodology.

As previously indicated, Robert Alexy divides PA into three subsequent tests (or "rules"). The first corresponds to "suitability". The second, to "necessity". The third corresponds to "proportionality in the narrow sense". In the following, I subject both the "stay" and the "cram down" to those three tests.

However, before proceeding it is necessary to mention three caveats. First, the discussion that follows is conducted with a certain level of generality. Sovereign debt crises are not necessarily identical, and the same can be true for the imposition of the measures to be scrutinized. For that reason, I was forced to make several assumptions in order to advance the discussion.

In addition, and for the same reason, I was unable to obtain certain data which can be considered critical for the deployment of a "proper" PA. Notably, said data is contingent on the specific context under which both measures may be implemented. Thus, as will be discussed later, this required circumscribing the scope of the analysis to one particular aspect of the proportionality test. In effect, instead of assessing whether both measures "pass" or "fail" said test, the analysis that follows limits itself to positing the conditions under which both measures can be considered in compliance with the proportionality principle. Therefore, it highlights the cases under which both measures can be deemed as aligned with expropriation and FET guarantees under international investment law. At the same time, it also clarifies the contexts under which both measures would not violate the ECHR.

Finally, due to the limitations of Alexy's methodology in what pertains to his "weight formula", the discussion below contents itself with a mere "illustration" of PA. In effect, as discussed above, the arithmetical operations to be performed in this section cannot

[2136] Provided that there is a *"prima facie"* breach of the standards.

replace argumentation in the context of the adjudication of PIL principles. For that reason, the discussion that follows attempts to justify "verbally" each step of the application of Alexy's methodology. Crucially, states and adjudicators will be called to complement said arguments from the perspective of the factual matrixes of the corresponding cases.

To simplify the exposition, I decided to conduct the analysis simultaneously, for both investment standards and the ECHR's guarantee of the "peaceful enjoyment of possessions". Admittedly, there are several differences between both regimes in what pertains to proportionality. The most significant differences are highlighted where appropriate.

6.1. The "Suitability" Test

The first stage of Alexy's PA is "suitability". As previously discussed, suitability asks if the measure under scrutiny can contribute to the realization of one of the two competing principles in the case at hand (i.e., to the satisfaction of the principle being "promoted"). The aforementioned competing principle is usually referred to as the "legitimate aim" which the measure pursues. Notably, from the perspective of international investment law, I chose citizens' "social" rights as the principle whose satisfaction needs to be justified at this stage. At the same time, and from the point of view of the ECHR, I decided to perform the test considering the "public interest".

Let me start the suitability analysis of both measures from the perspective of the ECHR. As stated throughout this *Thesis*, the "stay" and the "cram down" are critical, in certain cases, for successfully completing a debt restructuring. This consideration alone will tilt the balance in favor of the indebted state at the suitability stage. In effect, as previously posited, the ECtHR indicated in the "Mamatas" case that debt restructuring can be considered a "legitimate aim" justifying the impairment of creditors' rights[2137]. Furthermore, throughout its case-law, the Court has also highlighted other considerations, which can also serve as manifestations of the "public interest" in the context of debt crises. Among said considerations, the ECtHR mentioned the prioritization of non-debt related expenditures and the maintenance of economic stability. Consequently, if the debt restructuring to which the imposition of both measures contributes also allows the state to reach a sustainable debt level and to stabilize the budget, it can be posited that both will pass the suitability test.

Nevertheless, the state would have to justify that both measures are fit for those purposes in the case at hand. Four important arguments may assist the sovereign in this context. First, the state could stress that both measures contribute to a debt restructuring. For these purposes, it could highlight the market failures involved in debt renegotiation which both measures help to solve[2138]. Second, it could refer to the empirical evidence related to debt restructuring and economic growth. In this regard, it

[2137] The assessment of whether the aim pursued by the measure in question is "legitimate" is usually conducted under an additional stage of the proportionality test (i.e., under the "legitimate aim" test). Since I have already dealt with the "public interest" from the perspective of the ECHR, I limit the discussion to the three stages proposed by Alexy. See subsection 3.3.2 of this *Chapter*.
[2138] See Section 4 of this *Chapter*. For a detailed discussion, see *Chapters Three* and *Four*.

could note that the output of countries who have successfully restructured their debts tends to increase significantly after the operations are completed[2139]. Third, it could also indicate that auspicious growth projections (attributed to debt renegotiation) would be critical to stabilizing the public budget. Finally, and of equal importance, the state could also take advantage of the "margin of appreciation" granted by the ECHR. In this regard, it could note that it is in a better position than the transnational judiciary in what pertains to the assessment of the causal link between debt restructuring and the imposition of the measures. At the same time, it could make the same argument in what pertains to debt renegotiation and the achievement of debt sustainability[2140]. Therefore, I submit here that it is likely that the state would be successful at this stage of the PA.

I now continue the exposition by addressing the suitability test from the perspective of international investment law. As stated before, in this context, I chose to consider the satisfaction of citizens' "social" rights as the competing principle whose satisfaction needs to be scrutinized. Here, however, I found an almost insurmountable obstacle[2141]. In effect, although debt restructuring and growth can be deemed as directly correlated, the same is not necessarily true for the relationship between the former and the enhancement of the enjoyment of ESC rights in the indebted state[2142]. In other words, one cannot directly attribute *a priori* a particular degree of "social" rights enjoyment to each measure since a state may choose different complementary policies while confronting an insolvency crisis. For example, it is possible that a state may use all the

[2139] For example, using a dataset comprising defaults and restructuring of emerging and developed economies capturing the periods between 1920-1939 and between 1978-2010, Carmen Reinhart and Cristoph Trebesch found that per capita GDP significantly increases after the restructuring is completed. The same is true for sovereign ratings, for emerging markets in the 1978-2010 period. See, Carmen Reinhart and Cristoph Trebesch, *Sovereign Debt Relief and its Aftermath*, 14 Journal of the European Economic Association 1 (2016).

[2140] Debt sustainability is a contested category in itself. For a discussion, see Bohoslavsky and Goldmann, *An Incremental Approach…* Op. Cit.; Xavier Debrun et al., Debt Sustainability, in Ali Abbas et al., *Sovereign Debt: A Guide for Economists and Practitioners*. Oxford University Press (2020) and Martín Guzmán and Domenico Lombardi, *Assessing the Appropriate Size of Relief in Sovereign Debt Restructuring*, Columbia Business School Research Paper No. 18-9 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3088081 [last accessed 05.08.2021].

[2141] This obstacle would also be discussed in the context of the application of Sartor's methodology.

[2142] This issue has been highlighted by commentators. For example, according to Cephas Lumina it is difficult to directly link an increase of "social" rights satisfaction with debt reduction (either through debt cancellation or debt restructuring). In his own words: "It is, however, not easy to measure the direct fiscal impacts of debt relief. A decision to cancel a given nominal amount of debt does not necessarily result in an immediate cash flow gain. These may arise over time. Further, although the reduction in debt service payments may have contributed to improved social indicators, it may not be the main avenue through which these reported improvements have occurred. Other factors have also contributed to the reduction in debt payments, including higher prices for commodity exports, robust economic growth and increased government revenue". Cephas Lumina, Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, *An Assessment of the Human Rights Impact of International Debt Relief Initiatives*, A/HRC/23/37 (2013), para 16.

funds procured through debt relief for the satisfaction of interests other than those guaranteed under "social rights". Consequently, since the application of the "margin of appreciation" doctrine is not as straightforward in the context of international investment law[2143], the state would have to persuade investment tribunals with even more solid arguments in what pertains to this connection[2144].

Three arguments may assist the state in this regard. First of all, the state could argue that the funds obtained through debt restructuring would be used for the satisfaction of "social" rights. As has been noted by the scholarship, the public budget "is central to the realization of all human rights"[2145] and sovereign debt crisis can significantly impair their enjoyment[2146]. Secondly, the sovereign could rely on the anecdotal evidence available in what pertains to debt relief and "social" rights enjoyment[2147]. Though inconclusive, in this regard it could refer to the positive impact which debt relief under the HIPC and MDRI initiatives[2148] had on the allocation of funds destined for health and education in recipient countries[2149]. Thirdly, it could highlight the evidence related

[2143] See subsection 6.3.4.1 of this *Chapter* regarding the "margin of appreciation" and stalemate cases under international investment law below.
[2144] Referring to the challenges that this may entail for indebted states, see Goldmann, *Foreign Investment*… Op. Cit., pp. 143-144.
[2145] Lumina, *Sovereign Debt*… Op. Cit., p. 169.
[2146] See Goldmann, *Foreign*… Op. Cit., p. 131.
[2147] See Lumina, *Sovereign Debt*… Op. Cit., p. 170. For example, according to Cephas Lumina, the Argentinian restructurings of 2005 and 2010 allowed that country to dramatically improve, the satisfaction of ESC rights. In his own words, "As a result of the debt restructurings and settlement of IMF obligations, the debt as a percentage of GDP declined from 166.3 percent in 2002 to around 45 percent in 2012, with public external debt representing only 14 percent of GDP. This has enabled the Government to significantly increase its social spending, including on education, health and social security. Social spending for health, education, social security and housing in the national budget increased from 9.5 percent of GDP in 2003 to 15.5 percent of GDP in 2013. Overall social spending (by the national, provincial and municipal governments) rose to around 27.7 percent of GDP by 2009". Cephas Lumina, Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, Cephas Lumina, *Addendum: Mission to Argentina* (18–29 November 2013), UN Doc A/HRC/25/50/Add.3 (2014), para 21. Importantly enough, similar considerations apply for the case of Ecuador. See Lumina, *Sovereign Debt*… Op. Cit., p. 179.
[2148] The Heavily Indebted Poor Countries Initiative (HIPC) and the Multilateral Debt Relief Initiative (MDRI) both share the aim of forgiving, restructuring, and/or rescheduling the multilateral debt of a particular group of eligible countries. See Gamarra, Pollock and Primo, Debt Relief to Low Income Countries: A Retrospective and A/HRC/23/37 para 1-9. According to the IMF, 39 countries "have been found eligible or potentially eligible for debt relief under (…) the HIPC initiative" with a cost of USD 76 billion. See International Monetary Fund, "Debt Relief under the Heavily Indebted Poor Countries (HIPC) Initiative, available at https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/11/Debt-Relief-Under-the-Heavily-Indebted-Poor-Countries-Initiative [last accessed 2.5.2021].
[2149] See A/HRC/23/37 paras 26 and 30. See also Jesús Crespo and Gallina Andronova, Debt Relief and Education in Heavily Indebted Poor Countries in Carlos Primo and Dörte Dömeland (Eds.), *Debt Relief and Beyond*. The World Bank (2009) and Tim Jones, Sovereign Debt and the Right to Health in Ilias Bantekas and Cephas Lumina (Eds.), *Sovereign Debt and Human Rights*. Oxford University Press (2018), p. 219. Nevertheless, it is noteworthy that these positive effects

to the positive effects that sovereign defaults entail on said rights[2150]. However, as was true in the case of the suitability test under the ECHR, the state would need to justify how the *concrete* implementation of both measures would allow it to enhance their satisfaction.

Consequently, following from the above, I submit here that it is highly likely that both measures can be considered as satisfying the suitability test from the perspective of the ECHR. The same is not true from the perspective of international investment law, if citizens' "social" rights are taken as the competing principle whose satisfaction is being scrutinized. In that context, since the policy choices of the sovereign are not treated with the deference which characterizes the ECHR, the state would have to present strong evidence to be successful in said regard. In particular, it would need to justify the positive impacts of both measures on the conclusion of the renegotiation and on the renegotiation and the enjoyment of "social" rights.

6.2. The "Necessity" Test

If the state is successful in arguing that both measures satisfy the "suitability" test, the analysis needs to advance to the discussion of the second "rule" of proportionality (i.e., "necessity"). As previously indicated, "necessity" "requires that of two broadly equally suitable means, the one which interferes less intensively should be chosen"[2151].

Thus, determining whether both the "stay" and the "cram down" comply with the necessity test requires, first and foremost, assessing how detrimental both measures are from the perspective of creditors' interests. Three different methodologies can be used for that purpose.

To start with, the severity of both measures could be assessed from the perspective of the "haircut" to which creditors are subjected after a restructuring is completed. In this context, the larger the haircut, the more severe both measures could be considered. Nevertheless, I decided to discard this methodology for three reasons. First, it is not possible to implement it abstractly. In other words, its application requires knowing beforehand the specific size of the "haircut" in a particular restructuring event. Since in this *Chapter* PA is being conducted with a certain level of generality, this technique is not apt for its purposes. Second, as discussed above[2152], there are at least two different methodologies for measuring the size of a "haircut". Of note, the ECtHR seems to prefer

---

have also been questioned in the literature, see for example, Nicolas Depetris and Aart Kraay, *What has 100 Billion Dollars Worth of Debt Relief Done for Low-Income Countries?*, International Finance, University Library of Munich, Germany (2005).

[2150] For example, Lora and Olivera study a sample of 58 developing countries for the period 1958-2003 finding that high debt to GDP ratios have a significant negative effect on social expenditures, which is particularly more severe for the cases of health and education. At the same time, they highlight that sovereign defaults have a positive effect on the total expenditure on "social" rights of indebted states. See Eduardo Lora and Mauricio Olivera, *Public Debt and Social Expenditure*: *Friend or Foes?* (2006) available at https://publications.iadb.org/en/publication/10725/public-debt-and-social-expenditure-friends-or-foes [last accessed 22.12.2021].

[2151] Alexy, *A Theory*… Op. Cit., p. 398.

[2152] See subsection 5.1.1.1. of this *Chapter*.

only one, that being the technique calculating creditors' losses by comparing the NPV of the "new" bonds and the secondary market value of the "old" ones[2153]. If this technique is preferred, and the value of the restructured bonds exceed that of the "old" ones (as is usually the case), no impairment of creditors' interests will be found. Finally, if severity is measured, exclusively, from the perspective of the "haircut", it would not be possible to capture the detrimental effect of both measures separately. In other words, although both measures have different consequences from the perspective of creditors' rights, using the "haircut" criterion on its own will obscure the results for each measure.

Admittedly, some of those problems can be solved if creditors' economic losses are used as a complement and not as the exclusive criterion in this regard. Nevertheless, in order to simplify the analysis, I decided to set this issue aside by assuming: (a) that creditors' losses are to be measured by comparing the NPV of the restructured bonds and the secondary market value of the "old" instruments; and that (b) the difference between the two is not significant enough. Through said assumptions it is possible to capture the specific differences of both measures from the particular perspective of creditors' rights.

In the second methodology, the severity of the "stay" and the "cram down" can also be analyzed from the perspective of market preferences. Particularly, their negative effects on creditors' interests could be captured by investigating the extent to which the rights affected by both measures are valued by investors. On the one hand, one could compare the difference between the value of bonds with and without individual enforcement rights as a proxy for the negative effects of the "stay". On the other hand, one could repeat said procedure, and compare bonds with and without third generation CACs in the case of the "cram down". Nevertheless, as was the case with the "haircut" alternative, this is not a suitable methodology. Particularly, though the empirical evidence is scant, from the specific perspective of market valuation, there seems to be no significant difference in prices between the two pairs of instruments previously discussed[2154]. What is more, the evidence seems to suggest that bonds featuring third generation CACs are traded at a premium when compared to bonds with "older" renegotiation provisions[2155]. The aforementioned suggests that creditors tend to prefer orderly restructurings over disorderly defaults[2156]. Consequently, if this technique was used, no negative effect on creditors' interests would be found[2157].

[2153] See subsection 5.2. of this *Chapter*.

[2154] For the case of the comparison of bonds with and without individual enforcement rights see Sonke Haseler, *Individual Enforcement Rights in International Sovereign Bonds* (2008), available at https://mpra.ub.uni-muenchen.de/11518/1/MPRA_paper_11518.pdf [last accessed 19.3.2020].

[2155] See Mattia Picarelli, Aitor Erce and Xu Jiang, *The Benefits of Reducing Holdout Risk: Evidence from the Euro CAC Experiment 2013-2018*, Working Paper Series (2018), and Elena Carletti et al., *The Price of Law: The Case of the Eurozone's Collective Action Clauses*, The Review of Financial Studies (2020).

[2156] Carletti et al., *The Price of Law*… Op. Cit., p. 6.

[2157] Applying these considerations into the valuation of damages in the context of sovereign debt litigation, see Theresa Arnold, Mitu Gulati and Ugo Panizza, *How to Restructure Euro Area Sovereign Debt in the Era of Covid-19*, 15 Capital Markets Law Journal 3, pp. 344 et seq.

Finally, the severity of the measures can also be discussed from the perspective of their effects on creditors' contractual rights. I decided to use this criterion, which – as will be discussed – can be considered the most appropriate one. Methodologically, I apply this criterion by following Canale and Tuzet's proposal. Notably, I will use the results obtained in this subsection when applying Alexy's weight formula in the last stage of PA (i.e., proportionality "stricto sensu") in subsection 6.3.

6.2.1. The Degree of Impairment of the "Stay" and the "Cram Down" on Creditors' Interests: Canale and Tuzet

As previously indicated (see subsection 2.1.1.1), for the purposes of "measuring" the severity of a measure, Canale and Tuzet propose to recur to an argument "from comparative consequence". This type of argument requires comparing the detrimental effects of the measures under scrutiny (in this case, of the "stay" and the "cram down") with those of another hypothetical alternative. Then, the scale proposed by Alexy, and its numerical "illustrations" can be used. This is to be done by ranking the measures (ordinally and through argumentation) from the least severe ("light") to most severe ("serious"), including a middle point between both (i.e., a "moderate" interference).

Consequently, for the purposes of applying Canale and Tuzet's proposal, it is necessary to posit another measure and then compare the three using the scale. As can be noted, by doing this, it is possible to obtain the position of each of them on Alexy's scale. For these purposes, I propose using another alternative, arguably equally suitable to achieving debt sustainability and enhancing the enjoyment of citizens' "social" rights (the goal of the "stay" and of the "cram down"). This alternative corresponds to an outright repudiation of the debt.

Notably, through a repudiation, the indebted state simply "rejects its obligation to pay"[2158]. This measure is aimed at "annihilating the creditors' claims"[2159]. Therefore, depending on the specificities of the legal system governing the instruments, a repudiation may be able to completely wipe out the state's debt. Of note, the measure disregards creditors' consent in its entirety: it can clearly be characterized as a unilateral and coercive measure imposed by the state which alters the terms of the bonds and their legal framework.

Before deploying the argument "from comparative consequence", let me justify why I chose to exclude other, undoubtedly less severe measures which could also have been considered in this context. First, I decided to exclude a renegotiation conducted without the imposition of any measure other than an offer communicated by the state to its creditors. The reasons for ignoring this measure in the analysis relate to the fact that it would not be capable of achieving a restructuring in most cases. The "hold-out" and the "race to the courthouse" problems apply in that context with particular force[2160]. Secondly, the analysis also omits from the comparison a restructuring conducted exclusively under the terms of the instruments (assuming that a significant part of the

[2158] See Julianne Ams et al., *Sovereign Default*… Op. Cit., p. 279.
[2159] Waibel, *Sovereign*… Op. Cit., pp. 287-288.
[2160] For a discussion of these problems, see *Chapters Three* and *Four*.

debt-stock of the state is composed by first generation CACs). The same problems noted for the case of a "restructuring" without CACs also apply here. Therefore, those alternatives were excluded since, unlike the "stay", the "cram down" and a "repudiation", they would not in principle be suitable for achieving a debt restructuring. In other words, a renegotiation without CACs and a renegotiation conducted under first generation CACs would most likely not be successful[2161]. Thus, it would not provide the state with the debt relief needed to achieve a sustainable debt burden and/or to enhance the enjoyment of citizens' "social" rights. In short: the aforementioned alternatives were not considered since they would probably fail the "suitability" test.

Now, we may determine the corresponding intensities of interference with creditors' interests of each measure. Let me start with the "stay". Taking the "stay", the "cram down" and the "repudiation" together, it is clear that the "stay" is the least severe of the trio. As previously indicated, this measure simply halts enforcement for a prudential period. Additionally, the "stay" is merely intended to allow the operation of CACs (which I assumed were incorporated into the instruments). Taken together, those features drastically separate this measure from the others. Although the "stay" may deprive creditors of one right in their "bundle", defraud their legitimate expectations, or be considered to entail "forceful" conditions for renegotiation, it clearly exhibits a lesser degree of impairment of creditors' interests. In short, in contrast with the other measures, the only right the "stay" would deprive creditors of would be the "right to litigate", as was previously discussed. Consequently, I submit here that the "stay" can be ranked, using Alexy's triadic scale, as a "light" interference with investors' interests.

Moreover, I submit that the "cram down" is located in the ranking between the "stay" and a "repudiation". As was previously discussed, through the "cram down", the state requests the consent from a supermajority of creditors to: (a) amend the instruments, incorporating third-generation CACs, and to (b) modify the payment terms of the contracts (including maturity, principal and interest). If the "cram down" vote is successful, the bonds are deemed to be modified, and their terms are considered to be amended. As can be noted, the "cram down" is more detrimental from the perspective of creditors' interests (backed by the guarantee against expropriation, the FET standard and the protection of the "peaceful enjoyment of possessions") than the "stay". While the "stay" merely halts litigation, the "cram down" incorporates a restructuring mechanism not previously envisioned by creditors at the time the investment was made. Furthermore, the success and the "rationale" of the "stay" depends on the bonds including CACs, whereas the "cram down" directly inserts those provisions in the contracts.

For the same reasons, I submit that the effects of the "cram down" on creditors' interests are not as severe as those which a "repudiation" entails. As previously noted, a

[2161] At the same time, even if those renegotiation strategies are successful, the analysis put forward here assumes that they will not be as effective as a restructuring concluded with the help of the "stay" or the "cram down". In other words, restructurings conducted without CACs or only through first generation CACs would not be as suitable as those performed through the "stay" or the "cram down".

"repudiation" simply abrogates all of creditors' rights over the instruments. Instead of inserting new terms into the contracts, through a "repudiation", the state directly eliminates its debt, leaving its creditors with nothing, not even with a claim at their disposal. Clearly, and also from the point of view of "coercion", a "repudiation" can be considered as the most severe of the three measures previously mentioned.

Stemming from the above, I propose that the aforementioned measures can be ordered on an ascendent scale regarding the severity with which they impair creditors' interests. Of note, these results can be applied to investment guarantees (i.e., the protection against expropriation and to a fair and equitable treatment) and to the ECHR's protection of the right to property. Thus, the "stay" is the least severe, amounting to a "light" interference. The "cram down" is found between the "stay" and a "repudiation", corresponding to a "moderate" interference. Finally, a "repudiation" is the most severe of the trio, entailing a "severe" interference with creditors' interests.

The following table summarizes these findings:

Measure	Main Features	Ordinal Ranking (Alexy; Canale/Tuzet)
Stay	Deprives creditors of the possibility of enforcing their claims for a limited period.	"light" ("l")
Cram down	Inserts third-generation CACs retroactively on the bonds at stake. It deprives creditors of the possibility of individually rejecting the sovereign's offer. If successfully imposed, its effects are permanent.	"moderate" ("m")
Repudiation	Simply abrogates creditors' rights altogether. The state eliminates its debt through a sovereign act.	"serious" ("s")

Table 13: Severity of the Interferences of Each Measure on Creditors' Rights.

6.2.2. Can the "Stay" and the "Cram Down" Pass the Necessity Test?

Whether the "stay" and the "cram down" pass the necessity test depends on whether there are other "suitable" alternatives promoting the enjoyment of "social" rights in the context of international investment law (or the "public interest", under the ECHR) to the same degree which are less stringent.

While applying Canale/Tuzet's methodology, I discarded from the assessment two other measures to which the state could recur to restructure its debt. The first corresponded to a renegotiation without the use of CACs. The second referred to a renegotiation relying exclusively on first-generation CACs. In that context, I posited that due to "holdout" and "race to the courthouse" problems, those measures would not be suitable for the achievement of a debt restructuring in most cases. For the same reason, they would also not be suitable to promote the enjoyment of "social" rights (or the public interest). Consequently, I eliminated both measures, and I was left with three suitable measures. Ordered from the least severe to the most severe, these measures are the "stay", the "cram down" and a "repudiation".

Undoubtedly, the "stay" would, "prima facie", pass the necessity test. The case is not as straightforward, however, for the "cram down". Whether it conforms to the necessity test will depend on if it can be considered: (a) more capable of achieving a debt

restructuring than the "stay" and (b) more capable of procuring the state a more significant degree of debt relief than the "stay". In short, despite interfering with creditors' interests to a more severe degree, the "cram down" will pass the test if it enhances the enjoyment of the competing principles to a greater extent than the "stay".

Therefore, as was the case with the "suitability" rule, it is not possible to determine, *a priori*, whether the "cram down" will pass the necessity test. However, several arguments assisting the state on this point can be enunciated. First, the state could justify that the "cram down" is the only suitable means to achieve a restructuring in certain contexts. This will be true in cases where "holdout" creditors control a blocking position, and the bonds feature first-generation CACs. In those cases, the "stay" would not be capable of contributing to the success of the restructuring. Secondly, the state could also argue that through the "cram down" it will be able to obtain a more significant degree of debt relief from bondholders. In this latter case, the "cram down" will pass the necessity test since the alternative (i.e., the "stay"), although less severe, would not be equally capable of enhancing the enjoyment of citizens' "social" rights or achieving debt sustainability to the same degree that the "cram down" would. Finally, the same considerations regarding the "margin of appreciation" doctrine also apply here for the context of the "necessity" test from the perspective of the ECHR.

6.3. Proportionality in the Narrow Sense

Now is the time to subject both measures to the last stage of PA: proportionality in the narrow sense. I have already discussed the particularities of this phase from Alexy's perspective. However, it is important to reiterate that he operationalizes this stage through his "weight formula", which "illustrates" how proportionality "stricto sensu" works.

As is well known, in its complete form, the weight formula compares the concrete weight ($W_{i,j}$) of two constitutional principles (P_i and P_j) in a particular case. The formula requires analyzing the intensity of the interference of the measure on one of the principles (I_i) and the importance of satisfying the competing principle (I_j). It also requires determining the abstract weight of both principles (W_i and W_j) as well as the "reliability" of the corresponding empirical assumptions made (R_i and R_j)[2162]. The formula posits basic arithmetical operations (multiplication and division) which are to be performed over the variables. In short, the formula is given by:

$$W_{i,j} = \frac{I_i * W_i * R_i}{I_j * W_j * R_j}.$$

As previously discussed, Alexy suggests a system of scales for measuring the intensity of the interference with one principle (i.e., I_i), the degree of importance of satisfying the competing principle (i.e., I_j) and the reliability of the empirical assumptions (i.e., R_i and R_j). He proposes measuring the two first variables (i.e., I_i and I_j) through a "triadic" scale, arranged in ascending order, including "light" ("l"), "moderate" ("m") and "serious"

[2162] See Alexy, *On Balancing*… Op. Cit. at. p. 446

("s") degrees of interference/importance[2163]. To facilitate the analysis, Alexy proposes assigning numbers to each magnitude of the scale following a geometric sequence: 2^0 (i.e., 1) for "l", 2^1 (i.e., 2) for "m" and 2^2 (i.e., 4), for "s"[2164].

At the same time, he also proposes a triadic scale for measuring the "reliability" of the empirical assumptions taken (i.e., R_i and R_j). As stated before, these last variables concern "what the measure in question means" from the perspective of the realization and non-realization of the constitutional principles at stake[2165]. Alexy organizes "reliability" in a descending ranking from "certain or reliable" ("r", 2^0=1), "maintainable or plausible" ("p", $2^{-1} = \frac{1}{2}$) to "not evidently false" ("e", $2^{-2} = \frac{1}{4}$)[2166].

Finally, after the assessment is completed and each of the variables of the formula are determined, Alexy indicated that it is possible to "illustrate" the outcome of balancing. Hence, for Alexy's account, if $W_{i,j} > 1$, then P_i takes precedence over P_j (i.e., the measure is "disproportional"). If, on the contrary, $W_{i,j} < 1$, then the competing principle (i.e., P_j) takes precedence[2167] (i.e., the measure is "proportional"). If $W_{i,j} = 1$, then balancing cannot determine the outcome and the decision is discretionary[2168].

However, and this cannot be stressed too much, the weight formula and the numbers to be assigned to the variables, serve only as an "illustration" of how the "Law of Balancing" and proportionality "stricto sensu" work. In other words, the simple mathematical operations included in this subsection do not replace the argumentative steps that have already been taken, and which will continue to be refined here.

Hitherto, and from the formula's perspective, I have only clarified the magnitude of one of the variables pertaining to the "stay" and the "cram down". In effect, I have already indicated that the interference of the "stay" on creditors' interests amounts to a "light" interference ("l", $2^0 = 1$). At the same time, I have also posited that the "cram down" entails a "moderate" intromission with the same interests ("m", $2^1 = 2$).

Nevertheless, there are several missing variables which need to be discussed before reaching the point at which the formula can be applied. These variables are the following. First, it is necessary to discuss the importance of satisfying citizens' "social" rights and the "public interest" (i.e., I_j). Second, the "reliability" of the empirical premises (i.e., R_i and R_j) must also be addressed. Finally, the weight of both principles (W_i and W_j) from the perspective of the international legal order needs to be tackled. Thus, before deploying the last stage of the analysis, I proceed to discuss each of them in this same order.

[2163] Notably, said scale can be expanded. See, for example, Klatt and Meister, *The Constitutional…* Op. Cit., p. 12.
[2164] See Alexy, *A Theory…* Op. Cit., pp. 408-410.
[2165] See subsection 2.1 of this *Chapter*.
[2166] See Alexy, *A Theory…*, p. 419 footnote 97.
[2167] Robert Alexy, *A Theory…* Op. Cit. p. 410.
[2168] See Id. See also, Klatt and Meister, *The Constitutional Structure…* Op. Cit., p. 13.

6.3.1. The Importance of Satisfying the Competing Principles: Citizens' "Social" Rights and the "Public Interest"

According to Canale and Tuzet, measuring the degree of importance of satisfying the competing principle (i.e., I_j) in the last stage of PA requires a "counterfactual argument". This entails estimating the negative effects produced on the satisfaction of the competing principles if the measure at stake is found to be "invalid". As stated above, I chose to consider citizens' "social" rights for the case of investment law and the "public interest" for the case of the ECHR.

However, similar challenges to those encountered in the application of the suitability and necessity tests arise here as well. In short, the "counterfactual arguments" to be made in the context of determining the importance of "social" rights and of the "public interest" will depend on the circumstances faced by the indebted state. Said importance will be contingent on the particularities of the crisis, including the levels of public indebtedness, the country's growth forecasts, and the composition of its debt stock. Consequently, defining whether satisfying citizens' "social" rights or fulfilling the "public interest" are of a "light", "moderate", or "serious" importance cannot be done *a priori*.

For those reasons, I decided to conduct the PA that follows using three different scenarios: One under which the importance of the aforementioned competing interests (i.e., I_j) is deemed to be "light" ("l"), another under which it is considered to be "moderate" ("m"), and a final one under which it is estimated to be "serious" ("s"). As will be clarified below, said scenarios will serve to assess the conditions under which both the "stay" and the "cram down" could be considered as compatible with the values enshrined in international investment law and in the ECHR.

6.3.2. The Weight of the Competing Interests

Additionally, the application of Alexy's formula requires determining the abstract weights (i.e., W_i and W_j) of the competing interests[2169]. Of note, in the context domestic balancing, this is to be done considering the "relative social importance"[2170] of the constitutional principles in conflict. In that context, scholars have suggested that the weight of principles can be captured by considering their status in the legal system (including constitutional texts and case-law)[2171], assessing the "society's fundamental perceptions" on their regard[2172] and measuring "the strength of the interests" justifying

[2169] "The abstract weight is the weight that a principle possesses relative to other principles, but independently of the circumstances of any concrete case". Klatt and Meister, *Proportionality*… Op. Cit., p. 690.

[2170] See Aharon Barak, *The Judge in a Democracy*, Princeton University Press (2008), pp. 164 et seq. and Aharon Barak, *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press (2012), pp. 349-350.

[2171] This includes investigating their importance from the perspective of the constitution, distinguishing whether they are protected by the constitutions or by statutes, by assessing the importance given to the principles in the corresponding society and examining the pertinent case-law. See, Barak, *The Judge*… Op. Cit., p. 169; Barak, *Proportionality*… Op. Cit., pp. 349-350 and Silva Sampaio, *Measuring*… Op. Cit., pp. 83-84.

[2172] Barak, *Proportionality*… Op. Cit., p. 359.

them[2173]. Judge Barak suggests one additional criterion, i.e., that of the "internal" relationship of the principles. In his own words: "(…) a right used as a precondition for the realization or act of another right is understood as more socially important"[2174].

To assign weights to the PIL principles I rely on two of the aforementioned criteria: The "status" of the competing principles under international law and their "internal" relationship. To simplify the analysis, I propose to apply both in the following fashion: If the "status" of the principles is clear from the perspective of international law, there will be no need to rely on their "internal" relationship. If this is not the case, then the second criterion takes precedence, and the abstract weight should be assigned through its application.

I begin this discussion with the interaction between the guarantee against expropriation and the satisfaction of citizens' "social" rights under international investment law. First, the relative abstract weight of both principles needs to be assessed from the perspective of the applicable BIT. In this regard, let me assume that the guarantee against expropriation is drafted along the lines of the new treaties following the "mitigated police powers doctrine". Let me recall the relevant text of the United States Model BIT (2012) which provides, in this regard:

> *"Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations"*[2175].

As can be noted, said provision suggests that a greater abstract weight should be given to the legitimate interests pursued through the measure (in this case, "social rights") when compared to the right to property.

Next, the weight of both principles should also be considered from the perspective of the ICESCR. Notably, from the perspective of said Covenant, investment guarantees (including the guarantee against expropriation) can be considered as "retrogressive measures"[2176]. As indicated in *Chapter Two*, for the ICESCR, beyond the "minimum core", "non-retrogression" is not an absolute obligation[2177]. Therefore, states can justify "moving backwards" in ESC rights enjoyment under certain conditions. Nevertheless, the General Comments[2178] highlight that a "strong presumption of impermissibility"

[2173] Silva Sampaio, *Measuring*… Op. Cit., pp. 83-84.
[2174] Barak, *Proportionality*… Op. Cit., p. 361.
[2175] See United States, 2012 Model BIT, Annex B "Expropriation" 4 (a), available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [last accessed 20.4.2021].
[2176] See Goldmann, *Foreign Investment*… Op. Cit., p. 140.
[2177] See *Chapter Two*, pp. 106 et seq.
[2178] The "General Comments" are interpretative statements of the ICESCR put forward by the UN Committee on Economic, Social and Cultural Rights (henceforth, "CESCR"). The main function of said Committee is to monitor the implementation of the obligations contained in the Covenant. It is noteworthy that the General Comments are not legally binding. Nevertheless, the scholarship points out that they can be regarded as "highly persuasive". See Sabine

exists in this regard[2179]. For the particular case of sovereign debt, it should be noted that Art 2(1) of the ICESCR establishes states' commitments to use "the maximum of [their] available resources", which according to the scholarship include funds that may be destined for debt repayment[2180]. As can be noted, the ICESCR also suggests that "social rights" satisfaction ought to be assigned a greater weight when compared to the guarantee against expropriation.

Consequently, I propose to operationalize said considerations by assigning twice the weight to citizens' "social" rights in comparison to creditors' property rights in the context of the guarantee against expropriation (i.e., $W_i = 1;\ W_j = 2$). Admittedly, this is not the only means through which the language of BITs provisions and ICESCR commentaries can be construed, yet it remains a permissible interpretation of both.

Now, let me continue the exposition with the interaction of the FET standard and citizens' ESC rights. On the one hand, FET provisions do not tend to be drafted as "modern" expropriation provisions are. In effect, on a general basis, they lack language favoring public concerns, as do expropriation provisions expressing the "mitigated police powers" doctrine. Rather, FET provisions tend to be characterized by an "open textured" language. On the other hand, the considerations previously posited for the case of the ICESCR apply here as well.

Consequently, we find ourselves in a conundrum. Only one of the texts to be applied to the case seems to clearly establish the precedence of one PIL principle over the other in what pertains to their abstract weight. In other words, the "status" criterion is not conclusive in this regard. On the one hand, the ICESCR suggests that "social" rights are more important. On the other hand, the relevant BIT will remain silent for that particular consideration.

For that reason, I proceed by recurring to the "internal" criterion instead. As previously indicated, this criterion asks whether one of the competing principles may serve as "a precondition for the realization" of the other. Although the relationship between the protection of creditors' and citizens' rights can be presented as a trade-off[2181], I submit here that there are good reasons to frame said interaction in "complementary" terms instead.

Under the latter guise, it can be argued that the protection of creditors' legitimate expectations is fundamental to the satisfaction of citizens' "social" rights. In effect, the literature has highlighted that states' continuous access to capital markets (and thus, the maintenance of their ability to borrow) may be critical to averting budget cuts which

---

Michalowski, *Sovereign Debt*… Op. Cit., p. 40. At the same time, in the words of Manisuli Ssenyonjo, they set out "interpretative positions around which state practice may unite". Ssenyonjo, p. 42.

[2179] See, for example, CESCR, General Comment 13: The right to education (Art 13), UN Doc E/C.12/1999/10 (8 December 1999), para 45.

[2180] See Villaroman, *Debt Servicing*… Op. Cit., pp. 489 et seq and Michalowski, *Sovereign Debt*… Op. Cit., p. 48.

[2181] See, for example, Goldmann, *Foreign Investment*… Op. Cit., pp. 130-131; Lumina, *Sovereign Debt*… Op. Cit., p. 177 and Michalowski, *Sovereign Debt*… Op. Cit., p. 36.

severely impair the provision of public services[2182]. If access to capital markets requires respecting creditors' rights[2183] and access to capital markets is critical for the satisfaction of ESC rights, the latter depends on respecting creditors' interests. At the same time, the satisfaction of ESC rights may be critical for the maintenance of social peace and economic growth, and thus, for protecting property rights[2184].

Consequently, the protection of both sets of interests can be seen as mutually interdependent. For that reason, it would not be possible to give more weight to one of the competing principles over the other. Thus, I propose to assign the same weight to both principles (i.e., $W_i = W_j = 1$) in the context of the interaction of the FET standard and citizens' "social" rights. Notably, a conclusion such as this is not strange under domestic constitutional settings[2185] and, in this case, also intends to advance the notion that both interests have the same importance from the perspective of the international legal order.

Finally, the examination must also be carried out from the perspective of the ECHR. As stated above, under that framework, I chose as the competing principles both the protection of property and the public interest. I submit here that the "status" criterion suggests giving more weight to the "public interest" than to the protection of possessions. One argument suffices to substantiate the point. As previously stated, the "margin of appreciation" doctrine grants states significant leeway in designing and applying their policies. According to scholars, where said doctrine applies, proportionality analysis tends to tilt the balance in favor of the state[2186]. This means that, as a general rule, the public interest will outweigh property rights in the context of the ECHR[2187]. Crucially, this proposition can be reformulated for the purpose of assigning the relative abstract weight to the competing interests at stake. In short: it can be said that the "public interest" has more weight than the right to property. Taking the argument one step further, I propose to operationalize this by assigning twice the

[2182] See, for example, Elson, Balakrishnan and Heintz, Public Finance, Maximum Available Resources and Human Rights in Aoife Nolan et al. (Eds.), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2014), p. 1

[2183] Functionally, if this was not the case, no creditor would be willing to lend in the first place.

[2184] See, generally, Jeffrey Sachs, *Resolving the Debt Crisis of Low-Income Countries*, Brooking Papers on Economic Activity (2002).

[2185] According to Alexy, "(…) in many cases the abstract weights are equal (…)". Alexy, *On Constitutional*… Op. Cit., p. 7.

[2186] In the words of Steven Greer: "it is only in the most extreme cases that the Court is likely to decide that Article 1 of Protocol No. 1 has been violated". Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*. Council of Europe Publishing (2000), p. 13. According to Henckels: "In practice, the ECtHR will only find that the fair balance is upset where a measure's effect on the applicant's property rights is 'manifestly disproportionate'". Henckels, *Indirect Expropriation*… Op. Cit., p. 251. Discussing the problem from the perspective of non-precluded measures under international investment law, see William Burke-White and Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale Journal of International Law 2 (2010).

[2187] See Henckels, *Indirect Expropriation*… Op. Cit., pp. 251-252.

weight to the "public interest" in comparison to creditors' property rights (i.e., $W_i = 1$; $W_j = 2$).

Consequently, considering all of the above, I submit here that the abstract weights of the competing principles to be examined in this section are the following. First, for the case of investment law, I decided to assign "1" to the guarantee against expropriation and "2" to the satisfaction of citizens' "social" rights. Second, and using the same framework, I decided to give the same value to both the guarantee against unfair and inequitable treatment and to ESC rights (i.e., =1). Third, under the ECHR, I decided to assign "2" to the "public" interest and "1" to creditors' property rights. The following table summarizes these considerations:

Framework	Competing Principle (Pi)	Weight (Wi)	Framework	Competing Principle (Pj)	Weight (Wj)
International Investment Law	Guarantee Against Expropriation	1	**ICESCR**	"Social" Rights	2
International Investment Law	FET	1	**ICESCR**	"Social" Rights	1
ECHR	Right to Property	1	**ECHR**	"Public Interest"	2

Table 14: Abstract Weights of the Competing Principles under Different Frameworks.

6.3.3. The Reliability of the Empirical Premises

As stated above, the reliability of the empirical premises taken (i.e., R_i and R_j) regarding the negative (i.e., I_i) and positive effects (i.e., I_j) of both measures on the competing principles also needs to be scrutinized.

Let me first consider the reliability of the degree of impairment that the "stay" and the "cram down" produce on creditors' interests. I submit that, in this case, the solution is straightforward. Clearly, the negative effects which both measures entail can be considered "certain" or "reliable". As previously discussed, said measures alter the legal terms of the instruments, modify the regulatory environment and may subject creditors to a "coercive" renegotiation. Consequently, in both cases, "reliability" (i.e., R_i) corresponds to "r", (i.e., expressed numerically as 2^0=1).

The same is not true for the case of the empirical premises substantiating the importance of satisfying citizens' "social" rights or that of the protection of the public interest (i.e., R_j). As was the case with the "suitability" and "necessity" tests as well as the discussion regarding the "importance" of the competing principles, it is difficult to assess, *a priori*, the degree of "reliability" of the premises in this context. The considerations discussed for said cases apply here as well. For that reason, I decided to consider different scenarios while applying the weight formula, as I did for the "importance" of the satisfaction of the public and citizens' interests. In said scenarios, "reliability" for R_i can take the three magnitudes suggested by Alexy, including "certain or reliable" ("r", 2^0=1), "maintainable or plausible" ("p", $2^{-1} = \frac{1}{2}$) and "not evidently false" ("e", $2^{-2} = \frac{1}{4}$)[2188].

[2188] See Alexy, *A Theory*… Op. Cit., p. 419 footnote 97. Importantly enough, I do not discuss the problems related with judicial discretion and with the margin of appreciation granted to the

6.3.4. The Conditions Under Which the "Stay" and the "Cram Down" Can be Considered Proportional

Now is the time to complete the last stage of PA. The arguments previously provided, relating to the degree of demotion (i.e., I_i), the degree of importance (i.e., I_j), the weights (i.e., W_i and W_j) and "reliability" (i.e., R_i and R_j) serve as critical inputs for said purpose.

In particular, I have already determined: (a) the intensity of the interference on creditors' interests which the "stay" and the "cram-down" entail (i.e., I_i); (b) the "reliability" of the empirical premises connected to said degrees of interferences (i.e., R_i); and (c) the "weight" of the aforementioned interests in the light of the international legal order (i.e., W_i and W_j).

However, I noted the complications related to the assessment of the degree of importance of satisfying the rights being promoted (i.e., of I_j). Let me recall that, for the purpose of this discussion, said rights correspond to citizens' "social" rights and that under the ECHR they are manifested through the "public interest". At the same time, I also noted the problems pertaining to assigning magnitudes to the "reliability" of the effects which the measures entail (i.e., to R_j). Considering said difficulties, I decided to analyze different scenarios to determine the conditions that the "stay" and the "cram down" need to comply with to be deemed proportional.

Crucially, under the simplified version of Alexy's framework, I_j and R_j can only take one of three different values ("light", "moderate" and "serious" for I_j; and "reliable", "plausible" and "not evidently false" for R_j). For that reason, I will consider nine different combinations between said variables for evaluation in the following PA. The next table summarizes the nine scenarios (for the interaction of each principle) which will be discussed in detail:

Importance of Satisfying "Social" Rights (guarantee against expropriation)	**Reliability of Empirical Premises**		
Light	Not Evidently False	Plausible	Certain
Moderate	Not Evidently False	Plausible	Certain
Serious	Not Evidently False	Plausible	Certain
Importance of Satisfying Citizens' "Social" Rights (FET Standard)	**Reliability of Empirical Premises**		
Light	Not Evidently False	Plausible	Certain
Moderate	Not Evidently False	Plausible	Certain
Serious	Not Evidently False	Plausible	Certain
Importance of Satisfying the "Public Interest" (Peaceful Enjoyment of Possessions)	**Reliability of Empirical Premises**		
Light	Not Evidently False	Plausible	Certain
Moderate	Not Evidently False	Plausible	Certain
Serious	Not Evidently False	Plausible	Certain

Table 15: The Scenarios to be Discussed for Determining the Conditions which both Measures Need to Comply with to be Considered Proportional.

Therefore, now it is possible to conduct the last test of PA using Alexy's weight formula. I begin by discussing both measures from the perspective of the guarantee against

legislature or to the host-state. For a discussion of those points and their relationship with "reliability", see Klatt and Meister, *Proportionality…* Op. Cit., p. 111.

expropriation. I continue by analyzing both from the perspective of the FET standard and conclude the analysis by assessing them in the light of the ECHR.

6.3.4.1. The "Stay" and the "Cram Down" from the Perspective of the Interaction Between the Guarantee Against Expropriation and Citizens' ESC Rights

As previously discussed, Alexy's weight formula is given by:

$$W_{i,j} = \frac{I_i * W_i * R_i}{I_j * W_j * R_j}.$$

Let me start with the "stay". Replacing the already known values for this measure it is possible to obtain:

$$W_{i,j} = \frac{1 * 1 * 1}{I_j * 2 * R_j}.$$

Simplifying the results, I obtain the two variables which are still to be considered, namely the importance of satisfying citizens' "social" rights (i.e., I_j) and the "reliability" of its empirical premises (i.e., R_j). Accordingly, this is expressed as:

$$W_{i,j} = \frac{1}{I_j * 2 * R_j}$$

As stated above, the "stay" will be considered proportional if the "concrete" weight of citizens' "social" rights exceeds that of creditors' property rights (if P_j outweighs P_i on the particular case, i.e., if $W_{i,j} < 1$). In turn, the measure will fail the proportionality "stricto sensu" test if the contrary is true (i.e., if $W_{i,j} > 1$). At the same time, a "stalemate" will be found if neither of them outweighs the other (i.e., if $W_{i,j} = 1$).

The latter point deserves further clarification before I proceed to the application of Alexy's weight formula. In effect, I decided to leave open the question relating to "stalemate" cases and states' liability. As stated above[2189], in this type of case, balancing does not determine the outcome[2190]. For that reason, the literature notes that under domestic constitutional settings, stalemate cases ought to be decided favoring the legislators' decision[2191]. Although a part of the scholarship indicates that the same

[2189] See subsection 2.1.

[2190] Alexy, *A Theory*… Op. Cit., p. 410; Alexy, *On Balancing*… Op. Cit., p. 443.

[2191] See, for example, Robert Alexy, *Constitutional Rights and Proportionality*, 22 Journal for Constitutional Theory and Philosophy of Law (2014), p. 55; Robert Alexy, *On Constitutional Rights to Protection,* 3 Legisprudence 1 (2009), pp. 15-16; Robert Alexy, *Balancing, Constitutional Review and Representation*, 3 I-CON 4 (2005), p. 580; Moreso, *Ways of Solving*… Op. Cit., p. 37; Klatt and Meister, *The Constitutional*… Op. Cit., p. 80 and Paula Gorzoni, *Structuring Balancing within Rational Standards? The Data Screening Case,* 14 Revista Brasileira de Direito 2 (2018), p. 59. In the words of Virgilio Alfonso da Silva: "(…) if in stalemate situations balancing does not determine a result, because the trade-offs are equivalent for several answers to a given constitutional issue, courts thus cannot claim to have a better answer than the legislator (even if the court's hypothetical answer is different from the actual one, i.e., the legislator's decision). Virgilio Alfonso Da Silva, *Comparing the Incommensurable*, 31 Oxford Journal of Legal Studies (2011), p. 292.

reasoning should be extrapolated to investment disputes, the case-law remains unclear on this point[2192]. For that reason, it is questionable whether states' will be successful in avoiding liability in "stalemate" cases in the context of international investment law[2193]. Thus, the most straightforward answers can be found where the "stay" is either considered "proportional" or "disproportionate".

In short, whether the "stay" complies with the last stage of PA can be "illustrated" by calculating the missing values of the formula for this particular measure. As previously indicated, said values correspond to the importance of satisfying citizens' "social" rights (i.e., I_j) and to the reliability of the empirical premises (i.e., R_j). Notably, this is to be done assuming that both variables can only take the values already advanced by Alexy under his "simplified" system of scales. Again, let me recall that the first variable (i.e., I_j) can only assume the following magnitudes: for "light" interferences (i.e., "l"), 2^0=1; for "moderate" interferences, (i.e., "m"), 2^1=2; and for "serious" interferences, (i.e., "s"), 2^2=4. At the same time, the second variable (i.e., R_j) can only assume the following magnitudes: for certain effects (i.e., "r"), 2^0=1; for "plausible" effects, (i.e., "p"), $2^{-1} = \frac{1}{2}$ and for "not evidently false" premises (i.e., "e"), $2^{-2} = \frac{1}{4}$. Thus, combining both variables and considering that the weight of citizens' "social" rights is twice that of investors' interests in this context, it possible to posit that:

(a) The "stay" will fail the last stage of the proportionality test only if ($I_j = "l" = 1$; $R_j = "e" = 1/4$)
(b) A "stalemate" (i.e., $W_{i,j} = 1$) will be obtained when the following pairs are obtained: ($I_j = "l" = 1$; $R_j = "p" = 1/2$); ($I_j = "m" = 2$; $R_j = "e" = 1/4$).
(c) The "stay" will be considered proportional if both variables take the following magnitudes at the same time: ($I_j = "l" = 1$; $R_j = "r" = 1$); ($I_j = "m" = 2$; $R_j = "r" = 1$); ($I_j = "m" = 2$; $R_j = "p" = 1/2$); ($I_j = "s" = 4$; $R_j = "r" = 1$); ($I_j = "s" = 4$; $R_j = "p" = 1/2$); ($I_j = "s" = 4$; $R_j = "e" = 1/4$).

As expected, the chances of finding that the "stay" is proportional under the last test of PA increases with the importance of satisfying citizens' "social" rights and with the reliability of the empirical premises guiding the analysis. Of note, the "stay" will pass this last stage if:

(1) The importance of satisfying citizens' "social" rights is deemed to be "serious", regardless of the reliability of the empirical premises,
(2) The importance of satisfying ESC rights is deemed to be "moderate", and the empirical premises are judged to be "certain" or "plausible" and if;
(3) The importance of satisfying ESC rights is considered to be "light" and there is certainty regarding the positive effects of both measures (i.e., the empirical premises are "certain").

[2192] See, for example, Henckels, *Indirect Expropriation*… Op. Cit.
[2193] The same is not true for the case of the ECHR. See subsections 6.1 and 6.2 above.

Consequently, I submit here that if the state is in financial distress, and if the resolution of the crisis requires restructuring the debt, then it is probable that an investment tribunal applying PA following Alexy's methodology will consider that the "stay" complies with proportionality "stricto sensu". Therefore, it is likely that investors' expropriation claims against a state imposing a "stay" will fail. Notably, the importance of satisfying citizens' "social" rights increases with the magnitude of the crisis and with the state's budget constraints. Nevertheless, this will not exempt the state from justifying that the aforementioned conditions are complied with. Crucially, the arguments put forward in the context of the "suitability" (subsection 6.1) and "necessity" tests (subsection 6.2) may help the state in that regard.

Now, let me continue the analysis with the "cram down". As with the "stay", this measure will be considered proportional if $W_{i,j} < 1$ and a "stalemate" will be found if $W_{i,j} = 1$. Replacing the already known values for the case of this measure it is possible to obtain:

$$W_{i,j} = \frac{2*1*1}{I_j*2*R_j}.$$

Again, whether this measure complies with the third step of the proportionality test will depend on the magnitudes that I_j and R_j report. Reiterating the same operation conducted for the case of the "stay", I obtain that:

(a) The "cram down" will fail the test, i.e., $W_{i,j} > 1$, if $(I_j = "l" = 1;\ R_j = "p" = 1/2)$, $(I_j = "l" = 1;\ R_j = "e" = 1/4)$ and if $(I_j = "m" = 2;\ R_j = "e" = 1/4)$.
(b) A "stalemate" (i.e., $W_{i,j} = 1$) will be found when the following pairs are considered as true: $(I_j = "l" = 1;\ R_j = "r" = 1)$, $(I_j = "m" = 2;\ R_j = "p" = 1/2)$ and if $(I_j = "s" = 4;\ R_j = "e" = 1/4)$
(c) The "cram down" will be considered proportional if: $(I_j = "m" = 2;\ R_j = "r" = 1)$; $(I_j = "s" = 4;\ R_j = "r" = 1)$ and if $(I_j = "s" = 4;\ R_j = "p" = 1/2)$.

As can be noted, the "cram down" will pass this stage of the proportionality test only if the importance of satisfying citizens' "social" rights is considered "moderate" and the reliability of the premises is "certain" and if said importance is deemed to be "serious" and the reliability of the premises can be judged to be either "certain" or "plausible". Again, the state will be called upon to justify the interference with creditors' property rights and the arguments previously posited may assist it in this regard.

The following tables summarize the results for both the "stay" and the "cram down" in the context of the guarantee against expropriation[2194].

[2194] The design of these and of the following tables is inspired by the tables presented in Georgeta-Bianca Spirchez and Nicolae Barsan-Pipu, *About the Fair Balance of Competing Rights in the Context of the COVID-19 Pandemic*, 16 Transylvanian Review of Administrative Sciences (2020), p. 117.

The "Stay" in the Context of the Guarantee Against Expropriation

P_i: Creditors' Property Rights				P_j: Citizens' "Social" Rights				Balancing Outcome
I_i	W_i	R_i	$\prod i$	I_j	W_j	R_j	$\prod j$	$W_{i,j} = \frac{I_i * W_i * R_i}{I_j * W_j * R_j} = \frac{\prod i}{\prod j}$
"I" $2^0 = 1$	=1	"r" $2^0 = 1$	= 1	"I" $2^0 = 1$	$= 2$	"r" $2^0 = 1$	2	**Proportional** $W_{i,j} = 1/2$
				"I" $2^0 = 1$	$= 2$	"p" $2^{-1} = \frac{1}{2}$	1	**Stalemate** $W_{i,j} = 1$
				"I" $2^0 = 1$	$= 2$	"e" $2^{-2} = \frac{1}{4}$	$\frac{1}{2}$	**Disproportionate** $W_{i,j} = 2$
				"m" $2^1 = 2$	$= 2$	"r" $2^0 = 1$	4	**Proportional** $W_{i,j} = 1/4$
				"m" $2^1 = 2$	$= 2$	"p" $2^{-1} = \frac{1}{2}$	2	**Proportional** $W_{i,j} = 1/2$
				"m" $2^1 = 2$	$= 2$	"e" $2^{-2} = \frac{1}{4}$	1	**Stalemate** $W_{i,j} = 1$
				"s" $2^2 = 4$	$= 2$	"r" $2^0 = 1$	8	**Proportional** $W_{i,j} = 1/8$
				"s" $2^2 = 4$	$= 2$	"p" $2^{-1} = \frac{1}{2}$	4	**Proportional** $W_{i,j} = 1/4$
				"s" $2^2 = 4$	$= 2$	"e" $2^{-2} = \frac{1}{4}$	2	**Proportional** $W_{i,j} = 1/2$

Table 16: Numerical Illustration of PA Applied to the "Stay" in the Context of the Guarantee Against Expropriation.

The "Cram-Down" in the Context of the Guarantee Against Expropriation

P_i: Creditors' Property Rights				P_j: Citizens' "Social" Rights				Balancing Outcome
I_i	W_i	R_i	$\prod i$	I_j	W_j	R_j	$\prod j$	$W_{i,j} = \frac{I_i * W_i * R_i}{I_j * W_j * R_j} = \frac{\prod i}{\prod j}$
"m" $2^1 = 2$	=1	"r" $2^0 = 1$	= 2	"I" $2^0 = 1$	$= 2$	"r" $2^0 = 1$	2	**Stalemate** $W_{i,j} = 1$
				"I" $2^0 = 1$	$= 2$	"p" $2^{-1} = \frac{1}{2}$	1	**Disproportionate** $W_{i,j} = 2$
				"I" $2^0 = 1$	$= 2$	"e" $2^{-2} = \frac{1}{4}$	$\frac{1}{2}$	**Disproportionate** $W_{i,j} = 4$
				"m" $2^1 = 2$	$= 2$	"r" $2^0 = 1$	4	**Proportional** $W_{i,j} = 1/2$
				"m" $2^1 = 2$	$= 2$	"p" $2^{-1} = \frac{1}{2}$	2	**Stalemate** $W_{i,j} = 1$
				"m" $2^1 = 2$	$= 2$	"e" $2^{-2} = \frac{1}{4}$	1	**Disproportionate** $W_{i,j} = 2$
				"s" $2^2 = 4$	$= 2$	"r" $2^0 = 1$	8	**Proportional** $W_{i,j} = 1/4$
				"s" $2^2 = 4$	$= 2$	"p" $2^{-1} = \frac{1}{2}$	4	**Proportional** $W_{i,j} = 1/2$
				"s" $2^2 = 4$	$= 2$	"e" $2^{-2} = \frac{1}{4}$	2	**Stalemate** $W_{i,j} = 1$

Table 17: Numerical Illustration of PA Applied to the "Cram Down" in the Context of the Guarantee Against Expropriation.

6.3.4.2. The "Stay" and the "Cram Down" from the Perspective of the Interaction Between the FET standard and Citizens' ESC Rights

Now, the same procedure needs to be reiterated from the perspective of the FET standard. To avoid repetition, let me briefly summarize the findings in this regard as follows.

First, in what pertains to the "stay":

(a) The "stay" will be considered disproportionate if: $(I_j = "l" = 1;\ R_j = "p" = 1/2)$; $(I_j = "l" = 1;\ R_j = "e" = 1/4)$; and if $(I_j = "m" = 2;\ R_j = "e" = 1/4)$.
(b) A "stalemate" (i.e., $W_{i,j} = 1$) will be obtained when the following pairs are obtained: $(I_j = "l" = 1;\ R_j = "r" = 1)$; $(I_j = "m" = 2;\ R_j = "p" = 1/2)$ and $(I_j = "s" = 4;\ R_j = "e" = 1/4)$.
(c) The "stay" will be considered proportional if both variables take the following values at the same time: $(I_j = "m" = 2;\ R_j = "r" = 1)$; $(I_j = "s" = 4;\ R_j = "r" = 1)$; $(I_j = "s" = 4;\ R_j = "p" = 1/2)$.

Secondly, regarding the "cram down":

(a) This measure will fail the proportionality "stricto sensu" test if: $(I_j = "l" = 1;\ R_j = "r" = 1)$; $(I_j = "l" = 1;\ R_j = "p" = 1/2)$; $(I_j = "l" = 1;\ R_j = "e" = 1/4)$; $(I_j = "m" = 2;\ R_j = "p" = 1/2)$; $(I_j = "m" = 2;\ R_j = "e" = 1/4)$; and if $(I_j = "s" = 4;\ R_j = "e" = 1/4)$.
(b) A stalemate will be found if: $(I_j = "m" = 2;\ R_j = "r" = 1)$; $(I_j = "s" = 4;\ R_j = "p" = 1/2)$.
(c) The "cram-down" will pass the last stage of proportionality only if: $(I_j = "s" = 4;\ R_j = "r" = 1)$.

As can be noted, the state would be able to avoid liability in what pertains to the "stay" if (i) it is able to justify that the satisfaction of ESC rights is of a "moderate" importance and the corresponding empirical premises are deemed to be "certain" and if (ii) it is successful in arguing that the importance of the satisfaction of said rights is "serious" and if the corresponding empirical premises can be deemed either "certain" or "plausible". At the same time, the "second prong" of the FET standard will determine that there is no violation for the "cram-down" only if the state successfully argues that the satisfaction of citizens' rights is "serious", and the empirical premises can be considered "certain".

The following tables summarize these findings:

The "Stay" in the Context of the FET Standard

P_i: FET Guarantee				P_j: Citizens' "Social" Rights				Balancing Outcome
I_i	W_i	R_i	$\prod i$	I_j	W_j	R_j	$\prod j$	$W_{i,j} = \frac{I_i * W_i * R_i}{I_j * W_j * R_j} = \frac{\prod i}{\prod j}$
"l" $2^0 = 1$	=1	"r" $2^0 = 1$	= 1	"l" $2^0 = 1$	= 1	"r" $2^0 = 1$	1	**Stalemate** $W_{i,j} = 1$
				"l" $2^0 = 1$	= 1	"p" $2^{-1} = \frac{1}{2}$	$\frac{1}{2}$	**Disproportionate** $W_{i,j} = 2$
				"l" $2^0 = 1$	= 1	"e" $2^{-2} = \frac{1}{4}$	$\frac{1}{4}$	**Disproportionate** $W_{i,j} = 4$
				"m" $2^1 = 2$	= 1	"r" $2^0 = 1$	2	**Proportional** $W_{i,j} = 1/2$
				"m" $2^1 = 2$	= 1	"p" $2^{-1} = \frac{1}{2}$	1	**Stalemate** $W_{i,j} = 1$
				"m" $2^1 = 2$	= 1	"e" $2^{-2} = \frac{1}{4}$	$\frac{1}{2}$	**Disproportionate** $W_{i,j} = 2$
				"s" $2^2 = 4$	= 1	"r" $2^0 = 1$	4	**Proportional** $W_{i,j} = 1/4$
				"s" $2^2 = 4$	= 1	"p" $2^{-1} = \frac{1}{2}$	2	**Proportional** $W_{i,j} = 1/2$
				"s" $2^2 = 4$	= 1	"e" $2^{-2} = \frac{1}{4}$	1	**Stalemate** $W_{i,j} = 1$

Table 18: Numerical Illustration of PA Applied to the "Stay" in the Context of the FET Standard.

The "Cram Down" in the Context of the FET Standard

P_i: FET Guarantee				P_j: Citizens' "Social" Rights				Balancing Outcome
I_i	W_i	R_i	$\prod i$	I_j	W_j	R_j	$\prod j$	$W_{i,j} = \frac{I_i * W_i * R_i}{I_j * W_j * R_j} = \frac{\prod i}{\prod j}$
"m" $2^1 = 2$	=1	"r" $2^0 = 1$	= 2	"l" $2^0 = 1$	= 1	"r" $2^0 = 1$	1	**Disproportionate** $W_{i,j} = 2$
				"l" $2^0 = 1$	= 1	"p" $2^{-1} = \frac{1}{2}$	$\frac{1}{2}$	**Disproportionate** $W_{i,j} = 4$
				"l" $2^0 = 1$	= 1	"e" $2^{-2} = \frac{1}{4}$	$\frac{1}{4}$	**Disproportionate** $W_{i,j} = 8$
				"m" $2^1 = 2$	= 1	"r" $2^0 = 1$	2	**Stalemate** $W_{i,j} = 1$
				"m" $2^1 = 2$	= 1	"p" $2^{-1} = \frac{1}{2}$	1	**Disproportionate** $W_{i,j} = 2$
				"m" $2^1 = 2$	= 1	"e" $2^{-2} = \frac{1}{4}$	$\frac{1}{2}$	**Disproportionate** $W_{i,j} = 4$
				"s" $2^2 = 4$	= 1	"r" $2^0 = 1$	4	**Proportional** $W_{i,j} = 1/2$
				"s" $2^2 = 4$	= 1	"p" $2^{-1} = \frac{1}{2}$	2	**Stalemate** $W_{i,j} = 1$
				"s" $2^2 = 4$	= 1	"e" $2^{-2} = \frac{1}{4}$	1	**Disproportionate** $W_{i,j} = 2$

Table 19: Numerical Illustration of PA Applied to the "Cram Down" in the Context of the FET Standard.

6.3.4.3. The "Stay" and the "Cram Down" from the Perspective of the Interaction Between the "Peaceful Enjoyment of Possessions" and the "Public Interest" Under the ECHR

Finally, the same operation is to be conducted from the perspective of the ECHR which features the interaction of creditors' right to property and the "public interest". Notably, since the "margin of appreciation" granted to states calls for assigning more abstract weight to the "public interest" than to "property"[2195], the results are similar to those arrived at for the interaction of the guarantee against expropriation and "social" rights. Nevertheless, the "margin of appreciation" doctrine also lends states another important service in this context. In effect, it can be argued that through its application, the state would be successful in avoiding liability from the perspective of the guarantee of property even in "stalemate" cases[2196].

In order to avoid repetition, I present only the conclusions of said analysis in the following tables:

The "Stay" in the Context of the ECHR

P_i: Creditors' Property Rights				P_j: "Public Interest"				Balancing Outcome
I_i	W_i	R_i	$\prod i$	I_j	W_j	R_j	$\prod j$	$W_{i,j} = \frac{I_i * W_i * R_i}{I_j * W_j * R_j} = \frac{\prod i}{\prod j}$
"I" $2^0 = 1$	=1	"r" $2^0 = 1$	= 1	"I" $2^0 = 1$	= 2	"r" $2^0 = 1$	2	**Proportional** $W_{i,j} = 1/2$
				"I" $2^0 = 1$	= 2	"p" $2^{-1} = \frac{1}{2}$	1	**Stalemate** $W_{i,j} = 1$
				"I" $2^0 = 1$	= 2	"e" $2^{-2} = \frac{1}{4}$	$\frac{1}{2}$	**Disproportionate** $W_{i,j} = 2$
				"m" $2^1 = 2$	= 2	"r" $2^0 = 1$	4	**Proportional** $W_{i,j} = 1/4$
				"m" $2^1 = 2$	= 2	"p" $2^{-1} = \frac{1}{2}$	2	**Proportional** $W_{i,j} = 1/2$
				"m" $2^1 = 2$	= 2	"e" $2^{-2} = \frac{1}{4}$	1	**Stalemate** $W_{i,j} = 1$
				"s" $2^2 = 4$	= 2	"r" $2^0 = 1$	8	**Proportional** $W_{i,j} = 1/8$
				"s" $2^2 = 4$	= 2	"p" $2^{-1} = \frac{1}{2}$	4	**Proportional** $W_{i,j} = 1/4$
				"s" $2^2 = 4$	= 2	"e" $2^{-2} = \frac{1}{4}$	2	**Proportional** $W_{i,j} = 1/2$

Table 20: Numerical Illustration of PA Applied to the "Stay" in the Context of the ECHR.

[2195] See subsection 6.3.2 above.

[2196] See da Silva, *Comparing the Incommensurable…* Op. Cit., 299-300 and Klatt and Meister, *The Constitutional…* Op. Cit., 93-94.

The "Cram Down" in the Context of the ECHR

P_i: Creditors' Property Rights				P_j: "Public Interest"				Balancing Outcome
I_i	W_i	R_i	$\prod i$	I_j	W_j	R_j	$\prod j$	$W_{i,j} = \frac{I_i * W_i * R_i}{I_j * W_j * R_j} = \frac{\prod i}{\prod j}$
"m" $2^1 = 2$	=1	"r" $2^0 = 1$	= 2	"l" $2^0 = 1$	= 2	"r" $2^0 = 1$	2	**Stalemate** $W_{i,j} = 1$
				"l" $2^0 = 1$	= 2	"p" $2^{-1} = \frac{1}{2}$	1	**Disproportionate** $W_{i,j} = 2$
				"l" $2^0 = 1$	= 2	"e" $2^{-2} = \frac{1}{4}$	$\frac{1}{2}$	**Disproportionate** $W_{i,j} = 4$
				"m" $2^1 = 2$	= 2	"r" $2^0 = 1$	4	**Proportional** $W_{i,j} = 1/2$
				"m" $2^1 = 2$	= 2	"p" $2^{-1} = \frac{1}{2}$	2	**Stalemate** $W_{i,j} = 1$
				"m" $2^1 = 2$	= 2	"e" $2^{-2} = \frac{1}{4}$	1	**Disproportionate** $W_{i,j} = 2$
				"s" $2^2 = 4$	= 2	"r" $2^0 = 1$	8	**Proportional** $W_{i,j} = 1/4$
				"s" $2^2 = 4$	= 2	"p" $2^{-1} = \frac{1}{2}$	4	**Proportional** $W_{i,j} = 1/2$
				"s" $2^2 = 4$	= 2	"e" $2^{-2} = \frac{1}{4}$	2	**Stalemate** $W_{i,j} = 1$

Table 21: Numerical Illustration of PA Applied to the "Cram Down" in the Context of the ECHR.

As can be noted, regarding the "stay", a violation of the ECHR will be found only if the satisfaction of the "public interest" is deemed to be "light" and the reliability of the empirical premises in that context are considered "not evidently false". At the same time, the same will be true from the perspective of the "cram down" when (a) the "public interest" is considered to be of a "light" importance and the reliability of the empirical premises is regarded either "plausible" or "not evidently false" and (b) if the "public interest" represents only a "moderate" concern and the empirical premises are judged to be "not evidently false".

Consequently, I submit here that it is likely that the indebted state would be successful in avoiding liability, if the debt crisis is severe enough and it imposes the measures that have been studied throughout this *Thesis*.

6.4. Conclusions Regarding the Proportionality of the Measures from the Perspective of Alexy's Rational Reconstruction of Balancing

In this section, I outlined a PA following Alexy's methodology. Thus, I subjected the measures under scrutiny (i.e., the "stay" and the "cram-down") to the three "rules" or "stages" proposed by him (suitability, necessity and proportionality in the narrow sense). Importantly enough, the results of the assessment conducted here can inform tribunals' decisions in two important respects. First, they can serve as inputs in what pertains to the violation of the second prong of the guarantee against expropriation (if the "mitigated police powers" doctrine is followed) and of the FET standard. Secondly, the results also carry to the proportionality requirement of the ECHR in the context of the guarantee of property.

Nevertheless, it is important to once again highlight the limitations of the analysis conducted thus far. First, the discussion was advanced with a certain (unavoidable) level of generality. Therefore, although the analysis arrived at several conclusions pertaining to the conditions under which both measures can be considered in compliance with the proportionality requirement, states will be called upon to justify the imposition of said measures. This is particularly true in what pertains to the "suitability" and "necessity" tests. Although the discussion posited several arguments which may aid the state in that regard, this nevertheless does not exempt sovereigns from the burden of proof, at least under investment litigation.

Second, I decided to set aside one criterion which could be relied upon by international courts and tribunals for measuring the severity of both the "stay" and the "cram down". In effect, I chose not to include in the assessment the "haircut" to which bondholders would be subjected to under the restructurings achieved through the "stay" and the "cram down". This limitation, however, is not as important as it may appear at first sight. As previously argued, if one assumes that the difference between the NPV of the "restructured" bonds and the value of the "old" bonds on the secondary market is not significant (as is usually the case), then the results put forward maintain their usefulness.

Third, the differences between the frameworks under which the analysis was conducted also need to be highlighted. As previously discussed, while states are granted a significant margin of appreciation under the ECHR, the same is not necessarily true for the case of international investment law. Consequently, it is expected that tribunals will take a closer look at each of the steps of PA in the context of investment litigation, and states will have to present even stronger arguments justifying each measure in that context.

Fourth, and in direct connection with the last point, the outcome in "stalemate" cases also manifests the limitations of the analysis presented in this Section. In effect, whether states would be successful in avoiding liability if a stalemate is found in the context of international investment disputes remains an open question. The same is not true for the case of the ECHR. In that context, the application of the "margin of appreciation" doctrine suggests that "stalemate" cases should be decided in favor of the state.

The last limitation to be referred to is likely the most significant. As previously indicated, neither investment tribunals nor the ECHR tend to follow Alexy's three stages of PA to the letter. At first sight, this will diminish the relevance of the conclusions arrived at thus far. However, this is not necessarily true. Even if an adjudicator's approach dispenses with one or two of Alexy's stages, the results obtained here may help to shed some light on the "stage" actually relied upon.

Finally, while adjudicators may not follow each of the steps suggested by Alexy, the analysis presented thus far suggests that they should. As previously argued, his contribution delivers a sound, structured methodology for assessing arguments where

the most important interests of a *polity* collide. Therefore, its application can help tribunals to arrive at more transparent and better substantiated conclusions[2197].

[2197] See, for example, van Aaken, *Defragmentation*… Op. Cit., p. 512.

7. Application of the Proportionality Principle from Sartor's Perspective to the "Stay" and the "Cram-down" under Different Settings: International Investment Law and the European Convention on Human Rights

In this section, I sketch an application of Sartor's methodology for the purposes of finding the conditions under which the "stay" and the "cram down" can be considered proportional. Again, I discuss both measures from the perspective of international investment law (where the guarantee against expropriation and the FET standard clash with ESC rights) and of the ECHR (where the "peaceful enjoyment of possessions" conflicts with the "public interest"). As in the previous section, if the conditions put forward in this section are complied with, and the state succeeds in the application of the three rules of proportionality, the indebted state could avoid liability under the guarantees under present evaluation.

As previously discussed, Sartor reformulates Alexy's methodology, making balancing even closer to CBA. Therefore, his approach relies more heavily on the instruments of welfare economics. For that very reason, and since the analysis deployed in this *Chapter* rests on a certain level of generality, the limitations presented in section 6, apply here with even more force. Consequently, I shall stress that the following does not contain a fully-fledged PA informed by economics. On the contrary, as indicated, it is limited to discussing the conditions that need to be fulfilled in order to consider the "stay" and the "cram down" compatible with the relevant PIL principles under the frameworks discussed. At the same time, the tools of CBA to be employed in this section are only used as "heuristic devices", merely "illustrating" balancing with the help of economics. Two main reasons motivated this decision.

First of all, I could not find precise data capturing the effects of both the "stay" and the "cram-down" on the satisfaction/dissatisfaction of the PIL principles currently under consideration. Although there is evidence referring to the correlation of sovereign debt restructurings and the promotion/demotion of said PIL principles, it is not possible to directly and specifically attribute those effects to both measures separately[2198]. Consequently, since a proper application of an economic PA would have required a precise determination of those effects, I chose to follow a more cautious approach.

Secondly, a full-fledged PA can only be taken attending to the specific circumstances of a concrete case. This entails several challenges to judging – *a priori* – whether both GPDs can be considered compatible with international law.

For those reasons, and following the "cautious" approach taken here, the analysis merely "illustrates" the conditions under which the measures studied can be considered as complying with the proportionality principle[2199]. Thus, the PA presented in the following can be improved if further research is able to provide accurate data pertaining to the variables of interest. Since I was not able to rely on said information, I was forced to make several assumptions enabling the analysis. Consequently, and this cannot be

[2198] See subsections 6.1 and 6.2 of this *Chapter*.

[2199] Let me recall that Sartor's proposal can be used from two perspectives. The first one, is quantitative and rests on precise information regarding the promotion/demotion of principles. The second is "illustrative" and serves an auxiliary role in PA.

stressed enough, the discussion that follows merely "sketches" a PA in the context of an insolvency crisis.

Despite its limitations, I submit here that the "sketch" presented in the following is nonetheless useful. At minimum, it succeeds in formalizing legal discourse. For that reason, it makes the conflicts between the interests at stake more transparent and opens certain avenues for their rational reconciliation in the light of public international law.

7.1. The Variables of Interests According to Sartor's Approach

As previously indicated, for optimization accounts of proportionality, it is possible to compare the positive and negative effects of one or more actions on the satisfaction of different constitutionally guaranteed interests. Thus, the "crudest" form of a decision rule posited by a PA informed by economics would mandate a preference towards the actions whose positive effects (benefits) outweighs negative effects (costs). Expressing the latter in absolute value, said rule can be formalized as:

$$\underbrace{Benefits_{Principle\ 1}(Measure)}_{\textbf{Positive Effects}} > \underbrace{\left|Costs_{Principle\ 2}(Measure)\right|}_{\textbf{Negative Effects}}$$ [2200]

Nevertheless, and as previously discussed (see subsection 2.2), Sartor reformulates said rule by suggesting a series of steps. The first step is to capture the effects of the measure (i.e, "α") on each competing principle (i.e., "v"). This is to be done by comparing the level of satisfaction of said principles (i.e., "level") before (the "baseline") and after the measure is implemented[2201]. By doing this, he obtains the "realization impact" of α on each principle (i.e., $\Delta Real_v(\alpha)$). Thus, the first variables that need to be clarified correspond to the respective levels of satisfaction of the competing principles which are critical to obtaining the aforementioned "realization impact".

The second step corresponds to obtaining the "proportional impact" of the measures on each principle (denoted as "$\Delta PropReal_v(\alpha)$"). For this purpose, he proposes comparing the realization impact of the measure on each principle with their corresponding "maximum" feasible level of satisfaction (the latter denoted as, "$MaxReal_v\alpha$"). Thus, he formalizes the "proportional impact" as: $\Delta PropReal_v(\alpha) = \frac{\Delta Real_v\alpha}{MaxReal_v\alpha}$.

Subsequently, Sartor suggests reiterating the operation, but in utility terms. For this purpose, he posits that the level of enjoyment of each principle can be expressed through a utility function, which needs to comply with certain conditions which are standard in

[2200] This is a variation of the "crude" decision rule posited by Cristoph Engel. See Engel, *Besonderes…* Op. Cit., p. 19. As can be noted, it merely depicts the decision rule from the perspective of normative decision theory. See, van Aaken, *"Rational Choice"…* Op. Cit., p. 296.
[2201] Importantly enough, Sartor assumes a deterministic relationship between the imposition of the measure and the enjoyment of the principle under scrutiny. See subsection 2.2 for details.

welfare economics. After the operation is completed, it is possible to obtain the "proportional impact" in utility terms which he denotes as: $\Delta PropUt_v(\alpha) = \frac{\Delta Ut_v \alpha}{MaxUt_v \alpha}$.

The fourth step is to multiply the "proportionality impact" in utility terms by the weights of each principle, arriving at the "absolute utility impact" of the measure on each value (i.e., $\Delta Ut_v(\alpha) = \Delta PropUt_v(\alpha) * W_v$).

The fifth and final step is to aggregate the results in order to assess whether the benefits exceed the costs.

Thus, Sartor reformulated the aforementioned "crude" decision rule as:

$$\Delta Ut_{v1}(\alpha) > |\Delta Ut_{v2}(\alpha)|$$

Consequently, in the following, I clarify each of the aforementioned variables for both the "stay" and the "cram down". I start by explaining the levels of enjoyment of the PIL principles under scrutiny, the corresponding "baselines" and the respective post-measure effects. Next, I posit the "maximum degree" of enjoyment to be considered for each principle. After that, I assign the weight to each competing principle. Finally, I discuss the utility function which will be used in the application of Sartor's decision rules. As can be noted, said variables are critical for determining the conditions under which both measures comply with the proportionality requirement under both international investment law and under the ECHR, a problem to which I turn in section 7.2.

7.1.1. The Levels of Principle Enjoyment

As stated before, the first of Sartor's steps corresponds to determining the "realization impact" of the measure under scrutiny for the competing principles. For this purpose, it is necessary to compare the level of enjoyment of the principle before and after the measure is implemented.

Notably, this requires spelling out what is to be understood by the "level of enjoyment" or "satisfaction" of a principle. In short, Sartor indicates that it is possible to capture different degrees or "levels" of principle enjoyment. Following his proposal, I assume that said levels can be measured on a scale, including a set of non-numerical and numerical magnitudes representing different degrees of satisfaction. The scale orders said degrees from lowest to the highest, ranging from 0 to 100 (in numerical terms) and from "no enjoyment" to "absolute enjoyment" (in non-numerical magnitudes). The next table details this scale:

Scale PIL Principle Satisfaction	Level of Enjoyment of PIL Principles
0	No Enjoyment
10	Negligible Enjoyment
20	Very Low Enjoyment.
30	Low Enjoyment.
40	Almost Medium Enjoyment
50	Medium Enjoyment
60	More than Medium Enjoyment
70	Moderate Enjoyment
80	High Enjoyment
90	Very High Enjoyment
100	Absolute Enjoyment

Table 22: Scale of Enjoyment of PIL Principles.

Of note, the scale allows us to rank different alternatives from less preferred to more preferred. For example, we can say that all else being equal, a very high enjoyment of property is preferred to a moderate one. At the same time, the scale enables the analyst to translate informed judgments regarding the enjoyment of constitutional values (and thus, of PIL principles) into numerical magnitudes. For example, with our knowledge of a particular situation, we can determine whether a right is satisfied to a "very high" level and, subsequently, obtain an approximate quantity given by the scale. While not precise, this exercise serves as a tool for constraining legal reasoning with quantitative methods[2202].

Furthermore, the scale helps to capture the effects of a particular measure on the enjoyment of constitutional values. Indeed, if it is possible to say that a certain state of the world reports a certain level of enjoyment of a PIL principle, it is also possible to say that another entails a "higher" or a "lower" level. If the variation can be attributed to a particular measure, then the instrument assists the analyst in the determination of the impact of the measure on the satisfaction of different principles.

As can be noted, the differences between both states of the world (i.e., what Sartor denominates the "realization impact") requires determining the level of enjoyment of the principle (a) before (the "baseline") and (b) after the measure is imposed. However, and this cannot be stressed enough, the contribution of a measure to each values' promotion or demotion needs to be studied separately. Therefore, in what follows, I start by discussing the effects of the "stay" and the "cram down" on creditors' interests (subsection 7.1.1.1). This includes assessing the impact of both measures from the perspective of creditors regarding the guarantee against expropriation, the FET standard and the protection of property rights from the perspective of the ECHR. At the same time, this also includes studying the effects of the "stay" and the "cram down" from the perspective of the competing principles (i.e., citizens' "social" rights and the "public interest") (subsection 7.1.1.2).

7.1.1.1. The Effects of the "Stay" and the "Cram Down" from the Perspective of Creditors' Interests: Expropriation, FET and the Guarantee of Property

In this subsection, I determine the effects of the "stay" and the "cram down" from the perspective of creditors' interests. For said purpose, I rely on the scale previously posited

[2202] See Sartor, *A Quantitative…* Op. Cit., p. 633.

and on an assessment based on creditors' rights. Of note, this entails defining both (a) baseline and (b) post-measure levels of enjoyment. However, before proceeding, it is important to stress why I chose to rely on the aforementioned criterion of creditors' rights, instead of using other apparently suitable methods for capturing the negative effects of the measures on creditors' interests.

As previously discussed[2203], PA can be directly performed in quantitative terms when the costs and benefits at stake can be expressed in monetary terms. According to commentators, this would be the case in the context of principles such as those protecting the right to property[2204]. From that perspective, market preferences could be used to determine the detrimental effects of the "stay" and the "cram down". In short, said methodology would suggest comparing the secondary market value of instruments with and without individual enforcement rights and with and without third generation CACs, as the corresponding proxies for the effects of the measures. In that context, the price difference between instruments could be used as an input to arrive at the "realization impact" of the measures on creditors' property rights.

Nevertheless, I decided to discard said method here for the same reasons previously posited in the context of the application of Alexy's reconstruction of PA[2205]. In short, there is no evidence suggesting a significant price differential between the aforementioned instruments. Consequently, if said alternative was followed, no negative effect on creditors' interests would be found.

For that reason, I rely on the scale previously posited and on an approach based on bondholders' rights instead. Of note, as it was true for the application of Alexy's PA, the results arrived here apply for both measures under the three manifestations of creditors' interest under scrutiny. This includes the guarantee against expropriation, the FET standard and the protection of the "peaceful enjoyment of possessions".

The first step to be taken in this regard corresponds to defining the location on the scale of the "baseline" scenario. In this context, the analyst could take two alternatives. The first is to consider that, ex-ante, creditors are in possession of all the rights in their "bundle". From that perspective, their interests (including those enshrined by the guarantee against expropriation, the FET standard and the ECHR's property protection) would be located on the extreme upper level of the scale (equivalent to "absolute enjoyment" or "100" in numerical terms).

The second alternative is to consider the effects which the failure to achieve a restructuring would entail from the perspective of creditors. For this purpose, the analyst would have to factor several considerations in the assessment, including the severity of the default and how long would it take for the sovereign to either reach a deal capable of achieving debt sustainability or resume payments. If the crisis is severe enough, from the perspective of the scale, this alternative would probably situate the

[2203] See subsection 2.3 of this *Chapter*.
[2204] See Klatt and Meister, *Proportionality…* Op. Cit., p. 696
[2205] See subsections 6.1 and 6.2 of this *Chapter*.

satisfaction of bondholders' interests on a lower level than the "absolute enjoyment" indicated for the first one.

For the purposes of the analysis to follow, I chose the first of the aforementioned alternatives. To be sure, the second scenario inclines the balance in favor of both the "stay" and the "cram down"[2206]. However, the number of assumptions to be made for operationalizing the analysis in that context would make the discussion that follows intractable.

Thus, I propose that the "baseline" to be considered for the assessment of the realization impact of the measures from the perspective of creditors' interests corresponds to "absolute enjoyment" (equivalent to "100") on the scale. Importantly enough, since this analysis is being taken from the perspective of the different components of creditors' "bundle" of rights, said "baseline" carries to each of the PIL principles protecting their interests. This is due to the fact that both measures have the same effects pertaining to creditors' rights, regardless of the specificities of the guarantee being studied. In other words, the differences among the PIL principles do not alter the assessment from the perspective of the rights of which creditors are deprived after the imposition of the "stay" and the "cram down". Thus, let me express said considerations as:

$$creditors'\ interests_{baseline} = Exprop_{baseline} = FET_{baseline} = Property_{baseline} = 100$$

Having completed the first step, now is the time to move to the second. This phase is critical to the purpose of capturing the "realization impact" of the measures. In short, this step requires determining the detrimental effects which the "stay" and the "cram down" entail from creditors' perspective. Of note, I decided to rely on the arguments advanced in section 6.2, which attempted to measure said negative effects. In the following, I enrich the conclusions previously arrived at both from the perspective of the "stay" and the "cram down". However, before proceeding, it is capital to note the "extensive" application of the considerations that follows. In effect, as with the baseline, I submit that the negative effects of the measures also carry to each and every PIL principle guaranteeing creditors' interests (including expropriation provisions, the FET standard and the "peaceful enjoyment of possessions").

7.1.1.1.1. The Negative Effects of the "Stay"

Let me start the discussion with the "stay". As previously discussed in detail[2207], the "stay" suspends creditors' litigation for a limited period. During that time, the state is supposed to renegotiate the debt with its creditors with the help of CACs. Certainly, depriving creditors of the possibility of enforcing their claims (even for a limited period) negatively affects their interests. However, although sovereign bonds lack clauses

[2206] This is true since the assessment of the "realization impact" of the measures compares their effects with the baseline. The lower the baseline, the less detrimental the measure would be from the perspective of creditors' interests.
[2207] See subsections 4.2, 5.1 and 6.2 of this *Chapter*.

explicitly providing for this type of "stay"[2208], this measure does not necessarily constitute an intromission on the terms of the contracts.

Indeed, as previously argued, the "stay" merely gives effect to the clauses included in the bonds, which allows debtors and creditors to renegotiate the debt. Simultaneously, this measure does not deprive creditors of the control of their bonds: They can still decline the sovereign's restructuring offer. Additionally, if a "stay" is imposed, creditors' right to sell their instruments on the secondary market remains untouched. For these reasons, the "stay" does not severely impair creditors' right to property, nor does it significantly affect their legitimate expectations.

Considering the foregoing, if the "stay" is imposed, creditors would maintain the enjoyment of their property rights close to the highest level possible. Then, the question turns to how to transform this "informed judgment" into the magnitudes expressed by the scale previously posited. This is a difficult problem to solve due to the lack of available quantitative data capable of being operationalized from this perspective. Regardless, I propose to advance an approximate quantification of said judgment. Naturally, this approximation may be contested, and the arguments provided thus far may be considered inaccurate or inadequate. Nevertheless, I submit that, though inconclusive, they can be considered sufficiently persuasive for the purposes of deploying the analysis that follows. Thus, I submit here that since the "stay" merely suspends enforcement for a limited period, it is reasonable to locate the enjoyment of creditors' interests[2209] under this measure as belonging to a "very high enjoyment" (which equates to 90 on the scale).

Consequently, the "stay's" "realization impact" can be denoted as:

$$\Delta Real_{creditors' interests}(stay) = post - stay_{creditors' interests} - \ baseline_{creditors' interests}$$

Inserting the results of this section it is possible to obtain that:

$$\Delta Real_{creditor\ 'interests}(stay) = 90 - 100 = -10$$

Which is the same as saying:

$$\Delta Real_{exprop}(stay) = \Delta Real_{FET}(stay) = \Delta Real_{Property}(stay) = -10$$

[2208] The IMF proposed incorporating such clauses in sovereign bonds into the early 2000s under the "initiation clauses" rubric. Said clauses would have provided "(…) for a 'cooling off' period between the date when the sovereign announces its intention to restructure and the date that a creditor representative is chosen", and "(…) payments would be temporarily suspended or deferred during this period and bondholders would be prevented from initiating litigation". International Monetary Fund, *The Design and Effectiveness of Collective Action Clauses* (2002), available at https://www.elibrary.imf.org/view/journals/007/2002/029/article-A001-en.xml [last accessed 22.12.2021], p. 17. According to Kupelyants, the market rejected this type of clause. See Kupelyants, *Sovereign…* Op. Cit., p. 85.

[2209] As stated before, this category includes all guarantees protecting creditors' interests, including the protection from expropriation, the FET standard and the protection of property under the ECHR.

7.1.1.1.2. The Negative Effects of the "Cram Down"

As previously discussed[2210], the effects of the "cram down" on creditors' interests are of a more serious nature than those of the "stay". Let me recall that a "cram down" helps the state to accomplish a restructuring. If it is successfully imposed, a renegotiation agreement is deemed to be approved when a certain supermajority is achieved across all series of bonds. Furthermore, through this measure, there is no repudiation (the state still recognizes the debt) and creditors retain their rights to sell their bonds on the secondary market. Nevertheless, the "cram down" dramatically exceeds the terms of the contracts, impairing creditors' rights with substantial force. This point deserves closer scrutiny.

As previously stated, the "cram down" aims to solve aggregation problems. Aggregation is an important challenge in cases where bonds lack "single-limb" or "two-limb" modification CACs. In those cases, the imposition of this measure entails an ex-post modification of the terms of the contracts. Therefore, the "cram down" not only deprives creditors of certain rights in the "bundle", but also defrauds their legitimate expectations (which encompass the integrity of the original contractual bargain)[2211].

Therefore, in order to determine the degree of impairment that the "cram down" entails, it is necessary to assess its effects on the other attributes of bondholders' property rights. As the ECtHR noted in "Mamatas"[2212] creditors retain certain rights by means of this measure. First, they retain their right to sell the bonds on the secondary market. Second, creditors as a group maintain the prerogative to approve or reject the restructuring proposal.

Considering all the above, I propose that if the "cram down" is successfully imposed, the level of enjoyment on which this measure puts creditors corresponds to "moderate" (which equates to "70" on the scale). It impairs explicit contractual language while still giving creditors the opportunity to "exit" by selling their bonds on the secondary market and to reject the restructuring proposal (as a group). Again, the magnitude proposed can be questioned, and the lack of available quantitative data forced me to put forward the aforementioned informed judgment.

Consequently, the "realization impact" of the "cram down" (henceforth, "cd") can be denoted as:

$$\Delta Real_{creditors'interests}(cd) = post - cd_{creditors'interests} - baseline_{creditors'interests}$$

Inserting the results of this subsection, it is possible to obtain that:

$$\Delta Real_{creditors'interests}(cd) = 70 - 100 = -30$$

[2210] See subsection 6.2 of this *Chapter*.

[2211] In particular, an ex-post contract modification such as the one which a "cram down" entails would "undermine the framework of the sovereign bonds". If this measure is imposed by the state, and if the bonds are governed by the state's domestic law, then creditors' legitimate expectations would have been severely altered. See Waibel, *Opening Pandora's*… Op. Cit., p. 753.

[2212] See Mamatas, paras 107-118.

Which is the same as saying:

$$\Delta Real_{exprop}(cd) = \Delta Real_{FET}(cd) = \Delta Real_{Property}(cd) = -30$$

7.1.1.1.3. The "Realization Impact" of the "Stay" and the "Cram Down" on Creditors' Interests

In the previous subsections I have identified the "realization impact" of both measures under scrutiny from the perspective of creditors' rights. Of note, as previously indicated, these results carry to each of the PIL principles protecting creditors' interests. This includes the guarantee against expropriation ("exprop"), the protection against unfair and inequitable treatment ("FET") and the ECHR's protection for the "peaceful enjoyment of possessions" ("property"). In short, whereas the "stay" has a "realization impact" of "-10" on creditors' rights, the "cram down" is more severe, reaching "-30". Having discussed the negative effects (or costs) of the measures, now is the time to proceed to their positive ones, which entail calculating their "realization impact" from the perspective of the PIL principles which they may be able to promote. As previously stated, said PIL principles correspond to "social" rights for investment guarantees, and to the "public interest" in the case of the "peaceful enjoyment of possessions" under the ECHR.

7.1.1.2. ESC Rights and the Public Interest

As for the case of creditors' interests, the "realization impact" of the "stay" and the "cram down" on ESC rights and on the "public interest" requires comparing the effects of said measures with a particular baseline. At the same time, this requires developing a scale capturing the level of enjoyment of both PIL principles.

First, in what pertains to the "public interest", I decided to modify the previous scale to incorporate the notion of debt sustainability. From this perspective, debt sustainability serves as a proxy for the satisfaction of the "public interest"[2213]. Thus, under this modified version of the scale, the lower the degree of debt sustainability, the lower the satisfaction of the public interest (and vice versa). The following table outlines the different levels of debt sustainability and the connection of the levels of debt sustainability with the different degrees of satisfaction of the "public interest":

Scale Debt Sustainability	Debt Sustainability	Satisfaction of the Public Interest
0	Debt Definitively Unsustainable	No Enjoyment
10	Almost Definitively Unsustainable Debt	Negligible Enjoyment
20	Very Low Sustainability	Very Low Enjoyment.
30	Low Sustainability.	Low Enjoyment.
40	Almost Medium Sustainability	Almost Medium Enjoyment
50	Medium Sustainability	Medium Enjoyment
60	More than Medium Sustainability	More than Medium Enjoyment
70	Moderate Sustainability	Moderate Enjoyment
80	High Sustainability	High Enjoyment
90	Very High Sustainability	Very High Enjoyment
100	Debt Definitively Sustainable	Absolute Enjoyment

Table 23: Debt Sustainability and Public Interest (Scale).

[2213] This is in line with the EHCR's considerations regarding the "legitimate aims" in the context of a debt crisis. For a discussion, see subsection 3.3.2 of this *Chapter*.

Notably, although the judgment of "debt sustainability" presented here is not identical to those used by international organizations (such as the IMF)[2214] it is nevertheless compatible with them[2215]. This point deserves further scrutiny. At times, debt sustainability is assessed in dichotomic terms: Either the debt can be deemed sustainable or not. For example, an unsustainable debt burden is usually defined as the absence of any set "of politically and economically feasible policies that can stabilize the debt/GDP ratio with acceptably low rollover risk"[2216].

However, debt sustainability can also be understood as a matter of degree. For example, it can be defined in terms of probabilities. From this perspective, the question can be framed as to how likely it is for the debt to remain sustainable at a certain exchange rate[2217]. For example, Blanchard and Das built a "sustainability index" based on such probabilities[2218]. The IMF has taken a similar path in what pertains to the notion of "sovereign stress". According to the IMF, sovereign stress "refers to the likelihood of a sovereign experiencing stress"[2219], and the index is organized around the notion of risks, including three levels: "low", "moderate" and "high"[2220].

Thus, I propose relying on a similar notion. The scale previously presented can be seen as arranging different "informed judgments" regarding the economic fundamentals of the country. Notably, said judgments can be based on different proxies addressing the economic performance of a state (as is the case with the IMF's Debt Sustainability Analysis).

In what pertains to "social" rights, I decided to rely on the indicators provided by the "SERF" index. In its last version, the index assesses the degree of enjoyment of ESC rights in as many as 193 countries for the period 2006-2016[2221]. As in the scale proposed in subsection 7.1.1, the SERF index considers a scale of "social" rights satisfaction ranging from 0 to 100[2222]. It includes an overall score considering all rights and

---

[2214] See, for example, International Monetary Fund, *IMF Policy Paper: Review of the Debt Sustainability Framework for Market Access Countries* (2021), available at: https://www.imf.org/en/Publications/Policy-Papers/Issues/2021/02/03/Review-of-The-Debt-Sustainability-Framework-For-Market-Access-Countries-50060 [last accessed 12.05.2021].

[2215] For a discussion of debt sustainability analysis in the context of insolvency crises, see *Chapter Four*, pp. 164-166.

[2216] International Monetary Fund, *IMF Policy*… Op. Cit., p. 8.

[2217] This is the strategy followed by Blanchard and Das. Both authors define the notion as follows: "External debt is sustainable if there is a high enough probability that, at the current exchange rate, net debt is equal to or less than the present value of net exports". Olivier Blanchard and Mitali Das, *A New Index of External Debt Sustainability,* PIIE Working Paper 17-13 (2017), available at https://www.piie.com/publications/working-papers/new-index-external-debt-sustainability [last accessed 22.12.2021], p. 1.

[2218] See Id., p. 1.

[2219] International Monetary Fund, *IMF Policy*… Op. Cit., p. 8.

[2220] Id., p. 19.

[2221] See Overview, "The SERF Index", available at: https://serfindex.uconn.edu/overview/ [last accessed 11.05.2021].

[2222] See Susan Randolph, Sakiko Fukuda-Parr & Terra Lawson-Remer, *Economic and Social Rights Fulfillment Index: Country Scores and Rankings*, 9 Journal of Human Rights 3 (2010), p. 232.

"individual" scores capturing the level of enjoyment of the rights to work, social security, food, health, education, and housing. For that purpose, the index relies on socioeconomic data and compares it with the capacity of countries to satisfy each right[2223]. Since the purpose of this section is to merely illustrate the application of Sartor's methodology, and to simplify the analysis, I chose to use the SERF index's overall score as an indicator of the level of enjoyment of citizens' ESC rights. Nevertheless, it should be noted that the assessment could also consider the effects of both measures on individual rights (for example, on the rights to health and education, which tend to be the most impaired rights in the context of sovereign insolvency[2224]).

Having detailed the scales and the proxies to be considered for the assessment of the "realization impact" of the measures from the perspective of citizens' ESC rights and the "public interest", it is time to advance to the next step. Now we may determine the effects of said measures on the PIL principles previously mentioned. As stated above, this requires comparing the previous level of satisfaction of the principles (the "baseline") and the level after the measures are implemented. However, on this point, I encountered an obstacle similar to what I faced in the application of Alexy's methodology[2225].

Said obstacle pertains to the determination of the magnitudes to be assigned to both variables. In effect, as stated before, the analysis being carried out here is not circumscribed to a particular restructuring. For that reason, the "baseline" for "social" rights and the "public interest" cannot be directly determined (in contrast with the one corresponding to creditors' property rights). At the same time, the level of enjoyment of the PIL principles after the measures are implemented cannot be directly determined either. As previously indicated, it is difficult to disentangle the effects of those measures on the satisfaction of "social" rights and the "public interest". In other words, one cannot directly attribute a particular degree of PIL principle enjoyment to each of the measures since a state may choose different complementary policies when confronting an insolvency crisis. This forced me to make several additional assumptions in order to proceed with the analysis.

The first set of assumptions relates to the "baseline" to be used for both the "public interest" and citizens' ESC rights. In what pertains to the former, I decided to operate under the assumption that the state faces an economic situation which puts its debt

---

[2223] Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph, *An Index of Economic and Social Rights Fulfillment: Concept and Methodology,* 8 Journal of Human Rights 3 (2009), p. 198. See also Sakiko Fukuda-Parr, Terra Lawson-Remer and Susan Randolph*, Fulfilling Social and Economic Rights*, Oxford University Press (2015), pp. 59 et seq. In the words of the authors of the index: "The SERF Index measures a country's achievement relative to what is feasible to achieve at the country's per capita income level. That is, it looks at the actual enjoyment level of a right or right aspect relative to the possible level, as evidenced by the achievement of the best performing countries at each per capita income level". Randolph, Stewart, Fukuda-Parr, Lawson-Remer, SERF Index Methodology 2020 Update Technical Note, Economic and Social Rights Empowerment Initiative, 2020, www.serfindex.org/overview/ [last accessed 4.1.2020], p. 2.

[2224] See, for example, Goldmann, *Human Rights…* Op. Cit., pp. 4-5.

[2225] See subsection 6.1 of this *Chapter*.

under "medium sustainability" (which equals to "50") on the scale. Said baseline can be denoted as: $baseline_{PI} = 50$. Under that baseline, it would be equally likely for the debt to be considered sustainable or unsustainable, satisfying the "public interest (i.e., "PI"), at a "medium level" of enjoyment. The aforementioned assumption is intended to advance the notion that different stakeholders may disagree on this point: Creditors would most likely put forward the idea that the economic situation of the state is not serious enough to merit a debt restructuring (concluding, for example, that the debt is clearly sustainable). The sovereign, for its part, would justify the imposition of the measures by stressing its weakened economic fundamentals (and arguing, for instance, that the debt is clearly unsustainable).

Regarding citizens' "social" rights, I decided to use, as a baseline, the arithmetic mean of the SERF score reported for the year 2017 for non-high-income countries. Admittedly, a more suitable baseline would have been one capturing the effects of debt crises on ESC rights. Nevertheless, the information available under the SERF index was not fit for that purpose, since it featured incomplete data for the years that countries experienced a default (with the notable exception of Ecuador's 2008 restructuring). Despite the aforementioned, the magnitude chosen as baseline suffices to capture the "social" rights situation for non-high-income countries, which are the most likely to default on their debts. Said values correspond to 71.97, equivalent to "moderate enjoyment" on the scale. Thus, this baseline can be denoted as: $baseline_{social} = 71.97$.

The second set of assumptions relate to the level of enjoyment of the PIL principles after the measures are implemented. First, I assume that the achievement of a debt restructuring entails the provision of debt relief in favor of the state from bondholders. Second, I assume that this liberates resources for the satisfaction of "social" rights by the state and, alternatively, to the stabilization of its economic situation. Third, I assume that the state uses all those resources to increase the level of enjoyment of both principles. Fourth, I also assume that a scenario under which no restructuring is achieved delivers a lower level of satisfaction of both PIL principles than one under which the agreement is concluded. Fifth, I assume that the level of PIL principles enjoyment returns to the "baseline" level, if no restructuring is concluded[2226]. All these assumptions are intended to introduce the positive effects that the measures entail from the perspective of the enjoyment of ESC rights and the satisfaction of the "public interest".

Although the second set includes strong assumptions, they do not deprive the analysis that follows of informative power. Let me once again highlight that both the "stay" and the "cram down" contribute to (but do not guarantee) the achievement of a successful restructuring. This is a consequence of creditors retaining their rights to either accept

[2226] This last assumption is questionable. In that context, one may well argue that the enjoyment of said PIL principles will diminish beyond the baseline, if the state is not able to resolve the debt crisis and to resume access to capital markets. Nevertheless, modelling said scenario cannot be done at the level of generality under which the analysis is being conducted here. Consequently, from this perspective, the conclusions arrived at in this section can be seen as more demanding than they would be in practice.

or reject the renegotiation of the debt. For that reason, the degree of fulfillment of the "public interest" and ESC rights which the measures entail needs to be assessed in expected value terms. It is precisely in this context that the following analysis finds its relevance.

In effect, I decided to proceed by considering two different scenarios. Under the first, the restructuring fails and the enjoyment of the corresponding PIL principles returns to the baseline. Under the second, the restructuring is successful, and the level of enjoyment (of "social" rights and of the "public interest") is a variable whose specific value is to be determined. In that context, I define the probability of success as "p", and the probability of failure as "$1 - p$".

Consequently, and as will be discussed in more detail below, the discussion that follows will seek to identify the minimum values that said variables need to take in order to consider the measures in compliance with the proportionality principle.

According to the foregoing, the "realization impact" of the measures on ESC rights can be formalized as:

$$\Delta Real_{social}(stay) = post - stay_{social} - \ baseline_{social}$$

$$\Delta Real_{social}(cd) = post - cd_{social} - \ baseline_{social}$$

Including the positive effects that both measures may have on expected value terms,

$$\Delta Real_{social}(stay) = [(stay_{social} * p) + (baseline_{social}) * (1 - p)] - baseline_{social}$$

$$\Delta Real_{social}(cd) = [(cd_{social} * p) + (baseline_{social}) * (1 - p)] - baseline_{social}$$

Replacing the values assumed for the baseline,

$$\Delta Real_{social}(stay) = [(stay_{social} * p) + (71.97) * (1 - p)] - 71.97$$

$$\Delta Real_{social}(cd) = [(cd_{social} * p) + (71.97) * (1 - p)] - 71.97$$

And the "realization impact" on the "public interest" as:

$$\Delta Real_{PI}(stay) = post - stay_{PI} - \ baseline_{PI}$$

$$\Delta Real_{PI}(cd) = post - cd_{PI} - \ baseline_{PI}$$

Reformulating the aforementioned into expected value terms,

$$\Delta Real_{PI}(stay) = [(stay_{PI} * p) + (baseline_{PI}) * (1 - p)] - baseline_{PI}$$

$$\Delta Real_{PI}(cd) = [(cd_{PI} * p) + (baseline_{PI}) * (1 - p)] - baseline_{PI}$$

And finally, plugging in the assumed value for the baseline:

$$\Delta Real_{PI}(stay) = [(stay_{PI} * p) + (50) * (1 - p)] - 50$$

$$\Delta Real_{PI}(cd) = [(cd_{PI} * p) + (50) * (1 - p)] - 50$$

7.1.2. The Maximum Degree of Enjoyment of Each Principle and the "Proportional Realization Impact" of the Measures

Having established the "realization impact" of the measures, the next step suggested by Sartor is to determine the "maximum degree" of satisfaction for each of the competing principles. As stated before, this step is critical since it enables transforming the "realization impact" of the measures into their "proportional realization impact". For this purpose, let me assume further that the aforementioned variable corresponds to "absolute enjoyment" for all the competing principles (equivalent to "100" on the respective scales). This assumption is derived from the intuition that, in the context of insolvency, a state could destine all its available resources for the satisfaction of only one of the interests at stake: Either that of the creditors or that of the citizens and either that of creditors or those of the states (i.e., the "public interest"). This reflects the two extreme policy choices of the state in that context.

It should be noted that the "proportional realization impact" of the measures requires dividing the realization impact for each measure on each PIL principle by the maximum achievable by the latter (which was assumed that it was equal to "100" on the scale).

Thus, the "proportional realization impact" of the "stay" and the "cram down" for creditors' interests can be denoted as:

$$\Delta PropReal_{exprop}(stay) = \Delta PropReal_{FET}(stay) = \Delta PropReal_{PI}(stay) = -\frac{10}{100}$$

$$\Delta PropReal_{exprop}(cd) = \Delta PropReal_{FET}(cd) = \Delta PropReal_{PI}(cd) = -\frac{30}{100}$$

And the "proportional realization impact" of the measures on ESC rights as:

$$\Delta PropReal_{social}(stay) = \frac{[(stay_{social} * p) + (71.97) * (1-p)] - 71.97}{100}$$

$$\Delta PropReal_{social}(cd) = \frac{[(cd_{social} * p) + (71.97) * (1-p)] - 71.97}{100}$$

And finally, the "proportional realization impact" of the measures on the "public interest" as:

$$\Delta PropReal_{PI}(stay) = \frac{[(stay_{PI} * p) + (50) * (1-p)] - 50}{100}$$

$$\Delta PropReal_{PI}(cd) = \frac{[(cd_{PI} * p) + (50) * (1-p)] - 50}{100}$$

7.1.3. The Weights of the Competing Principles

The next variable missing from the discussion thus far corresponds to the abstract weight of each principle. For this purpose, I proceed by engaging with the same considerations put forward for the application of Alexy's PA (see subsection 6.3.2 for details). Thus, the weights of each of the competing principles can be summarized as follows. First, "social" rights have twice the weight of creditors' property rights in the context of the guarantee against expropriation under international investment law (i.e.,

$W_{social} = 2$; $W_{exprop} = 1$). Secondly, also under international investment law, ESC rights have the same weight of creditors' FET guarantee (i.e., $W_{social} = W_{FET} = 1$). Finally, the "public interest" has twice the weight of creditors' property rights under the ECHR (i.e., $W_{PI} = 2$; $W_{property} = 1$).

7.1.4. The Utility Function

As previously indicated, the previous steps (and the "crude" values obtained and assumed thus far) are not sufficient for the purposes of comparing the positive and negative effects of the measures on the PIL principles under scrutiny. In effect, this comparison requires a crucial next step. In short, according to Sartor, the effects of the measures on the principles need to be assessed in utility terms.

As was noted before, Sartor's analysis assumes that it is somehow possible to build a function capturing the utility reported by different levels of value-satisfaction (for each value, separately). He also posits that this function needs to comply with two conditions: (a) monotonicity (meaning that more is preferred to less) and (b) marginal decreasing utility (meaning that each increase in the level of enjoyment reports a lower utility)[2227].

Following Sartor, I assume that it is possible to separately capture different levels of PIL principle enjoyment through a simple function complying with the conditions previously mentioned. The function proposed uses as input the aforementioned scales and their corresponding magnitudes. It considers numerical and non-numerical expressions of the level of satisfaction of a PIL principle (ranging from 0, i.e., non-enjoyment, to 100, which corresponds to absolute enjoyment). Particularly, I assume a simple utility function given by

$$U_{(Level\ of\ enjoyment\ of\ Principle)} = Level\ of\ Enjoyment\ of\ Principle^{\theta}$$

With $\theta = 0.6$[2228]

which in turn can be expressed graphically as follows:

[2227] See subsection 2.2 for details.

[2228] As can be noted, under the function posited the maximum level on enjoyment of a PIL principle reports a utility corresponding to almost "16" in numerical terms (i.e.,$100^{\theta} = 100^{0.6} = 15.84$).

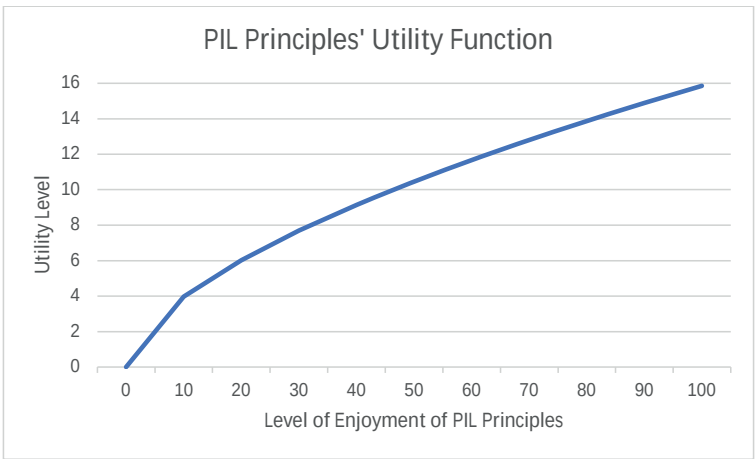

Figure 3: PIL Principles Utility Function.

As stated before, this function is a tool to transform the "proportional realization impact" of the measures into the "proportional impact on the utility by a value" (i.e., $\Delta PropUt_v(\alpha) = \frac{\Delta Ut_v\alpha}{MaxUt_v\alpha}$), and, from there, to capture the measures' "absolute utility impact" of the measures on each value (i.e., $\Delta Ut_v(\alpha) = \Delta PropUt_v(\alpha) * W_v$). Notably, according to Sartor, both steps are critical to achieving comparability of the effects of the measures on the PIL principles under scrutiny. Consequently, with the help of the utility function Sartor reformulates the decision rule posited at the beginning of this section from

$$Benefits_{Principle\ 1}(measure) > \left|Costs_{Principle\ 2}(measure)\right|$$

to,

$$\Delta Ut_{v1}(\alpha) > |\Delta Ut_{v2}(\alpha)|$$

which is the same as saying,

$$\Delta PropUt_{v1}(\alpha) * W_{v1} > |\Delta PropUt_{v2}(\alpha) * W_{v2}|$$

Thus, we can finally posit Sartor's decision rule for both measures for each of the PIL principles under scrutiny (in utility terms) as follows:

First, for the expropriation guarantee:

$$\frac{[(stay_{social}U * p) + (baseline_{social}U) * (1-p)] - baseline_{social}U}{social\ _{maximum}U} * W_{social} > \left|\frac{stay_{exprop}U - baseline_{exprop}U}{exprop_{maximum}U} * W_{exprop}\right| (1)$$

$$\frac{[(cd_{social}U * p) + (baseline_{social}U) * (1-p)] - baseline_{social}U}{social\ _{maximum}U} * W_{social} > \left|\frac{cd_{exprop}U - baseline_{exprop}U}{exprop_{maximum}U} * W_{exprop}\right| (2)$$

Second, for the FET standard:

$$\frac{[(stay_{social}U * p) + (baseline_{social}U) * (1-p)] - baseline_{social}U}{social\ _{maximum}U} * W_{social} > \left|\frac{stay_{FET}U - baseline_{FET}U}{FET_{maximum}U} * W_{FET}\right| (3)$$

$$\frac{[(cd_{social}U * p) + (baseline_{social}U) * (1-p)] - baseline_{social}U}{social\ _{maximum}U} * W_{social} > \left|\frac{cd_{FET}U - baseline_{FET}U}{FET_{maximum}U} * W_{FET}\right| (4)$$

Finally, for the "peaceful enjoyment of possessions" under the ECHR:

$$\frac{[(stay_{PI}U * p) + (baseline_{PI}U) * (1-p)] - baseline_{PI}U}{PI\ _{maximum}U} * W_{PI} > \left|\frac{stay_{property}U - baseline_{property}U}{property_{maximum}U} * W_{property}\right| (5)$$

$$\frac{[(cd_{PI}U * p) + (baseline_{PI}U) * (1-p)] - baseline_{PI}U}{PI\ _{maximum}U} * W_{PI} > \left|\frac{cd_{property}U - baseline_{property}U}{property_{maximum}U} * W_{property}\right| (6)$$

7.2. Application of Sartor's Approach to PA to the "Stay" and the "Cram Down"

Having described the variables, obtained and assumed each of their corresponding magnitudes, and completed each of Sartor's steps, it is now possible to express the conditions under which the "stay" and the "cram down" entail positive returns from the perspective of the PIL principles at stake. Let me recall that said conditions refer to the "probability" of success of the restructuring (i.e., "p") and to the level of enjoyment of the corresponding principle which the measures need to contribute to obtaining if the renegotiation is achieved.

First, I start by considering the conditions from the perspective of the interaction of the guarantee against expropriation and ESC rights under international investment law. Second, also under international investment law, I continue by assessing the issue from the perspective of the interaction of the FET standards and ESC rights. Finally, I analyze said conditions from the perspective of the interaction of the "peaceful enjoyment of possessions" and the "public interest" under the ECHR.

7.2.1. The "Stay" and the "Cram Down" from the Perspective of the Guarantee Against Expropriation under International Investment Law

Let me begin the discussion with the "stay". To find the conditions under which this measure maximizes the pie of PIL principles, it is necessary to solve the inequality (1) above. Let me recall that said inequality is given by:

$$\frac{[(stay_{social}U * p) + (baseline_{social}U) * (1-p)] - baseline_{social}U}{social\ _{maximum}U} * W_{social} > \left|\frac{stay_{exprop}U - baseline_{exprop}U}{exprop_{maximum}U} * W_{exprop}\right| (1)$$

I start by solving the right-hand portion of the inequality. Of note, I have already discussed the effects of the "stay" on creditors interests. As stated before, under a "stay" the state continues to recognize the debt and its adoption respects the terms of the contracts (when CACs are included in the bonds). Nevertheless, this "GPD" suspends creditors' litigation for a limited period. For that reason, I concluded that, if this measure is imposed, the enjoyment of creditors' property rights is situated on a level equivalent to "very high enjoyment" ($90^{0.6} = 14.87$). Setting the baseline for creditors' property rights at "absolute enjoyment" ($100^{0.6} = 15.84$), and its weight (i.e,, "W_{exprop}")

to "1", it is possible to obtain the absolute utility impact of the "stay" on creditors' interests in utility terms as follows[2229]:

$$\left|\frac{stay_{exprop}U - baseline_{exprop}U}{exprop_{maximum}U} * W_{exprop}\right| = \left|\frac{14.87 - 15.84}{15{,}84} * 1\right| = |-0.06|$$

Plugging in the results on inequality (1),

$$\frac{[(stay_{social}U * p) + (baseline_{social}U) * (1-p)] - baseline_{social}U}{social\ _{maximum}U} * W_{social} > |-0.06|$$

Replacing the known values on the left hand (in utility terms, including ("$baseline_{social}U$";"$social\ _{maximum}U$"; and "W_{social}"),

$$\frac{[(stay_{social}U * p) + (13.01) * (1-p)] - 13.01}{15{,}84} * 2 > |-0.06|$$

it is possible to solve inequality (1) and find the conditions under which: (a) the level of "social" rights enjoyment achieved by the state from the debt relief provided by creditors (i.e., $stay_{social}U$), as well as (b) the probability of achieving said debt relief ("p"), justify the imposition of the "stay". This is another way to say that, in those cases, the benefits provided by the "stay" to citizens' "social" rights outweigh the costs imposed by the same measure upon creditors' property rights (i.e., that benefits exceed costs). The following table summarizes the solutions for different probabilities of success and different levels of "social" rights satisfaction complying with the aforementioned condition:

Probability of Success	Minimum Level of "Social" Rights Enjoyment (success)	Minimum Value of $stay_{social}U$ (success)	Absolute Utility Impact Stay
0.2	95	15.36	0.001
0.3	88	14.67	0.003
0.4	84	14.27	0.003
0.5	82	14.06	0.006
0.6	80	13.86	0.003
0.7	79	13.75	0.005
0.8	78	13.65	0.003
0.9	78	13.65	0.011
1	77	13.54	0.006

Table 24: Conditions under which the "Stay" Maximizes the "Pie" of PIL Principles under the Guarantee Against Expropriation (International Investment Law)

Now, the same operation needs to be reiterated from the perspective of the "cram-down". This requires solving inequality (2) above. Let me recall that said inequality is given by:

$$\frac{[(cd_{social}U * p) + (baseline_{social}U) * (1-p)] - baseline_{social}U}{social\ _{maximum}U} * W_{social} > \left|\frac{cd_{exprop}U - baseline_{exprop}U}{exprop_{maximum}U} * W_{exprop}\right| \quad (2)$$

Again, I proceed by solving the right-hand portion first. Setting the baseline of creditors' rights in utility terms to "full satisfaction" (i.e., $baseline_{exprop}U = 100^{0.6} = 15.84$), the post-measure level of enjoyment to "moderate" (i.e., $cd_{exprop}U$=$70^{0.6} = 12.79$) and the weight of the principle to "1" (i.e., $W_{exprop} = 1$), it is possible to obtain:

[2229] Note that the only value not expressed in utility terms corresponds to the absolute weight of the competing principles.

$$\left|\frac{cd_{exprop}U - baseline_{exprop}U}{exprop_{maximum}U} * W_{exprop}\right| = \left|\frac{12.79 - 15.84}{15{,}84} * 1\right| = |-0.19|$$

Plugging in the results in the inequality,

$$\frac{[(cd_{social}U * p) + (baseline_{social}U) * (1-p)] - baseline_{social}U}{social\ _{maximum}U} * W_{social} > |-0.19|$$

Replacing the known values of the left-hand portion, including the baseline (i.e., $baseline_{social}U = 71.97^{0.6} = 13.01$), the maximum ESC rights achievement (i.e., $social\ _{maximum}U = 100^{0.6} = 15.84$) and the respective weight (i.e., $W_{social} = 2$):

$$\frac{[(cd_{social}U * p)\ + (13.01) * (1-p)] - (13.01)}{15.84} * 2 > |-0.19|$$

As with the "stay", from this inequality it is possible to find the conditions justifying the imposition of the "cram down". Again, this is another way to say that in such cases, the benefits provided by the "cram down" to citizens' "social" rights outweigh the costs imposed by the same measure upon creditors' property rights (i.e., that benefits exceed costs). The following table summarizes the solutions:

Probability of Success	Minimum Level of "Social" Rights Enjoyment	Minimum Value of $cd_{social}U$	Absolute Utility Impact Stay
0.6	97	15.56	0.005
0.7	93	15.17	0.001
0.8	91	14.97	0.007
0.9	89	14.77	0.008
1	87	14.57	0.005

Table 25: Conditions under which the "Cram Down" Maximizes the "Pie" of PIL Principles (Guarantee Against Expropriation under International Investment Law).

The next figure illustrates the aforementioned conditions for both measures from the perspective of the guarantee against expropriation:

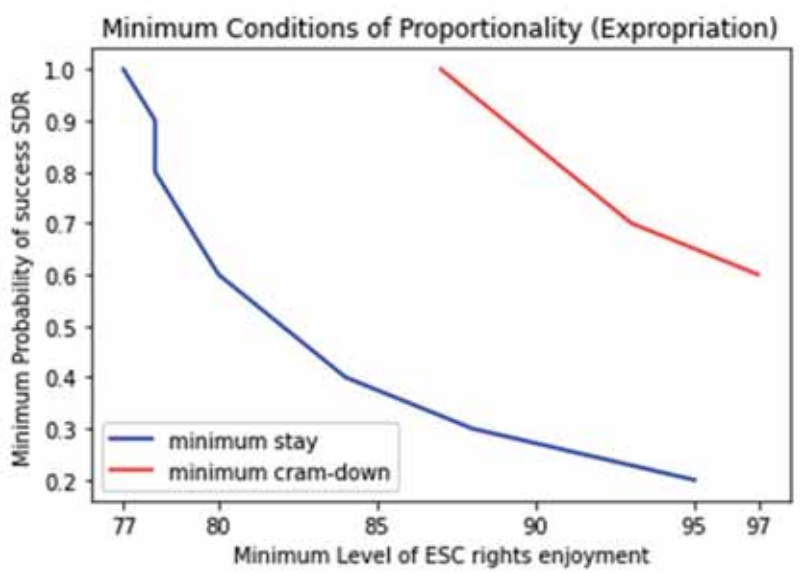

Figure 4: Minimum Conditions for the "Stay" and the "Cram Down" (Guarantee Against Expropriation under International Investment Law).

As can be noted, since the negative impact of the "stay" on creditors' interests is less severe than that of the "cram down", the "proportionality conditions" of the former are less stringent than those of the latter.

For example, while the "stay" will be deemed proportional even at lower levels of probability of success (the being minimum probability= 0.2); the "cram down" requires at least a significant degree of likelihood (at least p=0.6). The same is true for the minimum level of enjoyment of "social" rights if the restructuring is successful. While the "stay" requires the achievement of a level of enjoyment equivalent to "77" on the scale if the restructuring is successful (not in utility terms), the "cram down" requires a minimum of "87" (not in utility terms).

Consequently, I submit here that the sovereign will be able to avoid liability under BITs' expropriation guarantee if the aforementioned conditions are complied with in the context of the imposition of the measures. Nevertheless, this statement needs to be substantiated through the application of the (reformulated) three rules of proportionality, as will be discussed in subsection 7.3.

7.2.2. The "Stay" and the "Cram Down" from the Perspective of the FET Standard

Now, I reiterate the previous operations for both measures from the perspective of the FET standard. The main difference in this context refers to the weight of the competing principles (in this case, citizens' "social" rights and creditors' FET guarantee). As discussed before, I posited that the weight of both principles is the same (i.e., that

$W_{social} = W_{FET} = 1$). Therefore, maintaining the value assigned to the rest of the variables it is possible to directly obtain the conditions under which both measures would be able to maximize the "constitutional pie".

First, regarding the "stay", by replacing the known values in inequality (3) above and solving its right-hand portion, I obtain:

$$\frac{[(stay_{social}U * p) + (13.01) * (1 - p)] - 13.01}{15{,}84} * 1 > |-0.06|$$

And from there, it is possible to obtain the "minimum conditions" as expressed in the table below:

Probability of Success	Minimum Level of "social" rights enjoyment	Minimum Value of $social_{stay}U$	Absolute Utility Impact Stay
0.4	95	15.36	0.0002
0.5	91	14.97	0.002
0.6	88	14.67	0.002
0.7	86	14.47	0.004
0.8	84	14.27	0.002
0.9	83	14.17	0.004
1	82	14.06	0.005

Table 26: Minimum Conditions for the "Stay" (FET Standard).

Second, in what pertains to the "cram down", by replacing the known values in inequality (4) above, and solving the right-hand portion, I obtain:

$$\frac{[(cd_{social}U * p) + (13.01) * (1 - p)] - 13.01}{15{,}84} * 1 > |-0.19|$$

By solving said inequality, I find that there is no possible value which the variables may take that makes the "cram-down" maximizing the "pie" of PIL principles.

The following figure summarize the results for the "stay" under the FET standard:

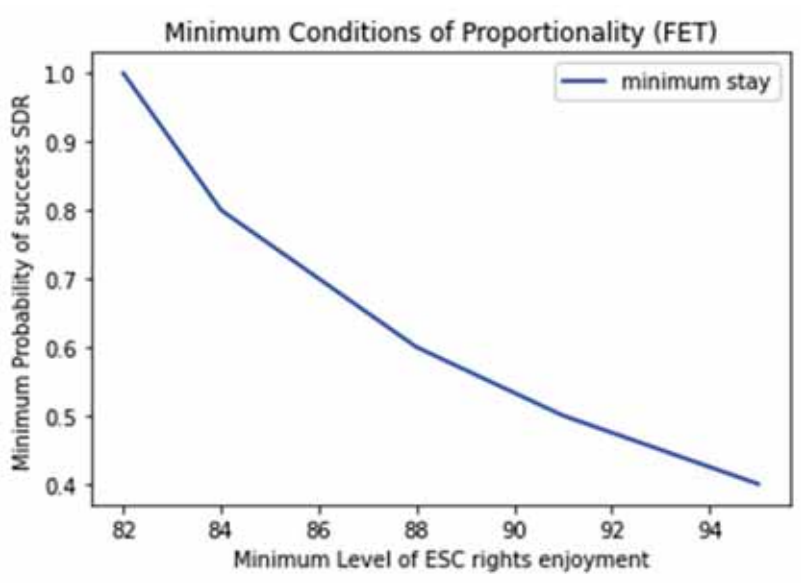

Figure 5: Minimum Conditions for the "Stay" (FET Standard).

Consequently, while sovereigns may be able to avoid liability under the FET standard if the "stay" is imposed, the same is not true in the case of the "cram-down"[2230]. Of note, the results are determined in this context not only by the baseline used, but, more importantly, by the weights assigned to the principles at stake. In effect, as previously indicated, I argued that due to the lack of specific treaty text to the contrary, and due to the complementary nature of the principles at stake, they both carried equal weight. Hence, states should be cautious when imposing the "cram-down" in the context of insolvency crises, since it may entail a violation of the FET standard.

7.2.3. The "Stay" and the "Cram Down" from the Perspective of the ECHR

Now, I continue with the assessment of both measures from the perspective of the interaction of the guarantee of property and the "public interest" in the context of the ECHR.

First, for the "stay", let me recall inequality (5) above, which is given by:

$$\frac{[(stay_{PI}U * p) + (baseline_{PI}U) * (1-p)] - baseline_{PI}U}{PI_{\ maximum}U} * W_{PI} > \left| \frac{stay_{property}U - baseline_{property}U}{property_{maximum}U} * W_{property} \right| \quad (5)$$

Replacing the known values in the inequality, and solving directly the right-hand portion:

$$\frac{[(stay_{PI}U * p) + (10.45) * (1-p)] - 10.45}{15{,}84} * 2 > |-0.06|$$

[2230] As in the previous case, this statement needs to be substantiated by the application of the three rules of proportionality, a problem to which I turn in subsection 7.3.

And from there, it is possible to obtain the "minimum" conditions for the "stay" to be considered proportional from the perspective of the PIL principles under scrutiny. The following table describes the minimum values in that regard.

Probability of Success	Minimum Level of "Public Interest" Enjoyment	Minimum Value of $stay_{PI}U$	Absolute Utility Impact Stay
0.1	90	14.87	0.001
0.2	70	12.79	0.001
0.3	64	12.12	0.004
0.4	60	11.66	0.001
0.5	58	11.43	0.001
0.6	57	11.31	0.004
0.7	56	11.19	0.004
0.8	55	11.07	0.001
0.9	55	11.07	0.008
1	54	10.95	0.001

Table 27: Minimum Conditions for the "Stay" (ECHR).

Next, for the "cram down", let me recall inequality (6), which is given by:

$$\frac{[(cd_{PI}U * p) + (baseline_{PI}U) * (1-p)] - baseline_{PI}U}{PI_{\ maximum}U} * W_{PI} > \left| \frac{cd_{property}U - baseline_{property}U}{property_{maximum}U} * W_{property} \right| (6)$$

Again, replacing the known values and solving directly the right-hand portion of the inequality:

$$\frac{[(cd_{PI}U * p) + (10.45) * (1-p)] - 10.45}{15{,}84} * 2 > |-0.19|$$

And, yet again, it is possible to determine the minimum conditions for the "cram down" under the ECHR. The following table summarizes said conditions.

Probability of Success	Minimum Level of "Social" Rights Enjoyment	Minimum Value of $cd_{PI}U$	Absolute Utility Impact Stay
0.3	93	15.17	0.002
0.4	82	14.06	0.0007
0.5	76	13.44	0.003
0.6	72	13.01	0.006
0.7	69	12.68	0.007
0.8	66	12.35	0.0007
0.9	65	12.23	0.01
1	63	12.01	0.003

Table 28: Minimum Conditions for the "Cram Down" (ECHR).

The next figure illustrates those results:

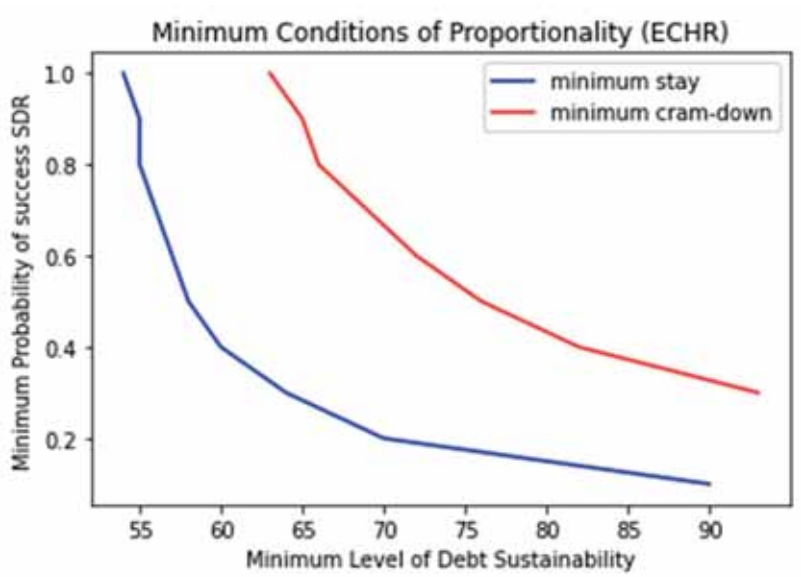

Figure 6: Minimum conditions for the "stay" and the "cram down" (ECHR).

Consequently, for the interaction of the "public interest" and the "peaceful enjoyment of possessions" under ECHR, the results are similar to those obtained for BITs' guarantees against expropriation. As can be noted, the "proportionality conditions" for the "cram down" are more stringent than those of the "stay". Again, this is a consequence of the severity of the interference (from the perspective of creditors' interests) entailed by the "stay" and the "cram down". Importantly enough, if the conditions previously posited are complied with, the sovereign may be able to avoid liability under the ECHR, provided that the measures pass the three rules of proportionality, as will be discussed in the next subsection.

7.3. Application of the Three Rules of PA to the Measures Under International Investment Law and the ECHR

Having obtained the aforementioned results, now is the time to proceed with the application of the three rules of proportionality. As previously discussed, Sartor reformulates said rules with the help of the instruments of welfare economics.

First, let me recall that for Sartor, a measure (α) will pass the suitability test if it has a positive "realization impact" on one constitutional principle (i.e., if $\Delta Real_v(\alpha) > 0$). If the probability of achieving a restructuring is more than 0 (i.e., p>0), the measures studied will pass said test[2231]. Then, following Sartor's notion, the "realization impact" of the measures is greater than 0. This can be formally presented as:

[2231] This is a consequence of the assumptions previously put forward. Let me recall that I assumed that, if the restructuring is successful, all the resources procured through the

$$\Delta Real_{social}(stay) > 0;\ \Delta Real_{social}(cd) > 0;\ \Delta Real_{PI}(stay) > 0;\ \Delta Real_{PI}(cd) > 0$$

Second, the "necessity" test needs to be scrutinized. In short, "necessity" demands that, having two equally suitable courses of action, the one which encroaches on the affected right the least should be taken. In Sartor's reconstruction, this rule of the proportionality principle states:

> *"a choice α having a negative impact on a prescribed value v_p is necessary if it has a positive impact on a permissible goal value v_g and there exists no alternative choice β, having a non-inferior impact on the goal value v_g and a better impact on the prescribed goal v_p"*[2232].

Consequently, as with the application of the test under Alexy's approach, subjecting the measures to this prong of PA requires one to contemplate other courses of action. This can be done first by considering an alternative which, unlike the "stay" and the "cram down", does not impair creditors' interests. Therefore, let me consider another scenario under which a restructuring is sought, exclusively through the activation of series-by-series CACs. This type of restructuring does not impair creditors' property rights in any case: It is conducted exclusively under the terms provided for by the contracts.

Considering said alternative, the "stay" and the "cram down" would not pass the necessity test if: (a) the probability of achieving the restructuring through the mere operation of series-by-series CACs is high and (b) if the degree of debt-relief captured by this alternative is more significant than the one procured by a restructuring using the "stay" or the "cram down". Thus, the necessity test needs to be examined from the perspective of the concrete case.

Nevertheless, there are good reasons to suspect that both measures would pass that test when compared with the hypothetical previously posited. On the one hand, the probability of achieving a restructuring increases if the "stay" and the "cram down" are employed. In effect, as previously discussed, the "stay" reduces the expected value of holdout strategies, diminishing the incentives for activists in acquiring the bonds to be restructured on the secondary market[2233]. At the same time, the "cram down" introduces third generation CACs into the instruments, counting the votes on the aggregate level and making the deal more feasible. On the other hand, and by the same token, both measures grant the sovereign more bargaining power for obtaining a more significant degree of debt relief when compared to a "normal" restructuring using series-by-series CACs.

Additionally, the necessity test can be applied by comparing the "stay" and the "cram down" among each other. Since the former is less detrimental from the perspective of creditors' interests, whether the "cram down" would pass the necessity test depends – again – on a comparison relating to: (a) how likely it was to achieve a restructuring by

---

renegotiation would be used by the state to increase the absolute level of enjoyment of ESC rights and of the public interest.

[2232] Sartor, *A Quantitative…* Op. Cit., pp. 628-629.

[2233] See *Chapter Four*, p. 269.

only recurring to the "stay" and (b) the degree of debt relief which the "stay" may have procured for the state. *A priori*, there are good reasons to suspect that the "cram-down" will pass this test if the crisis is severe enough. On the one hand, it increases the probability of achieving a deal (when compared to the "stay"). On the other hand, it allows the state to obtain a greater amount of debt relief (than the one obtained through the application of the "stay"), since through its application the sovereign is granted with a more considerable bargaining power.

However, the aforementioned considerations need to be taken with a grain of salt. As previously stated, the "necessity" judgment would depend on the circumstances of the concrete case.

Finally, for Sartor, the third rule of proportionality (i.e., proportionality "stricto sensu") is complied with if the absolute utility impact of the measure on the right being promoted exceeds the absolute utility impact of the measure on the right being demoted. Notably, this refers to inequalities 1 to 6 above. As I have already discussed, the "stay" and the "cram down" will pass the test if the conditions previously indicated are met. Notably, the only case in which the "cram down" fails the proportionality "stricto sensu" stage of PA refers to the conflict between the FET standard and citizens' ESC rights in the context of international investment law.

7.4. Conclusions

In this section, I attempted to sketch a PA informed by economics applied for the "stay" and the "cram down". Since the analysis was conducted with a certain degree of generality, I was forced to make several assumptions regarding the level of enjoyment of the PIL principles at stake.

Particularly, I argued that, under certain conditions, and given the assumptions made, both the "stay" and the "cram down" can be considered proportional. This conclusion holds for the interaction between the guarantee against expropriation and citizens' "social rights" under international investment law. It also applies to the interaction between the protection of the "peaceful enjoyment of possessions" and the "public interest" under the ECHR. However, in the context of the conflict between the FET standard and ESC rights, I found that while the "stay" can certainly be considered proportional, the same cannot be said for the "cram down". Importantly enough, I highlighted that said result is determined, first and foremost, by the weight assigned to the competing principles. At the same time, it is important to note that said results may change with different assumptions.

Notably, the conditions under which both measures will pass the proportionality test can be directly traced back to welfare economics. In effect, said conditions express the notion that, in certain cases, the positive effects of both GPDs on citizens' "social" rights and the public interest outweigh their negative effects on creditors' interests.

Interestingly, one of the results arrived at in this section stands in stark contrast with one obtained through the application of Alexy's understanding of PA. In effect, as previously discussed (subsection 6.3.4.2), after applying Alexy's methodology to the interaction of the FET standard and ESC rights, I concluded that the state will be able

to avoid liability for the "cram down" in one case. In particular, I argued that this would be the case if the state was able to show that the satisfaction of citizens' rights is "serious", and the empirical premises can be considered "certain". In contrast, after applying Sartor's methodology, I found that the "cram down" will fail the last stage of the proportionality test in that context. Certainly, this is a result determined by the assumptions taken. Thus, as previously indicated, it is left for further research to refine said conditions by using the empirical data which this *Chapter* lacked.

Finally, it is important to once again stress the limitations of the PA conducted in this section. First, as I have recently mentioned, the analysis presented relied on a set of assumptions regarding the positive effects of both measures on the satisfaction of citizens' "social" rights. Since I could not find (suitable) empirical evidence on the matter, recurring to those assumptions was a precondition for deploying the analysis.

Furthermore, the discussion took as baselines certain levels of satisfaction which determined, to a certain extent, the outcome. Consequently, a more robust approximation of this problem is left for future research.

Said limitations must be taken into account when considering the conclusions previously posited. That said, it is important to mention that those obstacles are not uncommon in the context of PA[2234]. As previously indicated, for some scholars, this type of analysis is driven by judicial arbitrariness. For others more sympathetic with this approach, it delivers important, though imprecise results. In this *Chapter*, I posited the assumptions of the analysis as clearly as possible to overcome the first line of criticism. At the same time, I relied on argumentation to transform informed judgments into quantitative notions. As Sartor notes, the assessment performed through PA is inevitably "noisy"[2235]. Nevertheless, it also lends important services by formalizing legal discourse and making legal decision-making more transparent[2236]. Therefore, though defeasible, I submit here that the conclusions presented provide useful insights on how to conduct a PA informed by economic thinking for the legal disputes arising in the context of insolvency conflicts.

[2234] See, for example, van Aaken, *"Rational Choice"…* Op. Cit., pp. 311-312.
[2235] See Sartor, *A Quantitative…* Op. Cit., p. 617.
[2236] See generally, Hofmann, *Rationality…* Op. Cit., and van Aaken, *"Rational Choice"…* Op. Cit., p. 312.

8. Conclusions

In this *Chapter*, I discussed whether the two GPDs identified in the previous *Chapters* may help to reconcile certain values (i.e., "PIL principles") enshrined by the international legal order. On the one hand, the GPDs studied corresponded to a "stay" on litigation and a "cram down" on dissenting creditors' claims. On the other hand, the PIL principles scrutinized were the FET and expropriation guarantees in international investment law, "social" rights, and the ECHR's property and "public interest" protection.

To answer the aforementioned question, I relied on PA. Particularly, I applied two methodologies belonging to the so-called "optimization accounts" of balancing: Alexy's and Sartor's proposals. Despite the differences between the two, I used them to illustrate the outcome of a hypothetical proportionality judgment concerning the PIL principles previously mentioned.

To arrive at that point, I recalled the discussion justifying the application of proportionality analysis under international investment law. Particularly, following the scholarship, I argued that there is authority in investment tribunal case-law suggesting that breaches of expropriation and FET provisions can be ascertained in two steps. First, adjudicators will question whether there is a "prima facie" violation of the standard (i.e., the "first prong"). If the answer is positive, they will move forward to the second step (i.e., the "second prong"): Assessing whether the state has maintained a proper relationship between the PIL principles being promoted and those being demoted. Crucially, I also indicated that PIL principles "external" to the treaties at stake can also be considered by investment tribunals in said assessment. Among said principles I noted those enshrined by the ICESCR (i.e., "social" rights).

Additionally, I discussed the application of the principle of proportionality under the ECHR. Particularly, I noted that the "fair balance" test is one requirement (among others) with which states need to comply in order to avoid violating that Convention.

Next, I offered a summarized account of the "GPDs" (i.e., the "stay" and the "cram down"). At the same time, I discussed whether the imposition of measures comprising said "GPDs" could entail a "prima facie" violation of investment standards. Additionally, I discussed whether they could be considered an "interference" with the right to property in light of the ECHR.

After that, I proceeded to apply both Alexy's and Sartor's approaches to PA. In the analysis, the aforementioned "GPDs" served as the "measures" whose conformity with international law was to be scrutinized. Meanwhile, the previously mentioned "PIL Principles" served as the "values" whose promotion and demotion was to be assessed.

In that context, I noted that PA tends to rely on the factual matrix of a concrete case. For that reason, I highlighted the limitations that affect the application of balancing from a general perspective and consequently affect the analysis conducted in this *Chapter*. For that reason, I decided to limit the scope of the analysis and proceeded to study the conditions under which the "stay" and the "cram down" can be considered compatible with the previously mentioned PIL principles.

Notably, by applying both Alexy's and Sartor's methodologies, I posited the conditions for both measures in the context of the interaction of: (a) "social" rights and creditors' FET and expropriation guarantees in the context of international investment law and (b) the protection of the "peaceful enjoyment of possessions" and the "public interest" under the ECHR. However, the application of said methodologies delivered dissimilar results in the context of the FET standard. In effect, when applying Alexy's methodology I found that the "cram down" can be considered proportional under certain conditions. I concluded that the same was not true if Sartor's methodology was applied instead. Indeed, I posited that if the assumptions posited in that context held, the "cram down" would always be considered "disproportionate" in what pertains to the FET standard.

However, before concluding, two caveats need to be taken into account. First, it is noteworthy that the international investment tribunals and the ECtHR's engagement with balancing do not always follow Alexy's three "rules" of proportionality to the letter. As discussed before, on some occasions, adjudicators tend to rely on only one or two of said "rules". For that reason, the conclusions presented in this *Chapter* would only be informative to the "rules" effectively applied in a concrete case.

Second, the differences between the frameworks scrutinized should also be stressed. For the purposes of this *Chapter*, perhaps the most important difference between the ECHR and international investment law corresponds to the wide "margin of appreciation" with which states are granted in the former. As previously discussed, this militates in favor of deciding "stalemate" cases in favor of states in the context of the ECHR. This is not necessarily true in the case of international investment law. That issue is left for future research.

CHAPTER SEVEN: CONCLUSIONS

1. Introduction

This *Thesis* has focused on the principles of international law relevant to the resolution of legal disputes arising from sovereign insolvency conflicts. It has attempted to contribute to the "incremental" approach literature by identifying principles, justifying their application in sovereign debt litigation and assessing whether they may help to reconcile the trade-offs prevalent in that context.

For that purpose, this *Thesis* has distinguished between two different types of principles of international law. First, this *Thesis* has investigated the "Principles of Public International Law" (henceforth, "PIL principles") relevant to the resolution of legal disputes arising from sovereign insolvency conflicts. As discussed throughout this *Thesis*, said category refers to norms of the law of nations which can be considered functionally and structurally similar to domestic constitutional principles (i.e., that can be regarded as "optimization" or "prima facie" requirements). Methodologically, the identification of said norms can be done from international legal materials and from the practice of international courts and tribunals[2237]. In short, whenever proportionality analysis (i.e., balancing or weighing) is mandated by a norm of the law of nations or used by international adjudicators in its interpretation or application, we can infer a principle in the aforementioned sense. Therefore, PIL principles do not refer to a particular source of international law (meaning that they can be identified in any source of the law of nations) but rather to a specific feature of those norms (i.e., to "principles" and not to "rules" in the sense posited by Robert Alexy).

Of particular interest to this *Thesis* are the PIL principles protecting the interests of the creditors and citizens as well as the "public interest" in the context of debt renegotiation. Crucially, it was argued that states and decision makers face a trade-off between these principles in the context of restructurings. In the context of sovereign insolvency, the satisfaction of citizens' interests (and of the "public interest") may require impairing those of creditors (and vice versa).

Secondly, this *Thesis* has also inquired into the "general principles of domestic law" (henceforth, "GPDs") which can be applied in sovereign debt restructuring. As discussed throughout this work, GPDs encompass normative propositions extracted from domestic legal systems which can be extrapolated to the international scenario. Two GPDs were identified in this *Thesis*: a "stay" on creditors' litigation and a "cram down" on dissenting creditors' claims. Although both principles have been identified by the prior literature, this work has presented a small but significant "twist" in the methodology used for that purpose. In short, it relied exclusively on functional and comparative analysis from the start, with the purpose of justifying their application in sovereign debt litigation before domestic courts *today*. Admittedly, the application of international law (and thus, of GPDs) in domestic legal systems depends on the reception of the former by the latter. For that reason, this *Thesis* limited that discussion to two jurisdictions: New York and

[2237] See van Aaken, *Defragmentation*… Op. Cit.

Germany. Finally, it was posited that, under certain conditions, said GPDs can help to mitigate the trade-offs between PIL principles, thus reconciling the interests at stake from the perspective of the values enshrined in the law of nations.

Particularly, this *Thesis* has posited and attempted to answer four research questions. The first refers to the identification of the PIL principles relevant to the resolution of the legal disputes arising from insolvency conflicts. In answering that question, this work ascertained certain international norms (which can be properly describe as "principles" in the sense posited by Alexy) protecting creditors', states' and citizens' interests. From the perspective of creditors' interests, this *Thesis* highlighted the guarantee against expropriation and the Fair and Equitable Treatment standard (under international investment law) and the protection of property (under the American and European Convention on Human Rights). In what pertains to citizens' and states' interests, it highlighted the norms protecting "social" rights (under the International Covenant on Economic, Social and Cultural Rights) and the "public interest" (as protected by the American and European Convention on Human Rights).

The second research question addressed by this work refers to the identification of the GPDs which, under certain circumstances, can mitigate the trade-offs between PIL principles. Specifically, it identified two such norms, including a "stay" on creditors' collection efforts and a "cram down" on dissenting creditors' claims.

The third research question corresponds to whether the aforementioned GPDs can be applied in sovereign debt litigation before the courts of Germany and New York. In this regard, it posited that in the case of litigation before German courts, both GPDs can be applied, provided that the criteria employed for the extrapolation of those norms is modified. For the courts of New York, the issue is not as straightforward. Specifically, it was argued that only the "stay" can be successfully invoked and applied, while the "cram down" will fail considering the role which GPDs play in that legal system.

The fourth and final research question refers to assessing the conditions under which the GPDs previously identified can reconcile the PIL principles at stake, and thus be lawful under the regimes scrutinized. For that purpose, this work applied proportionality analysis using two different methodologies: One proposed by Robert Alexy, and the other put forward by Giovanni Sartor. When applying Alexy's methodology, this *Thesis* concluded that both GPDs can mitigate the trade-offs between the PIL principles previously indicated if the European Convention on Human Rights and international investment law are regarded (separately) as the relevant decision criteria. The same is not true if Sartor's methodology is applied. If said framework is deployed for this purpose, it is likely that the imposition of a "cram down" will fail in what pertains to the Fair and Equitable Treatment standard under international investment law.

This concluding *Chapter* summarizes the findings of this work (section 2). It also succinctly answers the research questions posited (section 3) and underscores the interest that this work could generate for a law and economics audience (section 4). In addition, it stresses the limitations of the investigation thus conducted and discusses

possible avenues for future research (section 5). The *Chapter* ends by presenting final remarks on the work conducted (section 6).

2. Research Findings

Chapter Two explained the basic dynamics of sovereign insolvency conflicts. Said conflicts express the tensions between the interests of creditors and citizens in the context of sovereign debt renegotiation. The *Chapter* also highlighted the trade-offs that states face regarding these interests. More importantly, however, it sought to identify the norms of the law of nations protecting the aforementioned interests that can be considered functionally and structurally similar to domestic constitutional principles (i.e., PIL principles)[2238]. As suggested by the previous literature, said identification was made from international legal materials, including the practice of international courts and tribunals. Particularly, *Chapter Two* posited that whenever proportionality is mandated by an international norm or used for the interpretation and/or application of a norm of the law of nations, it is possible to infer a principle in the aforementioned sense.

Having clarified the scope of PIL principles as understood in this work, *Chapter Two* moved forward to the identification of norms belonging to that category. First, it ascertained the PIL principles protecting creditors' rights in the context of international investment law and human rights conventions. Regarding investment norms, it highlighted that their applicability to a case depends, first and foremost, on whether sovereign bonds can be qualified as protected assets by international investment law. The *Chapter* proceeded under the assumption that they could. It subsequently stressed that investors' protection against expropriation and the Fair and Equitable Treatment standard (henceforth, "FET") can be considered PIL principles. The most important reason justifying the consideration of both guarantees as such refers to the practice of international investment tribunals. Crucially, in some decisions, investment tribunals have treated those norms as "optimization requirements". In short: the *Chapter* posited that there is authority in the case-law according to which a violation of the guarantee against expropriation and of the FET standard can be ascertained by conducting a proportionality analysis.

Regarding human rights conventions, *Chapter Two* noted that sovereign bonds are protected by the guarantees to property included in the American Convention on Human Rights (henceforth, "ACHR") and in the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth, "ECHR"). It also stressed that it is possible to infer that those norms can be considered PIL principles, since they are applied and interpreted by the corresponding courts through proportionality analysis. At the same time, it noted that proportionality is the most important requirement with which interferences with property need to comply with to be considered compatible with the ACHR and the ECHR.

[2238] Crucially, as explained in *Chapters One* and *Two*, although both share the same name, this category is different from the one built by Juan Pablo Bohoslavsky, Matthias Goldmann and other scholars working on principles and sovereign debt restructurings. See, for example, Bohoslavsky and Goldmann, *An Incremental Approach…* Op. Cit. In short, the expression "principles of public international law" as used here refers to legally binding norms of the law of nations which can be regarded as "optimization" or "prima facie" requirements according to Robert Alexy. See *Chapter One* pp. 33 et seq. and *Chapter Two* pp. 49-53.

Chapter Two also identified certain norms protecting citizens' (and states') interests in the aforementioned Conventions and in the International Covenant on Economic, Social and Cultural Rights (henceforth, "ICESCR") which, under certain circumstances, need to be weighed against creditors' property rights. On the one hand, from the perspective of the ACHR and ECHR, it noted the role of the "public" or "general interest". In short, it emphasized that the "general interest" may justify the impairment of creditors' rights provided that the measures at stake can be deemed proportional. On the other hand, regarding the ICESCR, it followed the literature by noting that several of the guarantees offered by it can be impaired in the context of insolvency conflicts. Furthermore, *Chapter Two* also elaborated that the ICESCR imposes three different obligations on states: to respect, to protect and to fulfill the "social" rights set out therein. In what pertains to the obligation to fulfill, the *Chapter* indicated that beyond the obligation to guarantee a minimum essential level of satisfaction (i.e., the "minimum core"), most of the guarantees offered by the ICESCR can be considered PIL principles. It argued that this is a consequence of the structure of those rights. In that regard, it posited that states are authorized to downgrade the enjoyment of "social" rights (by imposing "retrogressive" measures) provided that a set of (stringent) requirements are complied with. Crucially, it noted that one of those requirements is that the measures at stake can be deemed proportional. Therefore, it posited that beyond the "minimum core", "social" rights can also be deemed as "optimization" requirements and thus, as PIL principles.

Chapter Two concluded by stressing the tensions between the PIL principles thus identified. It posited that, assuming a state's insolvency, the interaction between the PIL principles protecting creditors' interests, on the one hand, and citizens' (and states') interests, on the other, can be construed as involving a trade-off between goals. In short, it indicated that, while in some cases the protection of citizens' "social" rights (and/or the protection of the "public interest") will require restructuring the debt (by modifying the most important obligations of the bonds to be restructured), the protection of bondholders' property rights will require contractual stability and, therefore, debt repayment in the previously agreed terms. It further stressed that, in that context, it might not be possible for a state to fully satisfy its citizens' "social" rights (and/or the "public interest") without encroaching upon the property rights of bondholders. Moreover, it also indicated that, under the same circumstances, it might not be possible to respect property rights without impairing "social" rights (and/or of the "public interest").

Chapters Three and *Four* attempted to identify other norms of the law of nations which may be capable of reconciling the previously mentioned PIL principles in the context of insolvency conflicts. Those "other norms" refer to the "general principles of law recognized by civilized nations" (henceforth, "GPs") in the language of Article 38 (1)(c) of the Statute of the International Court of Justice[2239]. In stark contrast with PIL principles, the category of GPs refers to a particular source of the law of nations and not

[2239] See Statute of the International Court of Justice in Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, T.S. No. 993

to a "norm-type". In other words, GPs can be either "rules" or "principles" (in the sense posited by Alexy) and, together with treaties and custom, belong to the triad of "traditional" sources of international law.

As discussed throughout this *Thesis*, GPs comprise principles with different underpinnings, including those which can be found in domestic jurisdictions (i.e., "general principles of domestic law", henceforth, "GPDs"). These GPDs, were the subject of *Chapters Three* and *Four*. Of note, GPDs encompass normative propositions widely recognized by domestic legal systems around the world which are capable of being extrapolated to the international sphere. Methodologically, the identification of GPDs entails the fulfillment of two conditions: "recognition" and "extrapolation". On the one hand, "recognition" requires conducting a comparative study of domestic jurisdictions on a particular point of law. In that context, the purpose is to capture certain commonalities among them and to investigate their corresponding "rationales". The "rationale" of the norms in this context refers to their "function", i.e., to the solution that they provide to one or more problems. When different jurisdictions offer similar solutions to similar problems (hence sharing an underlying rationale), one or more common normative propositions can be built.

On the other hand, "extrapolation" requires that the common normative propositions previously found and built are capable of being transposed to the international context. Of note, the transposition of said norms from the domestic to the international sphere can be divided into several parts. First, those norms need to be compatible with the values embedded in the international legal order (i.e., the "compatibility test"). Second, it is necessary to account for the (dis)similarities between the international and domestic spheres. In this context, a successful argument ought to justify that, from the perspective of the problem at stake, both spheres are "relevantly" or "sufficiently" similar. What matters, at this point, is that the "function" of the domestic norms previously extracted holds in the international context. Two sub-conditions follow from this: (a) That the international and the domestic sphere share a similar problem which can be solved in the international level through the norms extracted from domestic jurisdictions, and that (b) the similarities between the domestic and the international sphere are significant enough to render the analogy plausible.

Chapters Three and *Four* took inspiration from the previous literature by attempting to identify GPDs relevant to sovereign debt restructuring. It should be noted that said *Chapters* discussed three groups of normative propositions which have been already ascertained by the prior scholarship. At the same time, that scholarship also relied on corporate insolvency law (domestic reorganization regimes in particular) as the source from which GPDs could be extracted. However, the work conducted in those *Chapters* differs from previous work in a small but significant respect. In effect, the strategy employed for the identification of said principles was oriented, from the outset, towards justifying their application in sovereign debt litigation, as highlighted in the following.

Chapter Three began the identification of said GPDs by tackling the "recognition" requirement and the first step of the "extrapolation" requirement. It presented a comparative survey of corporate reorganization frameworks belonging to five

jurisdictions and extracted three groups of normative propositions which were built following the law and economics literature on insolvency law. The first group referred to the benefits presented to the debtor in order to prevent risk-shifting and "gambling for resurrection" behavior and to encourage early reorganizations (the so-called "Debtor in Possession" or "DIP" regime). The second comprised the imposition of a "stay" on creditors' litigation to prevent a sub-optimal piece-meal liquidation of the debtor's assets and to encourage participation in the reorganization forum (i.e., the "stay"). The third referred to the subordination of dissenting groups of creditors to the will of the majority, a mechanism designed to solve anti-commons problems among claimants (i.e., the "cram down"). Additionally, *Chapter Three* tested whether said propositions can be deemed compatible with the values embedded in international law. It concluded that they can.

Chapter Four built on the above, completing the remaining parts of the extrapolation analysis for each group of normative propositions. Particularly, it discussed the second step (and its two sub-conditions) referred to earlier. In what pertains to the first sub-condition, *Chapter Four* analyzed whether the problem-solution nexus represented by the groups of normative propositions under domestic insolvency regimes also holds in the international sphere. It argued that only the "stay" and the "cram down" satisfied that condition. Regarding the second sub-condition, it discussed whether the similarities between the domestic and international contexts are sufficiently relevant to make the analogy plausible. It is in the application of this last sub-condition where the contribution of this *Thesis* in what pertains to the identification of GPDs can be highlighted.

As discussed throughout this *Thesis*, the previous scholarship approached the extrapolation requirement from a different perspective and consequently advanced other arguments in this regard. On the one hand, there is a body of work which has indicated that the extrapolation of domestic insolvency norms was contingent on the existence of a restructuring procedure for states[2240]. Following that line of thinking, if no such procedure exists, transposition will fail. Critically, this point of view has been endorsed by German courts[2241]. On the other hand, other literature seems to indicate that the existence of such a procedure is unnecessary. For that literature, what matters is whether the "informal arrangements" under which states' debts are restructured can be considered acts of "public authority" in the same way as the decisions made by domestic bankruptcy courts[2242].

In stark contrast with the above, *Chapter Four* indicated that neither of the conditions suggested by those works are necessary for transposing norms belonging to domestic insolvency systems to the international sphere. This is a consequence of the methodology which this *Chapter* used for that purpose. In effect, *Chapter Four* relied

[2240] See Goldmann, *On the Comparative*… Op. Cit., pp. 113 footnote 108.
[2241] See Bundesgerichtshof (Federal Court of Justice, Germany) Decision of 24 February 2015, Az.: XI ZR 193/14 paras 22 et seq. and BVerfG, (Federal Constitutional Court, Germany), Order of the Third Chamber of the Second Senate of 03 July 2019 - 2 BvR 824/15, 2 Rn. 1-45 paras 37-39.
[2242] See, for example, von Bogdandy and Goldmann, *Sovereign Debt Restructurings*… Op. Cit.

exclusively on analogical reasoning and functional analysis for extrapolation. The main tenets of said methodology can be summarized in two points. First, analogical reasoning does not require identity between the "source" (the domestic context) and the "target" (the international scenario). On the contrary, "similarity" between them suffices. Second, in this context, functional analysis complements analogical reasoning in the following fashion: "similarity" between the "source" and the "target" relates to the "functions" of the norms.

Consequently, through those means, *Chapter Four* argued that what is relevant for the purpose of extrapolation is whether there are mechanisms operating in the international context "functionally" equivalent to those in place under domestic insolvency regimes. Crucially, that *Chapter* put forward that the involvement of international organizations, such as the IMF, can build that bridge. Particularly, it noted that their participation in sovereign debt restructurings can contribute to mitigating information asymmetries and preventing moral hazard. This is precisely the point that the previous scholarship failed to make in this context, and which makes feasible the extrapolation of these norms in the absence of a restructuring procedure for states *today*.

Chapter Four concluded that only the "stay" and the "cram down" satisfied the extrapolation requirement. First, it argued that the function of the norms comprising the first group of normative propositions (i.e., the "DIP") failed the previously mentioned first sub-condition. In short, the *Chapter* posited that its functions do not hold in the sovereign debt scenario. This is due to the fact that they would be incapable of insulating incumbent politicians from being removed from power, and thus from preventing "risk-shifting" and "gambling for resurrection" behavior. Next, *Chapter Four* also contended that the "stay" is capable of solving similar problems at both the domestic and international level and therefore, it succeeded in the extrapolation analysis. Crucially, the *Chapter* maintained that said conclusion held even under the assumption that states can act opportunistically, provided that the IMF is actively involved throughout the restructuring process. Finally, and for similar reasons, *Chapter Four* determined that the "cram down" was also successful in the extrapolation analysis and that it can also be considered a GPD.

Chapter Five analyzed whether the GPDs identified in the previous *Chapters* (i.e., the "stay" and the "cram down") can be applied in sovereign debt litigation before domestic courts. Crucially, it noted that the applicability of said principles depends on the reception of international law in each jurisdiction. For that reason, the *Chapter* limited the inquiry to two domestic legal systems: New York and Germany. New York was chosen because its law is usually preferred by emergent market borrowers when issuing bonds abroad, whereas Germany was selected because it features several cases specifically discussing the application of GPDs in sovereign debt litigation.

In what pertains to New York (and the United States), *Chapter Five* relied on the (scant) secondary literature on the subject. It also conducted a problem-oriented search of decisions rendered by those courts. Particularly, it revealed that US courts have used GPs (and GPDs) as an aid in the interpretation of domestic statutes or as a means of

endorsing domestic legal principles. It was also suggested that the engagement of said courts with norms belonging to GPDs is not so different from their engagement with norms stemming from other sources of the law of nations (i.e., treaties and customary international law). In short, it argued that several elements of the "Charming Betsy" doctrine (which is used primarily for the other sources previously mentioned) can be identified in the case-law also in the context of the application of GPDs by US courts.

Once the relationship between GPs and US law was clarified, *Chapter Five* discussed whether the "stay" or the "cram down" could be applied in sovereign debt litigation before the courts of New York. On the one hand, it submitted that the "stay" could aid the interpretation of a particular norm of the Civil Practice Law and Rules of the State of New York (henceforth, "CPLR")[2243]. In short, it argued that New York courts can recur to said principle in order to operationalize the "general language" of section 2201 CPLR. On the other hand, regarding the "cram down", it argued that the "subsidiary" role that GPDs play in the US hinders its use as a defense against dissenting bondholders.

Additionally, *Chapter Five* also discussed whether those principles could be applied in sovereign debt litigation before the courts of Germany. Crucially, it noted that said international norms are specifically incorporated and directly applicable in the German legal system[2244]. It also highlighted that, despite said circumstance, there are no cases (to date) in which the invocation of GPDs has been successful before German courts in the context of sovereign debt litigation. *Chapter Five* argued that this is a consequence of the erroneous application of the methodology necessary for the identification of norms belonging to that source of the law of nations. In that regard, it noted that German courts have subordinated the extrapolation of insolvency principles in the international sphere to the existence of a formal international bankruptcy regime for states.

In contrast, as in the previous *Chapters*, *Chapter Five* argued that the aforementioned understanding is more stringent than necessary. Thus, it stressed that for a comparative law-based methodology attempting to identify GPDs, identity between the international and the domestic sphere is not necessary. On the contrary, it indicated that this methodology only demands similarity between the two. Hence, it was submitted that existing mechanisms in international finance (particularly those considered through the IMF's lending policies) serve an equivalent function to those considered under domestic reorganization regimes. At the same time, *Chapter Five* also posited that the existence of those mechanisms enables the extrapolation of domestic principles to the international sphere, and thus, to their application in the German legal system.

Chapter Six took stock of the foregoing analysis and attempted to answer the question posed in the title of this *Thesis*. In short, it discussed whether the GPDs identified in *Chapters Three* and *Four* could help to reconcile the "values" enshrined by the

[2243] Civil Practice Law and Rules of the State of New York, Section 2201. Available at: https://www.nysenate.gov/legislation/laws/CVP/2201 [last accessed 24.7.2020].

[2244] See Art. 25 Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland). English translation. Available at: https://www.btg-bestellservice.de/pdf/80201000.pdf [last accessed 29.7.2020].

international legal order (i.e., the PIL principles ascertained in *Chapter Two*) in the context of sovereign debt restructurings. For this purpose, it discussed the conditions under which measures comprising those GPDs (i.e., the "stay" and the "cram down") could be considered compatible with PIL principles protecting property rights, "social" rights and the "public interest". The analysis was conducted under two different frameworks: international investment law and the European Convention on Human Rights. The methodology used for that purpose was proportionality analysis (henceforth, "PA") applied to the international plane.

Particularly, *Chapter Six* relied on two different understandings belonging to the "optimization" accounts of PA: Alexy's and Sartor's. Crucially, for both of them, a measure can be deemed in conformity with the relevant decision criteria (in this case, PIL principles) if its expected "gains" on one principle exceed the expected "losses" on another[2245]. This *Chapter* also highlighted the limitations of the application of PA. In short, since the analysis was conducted with a certain level of generality, the *Chapter* was forced to make several assumptions. Those assumptions referred to the specific characteristics of the measures comprising the "stay" and the "cram down", the legal context under which they were imposed and their ability to satisfy citizens' "social" rights and the "public interest".

Chapter Six concluded by presenting the conditions of proportionality for both the "stay" and the "cram down" in the context of the interaction of: (a) "social" rights and creditors' FET and expropriation guarantees in the context of international investment law and (b) the protection of the "peaceful enjoyment of possessions" and the "public interest" under the European Convention on Human Rights. Notably, that *Chapter* reported that the application of Alexy's and Sartor's methodologies delivered dissimilar results in the context of the FET standard. On the one hand, it found that when applying Alexy's methodology, the "cram-down" could be considered proportional under certain conditions. On the other hand, it concluded that the same was not true if Sartor's methodology was applied instead. Particularly, it proposed that if the assumptions posited in that context held, the "cram down" would always be considered "disproportionate" in what pertains to the FET standard.

[2245] See, for example, Urbina, *A Critique of Proportionality*… Op. Cit., p. 35.

3. Research Questions and Corresponding Answers

This *Thesis* has posited and attempted to answer four research questions. Those questions can be answered succinctly, as indicated in the following:

1) **Research Question # 1:** *What are the PIL principles relevant to the resolution of legal disputes arising from insolvency conflicts?* From creditors' perspective, those principles are: The guarantee against expropriation and the Fair and Equitable Treatment standard (international investment law) and the guarantee protecting property rights (American and European Convention on Human Rights). From citizens' and states' perspective the principles considered were: The guarantees contained in the International Covenant on Economic, Social and Cultural Rights (i.e., "social" rights) and the "public interest" (American and European Conventions on Human Rights).

2) **Research Question # 2:** *What are the general principles of domestic law relevant to sovereign insolvency conflicts?* The GPDs identified were a "stay" on creditors' collection efforts and a "cram down" on dissenting creditors' claims.

3) **Research Question # 3:** *Can the previously identified general principles of domestic law be applied in sovereign debt litigation before the domestic courts of New York and Germany?* In the context of New York law, only the "stay" can be applied. For German law, both may be applied, provided that the criteria used by the courts for extrapolating those norms is modified according to the methodological suggestions of this *Thesis*.

4) **Research Question # 4:** *Can the measures comprising the previously identified general principles of domestic law help to reconcile the PIL principles at stake in sovereign insolvency conflicts?* If Alexy's understanding is followed, and assuming that both measures comply with the "suitability" and "necessity" tests, both measures can help to reconcile the PIL principles at stake. First, applying Alexy's methodology, both the "stay" and the "cram down" can potentially reconcile the PIL principles protecting creditors' rights (guarantee against expropriation and FET standard) and citizens' "social" rights in the context of international investment law. Crucially, the interaction of the FET standard with citizens' "social" rights presents more stringent conditions for the measures to be deemed proportional, and thus, to be regarded as in conformity with the PIL principles. Secondly, and also under Alexy's methodological proposal, both measures can potentially reconcile the guarantee of property and the "public interest" under the European Convention on Human Rights. Notably, under both frameworks, and applying this methodology, the "stay" is more likely to be judged proportional than the "cram down". Following Sartor's methodology, similar results were obtained, save for the interaction of the FET standard and citizens' "social" rights in the context of international investment law if a "cram down" was imposed. Particularly, said measure will fail the last stage of proportionality if performed according to Sartor's methodological proposal and if the assumptions posited in *Chapter Six* hold in a case.

Through these means, this *Thesis* has endeavored to make a modest contribution to the literature on sovereign debt restructuring and, in particular, to the scholarship advancing an "incremental" approach to sovereign indebtedness. As stated before, said literature seeks to identify, systematize and disseminate principles, norms and best practices for sovereign debt and sovereign debt restructuring. Particularly, this work attempted to add to the "incremental" approach scholarship a "practical" perspective, that is, a perspective oriented towards sovereign debt litigation before domestic and international courts and tribunals.

On the one hand, it identified two GPDs (i.e., a "stay" and a "cram down") and assessed whether they can be applied before the domestic courts of New York and Germany. On the other hand, it identified a group of "values" enshrined by the law of nations (i.e., PIL principles). In that regard, it further discussed whether the "stay" and the "cram down" could be deemed compatible with those PIL principles as established in two different regimes: international investment law and the European Convention on Human Rights.

The practical perspective adopted in this *Thesis* was born out of necessity. In fact, it is precisely this approach which justifies the policy relevance of this work. As scholars have indicated, "holdout" litigation has soared in the last twenty years[2246]. This has reinvigorated the calls for solutions targeting this particular problem[2247]. It is submitted that the solutions provided in this *Thesis* may be able to address that problem, while simultaneously respecting creditors' rights. Furthermore, it is hoped that the insights advanced in this *Thesis* are useful for the clarification and advancement of the law of sovereign debt restructuring. More ambitiously, however, it is also hoped that its conclusions reach those adjudicating sovereign debt cases, both at the domestic and international level.

[2246] See generally Julian Schumacher, Christoph Trebesch and Henrik Enderlein, *What Explains Sovereign Debt Litigation?* 58 Journal of Law and Economics (2015).
[2247] See Christoph Trebesch, *Sovereign Debt in the 21st Century: Looking Backward, Looking Forward*, CESIFO Working Papers (2021), available at https://www.cesifo.org/en/publikationen/2021/working-paper/sovereign-debt-21st-century-looking-backward-looking-forward [last accessed 05.08.2021], pp. 47-48.

4. Relevance of this Work for a Law and Economics Audience

The modest contributions put forward by this work may be of interest to a law and economics audience. Particularly, this *Thesis* combined legal doctrine with incentive analysis and applied them to sovereign debt restructuring. In short, it attempted to deploy the insights and tools of economic theory to the legal problems which may arise in the context of state indebtedness. However, it did not assume and perform said task from a perspective external to the law, as does the majority of law and economics scholarship (henceforth, "L&E"). For example, it is usually stated that the main promises of L&E to law relate to either positive or normative analysis. From that perspective, the "economist" lawyer assumes the role of an *external* advisor to lawyers, policy makers and adjudicators, suggesting avenues to either make predictions about the effects of the law (positive analysis) or to determine its desirability (normative analysis). In contrast, this *Thesis* forms part of the literature attempting to apply L&E *directly* to problems specifically related to legal doctrine, i.e., to problems which are viewed from the *internal* perspective of law[2248]. From this perspective, the role of the "economist" lawyer is not that of an *external* advisor, but that of a jurist attempting to determine *what the law is*. Specifically, this *Thesis* attempted to put this approach into practice by addressing two problems related to sovereign debt restructuring.

First, this book endeavored to identify norms of international law with the help of the conclusions and tools offered by L&E scholarship. Particularly, it took on the task of ascertaining certain GPDs which can be invoked and applied in sovereign debt litigation. For this purpose, it relied on the previous L&E literature putting forward the "function" which certain norms of domestic insolvency regimes play in domestic corporate reorganizations and thus capturing their "rationale". As discussed in *Chapter Three*, under certain circumstances, economic models can be used to describe the "function" and the "rationale" of the norms under scrutiny. Notably, the "function" and the "rationale" of a norm can be understood as the nexus between the problem which it attempts to solve and the solution that it puts forward. As previously indicated, clarifying the "function" and the "rationale" of the norms studied is critical for the purpose of GPD identification. Crucially, said step makes determining whether a common understanding exists on a particular point of law possible (thus enabling "recognition" analysis). It also allows the construction of the common normative propositions to be subjected to the "extrapolation" requirement. Moreover, this *Thesis* employed the insights offered by the L&E scholarship to verify whether the "function" of the domestic norms previously described survives in the international sphere (at the "extrapolation" stage). For this purpose, it applied analogical reasoning from an incentive-based and functional perspective to determine whether the domestic and international sphere can be considered relevantly similar. Through these means, this work identified two GPDs which may be of relevance to states attempting to restructure their debts: a "stay" and a "cram down".

Second, this *Thesis* attempted to determine the conditions under which the imposition of measures comprising the aforementioned GPDs could be considered lawful, if PIL

[2248] Highlighting this perspective, see van Aaken, *"Rational Choice"*… Op. Cit.

principles are relied upon as the relevant decision criteria. For that purpose, it applied a particular understanding of proportionality analysis which is highly indebted to economics (and, particularly, to cost-benefit analysis). This understanding corresponds to the "maximization accounts" of balancing. As previously indicated, according to that understanding, a measure can be deemed in conformity with the relevant decision criteria if the expected "gains" of a measure exceed expected losses. For example, in applying the methodology suggested by said understanding, this *Thesis* also benefited from the tools offered by economics. As suggested by Sartor, this work proposed a scale enabling the analyst to translate informed judgments regarding the enjoyment of PIL principles into numerical magnitudes. While not precise, this exercise is useful to the law in that it serves as a tool for constraining legal reasoning with quantitative methods[2249]. At the same time, and following the same author, this work posited a utility function capturing the satisfaction of PIL principles, assuming that the satisfaction of those principles exhibits a diminishing marginal utility. Through these means, this *Thesis* proposed a set of conditions under which a state could avoid liability when either the ECHR or international investment law is applicable to the merits.

Consequently, this work can be read as a modest attempt at showing that L&E can play a significant role in the courthouse in arguments *directly* related to the content of the law.

[2249] See Sartor, *A Quantitative…* Op. Cit., p. 633.

5. Limitations of this Thesis and Suggested Avenues for Future Research

Before concluding this *Thesis,* it is important to stress its main limitations and the possible avenues for future research.

The first limitation relates to the relationship between sovereign debt restructurings and international investment law. To date, there seems to be no agreement between scholars, practitioners and arbitrators on whether sovereign bonds can be considered protected by the wide network of treaties protecting foreign investment. In particular, the controversy refers to whether bonds can be regarded as "investments" from the perspective of Article 25(1) of the ICSID Convention. Nevertheless, throughout this *Thesis*, I proceeded under the assumption that bonds qualify as such. This allowed me to test how measures comprising the GPDs identified in *Chapters Three* and *Four* may fare from the perspective of the guarantees against expropriation and against unfair and inequitable treatment (both being PIL principles). Consequently, the status of sovereign bonds before international investment law (and particularly, from the perspective of the ICSID Convention) is still to be determined by the scholarship.

The second limitation of this *Thesis* refers to the reduced number of domestic jurisdictions under which the possibility of applying the GPDs identified (i.e., the "stay" and the "cram down") was justified. In effect, said discussion was exclusively conducted from the perspective of two legal systems: New York and Germany. As a result, the role which those GPDs may have in other domestic jurisdictions, including English law, was neglected. This is a significant limitation indeed if one considers that English law is also frequently recurred to as the governing law in sovereign bonds issued by emergent market borrowers.

Another limitation of this *Thesis* relates to the way in which proportionality analysis was used for the assessment of the compatibility of the "stay" and the "cram down" with the PIL principles protecting creditors' rights, citizens' rights and the "public interest". In this regard, it is crucial to stress that the analysis was conducted with an unavoidable level of generality. For that reason, it posited several assumptions regarding the specific characteristics of the measures comprising the "stay" and the "cram down", the legal context under which they were imposed and their ability to satisfy citizens' "social" rights and the "public interest". At the same time and for the same reason, the discussion was limited to assessing the conditions under which measures comprising the aforementioned GPDs can be deemed in conformity with the previously mentioned PIL principles.

In direct connection with the last point, the attempt to apply Sartor's economic reformulation of proportionality analysis suffered from those limitations among others. In effect, the lack of available data in what pertains to the direct effects of the measures under scrutiny on the satisfaction/dissatisfaction of PIL principles forced the analysis to rely on "informed judgements" in that regard. At the same time, the lack of available data also required the use of certain proxies, both for the PIL principles under scrutiny and for their corresponding baselines.

Therefore, the proportionality assessment thus conducted remained at the level of a "sketch" to be completed once: either (a) a particular application of the GPDs is litigated before the international fora discussed throughout this *Thesis* or (b) when reliable data in the previously mentioned respect becomes available. Further research is warranted to fill said gap.

The final, and perhaps most important limitation of this *Thesis* refers to its practical insights. To the knowledge of the author of this *Thesis*, no argument based on GPDs has been successful before domestic courts in the context of bondholder litigation, neither under German nor New York law. Although the research conducted in this work was oriented towards justifying the application of said norms under those jurisdictions, courts will always have the final say on this matter. A similar caveat can be posited for the application of proportionality analysis in the context of sovereign debt litigation before international courts and tribunals. In effect, as discussed in *Chapter Two* and *Chapter Six*, international adjudicators' engagement with balancing is not always structured in the manner suggested by the literature. For that reason, the conclusions relating to the possibilities of reconciling (in practice) the PIL principles at stake in the context of sovereign insolvency depend on international courts and tribunals following the "stages" posited by scholars, and particularly, on those advanced by Robert Alexy.

Ultimately, the overall success of the arguments advanced in this *Thesis* will be measured against whether they are persuasive enough to motivate the decisions to be rendered in the context of sovereign debt litigation. The proof of the pudding is in the eating.

6. Final Remarks

As stressed throughout this *Thesis*, sovereign debt restructurings are endeavors fraught with obstacles and problems. This research agenda is timely and relevant, above all, for the economic complications which the current pandemic has imposed on states' finances[2250]. Although the results arrived at in this work can help to either mitigate or solve some of them, there is one which will continue to haunt decision makers, creditors and states in the near future. Indeed, the restructurings to come will be conducted in the much-lamented absence of a multilateral regime addressing all the interests at stake in a comprehensive manner.

Therefore, as they have done to this day, domestic and international courts and tribunals will be called upon to decide on the basis of at times different and overlapping legal regimes. While some of them may put contractual stipulations and domestic law at the forefront, others may be more amenable to innovations grounded in the law of nations, and others still may directly adjudicate in accordance with the values enshrined by the international legal order.

Simply put, neither the "incremental" approach literature, nor the modest contribution offered by this *Thesis* are capable of solving the "fragmentation" that affects this area of international finance. Nevertheless, it is submitted here that future work to be conducted under the "incremental" approach can provide useful insights in that regard until proven persuasive enough to motivate the gap in the law of sovereign insolvency to be filled through an international agreement in the subject.

The above notwithstanding, it must be stated directly that even in the absence of a multilateral convention governing sovereign insolvency, the different interests at stake in that context can be reconciled in the light of public international law. The point is, however, that the law of nations needs to be applied for that purpose. This *Thesis* concluded that, under certain conditions and from particular perspectives, it can be.

[2250] See Kristalina Georgieva, Ceyla Pazarbasioglu and Rhoda Weeks-Brown, *Reform of the International Debt Architecture is Urgently Needed,* IMFBlog: Insights & Analysis on Economics & Finance (2020), available at https://blogs.imf.org/2020/10/01/reform-of-the-international-debt-architecture-is-urgently-needed/ [last accessed 13.08.2021].

REFERENCES

1. Books and Papers

Abel, Jeannette. *The Resolution of Sovereign Debt Crises: Instruments, Inefficiencies and Options for the Way Forward*. Nomos (2017).

Aceves, William. *Cost-Benefit Analysis and Human Rights*, 92 St. John's Law Review.

Ackermann, Tobias. Exception Clauses in International Investment Agreements: A Case for Systemic Integration? in Akbaba, Mesut and Capurro, Giancarlo (Eds.). *International Challenges in Investment Arbitration*. Routledge (2019).

Alexy, Robert. *A Theory of Constitutional Rights*. Oxford University Press (2002).

Alexy, Robert. *Balancing, Constitutional Review and Representation*, 3 I-CON 4 (2005).

Alexy, Robert. *Constitutional Rights and Proportionality*, 22 Journal for Constitutional Theory and Philosophy of Law (2014).

Alexy, Robert. *On Balancing and Subsumption. A Structural Comparison*. 16 Ratio Juris 4 (2003).

Alexy, Robert. *On Constitutional Rights to Protection,* 3 Legisprudence 1 (2009).

Ammann, Odile. *Domestic Courts and the Interpretation of International Law*, Brill Nijhoff (2020).

Ams, Julianne et al. Sovereign Default, in Ali Abbas et al (Eds.). *Sovereign Debt: A Guide for Economists and Practitioners*. Oxford University Press (2020).

Andenas, Mads and Chiussi, Ludovica. Cohesion, Convergence and Coherence of International Law, in Fitzmaurice, Malgosia et al. (Eds.). *General Principles and the Coherence of International Law*. Brill Nijhoff (2019).

Anderson, Hamish. *An Introduction to Corporate Insolvency Law*, 1 Plymouth Law and Criminal Justice Review (2016).

Arangio-Ruiz, Gaetano. *The United Nations Declaration on Friendly Relations and The System of The Sources of International Law* (1979).

Argyropoulou, Venetia. *Convergence and Divergence Between International Investment Law and Human Rights Law, in the Context of the Greek Sovereign Debt Restructuring*, 11 The Journal of Business, Entrepreneurship & The Law (2018).

Argyropoulou, Venetia. *International Arbitration and Greek Sovereign Debt: Postova Banka v. Hellenic Republic*, 19 Oregon Review of International Law (2018), pp. 187-188.

Armour, John et al. What Is Corporate Law? in Kraakman, Reinier et al. (Eds.). *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd Edition). Oxford University Press (2017).

Arnold, Theresa; Gulati, Mitu and Panizza, Ugo. *How to Restructure Euro Area Sovereign Debt in the Era of Covid-19*, 15 Capital Markets Law Journal 3.

Arsenault, Steven. *The Westernization of Chinese Bankruptcy: An Examination of China's New Corporate Bankruptcy Law Through the Lens of the UNCITRAL Legislative Guide to Insolvency Law*, 27 Penn State International Law Review 1 (2008).

Atanasova, Dafina. International Norms: A Defence in Investment Treaty Arbitration? in Akbaba, Mesut and Capurro, Giancarlo (Eds.). *International Challenges in Investment Arbitration*. Routledge (2019).

Aust, Anthony. *Handbook of International Law*. Cambridge University Press (2005).

Ayala, Carlos. *El Sistema Interamericano de Promoción y protección de los Derechos Humanos*, Derechos y Libertades, Revista del Instituto Bartolome de las Casas (1998).

Baderin, Mashood and Ssenyonjo, Manisuli. Development of International Human Rights Law Before and After the UDHR in Baderin, Mashood and Ssenyonjo, Manisuli (Eds.). *International Human Rights Law Six Decades after the UDHR and Beyond*. Routledge (2016).

Baird, Douglas. A World Without Bankruptcy in Jadgeep Bhandari et al. (Eds.). *Corporate Bankruptcy: Economic and Legal Perspectives*. Cambridge University Press (1996).

Balakrishnan, Radhika et al. Public Finance, Maximum Available Resources and Human Rights in Nolan, Aoife et al. (Eds.). *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights*. Hart Publishing (2014).

Balcerzak, Filip. *Jurisdiction of Tribunals in Investor-State Arbitration and the Issue of Human Rights*, 29 ICSID Review 1 (2014).

Banifatemi, Yas. The Law Applicable in Investment Treaty Arbitration, in Yannaca-Small (Ed). *Arbitration under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press (2018).

Banks, Tyler. *Corporate Liability under the Alien Tort Statute: The Second Circuit's Misstep Around General Principles of Law in Kiobel v. Royal Dutch Petroleoum co.*, 26 Emory International Law Review 1 (2012).

Banks, Glenn. *New York Contract Law*. Thomson/West (2019).

Bantekas, Ilias and Lumina, Cephas. Sovereign Debt and Human Rights: An Introduction in Bantekas, Ilias and Lumina, Cephas (Eds.). *Sovereign Debt and Human Rights*. Oxford University Press (2018).

Barak, Aharon. *Proportionality: Constitutional Rights and their Limitations*, Cambridge University Press (2012)

Barak, Aharon. *The Judge in a Democracy*, Princeton University Press (2008).

Bassiouni, Cherif. *A Functional Approach to "General Principles of International Law",* 11 Michigan Journal of International Law 3 (1990).

Belle, Alexandre. *From Creditor Protection to Preventing Holdouts*. University of Glasgow Phd thesis (2020), available at https://theses.gla.ac.uk/81619/7/2020BellePhD.pdf [last accessed 21.12.2021].

Bellia, Anthony and Clark, Bradford. *The Law of Nations and the United States Constitution.* Oxford University Press (2017).

Berensmann, Kathrin and Herzberg, Angélique. *International Sovereign Insolvency Procedure: A Comparative Look at Selected Proposals*, 23 Discussion Paper / Deutsches Institut für Entwicklungspolitik (2007).

Berk, Jonathan and DeMarzo, Peter. *Corporate Finance* (4th Edition). Pearson (2017).

Bernal Pulido, Carlos. *El Principio de Proporcionalidad y los Derechos Fundamentales.* Universidad Externado de Colombia (2014).

Bernal Pulido, Carlos. On Alexy's Weight Formula in Agustín Menéndez and Erik Eriksen (Eds.), *Arguing Fundamental Rights*. Springer (2006).

Bertrand, Frederic. *The Human Right to Property in International Investment* Law, 24 Appeal 45 (2019).

Besson, Samantha. General Principles in International Law – Whose Principles? in Besson, Samantha and Pichonnaz, Pascal (Eds.). *Principles in European and International Law*. Schulthess (2011).

Besson, Samantha. "*Sovereignty",* Max Planck Encyclopedia of Public International Law.

Besson, Samantha. Theorizing the Sources of International Law in Samantha Besson and John Tasioulas (Eds.), *The Philosophy of International Law*. Oxford University Press (2010).

Bi, Ran; Chamon, Marcos and Zettelmeyer, Jeromin. *The Problem that Wasn't: Coordination Failures in Sovereign Debt Restructurings*, 64 IMF Economic Review 3 (2016).

Bianchi, Andrea. *International Law and US Courts: The Myth of Lohengrin Revisited*, 15 European Journal of International Law (2004).

Biddulph, Michelle and Newman, Dwight. *A Contextualized Account of General Principles of International Law*, 26 International Law Review 2 (2014).

Bismuth, Régis. *Setting the Scope and the Limits to the Incremental Approach to Sovereign Debt Restructurings*, available at https://voelkerrechtsblog.org/de/setting-the-scope-of-and-the-limits-to-the-incremental-approach-to-sovereign-debt-restructurings/ [last accessed 28.07.2021].

Bjorge, Erik. *Public Law Sources and Analogies of International Law*, 49 Victoria University of Wellington Law Review (2018).

Blackman, Jonathan and Mukhi, Rahul. *The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos and Other Legal Fauna*, 73 Law and Contemporary Problems 4 (2010).

Blanchard, Olivier and Das, Mitali. *A New Index of External Debt Sustainability,* PIIE Working Paper 17-13 (2017), available at https://www.piie.com/publications/working-papers/new-index-external-debt-sustainability [last accessed 22.12.2021].

Blankenburg, Stephanie and Kozul-Wright, Richard. *Preface, Sovereign Debt Restructurings in the Contemporary Global Economy: The UNCTAD Approach*, 41 The Yale Journal of International Law 2 (2016).

Blum, Yehuda. *Historic Titles in International Law*. Nijhoff (1965).

Boas, Gideon. *Public international law: Contemporary Principles and Perspectives*. Edward Elgar Publishing (2012).

Bodansky, Daniel. "*Non Liquet",* Max Planck Encyclopedia of Public International Law, [last accessed 15.06.2019].

Boggio*,* Luca. *Investors and Sovereign Debt Restructurings: The Protection of Financial Property before International Courts and Arbitrators*, 15 Manchester Journal of International Economic Law (2018).

Bohoslavsky, Juan Pablo. Guiding Principles to Assess the Human Rights Impact of Economic Reforms? yes in Bantekas, Ilias and Lumina, Cephas (Eds.). *Sovereign Debt and Human Rights*. Oxford University Press (2018).

Bohoslavsky, Juan Pablo. Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of Human Rights, *Debt Disputes, International Investment Arbitration and Human Rights*, A/72/153 (2017).

Bohoslavsky, Juan Pablo. Report of the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, particularly economic, social and cultural rights, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development,* A/HRC/34/57 (2017).

Bohoslavsky, Juan Pablo. *Lending and Sovereign Insolvency: A Fair and Efficient Criterion to Distribute Losses among Creditors*, 2 Goettingen Journal of International Law (2010).

Bohoslavsky, Juan Pablo. *Responsibility for Abusive Granting of Sovereign Loans*, 14 Law and Business Review of the Americas (2008)-

Bohoslavsky, Juan Pablo and Goldmann, Matthias. *An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law*, 41 The Yale Journal of International Law Online 2 (2016).

Bohoslavsky, Juan Pablo and Goldmann, Matthias. *Guest Editors' Foreword*, 41 The Yale Journal of International Law 2 (2016).

Bohoslavsky, Juan Pablo and Espósito, Carlos. Principles Matter: The Legal Status of the Principles on Responsible Sovereign Financing in Carlos Espósito et al. (Eds.), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013).

Bolton, Patrick. *Toward a Statutory Approach to Sovereign Debt Restructuring: Lessons from Corporate Bankruptcy Practice Around the World*, 50 IMF Staff Papers (2003).

Bolton, Patrick and Skeel, David. *Inside the Black Box: How Should a Sovereign Bankruptcy Framework be Structured?* 53 Emory Law Journal (2005).

Bonnitcha, Jonathan. *Substantive Protection under Investment Treaties*, Cambridge University Press (2014).

Borgatta, Edgar and Bohrnstedt, George. *Level of Measurement: Once Over Again*, 9 Sociological Methods & Research 2 (1980).

Bork, Reinhard. *Debt Restructuring in Germany*, 15 European Company and Financial Law Review 3 (2018).

Born, Gary. *Customary International Law in United States Courts*, 92 Washington Law Review 4 (2017).

Borowski, Martin. *On Apples and Oranges. Comment on Niels Petersen*, 14 German Law Journal 8 (2013).

Bowett, Dereck. *Claims Between States and Private Entities: The Twilight Zone of International Law*, 35 Catholic University Law Review 4 (1986).

Borensztein, Eduardo and Panizza, Ugo. *The Costs of Sovereign Default*, IMF Working Paper WP/08/238 (2008).

Boudreau, Melissa. *Restructuring Sovereign Debt Under Local Law* (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1979238 [last accessed, 26.08.2021].

Boughton, James; Brooks, Skylar and Lombardi, Domenico. *IMF Lending Practices and Sovereign Debt Restructuring,* CIGI Policy Brief No. 41 (2014).

Bradley, Curtis and Goldsmith, Jack. *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harvard Law Review 4 (1997).

Bradley, Curtis. *What is Foreign Relations Law?* (2017). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960694 [last accessed 26.8.2020].

Bradley, Michael and Gulati, Mitu. *Collective Action Clauses for the Eurozone*, Review of Finance (2013).

Brand, Oliver. *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 Brooklyn Journal of International Law 2 (2007).

Bratton, William. *Pari Passu a Distressed Sovereign's Rational Choices*, 53 Emory Law Journal (2004).

Bratton, William and Levitin, Adam. *The New Bond Workouts*, 166 University of Pennsylvania Law Review (2018).

Bredimas, Antonis; Gourgourinis Anastasios and Pavlidis, Georges. The Legal Contours of Sovereign Debt Restructuring under the UNCTAD Principles in Espósito et al. (Eds.), *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013).

Brooks, Skylar and Lombardi, Domenico. Private Creditors and the Politics of Sovereign Debt Governance, in Works in Guzmán, Martín; Stiglitz, Joseph and Ocampo, José Antonio (Eds.). *Too Little Too Late: The Quest to Resolve Sovereign Debt Crises*. Columbia University Press (2016).

Brooks, Skylar. *Governing Sovereign Bankruptcy: Writing International Rules for Rewriting National Debts*. University of Waterloo Phd. Thesis (2019).

Brozek, Bartosz. Analogical Arguments in Giorgio Bongiovanni et al. (Eds), *Handbook of Legal Reasoning and Argumentation*. Springer (2018).

Bücheler, Gebhard. *Proportionality in Investor-State Arbitration*. Oxford University Press (2015).

Buchheit, Lee. Sovereign Debt Restructuring: The Legal Context in Bank for International Settlements (Ed.), *Sovereign Risk: A World Without Risk-free Assets?* Bank Of International Settlements (2013).

Buchheit, Lee. *Trustee versus Fiscal Agents for Sovereign Bonds*, 13 Capital Markets Law Journal 3 (2018).

Buchheit, Lee and De la Cruz, Andrés. *The Pari Passu Fallacy – Requiescat in Pace* (2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3108862 [last accessed, 19.03.2020].

Buchheit, Lee and Pam, Jeremiah. *The Pari Passu Clause in Sovereign Debt Instruments,* 53 Emory Law Journal (2004).

Buchheit, Lee and Gulati, Mitu. *Restructuring Sovereign Debt after NML v Argentina*, 12 Capital Markets Law Journal 2 (2017).

Buchheit, Lee and Gulati, Mitu. *Sovereign Bonds and the Collective Will*, 51 Emory Law Journal 4 (2002).

Buchheit, Lee and Gulati, Mitu. *Use of the Local Law Advantage in the Restructuring of European Sovereign Bonds*, 3 University of Bologna Law Review 2 (2018).

Buchheit, Lee; Gulati, Mitu and Thompson, Robert. *The Dilemma of Odious Debts*, 56 Duke Law Journal (2007).

Buchheit, Lee and Reisner, Ralph. *The Effect of the Sovereign Debt Restructuring Process on Inter-Creditor Relationships*, University of Illinois Law Review (1988).

Buchheit, Lee et al., *Revisiting Sovereign Bankruptcy*, Committee on International Economic Policy and Reform. Brookings Institution (2013), available at https://www.brookings.edu/wp-content/uploads/2016/06/CIEPR_2013_RevisitingSovereignBankruptcyReport.pdf [last accessed 05.08.2021].

Buchheit, Lee et. al. The Restructuring Process, in Abbas, Ali et al. (Eds.). *Sovereign Debt: A Guide for Economists and Practitioners.* Oxford University Press (2020).

Bui, Hien. *Human Rights Budgeting: Making Governments Accountable for Economic, Social and Cultural Rights*, 2 Human Rights Law Review (2015).

Burke-White, William and von Staden, Andreas. *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 Virginia Journal of International Law 2 (2008).

Burke-White, William and von Staden, Andreas. *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale Journal of International Law 2 (2010).

Burn, Lachlan. *Pari Passu Clauses: English Law After NML v Argentina,* 9 Capital Markets Law Journal 1 (2014).

Bussell, Richard; Jarvis, Rebecca and Windsor, Jo. *England & Wales*, The European, Middle Eastern and African Restructuring Review (2018).

Butensky, Jeffrey. *Tango or Sirtaki: The Argentine and Greek Dance with Sovereignty and a Multilateral Sovereign Debt Restructuring Framework*, 35 Boston University International Law Journal 1 (2017).

Byers, Michael. *Abuse of Rights: An Old Principle, a New Age*, 47 McGill Law Journal / Revue de Droit de McGill (2002).

Calamita, Jansen. *International Human Rights and the Interpretation of International Investment Treaties: Constitutional Considerations* (2013) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284224 [last accessed 7.12.2021].

Cabrillo, Francisco and Depoorter, Ben. Bankruptcy Proceedings, in Boudewijn Bouckaert and Gerrit De Geest *Encyclopedia of Law and Economics: Vol V.* Elgar (2000).

Calitz, Juanita. *An Overview of Certain Aspects Regarding the Regulation of Sovereign Insolvency Law*, 45 De Jure 329 (2012).

Canale, Damiano and Tuzet, Giovanni. *Can Constitutional Rights Be Weighed? On the Inferential Structure of Balancing in Legal Argumentation* (2020), Bocconi Legal Studies Research Paper No. 3658366, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2960694 [last accessed 18.05.2021].

Canale, Damiano and Tuzet, Giovanni. *What is the Reason for this Rule? An Inferential Account of the Ratio Legis*, 24 Argumentation (2010).

Canuto, Otaviano; Pinto, Brian and Prasad, Mona. *Orderly Sovereign Debt Restructuring: Missing in Action! (And Likely to Remain So)*, 29 The World Bank Research Observer 1 (2014).

Carletti, Elena et al. *The Price of Law: The Case of the Eurozone's Collective Action Clauses*, The Review of Financial Studies (2020).

Carmody, Francis et al. *Encyclopedia of* New York Practice with Forms. West Group (2019).

Cepec, Jaka and Kovac, Mitja. *Carrots and Sticks as Incentive Mechanism for the Optimal Initiation of Insolvency Proceedings*, 7 DANUBE: Law and Economics Review 2 (2016).

Chamon, Marcos; Schumacher, Julian and Trebesch, Cristoph. *Foreign-law Bonds: Can they Reduce Sovereign Borrowing Costs?* European Central Bank, Working Paper Series (2018).

Chodos, Sergio. From the Pari Passu Discussions to the "Illegality" of Making Payments: The Case of Argentina in Guzman, Martin; Ocampo, José Antonio and Stiglitz, Joseph (Eds.). *Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises*. Columbia University Press (2016).

Choi, Stephen; Gulati, Mitu and Posner, Eric. *The Evolution of Contractual Terms in Sovereign Bonds*, 4 Journal of Legal Analysis 1 (2012).

Choi, Stephen; Gulati, Mitu and Scott, Robert. *The Black Hole problem in Commercial Boilerplate*, 67 Duke Law Journal 1 (2017).

Choi, Stephen; Gulati, Mitu and Scott, Robert. *Variation in Boilerplate: Rational Design or Random Mutation?* American Law and Economics Review (2017).

Choudhury, Barnali. *Exception Provisions as a Gateway to Incorporating Human Rights into International Investment Disputes,* 49 Columbia Journal of Transnational Law (2011).

Clérico, Laura. *El Examen de Proporcionalidad en el Derecho Constitucional*. EUDEBA (2009).

Clifford Chance, *New ICMA Sovereign Collective Action and Pari Passu Clauses,* Briefing Note (October 2014).

Cohen, Robert. *"Sometimes a Cigar is Just a Cigar": The Simple Story of Pari Passu,* 40 Fortieth Anniversary Volume 1 (2011).

Colombo, Esmeralda. *Enforcing International Law in U.S. Courts: The Law of the Sea Convention at Play in Kivalina*, 23 ILSA Journal of International & Comparative Law 1 (2016).

Comment to the Draft Convention on the Law of Treaties, *Article 19 "Interpretation of Treaties"* reproduced in 29 The American Journal of International Law Supplement: Research in International Law (1935).

Committeri, Marco and Spadafora, Francesco. *You Never Give Me Your Money? Sovereign Debt Crises, Collective Action Problems, and IMF Lending*, IMF Working Papers WP/13/20 (2013), available at https://www.imf.org/external/pubs/ft/wp/2013/wp1320.pdf [last accessed 07.08.2021].

Contreras-Garduño, Diana. The Inter-American System of Human Rights in Anja Mihr and Mark Gibney (Eds.), *The SAGE Handbook of Human Rights*. Sage (2014).

Cooper, Richard; Brenneman, Adam and McBride, Jessica. *A New World for LatAm Creditors: Insolvency Reform in Latin America*, Pratt's Journal of Bankruptcy Law (2015).

Cooter, Robert and Gilbert, Michael. Constitutional Law and Economics (2019) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123253 [last accessed 15.12.2021].

Cooter, Robert and Ulen, Thomas. *Law and Economics* (6th Ed.). Addison-Wesley (2012).

Cosio-Pascal, Enrique. *The Emerging of a Multilateral Forum for Debt Restructuring: The Paris Club*. UNCTAD Discussion Papers No. 192 (2008).

Cottarelli, Carlo. *What We Owe: Truths, Myths and Lies About Public Debt*. The Brookings Institution (2017).

Coyle, John. *The Case Law for Writing International Law into the U.S. Code*, 56 Boston College Law Review (2015).

Crawford, James. *Brownlie's Principles of Public International Law* (8th Edition). Oxford University Press (2012).

Crawford, James. *Chance, Order, Change: The Course of International Law. General Course on Public International Law*. AIL-Pocket (2014).

Crawford, James. "*State"*, Max Planck Encyclopedia of Public International Law, [last accessed 29.10.2019].

Crawford, James. *The Creation of States in International Law* (Second Edition). Oxford University Press (2007).

Crawford, James. *Treaty and Contract in Investment Arbitration*, 24 Arbitration International 3 (2008).

Crespo, Jesús and Andronova, Gallina. Debt Relief and Education in Heavily Indebted Poor Countries in Primo, Carlos and Dömeland, Dörte (Eds.). *Debt Relief and Beyond*. The World Bank (2009).

Cruces, Juan and Trebesch, Cristoph. *Sovereign Defaults: The Price of Haircuts*, 5 American Economic Journal: Macroeconomics 3 (2013).

D'Aspremont, Jean. What Was Not Meant to Be: General Principles of Law as a Source of International Law in Global Justice, in Pisillo Mazzeschi, Riccardo and De Sena, Pasquale (Eds.). *Human Rights and the Modernization of International Law*. Springer (2019).

Da Silva, Virgilio Alfonso. *Comparing the Incommensurable*, 31 Oxford Journal of Legal Studies (2011).

Das, Udaibir et al., *Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts* (International Monetary Fund, Monetary and Capital Markets Department, August 2012).

Day, Gregory. *Market Failure, Pari Passu, and the Law and Economics Approach to the Sovereign Debt Crisis,* 22 Tulane Journal of International and Comparative Law 2 (2014).

De Brabandere, Eric. *Human Rights and International Investment Law*, Grotious Centre Working Paper Series No. 2018/075-HRL (2018).

De Weijs, Rolef. *Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool & Anticommons*, International Insolvency Institute Twelfth Annual International Insolvency Conference (2012).

Debrun, Xavier et al., Debt Sustainability, in Abbas, Ali et al. *Sovereign Debt: A Guide for Economists and Practitioners*. Oxford University Press (2020).

Dechamps, Jean Paul and Jaroslavsky, Pablo. Fair and Equitable Treatment under BITs with Argentina, in Fortese, Fabricio (Ed.). *Arbitration in Argentina*. Kluwer (2020).

Dekastros, Michail. *Portfolio Investment: Reconceptualising the Notion of Investment under the ICSID Convention*, 14 the Journal of World Investment & Trade (2013).

Della Torre, Ramon. *Sovereign Debt*: *Defaults and Restructurings by Means of International Adjudication*, Graduate Institute of International and Development Studies. Genva (2015).

Dickerson, Hollin. "*Minimum Standards"*, Max Planck Encyclopedia of Public International Law, [last accessed 15.06.2019].

Diehl, Alexandra. *The Core Standard of International Investment Protection*. Kluwer Law International (2012).

Dimitriu, Cristian. *Are States Entitled to Default on the Sovereign Debts Incurred by Governments in the Past?* Ethical Perspectives (2015).

Dodge, William. *The Charming Betsy and The Paquete Habana (1804 and 1900)* (2016). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2738241 [last accessed 28.8.2020].

Dolzer, Rudolph. *Fair and Equitable Treatment: Today's Contours*, 12 Santa Clara Journal of International Law 7 (2013).

Dordeska, Marija. *General Principles of Law Recognized by Civilized Nations (1922-2018): The Evolution of the Third Source of International Law Through the Jurisprudence of the Permanent Court of International Justice and the International Court of Justice*. Brill/Nijhoff (2020).

Doshi, Hetal and Jain, Yashasvi. *The Insolvency and Bankruptcy Framework and Principle of Business Efficacy across Different Jurisdictions in the COVID Era*, 42 Business Law Review 1 (2021).

Douglas, Zachary. *The International Law of Investment Claims.* Cambridge University Press (2009).

Dowell-Jones, Mary and Kinley, David. *Minding the Gap of Global Finance and Human Rights*, 25 Ethics & International Affairs 2 (2011).

Downs, George and Rocke, David. *Conflict, Agency, and Gambling for Resurrection: The Principal-Agent Problem Goes to War*, 38 American Journal of Political Science 2 (1994).

Drake, Keegan. *The Fall and Rise of the Exist Consent,* 63 Duke Law Journal (2014).

Dubinsky, Paul. United States in Dinah Shelton (Ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion*. Oxford University Press (2011).

Dumberry, Patrick. *A Guide to General Principles of Law in International Investment Arbitration*. Oxford University Press (2020).

Dumberry, Patrick. *The Emergence of the Concept of 'General Principle of International Law' in Investment Arbitration Case Law*, Journal of International Dispute Settlement (2020).

Dupuy, Florian and Dupuy, Pierre-Marie. What to Expect from Legitimate Expectations? in Ziadé, Naasib et al., (Eds.). *Festschrift Ahmed Sadek El-Kosheri*, Kluwer (2015).

Dupuy, Pierre-Marie. "*International Law and Domestic (Municipal) Law"*. Max Planck Encyclopedia of International Law.

Dupuy, Pierre-Marie and Traisbach, Knut. *Taking International Law Seriously: On the German Approach to International Law*, EU Working Papers Law 2007/34 (2007).

Dybowski, Maciej. Articulating Ratio Legis and Practical Reasoning in Klappstein, Verena and Dybowski, Maciej. *Ratio Legis: Philosophical and Theorical Perspective*. Springer (2018).

Eger, Thomas. *Bankruptcy Regulations and the New German Insolvency Law from an Economic Point of View*, 11 European Journal of Law and Economics (2001).

Ehrlich Albanese, Rachel and Ching Corrado, Dienna. *US-Chapter 11*, The Restructuring Review of the Americas: A Global Restructuring Review Special Report (2019).

Eidenmüller, Horst. *Comparative Corporate Insolvency Law* (2016). Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799863 [last accessed 04.11.2019].

Eidenmüller, Horst. *Trading in Time of Crisis: Formal Insolvency Proceedings, Workouts and the Incentives for Shareholders/Managers*, 7 European Business Organization Law Review (2006).

Elias, Olufemi and Lim, Chin. *General Principles of Law, Soft Law and the Identification of International Law*, XXVIII Netherlands Yearbook of International Law (1997).

Ellis, Jaye. *General Principles and Comparative Law*, 22 The European Journal of International Law 4 (2011).

Engel, Christoph. *Besonderes Verwaltungsrecht und Ökonomische Theorie*, Preprints of the Max Planck Institute for Research and Collective Goods, No. 2011, 2 (2011).

Erce, Aitor. *Sovereign Debt Restructurings and the IMF: Implications for Future Official Interventions*, Federal Reserve Bank of Dallas Working Paper No. 143 (2013).

Ernst, Andrea. "*Revere Copper Arbitral Award*", Max Planck Encyclopedias of International Law.

Espósito, Carlos; Li, Yuefen and Bohoslavsky, Juan Pablo. Introduction: The Search for Common Principles in Espósito, Carlos; Li, Yuefen and Bohoslavsky, Juan Pablo (eds.). *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013).

Euler, Dimitrij and Bianco, Giuseppe. *Breaking the Bond: Vulture Funds and Investment Arbitration*, 31 ASA Bulletin 3 (2013).

European Court of Human Rights. *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of Property* (1st Ed). Council of Europe/European Court of Human Rights (2019).

Fahner, Johannes and Happold, Matthew. *The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration*, International & Comparative Law Quarterly (2019).

Fanous, Maria and Tzevelekos, Vassilis. *The Shared Territory of the ECHR and International Investment law* (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3306776 [last accessed 22.12.2021].

Fatima, Shaheed. *Using International Law in Domestic Courts*. Oxford University Press (2005).

Fennell, Lee Anne. Commons, Anticommons, Semicommons in Ayotte, Kenneth and Smith, Henry (Eds.). *Research Handbook on the Economics of Property Law*. Elgar (2011).

Figueredo, Reinaldo and Cheru, Fantu. *Joint Report on Debt Relief and Social Investment: Linking the Heavily Indebted Poor Countris (HIPC) Initiative to the HIV/AIDS Epidemic in Africa and Nicaragua, and the Worst Forms of Child Labour Convention, 1999 (Convention No. 182) of the International Labour Organization*, E/CN.4/2000/51 (2000).

Financial Markets Law Committee, *Issue 79 – Pari Passu Clauses: Analysis of the Role, Use and Meaning of Pari Passu Clauses in Sovereign Debt Obligations as a Matter of English Law* (2005).

Finch, Vanessa. *Corporate Insolvency Law: Perspectives and Principles* (2nd Edition). Cambridge University Press (2009).

Fisch, Jill and Gentile, Caroline. *Vultures or Vanguards: The Role of Litigation in Sovereign Debt Restructuring*, 53 Emory Law Journal (2004).

Folz, Hans-Peter. Germany, in Shelton, Dinah (Ed.). *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion*. Oxford University Press (2011).

Ford, Christopher. *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law"*, 35 Duke Journal of Comparative & International Law 5 (1994).

Foster, George. *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgements Against States and Their Instrumentalities, and Some Proposals for its Reform*, 25 Arizona Journal of International & Comparative Law 3 (2008).

Fox, Hazel and Webb, Philippa. *The Law of State Immunity* (Revised and Updated 3rd Edition). Oxford University Press (2015).

Franzina, Pietro. *Sovereign Bonds and the Conflict of Laws: A European Perspective* (2014). Available at https://publicatt.unicatt.it/handle/10807/146727 [last accessed 24.8.2020].

Fuentes, Carlos. *Normative Plurality in International Law: A Theory of the Determination of the Applicable Rules*. Springer (2016).

Fukuda-Parr, Sakiko et al. *An Index of Economic and Social Rights Fulfillment: Concept and Methodology,* 8 Journal of Human Rights 3 (2009).

Fukuda-Parr, Sakiko et. al. *Fulfilling Social and Economic Rights*, Oxford University Press (2015).

Fyrigou-Koulouri, Marina. *Sovereign Debt Restructuring*, 14 Manchester Journal of International Economic Law (2017).

Gaja, Giorgio. "*General Principles of Law",* Max Planck Encyclopedia of Public International Law.

Gaja, Giorgio. General Principles in the Jurisprudence of the ICJ in Andenas, Mads et al. (Eds.). *General Principles and the Coherence of International Law*. Brill (2019).

Galvis, Sergio. *Solving the Pari Passu Puzzle: The Market Still Knows Best*, Capital Markets Law Journal (2017).

Gardiner, Richard. *Treaty Interpretation* (2nd Edition). Oxford University Press (2015).

Gathii, James. *The Sanctity of Sovereign Loan Contracts and Its Origins in Enforcement Litigation*, 38 George Washington International Law Review 251 (2006).

Gazzini, Tarcisio. *General Principles of Law in the Field of Foreign Investment*, 10 The Journal of World Investment & Trade 1 (2009).

Gelpern, Anna. *Bankruptcy Backwards: The Problem of Quasi-Sovereign Debt*, 121 Yale Journal of International Law 4 (2012).

Gelpern, Anna; Heller, Ben and Setser, Brad. *Count the Limbs: Designing Robust Aggregation Clauses in Sovereign Bonds* (2015), available at https://scholarship.law.georgetown.edu/facpub/1793/ [last accessed 19.3.2020].

Gelpern, Anna. *Courts and Sovereigns in the Pari Passu Goldmines*, 11 Capital Markets Law Journal 2 (2016).

Gelpern, Anna. Hard, Soft and Embedded: Implementing Principles on Promoting Responsible Sovereign Lending and Borrowing in Espósito, Carlos; Li, Yuefen and Bohoslavsky, Juan Pablo (Eds.). *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013).

Gelpern, Anna. *How Collective Action is Changing the Sovereign Debt,* International Financial Law Review (2003).

Gelpern, Anna and Weidemaier, Mark. *Injunctions in Sovereign Debt Litigation*, 31 Yale Law Journal on Regulation (2014).

Gelpern, Anna. *Sovereign Damage Control,* Peterson Institute for International Economics (2013).

Gerards, Janneke. *How to Improve the Necessity Test of the European Court of Human Rights*, 11 International Journal of Constitutional Law 2 (2013).

Germain, Gregory. *Bankruptcy Law and Practice* (3rd Ed.). CALI (2018).

Glannon, Joseph. *Civil Procedure* (7th Edition). Wolters Kluwer (2013).

Glenn, Patrick. Aims of Comparative Law, in Jan M. Smits (Ed.) *Elgar Encyclopedia of Comparative Law*. Elgar (2012).

Glinavos, Ioannis. *Haircut Undone? The Greek Drama and Prospects for Investment Arbitration*, Journal of International Dispute Settlement (2014).

Goldmann, Matthias. *Necessity and Feasibility of a Standstill Rule for Sovereign Debt Workouts* (2014), available at https://unctad.org/en/PublicationsLibrary/gdsddf2014misc4_en.pdf [last accessed 19.3.2020].

Goldmann, Matthias. Foreign Investment, Sovereign Debt, and Human Rights in Bantekas, Ilias and Lumina, Cephas (Eds.). *Sovereign Debt and Human Rights*. Oxford University Press (2018).

Goldmann, Matthias. *Human Rights and Sovereign Debt Workouts*, Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2330997 [last accessed 16.06.2021].

Goldmann, Matthias. On the Comparative Foundations of Principles in International Law: The Move Towards Rules and Transparency in Fiscal Policy as Examples in Espósito, Carlos; Li, Yuefen and Bohoslavsky, Juan Pablo (Eds.). *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2012).

Goldmann, Matthias. *Principles in International Law as Rational Reconstructions: A Taxonomy* (2014). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442027 [last accessed 21.10.2021].

Goldmann, Matthias. *Public and Private Authority in a Global Setting: The Example of Sovereign Debt Restructuring*, 25 Indiana Journal of Global Legal Studies 1 (2018).

Goldmann, Matthias. *Putting your Faith in Good Faith: A Principled Strategy for Smoother Sovereign Debt Workouts*, 41 The Yale Journal of International Law 2 (2016).

Goldmann, Matthias. *Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions*. A Comparative Survey Written for the United Nations

Conference on Trade and Development (2012). Available at https://unctad.org/en/PublicationsLibrary/gdsddf2012misc3_en.pdf [last accessed 04.08.2019].

Gonza, Alejandra. Artículo 21: Derecho a la Propiedad Privada in Steiner, Christian and Uribe, Patricia (Eds.). *Convención Americana sobre Derechos Humanos: Comentario*. Konrad Adenauer Stiftung (2014).

Gonza, Alejandra. *The American Convention on Human Rights, Essential Rights*. Oxford University Press (2017).

Gorence, Brianna. *The Constructive Role of General Principles in International Arbitration*, 17 The Law and Practice of International Courts and Tribunals (2018).

Gorzoni, Paula. *Structuring Balancing within Rational Standards? The Data Screening Case,* 14 Revista Brasileira de Direito 2 (2018).

Gourgourinis, Anastasios. *The Distinction between Interpretation and Application of Norms in International Adjudication*, 2 Journal of International Dispute Settlement 1 (2011).

Gragl, Paul. *Legal Monism: Law, Philosophy and Politics*. Oxford University Press (2018).

Gray Carlson, David. *Philosophy in Bankruptcy: The Logic and Limits of Bankruptcy Law by Thomas H. Jackson*, 85 Michigan Law Review 5/6 (1987).

Greer, Steven. *Balancing and the European Court of Human Rights: A Contribution to the Habermas Alexy Debate*, 63 The Cambridge Law Journal 2 (2004).

Greer, Steven. *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*. Council of Europe Publishing (2000).

Grosse Steffen, Christoph; Grund, Sebastian and Schumacher, Julian. *Collective Action Clauses in the Euro Area: A Law and Economic Analysis of the First Five Years,* 0 Capital Markets Law Journal 0 (2019).

Grund, Sebastian. *The Legal Consequences of Sovereign Insolvency – A Review of Creditor Litigation in Germany Following the Greek Debt Restructuring*, 24 Maastricht Journal of European and Comparative Law 3 (2017).

Gruson, Michael. *Restructuring Syndicated Loans: The Effect of Restructuring Negotiations on the Rights of the Parties to the Loan Agreement*, International Law: Revista Colombiana de Derecho Internacional 3 (2004).

Gulati, Mitu and Weidemaier, Mark. *A People's history of Collective Action Clauses*, 54 Virginia Journal of International Law (2013).

Gulati, Mitu and Bratton, William. *Sovereign Debt Reform and the Best Interest of Creditors*, 57 Vanderbilt Law Review (2004).

Guzmán, Martín and Lombardi, Domenico. *Assessing the Appropriate Size of Relief in Sovereign Debt Restructuring*, Columbia Business School Research Paper No. 18-9 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3088081 [last accessed 05.08.2021].

Guzmán, Martín. *Análisis de la Resolución del Default de Argentina de 2001*, 12 Revista de Economía Política de Buenos Aires (2018).

Guzmán, Martín and Stiglitz, Joseph. Creating a Framework for Sovereign Debt Restructuring that Works in Guzmán, Martín; Stiglitz, Joseph and Ocampo, José Antonio (Eds.). *Too Little Too Late: The Quest to Resolve Sovereign Debt Crises*. Columbia University Press (2016).

Hagan, Sean. *Designing a Legal Framework to Restructure Sovereign Debt*, 36 Georgetown Journal of International Law 2 (2005).

Hage, Jaap. *Legal Logic. Its Existence, Nature and Use* (2001). Available at http://www.jaaphage.nl/pdf/legal_logic_existence_nature_use.pdf [last accessed 22.04.2019].

Haley, James. *Sovereign Debt Restructuring: Good Faith or Self-Interest?* (2017), CIGI Paper No. 150 available at https://www.cigionline.org/publications/sovereign-debt-restructuring-good-faith-or-self-interest/ [last accessed 07.08.2021].

Haley, James. *Sovereign Debt Restructuring: Old Debates, New Challenges* (2014), CIGI Paper No. 32 available at https://www.cigionline.org/publications/sovereign-debt-restructuring-old-debates-new-challenges [last accessed 19.3.2020].

Hallak, Issam. Governing Law of Sovereign Bonds and Legal Enforcement, in Kolb, Robert (Ed.). *Sovereign Debt: From Safety to Default*. Wiley (2011).

Halonen, Laura. *Bridging the Gap in the Notion of "Investment" between ICSID and UNCITRAL Arbitrations: Note on the Award Rendered under the Bilateral Investment Treaty between Switzerland and Uzbekistan (Romak SA v. Uzbekistan)*, 29 Asa Bulletin 2 (2011).

Han, Sangwook Daniel and Jung, Youngjin. *Sovereign Debt Restructuring under the Investor-State Dispute Regime*, 31 Journal of International Arbitration 1 (2014).

Hanum, Hurst. *The Status of the Universal Declaration of Human Rights in National and International Law,* 25 Georgia Journal of International and Comparative Law (1995).

Haseler, Sonke. *Individual Enforcement Rights in International Sovereign Bonds* (2008), available at https://mpra.ub.uni-muenchen.de/11518/1/MPRA_paper_11518.pdf [last accessed 19.3.2020].

Haseler, Sonke. *Trustees versus Fiscal Agents and Default Risk in International Sovereign Bonds* (2010), available at https://mpra.ub.uni-muenchen.de/35332/1/MPRA_paper_35332.pdf [last accessed 19.3.2020].

Hays II, James. *The Sovereign Debt Dilemma*, 75 Brooklyn Law Review 3 (2010).

Heller, Michael. *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 Harvard Law Review 3 (1998).

Henckels, Caroline. *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15 Journal of International Economic Law 1 (2012).

Henckels, Caroline. *Proportionality and the Standard of Review in Fair and Equitable Treatment Claims: Balancing Stability and Consistency with the Public Interest*, Society of International Economic Law Working Paper No. 2012/27 (2012).

Henkin, Louis. *International Law as the Law in the United States*, 82 Michigan Law Review (1984).

Hennebel, Ludovic. *The Inter-American System for Human Rights: Operation and Achievements* (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2322896 [last accessed 03.07.2019].

Herold, Katharina. *Insolvency Frameworks for Sub-National Governments*, OECD Working Papers on Fiscal Federalism No. 23 (2018), p. 13. Available at https://www.oecd-ilibrary.org/taxation/insolvency-frameworks-for-sub-national-governments_f9874122-en [last accessed 16.09.2019].

Hertogen, An. *The Persuasiveness of Domestic Law Analogies in International Law*, 29 The European Journal of International Law 4 (2018).

Herman, Barry. *Introduction: The Players and the Game of Sovereign Debt*, 1 Ethics and International Affairs 21 (2007).

Hernandez, Fernando. *Argentina*, The Restructuring Review of the Americas: A Global Restructuring Review Special Report (2019).

Herrmann, Daniel. *An Uneven Exchange? Developing a Fair and Efficient Approach to Exit Consents*, 66 Rutgers Law Review 3 (2014).

Heuer, Jan-Ocko. Consumer Insolvency Proceedings in Europe: An Introduction to Consumer Over-Indebtedness and Debt Relief, in Kadner, Thomas et. al. (Eds.). *A Guide to Consumer Insolvency Proceedings in Europe*. Elgar (2019).

Hillgruber. *Art. 25 GG – Völkerrecht – Bundesrecht* in Schmidt-Bleibtreu; Hofmann; Henneke (Eds.), GG Grundgesetz. Heymanns (2017).

Hofmann, Ekkehard. *Rationality, Discretion, and Decision Theory, Legal Reasoning: The Methods of Balancing* (2010).

Holmes, Stephen and Sunstein, Cass. *The Costs of Rights: Why Liberty Depends on Taxes*. Norton & Co. (1999).

Horn, Sebastian; Reinhart, Carmen and Trebesch, Cristoph. *China's Overseas Lending, Kiel Working Paper* (2019). Available at: https://www.ifw-kiel.de/fileadmin/Dateiverwaltung/IfW-Publications/Christoph_Trebesch/KWP_2132.pdf [last accessed 14.09.2019].

Hornbeck, J.F. *Argentina's Defaulted Sovereign Debt: Dealing with the "Holdouts",* Congressional Research Service of the US (2013).

Howse, Robert. Concluding Remarks in the Light of International Law, in Espósito, Carlos et al. (Eds.). *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013).

Howse, Robert. Toward a Framework for Sovereign Debt Restructuring: What can Public International Law Contribute? in Guzmán, Martín; Stiglitz, Joseph and Ocampo, José Antonio (Eds.). *Too Little Too Late: The Quest to Resolve Sovereign Debt Crises.* Columbia University Press (2016).

Hughes, Justin. *The Charming Betsy Canon, American Legal Doctrine, and Global Rule of Law* (2020). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946483 [last accessed 26.8.2020].

Husa, Jaako. Legal Families, in Smits, Jan (Ed.). *Elgar Encyclopedia of Comparative Law*. Elgar (2012).

International Capital Market Association, Sovereign Bond Consultation Paper Supplement, June 2014 available at https://www.icmagroup.org/resources/Sovereign-Debt-Information/archived-information/ [last accessed, 18.2.2019].

International Capital Market Association, Standard Aggregated Collective Action Clauses ("CACs") For the Terms and Conditions of Sovereign Notes Governed by New York Law, available at https://www.icmagroup.org/resources/Sovereign-Debt-Information/ [last accessed 18.2.2020].

International Capital Market Association: Standard Pari Passu Provision for the Terms and Conditions of Sovereign Notes (August 2014) available at https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-topics/collective-action-clauses/ [last accessed 19.3.2020].

International Law Association, *International Monetary Law*, Berlin Conference (2004), available at https://www.mocomila.org/publication/2004-mocomila-berlin-report.pdf [last accessed 24.3.2020].

International Law Association (Sovereign Insolvency Study Group), *State Insolvency: Options for the Way Forward*, The Hague Conference (2010), available at https://www.ila-hq.org/index.php/study-groups?study-groupsID=44 [last accessed 20.11.2019].

International Law Association, Sovereign Bankruptcy Study Group, *Working Session Report Washington DC* (2014).

International Law Association, *Report of the Sovereign Bankruptcy Study Group* (Johannesburg) (2016).

International Monetary Fund, *Fourth Progress Report on Inclusion of Enhanced Contractual Provisions in International Sovereign Bond Contracts* (2019), available at https://www.imf.org/en/Publications/Policy-Papers/Issues/2019/03/21/Fourth-Progress-Report-on-Inclusion-of-Enhanced-Contractual-Provisions-in-International-46671 [last accessed 11.12.2021].

International Monetary Fund, Factsheet: IMF Lending, available at https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality [last accessed 14.07.2019].

International Monetary Fund, IMF Policy Paper: *Review of the Debt Sustainability Framework for Market Access Countries* (2021), available at: https://www.imf.org/en/Publications/Policy-Papers/Issues/2021/02/03/Review-of-The-Debt-Sustainability-Framework-For-Market-Access-Countries-50060 [last accessed 12.05.2021].

International Monetary Fund, *Modernizing the Framework for Fiscal Policy and Public Debt Sustainability Analysis* (2011), available at https://www.imf.org/external/np/pp/eng/2011/080511.pdf [last accessed 24.02.2020].

Kingsbury, Benedict and Schill, Stephan. Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality, in Schill, Stephan (Ed.). *International Investment Law and Comparative Public Law*. Oxford University Press (2010).

International Monetary Fund, *Progress Report on Inclusion of Enhanced Contractual Provisions in International Sovereign Bond Contracts* (2015). Available at https://www.imf.org/external/np/pp/eng/2015/091715.pdf [last accessed 14.09.2019].

International Monetary Fund, *Sovereign Debt Restructuring, Recent Developments and Implications for the Funds Legal and Policy Framework*, (2013) available at https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Sovereign-Debt-Restructuring-Recent-Developments-and-Implications-for-the-Fund-s-Legal-and-PP4772 [last accessed 05.08.2021].

International Monetary Fund, *Strengthening the Contractual Framework to Address Collective Action Problems in Sovereign Debt Restructuring* (2014), available at https://www.imf.org/external/np/pp/eng/2014/090214.pdf [last accessed 28.07.2021].

International Monetary Fund, *The Design of the Sovereign Debt Restructuring Mechanism – Further Considerations* (2002), available at https://www.imf.org/external/np/pdr/sdrm/2002/112702.pdf [last accessed 27.07.2021].

International Monetary Fund, *The Design and Effectiveness of Collective Action Clauses* (2002), available at https://www.elibrary.imf.org/view/journals/007/2002/029/article-A001-en.xml [last accessed 22.12.2021].

Ishikawa, Tomoko. *Collective Action Clauses in Sovereign Bond Contracts and Investment Treaty Arbitrations – Approach to Reconcile the Irreconcilable*, 4 Accounting Economics and Law 2 (2014).

Jackson, Miles. *State Instigation in International Law: A General Principle Transposed*, 30 The European Journal of International Law 2 (2019).

Jackson, Thomas. *The Logic and Limits of Bankruptcy Law*. Harvard University Press (1986).

Jagusch, Stephen and Sullivan, Jeffrey. A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern, in Waibel, Michael et al. (Eds.). *The Backlash Against Investment Arbitration*. Kluwer Law (2010).

Janis, Mark. *An Introduction to International Law* (3rd Edition). Aspen (1999).

Jessup, Philip. *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 The American Journal of International Law 4 (1939).

Jiang, Yujia. *The Curios Case of Inactive Bankruptcy Practice in China: A Comparative Study of U.S. and Chines Bankruptcy Law*, 34 Northwestern Journal of International Law & Business 3 (2014).

Jones, Tim. Sovereign Debt and the Right to Health in Ilias Bantekas and Cephas Lumina (Eds.), *Sovereign Debt and Human Rights*. Oxford University Press (2018).

Kadelbach, Stefan and Kleinlein, Thomas. *International Law – A Constitution for Mankind? An Attempt at a Re-Appraisal with an Analysis of Constitutional Principles*, available at https://core.ac.uk/download/pdf/14507728.pdf [last accessed 22.04.2019].

Kaplow, Louis. *Rules versus Standards: An Economic Analysis,* 42 Duke Law Journal (1992).

Kaplow, Louis and Shavell, Steven. *Fairness versus Welfare*. Harvard University Press (2002).

Karamanian, Susan. *The Place of Human Rights in Investor-State Arbitration*, 17 Lewis & Clark Law Review 2 (2013).

Kischel, Uwe. *Comparative Law*. Oxford University Press (2019).

Kimhi, Omer. *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 Yale Journal on Regulation 2 (2010).

Kjos, Hege. *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*. Oxford University Press (2013).

Klass, Gregory. *Interpretation and Construction in Contract Law* (2018). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913228 [last accessed 29.8.2020].

Klatt, Matthias. *Positive Obligations under the European Convention on Human Rights*, 71 Zaörv 4 (2011).

Klatt, Matthias and Meister, Moritz. *Proportionality – A Benefit to Human Rights? Remarks on the I-CON Controversy*, 10 I-CON (2012).

Klatt, Matthias and Meister, Moritz. *The Constitutional Structure of Proportionality*. Oxford University Press (2012).

Kleinlein, Thomas. Customary International Law and General Principles: Rethinking their Relationship in Lepard, Brian. *Reexamining Customary International Law* (Ed.). Cambridge University Press (2017).

Kleinlein, Thomas. *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, 12 German Law Journal 5 (2011).

Knapp, Charles. *Problems in Contract Law: Cases and Materials* (9th Ed.). Wolters Kluwers (2019).

Koh, Harold. *Is International Law Really State Law?* 111 Harvard Law Review 7 (1998).

Kolb, Robert. *Principles as Sources of International Law (With Special Reference to Good Faith)*, 53 Netherlands International Law Review 1 (2006).

Kornhauser, Lewis. Choosing Ends and Choosing Means: Teleological Reasoning in Law in Colin Aitken et al. (Eds.), *Handbook of Legal Reasoning and Argumentation*. Springer (2018).

Kornhauser, Lewis. Economic Logic and Legal Logic, in Giorgio Bongiovanni et al. (Eds.), *Handbook of Legal Reasoning and Argumentation*. Springer (2018).

Kotuby, Charles. *General Principles of Law, International Due Process, and the Modern Role of Private International Law,* 23 Duke Journal of Comparative & International Law (2013).

Kotuby, Charles and Sobota, Luke. *General Principles of Law and International Due Process*. Oxford University Press (2017).

Kötz, Hein. Comparative Law: A Veteran's View in Boele-Woelki, Katharina and Fernandez, Diego (Eds.). *The Past, Present and Future of Comparative Law*. Springer (2017).

Kriebaum, Ursula and Reinisch, August. "*Property, Right to, International Protection"*, Oxford Public International Law.

Kriebaum, Ursula and Schreuer, Christoph. *The Concept of Property in Human Rights Law and International Investment Law* (2007), available at https://www.univie.ac.at/intlaw/concept_property.pdf [last accessed 24.07.2019].

Kriebaum, Ursula. Human Rights and International Investment Arbitration in Schultz, Thomas and Ortino, Federico (Eds.). *The Oxford Handbook of International Arbitration*. Oxford University Press (2020).

Kriebaum, Ursula. *Human Rights of the Population of the Host State in International Investment Arbitration*, 10 The Journal of World Investment and Trade (2009).

Kriebaum, Ursula. Is the European Court of Human Rights an Alternative to Investor-State Arbitration? in Dupuy, Pierre-Marie et al. (Eds.). *Human Rights in International Investment Law and Arbitration*. Oxford University Press (2009).

Kriebaum, Ursula. *Partial Expropriation*, 8 Journal of World Investment & Trade 1 (2007).

Krommendijk, Jasper and Morijn, John. Proportional by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration in Pierre-Marie Dupuy et al (Eds.). *Human Rights in International Investment Law and Arbitration*, Oxford University Press (2009).

Krueger, Anne. *A New Approach to Sovereign Debt Restructuring*, International Monetary Fund (2002).

Kupelyants, Hayk. *Sovereign Defaults Before Domestic Courts*. Oxford University Press (2018).

Kuznetsov, Andrey. *The Limits of Contractual Stabilization Clauses for Protecting International Oil and Gas Investments Examined through the Prism of the Sakhalin-2 PSA: Mandatory Law, the Umbrella Clause, and the Fair and Equitable Treatment Standard*, 22 Willamette Journal of International Law and Dispute Resolution 223 (2016).

Lammers, Johan. General Principles of Law Recognized by Civilized Nations, in Frits Kalshoven et al. (Eds.) *Essays on the Development of the International Legal Order in Memory of Haro F. van Panhuys*. (1980).

Landemore, Helene and Ferreras, Isabelle. *In Defense of Workplace Democracy: Towards a Justification of the Firm-State Analogy*, 44 Political Theory 1 (2016).

Lawrence Westbrook, Jay et al., *A Global View of Business Insolvency Systems*. Martinus Nijhoff (2010).

Lee, Thomas. *Customary International Law and U.S. Judicial Power: From the Third to the Fourth Restatements* (2020). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3629791 [last accessed 26.8.2020].

Lee, Thomas. *The Law of Nations and the Judicial Branch*, 106 The Georgetown Law Journal (2018).

Legal Information Institute, "Stay of Proceedings" available at https://www.law.cornell.edu/wex/stay_of_proceedings [last accessed 19.12.2021].

Leiss, Johann. The Juridical Nature of General Principles, in Fitzmaurice, Malgosia et al. (Eds.). *General Principles and the Coherence of International Law*. Brill Nijhoff (2019).

Levin, Richard and Pettersson, Roland. *The transfer of Venezuela's Oil Assets to a Successor Entity and Fraudulent Conveyance*, 14 Capital Markets Law Journal 4 (2019).

Lewyn, Marc. *Foreign Debt – Act of State Doctrine – Unilateral Deferral of Obligations by Debtor Nations is Inconsistent with United States Law and Policy: Allied Bank International v. Banco Credito Agricola de Cartago*, 3 Georgia Journal of International and Comparative Law (1985).

Lee, Yan Ying. *Policy Implication of Poštová Tribunal's Jurisdiction Over Sovereign Bonds: Bankruptcy Cram-Down and ICSID Arbitration* (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2402643 [last accessed, 26.08.2021].

Li, Yuefen. *The Long March Towards an International Legal Framework for Sovereign Debt Restructuring*, 6 Journal of Globalization and Development 2 (2015).

Liakopoulos, Dimitris. Proportionality and Dispute Resolution Between WTO and ICSID, 1 RECorDIP (2020).

Lienau, Odette. *Rethinking Sovereign Debt: Politics, Reputation and Legitimacy in Modern Finance*. Harvard University Press (2014).

Lindahl, Lars. On Robert Alexy's Weight Formula for Weighing and Balancing, in Lindahl, Lars (Ed.). *Rights: Concepts and Contexts*. Routledge (2012).

López, Sebastián. *Interferences with Property Under European Human Rights Law*, 24 Florida Journal of International Law (2012).

López, Sebastián. *La Propiedad y su Privación o Restricción en la Jurisprudencia de la Corte Interamericana*, 21 Revista Ius et Praxis 1 (2015).

Lora, Eduardo and Olivera, Mauricio. *Public Debt and Social Expenditure*: *Friend or Foes?* Inter-American Development Bank (2006). available at https://publications.iadb.org/en/publication/10725/public-debt-and-social-expenditure-friends-or-foes [last accessed 22.12.2021].

Lord, Richard. *Williston on Contracts* (4th Edition). Thomson (2020).

Lu, Lili and Waibel, Michael. *Sub-national Insolvency: Cross-Country Experiences and Lessons*, World Bank Policy Research Working Paper 4496 (2008). Available at http://documents.worldbank.org/curated/en/332531468161672312/pdf/wps4496.pdf [last accessed 16.09.2019].

Lumina, Cephas. Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, *An Assessment of the Human Rights Impact of International Debt Relief Initiatives*, A/HRC/23/37 (2013).

Lumina, Cephas. Report of the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, Particularly Economic, Social and Cultural Rights, *Guiding Principles on Foreign Debt and Human Rights*, A/HRC/20/23 (2011).

Lumina, Cephas. Report of the Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of all Human Rights, Particularly Economic, Social and Cultural Rights, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, A/HRC/11/10 (2009).

Lumina, Cephas. Report of the Independent Expert on the Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full Enjoyment of All Human Rights, Particularly Economic, Social and Cultural Rights, Cephas Lumina, *Addendum: Mission to Argentina* (18–29 November 2013), UN Doc A/HRC/25/ 50/Add.3 (2014).

Lumina, Cephas. Sovereign Debt and Human Rights: Making the Connection, in Bantekas, Ilias and Lumina, Cephas (Eds.). *Sovereign Debt and Human Rights*. Oxford University Press (2018).

Malanczuk, Peter. *Akehurt's Modern Introduction to International law* (7th Revised Edition). Routledge (1997).

Malone, Samuel. *Sovereign Indebtedness, Default, and Gambling for Redemption*, 63 Oxford Economic Papers, (2011).

Maniruzzaman, A.F.M. *State Contracts in Contemporary International Law: Monists versus Dualists Controversies*, 12 European Journal of International Law 2 (2001).

Manov, Ann. *Shooing the Vultures? The Case for Investment Treaty Protection of Sovereign Debt*, 37 Arbitration International (2021).

Manuelides, Yannis. *Using the Local Law Advantage in Today's Eurozone (With Some References to the Republic of Arcadia and the Mamatas Judgement)*, 14 Capital Markets Law Journal 4 (2019).

Marboe, Irmgard and Reinisch, August. "*Contracts Between States and Foreign Private Law Persons"*, Max Planck Encyclopedia of International Law (2011).

Marboe, Irmgard. *Damages in Investor-State Arbitration: Current Issues and Challenges*, 2 International Investment Law and Arbitration 1 (2018).

Marzen, Chad. *The Application of International Law in State Courts: The Case of Florida*, 49 The University of Toledo Law Review (2018).

McCormack, Gerard. *Corporate Rescue Law: An Anglo-American Perspective*. Elgar (2008).

McKinney's Consolidated Law of New York Annotated. West (2019).

McLachlan, Campbell; Shore, Laurence and Weiniger, Matthew. *International Investment Arbitration: Substantive Principles* (2nd Ed). Oxford University Press (2017).

McNabb, Kyle and LeMay-Boucher, Philippe. *Tax Structures, Economic Growth and Development*, International Centre for Tax and Development Working Paper 22 (2014).

Megliani, Mauro. *For the Orphan, the Widow, the Poor: How to Curb Enforcing by Vulture Funds against the Highly Indebted Poor Countries*, 31 Leiden Journal of International Law (2018).

Megliani, Mauro. *Not Only Good Faith: Staying Enforcement*, Volkerrechstsblog (2017). Available at: https://voelkerrechtsblog.org/not-only-good-faith/ [last accessed 28.8.2020].

Megliani, Mauro. *"Paris Club"*, Max Planck Encyclopedias of International Law (2015).

Megliani, Mauro. *Sovereign Debt*: Genesis*, Restructuring Litigation*. Springer (2015).

Megliani, Mauro. *Vultures in Courts: Why the UNCTAD Principles on Responsible Financing Cannot Stop Litigation*, 28 Leiden Journal of International Law (2015)

Menezes, Antonia and Gropper, Akvile. *Overview of Insolvency and Debt Restructuring Reforms in Response to the COVID-19 Pandemic and Past Financial Crises: Lessons for Emerging Markets*, in COVID-19 Notes: Finance Series, World Bank (2021), available at https://openknowledge.worldbank.org/handle/10986/35425 [last accessed 10.10.2021].

Merkouris, Panos. "*Principle of Systemic Integration"*, Max Planck Encyclopedia of International Procedural Law.

Meshel, Tamar. *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 Journal of International Dispute Settlement 2 (2015).

Meyer, Josefin; Reinhart, Carmen and Trebesch, Cristoph. *Sovereign Bonds Since Waterloo*, NBER Working Paper Series (2019).

Michaels, Ralf. The Functional Method of Comparative Law in Reimann, Mathias and Zimmermann, Reinhard (Eds.). *The Oxford Handbook of Comparative Law*. Oxford University Press (2006).

Michalowski, Sabine. *Sovereign Debt and Social Rights: Legal Reflections on a Difficult Relationship*, 8 Human Rights Law Review 1 (2008).

Miller, Michael. *No Standing Room: How Lender Collective Action Subverts Basic Principles of Contract Interpretation*, Columbia Business Law Review (2012).

Mokal, Rizwaan Jameel. *Corporate Insolvency Law: Theory and Application*. Oxford University Press (2005).

Mokal, Rizwaan Jameel. *Priority as a Pathology: The Pari Passu Myth*, 60 The Cambridge Law Journal (2001).

Mola, Lorenza. *Sovereign Immunity, Insolvent States and Private Bondholders: Recent National and International Case Law*, The Law and Practice of International Courts and Tribunals (2012).

Moller, Kai. *Proportionality: Challenging the Critic*s, I-CON (2012).

Moreso, José Juan. *Ways of Solving Conflict of Constitutional Rights: Proportionalism and Specificationism*, 25 Ratio Juris 1, (2012).

Moringiello, Juliet. *Goals and Governance in Municipal Bankruptcy*, 71 Washington and Lee Law Review (2014).

Morris, Howard and Mudhar, Jai. *Less Scheming: Cross-Class Cram-Downs Are Out in the Open for All To See* (2021). Morrison Foster Note. Available at https://www.mofo.com/resources/insights/210201-less-scheming-cross-class.html [last accessed 10.10.2021].

Moscoso de la Cuba, Pablo. *The Statehood of "Collapsed" States in Public International law*, 29 Agenda Internacional (2011).

Mousourakis, George. *Comparability, Functionalism and the Scope of Comparative Law*, 41 Hosei Riron 1 (2008).

Mucciarelli, Federico. *Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension*, 14 European Business Organization Law Review (2013).

Müller-Terpitz, Art. *100 GG – Normenkontrolle* in Schmidt-Bleibtreu; Hofmann; Henneke (Eds.), GG Grundgesetz. Heymanns (2017).

New York City Bar, *Governing Law in Sovereign Debt – Lessons from the Greek Crisis and Argentina Dispute of 2012* (2013). Available at https://www.nycbar.org/pdf/report/uploads/20072390-GoverningLawinSovereignDebt.pdf [last accessed 23.8.2020].

Newcombe, Andrew and Paradell, Lluís. *Law and Practice of Investment Treaties: Standards of Treatment*. Wolters Kluwer (2009).

Nolan, Michael and Sourgens, Frederic. *Issues of Proof of General Principles of Law in International Arbitration*, 3 World Arbitration & Mediation Review 4-5 (2009).

Nolan, Michael; Sourgens, Frederic and Hugh Carlson. *Leviathan on Life Support? Restructuring Sovereign Debt and International Investment Protection After Abaclat*, Yearbook on International Investment Law & Policy 2011-2012 (2013).

Norton, Ellie. *International Investment Arbitration and the European Debt Crisis*, 13 Chicago Journal of International Law 1 (2012).

O'Brien, John. *International Law*. Cavendish Publishing Limited (2001).

Oechsli, Christopher. *Procedural Guidelines for Renegotiating LDC Debt: An Analogy to Chapter 11 of the US Bankruptcy Reform Act*, 21 Virginia Journal of International Law (1981).

Olivares-Caminal, Rodrigo. *The Definition of Indebtedness and the Consequent Imperiling of the Pari Passu, Negative Pledge and Cross-Default Clauses in Sovereign Debt Instruments*, 12 Capital Markets Law Journal 2 (2017).

Olivares-Caminal, Rodrigo. *To Rank Pari Passu or Not to Rank: That is the Question in Sovereign Bonds after the Latest Episode of the Argentine Saga*, 14 Law and Business Review of the Americas (2009).

Olivares-Caminal, Rodrigo. Transactional Aspects of Sovereign Debt Restructurings in Olivares-Caminal, Rodrigo et al. (Eds.). *Debt Restructuring*. Oxford University Press (2011).

Olivares-Caminal, Rodrigo. *Understanding the Pari Passu Clause in Sovereign Debt Instruments: A Complex Quest*,43 The International Lawyer 3 (2008).

Ortolani, Pietro. *Are Bondholders Investors? Sovereign Debt and Investment Arbitration after Postova*, Leiden Journal of International Law (2017).

Örücü, Esin. Methodology of Comparative Law, in Smits, Jan (Ed.). *Elgar Encyclopedia of Comparative Law*. Elgar (2012).

Ostrom, Elinor; Gardner, Roy and Walker, James. *Rules, Games and Common-Pool Resource Problems*. Michigan (1994).

Pahis, Stratos. *Investment Misconceived: The Investment-Commerce Distinction in International Investment Law*, 45 The Yale Journal of International Law 1 (2020).

Pahis, Stratos. *The International Law and Economics of Sovereign Debt*, 115 The American Journal of International Law 2 (2020).

Palombino, Fulvio Maria. *Fair and Equitable Treatment and the Fabric of General Principles*. Springer (2018).

Paliouras, Vassilis. *The Right to Restructure Sovereign Debt*, 20 Journal of International Economic Law (2017).

Panezi, Maria. *Sources of Law in Transition: Re-visiting General Principles of International Law*, 66 Ancilla Iuris (2007).

Panizza, Ugo; Sturzenegger, Federico and Zettelmeyer, Jeromin. *The Economics and Law of Sovereign Debt and Default*, 47 Journal of Economic Literature 3 (2009).

Paparinskis, Martins. Analogies and Other Regimes of International Law in Zachary Douglas et al. (Eds.), *The Foundations of International Investment Law: Bringing Theory into Practice*. Oxford University Press (2014).

Parisi, Francesco. *The Language of Law and Economics*. Cambridge University Press (2013).

Park, Stephen Kim and Samples, Tim. *Tribunalizing Sovereign Debt: Argentina's Experience with Investor-State Dispute Settlement*, 50 Vanderbilt Journal of Transnational Law (2017).

Pasqualucci, Jo M. *The Practice and Procedure of the Inter-American Court of Human Rights*. Cambridge University Press (2013).

Paulus, Andreas. The Emergence of the International Community and the Divide Between International and Domestic Law, in Janne Nijman and André Nollkaemper (Eds.), *New Perspectives on the Divide Between National and International Law*. Oxford University Press (2007).

Paulus, Christoph. *How Could the General Principles of National Insolvency Law Contribute to the Development of a State Insolvency Regime?* 21 Zeitschrift für das gesamte Insolvenzrecht 1-2 (2018).

Paulus, Christoph. *The New German Preventive Restructuring Framework* (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3849428 [last accessed 10.10.2021].

Paulus, Christoph. *Some Thoughts on an Insolvency Procedure for Countries*, 50 The American Journal of Comparative Law 3 (2002).

Payne, Jennifer. *An Assessment of the UK Restructuring Moratorium* (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3759730 [last accessed 10.10.2021].

Payne, Jennifer. *Debt Restructuring in the UK,* 15 European Company and Financial Law Review, De Gruyter 3 (2018).

Pellet, Allain. Article 38 in Andreas Zimmermann and Christian Tams (Eds.), *The Statute of the International Court of Justice: A Commentary* (2nd Edition). Oxford University Press (2012).

Perkams, Markus. The Concept of Indirect Expropriation in Comparative Public Law – Searching for Light in the Dark, in Schill, Stephan (Ed.). *International Investment Law and Comparative Public Law*. Oxford University Press (2010).

Petersen, Niels. *Customary International Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 American University Law Review 2 (2007).

Petersen, Niels. *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa.* Cambridge University Press (2017).

Petrov, Tsvetan. *Harmonising Restructuring Law in Europe: A Comparative Analysis of the Legislative Impact of the Proposed Restructuring Directive on Insolvency Law in the UK and Germany*, 3 Anglo-German Law Journal (2017).

Picarelli, Mattia; Erce, Aitor and Jiang, Xu. *The Benefits of Reducing Holdout Risk: Evidence from the Euro CAC Experiment 2013-2018*, Working Paper Series (2018).

Pinelli, Cesare. "*Conditionality",* Max Planck Encyclopedia of Public International Law.

Pirker, Benedikt. *Proportionality Analysis and Models of Judicial Review*. Europa Law (2013).

Pisillo Mazzeschi, Riccardo and Viviani, Alessandra. General Principles of International Law: From Rules to Values? in Pisillo Mazzeschi, Riccardo and De Sena, Pasquale (Eds.). *Global Justice, Human Rights and the Modernization of International Law*. Springer (2018).

Popelier, Patricia. *Preliminary Comments on the Role of Courts as Regulatory Watchdogs*, 6 Legisprudence (2012).

Portuese, Aurelien. *Principle of Proportionality as Principle of Economic Efficiency*, 19 European Law Journal 5 (2013).

Porzecanski, Arturo. Human Rights and Sovereign Debts in the Context of Property and Creditor Rights, in Bantekas, Ilias and Lumina, Cephas (Eds.). *Sovereign Debt and Human Rights* (2018).

Posner, Richard. *Economic Analysis of Law* (9th Ed.). Wolters Kluwer (1986).

Posner, Richard. Foreword in Bhandari, Jagdeep and Weiss, Lawrence (Eds.). *Corporate Bankruptcy: Economic and Legal Perspectives*. Cambridge University Press (1996).

Posner, Richard. *Law, Pragmatism and Democracy*. Harvard University Press (2003).

Practical Law Practice Note w-003-5047, *Stayin Actions in New Your State Court*. Westlaw (2020).

Price, Savannah. *The Right to Renounce Citizenship*, 42 Fordham International Law Journal 5 (2019).

Purdy, Jedediah and Fielding, Kimberly. *Sovereigns, Trustees, Guardians: Private-law Concepts and the Limits of Legitimate State Power*, 70 Law and Contemporary Problems 165 (2007).

Raffer, Kunibert. Debts, Human Rights, and the Rule of Law in in Guzmán, Martín; Stiglitz, Joseph and Ocampo, José Antonio (Eds.). *Too Little Too Late: The Quest to Resolve Sovereign Debt Crises*. Columbia University Press (2016).

Raimondo, Fabian. *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*. Martinus Nijhoff Publishers (2008).

Ramos, David. *Can Complex Contracts Effectively Replace Bankruptcy Principles: Why Interpretation Matters*, 92 American Bankruptcy Law Journal (2018).

Randolph, Susan; Fukuda-Parr, Sakiko and Lawson-Remer, Terra. *Economic and Social Rights Fulfillment Index: Country Scores and Rankings*, 9 Journal of Human Rights 3 (2010).

Ranjan, Prabbash. *Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Reappraisal*, 3 Cambridge Journal of International and Comparative law 3 (2014).

Rasmussen, Robert. *Integrating a Theory of the State into Sovereign Debt Restructuring* 22 Vanderbilt University Law School Law & Economics Working Paper Number 04-16 (2004).

Rasmussen, Robert and Simkovic, Michael. *Bounties for Errors: Market Testing Contracts*, 10 Harvard Business Law Review (2020).

Rault, Charlotte. *The Legal Framework of Sovereign Debt Management*. Nomos (2017).

Reinhart, Carmen and Trebesch, Cristoph. *Sovereign Debt Relief and its Aftermath*, 14 Journal of the European Economic Association 1 (2016).

Reinisch, August. *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 The European Journal of International Law 4 (2006).

Reinisch, August. *The Need for an International Insolvency Procedure*, 9 World Bulletin (1993).

Reimann, Mathias. Comparative Law and Economic Analysis of Law, in Reimann, Mathias and Zimmermann, Reinhard (Eds.). *The Oxford Handbook of Comparative Law*. Oxford University Press (2006).

Reisman, Michael et al. *Foreign Investment Disputes*: *Cases, Materials and Commentary* (2nd Ed). Kluwer (2014).

Rieffel, Lex. *Restructuring Sovereign Debt: The Case of Ad Hoc Machinery*. Brookings Institution Press (2003).

Rivers, Julian. Proportionality, Discretion and the Second Law of Balancing, in George Pavlakos, *Law, Rights and Discourse: Themes from the Legal Philosophy of Robert Alexy*. Hart (2007).

Rivers, Julian. *Proportionality and Variable Intensity of Review*, 65 Cambridge Law Journal 1 (2006).

Ryan, Molly. *Sovereign Bankruptcy: Why Now and Why Not in the IMF*, 82 Fordham University School of Law 5 (2014).

Robbins, Lionel. *An Essay on the Nature & Significance of Economics Science*, 2nd Edition, Revised and Extended. Macmillan & Co (1945). Digital Edition by the Mises Institute (2013).

Roberts, Anthea. *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 International and Comparative Law Quarterly 1 (2011).

Rogoff, Kenneth and Zettelmeyer, Jeromin. *Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976-2001*, 49 IMF Staff Papers 3 (2002).

Roos, Jerome. *Why Not Default? The Political Economy of Sovereign Debt*. Princeton University Press (2019).

Rose-Ackerman, Susan. *Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review*, 65 University of Miami Law Review 2 (2011).

Rose-Ackermann, Susan. *The Limits of Cost/Benefit Analysis When Disasters Loom*, 7 Global Policy 1 (2016).

Rouillon, Adolfo. *Rules of International Private Law, Priorities on Insolvency and the Competing Rights of Foreign and Domestic Creditors, under the Argentine Bankruptcy Law No 24522* (working paper). Available at https://www.iiiglobal.org/sites/default/files/13-_RULES%20OF%20INTERNATIONAL%20PRIVATE%20LAW.pdf [last accessed 04.11.2019].

Ruhl, Gisela. *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 Berkeley Journal of International Law 3 (2006).

Sabahi, Borzu and Rubins, Noah et al. *Investor-State Arbitration* (2nd Ed.), Oxford University Press (2019).

Sachs, Jeffrey. *Resolving the Debt Crisis of Low-Income Countries*, Brooking Papers on Economic Activity (2002), available at https://www.brookings.edu/bpea-articles/resolving-the-debt-crisis-of-low-income-countries/ [last accessed 27.08.2021].

Samuel, Geoffrey. *An Introduction to Comparative Law Theory and Method*. Hart Publishing (2014).

Santacroce, Fabio. *The Applicability of International Human Rights Law in International Investment Disputes*, 34 ICSID Review 1 (2018).

Sartor, Giovanni. A Quantitative Approach to Balancing, in Bongiovanni, Giorgio et al. (Eds.). *Handbook of Legal Reasoning and Argumentation*. Springer (2018).

Sartor, Giovanni. Consistency in Balancing: From Value Assessments to Factor-Based Rules, in Duarte, David and Silva Sampaio, Jorge (Eds.). *Proportionality in Law: An Analytical Perspective*. Springer (2018).

Sartor, Giovanni. *Doing Justice to Rights and Values: Teleological Reasoning and Proportionality*, 18 Artificial Intelligence Law (2010).

Sasson, Monique. *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law*. Kluwer Law (2017).

Scali, Emma. *Sovereign Debt and Socio-Economic Rights Beyond Crisis: The Neoliberalisation of International Law*. Cambridge University Press (2022).

Schäfer, Hans-Bernd. *Rules versus Standards in Rich and Poor Countries: Precise Legal Norms as Substitutes for Human Capital in Low-Income Countries*, 14 Supreme Court Economic Review (2006).

Shaw, Malcolm. *International Law* (5th Edition). Cambridge University Press (2003).

Schabas, William. *The European Convention on Human Rights: A Commentary*. Oxford University Press (2015).

Schier, Holger. *Towards a Reorganisation System for Sovereign Debt: An International Law Perspective*. Nijhoff (2007).

Schill, Stephan. *Der völkerrechtliche Staatsnotstand in der Entscheidung des BVerfG zu Argentinischen Staatsanleihen – Anachronismus oder Avantgarde?* ZaöRV 68 (2008).

Schillig, Michael. *Corporate Insolvency Law in the Twenty-First Century: State Imposed or Market Based?* 14 Journal of Corporate Law Studies 1 (2014).

Schlemmer-Schulte, Sabine. International Monetary Fund, "*Structural Adjustment Programme (SAP)",* Max Planck Encyclopedia of Public International Law.

Schmitt-Grohé, Stephanie and Uribe, Martín. *International Macroeconomics* (2014) available at http://www.columbia.edu/~mu2166/UIM/index.html [last accessed 30.10.2020].

Schrader, Howard. *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 Columbia Law Review (1982).

Schreuer, Christoph; Malintoppi, Loretta; Reinisch, August and Sinclair, Anthony. *The ICSID Convention: A Commentary*. Cambridge University Press (2009).

Schreuer, Christoph. *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 The Journal of World Investment & Trade 2 (2004).

Schumacher, Julian; Trebesch, Cristoph and Enderlein, Henrik. *Sovereign Defaults in Court*, CESIFO Working Papers 6931/2018 (2018).

Schumacher, Julian; Trebesch, Christoph and Enderlein, Henrik. *What Explains Sovereign Debt Litigation?* 58 Journal of Law and Economics (2015).

Schwarcz, Steven. *"Idiot's Guide" to Sovereign Debt Restructuring*, 53 Emory Law Journal (2004).

Schwarcz, Steven. *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 Cornell Law Review (2000).

Schwarcz, Steven. *Sovereign Debt Restructuring Options: An Analytical Comparison*, 2 Harvard Business Law Review (2012).

Schwartz, Alan. *A Contract Theory Approach to Business Bankruptcy*, 107 The Yale Law Journal (1998).

Scott, Robert. *The Law and Economics of Incomplete Contracts*, 2 Annual Review of Law and Social Science (2006).

Seider, Michelle; Goldberg, Adam and Christian Adams. Maximizing Enterprise Value and Minimizing "Hold Up Value": Reorganizations in the United States under Chapter 11 of the US Bankruptcy Code in Hajjiri, Tarek and Cohen, Adrian (Eds.). *Global*

Insolvency and Bankruptcy Practice for Sustainable Economic Development: vol 2. Palgrave (2016).

Senbet, Lemma and Wang, Tracy Yue. *Corporate Financial Distress and Bankruptcy: A Survey*, 5 Foundations and Trends in Finance 4 (2010).

Shelton, Dinah. Introduction in Dinah Shelton (Ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion*. Oxford University Press (2011).

Sidley, *German Stabilization and Restructuring Framework – the "German Scheme"* (2021), available at https://www.sidley.com/en/insights/newsupdates/2021/01/german-stabilization-and-restructuring-framework-the-german-scheme [last accessed 10.20.2021].

Siems, Mathias. *Varieties of Legal Systems: Towards a New Global Taxonomy*, 12 Journal of Institutional Economics 3 (2016).

Silva Sampaio, Jorge. Proportionality in its Narrow Sense and Measuring the Intensity of Restrictions on Fundamental Rights, in Duarte, David and Silva Sampaio, Jorge (Eds.). *Proportionality in Law: An Analytical Perspective*. Springer (2018).

Simma, Bruno. *Foreign Investment Arbitration: A Place for Human Rights?* 10 International & Comparative Law Quarterly (2011).

Simma, Bruno and Kill, Theodore. Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology in Binder, Christina et al. (Eds.). *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*. Oxford University Press (2009).

Shang, Shu and Shen, Wei. *When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds in the Post Financial Crisis Era: Is There Still a Black Hole in International Law?* 31 Leiden Journal of International Law (2018).

Skeel, David. *The Empty Idea of "Equality of Creditors"*, 166 University of Pennsylvania Law Review (2018).

Smith, Adam. *An Inquiry into the Nature and Causes of the Wealth of Nations*. University of Chicago Press (1977).

Ssenyonjo, Manisuli. Economic, Social and Cultural Rights: An Examination of State Obligations in Joseph, Sara and McBeth, Adam (Eds.). *Research Handbook on International Human Rights Law*. Elgar (2010).

Staubach, Peter. *The Interpretation of Unwritten International Law by Domestic Judges*, in Aust, Helmut Philipp and Nolte, Georg (Eds.). The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence. Oxford University Press (2016).

Stefanescu, Catalin. *Collective Action Clauses* (2016), available at https://efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2016-Switzerland/papers/EFMA2016_0442_fullpaper.pdf [last accessed 29.10.2019].

Steel, Howard et al. *NML Capital v Argentina: A Lesson in Indenture Interpretation,* 8 Insolvency and Restructuring International 2 (2014).

Steele, Stacey; Godwin, Andrew et al. *Trends and Developments in Chinese Insolvency Law: The First Decade of the PRC Enterprise Bankruptcy Law*, 20 The American Journal of Comparative Law (2018).

Stephan, Paul. International Law as a Source of Law, in Parisi, Francesco (Ed.). *Production of Legal Rules*. Elgar (2011).

Stoll, Peter-Tobias. "*State Immunity"*, Max Planck Encyclopedia of Public International Law, [last accessed 29.10.2020].

Stolper, Antonia and Dougherty, Sean. *Collective Action Clauses: How the Argentina Litigation Changed the Sovereign Debt Markets*, 12 Capital Markets Law Journal 2 (2017).

Stone Sweet, Alec. *Proportionality, General Principles of Law and Investor State Arbitration: A Response to Jose Alvarez*, 46 International Law and Politics (2014).

Stone Sweet, Alec and Mathews, Jud. *Proportionality Balancing and Global Constitutionalism*, 47 Columbia Journal of Transnational Law 72 (2008).

Stone Sweet, Alec. *Investor-State Arbitration: Proportionality's New Frontier* (2010), available at https://digitalcommons.law.yale.edu/fss_papers/69/ [last accessed 3.12.2021].

Stone Swet, Alec and Mathews, Jud. *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach*. Oxford University Press (2019).

Stubbs, Thomas and Kentikelenis, Alexander. Conditionality and Sovereign Debt: An Overview of Human Rights Implications, in Bantekas, Ilias and Lumina, Cephas (Eds.*). Sovereign Debt and Human Rights*. Oxford University Press (2018).

Sturzenegger, Federico and Zettelmeyer, Jeromin. *Debt Defaults and Lessons from a Decade of Crises*. The MIT Press (2006).

Subedi, Surya. *The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation"*, The International Lawyer (2006).

Suescun de Roa, Felipe. *Investor-State Arbitration in Sovereign Debt Restructuring: The Role of Holdouts*, 30 Journal of International Arbitration 2 (2013).

Šušnjar, Davor. *Proportionality, Fundamental Rights and Balancing of Powers*. Brill/Nijhoff (2010).

Sykes, Allan and Posner, Eric. *Economic Foundations of International Law*. Harvard University Press (2013).

Symeonides, Symeon. *Choice of Law*. Oxford University Press (2016).

Tarullo, Daniel. *Rules, Discretion, And Authority in International Financial Reform,* Journal of International Economic Law (2001).

Tasioulas, John. *Minimum Core Obligations: Human Rights in the Here and Now*, Research Paper, October 2017, The World Bank.

Teggi, Nikhil. *Legitimate Expectations in Investment Arbitration. At the End of its Life Cycle* 5 Indian Journal of Arbitration Law (2016).

Thomas, Dania. *Sovereign Debt as a Commodity: A Contract Law Perspective*, 54 Osgoode Hall Law Journal 2 (2018).

The World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Right Systems*. The World Bank (2016).

Thomas, Jonathan. *Bankruptcy Proceedings for Sovereign State Insolvency and their Effect on Capital Flows*, 13 International Review of Economics and Finance (2004).

Thrasher, Rachel and Gallagher, Kevin. *Mission Creep: The Emerging Role of International Investment Agreements in Sovereign Debt Restructurings*, 6 Journal of Globalization and Development 2, (2015).

Titi, Catharine. Refining the Expropriation Clause: What Role for Proportionality? In Chaisse, Julien (Ed.). *China-European Union Investment Relationships*. Elgar (2018).

Tomuschat, Christian. The European Court of Human Rights and Investment Protection, in Binder, Christina et al. (Eds.). *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*. Oxford University Press (2009).

Tomz, Michael and Wright, Mark. *Empirical Research on Sovereign Debt and Default*, 5 Annual Review of Economics 1 (2013).

Tomz, Michael and Wright, Mark. Sovereign Theft: Theory and Evidence about Sovereign Default and Expropriation, in William Hogan and Federico Sturzenegger (Eds.), *The Natural Resources Trap: Private Investment Without Public Commitment*. MIT Press (2012).

Torterola, Ignacio; Shaw, Gary and Kassa, Bethel. Opening the Umbrella: How the Argentine Economic Crisis Cases Shaped the Modern Umbrella Clause in Fortese, Fabricio (Ed.). *Arbitration in Argentina*. Kluwer (2020).

Totty, Peter; Moss, Gabriel and Segal, Nick. *Insolvency: Vol. 1*. Sweet & Maxwell (2019).

Trachtman, Joel. *Trade and… Problems, Cost-Benefit Analysis and Subsidiarity*, 9 European Journal of International Law (1998).

Trebesch, Christoph. *Delays in Sovereign Debt Restructuring, Should We Really Blame Creditors?* (2008) Available at https://ideas.repec.org/p/zbw/gdec08/44.html [last accessed 05.08.2021].

Trebesch, Christoph. *Sovereign Debt in the 21st Century: Looking Backward, Looking Forward*, CESIFO Working Papers (2021), available at https://www.cesifo.org/en/publikationen/2021/working-paper/sovereign-debt-21st-century-looking-backward-looking-forward [last accessed 05.08.2021].

Turchi, Natalie. *Restructuring a Sovereign Bond Pari Passu Work-Around: Can Holdout Creditors Ever Have Equal Treatment?* 83 Fordham Law Review 4 (2015).

Tuzet, Giovanni. *Alexy & Economics*, Bocconi Legal Studies Research Paper Series (2020).

United Nations, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*. United Nations (2005).

UNCITRAL, *Legislative Guide on Insolvency Law*. United Nations (2005).

United Nations Conference on Trade and Development, *Sovereign Debt Workouts: Going Forward. Roadmap and Guide* (2015), available at https://unctad.org/system/files/official-document/gdsddf2015misc1_en.pdf [last accessed 04.09.2021].

Van Aaken, Anne. *Blurring Boundaries between Sovereign Acts and Commercial Activities* (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236767 [last accessed 29.10.2021].

Van Aaken, Anne. *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 Indiana Journal of Global Studies 2 (2009).

van Aaken, Anne. How to Do Constitutional Law and Economics: A Methodological Proposal, in Eger Thomas et al. (Eds.), *Internationalization of the Law and its Economic Analysis*. Gabler Edition Wissenschaft (2008).

Van Aaken, Anne. *International Investment Law Between Commitment and Flexibility*: *A Contract Theory Analysis*, 12 Journal of International Economic Law 2 (2009).

Van Aaken, Anne. Normative Grundlagen der Ökonomischen Theorie im Öffentlichen Recht in van Aaken Anne and Schmid-Lubber, Stefanie (Eds.), *Beitrage zur Ökonomischen Theorie im Öffentlichen Recht*. DUV (2003).

Van Aaken, Anne. *"Rational Choice" in Der Rechtswissenschaft: Zum Stellenwert Der Ökonomischen Theorie Im Recht*. Nomos Verlagsgesellschaft (2003).

Van Aaken, Anne. Vom Nutzen der Ökonomischen Theorie des Rechts für die Rechtsvergleichung in Brigitta Jud et al. (Eds), *Prinzipien des Privatrechts und*

Rechtsvereinheitlichung- Wiener Tagung 13-16, September 2000. Jahrbuch Junger Zivilrechtswissenschaftler 2000. Boorberg-Verlag (2001).

Van Banning, Theo. *The Human Right to Property*. Intersentia - Hart (2002).

Varottil, Umakanth. *Sovereign Debt Documentation: Unraveling the Pari Passu Mistery*, 7 DePaul Business & Commercial Law Journal (2008).

Vásquez-Bermúdez, Marcelo. *First Report on General Principles of Law*, International Law Commission (A/CN.4/732) (2019).

Vásquez-Bermúdez, Marcelo. *Second Report on General Principles of Law*, International Law Commission (A/CN.4/741) (2020).

Veel, Paul-Erik. *Incommensurability, Proportionality, and Rational Legal Decision-Making*, 4 Law & Ethics of Human Rights (2010).

Verdier, Pierre-Hugues and Voeten, Erik. *How Does Customary International Law Change? The Case of State Immunity,* International Studies Quarterly (2014).

Villaroman, Noel. *Debt Servicing and its Adverse Impact on Economic, Social and Cultural Rights in Developing Countries*, 9 Journal of Human Rights 4 (2010).

Visscher, Louis and Biard, Alexandre. *Dutch Mass Litigation from a Legal and Economic Perspective and its Relevance for France*, Rotterdam Institute of Law and Economics (RILE) Working Paper Series (2014).

Voigt, Christina. *The Role of General Principles in International Law and Their Relationship to Treaty Law*, 31 Retfærd Årgang (2008).

Von Bogdandy Armin and Goldmann, Matthias. Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law in Espósito, Carlos; Li, Yuefen and Bohoslavsky, Juan Pablo (Eds.) *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*. Oxford University Press (2013).

Voss, Jan Ole. *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*. Martinus Nijhoff Publishers (2011).

Waibel, Michael. *Eurobonds: Legal Design Features*, 12 Review of Law and Economics 3 (2016).

Waibel, Michael. *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 The American Journal of International Law (2007).

Waibel, Michael. Sovereign Bonds: Internationalization and Partial Privatization, in Audit, Mathias and Schill, Stephan (Eds.). *Transnational Law of Public Contracts*. Bruylant (2016).

Waibel, Michael. *Sovereign Defaults Before International Courts and Tribunals*. Cambridge University Press (2011).

Wan, Wai Yee and McCormack, Gerald. *Transplanting Chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges*, Journal of Corporate Law Studies (2018).

Walton, Peter. *Company Voluntary Arrangements: Evaluating Success and Failure*, Association of Business Recovery Professional (2018). Available at: https://www.icaew.com/-/media/corporate/archive/files/technical/insolvency/publications/cvas-evaluating-success-and-failure.ashx [last accessed 04.011.2019].

Warbrick, Colin. Economic and Social Interests and the European Convention on Human Rights in Braderin, Mashood and McCorquodale, Robert (Eds.). *Economic, Social and Cultural Rights in Action*. Oxford University Press (2007).

Warwick, Ben TC. *The Minimum Core's Place in Social Rights: Fixity vs Dynamism*. Available at http://www.pol.ed.ac.uk/__data/assets/pdf_file/0003/232428/Warwick_-_summary.pdf [last accessed 12.07.2019].

Wautelet, Patrick. *International Public Contracts: Applicable Law and Dispute Resolution* (2013). Available at https://orbi.uliege.be/bitstream/2268/136404/1/Wautelet%20-%20Applicable%20Law%20(final).pdf [last accessed 24.8.2020].

Wautelet, Patrick. *The Greek Debt Restructuring and Property Rights: A Greek Tragedy for Investors?* (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2373891 [last accessed 22.12.2021].

Weidemaier, Mark and Gulati, Mitu. *A People's History of Collective Action Clauses*, 51 Virginia Journal of International Law 1 (2013).

Weidemaier, Mark and Gulati, Mitu. International Finance and Sovereign Debt in Francesco Parisi (Ed.), *The Oxford Handbook of Law and Economics: Volume 3: Public Law and Legal Institutions*. Oxford University Press (2017).

Weidemaier, Mark and Gelpern, Anna. *Injunctions in Sovereign Debt Litigation,* 31 Yale Journal on Regulation (2014).

Weidemaier, Mark and Gulati, Mitu. *The Relevance of Law to Sovereign Debt*, 11 Annual Review of Law and Social Science (2015).

Weidemaier, Mark; Scott, Robert and Gulati, Mitu. *Origin Myths, Contracts, and the Hunt for Pari Passu*, 38 Law & Social Inquiry, 1 (2013).

Weidemaier, Mark. *Sovereign Immunity and Sovereign Debt*, University of Illinois Law Review (2014).

Wheatley, Steven. *The Idea of International Human Rights Law*. Oxford University Press (2019).

Wheeler, Christopher and Attaran, Amir. *Declawing the Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation*, 39 Stanford Journal of International Law (2003).

White, Jefferson. Analogical Reasoning in Patterson, Dennis (Ed.). *A Companion to Philosophy of Law and Legal Theory* (2nd Edition). Wiley Blackwell (2010).

White, Michelle. Bankruptcy Law in Mitchell Polinsky and Steven Shavell (Eds.), *Handbook of Law and Economics*. Elsevier (2007).

White, Michelle. *Sovereigns in Distress: Do They Need Bankruptcy?* 1 Brookings Papers on Economic Activity (2002).

Wildhaber, Luzius and Wildhaber, Isabelle. Recent Case Law on the Protection of Property in the European Convention on Human Rights, in Binder, Christina et al. (Eds.). *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*. Oxford University Press (2009).

Wirtz, Alison. *Bilateral Investment Treaties, Holdouts Investors, and their Impact on Grenada's Sovereign Debt Crisis*, 16 Chicago Journal of International Law 1 (2015).

Witte, Andreas. *The Greek Bond Haircut: Public and Private International Law and European Law Limits to Unilateral Sovereign Debt Restructuring*, 9 Manchester Journal of International Economic Law 3 (2012).

Wood, Phillip. *Conflict of Laws and International Finance* (1st Ed.). Sweet & Maxwell (2007).

Wood, Phillip. *Conflict of Laws and International Finance* (2nd Ed.). Sweet & Maxwell (2019).

Wood, Phillip. *The Bankruptcy Ladder of Priorities and the Inequalities of Life*, 40 Hofstra Law Review (2014).

Wozny, Lucas. *National Anti-Vulture Funds Legislation: Belgium's Turn*, 2 Columbia Business Law Review (2017).

Wright, Mark. *The Pari Passu Clause in Sovereign Bond Contracts: Evolution or Intelligent Design?* 40 Hofstra Law Review 1 (2011).

Yang, Yihe. *Corporate Civil Liability Under the Alien Tort Statute: The Practical Implications from Kiobel,* 40 Western State University Law Review 2 (2013).

Yang, Xiadong. *State Immunity in International Law*. Cambridge University Press (2012).

Yee, Sienho. *Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases*, 7 Journal of International Dispute Settlement (2016).

Yotova, Rumiana. *Challenges in the Identification of the "General Principles of Law Recognized by Civilized Nations": The Approach of the International Court*, 3 Canadian Journal of Comparative and Contemporary Law 1.

Young, Alison. Proportionality is Dead: Long Live Proportionality! In Huscroft et al. (Eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning*, Cambridge University Press (2014).

Young, Katharine. *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 The Yale Journal of International Law (2008).

Yue, Vivian Zhanwei and Wei, Bin. *Sovereign Debt Theory*, Oxford Research Encyclopedia of Economics and Finance (2019).

Zandstra, Deborah. *New Aggregated Collective Action Clauses and Evolution in the Restructuring of Sovereign Debt Securities*, 12 Capital Markets Law Journal 2 (2017).

Zerbe, Richard. Cost-Benefit Analysis in Legal Decision Making in Parisi, Francesco (Ed.). *The Oxford Handbook of Law and Economics: Volume 1, Methodology and Concepts*. Oxford University Press (2017).

Zerbe, Richard. *Economic Efficiency in Law and Economics*. Elgar (2001).

Zettelmeyer, Jeromin; Trebesch, Cristoph and Gulati, Mitu. *The Greek Debt Restructuring: An Autopsy*, Working Paper Series (2013), available at https://scholarship.law.duke.edu/faculty_scholarship/2660/ [last accessed 22.12.2021].

Ziegler, Katja S. *"Domaine Réservé",* Max Planck Encyclopedia of Public International Law [last accessed 5.11.2019].

Zieme, Ineta. "*State, Extinction of",* Max Planck Encyclopedia of Public International Law, [last accessed 15.06.2019].

Ziff, Robert. *The Sovereign Debtor's Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law*, 10 Richmond Journal of Global Law and Business 3 (2011).

Zweigert, Konrad and Kötz, Hein. *Introduction to Comparative Law*. Oxford University Press (2011).

2. Cases

2.1. Domestic Courts

2.1.1. Germany

Bundesgerichtshof (Federal Court of Justice, Germany) Decision of 24 February 2015, Az.: XI ZR 193/14.

BVerfG (Federal Constitutional Court of Germany), Decision of the Second Senate, January 22, 1997 – 2 BvR 1915/91.

BVerfG (Federal Constitutional Court), Order of the Second Senate of 08 May 2007 - 2 BvM 1/03.

BVerfG (Federal Constitutional Court, Germany), Decision of the Second Chamber of the Second Senate of September 4, 2008, 2 BvR 1475/07.

BVerfG (Federal Constitutional Court), Order of the Second Senate of 15 December 2015 - 2 BvL 1/12.

BVerfG, (Federal Constitutional Court, Germany), Order of the Third Chamber of the Second Senate of 03 July 2019 - 2 BvR 824/15.

Landgericht Frankfurt am Main (District Court Frankfurt am Main), Decision of 18.03.2008 - 2-21 O 495/06, 2-21 O 495/06.

2.1.2. The United States

407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp., 244 N.E.2d 37, 41 (N.Y. 1968).

A.I. Credit Corp. v. Gov't of Jamaica, 666 F. Supp. 629 (S.D.N.Y. 1987).

Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

Acton v. Intellectual Capital Mgmt., Inc., 2015 WL 9462110, (E.D.N.Y. 2015).

Ajdler v. Province of Mendoza 17-2704-cv (May 11, 2018).

Af-Cap Inc. v. Republic of Congo, 383 F.3d 361 (5th Cir. 2004).

Ahmed v. Goldberg, No. CIV.A. 00-0005, 2001 WL 1842390 (D. N. Mar. I. May 11, 2001).

Allan Applestein Ttee FBO D.C.A. Grantor Tr. v. Province of Buenos Aires, No. 02 CIV. 1773 (TPG), 2003 WL 1990206 (S.D.N.Y. Apr. 29, 2003).

Allan Applestein TTEE FBO D.C.A. v. Republic of Argentina, No. 02 CIV. 4124 (TPG), 2003 WL 22743762 (S.D.N.Y. Nov. 20, 2003).

Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985).

Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003).

Am. Int'l Grp., Inc. v. Islamic Republic of Iran, 493 F. Supp. 522 (D.D.C. 1980).

Banco Cafetero (Panama) S.A. v. Republic of Peru, No. 94 CIV. 3569 (JSM), 1995 WL 494573 (S.D.N.Y. Aug. 18, 1995).

Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981).

Bd. Of Regents of Univ. Of Wisconsin Sys. v. Phoenix Int'l Software, Inc., 653 F.3d 448 (7th Cir. 2011).

Bison Bee LLC v. Republic of Argentina, 18-3542-cv (Oct 4, 2019).

Capital Ventures Int'l v. Republic of Argentina, 652 F.3d 266 (2d Cir. 2011).

Carl Marks & Co. v. Union of Soviet Socialist Republics, 665 F. Supp. 323 (S.D.N.Y. 1987).

Casa Express Corp v. Bolivarian Republic of Venezuela (1:18-cv-11940), District Court, S.D. New York, (30.09.2020).

CIBC Bank & Tr. Co. (Cayman) v. Banco Cent. do Brasil, 886 F. Supp. 1105 (S.D.N.Y. 1995).

Connecticut Bank of Commerce v. Republic of Congo, 299 F.3d 378 (5th Cir. 2002).

Credit Francais Int'l, S.A. v. Sociedad Financiera De Comercio, C.A., 128 Misc. 2d 564, 490 N.Y.S.2d 670 (Sup. Ct. 1985).

DeVanzo v. Newark Insurance, 44 A.D.2d 39, 40 (N.Y. App. Div. 1974).

Doe v. Exxon Mobil Corp., 654 F.3d 11 (2011).

Doe I v. Nestle USA, Inc., 766 F.3d 1013 (9th Cir. 2014).

DuPree v. United States, 559 F.2d 1151 (9th Cir. 1977).

E. Extension, Australasia & China Tel. Co. v. United States, 54 Ct. Cl. 108 (1919).

Elliot Associates v. Republic of Panama 1996 WL 474173.

Elliott Assocs., L.P. v. Republic of Panama, 975 F. Supp. 332 (S.D.N.Y. 1997).

Elliot Associates L.P. v. Republic of Peru, 12 F. Supp. 2d 328 (S.D.N.Y. 1998).

Elliott Assocs., L.P. v. Banco de la Nacion, 194 F.3d 363 (2d Cir. 1999).

EM Ltd. v. Argentina, No. 03 CIV.2507 TPG, 2003 WL 22120745 (S.D.N.Y. Sept. 12, 2003).

EM Ltd. v. Rep. of Argentina - 05-1525-cv (L), NML Capital v. Rep. of Argentina - 05-1543-cv (L) (May 13, 2005).

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Export-Import Bank of the Republic of China v. Grenada, 13 Civ. 1450(HB) (S.D.N.Y. Aug, 19, 2013).

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

Flores v. Southern Peru Copper Corp., 414 F.3d 233 (2003).

Geren v. Quantum Chemical Corp., 832 F. Supp. 728 (S.D.N.Y. 1993).

Gisbert v. U.S. Atty. Gen., 988 F.2d 1437 (5th Cir. 1993).

Goldberg v. UBS AG, 690 F. Supp. 2d 92 (E.D.N.Y. 2010).

Fairbank Reconstruction Corp. v. Greater Omaha Packing Co., 2014 WL 693001, (W.D.N.Y. 2014).

First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983).

Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895).

In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

Jiminez v. Credit One Bank, N.A., 377 F. Supp. 3d 324 (S.D.N.Y. 2019).

Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995).

Katz v Oak Industries Inc, 508 A 2d 873 (Del Ch 1986).

Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).

Kline v. Kaneko, 141 Misc. 2d 787, 535 N.Y.S.2d 303 (Sup. Ct. 1988).

L'Europeenne de Banque v. La Republica de Venezuela, 700 F. Supp.114 (S.D.N.Y. 1988).

Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980).

LNC Investments, Inc. v. Republic of Nicaragua, 115 F. Supp. 2d 358 (S.D.N.Y. 2000).

Lightwater Corp. v. Republic of Argentina, No. 02 CIV. 3804 (TPG), 2003 WL 1878420 (S.D.N.Y. Apr. 14, 2003).

Lightwater Corp. v. Republic of Argentina, No. 02 CIV. 3804 (TPG), 2003 WL 22037638 (S.D.N.Y. Aug. 29, 2003).

Metropolitan Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504 (S.D.N.Y. 1989).

Murray v. Schooner Charming Betsy, The, 6 U.S. 64, 2 L. Ed. 208 (1804).

Nat. Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981).

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. People's Republic of the Congo, 729 F. Supp. 936 (S.D.N.Y. 1989).

NML Capital Ltd. v. Republic of Argentina, 699 F.3d 246 (2nd Cir. 2012).

NML Capital Ltd. v. Republic of Argentina, No. 08-cv-6978 (S.D.N.Y Feb. 23, 2012).

NML Capital Ltd. v. Republic of Argentina, 727 F.3d 230 (2nd Cir. 2013).

NML Capital LTD. v. Argentina No. 08-cv-6978 (S.D.N.Y. Feb. 19, 2016).

Oliva v. U.S. Dep't of Justice, 433 F.3d 229 (2d Cir. 2005).

Osorio v. Dole Food Co., 665 F.Supp.2d 1307 (2009).

Plenum Fin. & Investments Ltd. v. Bank of Zambia, No. 95 CV 8350(KMW), 1995 WL 600818 (S.D.N.Y. Oct. 11, 1995).

Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, 165 B.R. 379 (S.D.N.Y. 1994).

Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, No. 74411, 1995 WL 102840 (S.D.N.Y. Mar. 8, 1995).

Pravin Banker Assocs., Ltd. v. Banco Popular del Peru, 895 F. Supp. 660 (S.D.N.Y. 1995).

Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850 (2d Cir. 1997).

Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

Re Arbulich's Estate, 248 P.2d 179 (Cal. Ct. App. 1952).

Republic of Argentina v. NML Capital Ltd., 134 S Ct. 2819 (2014).

Republic of Argentina et al. v. Weltover INC., et al., 504 U.S. 607 (1992).

Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65 (3d Cir. 1994).

Reynolds v. Time Warner Cable, Inc., 2017 WL 362025, (W.D.N.Y. Jan. 25, 2017).

Sairras v. Schleffer, No. 07-23295-CIV, 2009 WL 10708747 (S.D. Fla. Sept. 21, 2009).

Sanders v. Cain, No. CIV.A.02-0971, 2003 WL 21920894 (E.D. La. Aug. 8, 2003).

Smith v. Foto, 285 Mich. 361, 280 N.W. 790 (1938).

Soc'y of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000).

Sosa v. Alvarez-Machain, 542 U.S. 692, 730, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004).

State v. Dansinger, 521 A.2d 685 (Me. 1987).

State v. Martinez-Rodriguez, 2001-NMSC-029, 131 N.M. 47, 33 P.3d 267.

Stephens v. Nat'l Distillers & Chem. Corp., 69 F.3d 1226 (2d Cir. 1995).

Sullivan v. State of Sao Paulo, 122 F.2d 355 (2d Cir. 1941).

The Paquete Habana, 175 U.S. 677, 20 S. Ct. 290, 44 L. Ed. 320 (1900).

Turkmani v. Republic of Bolivia, 193 F. Supp. 2d 165 (D.D.C. 2002).

United States v. Ahmed, 94 F. Supp. 3d 394 (E.D.N.Y. 2015).

United States v. Al Bahlul, 820 F. Supp. 2d 1141 (USCMCR 2011).

United States v. Alvarez-Machain, 971 F.2d 310 (9th Cir. 1992).

United States v. DSD Shipping, A.S., No. CR 15-00102-CG-B, 2015 WL 5444094 (S.D. Ala. Sept. 15, 2015).

United States v. Enger, 472 F. Supp. 490 (D.N.J. 1978).

United States v. Georgescu, 723 F. Supp. 912 (E.D.N.Y. 1989).

United States v. Hasan, 747 F. Supp. 2d 599 (E.D. Va. 2010).

United States v. Louisiana, 394 U.S. 11, 89 S. Ct. 773, 22 L. Ed. 2d 44 (1969).

United States v. Maine, 475 U.S. 89, 106 S. Ct. 951, 89 L. Ed. 2d 68 (1986).

United States v. MacAllister, 160 F.3d 1304 (11th Cir. 1998).

United States v. Melekh, 190 F. Supp. 67 (S.D.N.Y. 1960).

United States v. Pendleton, No. CRIM.08-111-GMS, 2009 WL 330965 (D. Del. Feb. 11, 2009).

United States v. State of Alaska, 497 F.2d 1155 (9th Cir. 1974).

United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991).

United States v. Weingarten, 632 F.3d 60 (2d Cir. 2011).

United States v. Yousef, 327 F.3d 56 (2d Cir. 2003).

US v. Jeong 24 F.3d 706 (5th Cir. 2010).

Velez v. Sanchez, 693 F.3d 308 (2d Cir. 2012).

Walker Int'l Holdings Ltd. v. Republic of Congo, 395 F.3d 229 (5th Cir. 2004).

Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377 (S.D.N.Y. 2009).

White Hawthorne LLC v. Republic of Argentina, 16-cv-1042 (TPG) 16-cv-1192 (TPG) 16-cv-1436 (TPG)(S.D.N.Y. Dec 22, 2016).

Zolezzi v. Tarantola, 138 N.J. Eq. 579, 49 A.2d 482 (Ch. 1946).

2.2. International Courts and Tribunals

2.2.1. European Court of Human Rights

Andreyeva v. Russia, Judgement April 10, 2012.

Beyeler v. Italy, Judgement January 5, 2000.

Broniowski v. Poland, Judgment June 22, 2004.

Fomin and Others v. Russia, Judgement February 26, 2013.

Former King of Greece and Others v. Greece, Judgment November 23, 2000.

Gasus Dosier-Und Fördertechnik GmbH v. The Netherlands, Judgement February 23, 1995.

James and Others v. The United Kingdom, Judgement February 21, 1986.

Kjartan Ásmundsson v. Iceland, Judgment October 12, 2005.

Kopecký v. Slovakia, Judgement September 28, 2004.

Lithgow and Others v. The United Kingdom, Judgement July 8, 1986.

Lobanov v. Russia, Judgement December 2, 2010.

Lobanov v. Russia, Judgement (Just Satisfaction) February 14, 2012.

Marckx v. Belgium, Judgment June 13, 1979.

Malysh and Others v. Russia, Judgement February 1, 2010.

Mamatas and Others v. Greece, Judgement July 21, 2016.

Pressos Compania Naviera S.A. and Others v. Belgium, Judgement November 20, 1995.

SPK Dimskiy v. Russia, Judgement March 18, 2010.

Sporrong and Lönnroth v. Sweden, Judgement September 23, 1982.

Tronin v. Russia, Judgement March 18, 2010.

2.2.2. Inter-American Court of Human Rights

Abrill Alosilla et al. v. Peru, (Merits, Reparations and Costs), Judgement March 4, 2011.

Chaparro Álvarez and Lapo Íñiguez v. Ecuador (Preliminary Objections, Merits, Reparations, and Costs), Judgement November 21, 2007 (hereinafter "Chaparro").

"Five Pensioners" v. Peru (Merits, Reparations and Costs), Judgement February 28, 2003.

Furlan and Family v. Argentina (Preliminary Objections, Merits, Reparations and Costs), Judgement August 31, 2012.

Ivcher-Bronstein v. Peru (Merits, Reparations and Costs), Judgement February 6, 2001.

Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Merits, Reparations and Costs), Judgement August 31, 2001.

Palamara-Iribarne v. Chile (Merits, Reparations, and Costs), Judgement November 22, 2005.

Salvador Chiriboga v. Ecuador (Preliminary Objection and Merits), Judgement May 6, 2008.

2.2.3. Investment Tribunals

Abaclat and others v. The Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/07/5 (2011), Majority Decision.

Ambiente Ufficio S.P.A. and Others v. The Argentine Republic, ICSID Case No. ARB/08/9 (2013).

Archer Daniels v. Mexico, Award (2007).

Ata Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan (Award), ICSID Case No. ARB/08/2 (2010).

Azurix v. Argentina (Award), ICSID Case No. ARB/01/12 (2006).

Bayindir v. Pakistan (Award), ICISD Case No. ARB/03/29 (2009).

BG v. Argentina (Final Award) (2007).

Chemtura Corporation v. Government of Canada (Award), NAFTA (2010).

CME v. Czech Republic (Partial Award), (2001).

CMS v. Argentina (Award), Case No. ARB/01/8 (2005).

CMS Gas Transmission Co. v Argentine Republic, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/8 (2007).

Compañía del Desarrollo Santa Elena S.A., v. Costa Rica (ICSID CASE No. ARB/96/1), Final Award (2000).

Consortium RFCC v. Royaume du Maroc, (Award) ICSID Case No. ARB/00/6 (2003).

Continental Casualty Company v. Argentina, Award, Case No. ARB/03/9 (2008).

EDF v. Romania (Award), ICSID Case No. ARB/05/13 (2009).

Ekev Beheer B.V. v. Poland, PCA Case No. 2013-01, First Partial Award (2014).

El Paso v. Argentina, Award, ICSID Case No. ARB/03/15 (2011).

Enron v. Argentina (Award), ICSID Case No. ARB/01/3, (2007).

Eureko v. Poland (Partial Award) (2005).

Fedax N.V. v. The Republic of Venezuela, Award (Case No. ARB/96/3) (1998).

Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8 (2014).

Glamis Gold v. United States (Award), UNCITRAL (2009).

Grand River vs. The United States (Award) (2011).

Hesham v. Indonesia, Final Award (2014).

Impregilo v. Pakistan (Decision on Jurisdiction), ICSID Case No. ARB/03/3.

Impregilo v. Argentina (Award), (CSID CASE No. ARB/07/17.

Joseph Charles Lemire v. Ukraine (Decision on Jurisdiction and Liability), ICSID Case No. Arb/06/18.

Joy Mining Machinery Limited v. The Arab Republic of Egypt, Award on Jurisdiction (ICSID Case No. ARB/03/11) (2004).

LG&E v. Argentina (Decision on Liability), ICSID Case N° ARB/02/1 (2006).

MCI v. Ecuador (Award), ICSID Case No. ARB/03/6 (2007).

Metalclad v. Mexico (Award), Case No. ARB (AF)/97/1 (2000).

Methanex v. the United States, Final Award of the Tribunal on Jurisdiction and Merits (2005).

Middle East Cement v. Egypt (Award), ARB/99/6 (2002).

MTD v. Chile (Award), Case No. ARB/01/7 (2004).

National Grid v. Argentina, Award (2008).

Noble Ventures v. Romania (Award), ICSID Case No. ARB/01/11 (2005).

Occidental v. Ecuador (I) (Final Award), Case No. UN 3467 (2004).

Occidental v. Ecuador (II), (Award) (ICSID Case No. ARB/06/11) (2012).

Pan American Energy LLC. and BP Argentina Exploration Co. v Argentina; Decision on Preliminary Objections, ICSID Case No. ARB/03/13 (2006).

Phillip Morris v. Uruguay (ICSID Case No. ARB/10/7), Award (2016).

Pope & Talbot v. Canada (Interim Award) (2000).

Poštová Banka A.S and Istrokapital SE v. The Hellenic Republic, ICSID Case No. ARB/13/8 (2015).

Quiborax v. Bolivia (Award), ICSID Case No. ARB/06/2 (2015).

Revere Copper v. Overseas Private Investment Corporation (Award), AAA Case No. 1610013776 (1978).

Rompetrol v. Rumania, ICSID Case No. ARB/06/3 Award (2013).

S.D. Myers v. Canada (Partial Award) (2000).

SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, Decision of the Tribunal on Objections to Jurisdiction (Case No. ARB/01/13) (2004).

SGS Société Générale de Surveillance SA v. Republic of the Philippines, Decision on Objections to Jurisdiction, ICSID Case No. ARB/02/6 (2004).

Saipem v. Bangladesh (Award), ICSID Case No. ARB/05/7 (2009).

Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction.

Saluka Investments v. The Czech Republic, Partial Award (2006).

Saur v. Argentina, Caso CIADI N° ARB/04/4, Decisión Sobre Jurisdicción y Responsabilidad (2012).

Sempra v. Argentina (Award), Case No. ARB/02/16 (2007).

Suez and Vivendi v. Argentina (Decision on Liability) ICSID Case No. ARB/03/19 (2010).

Tecmed v. Mexico (Award), Case No. ARB (AF)/00/2 (2003).

Urbaser v. Argentina (Award) ICSID Case No. ARB/07/26 (2016).

Wena Hotels v. Egypt (Award), Case No. ARB/98/4 (2002).

White Industries v. India (Final Award) (2011).

3. Legal Documents

African Charter on Human and Peoples' Rights, June 27, 1981 1520 U.N.T.S. 217.

Agreement Between the Republic of Chile and the Republic of Austria for the Promotion and Reciprocal Protection of Investment. Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/178/download [last accessed 1.12.2021].

American Convention on Human Rights "Pact of San Jose, Costa Rica", Nov. 22, 1969 S. Treaty Doc. No. 95-21;1144 U.N.T.S.123; O.A.S.T.S. No. 36.

American Declaration on the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30-May 2, 1948.

Argentine Bankruptcy Law ("Ley de Concursos y Quiebras") Law No. 24522, available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/25379/texact.htm [last accessed 04.11.2019].

Arab Charter on Human Rights May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005).

Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland). English translation. Available at: https://www.btg-bestellservice.de/pdf/80201000.pdf [last accessed 29.7.2020].

Bankruptcy Code of the United States ("Title 11 of the United States Code"), available at https://www.law.cornell.edu/uscode/text/11 [last accessed 04.11.2019].

CESCR, General Comment 3: The nature of States parties' obligations (Art 2(1)), UN Doc E/1991/23 (14 December 1990).

CESCR, General Comment 12: The right to Adequate Food (Art 11), UN Doc E/C.12/1999/5 (12 May1999).

CESCR, General Comment 13: The right to education (Art 13), UN Doc E/C.12/1999/10 (8 December 1999).

CESCR, General Comment 14: The right to the highest attainable standard of health (Art 12), UN Doc E/C.12/2000/4 (11 August 2000).

CESCR, General Comment 15: The right to water (Arts 11 and 12), UN Doc E/C.12/2002/11 (20 January 2003).

CESCR, General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art 3), UN Doc. E/C.12/2005/3 (11 August 2005).

CESCR, General Comment 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (Art 15(1)(c)), UN Doc E/C.12/GC/17 (12 January 2006).

CESCR, General Comment 18: The right to work (Art 6), UN Doc E/C.12/GC/18 (6 February 2006).

CESCR, General Comment 19: The right to social security, UN Doc E/C.12/GC/19 (4 February 2008).

CESCR, General Comment 21: The right of everyone to take part in cultural life (Art. 15 (1)(a)), UN Doc E/C.12/GC/21 (21 December 2009).

CESCR, General Comment 23: The right to just and favourable conditions of work (Art. 7), UN Doc E/C.12/GC/23 (27 April 2016).

Civil Practice Law and Rules of the State of New York, Section 2201. Available at: https://www.nysenate.gov/legislation/laws/CVP/2201 [last accessed 24.7.2020].

Comprehensive Economic and Trade Agreement (CETA) Between Canada and the European Union, available at https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [last accessed 20.4.2021].

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 Europ.T.S. No. 5; 213 U.N.T.S. 221.

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950 Europ.T.S. No. 5; 213 U.N.T.S. 221, Protocol 1.

Convention on Jurisdictional Immunities of States and their Property of 2 December 2004, 44 ILM 803.

Convention on the Rights of the Child, Nov. 20, 1989 1577 U.N.T.S. 3.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.

Enterprise Bankruptcy Law of the People's Republic of China, translated by the Bankruptcy Law and Restructuring Research Center of China University of Politics and Law, published in 17 International Insolvency Review, no. 1 (2008).

European Convention on State Immunity, 16 May 1972, CETS No. 074, 11 ILM (1972) 470.

German Insolvency Code ("Insolvenzordnung" – InsO) of 5 October 1994 (Federal Law Gazette I Page 2866), as last amended 29 December 2016, translated by Schultze & Braun, available at http://www.schubrapp.com/index.php?lang=en#home [last accessed 04.11.2019].

Guiding Principles on Human Rights Impact Assessments of Economic Reforms, UN DOC A/HRC/40/57 (19 December 2018).

Guiding Principles on Foreign Debt and Human Rights, UND DOC A/HRC/C/20/23 (10 April 2011).

Insolvency Act (1986) United Kingdom.

International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

Judiciary Law of the State of New York Section 489, available at https://www.nysenate.gov/legislation/laws/JUD/489 [last accessed 16.7.2020].

Law No. 26,017, available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/100000-104999/103619/norma.htm [last accessed 11.2.2019].

Law No. 26,547, available at http://servicios.infoleg.gob.ar/infolegInternet/anexos/160000-164999/161317/norma.htm [last accessed 11.2.2019].

Law No. 26,886, available at https://www.argentina.gob.ar/normativa/nacional/ley-26886-220129/texto [last accessed 11.2.2019].

Montevideo Convention on the Rights and Duties of States, December 26, 1933, 165 L.N.T.S. No. 19.

Restatement (Third) of the Law, the Foreign Relations Law of the United States.

Restatement (Fourth) of the Law – The Foreign Relations Law of the United States.

Statute of the International Court of Justice in Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, T.S. No. 993.

UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf [last accessed 27.08.2021].

Uniform Foreign-Country Money Judgments Recognition Act (2005), available at https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=deaece0b-b7e6-1ddf-89bf-c36338d10bce [last accessed 15.7.2020].

United States, 2004 Model BIT, Annex B "Expropriation" 4 (a), available at https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf [last accessed 20.4.2021].

United States, 2012 Model BIT, Annex B "Expropriation" 4 (a), available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [last accessed 20.4.2021].

Universal Declaration of Human Rights, Dec. 8, 1948 G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

United Nations Conference on Trade and Development (UNCTAD), *Principles on Promoting Responsible Sovereign Lending and Borrowing* (2012), available at https://unctad.org/system/files/official-document/gdsddf2012misc1_en.pdf [last accessed 29.07.2021].

United Nations General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV).

United Nations General Assembly, Effects of Foreign Debt and Other Related International Financial Obligations of States on the Full enjoyment of All Human Rights A/63/289 (2008).

United Nations General Assembly resolution 69/139, "Towards the establishment of a multilateral legal framework for sovereign debt restructuring processes", A/RES/68/304, (17 September 2014).

United Nations General Assembly resolution 69/139, Basic Principles on Sovereign Debt Restructuring Processes, A/RES/69/319 (10 September 2015).

4. Other Sources

Bases, Daniel; Lough, Richard and Marsh, Sarah. Argentina, lead creditors settled 14-year debt battle for $ 4.65 billion. Reuters. Retrieved from https://www.reuters.com/article/usargentina-debt-idUSKCN0W2249 [last accessed 29.11.2018].

Brief of Amici Curiae of Comparative Law Scholars and Practitioners in Support of Petitioners, 2017 WL 2822777.

Business Round Table, *Statement on the Purpose of a Corporation* (2019) available at https://opportunity.businessroundtable.org/ourcommitment/ [last accessed 29.10.2021].

Euler, Dimitrij. *Switzerland's Department of Foreign Affairs endorsed Federal Supreme Court decision (BGE 136 III 379) not to lift Bank of International Settlement's (BIS) immunity due to an attempt of NML Capital to freeze $300m (£186m) on Argentina's bank accounts* (2012), available at https://youngicca-blog.com/switzerlands-department-of-foreign-affairs-endorsed-federal-supreme-court-decision-bge-136-iii-379-not-to-lift-bank-of-international-settlements-bis-immunity-due-to-an-attempt-of/ [last accessed 15.10.2021].

Elliott Associates No 2000/QR/92, Court of Appeals of Brussels, 26.09. 2000 (not published).

FG Hemisphere Associates LLC v. Congo, 2005 [EWHC] 3103 (Comm), 2005 WL 3767836.

Gelpern, Anna. Imagine Riding the Ceteris Pari-bus into the Sunset ... in Argentina available at https://www.creditslips.org/creditslips/2019/11/imagine-riding-the-cetris-pari-bus-into-the-sunset-in-argentina.html [last accessed 18.02.2020].

Gallagher, Adam et al. *Is the New U.K. Restructuring Plan a Viable Alternative to Chapter 11?* (2021), available at https://www.lexology.com/library/detail.aspx?g=f426b849-e055-4eda-8ca8-f98d0bddd0dd [last accessed 10.10.2021].

Gulati, Mitu. Do Judgements Trump CACs? https://www.creditslips.org/creditslips/2020/02/do-judgements-trump-cacs.html [last accessed 19.3.2020].

Joint Response Brief of Plaintiffs-Appellees NML Capital, LTD., Olifant Fund, LTD., and Varela Et. Al. v. Republic of Argentina.

McGregor, Jena. *Group of CEOs says maximizing shareholder profits no long can be the primary goal of corporations* (2019), the Washington Post, available at https://www.washingtonpost.com/business/2019/08/19/lobbying-group-powerful-ceos-is-rethinking-how-it-defines-corporations-purpose/ [last accessed 29.10.2021].

Memorandum of the Bolivarian Republic of Venezuela in Response to Motion for Summary Judgment and in Support of Cross-Motion for a Stay (16/01/2020), Casa Express Corp, plaintiff, v. the Bolivarian republic of Venezuela, Defendant. Pharo Gaia fund Ltd., et al., Plaintiffs, v. the Bolivarian Republic of Venezuela, Defendant. Case Nos. 18-cv-11940 (AT) 19-cv-3123 (AT).

Millan, Carolina and Squires, Scot. *"As Creditors Blast Argentina's Offer, Bond Prices Start to Rise"*. Bloomberg (20.4.2020), available at https://www.bloomberg.com/news/articles/2020-04-20/argentina-debt-offer-panned-with-bondholders-girding-for-battle [last accessed 09.03.2021].

Prospectus Supplement (January 7, 2003) Republic of Chile, available at https://www.hacienda.cl/english/public-debt-office/treasury-bonds/sovereign-bonds/chile-13-legal-documents/prospectus-supplement-bonds-due-2013.html [last accessed 10.2.2020].

Reply Memorandum of Law in Support of Plaintiffs' Consolidated Motion for Summary Judgment and in Opposition to Venezuela's Cross-Motion to Stay 06/02/2020, Casa Express Corp, plaintiff, v. the Bolivarian republic of Venezuela, Defendant. Pharo Gaia fund Ltd., et al., Plaintiffs, v. the Bolivarian Republic of Venezuela, Defendant. Case Nos. 18-cv-11940 (AT) 19-cv-3123 (AT).

Reply Memorandum of the Bolivarian Republic of Venezuela in Support of Cross-Motion for a Stay 3/03/2020.

Sinha, Rohan. *"Once a Trader, always a State": The Federal Constitutional Court classifies Greek Debt Restructuring Measures As Acta Iure Imperii,* GPIL: German Practice in International Law, available at https://gpil.jura.uni-bonn.de/2020/07/once-a-trader-always-a-state-the-federal-constitutional-court-classifies-greek-debt-restructuring-measures-as-acta-iure-imperii/ [last accessed 8.8.2020].

Sobel, Mark. *Argentina and creditors enter new round*, OMFIF June 3, 2020. Available at https://www.omfif.org/2020/06/argentina-and-creditors-enter-new-round/ [last accessed 20.8.2020].

Wagner, Julia. *In another Argentinian State bankruptcy case the German Federal Constitutional Court once again rejects the existence of a state of necessity as a general principle of international law*, available at https://gpil.jura.uni-bonn.de/2019/10/in-another-argentinian-state-bankruptcy-case-the-german-federal-constitutional-court-once-again-rejects-the-existence-of-a-state-of-necessity-as-a-general-principle-of-international-law/ [last accessed 10.8.2020].

Weidemaier, Mark and Gulati, Mitu. Argentina's [Insert Adjective Here] Debt Crisis, available at https://www.creditslips.org/creditslips/2019/10/argentinas-insert-adjective-here-debt-crisis.html#more [last accessed 18.2.2020].

Weidemaier, Mark. Judgements > CACs https://www.creditslips.org/creditslips/2020/02/judgments-cacs.html [last accessed 19.3.2020], Mitu Gulati, Judgements, CACs and Civil Procedure Quicksand https://www.creditslips.org/creditslips/2020/02/judgements-cacs-and-civil-procedure-quicksand.html [last accessed 19.03.2020].

Weidemaier, Mark. Judgements > CACs!!! https://www.creditslips.org/creditslips/2020/02/judgments-cacs-1.html [last accessed 19.30.2020].

EDLE PhD Portfolio

Name PhD Student:	Carlos Riquelme Ruz
PhD period:	2017-2022
Promoters:	Prof. Dr. Michael Faure and Prof. Dr. Anne van Aaken

PhD Training

Bologna Courses	**year**
Mathematical Methods (EMLE)	2017
Introduction to Microeconomics (EMLE)	2017
Introduction to Statistics	2017
Experimental Economics	2017
Modelling Private Law	2017
European Competition Law	2017
Game Theory and the Law	2018
Law Enforcement and Behavioural Economics	2018
Law and Economic Development	2018
Hamburg Courses	**year**
Introduction to Empirical Methods	2017
Introduction to the German Legal System	2018
Topics in International Law and International Relations	2018
The Transformation of Global Environmental Politics	2018
The Use of Economics for Understanding Law: A Guided Tour	2018
International Summer School	2018
Rotterdam Courses	**year**
Academic writing	2018
Experimental Law and Economics	2019
Advanced Empirical Methods	2019
Advanced ELS Research Design	2019
Academic Integrity	2020
Conferences, seminars and other activities	**year**

Bologna November seminar (attendance)	2017
Bologna March seminar (presentation)	2018
EDLE Hamburg June Conference (presentation)	2018
Rotterdam seminar series (attendance, presentations & peer feedback)	2018-2019
Joint Seminar "The Future of Law and Economics" (attendance)	2019
BACT seminar series (attendance)	2019
EGSL lunch seminars (attendance)	2019
Bologna November seminar (presentation)	2019
Hamburg Lectures on Law and Economics (attendance)	2019-2020
Joint Seminar "The Future of Law and Economics" (presentation)	2020
Rotterdam seminar series (presentation)	2021

Carlos **Riquelme Ruz**

PERSONAL INFORMATION

Andrés de Fuenzalida 98, Dpt. 601, Santiago, Chile
carlos.riquelme.ruz@gmail.com
+56992608441

EDUCATION

2017 —	European Doctorate in Law and Economics (Candidate) Universities of Hamburg, Rotterdam & Bologna
2014	LLM in International Law, Investment & Trade *Heidelberg University & Universidad de Chile*
2013	Diploma de Postítulo en Economía y Finanzas para Abogados *Universidad de Chile*
2011	Licenciado en Ciencias Jurídicas y Sociales *Universidad de Chile* | Título profesional de abogado

WORK EXPERIENCE

2022—Act.	Associate Lawyer *Tapia, Guzmán, Costa & Margozzini*
2021—.	Associate Lawyer *Marelic Cárcamo Busch*
2020—2021.	Legal Counsel *Asociación Andes Pacific Technology Access*
2016—2017	Head of Legal and IP Department *Vicerrectoría de Investigación y Desarrollo de la Universidad de Chile*
2011—2014	Patent Attorney *Vicerrectoría de Investigación y Desarrollo de la Universidad de Chile*
2007—2008	Legal Intern *Figueroa & Coddou*

ACADEMIC EXPERIENCE

2021	Lecturer "Teoría del Acto de Comercio y Títulos de Crédito" (Commercial Law) *Universidad de Tarapacá*
2017	Lecturer in International Law at "Diploma en Política Exterior, Comercio y Diplomacia" *Universidad de Santiago de Chile*
2016—2017	Lecturer in "Introduction to Law" *Universidad Academia de Humanismo Cristiano*
2015	TA: "Economics of Innovation" *Magíster de Políticas Públicas, Facultad de Economía y Negocios, Universidad de Chile*
2014-2016	Researcher *Universidad Academia de Humanismo Cristiano*
2010-2015	TA: "Introduction to the tought of G.W.F. Hegel" and "Elements for a Social Idea of Law". *Facultad de Derecho, Universidad de Chile.*

CERTIFICATES

2017	"Licensing Academy" *Universidad de California, Davis*
2013	"Technology & Knowledge Transfer" *Isis Innovation, Universidad de Oxford.*

ACADEMIC PUBLICATIONS

2018	"Consolidando la política de inversiones por medio de la Cláusula de Nación Más Favorecida en los Tratados Internacionales de Inversión", *Estudios Internacionales*, vol. 50, Nº 189: pp. 121-148.
2015	"El efecto 'congelante' de los compromisos internacionales de Chile en materia de inversión extranjera durante la post-dictadura (1990-2015)". En: Pinol, Andrea (ed.) *Democracia versus Neoliberalismo: 25 años de neoliberalismo en Chile* (Santiago: CLACSO e ICAL): pp. 114-129.
2015	"Transfer of funds clause in Chilean international investment treaties", *Latin American Journal of International Trade Law*, vol 3, Nº 1.

GRANTS

Beca de Doctorado en el Extranjero Becas Chile (2017).

THESIS PROJECT

"Reconciling the Irreconcilable: Sovereign Debt Restructuring and the Principles of International Law".

Reconciling the Irreconcilable? Sovereign Debt Restructuring and the Principles of International Law

A Law and Economics Perspective

Carlos Riquelme Ruz

Thesis Summary

This Thesis focuses on the principles of international law relevant to the resolution of legal disputes arising from sovereign insolvency conflicts. It attempts to contribute to the "incremental" approach literature by identifying principles, justifying their application in sovereign debt litigation and assessing whether they may help to reconcile the trade-offs prevalent in that context.

For that purpose, this Thesis distinguishes between two different types of principles of international law. First, this work investigates the "Principles of Public International Law" (henceforth, "PIL principles") relevant to the resolution of legal disputes arising from sovereign insolvency conflicts. As discussed throughout the book, said category refers to norms of the law of nations which can be considered functionally and structurally similar to domestic constitutional principles (i.e., that can be regarded as "optimization" or "prima facie" requirements). Methodologically, the identification of said norms can be done from international legal materials and from the practice of international courts and tribunals. In short, whenever proportionality analysis (i.e., balancing or weighing) is mandated by a norm of the law of nations or used by international adjudicators in its interpretation or application, we can infer a principle in the aforementioned sense. Therefore, PIL principles do not refer to a particular source of international law (meaning that they can be identified in any source of the law of nations) but rather to a specific feature of those norms (i.e., to "principles" and not to "rules" in the sense posited by Robert Alexy).

Of particular interest to this Thesis are the PIL principles protecting the interests of the creditors and citizens as well as the "public interest" in the context of debt renegotiation. Crucially, it is argued that states and decision makers face a trade-off between these principles in the context of restructurings. In the context of sovereign insolvency, the satisfaction of citizens' interests (and of the "public interest") may require impairing those of creditors (and vice versa).

Secondly, this Thesis also inquires into the "general principles of domestic law" (henceforth, "GPDs") which can be applied in sovereign debt restructuring. As discussed throughout this work, GPDs encompass normative propositions extracted from domestic legal systems which can be extrapolated to the international scenario. Two GPDs are identified in this Thesis: a "stay" on creditors' litigation and a "cram down" on dissenting creditors' claims. Although both principles have been identified by the prior literature, this work advances a small but significant "twist" in the methodology used for that purpose. In short, it relies exclusively on functional and comparative analysis from the start, with the purpose of justifying their application in sovereign debt litigation before domestic courts today. Admittedly, the application of international law (and thus, of

GPDs) in domestic legal systems depends on the reception of the former by the latter. For that reason, this Thesis limits that discussion to two jurisdictions: New York and Germany. Finally, it posits that, under certain conditions, said GPDs can help to mitigate the trade-offs between PIL principles, thus reconciling the interests at stake from the perspective of the values enshrined in the law of nations.

Het niet-verzoenbare verzoenen? Het herstructureren van de staatsschuld onder internationaal recht

Een rechtseconomisch perspectief

Carlos Riquelme Ruz

Samenvatting

Deze thesis legt de nadruk op de beginselen van internationaal recht relevant voor de beslechting van juridische geschillen voortvloeiend uit conflicten die rijzen bij staatsinsolventie. Zij wil bijdragen aan de "incrimentele" methode die in de literatuur ontwikkeld is door beginselen te ontdekken en hun mogelijke toepassing in geval van staatsinsolventie te onderzoeken en door te beoordelen of zij kunnen helpen bij het in overeenstemming brengen van de in die context gangbare trade-offs.

Met dat doel onderscheidt deze thesis twee verschillende soorten beginselen van internationaal recht. Ten eerste, onderzoekt dit werk de "Beginselen van Internationaal Publiekrecht" (hierna "BIP-beginselen") relevant voor de beslechting van juridische geschillen, voortvloeiend uit conflicten met betrekking tot staatsinsolventie. Zoals besproken in het boek, verwijst genoemde categorie naar normen van internationaal recht die functioneel en structureel worden geacht, vergelijkbaar met binnenlandse constitutionele beginselen (d.w.z. dat ze kunnen worden beschouwd als "optimalisering" of "prima facie" vereisten). Methodologisch kunnen genoemde normen gevonden worden in internationaalrechtelijke bronnen en in de praktijk van internationale gerechten en tribunalen. Kortom, wanneer evenredigheidsanalyse (d.w.z. weging of afweging) wordt voorgeschreven door een norm van internationaal recht of wordt gebruikt door internationale geschillenbeslechters bij hun interpretatie of toepassing, kunnen wij een beginsel afleiden zoals hiervoor bedoeld. BIP-beginselen verwijzen derhalve niet naar een bepaalde bron van internationaal recht (wat betekent dat zij afkomstig zijn uit een bron van internationaal recht) maar naar een specifiek kenmerk van die normen (d.w.z. naar "beginselen" en niet naar "regels" zoals aangevoerd door Robert Alexy).

Van bijzonder belang voor deze thesis zijn de BIP-beginselen, die de belangen beschermen van crediteuren en burgers evenals het "publiek belang" in de context van schuldheronderhandeling. Bovenal wordt gesteld, dat staten en beleidsmakers te maken hebben met een trade-off tussen deze beginselen in de context van herstructureringen. In de context van staatsinsolventie kan de tegemoetkoming aan de belangen van burgers (en het "publiek belang") verlangen, dat afbreuk wordt gedaan aan die van de crediteuren (en omgekeerd).

Ten tweede, onderzoekt deze thesis ook de "Algemene Beginselen van Nationaal Recht" (hierna "ABNR") die kunnen worden toegepast bij staatsschuldherstructurering. Zoals besproken in dit werk, bevatten ABNR normatieve voorstellen ontleend uit nationale rechtssystemen, die kunnen worden geëxtrapoleerd naar het internationale niveau. In deze thesis zijn twee ABNR vastgesteld: een "opschorting" van vorderingen van crediteuren en een "verplichting" betreffende afwijzing van claims van crediteuren. Hoewel beide beginselen in eerdere literatuur zijn vastgesteld, stimuleert dit werk een

kleine maar belangrijke “draai” in de voor dat doel gebruikte methodologie. Kort gezegd, dit werk is vanaf het begin exclusief op een functionele en vergelijkende analyse gebaseerd, met het doel een rechtvaardiging te zoeken voor de toepassing van die beginselen vandaag de dag in de staatsschuldprocedures voor de binnenlandse rechter. Toegegeven, de toepassing van internationaal recht (en dus van ABNR) in nationale rechtssystemen is afhankelijk van de aanvaarding van eerstgenoemde door laatstgenoemden. Daarom beperkt deze thesis die discussie tot twee rechtsgebieden: New York en Duitsland. Ten slotte wordt aangevoerd dat, onder bepaalde voorwaarden, genoemde ABNR kunnen helpen om de trade-offs tussen BIP-beginselen te matigen, en aldus de betrokken belangen in overeenstemming te brengen vanuit het perspectief van de in het internationaal recht vastgelegde waarden.