International Investment Arbitration and the European Debt Crisis

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Abstract

Argentina's 2001 default led to a unique development in the realm of sovereign debt restructuring. During the lengthy process of negotiations, exchange offers, and haircuts, some of the country's creditors began to allege violations of their bilateral investment treaties (BITs) with Argentina and filed suit in the International Centre for the Settlement of Investment Disputes (ICSID). Before this unprecedented action, it had been uncertain whether sovereign debt could be considered an "investment" covered by BITs at all. In August 2011, however, the ICSID determined that it may be and that its tribunals have jurisdiction over these claims. This decision has created a path to increased ICSID involvement in future sovereign debt restructurings and has raised the question of the consequences for the current European debt crisis. This Comment evaluates the ramifications of the introduction of international investment arbitration into the realm of sovereign debt restructuring, particularly in light of the situation in Europe. Despite some legitimate concerns, the Comment suggests that this development may prove positive, increasing creditor protections and balancing negotiations, strengthening the market for sovereign debt, and potentially lessening the gravity of the crisis itself.

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I. Introduction

The past ten years saw the advent of a novel development in the process of sovereign debt restructuring. During Argentina's one-hundred-month restructuring, the country's creditors began to bring unprecedented claims to the International Centre for the Settlement of Investment Disputes (ICSID), alleging that aspects of the restructuring violated the bilateral investment treaties (BITs) between their home nations and Argentina. Until recently, however, it was unclear whether sovereign debt actually qualified as an “investment” under these treaties, and thus whether the ICSID had jurisdiction to hear the investors' claims. But in August 2011, the ISCID held in the landmark case Abaclat v Argentina1 (Abaclat) that sovereign debt does fall under the definition of investment in at least some BITs.2 This decision will likely lead to increased ICSID involvement in future sovereign debt restructuring.

This Comment evaluates the effects of the intersection of international investment arbitration and sovereign debt restructuring, particularly in light of

1 Abaclat and Others v Argentine Republic, Decision on Jurisdiction and Admissibility, ICSID Case No ARB/07/5 (Aug 4, 2011) (Abaclat).

2 Id at ¶ 356.
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the current European debt crisis and Greek restructuring. Section II examines the relationship between sovereign debt restructuring and international investment arbitration and lays out the key holdings of Abaclat. Section III assesses the ramifications of this decision and argues that increased recourse to investment arbitration during sovereign debt restructuring may prove to be a beneficial development for both debtors and creditors. Section IV analyzes the European debt crisis and predicts how Abaclat may influence its outcome.

This Comment ultimately suggests that increased ICSID involvement will improve creditor protections, stabilize the market for sovereign debt, and allow for more balanced and collective bargaining during restructuring. Given that there is currently no alternative international mechanism to deal systematically with creditor claims during sovereign debt crises, the ICSID may be the best means by which to develop needed law in this arena. While there are concerns regarding ICSID involvement, and several scholars have expressed anxiety over its impact on the European debt crisis, this Comment argues that there are ways in which these drawbacks can be mitigated. A close examination of the situation in Greece suggests that international investment arbitration may not play a major role in its restructuring. Yet the potential for ICSID recourse may nonetheless strengthen the sovereign debt market and lessen the chance of default for other struggling European countries, ultimately decreasing the severity of the crisis.

II. SOVEREIGN DEBT RESTRUCTURING AND INTERNATIONAL INVESTMENT ARBITRATION

Governments have issued sovereign bonds as a primary means of raising public funds for centuries. Current global public debt has been estimated at over $35 trillion, almost half of world economic output. But countries have also continually found their debt loads unsustainable. Sovereign debt restructurings occur when these countries change the terms of their repayments


4 See Waibel, Sovereign Defaults Before International Courts and Tribunals at 8 (cited in note 3).


7 See Waibel, Sovereign Defaults Before International Courts and Tribunals at 9 (cited in note 3).
in order to manage the debt better over time or reduce its net present value. There is currently no single method or forum by or in which sovereign debt can be restructured. Rather, debtor countries generally provide their creditors with a proposal, known as an exchange offer, to replace old bonds with new ones that better reflect the country's current situation and ability to repay. These swaps commonly include reductions in principal amounts, drops in interest rates, or extended payment periods, often leading to significant bondholder losses.

Argentina's 2001 default led to the longest and most complex sovereign debt restructuring in history. It was also the first restructuring during which creditors who chose not to participate in exchange offers pursued legal claims through international investment arbitration, alleging violations of BITs between their nations and Argentina. In total, approximately one billion dollars is at stake in these arbitration proceedings at the ICSID.

While these claims were novel at the time, it has become apparent that there are several ways in which a country's debt restructuring could lead to violations of its international arbitration agreements. In the cases brought under the Italy-Argentina BIT, investors argue that Argentina's decision to bar any reopening of the exchange process after its 2005 Exchange Offer constituted expropriation, unfair and inequitable treatment, and national treatment discrimination. The implementation of certain capital controls during restructuring could also lead to claims of breaches of BIT transfer clauses.

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13 Id at *3.

14 Id.

15 Id at *5.
A. Potential BIT Violations During Restructuring

1. Expropriation.

BITs generally include a provision prohibiting the expropriation of investors' property rights. Expropriation is typically defined as any state action that deprives investors of the ownership, control, and/or economic benefit of their investments. Expropriation is typically defined as any state action that deprives investors of the ownership, control, and/or economic benefit of their investments.16 Both default and restructuring diminish the value of investors' assets. Outright default renders bonds completely worthless. Similarly, exchange offers, typically made on a “take-it-or-leave-it” basis, give investors the choice of holding on to a worthless bond or accepting a new bond with a significant haircut.17 If investors can show they were “substantially deprived” of the economic benefit of their investment, international investment arbitration may provide them compensatory relief pursuant to the expropriation provision.18


Most BITs also include a “national treatment clause,” which requires that foreign investors from one state be treated the same as national investors and foreign investors from other states.19 During both Russia’s and Argentina’s restructurings, each government prioritized debt held by domestic investors, often providing those bondholders earlier recovery on better terms. While the debtor countries argued that this was absolutely necessary to keep their financial systems from collapse, their preferential treatment of domestic creditors could still be considered a violation of most BITs’ national treatment clauses.


The standard BIT “fair and equitable treatment” clause reads: “Each Contracting Party shall guarantee a fair and equitable treatment to investments

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19 The typical national treatment clause reads: “Neither Contracting Party shall subject investments in its territory owned or controlled by investors of the other Contracting Party to treatment less favorable than that which it accords to investments of its own investors or to investments of investors of any third State.” Chile-Greece BIT (cited in note 16).

made by investors of the other Contracting Party in its territory and shall ensure 
that the exercise of the rights thus recognized shall not be hindered in 
practice.21 This has generally been interpreted to grant investors rights to 
transparency, freedom from harassment and coercion, due process, good faith, 
and protection of reasonable expectations.22 

Michael Waibel has pointed out several ways in which investors could 
claim that sovereign bond exchanges, especially when followed by laws 
prohibiting further negotiations, constitute unfair and inequitable treatment.23 
First, bondholders could argue that bond exchanges lack transparency as to the 
debtor country’s payment capacity.24 The basis of this claim would be that the 
bondholders’ legitimate expectations were impeded: They lent money on certain 
terms and expected the debtor to be able to repay them on those terms.25 
Second, any bond exchanges that were clearly coercive26 would also violate fair 
and equitable treatment. Even in the absence of explicit threats or 
misrepresentations, if bondholders could show that defaulting governments did 
not take their concerns into account before unilaterally issuing a take-it-or-leave- 
it offer, this could constitute a violation of due process.27 Finally, the 
restructuring process itself may be deemed to have been conducted in bad faith 
if, as is typical of such restructurings, the government failed to participate in any 
serious negotiations with investors before instituting a take-it-or-leave-it offer. In 
order to succeed in a bad faith claim, however, bondholders would likely have to 
prove that it was not merely the government’s inability to pay that brought about 
the restructuring, but its willful refusal to pay despite being capable of doing so.28 

On the whole, it seems likely that fair and equitable treatment claims will 
be brought frequently during sovereign debt restructuring. Yet it is less certain 
whether they will be successful. This particular standard accords a great deal of 
discretion to arbiters in weighing the interests of investors and debtor countries, 
and decisions are likely to be highly fact-based and case-specific.29 

21 Chile-Greece BIT (cited in note 16).
23 Id at 752–54.
24 Id at 752.
25 Past restructuring by a country would weaken this argument. Id.
26 See Pope & Talbot Inc v Canada, Award in Respect of Damages, 41 ILM 1347 ¶¶ 68–69 (NAFTA 
2002) (defining coercive actions as actions that are burdensome and confrontational, involving 
threats or misrepresentations).
28 See id at 753.
29 See id at 753–54.
4. Transfer.

Finally, most BITs provide for "the unrestricted transfer of the investment and its return," to be "effected without delay." Not only would outright default stop the transfer of a bond, but extended negotiations would also halt transfers and could lead to threats of litigation. Moreover, in El Paso Energy International Company v Argentine Republic, the tribunal ruled that a tax on outflows constituted an infringement of the transfer provision, entitling the investor to compensation. This ruling suggests that certain capital controls commonly employed during restructuring may also violate a BIT's transfer clause.

There is a reason, however, that BIT claims have only recently begun to arise in the context of sovereign debt restructuring. The idea that sovereign debt represents an "investment" of the kind BITs are designed to protect is both novel and contentious. Nonetheless, the ICSID recently held that sovereign debt does in fact fall under a common definition of "investment" provided in BITs. Regardless of its merits, this decision has opened the door to unprecedented ICSID involvement in future sovereign debt restructurings. The next sections will discuss both the details and ramifications of this development.

B. The Key Holdings of Abaclat

After defaulting on over $100 billion of debt in 2001, Argentina introduced Exchange Offer 2005, allowing bondholders to trade in their bonds for new ones with a lower principal or interest rate. After the offer expired, Argentina enacted an "Emergency Law" or "Cram Down Law," which barred the government from reopening the exchange process or entering into any settlement agreements with those who could have, but chose not to, participate in the exchange. While more than 75 percent of bondholders participated, the claimants in Abaclat did not. Initially, 180,000 claimants filed suit with the ICSID, allegations expropriation, unfair and inequitable treatment, and national treatment discrimination. In 2010, Argentina temporarily suspended parts of the Emergency Law to open another exchange offer, but sixty thousand

30 Chile-Greece BIT at *5 (cited in note 16).
32 Decision on Jurisdiction, ICSID Case No ARB/03/15 (Apr 27, 2006).
34 See, for example, Waibel, Sovereign Defaults Before International Courts and Tribunals at 212 (cited in note 3); Abaclat, ICSID Case No ARB/07/5 at ¶ 38–61 (Georges Abi-Saab dissenting).
35 Abaclat, ICSID Case No ARB/07/5 at ¶ 356.
36 Id at ¶ 77.
37 Id at ¶ 78.
38 See id at ¶ 234; Alemanni, ICSID Case No ARB/07/8; Alpi, ICSID Case No ARB/08/9.
claimants still refused to participate or to withdraw from arbitration. On August 4, 2011, the ICSID ruled that it had jurisdiction over these claims, and that sovereign debt was an investment as defined by the Italy-Argentina BIT.

The tribunal in Abaclat made three key rulings, each highly relevant to the tribunal’s future role in negotiating disputes arising out of sovereign debt restructurings. First, the court concluded that sovereign debt falls under the definition of “investment” provided in the Italy-Argentina BIT. Second, the court allowed the aggregation of tens of thousands of individual claims into a single “mass claim,” despite lacking any precedent and admitting that this consolidation would necessarily lead to decreased procedural rights for individual claimants. Finally, the court ruled that when countries act unilaterally as sovereigns to restructure debt in a way that may violate BIT provisions, this gives rise to a treaty claim, which is independent of any contract claim.

The definition of “investment” provided in Article 1(1)(c) of the Italy-Argentina BIT, as translated by the tribunal, includes “obligations, private or public title or any other right to performances of services having economic value, including capitalized revenues.” The majority reasoned that the word “obligations,” considered in the context of the rest of the clause, must include bonds, as well as security entitlements in those bonds. It went on to hold that sovereign debt also constitutes an investment under the ICSID Convention, as its purpose is to “encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote.” Here, the tribunal found that bondholders made a contribution that led to the creation of the kind of value that the language of the BIT made clear both parties meant to protect. Thus, the tribunal concluded that under both the BIT and the ICSID Convention, the claimants’ sovereign debt constituted an investment.

Argentina then argued that mass claims are incompatible with the framework of the ICSID, as the tribunal is unable to find facts on and consider

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39 Abaclat, ICSID Case No ARB/07/5 at ¶¶ 95–97.
40 Id at ¶¶ 331, 356.
41 Id at ¶ 356.
42 Id at ¶¶ 490, 537.
43 Abaclat, ICSID Case No ARB/07/5 at ¶¶ 321–23.
44 Id at ¶ 352.
45 Id at ¶ 361.
46 Id at ¶ 364. The tribunal refused to apply the previously established Salini test, reasoning that it would preclude ICSID jurisdiction over sovereign debt (a means-ends argument sharply criticized by the dissent). Because the tribunal believed that both Italy and Argentina clearly meant for sovereign bonds to be considered investments under their BIT, it found that it would be contrary to the Convention’s aim to exclude them from ICSID’s jurisdiction. See Salini v Morocco, Decision on Jurisdiction, ICSID Case No ARB/00/04 (July 23, 2001).
47 Abaclat, ICSID Case No ARB/07/5 at ¶¶ 366–67 (cited in note 1).
each individual's circumstances. The majority countered, however, that if “the tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could lose jurisdiction where the number of Claimants outgrows a certain threshold.” It also deemed Argentina's express consent to collective proceedings unnecessary, reasoning that even though the ICSID Convention does not provide for mass claims, refusing to allow them would be contrary to the Convention’s spirit. The tribunal did admit that as the case progresses the tribunal will likely be unable to consider each claim individually, and that parties’ procedural rights will necessarily be limited. But these concerns were outweighed by the fact that requiring each claimant to file individually would be “practically impossible,” and that the claims in Abaclat are similar enough to allow decreased procedural rights. The tribunal considers itself flexible enough to adjust to modified collective proceedings. And its ruling suggests that the ICSID will be amenable to hearing similar mass creditor claims in future sovereign debt restructurings.

Argentina further contended that its actions merely constituted a breach of the repayment provisions of its bond contracts, not a violation of its treaty obligations under the Italy-Argentina BIT. The tribunal responded, however, that whether Argentina breached its contractual obligations was irrelevant, because the state justified its failure to perform by its dire financial situation. Deeming itself insolvent, Argentina enacted a law unilaterally changing the terms of its bonds. This action was an exercise of sovereign power alone—neither based on nor derived from any contractual provision. The tribunal therefore found that while investors may have independent contract claims against Argentina, claims based on the exercise of sovereign power must be considered separate treaty claims alleging a breach of the Italy-Argentina BIT.

This reasoning suggests that any sovereign action during restructuring may give rise to a treaty claim, independent of any contract claim. If investors can show that a defaulting country exercised sovereign power, they may bring suit in

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48 Id at ¶ 490.
49 Id at ¶¶ 518–20.
50 Id at ¶ 531.
51 Abaclat, ICSID Case No ARB/07/5 at ¶ 537.
52 Id at ¶¶ 534–35.
53 This may be key in evaluating the consequences of increased ICSID involvement in sovereign debt restructurings, and will be discussed further in Sections III and IV.
54 Abaclat, ICSID Case No ARB/07/5 at ¶ 307.
55 Id at ¶ 318.
56 Id at ¶ 321.
57 Id at ¶ 323.
58 Abaclat, ICSID Case No ARB/07/5 at ¶ 331.
the ICSID regardless of existing contracts. This means not only that investors can choose the most favorable forum in which to sue, but that contractual provisions will be irrelevant for investors who choose to pursue a BIT rather than a contract action. Thus, even if most creditors have agreed to accept certain restructuring terms, holdouts, who otherwise would be contractually bound, can seek potentially superior legal relief by bringing treaty actions to the ICSID.

III. THE CONSEQUENCES OF ABACLAT

Despite strong arguments that the ICSID should not have interpreted sovereign debt as an investment subject to its jurisdiction, it nonetheless seems to have decided to enter the world of sovereign debt restructuring. What remains to be seen is whether this will prove detrimental or beneficial. This Comment suggests the latter: the availability of an opportunity to resolve debtor-creditor disputes effectively could improve creditor protections, stabilize the market for sovereign debt, and allow for more balanced bargaining during restructuring. Moreover, if accompanied by the establishment of a sovereign debt restructuring mechanism (SDRM) able to mitigate debtor financing and holdout concerns, all parties could ultimately gain.

A. Benefits of ICSID Involvement in Sovereign Debt Restructuring

There are currently significant gaps in creditor protection during sovereign debt restructurings. Creditors have very few legal rights, especially when compared to creditors in the average corporate bankruptcy proceeding. It is generally difficult for creditors to affect almost any aspect of a restructuring

59 See, for example, Abaclat, ICSID Case No ARB/07/5 (Georges Abi-Saab dissenting); Waibel, Sovereign Defaults Before International Courts and Tribunals at 212–16 (cited in note 3).

60 Neither ICSID Convention nor individual BITs explicitly recognize that previous tribunal awards must be considered binding precedent. See Salacuse, The Law of Investment Treaties at 155 (cited in note 33). Thus, one might argue that a future tribunal could rule contrary to the court in Abaclat, undermining the significance of the decision. However, both the practice and purpose of international investment arbitration suggest that this is unlikely to occur. In ICSID cases, counsel frequently rely on previous decisions to support their positions, and tribunals regularly cite to prior cases in their rulings. This promotes one of the chief purposes of international investment law: “[T]o establish a predictable, stable framework for investments, which causes tribunals to pay attention to previous decisions on similar issues.” Id at 156. In Abaclat, in particular, the tribunal interpreted a key phrase present in every BIT. Given the importance of uniformity and consistency, a future tribunal seems unlikely to come to the exact opposite conclusion—that sovereign debt is not an investment—without strong justification.

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Exchange offers are decided solely by debtor countries and made on a take-it-or-leave it basis. And there are no rules or methods by which to establish rules outlining the treatment of different creditor groups. When debtor countries do breach creditors' few legal rights, which are primarily contractual, the judgments of national courts are largely unenforced, due to sovereign immunity and the minimal presence of state assets abroad.

ICSID involvement could increase creditor protection by providing greater likelihood of compliance with decisions against debtor states. Evidence suggests that so far, observance of ICSID awards has been both voluntary and high. While the ICSID Convention does recognize sovereign immunity, ICSID awards are more likely to be followed than the awards of national courts or other international arbitral panels for three key reasons. First, the ICSID is part of the World Bank Group, meaning that debtor countries may fear that noncompliance with ICSID awards will result in negative attention from the World Bank and its partners. During the financial crises that accompany default, countries are often dependent on substantial, but conditional, aid from the International Monetary Fund (IMF), a key World Bank ally. If noncompliance did become an issue, the World Bank and/or the IMF could threaten debtor countries with a funding cut-off, or refuse to extend further loans, for failure to recognize ICSID awards. This would truly give ICSID rulings bite.

Second, ICSID awards are final, binding, and not subject to review outside the Convention. They are also required by Article 54 of the Convention to be recognized and enforced by and in all states that are parties to the Convention as if they were final judgments of those states’ domestic courts. Creditors can

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62 See id at *3.
63 Waibel, Sovereign Defaults Before International Courts and Tribunals at 318 (cited in note 3).
64 Id.
66 For example, Argentina, the Dominican Republic, Ecuador, Pakistan, Russia, Serbia, and Uruguay. See Javier Díaz-Cassou, Aitor Erece-Dominguez, and Juan J. Vázquez-Zámora, The Role of the IMF in Recent Sovereign Debt Restructurings *10 (Banco de España Occasional Paper No 0805 2008), online at http://ideas.repec.org/p/bde/opaper/0805.html (visited Mar 30, 2012).
67 In fact, Argentina has indeed been barred from sources of international finance as a result of its refusal to comply with some ICSID awards. See Dany Khayat, Enforcement of Awards in ICSID Arbitration (Mayer Brown Dec 19, 2011), online at http://www.mayerbrown.com/publications/article.asp?id=11916&nid=6 (visited Mar 30, 2012). This has been burdensome even for Argentina, which is much less dependent on these sources now than most countries entering default. Id.
68 See ICSID Convention at Art 53 (cited in note 65).
69 Id at Art 54. This res judicata requirement is unique among international courts and tribunals.
therefore pursue enforcement in whichever state offers the highest likelihood of recovery—like the country in which the debtor’s assets are located.

Third, ICSID awards are both public and high-profile. Noncompliance would send a clear message to international capital markets, hindering a debtor country’s reputation and future ability to raise money abroad. While any default leads to heightened risk premiums and increased difficulty raising funds, failure to follow the ruling of a respected, independent body could have crippling long-term consequences for countries hoping to reenter international debt markets. Further, Article 27 of the ICSID Convention explicitly allows investor countries to resort to explicit diplomatic protection in the event of noncompliance, meaning that investor states could even go as far as bringing a suit with the International Court of Justice (ICJ). The price of diplomatic protection has been considered even higher than the threat of Article 54 judicial enforcement.

Enforceable ICSID arbitration could also allow the growth of a healthy market for sovereign debt—one not based solely on reputation but on reliable contracts. As discussed above, when creditors know that they have legitimate recourse in the event of sovereign default, they likely will be more willing to invest, or will charge lower risk premiums, knowing that their investments are protected. Promises to pay would no longer be merely promises backed solely by past behavior, but true obligations likely to be enforced. This could lead to greater access to financing for all states, and more efficient investment by creditors, increasing the welfare of both borrowing and lending countries.

These benefits aside, however, some scholars have pointed out potential negative aspects of ICSID involvement in sovereign debt restructuring. Section III.B responds to each of these objections and Section III.C suggests a way in which legitimate concerns might be mitigated.

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70 See Christoph Schreuer, The World Bank/ICSID Dispute Settlement Procedures (OECD), online at www.oecd.org/dataoecd/47/25/2758044.pdf (visited Mar 30, 2012). While some countries will likely have few assets to pursue, there has been evidence of defaulting countries hiding assets in foreign countries—Argentina, for example. See also Edward Schumacher, Defending Argentina’s New Democracy, NY Times Section 6 (June 10, 1984).

71 Waibel, Sovereign Defaults Before International Courts and Tribunals at 319 (cited in note 3).

72 See Gauthier Vanrueuwenhuyse, Bringing a Dispute Concerning ICSID Cases and the ICSID Convention Before the International Court of Justice, 8 Law and Practice of Intl Courts and Tribunals 115, 120–21 (2009).

73 See Giuliana Cané, The Enforcement of ICSID Awards: Revolutionary or Ineffective?, 15 Am Rev Int’l Arb 439, 458 (2006). Cané also notes that both diplomatic and judicial methods of enforcement may be used to gain compliance. Id.
B. Objections and Responses

1. Decreased involvement of creditor governments and international institutions.

Some scholars contend that ICSID involvement in sovereign debt restructuring could minimize the role of creditor governments and other international institutions, like the IMF, in managing debt crises. This, they assume, may mean decreased economic policy flexibility. However, this argument suffers from several flaws. First, the need for IMF involvement, especially in the form of bailouts, is often the result of creditors' fleeing sovereign financial distress out of fear of inadequate treatment during restructuring. If enforcement became more reliable, IMF and creditor-government intervention may become less necessary. Similarly, creditor governments become involved in restructuring negotiations primarily due to the lack of a single forum in which individual creditors can resolve their claims. Basically, creditor governments often seek to solve collective action problems between investors. Recourse to ICSID arbitration, especially with access to mass claims, could remove the need for such high-level government involvement.

Second, while creditor governments have traditionally played a role as "diplomatic gatekeeper over sovereign debt," a shift in control to individual creditors is not necessarily negative. While creditor governments may have a larger and more flexible arsenal for negotiations, they often have a less significant stake in the result of specific disputes than individual investors. If creditor governments undermine the welfare of these investors in favor of other interests, they undermine a key purpose of international investment agreements—the promotion of foreign investment. People will be less likely to invest in other countries if they do not believe their investments will be protected and are not allowed to control their own disputes. Moreover, a focus on creditors as individuals, rather than as countries, may lead to more uniform treatment. Currently, creditor countries with established diplomatic relationships with the debtor may have greater bargaining power during restructuring than countries without existing ties. A shift from state diplomacy to individual adjudication may keep debtor countries from distinguishing important partners, potentially undermining their ability to deal with their own financial crises. However, it would ensure a consistency of creditor treatment that would encourage greater investment ex ante. Ultimately, these ex ante gains must be weighed against the loss of ex post diplomatic flexibility. Given that ICSID

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74 Waibel, Sovereign Defaults Before International Courts and Tribunals at 317 (cited in note 3).
75 Roubini and Setser, Improving the Sovereign Debt Restructuring Process at *6 (cited in note 61).
76 See Wells, Property Rights for Foreign Capital at 477 (cited in note 8).
77 Waibel, Sovereign Defaults Before International Courts and Tribunals at 316 (cited in note 3).
involvement may in fact decrease the need for IMF and creditor intervention, and that this intervention is not always beneficial, the benefits of individual creditor-based arbitration may be substantial enough to mitigate any losses.

2. Determining debtor capacity to pay.

Some scholars also maintain that it is critical that any international tribunal be able to determine a defaulting country's actual capacity to pay, and claim that the ICSID lacks the expertise to do so. This argument, however, ignores both the alternative state of affairs and the ICSID's flexibility. Currently, debtor countries themselves essentially "determine" their own capacity to pay. And, historically, sovereign debt disputes have largely been resolved by national courts. While exact economic tools may not yet exist to measure a country's ability to pay, it seems illogical to argue that self-interested parties and courts with fewer resources should therefore be left to make the determination, rather than an impartial body able actively to consider the best methods of evaluation.

Moreover, international tribunals in the past have been entrusted with this authority, and throughout the twentieth century there have been calls for the establishment of an International Loans Tribunal to serve precisely this purpose. There is also evidence that the ICSID is aware of the importance of taking debtor payment capacity into consideration. The tribunal in Saluka Investments BV v Czech Republic recognized that international law should not require states to compensate foreign investors when "in the normal exercise of their regulatory powers, they adopt in a nondiscriminatory manner bona fide regulations that are aimed at general welfare." While it may be a difficult and contentious task, tribunals can exercise judicial restraint in their determinations by recognizing differences in methods or opinions by hearing and evaluating the testimony of multiple experts. Disagreements need not preclude an ultimate assessment by the tribunal, but may simply act to restrain decisions with significant consequences.

Finally, an increase in ICSID claims would arguably allow the development of legal principles for determining when a nation is unable to pay its debts. A
coherent framework only will arise if it can be built over time, and the ICSID is currently likely the best available forum to begin resolving this issue.

3. Intent of the parties.

Scholars also contend that countries that explicitly gave national courts jurisdiction in their bond contracts did not intend for disputes to end up in front of an international tribunal. Yet countries have arguably been aware of the possibility that bilateral investment treaties cover sovereign debt for some time. Scholars began to discuss the possibility upon Argentina’s default. And soon after investors were bringing suits to the ICSID based on this interpretation.

After these developments, some countries chose explicitly to exclude sovereign debt from their BITs. However, very few BITs, even new ones, have actually included this restriction. The fact that for over ten years most countries have not taken steps to remove sovereign debt from their agreements suggests an awareness, and perhaps even an intention, that these disputes may be resolved before the ICSID. Even if this is not the case, the ruling in Abaclat ensures that countries are now aware of the possibility of creditor recourse to the ICSID. If countries do not in fact desire ICSID involvement, they are free to take action to ensure that sovereign debt is clearly excluded from their BITs.

4. Institutional competence.

There are also historical objections to the involvement of any international body in sovereign debt restructuring. Opponents claimed for much of the past century that any institution would be incapable of adapting to constant change in economic conditions, and that individual adjudicators would likely lack sufficient expertise. Yet these arguments have been seriously undermined by the overwhelming success of the World Trade Organization, which provides a

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84 See, for example, Waibel, 101 Am J Intl L at 735 (cited in note 17).
85 See, for example, id; Karen Halverson Cross, Arbitration as a Means of Resolving Sovereign Debt Disputes, 17 Am Rev Intl Arb 335 (2006).
86 Examples of such explicit exclusion include The North American Free Trade Agreement (NAFTA), Peru’s BITs, and the Australia-Chile BIT. See Gallagher, New Vulture Culture at 16 (cited in note 3).
88 It is worth noting, however, that it may be more difficult to amend existing agreements than to exclude sovereign debt from new agreements. Amendment requires the agreement of both parties over a single negotiated issue, whereas in initial bargaining one party may use a particular issue as leverage to obtain more favorable treatment in another area.
89 Waibel, Sovereign Defaults Before International Courts and Tribunals at 326 (cited in note 3). See also Free Zones of Upper Savoy and the District of Gex (Fr v Switz), Order, 1929 PCIJ (see A) No 22 (Aug 19, 1929).
model for international legal involvement in the economic arena. While these concerns should certainly be recognized and taken into account, they are likely exaggerated and should not preclude a potentially beneficial ICSID presence.

5. Holdout incentives.

While many objections to ICSID arbitration during sovereign debt restructurings are relatively easy to dismiss, there are two legitimate concerns that should be seriously considered. First, the possibility of recourse to the ICSID could increase creditors’ incentives to hold out of the restructuring negotiations, potentially prolonging the process and seriously harming debtors.

Before considering the negative aspects of greater holdout litigation, it is important to note that traditional exchange offers are made purely on the debtor’s terms. Bondholders have limited bargaining power. The ability to threaten ICSID arbitration would increase creditors’ bargaining opportunities. And the ability to bring mass claims could lead to more collective negotiations, which may allow the parties to reach a settled agreement more quickly, and even avoid litigation. Increased ICSID involvement, at least theoretically, should bring greater balance to the negotiating process.

However, the introduction of ICSID recourse into the current negotiating arena could result in significant holdout problems. Any take-it-or-leave-it exchange offer could be seen as a violation of BITs’ expropriation or fair and equitable treatment clauses, as could extended negotiations. Essentially, creditors would have a bargaining chip at every step of the process. But unlike in traditional bankruptcy or under contractual Collective Action Clauses (CACs), most BITs have no mechanism by which a majority of creditors can bind holdouts to a negotiated restructuring plan.

Indeed, it has been claimed that the WTO “may be the single most effective international agency,” with 95 percent of world trade bound to its dispute settlement mechanisms. William A. Niskanen, Building on the WTO’s Success, 19 Cato J 459, 459 (2000).


Waibel, Sovereign Defaults Before International Courts and Tribunals at 14 (cited in note 3). Though, as mentioned previously, in the current diplomatic system larger creditor countries often have some bargaining clout. Further, this is solely for traditional exchange offers—note that the current situation in Greece, which will be discussed in greater depth in Section IV, represents a unique voluntary pre-default exchange.

Mass claims will necessarily lead to a quicker adjudication process, but if those creditors who would be grouped together during litigation are able to bargain together during restructuring, they may be able to negotiate more effectively and stay away from litigation entirely.

These allow a supermajority of creditors to bind a minority to certain restructuring terms. For further discussion, see Section IV.

Even if bonds did include contractual collective action solutions, Abactat ensured that these would not have to be adhered to if holdouts wished to bring a separate treaty claim.
Some recent US-negotiated BITs and Free Trade Agreements (FTAs) have, however, included provisions prohibiting claims against negotiated debt restructuring, unless an investor alleges that the restructuring violates the national treatment or most favored nation clauses.96 “Negotiated restructuring” generally means a restructuring where 75 percent of bondholders have agreed to modified payment terms.97 So if a contractual CAC agreement were reached, treaty claims would be barred. While currently included in very few agreements, and subject to the problems of CAC resolution,98 these provisions represent a positive step toward mitigating the holdout problem.

Ultimately, while greater creditor bargaining power may be desirable, the way that restructuring negotiations normally occur, and the lack of an established method by which to bind minority holdouts, may allow inflexible holdouts seriously to impair efficient restructuring.

6. Domestic prioritization.

Second, the focus on equal treatment of creditors in bilateral investment treaties could render a debtor country unable to favor domestic creditors even when this is reasonably necessary for continuing crucial national functions.99 As mentioned previously, during both the Russian and Argentinean sovereign debt restructurings the government prioritized debt held by domestic investors, often providing them earlier recovery on better terms. The debtor countries argued that this was absolutely necessary to keep their financial systems from collapse, to create liquidity, and to minimize risk.100 Scholars have pointed out that domestic preference may also allow domestic employers to maintain salaries, pensions, benefits, and the like; keep up domestic demand; and stave off widespread protest.101 Treating priority for domestically held debt as a violation


97 Id.

98 The biggest problem with CAC resolution in sovereign debt crises is that any agreement is limited to the bondholders of a single issue, while restructuring generally involves numerous bond issues—this leads to collective action problems. See G10, *Report of the G-10 Working Group on Contractual Clauses* (Sept 2002), online at www.bis.org/publ/gen08.htm (visited Mar 30, 2012). Moreover, as is the case in Greece, some bonds may not include CACs at all. Holders of those bonds would still be free to bring investment claims.


of BITs’ national treatment clauses could therefore be detrimental to debtor countries attempting to restructure their debt without a severe national crisis.

The *Saluka* case suggests the ICSID is aware of the importance of legitimate state actions taken to improve national welfare.102 There, the tribunal refused to consider state regulations expropriatory.103 If sovereigns can justify the preference of domestic creditors on national welfare grounds, then the logic of *Saluka* may be extended to national treatment claims. Moreover, the provisions included in the US BITs and FTAs discussed above suggest that countries could amend agreements to modify or remove national treatment provisions in the case of sovereign debt restructuring. This may prove a complex task, however, as (1) broad or ambiguous language could lead to detrimental manipulation by defaulting countries, suggesting high error and therefore high bargaining costs, and (2) the implications of failing to take action have not yet been extensively discussed in scholarship or determined in an explicit ruling by the court, unlike with sovereign debt as an investment. Thus, the bargaining costs of modification likely outweigh the uncertain benefits, which may explain why no changes have been seen in this area. These difficulties, and the uncertainty as to whether future tribunals would actually extend the ruling in *Saluka*, render BITs’ interference with legitimate domestic prioritization a well-founded concern.

C. A Potential Solution

Both the holdout and domestic preference concerns could be mitigated by some change in the sovereign debt restructuring process. If ICSID involvement were accompanied by a formal sovereign debt restructuring mechanism that took these issues into account, the result could prove positive for all parties.

Soon after Argentina’s default, scholars began proposing alternatives to the current free-market sovereign debt restructuring process. Suggestions for SDRMs included the IMF’s Sovereign Debt Restructuring Mechanism104 and its predecessor, the Sovereign Debt Restructuring Convention.105 While the IMF’s specific proposal was rejected, various forms of a sovereign debt restructuring mechanism have continued to be discussed in scholarly literature.106

102 *Saluka*, Partial Award at ¶ 255.
103 Id.
While the details of these plans differ, the basic SDRM structure is the same. Debtors and creditors are bound by an international convention that lays out a specific debt restructuring procedure. This includes a CAC-like provision that binds holdouts to restructuring plans approved by a supermajority of creditors. If these holdouts were nonetheless to bring claims to the ICSID, tribunals would be unlikely to authorize an award in direct contravention of another international treaty. However, before a majority of creditors reached any agreement, the potential for ICSID recourse would still provide the benefits of more equal bargaining, as well as increased creditor security and therefore increased lending pre-default. Therefore, the presence of an SDRM would allow the benefits of ICSID involvement while blocking key holdout concerns.

Many SDRM schemes have also proposed adding priority structures to the restructuring process. This may be key to the resolution of the national treatment problem. Proposals have focused on giving priority to creditors who continue to finance insolvent countries during the restructuring process. A debtor country’s favorable treatment of domestic creditors arguably serves a similar purpose—it allows the country to continue critical internal operations during the crisis. And as the SDRM form of prioritization is targeted at groups of creditors who clearly continue to aid the country, it avoids the complications of a court’s trying to determine which domestic preferences were truly critical. If priority structures allow countries to avoid national treatment discrimination while ensuring that crucial domestic functions continue, the fear that ICSID involvement would hinder domestic prioritization should be greatly mitigated.

An SDRM could alleviate concerns over increased ICSID involvement in sovereign debt restructurings. Any mechanism that allows a majority of creditors to bind holdouts and establishes a priority scheme encouraging adequate debtor-country financing during restructuring would allow all parties to benefit from ICSID involvement without suffering from many of its potential inefficiencies.

107 See Schwarz, Sovereign Debt Restructuring Options at *18 (cited in note 106).
108 While there is nothing explicitly in the ICSID Convention requiring adherence to other international treaties, Article 31(3)(c) of the Vienna Convention requires that treaty interpretation take into account relevant rules of international law applicable to the parties. See Salacuse, The Law of Investment Treaties at 150 (cited in note 33).
110 See, for example, Patrick Bolton and David A. Skeel, Jr., Redesigning the International Lender of Last Resort, 6 Chi J Intl L 177, 186–87 (2005). This mechanism would serve much the same function as the purchase money priority interest in US secured transactions law.
111 See id.
IV. THE EUROPEAN DEBT CRISIS

A. General Background

In December 2009, Greece’s debts had reached €300 billion—the highest level in its modern history.112 This debt was equal to 113 percent of Greece’s GDP, far above the EU’s 60-percent limit.113 Over the following months, ratings agencies began to downgrade Greek government debt and the Euro began to fall continually against the dollar. In May 2010, the IMF and other eurozone countries offered Greece a €110 billion bailout. Fears of similar debt woes spread to Ireland and Portugal. In November, the EU and IMF extended €85 billion in assistance to Ireland and, in May, €78 billion to Portugal.114

The situation in Greece failed to improve and a second bailout of €109 billion was arranged in July 2011. But yields on Italian and Spanish government bonds continued to rise sharply, forcing the European Central Bank (ECB) to buy sovereign debt. Eurozone banks began to struggle visibly, leading to ECB emergency loans. October 2011 brought another €8 billion in loans to Greece.115

In March 2012, Greece technically defaulted.116 In order to secure another round of IMF Funding, it reached a voluntary deal with private creditors.117 The details of this deal are key to evaluating the potential for international investment arbitration in Greek restructuring.

B. Greek Restructuring

First, it is important to understand the content, governing law, and ownership of Greek sovereign bonds. Ninety percent of Greek bonds, more than $200 billion,118 are governed by Greek law.119 These bonds contain no

113 Id. This limit was established by the Stability and Growth Pact (SGP) and the adoption of Excessive Deficit Procedure (EDP). See Resolution of the European Council on the Stability and Growth Pact, OJ 1997 (C 236) 1; Council Regulation No 1467/97, 1997 OJ (L 209) 6. For a general history and overview of the requirement, see European Commission, Stability and Growth Pact (Oct 17, 2011) online at http://ec.europa.eu/economy_finance/economic_governance/sgp/deficit/index_en.htm (visited Apr 18, 2012).
114 Timeline: The Unfolding Eurozone Crisis (cited in note 112).
115 Id.
118 Figures indicated in US dollars.
modification provisions,\textsuperscript{120} no pari passu clauses,\textsuperscript{121} and no cross-default clauses.\textsuperscript{122} This means that in the event of restructuring, bondholders have very few contractual opportunities to hold out in bargaining with Greece.\textsuperscript{123} Only 10 percent, approximately $25 billion, of Greek bonds are governed by foreign—predominately English—law.\textsuperscript{124} These bonds include CACs, which permit holders of either 66 percent or 75 percent of a bond issue, depending on the year of issue, to agree to modified payment terms and bind all other bondholders to these terms.\textsuperscript{125} The bonds also contain pari passu clauses, cross-default clauses, and negative pledges. As a result, holders of Greek bonds governed by English law have considerably greater contractual opportunities to hold out during restructuring negotiations and thereby obtain better terms.\textsuperscript{126}

While it is difficult to know the exact distribution of Greek bonds, it appears that the holders are largely public institutions.\textsuperscript{127} European governments, the IMF, the ECB, and eurozone national central banks are believed to hold more than 50 percent of Greek sovereign bonds, while Greek institutional investors hold around 30 percent. That leaves the private investors in Austria, Belgium, France, Germany, Luxembourg, the Netherlands, and the UK.\textsuperscript{128}

The deal reached with these private creditors in March consisted of two phases. First, holders of Greek law-governed bonds tendered around $199.5 billion in existing debt\textsuperscript{129} in exchange for new bonds with a face value of 31.5 percent of the original bonds, notes from the European Financial Stability Fund,

\begin{itemize}
\item \textsuperscript{120} An example of a modification provision would be Collective Action Clauses (CACs), further discussed below, which allow a supermajority of bondholders of a particular issue to agree to a modification of payment by the debtor.
\item \textsuperscript{121} These contain the borrower's promise that the bond will rank equally, in terms of right to payment, with all of its other unsubordinated debts.
\item \textsuperscript{122} Choi, Gulati, and Posner, \textit{Pricing Terms in Sovereign Debt Contracts} at *14 (cited in note 119).
\item \textsuperscript{123} Id at *4.
\item \textsuperscript{124} See id at *2.
\item \textsuperscript{125} See G10, \textit{Report of the G-10 Working Group on Contractual Clauses} at *3 (cited in note 98).
\item \textsuperscript{126} Though evidence has shown that these bondholders actually paid a premium in exchange for this holdout opportunity. See Choi, Gulati, and Posner, \textit{Pricing Terms in Sovereign Debt Contracts} at *17 (cited in note 119).
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Moses and Childs, \textit{Greek Credit Swaps Payouts to Be Expedited} (cited in note 116).
\end{itemize}
and securities linked to Greek output.  

Greece then extended the offer to holders of foreign-law governed bonds, swapping at least $2.5 billion.  

The fact that 90 percent of Greece’s sovereign debt is governed by Greek law put Greece in the unique position to change its law to effectuate wide-scale restructuring. Greece successfully did so, adding the equivalent of CACs to Greek law to bind holdouts and thereby garnering 95.7 percent participation.  

C. Abaclat and Greece  

However, Abaclat may have changed the playing field. If sovereign debt falls under Greece’s BIT obligations, and Greece’s decision to change its law is considered an exercise of sovereign power, any contractual CAC will not bar treaty claims. Bondholders may therefore be able to hold out from contractual restructuring by threatening to bring claims with the ICSID. They will bring claims if they believe they can obtain better returns with this strategy: They may believe, for example, that their debt is so junior that during restructuring they would receive almost nothing, making the chance to obtain an enforceable damages award actually worth more. This is precisely the holdout risk discussed previously: these creditors could prevent timely, efficient restructuring. Indeed, scholars who have recently commented on the implications of Abaclat have all raised fears of ICSID claims during Greek restructuring.  

131 See id.  
132 Id.  
133 This seems likely, as most of Greece’s BITs include definitions of investments very similar to the one interpreted by the court in Abaclat. Compare, for example, the definition adopted by the Abaclat tribunal ("obligations, private or public title or any other right to performances of services having economic value, including capitalized revenues") with that in the Greece-India BIT ("claims to money or to any performance under contract having economic value, as well as loans connected to an investment"). See Abaclat, ICSID Case No ARB/07/5 at ¶ 352 (cited in note 1); Agreement between the Government of the Hellenic Republic and the Government of the Republic of India on the Promotion and Reciprocal Protection of Investments (2009), online at http://www.unctad.org/templates/DocSearch.aspx?PageIndex=1&TextWord=Greece%27,%20%27%20,1&CategoryBrowsing=False&sysYear= (visited Apr 18, 2012) (Greece-India BIT).  

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To avoid what they see as detrimental ICSID involvement, scholars have proposed several ways in which sovereign debt restructuring might be removed from the ICSID’s reach. The United Nations Conference on Trade and Development (UNCITAR) and Professor Kevin P. Gallagher have suggested that international investment agreements be amended to exempt sovereign debt from their purview.135 They have further recommended that the resolution of these issues should take place through state-state arbitration or solely in national courts.136 Finally, they have lauded the inclusion of “essential security exceptions” in BITs, which allow states to take actions they consider necessary to maintain essential security interests and could be interpreted to provide immunity for states in economic and financial crises.137 Yet these policy solutions are entirely inapplicable to the current situation in Greece. Greece is party to 41 BITs, 39 of which are in force. All of Greece’s BITs include expropriation, national treatment, fair and equitable treatment, and transfers clauses, and all but four138 expressly include consent to ICSID arbitration. None of Greece’s BITs exclude sovereign debt; none provide exclusive jurisdiction to national courts;139

15,10 Wallstreetlawyer.com: Securities in the Electronic Age 16 (LegalWorks 2011); Lee Bucheit and G. Mitu Gulati, Restructuring a Nation’s Debt, 29 Intl Fin L. 46 (2010).

135 UNCTAD, Sovereign Debt Restructuring and International Investment Agreements at *8 (cited in note 12); Gallagher, Mission Creep (cited in note 96).

136 UNCTAD, Sovereign Debt Restructuring and International Investment Agreements at *8 (cited in note 12); Gallagher, Mission Creep (cited in note 96).

137 UNCTAD, Sovereign Debt Restructuring and International Investment Agreements at *8 (cited in note 12); Gallagher, Mission Creep (cited in note 96).


139 As mentioned previously, several only provide a choice between ad-hoc UNCITAR governed arbitration and ICSID arbitration. See, for example, Agreement on the Promotion and Protection of Investments Between the Hellenic Republic and Bosnia and Herzegovina (2000), online at http://www.unctad.org/sections/dite/iia/docs/bits/greece-bosnia.pdf (visited Mar 31, 2012);
only one limits resolution to state-state arbitration;\textsuperscript{140} and only one includes an essential security exception.\textsuperscript{141} While these proposed solutions may prove viable in the future,\textsuperscript{142} they are irrelevant to the situation currently at hand.

In spite of this, holdouts pursuing ICSID arbitration may not actually be a critical concern for Greece. The majority of Greece’s bondholders are investors in Western European countries—Belgium, France, Germany, the UK, and perhaps the US\textsuperscript{143}—yet Greece does not have any BITs with these countries.\textsuperscript{144} And while Greece is part of the economically integrated EU, as well as the European Economic Area, which both require the free movement of goods, persons, services, and capital among EU and certain other European countries, these agreements do not provide for specific investment protections comparable to those in BITs.\textsuperscript{145} Therefore, if investors in these countries continue to be the primary holders of Greek debt, their restructuring holdout options are likely to be solely contractual (or based on violations of other international law).

Even if investors in countries with BITs with Greece were to purchase Greek debt, perhaps believing that pursuing litigation (especially in mass claims form, where individual costs are likely low) would be profitable, the analysis in Section III suggests that this may not be as detrimental as commentators are suggesting. ICSID recourse would allow some creditors greater leverage to


\textsuperscript{141} Agreement Between the Government of the Hellenic Republic and the Government of the Republic of India on the Promotion and Reciprocal Protection of Investments (2007), online at http://www.unctad.org/sections/dite/iia/docs/bits/greece_india.pdf (visited Mar 31, 2012). Moreover, it is still unclear to what extent the essential security exception actually covers economic and financial crises, and to what standard of necessity countries will be held. See Salacuse, Investment Treaties at 345 (cited in note 33).

\textsuperscript{142} This is assuming that countries decide that they do not desire the involvement of international investment tribunals in sovereign debt restructurings, and amend or issue new agreements.

\textsuperscript{143} Of the twelve key financial institutions that participated in the bond exchange in March, eleven are Western European and one is American. See Stevis, Private Creditors Back Greek Debt Swap (cited in note 117).

\textsuperscript{144} UNCTAD, Total Number of Bilateral Investment Treaties Concluded (Italy) (June 1, 2011), online at www.unctad.org/sections/dite_pcbi/docs/bits_italy.pdf (visited Mar 31, 2012).

\textsuperscript{145} They do require free movement of capital and prohibit discrimination in investment, yet they do not include provisions parallel to those of expropriation, national treatment, or transfers present in bilateral investment treaties. See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Art 2 \(\textsuperscript{16} 1997\) OJ (C 340) 1 (Oct 2, 1997); Agreement on the European Economic Area (May 2, 1992), OJ (L 1) 1 (Jan 3, 1994).
negotiate with Greece, which may simply lead to settlement, rather than litigation.\textsuperscript{146} But the more significant benefits of ICSID recourse are likely to be seen by other European countries in financial distress. The next section discusses how this development may lessen the severity of the current crisis.

D. The Future of the European Debt Crisis

It seems unlikely that the same investors that currently hold Greek debt will similarly dominate the market for the debt of other struggling European countries. Take Italy, for example. As Greece restructures, banks exposed to Italian debt may fear contagion and begin to unload their Italian bonds. In a worst-case scenario, already over-stretched official-sector institutions may eventually be unable or unwilling to take the kind of actions they have with Greece in order to stave off an Italian collapse. But investors with ties to countries that do have BITs with Italy\textsuperscript{147} should be aware of the increased possibility of recourse to ICSID arbitration after Abaclat. And if they believe that they can get higher returns by threatening or pursuing arbitration in the event of a restructuring, they may be incentivized to buy up some of this debt.

While any acquisition of Italian bonds by investors in countries with BITs with Italy could garner the same concerns of inefficient restructuring, there is a more positive perspective available. If creditors believe that they will have a strong negotiating position in the event of a default, they will not flee so quickly as countries begin to struggle financially. If markets for sovereign debt continue to function well, this means that struggling countries will be able to issue new bonds more cheaply—which would actually help stave off, or at least reduce the size of, any default. Increased creditor ability to hold out ex post may decrease the chance of debtor default ex ante. Thus, the mere possibility of ICSID recourse could lessen the severity of the European Debt Crisis.

V. CONCLUSION

The ICSID's recent ruling in Abaclat has ensured that international investment arbitration will play a role in future sovereign debt restructurings. Despite concerns over the effect of this development on the efficiency of restructuring, increased ICSID involvement may in fact prove positive. Recourse to the ICSID should improve creditor protections, stabilize the market for

\textsuperscript{146} Steven Friel, a litigation partner at Brown Rudnick, recently expressed a similar opinion: "The primary strategy is unlikely to be a court judgment after protracted litigation. Bondholders are much more likely to work towards settlement, if necessary using the threat of litigation as leverage to negotiate a better deal." Sarah White and Tommy Wilkes, *Hedge Funds Prepare Legal Battle with Greece* (Reuters Feb 27, 2012), online at http://www.reuters.com/article/2012/01/25/uk-greece-hedge-funds-idUSLNE80000R20120125 (visited Mar 31, 2012) (quotation marks omitted).

\textsuperscript{147} While Italy, like Greece, has over 50 BITs, none of them are with Western European countries. UNCTAD, *Total Number of Bilateral Investment Treaties Concluded (Italy)* (cited in note 144).
sovereign debt, and allow for more balanced and collective bargaining during restructuring. Moreover, the establishment of a sovereign debt restructuring mechanism that deals with both holdout and debtor financing issues could mitigate the most serious concerns over ICSID arbitration and benefit both creditors and debtors. While the ICSID may not be the ideal forum to begin developing this strand of international law, it has nonetheless chosen to take on this task and may indeed effect positive change. In the context of the current European debt crisis, evidence suggests that while international investment arbitration may not play a major role in Greek restructuring, the potential for ICSID recourse may strengthen the sovereign debt market, lessen the chance of default in other struggling European countries, and ultimately diminish the severity of the crisis.