5 SOCIO-ECONOMIC RIGHTS IN SOVEREIGN DEBT ADJUDICATION

1 Introduction

Despite the predominance of positivists' state-centric narrative of international human rights law (IHRL), there is growing consensus recognising the centrality of socio-economic rights in the evolving sovereign debt regime.[1] The previous chapter has demonstrated how the global community acknowledged this imperative through the adoption of different soft law instruments. In addition, creditors' socio-economic rights responsibilities are now incorporated, albeit insufficiently, into the broader business and human rights framework. It was also argued that socio-economic rights could qualify as 'essential interests' to justify debt moratorium especially within the context of the defence of necessity in customary international law (CIL). Others even argue that an unsustainable debt and insolvency situation could warrant a complete denunciation of sovereign debt.[2]

Importantly, international courts and tribunals have been adjudicating and giving their perspectives on these issues. Therefore, it is important to extend the discussion to the realm of sovereign debt adjudication (SDA) by examining the attitudes of adjudicators towards socio-economic rights as 'essential interests' in sovereign debt governance. This is because, by the stakeholder approach to sovereign debt governance adopted in this book, international tribunals are critical stakeholders. They have increasingly

1 S Michalowski 'Sovereign debt and social rights – Legal reflections on a difficult relationship' (2008) 8 *Human Rights Law Review* 35-68; P Hunt 'Using rights as a shield' (2002) 6 *Human Rights Law and Practice* 111; J Tooze 'Aligning states economic policies with human rights obligations: The CESCR's quest for consistency' (2002) 2 *Human Rights Law Review* 229; S Michalowski 'Human rights in times of economic crises: The example of Argentina' in R Brownsword (ed) *Global governance and the search for justice* (2004) 33; EA Friedman 'Debt relief in 1999: Only one step on a long journey' (2000) 3 *Yale Human Rights and Development Law Journal* 191; S Ambrose 'Social movements and the politics of debt cancellation' (2005) 6 *Chicago Journal of International Law* 274.

2 I Bantekas 'Sovereign debt denunciation and unilateral insolvency under international law: When is it lawful?' (2023) 46 *Hastings International and Comparative Law Review* 127; A Mockiene 'Is the insolvency of the state legitimate basis to suspend or repudiate on international financial obligations?' (2010) *Teises Apzvalga Law Review* 16.

been exercising jurisdictions over sovereign debt claims.[3] SDA, therefore, is a key component of sovereign debt governance in international law. Unfortunately, the increasing judicialisation of the regime has not received the deserved attention in the literature.[4]

Since World War II, international tribunals have gained prominence as key institutional actors shaping, first, the form and substance of specific regimes of international law and, second, the progressive development of general international law. In performing these roles, tribunals are strengthening and deepening international rule of law, holding global actors accountable for their actions.[5] They are, thus, widely accepted as institutions for global accountability. Interestingly, as noted in the previous chapters, international tribunals have an obligation to adjudicate in conformity with the principles of justice and international law that invariably includes 'universal respect for, and observance of, human rights and fundamental freedoms for all'.[6] Therefore, their perceptions, attitudes and decisions would be critical in shaping the law on sovereign debt. This would help in determining the weight the regime attaches to socio-economic rights.[7]

3 M Waibel *Sovereign defaults before international courts and tribunals* (2011).

4 K Crow & LL Escoba 'International corporate obligations, human rights and the *Ubaser* standard: Breaking new grounds?' (2018) 36 *Boston University International Law Journal* 87-118.

5 UN Charter (1945) art 33; International Centre for Ethics, Justice and Public Life and the Pluri Courts Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order *Oslo*, *Recommendations for Enhancing the Legitimacy of International Courts (*2018*)* https://www.brandeis.edu/Ethics/Pdfs/Oslo%20Reccs%20Legitimacy%20of%20ics.Pdf (accessed 10 January 2019); G Born 'A new generation of international adjudication' (2012) 61 *Duke Law Journal* 775-879; D Shelton 'Form, function, and the powers of international courts' (2009) 9 *Chicago Journal of International Law* 537-571; P Paulus 'International adjudication' (2010) 1-20, http://www.uni-goettingen.de/de/430924.html (accessed 14 January 2018); AK Bjorklund 'Private rights and public international law: Why competition among international economic law tribunals is not working' (2007) 59 *Hastings Law Journal* 101-163; SD Franck 'The legitimacy crisis in investment treaty arbitration: Privatising public international law through inconsistent decisions' (2005) 73 *Fordham Law Review* 1559-68; HR Helfer & AM Slaughter 'Towards a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 367-368.

6 Vienna Convention on the Law of Treaties (VCLT) 1969 art 31(3)(c). See also E Petersmann 'International rule of law and constitutional justice in international investment law and arbitration' (2009) 16 *Indiana Journal of Global Legal Studies* 31-34.

7 *Statute of the International Court of Justice* (adopted 26 June 1945, came into effect 24 October 1945) United States Treaties Series 993 (ICJ Statute) art 38(1)(d).

Unfortunately, international adjudication involves a complex legal process and, not surprisingly, is theoretically in a state of fuss.[8] SDA is part of this complex legal process. The increasing resort to international adjudicative fora especially through the investor-state dispute settlement (ISDS) mechanism by non-official creditors and the innovative deployment of other novel legal strategies by vulture funds and hold-out creditors to reclaim the full value of their debts have increased the complexity of the sovereign debt regime.[9] It raises jurisdictional and doctrinal concerns regarding the scope, objectives, and functions of SDA. The doctrinal issues include determining the status of non-parties, especially the debtor's citizens and the place of socio-economic rights in the adjudicatory process. Importantly, adjudicating sovereign debt claims has a potential jurisprudential consequence: It might lead to a further judicialisation of the sovereign debt regime.[10] This is important because, first, the idea of adjudication correlates with the justice of sovereign debt governance as earlier conceptualised. Second, the frequency of creditor litigation has contributed to the adoption of global legal and policy initiatives as examined in the previous chapter.

These initiatives are redefining the relationship between sovereign debt and socio-economic rights. For instance, citizens' concerns are now increasingly being incorporated into soft law instruments because of the potential impacts of sovereign debt crisis on citizens' welfare and dignity.[11] In addition, one of the objectives of these initiatives is to address the persistent imbalance and the legitimacy crisis confronting this

8 M Steinitz 'Transnational legal process theories' University of Iowa Legal Studies Research Paper (2012) 12-18, http://ssrn.com/abstract=2151555 (accessed 23 May 2019); HH Koh 'Transnational legal process' (1996) 75 *Nebraska Law Review* 181; HH Koh 'Why transnational law matters' (2006) 24 *Penn State International Law Review* 745.

9 SP Park & TR Samples 'Tribunalising sovereign debt: Argentina's experience with investor-state dispute settlement' (2017) 50 *Vanderbilt Journal of Transnational Law* 1033; L Hopwood 'ICSIDious: The uneasy relationship between sovereign bonds and investment arbitration' (2018) 21 *International Trade and Business Law Review* 19; D Thomas 'Sovereign debt as a commodity: A contract law perspective' (2017) 54 *Osgoode Hall Law Journal* 419; WMC Weidemaier & A Gelpern 'Injunctions in sovereign debt litigation' (2013) 2-6, http://ssrn.com/abstract=2330914 (accessed 10 November 2018).

10 WNL Landes & RA Posner 'Adjudication as a private good' (1979) 8 *Journal of Legal Studies* 236-240.

11 See, eg, UNGA Basic Principles on Sovereign Debt Restructuring Processes (adopted 10 September 2015) (UN BPSDR 2015); UNCTAD Sovereign debt workout: Going forward, roadmap and guide (UNCTAD SDWG 2015); UNCTAD Principles on Responsible Sovereign Lending and Borrowing (amended 10 January 2012) (PRSLB 2012); UNHRC Guiding Principles on Foreign Debt and Human Rights (adopted 5 July 2012) (GPFDHR 2011).

regime especially in the area of adjudication.[12] Third, the private-public divide that undergirds the private law paradigm of the sovereign debt regime dissolves in the context of SDA, thereby giving credence to the transnational, pluralists' governance paradigm.

It is, therefore, important to examine how socio-economic rights feature in SDA in the light of both the recent developments in this area and the recurring debt crises across the world. As indicated earlier, it is surprising that the attitudes of international tribunals towards these developments have so far remained largely (perhaps completely) unexplored in the literature.[13] This gap is worth exploring here, especially in view of the increasing push for a comprehensive creditor accountability framework in the area of sovereign debt governance.[14] Without understanding adjudicators' attitudes towards socio-economic rights in this regime, it might be difficult to concretise creditors' socio-economic rights responsibilities or to hold them liable for the impact of their activities on the realisation of these rights. It might also be difficult to advance any intelligible proposition in this regard. It should be admitted, however, that although the involvement of international tribunals in the sovereign debt regime could aid in shaping creditors' socio-economic rights responsibilities, creditor accountability remains a tendentious issue especially with regard to private creditors and certain official creditors who possess a functional immunity and a *de facto* 'preferred creditor' status in sovereign debt restructuring (SDR).[15]

Therefore, this chapter examines these issues and how they relate to socio-economic rights. Apart from locating socio-economic rights in SDA, it will attempt to demonstrate a paradigm shift in sovereign debt governance through adjudication: The increasing expansion of private creditors' options to other international law regimes which, first, reveals the changing dynamics of SDAs from espousal claims to investment treaty arbitration (ITA) and human rights-based claims and, second the cross-

12 O Lienau 'The challenge of legitimacy in sovereign debt restructuring' (2016) 57 *Harvard International Law Journal* 151-214.

13 Relevant literature that discussed related issues include F Lupo-Pasini 'Financial disputes in international courts' (2018) 21 *Journal of International Economic Law* 1-30; Crow & Escoba (n 4) 87-118; S Steininger 'What's human rights got to do with it? An empirical analysis of human rights references in investment arbitration' (2018) 31 *Leiden Journal of International Law* 33-58.

14 N Briercliffe 'Holding investors to account for human rights violations through counterclaims in investment treaty arbitration' (2017) 1-3, http://www.jdsupra.com/legalnews/holding-investors-to-account-for-human-59713/ (accessed 23 August 2019).

15 S Schadler 'The IMF's preferred creditor status: Does it still make sense after the Euro crisis?' 1-8, https://www.cigionline.org/sites/default/files/cigi_pb_37_1.pdf (accessed 23 August 2019).

regime interaction as evidenced by the recognition of socio-economic rights-based counter-claims in ITA.

Because official creditors do not usually resort to adjudication in the event of default, the present chapter will be limited to three classes of sovereign debt cases all connected to private creditors: state-state espousal claims, ITA and human rights-based claims.[16] The following factors were used as the case selection criteria: the sovereign debt crisis that provides the factual and contextual basis for instituting the debt recovery claim; the existence of one or more features of sovereign debt as conceptualised in this book; the existence of a sovereign respondent; the raising of socio-economic rights-related defences by the sovereign respondent; and the elements of debt recovery in the substantive creditor claims. Thus, espousal claims by creditors' home countries, investment treaty arbitration and human rights-based cases satisfy these criteria. However, pronouncements of mixed claims commissions do not, for instance, satisfy most of these criteria and, therefore, are excluded from the case review part.

Before delving into these categories, however, the next part the chapter will contextualise SDA within the broader transnational legal theories of adjudication in line with the stakeholder approach to sovereign debt governance. The part will demonstrate the multifunctionality of SDA, arguing that it goes beyond mere dispute resolution as it involves an exercise of public authority that might directly affect the realisation of socio-economic rights. It will examine the main reasons behind the increasing internationalisation of bondholder litigation, on the one hand, and the paucity of state-state SDA, on the other. Part 3 will then examine the espousal of claims by creditors' home states ('state-state SDAs') and related official creditors' issues in relation to socio-economic rights.

Part 4 will examine the non-official creditors' approach with a specific focus on ITA and human rights-based creditor claims. It will examine the attitudes of arbitrators towards socio-economic rights using specific cases. It will also briefly examine the viability (and perhaps suitability) of the emerging trend of invoking specialised human rights courts by private creditors for the determination of their sovereign debt claims. Using these cases from the three forms of SDA, part 5 will identify and examine the

16 Cases before domestic courts are excluded here. See, however, the case of Russia against Ukraine – *Law Debenture Trust Corp plc v Ukraine* 2017 EWHC 655. See also H Yu 'Official bondholder: A new hold-out creature in sovereign debt restructuring after vulture funds' (2017) 16 *Washington University Global Studies Law Review* 535; WMC Weidemaier 'Contract law and Ukraine's $3 billion debt to Russia' (2016) 1-11, http://ssrn.com/abstract=2725178 (accessed 15 June 2019).

emerging trends and adjudicators' attitudes towards socio-economic rights in sovereign debt governance.

2 Sovereign debt adjudication: Theories, forms and scope

It is worth recalling here that there currently is no specific international tribunal vested with jurisdiction over sovereign debt claims largely because of normative hybridity and the absence of a legal framework on SDR. This vacuum contributes to the rising hold-out and vulture funds litigations.[17] It allows these creditors to invoke or choose from multiple domestic and international adjudicating fora to enforce their claims.[18] Thus, SDA is a specie of international adjudications.[19] This, arguably, makes it a complex form of adjudication. SDA may arise either following events of default and restructuring or following disagreement over the interpretation of terms or application of loan contracts. Regarding the former, SDA is initiated to determine hold-out creditors' claims against sovereign debtors or to question regulatory measures adopted by the sovereign debtor following any default to return the country to debt sustainability.[20] Adjudication helps to clarify contractual terms and obligations. Thus, the form that a SDA takes would depend upon the prescribed governing law and the dispute settlement mechanism (DSM) set out in the relevant clauses of the loan contract, definitive bonds and/or investment treaty commitments of the concerned debtor nation.

However, notwithstanding the forum/jurisdiction clause contained in the contract, the possible invocation of multiple DSMs presents practical and theoretical challenges worthy of examination here. In particular, the multiplicity of adjudicative fora and their potentially conflicting jurisprudence could blur the contours of SDA. Conceiving this form of adjudication as an instrument exclusively in the hands of parties to

17 MR Mauro 'Sovereign default and litigation: *NML Capital v Argentina*' (2014) 24 *Italian Yearbook of International Law* 249; Weidemaier & Gelpern (n 9) 4-8.

18 K Oellers-Frahm 'Multiplication of international courts and tribunals and conflicting jurisdiction – Problems and possible solutions' (2001) 5 *Marx Plank Yearbook of UN Law* 67-104.

19 AO Sykes 'Public versus private enforcement of international economic law: Standing and remedy' (2005) 34 *Journal of Legal Studies* 631; T Schultz 'The concept of law in transnational arbitral legal orders and some of its consequences' (2011) 2 *Journal of International Dispute Settlement* 59; R Michaels 'A fuller concept of law beyond the state? Thoughts on Lon Fuller's contributions to the jurisprudence of transnational dispute resolution – A reply to Thomas Schultz' (2011) 2 *Journal of International Dispute Settlement* 417.

20 M Goldmann 'Foreign investment, sovereign debt, and human rights' (2018) 2-20, https://ssrn.com/abstract=3103632 (accessed 23 March 2019).

sovereign debt contracts, such as other transnational adjudications, might negate the public policy elements and multiplicity of interests inherent in sovereign debt governance.

2.1 Theorising 'sovereign debt adjudication': A stakeholder perspective

Sovereign debt dispute is a form of international financial dispute.[21] The Permanent Court of International Justice (PCIJ) famously remarked that a 'dispute' arises where there is a 'disagreement on a point of law or fact, a conflict of legal views or interests between two persons'.[22] Romano considers 'international dispute' broadly as any dispute involving a sovereign state.[23] It is a dispute 'between two or more parties, at least one of which, the defendant, will be a state or an individual acting on behalf of a state … [with a DSM] … specifically designed to monitor and enforce the obligatory rules of the regime'.[24]

Although sovereign debt disputes tend to have some political elements, the focus here is on the legal aspect of such disputes that often lead to adjudicatory decisions. In this context, a disagreement between parties to a sovereign debt contract must be a legal conflict capable of being resolved by an adjudicative body to qualify as a justiciable sovereign debt dispute.[25] This means that such a dispute must be specific with respect to the subject

21 Lupo-Pasini classifies international financial disputes into four groups: '(i) contractual disputes concerning the violation of contractual commitments by the sovereign, such as the restructuring of a sovereign bond; (ii) supervision disputes, which concern a supervisory measure affecting a financial institution, such as the decision of a bank supervisor to remove a bank's CEO or to impose fines; (iii) resolution and insolvency disputes, which deal with a range of measures adopted in the context of a crisis; (iv) "other" disputes, which include government measures affecting the life of a financial institution but that are not motivated by a regulatory or commercial reason. Such measures broadly include, the privatisation of the financial sector, expropriations in the context of war, or broad emergency measures during a crisis'. See Lupo-Pasini (n 13) 10.

22 *Mavromattis Palastine Concession (Greece v UK)* (1924) PCIJ Series A 11; *Abaclat & Others v The Argentine Republic* (2013) 52 ILM 667 (reference is to the ICSID electronic report available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5313_En&caseId=C95 (accessed on 12 November 2017) (*Abaclat* case or '*Abaclat* (Majority') para 255; *Case Concerning East Timor* (1995) *ICJ Reports* 89, 99.

23 CPR Romano 'From the consensual to the compulsory paradigm in international adjudication: Elements for a theory of consent' NYU Public Law Research Paper (2006) 3-61, http://ssrn.com/abstract=893889 (accessed 12 December 2022).

24 RO Keohane and others 'Legalised dispute resolution: Interstate and transnational' (2000) 54 *International Organisation* 459.

25 UN Charter 1945 art 36(3).

matter; it must be specific with respect to the claim of rights or grievance complained of; the claim must be made against, and specifically resisted or denied or counter-claimed by a recognised international subject; and it must be capable of engaging the jurisdiction of an adjudicative body established 'by inter-governmental agreement … or by agreement between a national government and a foreign private entity, where the court is legally situated either fully or partly outside the national juridical and governmental system of any state'.[26]

From the above, a sovereign debt dispute must be capable of being resolved through adjudication. Adjudication, however, is one among several available DSMs.[27] Broadly, 'adjudication' is a form of third-party social ordering that usually is in the form of arbitration and judicial settlement.[28] It is designed to ensure social cohesion and to establish justice through dispute resolution and affirmation of societal normative expectations.[29] It is 'a device which gives formal and institutional

26 *South China Sea Arbitration (Philippines v China)* (2016) PCA Case 2013-19. See also N Grossman 'The normative legitimacy of international courts' (2013) 86 *Temple Law Review* 61-105; N Krisch 'The decay of consent: International law in an age of global public goods' (2014) 108 *American Journal of International Law* 1-40; E Benvenisti & S Agon 'The law of strangers: The form and substance of other-regarding international adjudication' (2018) 9-21, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013014 (accessed 23 June 2019); K Kingsbury 'International courts: Uneven judicialisation in global order' (2011) 1-6, http://ssrn.com/abstract=1753015 (accessed 23 June 2019).

27 RB Bilder 'An overview of international dispute settlement' (1986) 1 *Emory Journal of International Dispute Resolution* 4.

28 SW Schill 'The overlooked role of arbitration in international adjudication theory' (2015) 4 *European Society of International Law Reflections* 1-6; SD Franck and others 'Inside the arbitrator's mind' (2017) 66 *Emory Law Journal* 1117-1178; EA Posner & JC Yoo 'Judicial independence in international tribunals' (2005) 93 *California Law Review* 1-74; J Bingham 'Reasons and reasons for reasons: Differences between a court judgment and an arbitration award' (1988) 4 *International Arbitration* 141-154.

29 Adjudication is sometimes used synonymously with judicial settlement. In a broad jurisprudential sense, however, adjudication goes beyond judicial settlement. See Romano (n 23) 2-4; Landes & Posner (n 10) 236-240; Keohane and others (n 24) 461; M Wood 'Choosing between arbitration and a permanent court: Lessons from inter-state cases' (2017) 32 *ICSID Review* 1-16. Fuller opines thus: '[A]djudication in the very broadest sense includes a father attempting to assume the role of judge in a dispute between his children over possession of a toy. At the other extreme it embraces the most formal and even awesome exercises of adjudicative power: a Senate trying the impeachment of a President, a Supreme Court sitting in judgment on the powers of the government of which it is a part, an international tribunal deciding a dispute between nations … It includes adjudicative bodies which owe their powers to the consent of the litigants expressed in an agreement of submission, as in labour relations and in international law. It also includes tribunals that assume adjudicative powers without the sanction either of consent or of superior governmental power.' See LL Fuller

expression to the influence of reasoned argument in human affairs'.[30]

Thus, an adjudicative decision would arise from reasoned arguments advanced by the disputing parties.[31] In the words of Fuller, 'adjudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments'.[32] The participation is not in the form of a blanket demand or defence, but by way of a meaningful assertion or denial of rights supported by facts and legal principles.[33] In other words, a key, distinctive feature of adjudication is the determination of claims of rights by allowing the affected parties to actively participate in the process leading up to the decision. The effects of such decision, however, may extend beyond the parties depending upon the form and structure of such adjudication as well as the regime or the controlling legal setting within which it operates.[34] The parties' respective reasoned positions must meet 'the peculiarly urgent demand of rationality' in order to persuade the third-party adjudicator.[35] This, in a sense, confers legitimacy on the adjudicating process. Other legitimacy-conferring factors include the adjudicator's source of authority, the governing or applicable law and the final acceptance of, or compliance with, the outcome.[36]

However, the issue of legitimacy of international adjudication is not uncontroversial. This is because, unlike the domestic system of adjudication, international adjudication is not controlled by a specific constitutional system. In other words, unlike the relatively well-ordered, structured, centralised and hierarchically-organised domestic system, international adjudication is largely horizontal, operating in a generally authority-deficient legal order with multiple, often uncoordinated, courts

'Forms and limits of adjudication' (1978) 92 *Harvard Law Review* 357; Paulus (n 5) 1-10 (noting that '[c]lassical international dispute settlement consists in the resolution of a dispute between two or more parties by a neutral third party, ideally a court or an arbitral tribunal, in an adversarial procedure on the basis of international law').

30 Fuller (n 29) 357; Helfer & Slaughter (n 5) 320-378.

31 Fuller notes thus: 'Three aspects of adjudication that seem to present distinct qualities are in fact all expressions of a single quality: (i) the peculiar mode by which the affected party participates in the decision; (ii) the peculiarly urgent demand of rationality that the adjudicative process must be prepared to meet; and (iii) the fact that adjudication finds its normal and "natural" province in judging claims of right and accusations of fault.' See Fuller (n 29) 369.

32 Fuller (n 29) 369.

33 As above.

34 Fuller (n 29) 357.

35 Fuller (n 29) 369.

36 T Treves 'Aspects of legitimacy of decisions of international courts and tribunals' (2017) 38 *Seqüência (Florianópolis)* 19-42.

and tribunals driving it.[37] These tribunals are not uniformly structured. Most of them do not have compulsory jurisdictions.[38] Their principal mandates or jurisdictions vary in terms of their respective constitutive instruments.[39]

Scholars have advanced different typologies to explain international adjudication. For instance, Born divides it into 'first generation' and 'second generation' adjudications, distinguished largely by a tribunal's jurisdictional reach and functional effectiveness.[40] Helfer and Slaughter distinguish between 'international adjudication' and 'supranational adjudication'.[41] The latter enables a tribunal to establish an enforcement linkage with the domestic legal system.[42] Along the same line, Keohane and others distinguish between 'interstate' and 'transnational adjudication'.[43]

There are various theoretical propositions about the functions, significance and objectives of these forms of adjudication. For instance, the private law-inspired consent theory conceives international adjudication as an agency relationship between the disputing parties, on the one hand, and the tribunal, on the other. Hence, the latter is exclusively a dispute resolution forum subject to the will of the disputing parties.[44] In this sense, adjudication simply is the result of delegation of authority to the tribunal.[45] Another variety of the consent theory considers adjudicators as trustees rather than agents.[46] One of the key elements of this theory is that adjudication is monofunctional, that is, its function is simply to settle disputes.[47]

37 KJ Alter 'The evolving international judiciary' (2011) 2-8, http://ssrn.com/abstract=1859507 (accessed 25 October 2018); Shelton (n 5) 537.

38 Romano (n 23) 3-6; Born (n 5) 775-879.

39 Shelton (n 5) 537.

40 Born (n 5) 775-879.

41 Helfer & Slaughter (n 5) 289-290.

42 LR Helfer & AM Slaughter 'Why states create international tribunals: A response to Professors Posner and Yoo' (2005) 93 *California Law Review* 899-956 (noting that supranational tribunals are those that allow direct access by private parties).

43 Keohane and others (n 24) 457-458.

44 Romano (n 23) 3-5; CH Brower 'The functions and limits of arbitration and judicial settlement under private and public international law' (2008) 18 *Duke Journal of Comparative and International Law* 259-310.

45 Keone and others (n 24) 459.

46 KJ Alter 'Agents or trustees? International courts in their political context' (2008) 14 *European Journal of International Relations* 33-63.

47 AV Bogdandy & I Venzke 'Beyond dispute: International judicial institutions as lawmakers' (2011) 12 *German Law Journal* 979-1004 (Bogdandy & Venzke 2011); AV Bogdandy & I Venzke 'In whose name? An investigation of international

Ironically, the consent theory reflects the idea of sovereignty. This is because a tribunal cannot be seized of jurisdiction except with the prior consent of the state party concerned. Support for this theory can be found in the declaration of PCIJ that 'no state can, without its consent, be compelled to submit its disputes … to arbitration, or any other kind of pacific settlement'.[48] This view is often extended to the monofunctionality perspective of international adjudication.[49] It implies that international courts and tribunals are continuously dependent on the parties' consent as their ultimate source of legitimacy, authority and jurisdiction. Therefore, their pronouncement must be strictly limited to the parties involved and the issues they raised.[50] This also finds expression in international commercial arbitration (ICA) and ITA.[51] As will be discussed subsequently, the latter is regime-specific adjudication designed to offer an impartial dispute

courts' public authority and its democratic justification' (2012) 23 *European Journal of International Law* 7-41 (Bogdandy & Venzke 2012); AV Bogdandy & I Venzke 'On the functions of international courts: An appraisal in light of their burgeoning public authority' (2012) 1-20, http://ssrn.com/abstract=2084079 (accessed 3 June 2018) (Bogdandy & Venzke 2012b); I Venzke 'The role of international courts as interpreters and developers of the law: Working out the jurisgenerative practice of interpretation' (2011) 34 *Loyola International and Comparative Law Review* 99-131; SW Schill 'System-building in investment arbitration and law making' (2011) 12 *German Law Journal* 1083-1110.

48 *Status of Eastern Carelia* Advisory Opinion (1923) PCIJ Series B 27.

49 Posner & Yoo (n 28) 6-28. See also Helfer & Slaughter (n 5) 273; Helfer & Slaughter (n 42) 899; EA Posner & JC Yoo 'Reply to Helfer and Slaughter' (2005) 93 *California Law Review* 957-973. Ginsburg & McAdams observe: '[I]nterstate dispute resolution originated in ancient times … It was particularly well developed in the form of arbitration among the ancient Greek city-states. The Greeks attributed the origin of arbitration to the gods of Olympia, whose interactions paralleled the relations among city-states. Arbitration was sometimes carried out by intergovernmental organisations, known as *amphictyones*, which were formed among several states that shared religious sites, as well as by city-states. Competition between multiple potential arbitrators meant that there was some incentive for the arbitrators to signal accurately … The arbitrators did not rely on centralised enforcement, but on persuasion and reason for legitimacy. We do not know precisely how many of these decisions were enforced, but there does seem to be evidence that many of them were complied with in the absence of centralised enforcement. In the modern period, an important juncture in the development of routinised procedures for international dispute resolution was the *Alabama* arbitration between the United States and Britain, concluded in 1872.' See T Ginsburg & RH McAdams 'Adjudicating in anarchy: An expressive theory of international dispute resolution' (2003) 45 *Williams and Mary Law Review* 1229-1339. See also HT King & JD Graham 'The origins of modern international arbitration' (1996) 51 *Dispute Resolution Journal* 48; HS Fraser 'Sketch of the history of international arbitration' (1926) 11 *Cornell Law Review* 179-208.

50 Posner & Yoo (n 28) 6-7; cf Helfer& Slaughter (n 5) 910-915; Brower (n 44) 265.

51 Schill notes: 'Investment treaty arbitration, therefore, is an adjudicatory process that has little in common with commercial arbitration … Investment treaty disputes therefore involve core issues of public law in any area touching upon economic policy-making.' See Schill (n 47) 1084.

resolution mechanism in disputes between foreign investors and their host state pursuant to free trade pacts or international investment agreements (IIAs). On the other hand, ICA involves adjudicating cross-border commercial disputes outside the investment treaty regime.[52]

Although the consent theory reflects CIL, it is, however, too restrictive and functionally questionable as it reduces tribunals' functions to only dispute resolution (that is, monofunctionality). Also, it is purely state-centric in its approach as it mainly operates in the shadow of inter-state adjudication. It, arguably, ignores the reality of universal values shaping adjudication and the increasing internationalisation of trade, finance and investments occasioned by the irresistible forces of economic globalisation. The latter phenomenon enables individuals to operate on the same level as states in their commercial undertakings. Furthermore, the theory also ignores the corresponding proliferation of international tribunals established to address complex legal problems arising from these issues and phenomenon. The form and content of the 'consent' is also unclear, thereby raising some concerns about the genuineness of such consent.[53]

Thus, contrary to the consent theory, compulsory jurisdiction is becoming common today as many tribunals' jurisdictions are 'triggered often, and in certain cases solely, unilaterally'.[54] Indeed, even 'arbitration, which for centuries has been a quintessential consensual exercise, has … been increasingly resorted to unilaterally'.[55] The world has become a 'community of law' where the 'participants – both individuals and institutions – understand themselves to be linked through their participation in, comprehension of, legal discourse'.[56]

Adjudication in this 'community of law' reflects the desire to manage the complex diversity of actors and their interests on the global stage. States interact with different non-state actors with varying interests and powers and this 'web of potential relationships between private parties, supranational entities, and domestic government institutions lies at the heart of supranational adjudication'.[57] This aligns more with the evolving

52 Schill (n 47) 1084.

53 DN Cinotti 'How informed is sovereign consent to investor-state arbitration' (2015) 30 *Maryland Journal of International Law* 105-117.

54 Romano (n 23) 5.

55 Romano (n 23) 5-10.

56 Helfer & Slaughter (n 5) 289-297.

57 As above.

global governance regimes and with the transnational legal theories that explain the transformative role of law in a globalised society.[58]

Therefore, in functional terms, international tribunals have become global institutions with immense jurisprudential clout.[59] There is growing consensus suggesting a paradigm shift away from a monofunctional understanding of adjudication to public law theory built around the notions of multifunctionality, global cosmopolitanism, common human values and collective communitarian interests.[60] Tribunals are multifunctional actors that strengthen the legitimacy of legal regimes and exercise public authority affecting the rights of individuals and shaping the expectations of global actors and their communities.[61] International adjudicative institutions derive their legitimacy not only from the consent of the parties, but from their exercise of public authority as institutions administering justice 'in the name of the peoples and the citizens'.[62] They are multifunctional actors because their decisions 'contribute to the stabilisation and development of the law [and they] review and legitimise the authority exercised by other actors on different levels of government – be it the authority of international or domestic bodies'.[63] In exercising their jurisdiction, they can (and often do) 'affect the freedom of others in pursuance of a common interest'.[64] In the same vein, they affect individuals and institutions through their law-making function.[65]

In the context of sovereign debt dispute, adjudications can, both directly and indirectly, affect a state's capacity to fulfil its socio-economic rights commitments. Indeed, creditor litigations could impact the fiscal capacity of debtor states.[66] Apart from the huge cost of such adjudication, the judgment or award (as the case may be) could disrupt sustained financing of socio-economic rights-based programmes of the debtor state.

58 P Zumbansen 'Transnational private regulatory governance: Ambiguities of public authority and private power' (2013) 76 *Law and Contemporary Problems* 117-138.

59 Bogdandy & Venzke 2011 (n 47) 979-1004.

60 Bogdandy & Venzke 2012 (n 47) 7-20.

61 I Venzke 'Investor-state dispute settlement in TTIP from the perspective of a public law theory of international adjudication' (2016) 1-12, http://ssrn.com/abstract=2742173 (accessed 24 July 2019).

62 Schill (n 28) 5.

63 Venzke (n 61) 5-7.

64 Bogdandy & Venzke 2012 (n 47) 7-41.

65 This aligns with the international public authority approach to sovereign debt governance. According to Venzke 'public authority [is] a capacity … to affect others in the exercise of their freedom in pursuit of a common interest'. See Venzke (n 61) 5-6.

66 J Schumacher and others 'Sovereign defaults in courts' (2018) 33-35, https://ssrn.com/abstract=2189997 (accessed 14 June 2019).

In addition, international tribunals' decisions and law-making function are increasingly being seen as global public goods.[67] This is because of their features of transparency, law clarification and adaptation, and implicit authority in shaping normative expectations of global actors.[68] The tribunals, arguably, have become law makers in their own rights through interpretation and application of treaties and dispute resolution function even in the absence of an institutionalised *stare decisis* doctrine.[69] The evolution and application of rules with the support of *stare decisis*-like reverence further supports the judicialisation of different regimes of international law, including the sovereign debt regime.

While acknowledging the difficulties of extending this public law, multifunctional understanding to ITA, Schill argues for an integrated theory of international adjudication because of the increasing judicialisation of the investment treaty regime.[70] The integrated theory seeks to tie investment arbitration to the public law theory. The move to establish an investment court system under the Transatlantic Trade and Investment Partnership (TTIP) lends support to the integrated approach.[71]

However, the multifunctionality effect seems to be the same in both permanent and *ad hoc* tribunals, specific or general regimes, commercial arbitration or ITA. Therefore, it would be an oversimplification to consider tribunals' function as that of exclusively resolving parties' disputes. The practices of most investment arbitration institutions support the multifunctionality approach. First, the formal recognition of *amicus curiae* briefs in these forms of adjudication dealt a blow to the party-exclusivity argument as non-parties have now been recognised as participants often advancing reasoned arguments to help in the final determination of claims.[72] Through this, for instance, citizens' socio-economic rights'

67 J Paine 'International adjudication as a global public good?' (2018) 29 *European Journal of International Law* 1223-1249.

68 Paine (n 67) 1233-1243.

69 Venzke (n 61) 2-5. In *Saipem Spa v Bangladesh* the tribunal held that 'it has a duty to seek to contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of states and investors towards certainty of the rule of law'. See *Saipem v People's Republic of Bangladesh* (2009) IIC 378 (ICSID) para 67.

70 Schill (n 28) 6 (noting that '[i]ntegrated theories of international adjudication would benefit both permanent courts and international arbitration and become the framework for a fruitful cross-fertilisation between both forms of international adjudication').

71 Venzke (n 61) 7-24; C Titi 'The European Union's proposal for an international investment court: Significance, innovations and challenges ahead' (2016) 1-44, http://ssrn.com/abstract=2711943 (accessed 25 June 2019). See also *AES v Argentine Republic* (2005) 12 ICSID Report 308; *Saipem v People's Republic of Bangladesh* (n 69).

72 L Bastin '*Amici curiae* in investment treaty arbitration: Eight recent trend' (2017) 30 *Arbitration International* 126.

concerns have found a direct entry point into ISDS.[73] This also aligns with the stakeholder approach to sovereign debt governance which includes anonymous bondholders, taxpayers and civil society organisations as stakeholders in the sovereign debt regime.[74]

In fact, the legitimacy crisis facing ISDS, and the limited regulatory space granted to states on public policy grounds, are connected to the monofunctionality and party-exclusivity position of the private governance paradigm. These, among others, have led to increasing agitation for the reform of the ISDS regime.[75] The growing trend now is the establishment of an investment court system that, invariably, would incrementally and formally judicialise the investment treaty regime with explicit treaty interpretation and law-making functions. As will be argued later, unless a human rights approach is adopted, these functions could negatively affect non-parties such as debtor's citizens, thereby undermining their status and their rights. Hence, tribunals are now striving to accommodate these concerns.

Finally, the inherent public policy elements and treaty-based dynamics in modern trade, finance and investment relationships make it implausible to limit the adjudicative function exclusively to the parties' objectives or interests in these and other areas. This does not underrate the requirement of consent in adjudication.[76] It only accommodates a broader, functional perspective in line with state practice and global imperatives.

Therefore, arising from the above, SDA should be understood in the context of the peculiar nature of sovereign debt itself as well as within the context of the broader multi-stakeholder approach to sovereign debt governance and the multifunctional public law theory of adjudication. This is because, first, in sovereign debt, creditors comprise both public and private entities. This creates the possibility of employing both interstate and transnational (that is, at the instance of private creditors) adjudications.

73 *Ubaser v Republic of Argentina* (2012), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf (accessed 9 August 2018).

74 I Bantekas 'The emergence of an international law of sovereign debt and insolvency' (2014) 3 *International Human Rights Law Review* 161-163.

75 See, eg, A Roberts 'Incremental, systemic, and paradigmatic reform of investor-state arbitration' (2018) 1-24, https://ssrn.com/abstract=3189984 (accessed 14 June 2019); S Puig & G Shaffer 'Imperfect alternatives: Institutional choice and the reform of investment law' (2018) 112 *American Journal of International Law* 361-409; UN Commission on International Trade Law (UNCITRAL) United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration 2015; UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (2014).

76 *Alemanni v Argentine Republic* (2014) paras 284-285. https://www.italaw.com/sites/default/files/case-documents/italaw4061.pdf (accessed 14 March 2018).

Thus, like investment arbitration and interstate adjudication, public international law principles would ineluctably become applicable and employable by parties to buttress their 'reasoned' or 'urgent rationality'. Importantly, there are certain common, shared human values that cannot simply be shelved aside in these forms of adjudication without impeaching the latter's legitimacy. This concerns both interstate and transnational adjudications. As states become agents of common, community interests of humanity and their citizens, international tribunals have now assumed an objective role of 'arbiters of international public or community interests … [filling] gaps in positive international law to advance human values and of balancing state rights and individual rights'.[77]

Second, although most creditors' primary objective in employing adjudication is to recover their unpaid claims, in the context of sovereign debt, the diversity of creditors and their distinct and sometimes conflicting interests in the event of default raise intercreditor concerns. Official creditors rarely employ adjudication to enforce their claims.[78] Most multilateral creditors, for instance, enjoy a *de facto* preferred creditor status.[79] This, in part, explains their non-resort to adjudication.

Third, as noted earlier, the absence of a statutory legal framework for SDR means that there is no regime-specific system of SDA.[80] It, thus, is a fragmented, patchwork of different systems of adjudication: national, regional, transnational and international. Domestic courts often vested with jurisdictions in nonofficial loans or bonds, but enforcement of the resulting judgment has always been challenging despite the practice of waiving sovereign immunity by debtors.[81] Thus, permanent, *ad hoc* and other regime-specific international and transnational adjudicatory mechanisms (for instance, ISDS, ICA, human rights courts, and so forth) have become potentially employable by creditors, subject, of course, to relevant treaty or contractual limitations as may be determined at the jurisdiction and admissibility stage.

77 Paulus (n 5) 5.

78 See, however, *Law Debenture Trust Corp Plc v Ukraine* (n 16).

79 Schadler (n 15) 1-8.

80 The League of Nations' proposed International Loans Tribunal could not see the light of day. Ever since, there has been no significant effort to establish one. See Waibel (n 3) 324-326.

81 F Ahmed and others 'Lawsuits and empire: On the enforcement of sovereign debt in Latin America' (2010) 73 *Law and Contemporary Problems* 39-46; Schumacher and others (n 66) 3-30.

Finally, despite the functional/jurisdictional variations of international tribunals and the non-applicability of *stare decisis*, there is growing consensus that their pronouncements have 'guiding' effects in subsequent cases across different regimes.[82] In investment arbitration, for instance, this is leading to what now is referred to as 'arbitral common law', thereby further concretising the judicialisation process.[83] For instance, in *Saipem v Bangladesh*, the tribunal held thus:

> [The tribunal] has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[84]

This position seems to agree with the 'community of law' proposition.[85] It also captures the reality of multifunctional adjudication and the stakeholder approach to sovereign debt governance that considers courts and tribunals as critical stakeholders in the sovereign debt regime. By following 'solutions established in a series of consistent cases', arbitrators are shaping normative expectations and building a coherent jurisprudence.[86] In the words of Stone, 'arbitral tribunals are actively engaged in building *jurisprudence*: a judge-made, precedent-grounded, law of investment arbitration, created in order to stabilise (potentially explosive) strategic environments, to entrench specific frameworks of argumentation, and to legitimise their own law making'.[87] The 'laws' emanating from this process are, *ab initio*, conscious, consent-based but outside the direct control of the states. Indeed, the ITA system simply is 'the reasoning of law professors', ironically driving a judicialisation process without a judiciary.

The public, multifunctional theoretical approach finds expression in the areas of human rights, finance, and investments laws. Adjudication in these areas occurs within treaty-based dispute settlement frameworks that, depending upon the purpose, could be a state-state (interstate) or an ISDS framework or both.[88] As will be elaborated later, most dispute settlement frameworks in finance and investment are provided under IIAs

82 AS Stone 'Arbitration and judicialisation' (2011) 1 *Onati Socio-Legal Series* 3-21.

83 Stone (n 82) 7.

84 *Saipem* case (n 69) para 67.

85 Helfer & Slaughter (n 42); Helfer & Slaughter (n 5).

86 Stone (n 82) 7.

87 As above.

88 UNCTAD *Dispute settlement: State-state* (2003) 3-21.

or investment chapters of free trade agreements (FTAs).[89] Even among these treaties, there are variations in the designs of the DSM frameworks reflecting states' consensual law-making desires.[90] However, most IIAs share a common clause exempting regulatory controls on account of necessity, public interests and public order. This is not a treaty design only. It is a CIL principle in general international law extended to both the established and the evolving regimes.

2.2 Contours of sovereign debt adjudication

Having theorised international sovereign debt adjudication as a multifunctional, decentralised adjudicatory system, it is appropriate to draw its contours in order to identify the relevant tribunals and the suitable cases for review here. From the above discussion, a logical inference is the fact that sovereign debt adjudication is mostly initiated by hold-out creditors against their debtors to recover the value of their debts following events of default. The adjudicative forum, governing law and DSM are usually defined and limited by the contractual documents and/or treaties depending upon the character of the parties and the nature of the contract. Usually, official loans prescribe arbitration as the preferred DSM while non-official loans and bonds prescribe either judicial settlement or arbitration before domestic adjudicative forum, especially in London or New York or, in some cases, adjudication by way of commercial arbitration. In this respect, SDA is a matter of contract design.[91]

Thus, third party arbitration and judicial settlements could be employed by both official and non-official creditors to enforce their claims. However, arbitration appears to be more convenient as it, comparatively, offers more advantages for creditors.[92] Not surprisingly, today arbitration clauses are gaining more grounds in sovereign debt contracts.[93] For official creditors, other possible adjudicating fora would be the International Court of Justice (ICJ) and mixed-claims commissions.[94] In practice, however, official creditors rarely resort to SDA. Hence, while there is a paucity of state-state SDA, reported cases on international financial institution (IFI)-state SDA are hard to come by. The reason for this situation, as will be

89 UNCTAD (n 88) 8.

90 UNCTAD (n 88) 12.

91 Waibel (n 3) 253.

92 KH Cross 'Arbitration as a means of resolving sovereign debt disputes' (2006) 17 *American Review of International Arbitration* 337-338.

93 Waibel (n 3) 211-212.

94 Waibel (n 3) 252-270.

examined later, may not be unconnected to the functional immunity and the preferred creditor status of some multilateral creditors.

While there is little or no increase in official creditor litigation activities, there is a significant increase in nonofficial creditor litigation activities.[95] An express waiver of sovereign immunity contributes to the rising wave of this form of litigation.[96] Recently, ITA (through the ICSID and the UN Commission on International Trade Law (UNCITRAL)), regional economic courts and human rights tribunals have become additional sovereign debt adjudicative fora as non-official creditors seek for effective debt collection mechanisms, thereby expanding their possible options to other regimes of international law. This is not free from challenges. For instance, although a sovereign is almost always the defendant/respondent in both creditor claims and human rights cases, there are fundamental substantive and procedural variations in these types of cases.[97] While human rights complaints are adjudicated in regime-specific tribunals (usually regional human rights courts), creditor claims enjoy no such regime-specific tribunals. Nevertheless, we have seen cross-regime interactions especially in the interpretation and application of relevant provisions of treaties and principles of law.[98] As creditors' expansion to other regimes has opened the doors for increased forum shopping, it has also opened the doors for more cross-regime interactions.

In the context of investment arbitration, Goldman identifies two forms of SDAs.[99] The first is where hold-out creditors reject any debt restructuring or haircut and, instead, seek full repayments of their debts through the courts or tribunals. The second involves a situation where 'investors holding investments in the real economy attack individual measures taken by the host state in the context of a debt crisis [… which] focus on the question whether the debt crisis provides sufficient justification for the chosen course of regulatory action'.[100] The latter might be called a 'debt crisis' approach to SDA.

95 Schumacher and others (n 66) 30-35. Of course, there had been mixed claim commissions and state-state cases of sovereign debt adjudications in the past. See, eg, *Germany & Ond others v Venezuela* (*Preferential Claims* case) 1904 Tribunal of the Permanent Court of Arbitration; LM Drago 'State loans in their relation to international policy' (1907) 1 *American Journal of International Law* 692.

96 Schumacher and others (n 66) 1-3. See also *Republic of Argentina v Weltover Inc* (1992) 504 US 607.

97 Eg, the character of the claimants, contractual basis of creditors' claims, etc.

98 As seen in *Urbaser v Argentina* (2016) ICC 904 which will be examined in the next part.

99 Goldmann (n 20) 6.

100 As above.

From the above analysis, four varieties of SDAs may be identified. First, there is espousal of claims initiated by creditors' home government against a sovereign debtor. This is strictly a state-state SDA although it would have been needless without the private creditors' interests as the basis of the actual complaint. Second, there are SDAs initiated by hold-out creditors in domestic courts pursuant to the loan contract or bonds.[101] This is by far the most widely employed because of its simplicity, clear contractual basis and domestic law advantage. However, because of the character of the debtor, enforcing resulting judgments has always been problematic. Third, there are SDAs initiated by hold-out creditors through ITA or other systems of international adjudication solely with the aim of rejecting or frustrating a debt restructuring deal and reclaiming the full value of the original debts.[102] This too is problematic especially because of its unsettled legal basis and a series of legitimacy concerns confronting it.[103] Fourth, there are SDAs also initiated by way of investment arbitration to challenge regulatory measures by sovereign debtors as a result of an impending or actual sovereign debt crisis.[104] The latter are the 'debt defence' cases that host states usually invoke to reject such claims.[105] The problem here is that these cases are similar to a typical investment treaty claim.

Except the first variety of SDA that may not necessarily result from debt default, all the other cases are usually triggered by events of default and the ensuing crisis that usually lead to the adoption of remedial measures by the sovereign debtor desperate to return to debt sustainability. Indeed, as will be examined subsequently, the fourth category of SDA essentially is an investor-host state dispute usually triggered by measures adopted to address sovereign debt crisis. All four categories, however, fit into our stakeholder approach to sovereign debt governance.

Importantly, the public-private element in sovereign debt governance, which is visible in the enforcement of claims against sovereign debtors, contributes to these variations.[106] However, for reason of scope, the case reviews here will focus only on the few international SDAs. Domestic SDAs that are usually adjudicated in the courts of creditor nations are excluded. This is because, first, including domestic SDAs will require a broader conception of sovereign debt to include both domestic and external debts.

101 Schumacher and others (n 66) 5-35.

102 Goldmann (n 20) 6.

103 See, eg, Park & Samples (n 9) 1033; Hopwood (n 9).

104 Goldman (n 20) 6.

105 As above.

106 Waibel (n 3) 19-20; Schumacher and others (n 66) 2-19.

Second, it will be simply impossible to review and determine attitudes of adjudicators or draw any discernible trend in cases emanating from diverse domestic jurisdictions on SDAs. As rightly observed by the ICJ in the *Norwegian Loan* case, 'in matters of … international loans the decisions of courts of various countries … have not been characterised by such a pronounced degree of uniformity and certainty as to permit a forecast'.[107] In plain reality, the cases would be unmanageable. Third, as indicated in the previous chapter, the creditor nations' positions favour the private law paradigm with a creditor-diktat narrative that is unquestionably biased against sovereign debtors and overlooks socio-economic rights considerations and exogenous elements visible in sovereign financing.

Therefore, for the above reasons, the focus here will be on the three internationalised forms of SDA: espoused creditors' claims, ITA-based sovereign debt cases and human rights-based debt claims.

3 Socio-economic rights and SDAs by official creditors

As noted above, SDAs at the instance of official creditors are rare today.[108] Up to the early twentieth century, state-state resolution of sovereign debt crisis involved multiple approaches including, notably, the resort to the use of force, gun-boat diplomacy and forced receivership. In the past, SDD was regarded by some scholars as a just cause of war.[109] These were practical, extra-legal solutions lacking grounding in legal principles and rule of law imperatives.[110] In the words of Weidemaier, 'formal legal enforcement was virtually unavailable to sovereign lenders during the early twentieth century'.[111]

However, with the adoption of the Second Hague Convention on the Limitation of the Employment of Force for the Recovery of Contract Debts (Recovery of Contract Debt Convention/Drago Porta Convention),

107 *Case of Certain Norwegian Loans (France v Norway)* (1957) ICJ Report paras 46-47, https://www.icj-cij.org/files/case-related/29/029-19570706-JUD-01-00-EN.pdf (accessed 12 August 2018).

108 C Gray & B Kingsbury 'Developments in dispute settlement: Inter-state arbitration since 1945' (1992) 63 *British Yearbook of International Law* 97-134. The *Law Debenture* case was decided by a domestic court.

109 K Mitchener & WMC Weidenmier 'Supersanctions and Sovereign Debt Repayment' National Bureau of Economic Research Working Paper 11 (2005); WMC Weidemaier 'Contracting for state intervention: The origins of sovereign debt arbitration' (2010) 73 *Law and Contemporary Problems* 338-341.

110 Weidemaier (n 109) 338.

111 As above.

states began to exercise some restraint.[112] By this Convention, according to the ICJ, 'an intervening power [creditor nation] must not have recourse to force before it has tried arbitration'.[113] Thus, following World War I, resort to extra-legal approaches reduced dramatically as states began to use the courts and arbitral tribunals to resolve sovereign debt disputes mostly through diplomatic protection and mixed claim commissions.[114] Dispute resolution became more formalised.

The general sense of 'rule of law' was further reinforced following World War II. Indeed, human rights standards were significantly incorporated into the evolving international dispute resolution mechanisms. However, since the late 1950s, official bilateral debts are usually resolved through non-adjudicatory means in Paris Club or through bilateral negotiations that, as argued in the previous chapter, have little or no regard for the socio-economic rights obligations of debtor and creditor nations respectively.[115] This further explains the paucity of state-state SDAs in recent decades.

In addition, the compulsory jurisdiction of the ICJ can only be invoked in interstate disputes or by way of diplomatic protection upon fulfilment of certain conditions.[116] For instance, the case initiated in 2014 by Argentina against USA at the ICJ titled 'Dispute concerning judicial decisions of the

112 The key provisions of this Convention are: 'The contracting powers agree not to have recourse to armed force for the recovery of contract debt claims from the government of one country by the government of another country as being due to its national. This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration, fails to submit to the award. 1. It is further agreed that the arbitration mentioned in the forgoing Article shall be subject to the procedure laid down in Part IV, Chapter III, of the Hague Convention for the Pacific Settlement of International Disputes. The award shall determine, except where otherwise agreed by the parties, the validity of the claim, the amount of the debt, and the time and mode of payment.' See Articles 1 and 2 of the International Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts (Haue II) (adopted 18 October 1907).

113 *Norwegian Loans* case (n 107) para 24.

114 See, eg, *Preferential Treatment of Claims of Blockading Powers v Venezuela* 1904 PCA (22 February 1904), http://www.pca-cpa.org/showpage.asp?pag_id=1029 (accessed 12 August 2018). This reflects the creditor diktat narrative. See Ahmed and others (n 81) 40-42; WMC Weidemaier 'Sovereign debt after *NML v Argentina*' (2013) 8 *Capital Markets Law Journal* 123-131; WMC Weidemaier & M Gauthier 'Venezuela as a case study in limited (sovereign) liability' (2017) 2-10, https://ssrn.com/abstract=2882835 (accessed 12 August 2019).

115 CP Enrique 'Paris Club: Intergovernmental relations in debt restructuring' in H Barry and others (eds) *Overcoming developing country debt crisis* (2010) 234.

116 ICJ Statute (n 7) arts 34 & 36.

USA relating to the restructuring of the Argentine sovereign debt' could not proceed because the USA did not consent to the Court's jurisdiction.[117]

3.1 State-state SDAs and socio-economic rights: Espousal of creditors' claims

Notwithstanding the rarity of state-state SDAs, there are a few reported espoused debt cases worthy of consideration here.[118] These cases will be briefly examined to gauge the changing trend in SDA. As hinted earlier, the focus will be on the espousal of private creditors' claims by their home states.[119] The espousal of private claims is sometimes referred to as 'diplomatic protection' or 'diplomatic intercession'.[120] It is a state-state action instituted to secure redress of alleged wrong done to a state's citizens (individuals and corporations).[121] According to Koessler, it is an

117 In its request, Argentina 'contends that the United States of America has committed violations of Argentine sovereignty and immunities and other related violations as a result of judicial decisions adopted by US tribunals concerning the restructuring of the Argentine public debt'. See ICJ 'Press Release No 2014/25: The Argentine Republic seeks to institute proceedings against the United States of America before the International Court of Justice. It requests US to accept the Court's jurisdiction' (2014), https://www.icj-cij.org/files/press-releases/4/18354.pdf (accessed 10 August 2018); A Deutsch 'Argentina seeks legal case against US in the Hague', https://uk.reuters.com/article/uk-argentina-debt-usa-courts/argentina-seeks-legal-case-against-u-s-in-the-hague-idUKKBN0G724U20140807 (accessed 10 August 2018).

118 It is important to recall the peculiarity of the recent case between Russia and Ukraine (*Law Debenture Trust Corp plc v Ukraine*) that raised issues of responsible lending by official creditor under public international law. Ukraine contended that Russia compelled it into the contract 'on onerous terms' and, consequently, it was entitled to repudiate same on account of duress, *ultra vires* and internationally wrongful acts of Russia that impeded performance of the contract. Although socio-economic rights issues were not directly raised in defence, Ukraine argued that the debt was contracted by a Russian puppet government that lacked capacity to do so under the Ukrainian budget law. Weidemaier describes the case as 'a garden-variety debt enforcement case … [which] is unique in the annals of sovereign debt litigation'. See Weidemaier (n 16) 1-7. The trial court based its reasoning on English law of contract and entered a summary judgment against the sovereign debtor. Interestingly, it held that 'once a state is recognised as such, as a matter of international law, it has unlimited capacity to borrow, and such capacity is recognised under English law' (para 129-130). On the defence of duress, the Court held that it is one of the 'core examples of issues upon which domestic courts should refrain from adjudicating' as it would be inappropriate to adjudicate on 'rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law' (paras 295iv & 307x). On appeal, the UK Court of Appeal held that the defence of duress could avail a sovereign debtor to repudiate the debt based on the UN Charter. However, the Supreme Court disagreed on this point. See *Ukraine v Law Debenture Trust Corp Plc* (2023) UKSC 11.

119 Bjorklund (n 5) 123.

120 M Koessler 'Government espousal of private claims before international tribunals' (1946) 13 *Chicago Law Review* 180-194.

121 Koessler (n 120) 180.

interposition grown out of feudal representation of a serf (who lacked legal standing) by his lord in the court of the baron.[122] Thus, 'its peculiarity is based on the fact that the claim of a private person, normally without judicial standing as against a foreign state, is espoused by a state and thus converted into a government claim which will be heard by the appropriate international tribunal'.[123]

Indeed, investment arbitration claims are likened to delegated espousal claims.[124] In other words, ITA emerged partly to address the deficiencies of state-state espousal claims by enabling investors to initiate direct claims against states. A few cases will be reviewed here.

3.1.1 Russia v Turkey (Russian Indemnities case)

This case arose out of a delay in paying war indemnities and certain monetary claims of Russian citizens in Turkey.[125] While Russia contended that it was a state-state debt, Turkey argued that the claim was inadmissible as individual Russian subjects were the direct creditors of the principal sum. The tribunal rejected Turkey's objection.[126]

Despite Turkish payments of the debts by instalment following the financial crisis of 1881-1902, Russia demanded interests to cover the delayed period. Turkey contested the claim for interests as falling outside the original indemnity agreement. Accepting this obligation, Turkey reasoned, would make a sovereign debtor a 'debtor to a greater extent than it would have desired, and would risk compromising the political life of the state, by injuring its vital interests, overturning its budget, by preventing it from defending itself against an insurrection'.[127] In the event liability is found, however, Turkey urged the tribunal to exempt it on ground of *force majeure* because of its financial crisis of 1881-1902 that forced it to delay the payment.[128] Russia countered that during the same crisis period Turkey had paid bigger debts to other creditors. However, it agreed in principle that 'the obligation of a state to fulfil treaties may give

122 As above.

123 As above.

124 Bjorklund (n 5) 123-125.

125 *Russian Claim for Interest on Indemnities (Russia v Turkey)* 1912 PCA 1-15 para 9, https://pcacases.com/web/sendAttach/643 (accessed 10 August 2018).

126 *Russian Indemnity* case (n 125) paras 3-4.

127 *Russian Indemnity* case (n 125) para 2.

128 *Russian Indemnity* case (n 125) para 6.

way if the very existence of the state should be in danger, if the observance of the international duty is … "self-destructive"'.[129]

The tribunal held that, through the parties' correspondence, Russia had implicitly renounced its claim to interests.[130] Absent this renunciation, however, the tribunal held that Turkey was liable under international law to pay interest for delayed payments of the principal debts. It stated:

> [T]he general principle of the responsibility of states implies a special responsibility in the matter of delay in the payment of a monetary debt … If a state is condemned to compensatory interest damages … for the non-fulfilment of an obligation, it is a debtor to a degree which it may not have voluntarily stipulated, even more so … in the case of delay in the payment of a conventional monetary debt. Moreover, *however little the responsibility may imperil the existence of the state, it would constitute a case of force majeure which could be pleaded in public international law as well as by a private debtor'*.[131]

However, the tribunal rejected the defence of *force majeure* because Turkey repaid other comparatively larger loans without any peril to its existence.[132] Nevertheless, the tribunal held, *obiter*, that Turkey had proved that 'from 1881 to 1902, [it was] in the midst of financial difficulties of the utmost seriousness, combined with domestic and foreign events (insurrections, wars) which forced it to make special disposition of a large part of its revenues … and, generally, it could satisfy its obligations only through delay and postponements, and even then at great sacrifice'.[133]

The tribunal clearly recognised the idea of sovereign debt moratorium on account of financial crisis, recognising the dilemma of satisfying competing obligations at the same time. The determining factor for the tribunal was the weighing of competing debt obligations. In other words, where the amount covering debt servicing would be so huge as to negatively impact the continued functioning of vital public services, its suspension might be excused. It should be admitted that the tribunal did not refer to socio-economic rights in any way. This, however, is understandable because at the time of the award these rights were not legally recognised at the international level. Nevertheless, the tribunal recognised debt moratorium to finance vital state interests. It alluded to the prioritisation of obligations by sovereign debtor based, among others,

129 As above.

130 *Russian Indemnity* case (n 125) para 9.

131 *Russian Indemnity* case (n 125) para 4 (my emphasis).

132 *Russian Indemnity* case (n 125) para 6.

133 *Russian Indemnity* case (n 125) para 6.

on Turkey's argument to avert risks of compromising its 'political life', 'injuring its vital interests' and 'overturning its budget'. In today's context, it could be argued, non-implementation or relegation of socio-economic rights would have posed similar risks.

3.1.2 Great Britain v Costa Rica (Tinoco Arbitration)

This was an espousal claim concerning the validity of sovereign debts advanced to the Tinoco government by the Royal Bank of Canada and the Central Costa Rica Petroleum Company, both British corporations with British shareholders.[134] The successor of the Tinoco government nullified the debts by an Act of Parliament because the debts contravened the pre-Tinoco Costa Rican Constitution, hence the agreement to submit to arbitration. The British government, on behalf of its citizens, claimed that the loans were valid having been contracted by both the *de facto* and the *de jure* government of Costa Rica while the Costa Rican government contested these claims. No sovereign debt crisis accompanied this dispute, hence no socio-economic rights-related concerns/issues were raised. The whole case centred around the validity of the loan and not obligations arising from it.

However, in invalidating the loan, the sole arbitrator conceived a valid sovereign debt as one incurred to advance a legitimate governmental purpose that, invariably, in today's context, would include fulfilling socio-economic rights obligations. The arbitrator found that the lender did not advance the money 'to the government for its legitimate use' but for the personal use of the retiring President Tinoco and his brother.[135] In other words, for a sovereign loan to be valid and recoverable it must be obtained 'for legitimate government purposes' not for 'personal and unlawful uses' by state officials.[136]

Although the arbitrator did not consider any socio-economic rights-related issues, he developed a fundamental creditor responsibility theory that is relevant today. Under this theory, to be entitled to repayment, a creditor must establish that the debt in issue was incurred for a 'legitimate government purpose' which, for the present purpose, would include general and specific governmental operations and commitments towards the citizens. This fits into the concept of responsible lending under the

134 *Aguilar-Amory and Royal Bank of Canada Claims (Great Britain v Costa Rica)* 1923 1 UN Report of International Arbitration Awards 369-399, 394, http://legal.un.org/riaa/cases/vol_I/369-399.pdf> (accessed 11 January 2019) (*Tinoco Arbitration*).

135 *Tinoco Arbitration* (n 134) 394.

136 As above.

Principle for Responsible Sovereign Lending and Borrowing (PRSLB). The PRSLB considers borrowing governments as agents who must protect their citizens' interests.[137] Indeed, the notion of 'legitimate government purpose' has become part of the ongoing efforts to address the legitimacy crisis facing the sovereign debt regime today.[138]

3.1.3 Belgium v Greece (Belgium Bank case)

This was also an espousal claim against Greece filed at PCIJ.[139] Belgium claimed that Greece had failed to satisfy an arbitral award on payments of its debt to a Belgium bank (Societe Commerciale de Belgium) thereby violating its international obligations.[140] The claim arose out of the non-payment of a loan originally advanced to finance the construction of rail. The loan was considered as part of Greece's external debt.[141] Greece defaulted owing to the 1932 financial crisis.[142] The loan contract provided for arbitration in the event of disputes, hence, the creditor took the matter of non-payment to arbitration and obtained an award which Greece failed to settle insisting, instead, that it is part of its external debt.[143] While acknowledging its obligation to repay the debt, Greece argued that 'by reason of its budgetary and monetary situation, however, it is materially impossible for the Greek Government to [do so]'.[144] In other words, repayment should be based on 'budgetary and monetary capacity of the debtor'.[145] It was impossible to pay because of Greece's financial position and a prior SDR with its bondholders preventing discrimination against certain creditors.[146]

137 PRSLB (n 11) Principles 1 & 8.

138 O Lienau 'Who is the sovereign in sovereign debt: Reinterpreting a rule-of-law framework from the early twentieth century' (2008) 33 *Yale Journal of International Law* 63-111; O Lienau 'The challenge of legitimacy in sovereign debt restructuring' (2016) 57 *Harvard International Law Journal* 151-214.

139 *Societe Commerciale de Belgium (Belgium v Greece)* (1939) PCIJ Judgment Series A/B 160-179 (*Belgium Bank*), https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_AB/AB_78/01_Societe_commerciale_de_Belgique_Arret.pdf (accessed 12 August 2018).

140 *Belgium Bank* (n 139) 164.

141 *Belgium Bank* (n 139) 165-166.

142 *Belgium Bank* (n 139) 166.

143 *Belgium Bank* (n 139) 169.

144 *Belgium Bank* (n 139) 164.

145 *Belgium Bank* (n 139) 165.

146 *Belgium Bank* (n 139) 171.

PCIJ did not make pronouncement on these issues due to objections on grounds of *res judicata* and abandonment of the claims.[147] Nevertheless, the Court noted, *obiter*, that negotiating repayment between Greece and the private creditor was outside its jurisdiction but, were such negotiation to happen, it would be 'highly desirable' to have regard to 'Greece's capacity to pay'.[148] The Court noted that it could not invite the parties 'to agree upon an arrangement corresponding to the budgetary and monetary capacity of the debtor [nor can it] indicate the bases for such an arrangement'.[149]

Although technical issues prevented the Court from making a pronouncement on the defences of impossibility of performance and *force majeure*, it seems that the Court was receptive to the idea and expressed sympathy with Greece. Not surprisingly, no socio-economic rights issues were raised given the time the case was brought, as in the *Russian Indemnities* case.

3.1.4 French Loan cases: Serbian, Brazilian and Norwegian Loan cases

These cases were initiated by the French government on behalf of French bondholders through espousal procedure. The cases fall under the first form of SDA (that is, espousal claims) because they, almost entirely, focused on resolving conflicting interpretations regarding the actual currency for the debt servicing under the respective bonds. Nevertheless, they raised some fundamental issues worthy of consideration here.

In the first, the *Serbian Loan* case, for instance, the French bondholders contended that the debt servicing was to be done according to a gold standard while the Serbian government argued that it was to be done according to the prevailing legal tender in France (that is, the Franc).[150] Although no socio-economic rights considerations were raised, the Serbian government raised impossibility of performance (that is, following depreciation of the value of the French currency) according to the gold standard as demanded by the bondholders as a defence. In a split decision, PCIJ rejected the defence and held that the contractual documents evidenced an intention to pay according to the gold standard to avoid

147 *Belgium Bank* (n 139) 174-175.

148 *Belgium Bank* (n 139) 178.

149 *Belgium Bank* (n 139) 176-177.

150 *Case Concerning the Payment of Various Serbian Loans issued in France (France v Serbia)* 1929 PCIJ Judgment Series *A* 5-49 (*Serbian Loan* case), https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_20/62_Emprunts_Serbes_Arret.pdf (accessed 12 August 2018).

possible currency devaluation.[151] With respect to the effect of World War I, it held thus:

> It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian government and the French bondholders. *The economic dislocations caused by the war did not release the debtor state, although they may present equities which doubtless will receive appropriate consideration in the negotiations*.[152]

The Court considered the espousal procedure and held that 'by taking up a case on behalf of its nationals before an international tribunal, a state is asserting its own right – that is to say, its right to ensure in the person of its subjects, respect for the rules of international law'.[153] Finally, it held that municipal law governs sovereign bonds and 'a state is entitled to regulate its own currency … so long as it does not affect the substance of the debt to be paid and does not conflict with the law governing such debt'.[154]

Similarly, in the *Brazilian Loan* case, the facts of which were on all fours with the *Serbian Loan* case, the PCIJ held that 'the economic dislocation caused by the Great War has not, in legal principle, released the Brazilian government from its obligations'.[155] This, without doubt, was influenced by the private law paradigm that arguably ignores the public elements inherent in sovereign debt.[156] It was held that there was no impossibility of performance due to currency fluctuation as the parties intended to apply the gold standard.[157] Importantly, subsequent sovereign debt adjudications were significantly influenced by the *Serbian Loan* and *Brazilian Loan* cases.

151 See Bustamante J *Serbian Loan* case (dissenting opinion), https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_20/62_Emprunts_Serbes_Arret_1.pdf (accessed 12 August 2018); Pessoa J *Serbian Loan* case (dissenting opinion), https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_20/62_Emprunts_Serbes_Arret_2.pdf (accessed 12 August 2018); Novacovics J *Serbian Loan* case (dissenting opinion), https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_20/62_Emprunts_Serbes_Arret_3.pdf (accessed 12 August 2018).

152 *Serbian Loan* case (n 150) para 40 (my emphasis).

153 *Serbian Loan* case (n 150) para 17.

154 *Serbian Loan* case (n 150) paras 42-43.

155 *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil)* 1929 PCIJ Judgment 15, 93-126 (*Brazilian Loan* case) para 120.

156 Pessoa and Bustamante JJ gave dissenting opinions.

157 *Brazilian Loan* case (n 155) para 126.

Finally, in the *Norwegian Loan* case the French government raised similar questions of interpretation with regard to the debt servicing currency.[158] The Court characterised the dispute as 'intrinsically international' because '[t]he question of the treatment by a state of property rights of aliens – including property rights arising out of international loans – is a question of international law'.[159] It held that the Hague Convention of 1907 relating to contract debts 'indirectly recognises that controversies of [this] character are suitable for settlement by reference to public international law' and that the Convention specifically mentioned disputes 'arising from contract debts' as suitable for arbitration.[160]

Unlike the pre-World War II cases, there was no reference to *force majeure* defence here. There also was no reference to any human rights instrument. Nevertheless, the Court recognised the hybridity of norms (that is, at both the national and international levels) in the sovereign debt regime. It equally did not emphasise the strict private, contractualist paradigm that creditors often invoke to reject any socio-economic rights-based considerations.

In all three cases, therefore, the courts were influenced by the dominant private law paradigm. However, in the *Serbian Loan* case, the Court speculated that 'in the second phase of the proceedings [that is, the parties' agreed post-judgment arbitration], considerations of equity and necessity may come into account'.[161] Thus, given a similar situation today, the court might probably not adopt such an approach partly because of the strong influence of human rights considerations in international adjudication and the significant evolution of the sovereign debt regime over the years, especially the hybridity of norms and the adoption of soft laws. This perhaps might explain the position of the ICJ in the case of *Guinea v Democratic Republic of the Congo* (DRC).

3.1.5 Guinea v Democratic Republic of the Congo (Diallo case)

This is a peculiar espousal claim initiated at the ICJ covering complex issues of debt recovery, expropriation of investments and violations of human rights.[162] The Republic of Guinea filed a diplomatic protection

158 *Norwegian Loan* case (n 107) para 9.

159 *Norwegian Loan* case (n 107) paras 37-38.

160 *Norwegian Loan* case (n 107) paras 37-38.

161 *Norwegian Loan* case (n 107) para 20.

162 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* 2010 ICJ Reports 639 (*Diallo* case); *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Preliminary Objections, Judgment, 2007 ICJ Reports 582, 588 (*Diallo*

claim on behalf of its citizen (Mr Diallo) at the ICJ claiming, among others, that the DRC had committed wrongful acts engaging its international responsibility by not paying debts owed to 'Guinea in the person of its national' and his companies.[163] Mr Diallo was arrested, detained and removed from the DRC for demanding payment of the debts. Accordingly, Guinea asked for reparation and compensation. The DRC objected on the ground of non-exhaustion of local remedies and the fact that Guinea cannot espouse a claim for recovery of debts in the name of companies registered in DRC. It argued that Mr Diallo was removed partly because of his

> increasingly exaggerated financial claims against Zairean public undertakings and private companies operating in Zaire … [as] … the total sum claimed by Mr Diallo as owed to the companies run by him came to over 36 billion United States dollars … which represents nearly three times the [DRC's] total foreign debt.[164]

The DRC argued that Mr Diallo's removal was therefore justified on grounds of public order.[165] While rejecting diplomatic protection by substitution on behalf of the DRC companies of Mr Diallo (that is, due to their separate legal personality), the ICJ held that diplomatic protection could be extended to cover the enforcement of guaranteed human rights.[166] Therefore, Guinea was entitled to assert the direct rights of its national who is an investor in another country where he had exhausted local remedies.[167] In the words of the Court:

> Owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights.[168]

Although the court declines pronouncement on the debt claims on account of the separate legal personality principle, this case implicitly

objection), https://www.icj-cij.org/files/case-related/103/103-20070524-JUD-01-00-EN.pdf (accessed 12 August 2018).

163 *Diallo objection* (n 162) 588.

164 *Diallo* case (n 162) para19.

165 *Diallo* case (n 162) para 81.

166 *Diallo* case (n 162) para 39.

167 *Diallo* case (n 162) para 65.

168 *Diallo* case (n 162) para 39. However, the Court noted: 'The Court is bound to note that, in contemporary international law, the protection of the rights of companies

confirms the important place of human rights in espousal claims for debt recovery. In fact, from debt recovery and investment guarantees, the case, surprisingly, was transformed into a human rights protection action with copious references to, and reliance on, human rights as *jus cogens* as well as the Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Civil and Political Rights (ICCPR). There was no reference to the International Covenant on Economic, Social and Cultural Rights (ICESCR), although the right to dignity, which is common to both Covenants, was examined. In particular, it referred to article 5 of the African Charter on Human and Peoples' Rights (African Charter) and held that 'the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on states in all circumstances, even apart from any treaty commitments'.[169] This confirms the *jus cogens* status of human rights. However, no issues of socio-economic rights of debtor's citizens were raised at all. This might be because of the peculiar nature of the claim.

3.1.6 Espousal of creditors' claims, SDR and socio-economic rights

From the above cases, socio-economic rights were not central to the espousal of creditors' claims over the years. Indeed, the pre-World War II cases were framed as contract-based claims governed by municipal laws. The defences raised, therefore, were anchored on such contracts. In particular, the defences of *force majeure* and impossibility of performance were raised. However, as the *Diallo* case shows, this trend is changing thanks to the remarkable evolution of human rights norms under treaties,

and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between states and nationals of other states, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between states and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty regimes do not exist or have proved inoperative.' See *Diallo* case (n 162) para 88. Of particular note is the separate opinion of Cancado Trindade J, arguing for a humanised approach beyond inter-state adjudication by the ICJ thus: '[*D*]*ignitatemvivere* surely stands above property rights … [The ICJ has] to pronounce on the rights of human person[s], beyond the inter-state straitjacket … [because] the state exists for the human being, and not vice-versa … [I]nternational tribunals should pursue their common mission – the realiation of international justice, [by engaging in] dialogue … to recover their faith in human justice … [T]hey will thus be striving towards securing to states as well as to human beings what they are after: the realisation of justice.' See *Diallo* case (n 162) (separate opinion of Cancado Trindade J) paras 18-22, 83-85, 93-106,185, 244-245.

169 *Diallo* case (n 162) paras 87 & 157.

CIL, general principles of law, and judicial decisions. There is a gradual recognition of the role that human rights can play in these forms of international adjudication. The *jus cogens* status of human rights has been acknowledged.

In addition, the fact that both parties in espousal claims are states means that situating the preeminence of their socio-economic rights obligations within this class of SDAs would not be entirely implausible. Although issues related to these rights were not directly raised in the above cases, the dilemma facing sovereign debtors in debt default was acknowledged by the courts. In addition, the *Diallo* case hints at a gradual paradigm shift towards 'humanity principle' that might allow socio-economic rights to be invoked in future state-state debt claims. This type of claim may not preclude the invocation of the socio-economic rights obligations of parties to such disputes, that is, where both are signatories to ICESCR. This would extend to their extraterritorial responsibilities. It is not a case of enforcing rights against businesses (that is, the original, private creditors asking intervention of their state). It concerns direct socio-economic rights responsibilities of the states concerned and this extends to the extraterritorial application of these rights as provided under the Maastricht Principles.

3.2 IFIs and socio-economic rights in SDA

Before examining the other two forms of SDA, it is important not to overlook the role of IFIs in SDA. Although IFIs have the capacity to initiate claims in international tribunals, there are no reported cases in which they seek to enforce any debt claims against their member sovereign borrowers.[170] The enforcement of sovereign debt by IFIs is governed by their articles of agreement, operational policies and relevant loan contracts.[171] Of course, there are notable variations in their approaches to enforcement depending on the objectives and operational frameworks of each IFI. The IMF, for instance, does not initiate adjudication to enforce payments of its outstanding credits. This is because, first, the IMF is a 'collateralised bilateral swap agent',

170 The ICJ stated that it was 'established that the Organization has capacity to bring claims on the international plane'. See *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion (1949) ICJ Reports 184-185 (*Reparation of Injuries* case). This applies to all IGOs, and they can sue to enforce obligations owed to them by states. See also ILC Report of the UN Special Rapporteur (Giorgio Gaja) on Responsibility of International Organisations (2008).

171 ICJ Statute (n 7) arts 34(1) & (2).

hence, technically, its borrowers cannot default.[172] Its credits are uniquely designed to address balance of payment problems and this is effected through the purchase-repurchase currency exchange arrangement.[173] They are more of 'swaps' than loans. The implication is that, unlike bonds and typical loans, IMF credits are internationalised, treaty-based currency swap arrangement outside the province of any municipal contract law. The executive directors perform a quasi-judicial function by interpreting the articles of agreement's provisions on members' special drawing rights.[174]

In addition, IMF enjoys a *de facto* preferred creditor status.[175] This is a payment priority accorded to IMF. While other creditors face looming uncertainty, struggling to enforce their claims probably through adjudication, the IMF is assured of repayment.[176] The preferred creditor

172 I Kaminska 'Why you can't technically default on the IMF' *Financial Times* 16 July 2015, https://www.ft.com/content/b089b708-7914-3fb0-861f-54b8dc9038c1 (accessed 20 November 2023).

173 Members draw on IMF's pool of members' currencies and special drawing rights through a purchase-repurchase mechanism. The member purchases either special drawing rights or the currency of another member in exchange for an equivalent amount (in special drawing rights) of its own currency; the borrowing member later reverses the transaction through a repurchase of its currency held by the IMF with special drawing rights or the currency of another member. See Articles of Agreement of the IMF (as amended 2016) art XXII.

174 The special drawing rights is the 'principal reserve asset of the international monetary system'. It is an interest-bearing reserved asset created in 1969 and serves as a unit of account held by the IMF and its members. The value of special drawing rights is measured by a basket of major, usable currencies (ie dollar, pounds, Euro, Renmenbi and Yen). Members' special drawing rights allocations reflect their respective quotas (shareholding). A member can freely exchange its special drawing rights allocation for a usable currency to settle balance of payment problem. See IMF Articles of Agreement (amended 2016) arts XV-XXIII. In particular, art XXIX(c) requires submission to arbitration only in the event of member's withdrawal or disagreement on interpretation after resort to the Executive Board and Board of Governance: 'Whenever a disagreement arises between the Fund and a member which has withdrawn, or between the Fund and any member during liquidation of the Fund, such disagreement shall be submitted to arbitration.' The Articles of Agreement provide that a member's disagreements with the Board on special drawing rights or withdrawal 'shall be submitted to arbitration'. See IMF Articles of Agreement arts XXII & XXIX(c) & (d)*;* IMF By-Laws, Rules and Regulations (2016) sec 23.

175 PR Wood 'Debt priorities in sovereign insolvency' (1982) 1 *International Financial Law Review* 4; S Schadler 'The IMF's preferred creditor status: Questions after the Eurozone crisis' (2018) 1-6, https://voxeu.org/article/imf-preferred-creditor-status-and-eurozone-crisis (accessed 11 June 2019); S Schadler 'Unsustainable debt and the political economy of lending: Constraining the IMF's role in sovereign debt crises' (2013) 2-6, https://www.cigionline.org/sites/default/files/no19.pdf (accessed 11 June 2019).

176 MJ Rutsel Silvestre 'Preferred creditor status under international law: The case of the International Monetary Fund' (1990) 39 *International and Comparative Law Quarterly* 801-826.

status is often justified on the ground that it offers protection to IMF's resources that it uses to rescue its indebted members. This, it is reasoned, is because IMF is

> the closest thing to an international lender of last resort … [and the] preferred status permits the IMF to help distressed countries formulate policies necessary for restoring economic stability and a manageable level of debt, and to have credibility-enhancing 'skin in the game' while putting its own financial resources at minimal risk.[177]

In practice, defaulting on this form of official loan is rare as debtors want to avoid being cast as pariahs, which might block their access to the debt markets.[178] In the words of Schadler, 'rarely has the IMF not been paid on time, and even less frequently has it not been fully repaid'.[179] Similarly, Woods reasoned that, as an internationalised debt, 'a default on IMF or World Bank debt is, in effect, a default towards more than 140 members of the international community'.[180]

However, it might be argued that this preference lacks legal basis and has been severely criticised as encouraging moral hazard while at the same time subordinating other creditors' claims.[181] IMF's Articles of Agreement does not expressly provide for this special status, but some scholars have

177 Schadler 2018 (n 175).

178 As above.

179 The Eurozone crisis challenged the relevance of this status. In 2011 the EU's European Stability Mechanism (ESM) recognises a form of 'next-in-line' preferred status as its 'loans to member states will enjoy [preferred creditor status] in a similar fashion to those of the IMF, while accepting [the preferred status] of the IMF over the ESM'. See Schadler 2018 (n 175) 1-5; *Chrysostomides & Others v Council of European Union & Others* Case T-680/13 (13 July 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013TJ0680&from=EN (accessed 12 August 2019).

180 Wood observes thus: 'In the case of the League Loans in the 1930s, the League Loans Committee argued for priority since they emphasised that the League Loans formed part of a powerful and useful reconstruction machine in the interests of all creditors and so were entitled to front rank. On the basis of this general principle (amongst others) it is invariably the case that debt owing to the IMF (usually obligations by the debtor to repurchase its currency originally sold for foreign currencies pursuant to a standby arrangement) is never rescheduled. IMF standbys are usually crisis short-term measures. They pave the way to recovery through conditionality, thereby encouraging parallel financing by banks. Article IX, Section 6, of the IMF Articles of Agreement provides: "[a]ll property and assets of the Fund shall be free from restrictions, regulations, controls and moratoria of any nature." World Bank debt is similarly treated.' See Wood (n 175) 8.

181 Rutsel-Silvestre (n 176) 801-810.

suggested that it is part of IMF's mandate to 'require adequate safeguards' for its resources.[182]

Although IMF does not resort to SDA, it has, however, shaped the debate about hold-out and vulture funds litigation behaviour in its bid to support an orderly restructuring.[183] Unfortunately, as argued in the previous chapter, IMF's somewhat strict contractualist stance enables these behaviours to fester as, for instance, the Principles for Stable Capital Flow require that creditors' contractual rights 'must remain fully enforceable' subject to their voluntary agreement for a restructuring through a prior collective action clause.[184] Its acclaimed apolitical nature relegates socio-economic rights considerations, especially in its debt sustainability standard.

The World Bank also prefers negotiation and disciplinary action by way of sanction and suspension of further disbursement and membership against a sovereign debtor who defaulted on its loan facilities rather than adjudication.[185] Its different loans and development financing agreements are generally internationalised. For instance, the World Bank's Revised General Conditions 2017 provide that the rights and obligations of the parties 'under the Legal Agreements shall be valid and enforceable in accordance with their terms notwithstanding the law of any state'.[186] These agreements often make provision for arbitration.[187] The logic is to minimise publicity. Indeed, third parties are explicitly excluded in that 'the parties to such arbitration shall be the [International Development] Association and the Recipient [borrower]'.[188] Like the IMF, the World

182 Schadler 2018 (n 175).

183 See, eg, UN BPSDR 2015 (n 11), UNCTAD SDWG 2015 (n 11), PRSLB 2012 (n 11), and IIF Principles for Stable Capital Flows and Fair Debt Restructuring (2013 updated April 2022), https://www.iif.com/Publications/ID/4887/The-Principles-for-Stable-Capital-Flows-and-Fair-Debt-Restructuring-April-2022-Update (accessed 20 October 2023); IMF Reforming the Fund's policy on non-toleration of arrears to official creditors (2015), http://www.imf.org/external/np/pp/eng/2015/101515.pdf (accessed 12 August 2018).

184 Principles for Stable Capital Flow (n 183) principle 3.

185 World Bank Group Revised IBRD and IDA General Conditions (2017), http://documents.worldbank.org/curated/en/577851500256855740/Revised-IBRD-and-IDA-General-Conditions (accessed 9 August 2018) (IBRD Revised General Conditions 2017); General conditions for IBRD financing (2017), https://policies.worldbank.org/sites/ppf3/PPFDocuments/ c67d8e10919544beabd87720cd23b825.pdf (accessed 9 August 2018).

186 IBRD Revised General Conditions 2017 (n 185) art IX sec 9.01.

187 IBRD Revised General Conditions 2017 (n 185) art IX sec 9.03.

188 IBRD Revised General Conditions 2017 (n 185) art IX sec 9.03(b).

Bank and most multilateral development banks enjoy functional immunity from local judicial proceedings, thereby raising accountability concerns.[189]

In summary, the fact that there are no SDAs at the instance of IFIs is explainable in terms of their operational structures as well as legal and historical factors. The vital point for the present purpose is that the preferred creditor status reduces the risk of default and the possibility of adjudication at the instance of multilateral official creditors. The implication is that there are no cases involving IFIs to review for the purpose of determining the attitude of adjudicators to socio-economic rights concerns. This, arguably, shields them from further judicial scrutiny and compounds the case for socio-economic rights responsibility of IFIs. In addition, their functional immunity hinders accountability.[190] Following a barrage of criticisms in this respect, IFIs have now developed some internal accountability mechanisms to enable them to align with human rights standards in their operations.[191] However, beside their ineffectiveness, these mechanisms lack legal teeth, thereby undermining the quest for IFIs' accountability in the sphere of socio-economic rights.[192]

Nonetheless, it is possible to raise socio-economic rights concerns in IFIs-states arbitration as both parties are responsible actors under international law although IFIs are not signatories to ICESCR. IFIs' role in supporting or undermining these rights has been debated extensively.[193] The challenge, however, is about establishing how their loan operations undermine these rights, that is, the causality and reasonable foreseeability of harm occasioned by their loan operations.[194]

189 UN Convention on the Privileges and Immunities of the Specialised Agencies (adopted 21 November 1947, entered into force 2 December 1948). See also DD Bradlow 'Using a shield as a sword: Are international organisations abusing their immunity?' (2017) 31 *Temple International and Comparative Law Journal* 45-68; DD Bradlow 'The World Bank, the IMF, and human rights' (1996) 6 *Transnational Law and Contemporary Problems* 47-90.

190 Bradlow 2017 (n 189) 53-60.

191 See IMF Making the IMF's independent Evaluation Office (EVO) operational (2000), http://www.imf.org/external/np/eval/evo/2000/Eng/evo.htm (accessed 9 August 2018); IBRD World Bank Inspection Panel, http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/Resolution1993.pdf (accessed 9 August 2018).

192 Bradlow 2017 (n 189) 45-68.

193 F Gianviti 'Economic, social and cultural rights and the International Monetary Fund', https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf (accessed 13 November 2023). See discussions on this in part 3.4.2 of ch 3.

194 Tooze (n 1) 230.

4 Private creditors, SDA and socio-economic rights

Unlike official creditors, bank creditors, institutional investors and bondholders frequently employ SDA in cases of sovereign debt defaults. Most reported SDAs were handed down by domestic tribunals of different jurisdictions; hence, as noted above, they are outside the scope of this book. It should be emphasised that while the waiver of sovereign immunity enables debtors to easily access the debt markets, it also exposes them to potential litigation.[195] The focus here will be on investment arbitration and human rights-based SDAs in the international arena.

4.1 Investment arbitration, SDA and socio-economic rights

Before delving into the specific cases, some context is important here. As examined above, investment treaty arbitration is different from *ad hoc* state-state arbitration and commercial arbitration. The most popular investment arbitration institutions are ICSID and UNCITRAL.[196] Apart from the institutional and procedural variations, there are not many differences between these institutions, especially with regard to their objectives of enabling more investments and empowering investors to question respondent states' decisions affecting their investments. For this reason, the arbitral decisions to be examined here are mostly from ICSID.

ICSID was established under the 1965 ICSID Convention as a self-contained, specialised DSM designed to avoid the difficulties of espousal procedure and to balance the interests of investors and host states.[197] It is, therefore, totally independent of the domestic legal systems of its members.[198] Thus, like the espousal of claims, it operates in the shadow of public international law. However, as will be examined later, the espousal

195 Schumacher and others (n 66) 2-19.

196 UNCTAD (n 88) 7-19; UNCTAD *Investor-state disputes: Prevention and alternatives to arbitration* (2010) 2-7.

197 The ICSID Convention provides that '[n]o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention'. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965) (ICSID Convention 1965) art 27. See also ICSID *History of the ICSID Convention: Documents concerning the origin and the formulation of the convention on the settlement of investment disputes between states and nationals of other states vol ii-1* (2009) 23-24 (ICSID History 2009); A Broches 'The Convention on the Settlement of Investment Disputes: Some observations on jurisdiction' (1966) 5 *Columbia Journal of Transnational Law* 261.

198 GR Delaume 'ICSID arbitration' in JDM Lew (ed) *Contemporary problems in international arbitration* (1986) 23-39.

of claims and ICSID arbitration are mutually exclusive under the ICSID Convention.[199]

Historically, for decades capital-exporting states desired an effective mechanism to protect the property rights of their nationals located in other countries.[200] Diplomatic protection was deeply politicised and, often, ineffective.[201] Following failures at the level of the United Nations (UN), the World Bank, tightly controlled by capital-exporting countries, decided to devise an alternative in line with its mandate of promoting economic development.[202] Accordingly, ICSID was established in 1966 by, and is still closely related to, the World Bank in its quest to encourage the inflow of foreign investments into developing countries and to promote economic development.[203] Apart from formulating the ICSID Convention, the World Bank, subject to the parties' choice of arbitrators, plays an important role in the constitution of arbitral panels and, to a large extent, funds ICSID.[204] It equally is a depository for members.[205]

Although this link between World Bank and ICSID seems to have been normalised, it may be argued that it raises a further legitimacy concern. Perhaps, as noted above, sovereign debt disputes of the types seen today mainly by way of activism by private creditors and state-owned investment vehicles were hardly contemplated at its conception.[206] Otherwise, the World Bank, being a global creditor institution itself, arguably, should not

199 ICSID Convention 1965 (n 197) arts 26 & 27. In its Commentary, ICSID observed thus: 'The Convention recognizes the right of a private party, within the limits laid down in the Convention, to proceed against a foreign State before an international arbitral tribunal in its own name, rather than seek the diplomatic protection of its national State or have that State bring an international claim. It would seem to be a natural concomitant of the recognition of the private party's right of direct access to an international jurisdiction, to exclude action by its national State in cases in which such access is available under the Convention; and the same would seem to be true in cases in which the private party is a defendant rather than a plaintiff. Since the exclusion of the national State rests on the premise that the other Contracting State will abide by the provisions of the Convention, the rule of exclusion is subject to an exception in the event that premise falls away; in that event the right to give diplomatic protection and to bring an international claim remains unaffected.' See ICSID History 2009 (n 197) 23-24.

200 M Sornarajah *International law on foreign investment* (2007) 18-22, 34-39.

201 Sornarajah (n 200) 18-39, 211-217.

202 ICSID History 2009 (n 197) 17; AF Lowenfeld 'The ICSID Convention: Origins and transformation' (2009) 38 *Georgia Journal of International and Comparative Law* 48-49.

203 Delaume (n 198) 23.

204 ICSID Convention 1965 (n 197) arts 17, 37-40.

205 ICSID Convention 1965 (n 197) art 73.

206 ICSID History 2009 (n 197) 6-12.

have been able to deliberately conceived and controlled a DSM in which other creditors, albeit private creditors, can directly sue their debtors.[207] This is, unarguably, a legitimacy concern because of the possibility, however remote, of partiality on the part of the World Bank in favour of fellow (private) creditors. Indeed, a similar concern was raised at the point of conception of ICSID, but it was uncritically rejected because, it was argued, neither the World Bank nor the ICSID was to function as an arbitrator or a conciliator.[208] In this regard, the World Bank reasoned thus: 'The fact that it [that is, World Bank] is a creditor of most of its members has never put its impartiality in question'.[209]

207 There is evidence suggesting that the WB had performed a 'direct adjudicatory' role prior to the establishment of the ICSID. Eg, preparatory to the establishment of the ICSID, the WB itself observed thus: 'The question was asked whether the establishment of the Center [ie ICSID] would not essentially amount to 'institutionalizing' the Bank's present activities in assisting in the solution of investment disputes … The present activities of the Bank … in the field of investment dispute settlement fall into three categories. The first comprises the two cases involving full scale conciliation, namely the Suez Canal Compensation and City of Tokyo Bonds cases … The second comprises a larger number of cases in which the President has undertaken to designate impartial arbitrators, umpires or experts in connection with the solution of existing or future disputes. The third category comprises instances in which the Bank seeks to help parties to disputes to agree on a method of solving their dispute outside the framework of the Bank, for instance by recourse to commercial arbitration ... One of the ideas underlying the present proposals is to relieve the Bank of some of the extra-curricular burdens it is from time to time asked to assume, and to transfer these burdens to an organ somewhat removed from, although linked to, the Bank. To that extent one could say that they aim at "institutionalizing" the Bank's present dispute settlement activities … The further question was asked whether establishment of the Center would not deprive parties to a dispute of the valuable possibility of requesting the services of the Bank … Establishment of the Center would not mean that the Bank could or would no longer act directly in connection with investment disputes. It would mean that the Bank would be in a position to be more selective and to limit its intervention.' See Note by the General Counsel transmitted to the Executive Directors (19 January 1962) in ICSID History 2009 (n 197) 6-12.

208 The then World Bank's General Counsel wrote: 'The question was also asked whether establishment of the Center might not involve the Bank in disputes with which it would prefer not to be concerned. At the present time, the Bank is free to accept or reject a request for its services in connection with dispute settlement ... It is true that the Center would not have the discretion which the Bank can now exercise. However, it is hard to see how this could be a source of embarrassment to the Bank. The proceeding in question, whether conciliation or arbitration, would not be conducted either by the bank itself or by the Center, but by conciliators or arbitrators selected from the roster of the Center or indeed, if the parties so decided, by persons outside the roster.' See Note by the General Counsel transmitted to the Executive Directors (19 January 1962) in ICSID History 2009 (n 197) 6-12.

209 Eg, World Bank's General Counsel wrote: 'The question was asked whether the fact that the Bank can itself be regarded as an 'investor' would not tend to raise doubts as to the impartiality of a Center sponsored by, and affiliated with, the Bank … The Bank is an international cooperative institution which lends funds for the benefit of its members which are also its shareholders. The fact that it is a creditor of most of

This self-validation seems to contradict the World Bank's own admission, at the time, that it had facilitated the resolution of certain financial disputes.[210] Indeed, the argument is even less persuasive today given the increasing resort to ICSID arbitration by private hold-out creditors to reclaim the full value of their debt.[211] Furthermore, the World Bank was well aware of the previous botched efforts to establish an international loans tribunal, hence, it could not have re-engineered this process without clear articulation of its objectives to its members.

The legitimacy concern notwithstanding, the original idea was to enable investors to have direct access to arbitral tribunals in the same way that state claimants have access to the ICJ.[212] The architects of ICSID believed that this would, on the one hand, allay the fears of investors by guaranteeing their rights and offering them a depoliticised, impartial and effective DSM and, on the other, enable developing states to attract much needed foreign capital for their economic development.[213] Although this seems to be a logical narrative for foreign direct investment (FDI), there is, however, little or no convincing empirical evidence to show a positive correlation between sovereign financing and the investment protection regime.[214]

Despite this legitimacy concern, ICSID tribunals have adjudicated over sovereign debt claims over the past two decades. The jurisdiction of ICSID tribunals in this regard is not uncontroversial. Article 25 of the ICSID Convention provides that 'the jurisdiction of the Centre [that is, ICSID] shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre'. The initial draft of this provision reads: 'The jurisdiction of the Center shall be limited to disputes between Contracting States and

its members has never put its impartiality in question. This would seem to be borne out by the requests addressed to the Bank by member governments for assistance in the solution of investment disputes. Apart from this, the administrative apparatus of the Center would not, as noted earlier, itself engage in conciliation or arbitration.' See Note by the General Counsel transmitted to the Executive Directors (19 January 1962) in ICSID History 2009 (n 197) 6-12.

210 ICSID History 2009 (n 197) 6-12.

211 In 2017 alone, 65 ITA cases were initiated. See UNCTAD *World investment report* (2018) 91.

212 ICSID History 2009 (n 197) 1-3.

213 Report of the Executive Directors on the Convention (10 September 1964) 6-14 in ICSID History 2009 (n 202) 606-607; note by A Broches, General Counsel, transmitted to the Executive Directors paras 1-7, in ICSID History 2009 (n 202) 1-3.

214 Note by A Broches (n 213) para 12.

nationals of other Contracting States and shall be based on consent.'[215] Such consent 'may be evidenced by an undertaking of such party … or by the acceptance by such party of the jurisdiction of the Center in respect of a dispute submitted to it by another party'.[216]

Under the ICSID Convention, consent to arbitration excludes other remedies, although a state may require exhaustion of local remedies as a precondition for its consent.[217] Consent to arbitration precludes diplomatic protections or the espousal of private claims.[218] The method of expressing such consent was not clear at inception.[219] ICSID tribunals often refer to provisions on consent to arbitration under bilateral investment treaties (BITs) as an offer to ICSID arbitration which the investor may accept by a request for arbitration.[220] Although this practice has somewhat become part of CIL, the Convention did not specifically contemplate it.[221] In the words of Lowenfeld, one of the architects of ICSID:

> Nothing in the text says the consent by the State must have been given in the investment agreement giving rise to the dispute, or even that there must have been an investment agreement. *But the link was unexpected, and I am fairly certain, unplanned*. There is no doubt that the vast number of BITs containing consent to arbitrate under ICSID has effected a major transformation of the Convention.[222]

In addition, a state may exclude or restrict its consent to certain types of disputes by way of notification to ICSID.[223] In the *Abaclat* case (as will be discussed below) the tribunal assumed jurisdiction partly because Argentina neither notified ICSID of such restriction, nor did it, under

215 ICSID History 2009 (n 197) 33-34.

216 As above.

217 ICSID Convention 1965 (n 197) art 26.

218 ICSID Convention 1965 (n 197) arts 26-27.

219 Lowenfeld (n 202) 57.

220 *Abaclat* case (n 22) para 258.

221 According to Lowenfeld: '[T]he ICSID Convention, the very wide acceptance of substantially identical BITs, and the substantial body of precedents, taken together, do represent a contribution to customary international law, a body of law that cannot and should not stand still … [T]he combination of ICSID and BITs clearly served as a stimulus to foreign investors. But the combination has clearly transformed the Convention, filled in the gaps necessary to make ICSID an important institution, and as I see it, contributed to the progress of customary international law.' See Lowenfeld (n 202) 57.

222 As above (my emphasis).

223 ICSID Convention 1965 (n 197) art 25(4).

the relevant BIT, explicitly exclude sovereign debt from the category of protected investments.[224]

The terms 'investment', 'investment disputes' and 'investor' were left deliberately undefined.[225] In practice, however, ICSID tribunals adopt a 'double-barrel' approach, that is, they first refer to definitions of 'investment' in the relevant BIT or investment chapters of FTAs for guidance and then, second, they examine 'investment' under the provision of article 25 of the ICSID Convention.[226] In other words, there has to be an intersection between article 25 and the provisions of the enabling investment agreement on the meaning of 'investment' for the tribunal to assume jurisdiction.[227] The definition of 'investment' in these agreements often is broad and elastic, covering tangible and intangible properties, assets and rights.[228] Naturally, BITs' definitional scope would vary depending upon contexts, objectives, national resources and priorities of the respective parties. This is, however, limited by the objective (that is, the outer limits) of article 25 of the ICSID Convention.[229]

According to the popular *Salini* case, an economic activity must meet the following criteria to qualify as an 'investment' under article 25: (a) it must amount to a substantial contribution of the investor; (b) it must be for a certain duration; (c) the investment activity must involve an operational risk; (d) there must be a certain regularity of profit; and (e) a contribution to the economic development of the host state.[230]

The focus is on the investor. Thus, a shareholder, whether having majority or minority shares in a company, would qualify as an investor capable of initiating a claim.[231] This may give rise to multiple claims by

224 The tribunal in the *Abaclat* case held that 'a state has the possibility under Article 25(4) ICSID Convention to notify the Centre of the class or classes of disputes from that it would not consider submitting to the jurisdiction of the Centre. No such notification has been made by Argentina … [therefore] … there is no reason to exempt foreign debt restructuring situations from the scope of application of the BIT.' See *Abaclat* case (n 22) paras 476-479.

225 ICSID History 2009 (n 197) 22.

226 *Abaclat* case (n 22) paras 344 & 387; *Ambiente Ufficio SpA v Argentine Republic* (ICSID) (2013), https://www.italaw.com/sites/default/files/case-documents/italaw1276.pdf (accessed 20 January 2020) (*Ambeinte* case or *Ambeinte Majority*) paras 212-235, 356 & 438.

227 *Phoenix v Argentine Republic* (2009) IIC 367; *Ambiente* Dissenting Opinion para 277.

228 Sornarajah (n 200) 220-228.

229 *Abaclat* case (n 22) para 200.

230 *Salini v Morocco (*2001) 41 ILM 609 para 52.

231 Sornarajah (n 200) 220-226.

different shareholders of the same company.[232] Even more problematic is where the investment agreement is unclear as to the status of credits advanced by a foreigner or bondholders. The interpretive jurisdiction of the tribunal in line with the provisions of the Vienna Convention on the Law of Treaties (VCLT) and CIL would be invoked for clarification. This will now be examined in view of its policy implications in the context of sovereign debt.

As noted above, it is arguable whether sovereign debt qualifies as 'investment' to enable ICSID tribunals to assume and exercise jurisdiction over sovereign debt claims. In his dissenting opinion in the famous *Abaclat* case, Professor Abi-Saab raised the following vital question: 'Do ICSID tribunals have jurisdiction over sovereign debt instruments issued internationally, expressed in foreign currency and payable abroad, governed by various external laws and subject to the jurisdiction of various external courts, and traded as dematerialised security entitlements in global capital markets?'[233]

Although Abi-Saab answered the question in the negative, there are two schools of thoughts on this issue. The first school argues that debt instruments are not typical investments as defined in the *Salini* case in that most of the substantive investment protection guarantees cannot address creditors' desire for enforcement and, therefore, recourse to ICSID by hold-outs and activist creditors amounts to a misuse of investment treaty arbitration.[234] In addition, on policy grounds, ICSID arbitration might encourage hold-out creditors to thwart SDR and the tribunal may not be able to determine debtor's payment capacity in the event of an award.[235]

The second school considers sovereign debt an 'investment'.[236] It is claimed that ICSID arbitration offers a depoliticised, binding, impartial,

232 UNCTAD *Investor-state dispute settlement* (2005) 17.

233 Dissenting opinion of Prof Georges Abi-Saab in the *Abaclat* case (*Abaclat* Dissenting Opinion) para 269. See Also *Ambiente* Dissenting Opinion paras 171-173.

234 M Waibel 'Opening Pandora's box: Sovereign bonds in international arbitration' (2007) 101 *American Journal of International Law* 711-759; Bantekas (n 2) 141. Bantekas proposes an inter-governmental human rights-based arbitral mechanism for sovereign debt disputes. See I Bantekas 'A human rights-based arbitral tribunal for sovereign debt' (2018) 29 *American Review of International Arbitration* 10-24.

235 Waibel (n 234) 750-759; Waibel (n 3) 209-251; Bantekas (n 2) 141-142.

236 P Griffin & A Farren 'How ICSID can protect sovereign bondholders?' (2005) 24 *International Financial Law Review* 21-24; E Norton 'International investment arbitration and the European debt crisis' (2012) 13 *Chicago Journal International Law* 291-316; ZA Clement & AR Black 'Proposal for restructuring a sovereign debtor's finances through arbitration' (2014) 8 *Insolvency and Restructuring International* 24-27; J Youngjin & HD Sangwook 'Sovereign debt restructuring under the investor-state dispute regime' (2014) 31 *Journal of International Arbitration* 75-96.

effective adjudication forum away from the shortcomings of domestic tribunals struggling with the pervasive effects of sovereign immunity.[237] This appears to enjoy the support of arbitral tribunals. For instance, while rejecting the *Salini* test, the majority in *Abaclat* held that 'with regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred'.[238] Thus, portfolio investments and bonds may qualify as 'investments'.[239] Some BITs are explicit on this. In *Fedax v Venezuela*,[240] for instance, promissory notes were held to qualify as investments under the BIT.

It would be a mistake to ignore the force of parties' consent in the constitution and legitimacy of international adjudication. By nature, ICSID arbitration must reflect the parties' consent and this is determined by the inclusion or exclusion of a dispute through either an ICSID reservation or explicit BIT definition of 'investment'. For instance, in the *Alemanni* case the tribunal held that 'as a fact of international economic life, sovereign bond issues were plainly within the normal field of contemplation of the Contracting Parties'.[241] Indeed, modern BITs often explicitly exclude sovereign debt from the definitional scope of investment, suggesting that the old generation BITs were not focused on sovereign debt, but FDI.[242] For instance, the 2016 Morocco-Nigeria BIT explicitly provides that 'for greater certainty, "investment" does not include (a) debt securities issued by a government or loans to a government; (b) portfolio investments'.[243]

237 Norton (n 236) 302.

238 *Abaclat* case (n 22) paras 346-374.

239 *Abaclat* case (n 22) paras 376-387.

240 *Fedax NV v Venezuela* (1998) 37 ILM 1378 where the Tribunal concluded that 'loans qualify as an investment within ICSID's jurisdiction, as does, in given circumstances, the purchase of bonds. Since promissory notes are evidence of a loan and a rather typical financial and credit instrument, there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case like this'.

241 *Giovanni Alemanni & Others v Argentine Republic* para 320, https://www.italaw.com/sites/default/files/case-documents/italaw4061.pdf (accessed 9 May 2018) (*Alemanni* case).

242 A notable example is the EU-Canada Comprehensive Economic and Trade Agreement (CETA) that exempts negotiated sovereign debt restructurings from the scope of application of the fair and equitable and expropriation standards. See EU-Canada Comprehensive Economic and Trade Agreement annex X. See also United States-Uruguay BIT and NAFTA (art 11.39); Morocco-Nigeria BIT (2016) (art 1) which clearly excludes sovereign debt instruments from definition of 'investment'.

243 Morocco-Nigeria BIT 2016 (n 242) art 1.

The ICSID Convention is only a procedural mechanism for the enforcement of investors' substantive rights. The substantive safeguards are provided under thousands of IIAs.[244] These include the standards on national treatment (NT), fair and equitable treatment (FET), most favoured nation (MFN) and compensation for expropriation.[245] These safeguards are founded on property rights and, therefore, have a human rights flavour. They are generally considered to create a tension between socio-economic rights and investors' property rights.[246] However, recent developments in treaty drafting and investment policies have shown that the two are not necessarily incompatible or mutually exclusive. In fact, as will be shown later, investors, including creditors, now resort to human rights courts to enforce these rights.

In this regard, BITs, essentially, are products of the parties' consent and normally recognise local regulatory imperatives of their respective signatories. It should be admitted, however, that, by their nature, BITs are not specifically meant to protect socio-economic rights of citizens of their signatories.[247] Nevertheless, they recognise several regulatory and public policy considerations intrinsically connected to the protection and realisation of these rights.[248] Most BITs make exemptions or provide defences for parties' regulatory measures that might violate these substantive investment guarantees on account of public order, necessity

244 As of October 2023, there were 3276 IIAs. See UNCTAD's Investment Agreement Navigator (2023), www.investmentpolicy.unctad.org. The enthusiasm for signing IIAs has been declining over the years. In 2017, eg, the number of terminated IIAs (22) exceeded the number of new IIAs (18). See UNCTAD 'IIA issue note: Recent developments in the international investment regime' (2018) 2, https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf (accessed 13 February 2019).

245 Sornarajah (n 200) 233-256.

246 LE Peterson 'Human rights and bilateral investment treaties – Mapping the role of human rights law within investor-state arbitration' (2009), http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf (accessed 3 May 2017); B Simma 'Foreign investment arbitration: A place for human rights?' (2011) 60 *International and Comparative Law Quarterly* 573-596.

247 According to UNCTAD: '[H]uman rights issues have been relatively slow to arise in the IIA arbitration context. Indeed, IIAs themselves are generally silent with respect to human rights matters, and do not expressly reference human rights-related obligations of States, much less seek to introduce any new human rights duties or obligations for governments or investors. For their part, governments have rarely articulated clear views as to the relationship between IIAs and human rights.' See UNCTAD 'Selected recent developments in IIA and human rights' (2009) 3, http://www.unctad.org/en/docs/webdiaeia20097_en.pdf (accessed 3 May 2017).

248 G Sacerdoti 'BIT protections and economic crises: Limits to their coverage, the impact of multilateral financial regulation and the defence of necessity' (2013) 28 *ICSID Review* 351-383.

and protection of essential state security or interests.[249] It will be argued here that BITs cannot override *jus cogens* and prior socio-economic rights treaty obligations of the concerned state parties. A review of some selected cases would shed more light on this.

4.2 Investment arbitration, sovereign debt and socio-economic rights: Case review

Selected cases in which issues related to sovereign debt and socio-economic rights were raised will now be reviewed, starting with the cases arising out of the Argentine debt crisis. The common factual features of these cases are the debt crisis and the post-default emergency measures adopted by Argentina to address the crisis. While the line of defence adopted by Argentina (including issues of socio-economic rights) was almost the same in all the cases, it will be observed that the tribunals in the first three cases could not conclude the merit phase on account of cost or out-of-court settlement.

4.2.1 Abaclat & Others v Argentina

Although this matter was eventually settled with a payment of over US $1 billion to the creditors during the merits phase, the decision on jurisdiction in this case influenced subsequent ITA SDAs connected to the Argentine debt default of 2001. It also recognised, for the first time, the utility of investment arbitration in the sovereign debt scheme.[250]

Facts and parties' positions

Following the 1980s debt crises, Argentina embarked upon massive economic reform by, among others, signing numerous BITs with other countries to encourage the inflow of investments, deregulating the economy, privatising public utilities and issuing sovereign bonds in line with a specific legislation setting out the framework and procedures for such undertakings.[251] Consequently, between 1991 and 2001 Argentina issued over US $186 billion worth of sovereign bonds in domestic and international debt markets.[252] Out of 179 bonds issued, 173 were denominated in foreign currencies and the claimants purchased 83 of the 173 series of bonds which were contractually governed by laws of different

249 As above.

250 *Abaclat* case (n 22) paras 376-387.

251 *Abaclat* case (n 22) paras 43-44.

252 *Abaclat* case (n 22) para 50.

countries.[253] During 1997 to 1999 the country experienced dwindling revenues and increased debts due to crippling economic recession, raising of interest rates in USA and the exogenous effects of the Brazilian, Russian and Asian financial crises.[254] In 2001 capital inflow dwindled while capital flights reached US $15 billion, thereby endangering the banking system.[255]

Despite a series of measures, including export incentives, restrictions on bank withdrawals and the cutting of public spending, Argentina eventually defaulted on all its sovereign bonds in December 2001, leading to massive social and political unrests.[256] A Law of Public Emergency and Reform of the Monetary Exchange Regime (Federal Law 25, 561 of 2002) was enacted leading to a devaluation of the local currency. The citizens were devastated: Unemployment reached 21 per cent, underemployment at 19 per cent and poverty increased to 54 per cent.[257]

Argentina proposed an exchange offer to all bondholders in 2003 and 2004. On account of the defaults, the claimants, constituting about 180 000 Italian bondholders holding bonds worth US $13,5 billion, engaged in negotiation with Argentina. The negotiation failed. In line with the reality of its repayment capacity, Argentina made a gross domestic product (GDP)-linked exchange offer covering over US $81 billion, entitling each bondholder to choose among par bonds (same principal but lower interest than the non-performing debts), discount bonds (reduced principal but higher interests) or quasi-bonds (principal and interest lower). This was accompanied by the Law of Public Emergency and Reform (Law 26, 017), often called Cramdown or Lock Law by creditors, which prohibited reopening of the exchange offer. The claimants held out; they did not participate in this exchange preferring, instead, to negotiate a better deal.[258] They, however, failed and, hence, instituted an ICSID arbitration pursuant to the Argentina-Italy BIT in 2006.[259] In 2010, while the case was pending, some claimants participated in another exchange offer but over 60 000 of them continued the ICSID claim.

In their claims the bondholders argued that through its debt defaults, Argentina deprived them of the value of their investments.[260] They alleged

253 *Abaclat* case (n 22) para 51.
254 *Abaclat* case (n 22) para 53.
255 *Abaclat* case (n 22) para 54.
256 *Abaclat* case (n 22) paras 55-60.
257 *Abaclat* case (n 22) para 61.
258 *Abaclat* case (n 22) paras 82-85.
259 *Abaclat* case (n 22) para 91.
260 *Abaclat* case (n 22) para 238.

that Argentina was a rogue debtor who repudiated its debt servicing obligations by 'a unilateral, punitive exchange offer' using its emergency legislation and other measures.[261] These actions, they alleged, violated Argentina's obligations under the BIT; and that the exchange offers amounted to expropriation of bondholders' investments, the different treatments accorded to domestic pension funds violated national treatment standard, and the emergency law amounted to unfair and inequitable treatments.[262]

Argentina argued that there was no violation of any of the substantive protections in the Argentina-Italy BIT as non-payment of debts only creates contractual, not treaty, claims in international law.[263] It argued that it did not consent to this type of adjudication as the action was a 'legally unsupported attempt to turn a sovereign's non-payment of external debt that is governed by other states' laws ... into a violation of investment treaty protection'.[264] Even if it is a treaty claim, Argentina argued, there was no violation because 'the 2001 crisis was unprecedented and could not be resolved merely through economic reform, that Argentina's actions were in accord with the actions of other sovereign debtors, and that there was no bad faith on Argentina's side'.[265] It further argued that 'opening of ICSID arbitration with regard to sovereign debt restructuring would be counterproductive and go against current efforts to modernise foreign debt restructuring process [and] it would encourage hold-outs'.[266]

This contention, the claimants argued, 'is outdated and irrelevant' and that

> the major threat to the efficiency of foreign debt restructuring would be rogue debtors, such as Argentina. Consequently, opening the door to ICSID arbitration would create a supplementary leverage against such rogue debtors and therefore be beneficial to the efficiency of foreign debt restructuring.[267]

The majority decision and the dissenting opinion

In assuming jurisdiction, the majority tribunal held that the action was not a pure contract but a treaty claim as Argentina's default was an exercise

261 *Abaclat* case (n 22) para 238.
262 *Abaclat* case (n 22) paras 309-311.
263 *Abaclat* case (n 22) paras 233, 234 & 307.
264 *Abaclat* case (n 22) para 234.
265 *Abaclat* case (n 22) para 308.
266 *Abaclat* case (n 22) paras 471 & 512.
267 *Abaclat* case (n 22) paras 514 & 537-588.

of sovereign power not justified by any contractual instrument.[268] The default, according to the tribunal, constituted a *prima facie* treaty violation and that 'as debtor of the bonds, [Argentina] has failed to perform its obligations under these bonds [justifying its actions] on the exceptional circumstances surrounding its public debt' rather than on contractual defences contemplated by the bonds.[269] The tribunal reasoned that redressing these circumstances through emergency legislation 'had the effect of unilaterally modifying Argentina's payment obligations, whether arising from the concerned bonds or from other debts'.[270] Furthermore, the tribunal held that justifying contractual non-performance on the basis of sovereign insolvency was untenable although it accepted that generally 'an insolvent debtor may, in principle, benefit from special regimes such as bankruptcy or other mechanisms of financial redress, and such mechanisms can very well affect the way a contract is performed by partially or fully liberating the debtor from its obligations thereunder'.[271]

This cannot avail Argentina because of the absence of a bankruptcy mechanism under international law setting out the competent regulatory authorities and 'specific procedure taking into account both the debtor's and the creditors' interests, and the provision of distribution principles of the debtor's assets with regard to the entirety of the creditors' group and not just with regard to a specific contract or creditor'.[272] Thus, Argentina cannot be 'liberated' in this regard by 'fixing sovereignly the modalities and terms of such liberation based on its sovereign power [which] is neither based on nor does it derive from any contractual argument or mechanism'.[273] The tribunal concluded thus:

> The present dispute does not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its state power to modify its payment obligations towards its creditors in general ... Whilst it is true that there exists no international bankruptcy regime for states, certain principles have nevertheless been developed by the international community with regard to sovereign debt restructuring.[274]

268 *Abaclat* case (n 22) paras 320-325.

269 *Abaclat* case (n 22) para 320.

270 *Abaclat* case (n 22) paras 320-324.

271 *Abaclat* case (n 22) para 324.

272 *Abaclat* case (n 22) paras 320-325.

273 As above.

274 As above.

The latter reasoning seems unpersuasive because, as argued in the previous chapter, the so-called 'principles' 'developed by the international community' have no solid legal basis and face serious legitimacy questions.[275] The notion of 'international community' itself is a fuzzy term at best given the increasing emergence of unconventional, non-Western creditors unto the sovereign debt landscape. Therefore, without setting out these 'principles' developed by 'international community' and the specific convenient forum, the tribunal held that ICSID arbitration was not incompatible with claims arising from SDR because, 'to the extent that the … actions of Argentina relating to its foreign debt restructuring may … affect Claimants' rights, there is no reason to exempt foreign debt restructuring situations from the scope of application of the BIT'.[276] It concluded that the proceeds of the issued bonds were made available to Argentina and 'served to finance Argentina's economic development'.[277] The tribunal recognised Argentina's defence rights but held that its policy arguments on the propriety of ICSID in SDR were inapposite and that, therefore, it could not reject the claim based merely on policy considerations.[278]

On the argument against the activities of so-called activist, hold-out creditors using arbitration, the tribunal held thus:

> The present policy considerations are controversial and based on respondent's assumption that the biggest threat to the stability and fairness of sovereign debt restructuring are hold-out creditors. Policy reasons are for states to take into account when negotiating BITs and consenting to ICSID jurisdiction in general, not for the Tribunal to take into account in order to repair an inappropriately negotiated or drafted BIT.[279]

It may be argued that the tribunal used an FDI-focused, old-generation BIT to adjudicate a sovereign debt dispute. It was not a surprise that the tribunal was not unanimous in its judgment as there was a strong dissenting opinion by Professor Abi-Saab.[280] Referring to the *travaux préparatoires* of the ICSID Convention, he argues that there is a 'hard core' meaning of 'investment' intended by the framers which 'cannot be waived even by

275 See parts 4.3, 4.4 and 4.5 of ch 4 of this book.

276 *Abaclat* case (n 22) paras 476-479.

277 *Abaclat* case (n 22) para 378.

278 *Abaclat* case (n 22) paras 548-549 & 603.

279 *Abaclat* case (n 22) paras 549-550.

280 Dissenting opinion of Prof Georges Abi-Saab, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC5313_En&caseId=C95 (accessed on 12 November 2017) (*Abaclat* Dissenting Opinion).

agreement of states parties to a BIT'.[281] Thus, sovereign debt under BIT and the ICSID Convention is not a protected investment because the purpose of the ICSID Convention was to provide an alternative to investors by providing a neutral forum to serve as an additional (alternative) procedural guarantee for the investors against host states' regulatory actions.[282] He insists that limitations to ICSID arbitration by state parties in a treaty is designed to protect 'the collective interest of its population'.[283]

Abi-Saab questioned the characterisation of the claim as a 'pure treaty claim' as all the claims were originally anchored on contract and the homogeneity arose out of the economic crisis which led to 'Argentina's cessation of payment'.[284] In other words, the treaty claim arose out of the 'same fact pattern' created by the debt crisis, but this cannot be severed from the original contractual base.[285] Further, the bondholders who purchased their bonds on the secondary markets had no territorial link and, therefore, their bonds might be inconsistent with the letter and spirit of the ICSID Convention.[286] In rejecting the presumption that the bonds 'served to finance Argentina's economic development', Abi-Saab argues thus:

> Not all funds made available to governments are necessarily used as "investment" in projects or activities contributing to the expansion of the productive capacities of the country … [as such] funds can be used to finance wars, even wars of aggression, or oppressive measures against restive populations, or even be diverted through corruption to private ends.[287]

Abi-Saab situates his argument within the broader policy considerations rejected by the majority and argues that the majority proceeded on 'a

281 *Abaclat* Dissenting Opinion (n 280) paras 2-15.

282 *Abaclat* Dissenting Opinion (n 280) para 2.

283 *Abaclat* Dissenting Opinion (n 280) para 158.

284 *Abaclat* Dissenting Opinion (n 280) para 144.

285 As above.

286 *Abaclat* Dissenting Opinion (n 280) paras108-109.

287 Abi Saab notes thus: 'Spiritism apart, the object and purpose of these two treaties – the ICSID Convention and the BIT – are described as being exclusively to afford maximum protection to foreign investment and foreign investors; as if these treaties were 'unilateral contracts' creating rights for the benefit of one party only. In consequence, according to this vision, all the provisions of these treaties have to be interpreted exclusively with this aim in mind … Viewed from this perspective, all the limitations to the jurisdiction of ICSID tribunals, whether inherent or patiently and carefully negotiated and stipulated in the treaty to protect the interests of the State party (which are after all, the collective interests of its population) are seen as obstacles in the way of achieving the 'purpose' of the treaties, which have to be overcome at any price and by whatever argument. This unilateral vision is in stark contrast to the 'object

subjective, partial and truncated representation of the object and purpose of the ICSID Convention and the BIT, as being exclusively the effective protection of investment, all but totally disregarding the legitimate interests of the host state'.[288] In particular, on the policy argument of SDR, Abi-Saab maintains thus: 'ICSID Convention did not foresee [SDR] and … financial markets did not contemplate [ICSID arbitration] then or now … [yet] the majority award blows hot and cold at the same time, uncritically adopting the claimant's policy arguments over the Respondent's, to which it hardly gave any attention.'[289] He argued that, although policy consideration should not be the decisive factor in adjudication, an international arbitrator 'cannot be totally blind to the social, economic and political environment which constitutes the larger context of the case'.[290] Therefore, policy considerations can, 'within the permissible margin of interpretation, shed light on what makes sense or nonsense among possible alternative solutions, when seen against the larger background'.[291] This is because the *Abaclat* case 'is the first ICSID case that involves a sovereign debt financial instrument … that is totally unhinged and detached from any specific economic activity or project in the host country'. Therefore, addressing this issue would help 'the international community and countries borrowing abroad [to] resolve the present and future sovereign debt crises and how the burden for such crises will be shared between taxpayers and creditors; a perennial challenge that is now occupying the daily headlines and confronting countries at all levels of development'.[292] He clearly embraces the multifunctionality role of international arbitration.

On the desirability of ICSID arbitration in the evolving sovereign debt regime, Abi-Saab argues that an incoherent system of adjudication is unsuitable in the context of sovereign debt disputes and concludes thus:

> In view of the actual profound structural crisis of the international financial system; the absence of agreed international procedures regulating state bankruptcy; and the intense international discussions and efforts to improve

and purpose' of the ICSID Convention, as expressed in the Report of the Executive Directors in the following terms: 'While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States.' See *Abaclat* Dissenting Opinion (n 280) paras 113-159.

288 *Abaclat* Dissenting Opinion (n 280) para 261.

289 *Abaclat* Dissenting Opinion (n 280) para 265.

290 As above.

291 As above.

292 *Abaclat* Dissenting Opinion (n 280) paras 266-269.

> the sovereign debt restructuring process, the present case raises, in an acute manner, an international public policy issue about the workability of future sovereign debt restructuring, should ICSID tribunals intervene in sovereign debt disputes. It suffices to ponder the potential disrupting effect of different *ad hoc* tribunals following separate ways or deciding at cross purposes with the desperate international efforts to reconstruct a semblance of a coherent international financial architecture.[293]

Finally, Abi-Saab reiterates the investor bias visible in most ICSID arbitration. In particular, he rejects

> the tendency of certain ICSID tribunals to consider any limitation on their jurisdiction – to protect the legitimate interests of state parties – as an obstacle in the way of achieving the object and purpose of these treaties, which they interpret as being exclusively to afford maximum protection to investment, notwithstanding the legitimate interests of the host state.[294]

In summary, the dissenting opinion in *Abaclat* re-echoes the enforcement dilemma facing parties to sovereign debt contract. It exposes the fallacy of the dominant private governance framework as creditors struggle to supplement the domestic private law mechanism with a transnational regime whose legitimacy is open to question. The implication of the majority decision is that a sovereign debtor may be dragged to multiple adjudication fora by different creditors. It will surely incentivise hold-outs and so-called vulture funds to frustrate debt restructuring.

Socio-economic rights and the *Abaclat* case

Argentina's defences to the claim anchored on necessity and competing obligations were not addressed as there was no decision on the merit. Although Argentina did not frame its objection based on its socio-economic rights obligations at the jurisdictional phase, it alluded to the inevitability of the defaults in relation to its constitutional responsibility to ensure public order and economic stability to guarantee the general well-being of its citizens. Neither the majority decision nor the dissenting opinion contextualised their reasoning along this line. While the majority decision characterises the claims as treaty-based private investors' rights of action, it, however, acknowledges the rising unemployment and socio-political crisis that the debtor faced.

293 *Abaclat* Dissenting Opinion (n 280) para 271.

294 *Abaclat* Dissenting Opinion (n 280) paras 272-274.

The dissenting opinion cautioned against 'overzealous' protection of creditors' treaty-based rights in disregard of the legitimate interests of the sovereign debtor and its population. Indeed, Abi-Saab has advocated a 'sharing' of the sovereign debt burden by both taxpayers and creditors. This may imply accepting the necessity of austerity measures by the citizens; it may also imply recognising that SDR and debt moratorium are necessary for resuming both debt service and social services to the people. This, arguably, may support the game-theoretic proposition advanced in the previous chapter that if a loss is inevitable, then, since both creditors and debtors have socio-economic rights responsibilities, the best option would be a prioritisation in favour of debt moratorium and a rejection of creditor claims that compounds, at least during the debt crisis, the socio-economic conditions of the citizens. This might potentially minimise the possibility of trading off socio-economic rights commitments.

However, despite the recognition of the interests of the debtor and its population, the dissenting opinion adopted a private law approach to sovereign debt governance. This, it is submitted, is a contradiction in terms because the private approach does not sufficiently align with the interests of the debtor's citizens. It allows domestic hold-out litigation against sovereign debtors. Hence, both the majority decision and the dissenting opinion do not examine the socio-economic rights situations occasioned by the debt crisis, the latter being the basis of the claim. This is surprising because the majority decision was anchored on treaty-based obligations of the debtor interpreted with the aid of VCLT. Yet, the latter clearly prioritises *jus cogens* and obliges tribunals to have regard to human rights in their interpretative function.[295]

4.2.2 Ambiente Ufficio v Argentine Republic (Ambiente case)

The facts of this case are on all fours with those of the *Abaclat* case.[296] Unsurprisingly, the majority decision closely followed the *Abaclat*

295 VCLT 1969 Preamble & art 31(3)(c).

296 *Ambiente* case (n 226) paras 10-13. The majority decision's reliance on the *Abaclat* case was remarkable, noting thus: 'The present Tribunal will therefore not hesitate to benefit, where applicable and appropriate, from the reasoning of the *Abaclat* Tribunal. Far from adhering to any doctrine of *stare decisis* or considering itself legally bound by the findings of the *Abaclat* Tribunal, this implies a process of critically engaging with the majority decision, but also with the counter-arguments contained in the Dissenting Opinion of Professor Abi-Saab … [T]he present Tribunal agrees with many, though not all, considerations and views expressed in the *Abaclat* Decision … [But] the reasoning of the *Abaclat* Decision can thus be of relevance to that of the present Tribunal only if and to the extent that the Parties in the present case have submitted arguments similar to, and compatible with, those marshalled in the *Abaclat* case.' See *Ambiente* case (n 226) paras 12-13. This was criticised by the dissenting arbitrator. See *Ambiente* case

majority decision, but the dissenting opinion, although it followed some of the reasoning of Abi-Saab in that case, advanced a *pacta sunt servanda* perspective on SDA, that is, a state-state SDA.

Facts and parties' positions

In June 2008 the claimants numbering 119 (reduced to 90 after an exchange offer in 2010) filed a request for arbitration at ICSID alleging that Argentina (the respondent) had, by defaulting on its debts, violated its international obligations under the Argentina-Italy BIT of 1990 and, therefore, was liable for compensatory damages arising from such defaults.[297] They claimed that the post-default legislative measures implemented by Argentina were unfair, inequitable and amounted to expropriation of their investments.[298] In particular, they alleged that Argentina violated the fair and equitable treatment (FET) standard in the said BIT because the events of default and the subsequent legislative measures dictating the debt restructuring complained of 'eliminated [their] rights to capital and interest'.[299] They maintained thus:

> [B]y refusing to restore their rights even after Argentina's economic situation came back to normal, [the] respondent committed a gross violation of the obligation[s] to protect the investors' legitimate expectations, to respect the stability of the investment environment as well as the requirements of reasonableness, proportionality and due process.[300]

They claimed that Argentina's default and restructuring 'led to the total and irreversible annihilation of claimants' rights'.[301] These, they argued, were sovereign acts constituting 'a violation of the respondent's obligation to refrain from measures of expropriation of the investors' right and property, without immediate, adequate and effective compensation'.[302] In particular, Law 26 017 (that is, one of the Emergency Laws enacted by Argentina) prohibited settlement or reopening of the exchange offer and the Argentine Supreme Court had upheld the constitutionality of this debt restructuring law as a 'non-justiciable political question'.[303]

Dissenting Opinion of Santiago Torres Bernárdez (*Ambiente* Dissenting Opinion) paras 40-50.

297 *Ambiente* case (n 226) paras 1-2, 115, 336-347 & 542.

298 *Ambiente* case (n 226) para 63.

299 *Ambiente* case (n 226) para 529.

300 As above.

301 *Ambiente* case (n 226) paras 532.

302 *Ambiente* case (n 231) paras 530.

303 *Ambiente* case (n 231) paras 565-566 referring to the Argentine Supreme Court decision

Finally, the claimants argued that the operative time for consent to arbitration was determined by the recognised principles of treaty interpretation as provided in VCLT.[304] If these interpretive tools are employed, the claimants believed, they will qualify as 'investors' within the meaning of article 25 of the ICSID Convention especially as their loans contributed to the economic development of Argentina. They reasoned that they qualified as 'investors' because 'the investment at stake is the overall loan which made funds available to finance respondent's budgetary needs'.[305]

Argentina, on the contrary, questioned the competence of the tribunal arguing that it did not give the requisite consent to arbitration in respect of sovereign debt disputes by ICSID tribunals regarding the bond series held by the claimants.[306] It argued that some of the claimants were vulture funds who purchased their bonds after the events of default.[307] They were remotely connected to the bonds as they acquired their interests through intermediaries.[308] As such, Argentina argued, 'causing any right deriving from the issuance of security entitlements related to debt securities traded on capital markets to be subject to the provisions of the extensive network of BITs would hinder the issuance, circulation, payment and restructuring thereof'.[309]

There equally was no *prima facie* evidence that the non-payment of debts and the emergency-induced restructuring that followed constituted a violation of substantive standards contained in the Argentina-Italy BIT.[310] As the debt restructuring was voluntary (and a default is not a violation of international law), the FET standard 'does not prohibit debtors from offering options for the repayment of obligations in situations of need and from restructuring its debt in accordance with their real ability to pay',[311] nor was there any expropriation as the claimants were fully in control of their bonds and security entitlements.[312] Finally, the restructuring legislation that prohibited reopening the exchange offer could be set aside

in *Galli, Hugo G y otro/PoderEjecutivo Nacional* s/ amparo, Final decision (5 April 2005) Case G 2181 XXXIX (*Galli* case).

304 *Ambiente* case (n 226) paras 98 & 129.

305 *Ambiente* case (n 226) paras 384 & 385-398.

306 *Ambiente* case (n 226) paras 67 & 327.

307 *Ambiente* case (n 226) paras 67 & 365-67.

308 *Ambiente* case (n 226) para 327.

309 *Ambiente* case (n 226) para 363.

310 *Ambiente* case (n 226) paras 521-525.

311 *Ambiente* case (n 226) paras 524-525.

312 *Ambiente* case (n 226) para 526.

if the claimants had recourse to domestic courts as, by Argentinian law, international law takes precedence over local law.[313] Importantly, Argentina referred to and relied on UNCTAD's PRSLB and the Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets[314] to argue that there would be no international responsibility if a government, by reason of financial crisis, suspends debt servicing.[315]

Majority decision and dissenting opinion

While substantially relying on the *Abaclat* case, the majority tribunal held, among others, that purchasing bonds on the secondary markets is 'part and parcel of a single investment [constituting] the overall loans which made funds available to finance the respondent's budgetary needs'.[316] According to the tribunal, the risk of debt default is more than 'an ordinary commercial risk'.[317] Therefore, the *Salini* test was satisfied especially as 'the funds generated through the bonds issuance process were ultimately made available to Argentina and must be deemed to have contributed to Argentina's economic development'. In view of the volume of the bonds involved, the tribunal maintains, the contribution was certainly significant to Argentina's development.[318] On the emergency laws that forced and controlled the debt restructuring/exchange offer, it held that 'it was notably through the operation of Law No 26.017 that the respondent sought to influence the terms of the bonds/security entitlements issued by it'.[319] Therefore, 'it was not so much the failure to pay, but the use of the respondent's sovereign prerogatives when restructuring its debt, notably including the adoption of Law 26.017, which qualify the respondent's acts as potential breaches of the Argentina-Italy BIT and thus as treaty claims'.[320] Quoting the reasoning in the *Abaclat* case *in extenso*, it held that 'whatever types of legislative acts and different legal consequences engendered by them one might envisage, Law No 26.017 and related legislative and regulatory acts did in fact unilaterally modify respondent's payment obligation'.[321]

313 *Ambiente* case (n 226) para 615.
314 Principles for stable capital flows (n 183).
315 *Ambiente* case (n 226) paras 617-619.
316 *Ambiente* case (n 226) paras 425 & 434-438.
317 *Ambiente* case (n 226) para 485.
318 *Ambiente* case (n 226) paras 468-469 & 485-487.
319 *Ambiente* case (n 226) paras 507-510.
320 *Ambiente* case (n 226) para 543.
321 *Ambiente* case (n 226) paras 545-548.

On the effects of the restructuring legislation on domestic remedies, the tribunal, using interpretation rules under VCLT and CIL, held that this law and subsequent Supreme Court's decision rendered recourse to domestic remedies futile.[322] In particular, the Supreme Court was not willing to set aside or interfere with the debt restructuring given its understanding of international law that 'if a government decided to suspend the payment of debt for reasons of financial necessity or public interest, this was generally accepted by the international community'.[323] This, the Supreme Court reasoned, is because there is 'a principle of international law that precludes a state's international responsibility in case of suspension or modification, in whole or in part, of the payment of the external debt, in the event the state is forced to do so due to reasons of financial necessity'.[324] The tribunal therefore concluded thus:

> [G]iven the Supreme Court's stance on international law, it is very doubtful whether a reference … to Argentina's international obligations under the BIT would have changed the picture. It may well be that the Constitution endows international treaties with a higher normative rank than [local] laws, but a BIT would still be inferior to the provisions of the Constitution itself. The Supreme Court in *Galli* emphasises the powers of Congress to settle domestic and foreign debt, notably in emergency situations, and accepts the debt restructuring process as emanating from this constitutional power.[325]

Interestingly, it is worth noting here that the tribunal did not address Argentina's policy arguments regarding the implication of allowing 'vulture fund arbitration' on the existing SDR regime in international law, nor was there any analysis of the public policy exceptions under the BIT in issue. Understandably, the tribunal could not pronounce on the necessity and other defences raised by Argentina as the matter was discontinued on account of failure to pay the arbitration cost.[326]

The tribunal's reliance on the reasoning in the *Abaclat* case was remarkable. Therefore, in his dissenting opinion, arbitrator Bernerdez strongly argues that since 'under general international law the restructuring of sovereign debt by a state … in situations of national emergency are not *prima facie* an internationally wrongful act, it is difficult to visualise how the respondent might have committed a *prima facie* breach of the

322 *Ambiente* case (n 226) para 618.

323 Quoting the Supreme Court in the *Galli* case.

324 *Ambiente* case (n 226) paras 618, quoting the *Galli* case.

325 *Ambiente* case (n 226) paras 618-620.

326 *Ambiente Ufficio SpA v Argentine Republic* ICSID Case ARB/08/9 Order of Discontinuance of Proceedings (28 May 2015) paras 20-23.

… BIT'.[327] The intention of the parties to a BIT (primary consent) is always the paramount consideration and not the intention of the parties to the dispute arising from the said BIT (secondary consent).[328] He questioned the tribunal's 'excessive zeal in the protection of the interests of alleged foreign investors … [which] does not fit well into the realities of international public law system and disregards the rules governing the interpretation of treaties'.[329]

He argues that a tribunal must not forcibly use 'the ICSID framework out of concern for access to justice; that is for states to undertake if injustice is perceived'.[330] According to him, a state is not liable under international law for exercising its regulatory powers to address the general welfare of its people.[331]

While rejecting the majority's 'selective endorsement' of the facts in the *Abaclat* case, he observes that a global analysis of the facts in this case would have revealed that 'Argentina's 2005 restructuring of its sovereign debt follows the principles, steps and methods general[ly] applied at the relevant time by the international community to this kind of sovereign financial operation with international overtones'.[332] He argues that there was no proper consent to ground the arbitration in the first place and that the sovereign debt in question was not an 'investment'.[333]

In the context of the *Salini* test, he argues that the bonds do 'not satisfy ... the hard core of the objective, traditional requirements defining an "investment" under the ICSID Convention, described succinctly as contribution/duration/risk, [as they did] not contribute to the economic development of Argentina'.[334] He reasons that neither the issuance of sovereign bonds nor sovereign default problems was a subject-matter of consideration within the framework of the negotiations leading to the elaboration of the ICSID Convention and that, in practice, a sovereign debt dispute arising from debt restructuring has never been presented before ICSID for adjudication until the *Abaclat* case.[335] Accordingly, regardless

327 *Ambiente* Dissenting Opinion para 2.

328 *Ambiente* Dissenting Opinion paras 5-9 &12-13.

329 *Ambiente* Dissenting Opinion paras 3-5.

330 *Ambiente* Dissenting Opinion fn 19.

331 *Ambiente* Dissenting Opinion para 17. See *Saluka Investments BV v The Czech Republic* (2006) *International Investment Claims* 210 para 254.

332 *Ambiente* Dissenting Opinion para 65.

333 *Ambiente* Dissenting Opinion paras 109-145 & 151-168.

334 *Ambiente* Dissenting Opinion paras 179-185.

335 *Ambiente* Dissenting Opinion paras 211-217 & 247, 336.

of inclusion or exclusion in the BIT definition, sovereign debt *ipso facto* is outside the province of ICSID arbitration as the ICSID Convention controls the BIT and not the other way round.[336] In other words, his conception of 'investment', for the purpose of arbitration, excludes sovereign debt because when ICSID Convention was adopted in 1965, 'the time of the tradable Brady sovereign bonds of the 1990s and later markets was still far away ... Their transactions are in fact alien to the very notion of "host state".'[337] Importantly, unlike the majority decision, he noted the evolving international framework on sovereign debt restructuring under the auspices of the UN, the IMF and UNCTAD thus:

> [T]he Tribunal's attention was called to the 'Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets' noted in 2005 by the Monetary and Financial Committee of the Board of Governors of the IMF. Since then, as it is in the public domain, UNCTAD launched in 2009 the initiative to formulate a set of global principles to promote responsible sovereign lending and borrowing practices, an initiative endorsed by the United Nations General Assembly, and in 2012 a consolidated version of the UNCTAD 'Principles on Promoting Responsible Sovereign Lending and Borrowing' was achieved in Doha on the occasion of UNCTAD XIII, inaugurating the phase of endorsement and implementation of the Principles, whose principle 15 deals with unavoidable 'Restructuring' of sovereign debts obligations in a state of economic necessity.[338]

He briefly touched on the question of norm conflict and, while insisting on the principle of *pacta sunt servanda* as the basis of his opinion, noted that 'the values protected by the BIT are important, but they are certainly not higher in importance than those protected by the rules enumerated by the ICJ [*jus cogens* obligations or obligations protecting essential human values in the form of *erga omnes*]'.[339]

In summary, the dividing line between the majority decision and the dissenting opinion was the normative principles governing sovereign debts in the international context. The pro-creditor majority decision was influenced by the private contractual paradigm while the dissenting opinion was influenced by the public law paradigm. The latter considered the sovereign debtor's concerns and public policy considerations while the former did not.

336 *Ambiente* Dissenting Opinion paras 336-355.

337 *Ambiente* Dissenting Opinion paras 267 & 316.

338 *Ambiente* Dissenting Opinion para 330.

339 *Ambiente* Dissenting Opinion paras 338 & 356-357.

4.2.3 Giovanni Alemanni & Others v Argentine Republic (Alemanni case)

This case further affirms non-official creditors' use of ICSID as an adjudicative institution for sovereign debt disputes.[340] It was also influenced by the *Abaclat* and *Ambiente* cases.[341]

Facts and parties' positions

The case involved a similar factual background and was brought pursuant to the same Argentina-Italy BIT as the above two cases. It was initiated by 183 (the number reduced to 74 after the restructuring of 2010) holders of 51 bonds, challenging the SDR of 2005 (accepted by 76,1 per cent of Argentina's bondholders) and 2010 (accepted by 92 per cent of bondholders).[342] In particular, they claimed that Argentina violated its treaty obligations to guarantee FET, full protection and security and not to expropriate without the payment of prompt, adequate and immediate compensation.[343] The premise of their claim was that Argentina was a rogue and irresponsible borrower that, despite IMF warnings, pursued 'profligate and undisciplined policies' leading to a rising foreign debt profile, massive and unsustainable borrowing and that, 'had Argentina been a responsible policy-maker and enforcer and a prudent spender and borrower, it would have prevented the 2001 crisis and would have been able to service its debt commitments'.[344] The debt to GDP ratio rose from 35 per cent in 1994 to 150 per cent in 2002.[345] It was, they maintained, unconscionable for Argentina to allege that it was not the author of its own debt default and that it was an 'innocent victim of the crisis leading to its default.'[346] They argued that by the restructuring of 2005 Argentina grossly understated its repayment capacity and imposed 'on the holders of its bonds … an outrageous take-it-or-leave-it offer unprecedented in the history of sovereign debt restructuring and totally out of keeping with the commonly accepted guidelines of sovereign debt restructuring'.[347]

The claimants further asserted that the bonds were the same as borrowing under a loan agreement and, with a high risk of repudiation and default, they qualified as 'investment' for the purposes of ICSID

340 *Alemanni* case (n 241).
341 *Alemanni* case (n 241) paras 254-255.
342 *Alemanni* case (n 241) paras 1-3 & 203.
343 *Alemanni* case (n 241) para 31.
344 *Alemanni* case (n 241) para 74.
345 *Alemanni* case (n 241) paras 74-76.
346 *Alemanni* case (n 241) para 74.
347 *Alemanni* case (n 241) paras 75-92.

arbitration.[348] They agreed that the financial crisis caused 'a run on the Argentine banks [and] a moratorium on all payments on the external debt, resulting in …"the largest sovereign default in history"'.[349] However, they argued that Argentina caused the crisis and, therefore, the default 'constituted a repudiation of the respondent's promise to honour its financial obligations and to pay the full amount of principal and interest at the agreed maturity dates'.[350]

Apart from its defences to the claim, Argentina raised objections with regard to the litigious behaviours of hold-outs and vulture funds. It argued thus:

> [I]n view of the fact that the Exchange Offer was based upon terms that would make it possible for Argentina to pay its new debt in the long term, offering to pay a higher amount to any other creditor at a later time would have defeated the purpose of the initial restructuring and would have led Argentina once again to the position of unsustainable debt existing before the Exchange Offer.[351]

In rejecting a multi-party, unrelated contractual claim, Argentina compared the ICSID Convention with the Inter-American Convention on Human Rights[352] and maintained that such proceeding 'would impair Argentina's fundamental right to analyse and address each claim individually'.[353]

Argentina further argued that the default was caused by external shocks, deep contraction of its GDP which was greater than USA's contraction during the Great Economic Depression of the 1930s and reduced public revenue leading to the worst political, social and economic crisis in its history.[354] Since there was no international legal framework on SDR, the resulting restructuring did not obliterate the bondholders' contractual rights under the original bond hence hold-outs could pursue their claims in the different jurisdictions stipulated by the respective bonds and, consequently, no sovereign actions in Argentina could affect these rights outside Argentina.[355] However, such hold-out creditors 'cannot reasonably

348 *Alemanni* case (n 241) paras 101-107 & 185-195.

349 *Alemanni* case (n 241) para 33.

350 *Alemanni* case (n 241) paras 33-42.

351 *Alemanni* case (n 241) paras 124 & 319.

352 Organisation of American States Inter-American Convention on Human Rights (adopted 22 November 1969, came into force 18 July 1978).

353 *Alemanni* case (n 241) paras 131-132.

354 *Alemanni* case (n 241) paras 40-41.

355 *Alemanni* case (n 241) paras 49 & 62.

expect that the sovereign debtor will be able to pay them a sum higher than that accepted by the creditors who did participate in the restructuring'.[356] This, Argentina reasoned, is because 'no holder of interests would choose to participate if he knew, or even had the reasonable expectation, that another person, in a similar position, would later receive a better offer'.[357] That is why Argentina accorded 'the same treatment to all creditors who are in a similar position'.[358] This is more so in the case of claimants who purchased their bonds after the default (vultures).[359]

Accordingly, Argentina argued, there was no treaty violation. This is because 'a mere failure to pay a contractual debt cannot in itself amount to a violation of international law, nor does international law preclude a debtor from offering terms of settlement to its creditors or to offer special treatment to creditors who do accept settlement terms'.[360] Holding otherwise, Argentina argued, would endorse bad faith of hold-out and vulture fund creditors.[361] In line with the evolving SDR regime embodied in, among others, UNCTAD's PRSLB and the Principles for Stable Capital Flows, 'the conduct of creditors, in the event of a default, was to be evaluated against the agreed framework principles worked out under the aegis of the G-20 for sovereign debt restructurings'.[362] According to this evolving regime, debtors and all classes of creditors are required to cooperate 'to ensure that the terms for amending existing debt contracts and/or a voluntary debt exchange are consistent with market realities and the restoration of growth and market access'.[363]

The decision

In 2014 the tribunal rendered a unanimous decision noting that following the majority in the *Abaclat* and *Ambiente* cases was a 'simple wisdom' while avoiding the key question raised by Argentina regarding the policy implications of arbitration by hold-out creditors.[364] The tribunal held that the violations complained of and the jurisdictional objections were so

356 *Alemanni* case (n 241) paras 43.

357 As above.

358 As above.

359 *Alemanni* case (n 241) paras 154 & 216.

360 *Alemanni* case (n 241) para 63.

361 *Alemanni* case (n 241) para 171 citing Principles for Stable Capital Flows 2013.

362 *Alemanni* case (n 241) para 171.

363 As above.

364 *Alemanni* case (n 241) paras 255-256 & 267-271.

intertwined as to require deferment to the merits phase.[365] The complaints of the claimants arose out of Argentina's sovereign debt default and would only qualify as a 'dispute' where 'the interest represented on each side of the dispute [is] in all essential respects identical for all of those involved on that side of the dispute'.[366] It compares with the *Bayview* case where multiple claimants were alleging a violation of their water rights[367] and held that sovereign debts constitute investment under the ICSID Convention because 'when the Convention was under negotiation, sovereign bonds were actually used as an example of the potential breadth of the Convention's reach in terms of what sorts of future dispute could be put before an ICSID tribunal'.[368] Therefore, Argentina's formal default on its external debt was a *prima facie* violation of the BIT guarantees of FET and non-expropriation.[369] It concludes thus:

> [T]here is no denying that, by a combination of governmental policy and legislative action – thus quintessentially sovereign acts – the Republic of Argentina went beyond a mere failure to pay the sums contractually due to its creditors, and that this happened under circumstances which lay outside the normal legal remedies and controls that exist for the benefit of creditors in the case of private bankruptcy. The Tribunal does not believe that it can seriously be argued that this combination of circumstances is not capable of constituting a breach of the treaty guarantees.[370]

In addition, the tribunal relied on the decision of the *Ambiente* tribunal to the effect that redress in domestic courts as prescribed by the BIT would have been futile because of Argentina's Supreme Court's understanding of international law that 'international responsibility is precluded where a state suspends or modifies payment of the external debt for reasons of financial necessity'.[371]

Having ruled that sovereign bonds were investments within the contemplation of the relevant BIT, it, however, observed that 'the Tribunal is sensible of the issues raised by the respondent which it can well understand might be regarded as serious matters on the international bond

365 *Alemanni* case (n 241) para 293.
366 *Alemanni* case (n 241) paras 292-295.
367 *Alemanni* case (n 241) para 294.
368 *Alemanni* case (n 241) para 296.
369 *Alemanni* case (n 241) paras 298-300.
370 *Alemanni* case (n 241) paras 300-315.
371 *Alemanni* case (n 241) paras 315-316.

markets'.[372] Notwithstanding this observation, it relied on the *Abaclat* case and concludes thus:

> As a fact of international economic life, sovereign bond issues were plainly within the normal field of contemplation of the Contracting Parties at the time when the BIT was under negotiation, and they could readily have introduced an exception in that regard into an appropriate place in the BIT if that had been what they wanted. The answer to the respondent's assertion lies in the first place therefore … not in asking the Tribunal to import policy considerations into one area while vigorously rejecting them in others, but rather in a sober analysis of whether, given that the original Bond issues were plainly capable of falling within the concept of 'investment in the territory of Argentina' under the BIT, the same necessarily applies to derivative rights of the kind held by the Claimants.[373]

Finally, in December 2015 the tribunal discontinued the proceedings without a decision on the merits on account of non-payment of arbitration cost.[374] The case followed the pro-creditor interpretations of the majority decisions in the *Abaclat* and *Ambiente* cases even as SDR cases were never adjudicated by ICSID tribunals in the past despite recurring debt crises. The *Alemanni* case, therefore, re-echoes the gradual embeddedness of transnational private law into the sovereign debt regime.

It can be observed that the above three decisions did not address the defences relating to the debt crisis but, by accepting the claims, they took an unprecedented position on SDR that, arguably, relegates the debtors' other competing obligations during crisis to the background. This appears to contradict the positions in the espousal claim cases. Thus, the merit phase cases (that is, the SDC cases to be examined hereunder), it will be shown, were more sympathetic to the debtors' 'obligatory dilemma' and the severe impacts of the crisis on the citizens' human rights.

4.2.4 The SDC *cases:* EDFI v Argentina *(*EDFI *case),* Urbaser v Argentina *(*Urbaser *case),* Impregilo v Argentina *(*Impregilo *case) and* Sempras v Argentina *(*Sempra *case)*

These cases bear virtually the same factual situations involving, among others, accumulation of debts due to non-payments of subsidy costs

372 *Alemanni* case (n 241) para 320.

373 *Alemanni* case (n 241) para 320.

374 *Giovanni Alemanni & Others v Argentine Republic* (Discontinuance of Proceedings) (14 December 2015) paras 17-25, https://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207009.pdf (accessed 9 May 2018).

arising from investments in Argentina's real economy. Unlike the above three cases, these cases proceeded to the merit phase and awards were handed down, hence, socio-economic rights issues were directly raised, contested and pronounced upon.[375] Although the cases were not initiated as bondholders' claims like the above three cases, they, however, fit into our classification of SDAs because their factual background and the defences put up by Argentina were directly connected to the debt defaults of 2001 and the emergency legislative and executive measures adopted in a bid to return the country to debt sustainability.[376] Accordingly, relevant factual and legal issues arising out of the debt crisis will be examined now.

The *EDFI* case

The facts are similar to the above cases in the context of Argentina's debt crisis. In a bid to modernise and grow its economy, Argentina embarked upon a massive deregulation and privatisation of public enterprises in the 1980s and 1990s.[377] The claimants, French companies, filed a request for arbitration under the ICSID Convention pursuant to the Argentina-France BIT of 1991 and the Argentina-Luxembourg BIT claiming over $120 million arising from alleged breaches of contract partly occasioned by the debt crisis and non-payments of debts.[378] The dispute arose out of an electricity tariff charged under an agreement between the claimants and the government of the Mendoza Province of Argentina pursuant to a legal framework designed to reorganise, privatise and stabilise electricity transmission and distribution services.[379] The tariff rates were regulated by a federal currency convertibility law pegging the exchange rate of dollar to the peso on the basis of one to one.[380] The rationale, according

375 *EDF International SA & Others v Argentine Republic* ICSID Case ARB/03/23 (11 June 2012), https://www.italaw.com/sites/default/files/case-documents/ita1069.pdf (accessed 9 May 2018) (*EDFI* case); *Urbaser v The Argentine Republic* (*Urbaser* case); *Impregilo v Argentine Republic* ICSID Case ARB/07/17 (21 June 2011), https://www.italaw.com/sites/default/files/case-documents/ita0418.pdf (accessed 9 May 2018) (*Impregilo* case); *Sempra v Argentina* Case ARB/02/16 (28 September 2007), https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf (accessed 20 October 2023).

376 AC Porzecanski 'The origins of Argentina's litigation and arbitration saga, 2002-2016' (2016) 40 *Fordham International Law Journal* 40-77; RM Ziff 'The sovereign debtor's prison: Analysis of the Argentine crisis arbitrations and the implications for investment treaty law' (2011) 10 *Richmond Journal of Global Law and Business* 345-386.

377 *EDFI* case (n 375) paras 54-60.

378 *EDFI* case (n 375) paras 1-10.

379 *EDFI* case (n 375) paras 54-62.

380 *EDFI* case (n 375) paras 78-83.

to the claimants, was to allow for a long-term debt financing from the international capital markets.[381]

By the provisions of a local law, which were incorporated into a subsequent contract with the power generation company, the government was to compensate the claimants for the purchase of power at a higher price than the price at the wholesale market (that is, reimbursements for extra costs).[382] In addition, the government undertook to subsidise electricity tariffs for the elderly, rural farmers for irrigation purposes and for public lightening services (that is, compensation for subsidy).[383] The government stopped making both payments, forcing it into indebtedness.[384] Consequent upon the debt crisis, the government owed over US $5 million in subsidy and compensation costs.[385] The claimants' local representatives' recovery claims were rejected by the Supreme Court for failure to first exhaust administrative remedies. The government agreed to repay the outstanding amounts following a renegotiation.[386] Furthermore, by government directives, the claimants were forced to accept government's issued notes/bonds as valid payments (that is, instead of currency) for electricity resulting in a 20 per cent loss for the claimants.[387]

As a result of the debt crisis and the ensuing economic turmoil, Argentina enacted the Law of Public Emergency and Reform of the Monetary Exchange Regime (Federal Law 25, 561 of 2002) which devalued the peso (that is, on the ratio of three pesos to one US dollar) thereby setting aside the fixed-parity, convertibility currency regime in order to encourage exports.[388] The law, however, froze the tariff rates under the agreement as obtained before the emergency law (pesification), thereby forcing the claimants to shoulder the inflationary risks. It also prohibited a suspension or an alteration of performance of public services/utilities contracts.[389] The government could not pay its debts to the claimants' representatives.[390] Unfortunately, in July 2002 the claimants' local representative also defaulted on its debts and the claimants, consequently,

381 *EDFI* case (n 375) para 292.

382 *EDFI* case (n 375) paras119-120.

383 *EDFI* case (n 375) paras 127-130.

384 *EDFI* case (n 375) paras 121 & 271-279.

385 *EDFI* case (n 375) paras 118-133.

386 *EDFI* case (n 375) paras 123-126.

387 *EDFI* case (n 375) paras 280-283.

388 *EDFI* case (n 375) paras 143-145 referring to Federal Law 25, 561 of 2002 (Emergency Law).

389 *EDFI* case (n 375) paras 154-155.

390 *EDFI* case (n 375) paras 150, 296-297.

decided to employ ISDS mechanism pursuant to the Argentina-France BIT and Argentina-Luxemburg BIT.

The ICSID tribunal assumed jurisdiction.[391] During the merit phase, the claimants argued that the non-payments of subsidy costs and compensations as well as the emergency measures adopted arising from the debt crisis violated FET, national treatment, and full protection and security standards under the Argentina-France BIT.[392] They also argued that the government's actions, notwithstanding the debt crisis, were arbitrary, unreasonable, unjustified measures amounting to indirect expropriation.[393]

For the present purposes, one of the fundamental issues of contention between the parties was what the tribunal calls 'the preemptive nature of international human rights laws which might have prohibited the observance of the Treaty'.[394] In this regard, the claimants argued that the BITs and CIL ordinarily define and control treaty-based rights and their violations. Therefore, by the ILC Draft on International Responsibility of States and VCLT, no emergency law can excuse non-payments and other breaches amounting to treaty violations.[395] On the contrary, the respondent argued that the claimants' rights were exercisable in accordance with the prevailing circumstances and the legal regime relevant to the economic crisis.[396] The latter altered the economic expectations of the parties and those of the population, hence 'the emergency laws were legitimate and reasonable to allow for the gradual economic and social recovery which would benefit all constituents'.[397] Importantly, Argentina argued that its investment treaty obligations must not be construed in such a manner as to undermine its international human rights obligations and, therefore, 'the Treaty should be construed and interpreted consistently with international canons aimed at fostering respect for human rights'.[398]

391 *EDFI* case (n 375) paras 158-163.

392 *EDFI* case (n 375) paras 181-190.

393 *EDFI* case (n 375) paras 201-203.

394 *EDFI* case (n 375) para 183.

395 *EDFI* case (n 375) paras 182-190.

396 *EDFI* case (n 375) para 187.

397 *EDFI* case (n 375) paras 299-300, 305, 392 & 427-428.

398 *EDFI* case (n 375) para 192.

Argentina further advanced a socio-economic rights' justification that it was necessary to adopt the emergency measures complained of

> in order to guarantee the free enjoyment of certain basic human rights – such as, *inter alia*, the right to life, health, personal integrity, education, the rights of children and political rights [which were] directly threatened by the socio-economic institutional collapse suffered by the Argentine Republic, where tens of people lost their lives, the right to health, to personal integrity, to work and safety.[399]

The *jus cogens* status of these rights was also advanced to justify the SDC-induced emergency measures adopted by Argentina.[400] It reasoned thus:

> [Investors' treaty rights] should not be deemed absolute to the detriment of the Argentine population's entitlement to universal human rights enshrined in international instruments such as the 1948 UN Universal Declaration of Human Rights, the 1966 UN International Covenant on Civil and Political Rights, the 1989 UN Convention on the Rights of the Child, and the 1969 American Convention on Human Rights ... [as] these multilateral pacts proscribe the abrogation or suspension in any situation of those rights contained thereunder; hence, the non-derogable nature of such rights is said to be conclusive evidence that they are tantamount to *jus cogens.*[401]

Therefore, measures designed to ensure the sustained enjoyment of these rights must be excused from international responsibility because '[t]he government … [pursuant to the American Convention on Human Rights] … was not supposed to suspend the exercise of human rights but to ensure their satisfaction at reasonable levels'.[402] In adopting the emergency measures complained of, Argentina's main objectives, it maintained, were 'to avoid hyperinflation, improve fiscal situations and halt deterioration of life conditions'.[403]

The claimants rejected the characterisation of socio-economic rights as candidates for a *jus cogens* norm. While accepting that investors' rights must give way to *jus cogens* norms, they insisted, however, that with the exception of norms against genocide and slavery, there are no specific international human rights assuming the status of *jus cogens* that would

399 As above.

400 *EDFI* case (n 375) para 193.

401 As above.

402 *EDFI* case (n 375) para 194.

403 *EDFI* case (n 375) para 416.

warrant the adoption of the measures complained of.[404] In their words, 'it is preposterous to suggest that any *jus cogens* norms required Argentina to repudiate the claimants' rights … or that Argentine citizens hold a supervening right to consume electricity at certain reduced prices'.[405] They maintained that simply because states' duties under the American Convention were non-derogable, it does not make the corresponding rights to qualify as *jus cogens* norm because, by VCLT, the latter is a norm 'accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[406]

While relying on, among others, the *Russian Indemnities* case, Argentina advanced the BIT-based public emergency and CIL necessity defences, arguing that the measures adopted were excused because they sought to maintain public order by 'ensuring internal safety, in the face of situations such as violent internal insurrections, riots, lootings and crimes, extended social tension, or the possibility that the fundamental order be disintegrated and the government lose effective control over the state's territory'.[407]

In addition, by article 3(2) of the Argentina-Luxemburg BIT, investors' protection shall be 'without prejudice to measures necessary for the maintenance of public order'.[408] This is because 'the main purpose of BITs is to rule in normal situations and do not particularly address exceptional situations'.[409] Furthermore, it argued, this is a universally accepted position as, for instance, the European Convention (articles 8-11 and 15) permits states to adopt emergency measures 'to the extent strictly required by the exigencies of the situation …[and] necessary in a democratic society'.[410]

Using article 25 of the ILC Draft on State Responsibility for Internationally Wrongful Acts 2001 (ILC Draft on State Responsibility),[411] Argentina argued that by halting increasing poverty, 'personal as well as

404 *EDFI* case (n 375) para 191.

405 As above.

406 *EDFI* case (n 375) paras 195 & 221-226.

407 *EDFI* case (n 375) paras 482-485, 507, 520-522.

408 *EDFI* case (n 375) para 883.

409 *EDFI* case (n 375) para 486.

410 *EDFI* case (n 375) para 489.

411 ILC Draft Articles on State Responsibility for Internationally Wrongful Acts (2001), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed 22 July 2019).

property rights and obligations of the general public [qualify as] essential interests' because the debt crisis was an existential crisis for the survival of Argentina as a state, and public order and economic viability were directly at stake and should, therefore, be prioritised over contractual commitments.[412] Citing UN reports on the social impacts of the Argentine debt crisis, it argued that there were sufficient evidence that

> life, health, liberty, and security of individuals, as well as the institutional continuity of the state, were seriously at risk – social unrest claimed the lives of several and a wave of lootings, kidnappings and vandalising ensued, levels of unemployment and poverty sharply increased, and healthcare services experienced dire shortages in medicine resulting in the outbreak of diseases such as yellow fever, dengue, malaria, and tuberculosis.[413]

The debt crisis had 'impoverished the people of Argentina due to budgetary and financial limitations suffered by the government.'[414] It further submitted that there was general consensus that the debt crisis came about largely because of exogenous factors: Argentina's debts were 'indexed to the US dollar' and IFIs' recommendations to return to debt sustainability 'proved insufficient'.[415] Indeed, 'several exogenous factors, including the rise in interest rates, the collapse of emerging markets, devaluation of the currency, and the fall of exports-value' were the immediate, direct causes of the debt default.[416] Despite this, it argued, Argentina lost support from international organisations and creditor nations.[417] Consequently, the only reasonable way out was 'the issuance of a decree cancelling [the] said indexation' and restructuring by way of haircut.[418]

On the contrary, the claimants reject the necessity defence because, first, the debt crisis did not put Argentina in any grave and imminent peril as there was no 'significant institutional rupture, such as disintegration of the rule of law or of the constitutional order that could have caused a state of ungovernability or anarchy.'[419] Second, Argentina directly caused the crisis by years of persistent fiscal indiscipline and accumulation of unsustainable debt.[420] Hence, the debt crisis was simply 'self-generated',

412 *EDFI* case (n 375) para 516.
413 *EDFI* case (n 375) para 529.
414 *EDFI* case (n 375) para 534.
415 *EDFI* case (n 375) paras 531-532.
416 *EDFI* case (n 375) paras 565-566.
417 *EDFI* case (n 375) para 551.
418 *EDFI* case (n 375) para 532.
419 *EDFI* case (n 375) para 526.
420 *EDFI* case (n 375) paras 569-576.

not exogenous. Third, Argentina did not provide specific evidence to show that the post-default measures it adopted were the only way to guarantee social, economic and political stability especially as other measures compatible with its international obligations existed at the time of the statutory debt restructuring measures.[421] Fourth, the necessity defence covers a temporary period because, according to article 27 of the ILC Draft on State Responsibility, the invocation of such defence is 'without prejudice to … compliance with the obligations in question, if and to the extent that the circumstance precluding wrongfulness no longer exists'.[422] Therefore, if the debt crisis ends, the 'obligation regains full force and effect'.[423] In other words, the defence only temporarily precludes wrongfulness, not exempting liability permanently.[424] Fifth, the high level of poverty arising from the crisis did not qualify as an 'essential interest'. They advanced the following policy argument:

> [I]f the mere existence of a severe economic crisis or of a high level of poverty were by themselves sufficient to constitute an essential interest for purposes of the State of Necessity defence, there would be numerous countries in the world that would subsist in a quasi-permanent state of necessity … [T]he exceptional nature of the rule of necessity would consequently be degraded to a generic opt-out mechanism for countries to circumvent their international treaty obligations, since then every country with a risk of hyperinflation or other severe macroeconomic maladjustment as well as every country with a poverty level higher than 40% would be exempted from international treaty obligations … [I]t is unreasonable to propose that sovereigns with a high country risk must be considered, almost by definition, to be in a state of necessity.[425]

Like all the above tribunals, this tribunal relied heavily on VCLT's principles of interpretation with respect to good faith and a treaty's context, purpose and objects.[426] It also relied on the provisions dealing with conflicts between *jus cogens* and treaty provisions.[427] Consequently, the tribunal held that Argentina could not rely on its domestic law to violate its international obligations on FET and contractual obligations via the 'umbrella clause' of the BITs.[428]

421 *EDFI* case (n 375) paras 536 & 543-556.

422 *EDFI* case (n 375) para 579.

423 *EDFI* case (n 375) paras 579-584.

424 *EDFI* case (n 375) paras 590-592.

425 *EDFI* case (n 375) para 522.

426 *EDFI* case (n 375) paras 891-895.

427 *EDFI* case (n 375) paras 895-897 referring to VCLT 1969 art 53.

428 *EDFI* case (n 375) paras 905-907.

Importantly, the tribunal recognised that socio-economic rights may qualify as *jus cogens* but that this would require some compelling evidence to show that the non-payments of debts and the subsequent emergency measures adopted would directly guarantee the said human rights.[429] Argentina did not adduce specific evidence to link these rights to the emergency measures. The tribunal noted that although it is 'sensitive to international *jus cogens* norms from which no derogation is permitted, including human rights', in the circumstances of the present case this defence cannot avail Argentina.[430] It reasoned thus:

> The Tribunal does not call into question the potential significance or relevance of human rights in connection with international investment law. However … no showing has been made that Argentina was not able to comply with the relevant treaty provisions later, through a rectification of the economic equilibrium which had been disrupted by the Emergency Measures … [N]o evidence persuades the Tribunal that [the] Respondent's failure to re-negotiate … in a timely fashion, so as to re-establish the economic equilibrium … was necessary to guarantee human rights.[431]

In other words, showing a causal nexus between the debtor's actions and the protected human rights in question is a question of evidence.

The tribunal held that Argentina violated its treaty obligations under the BIT and the terms of the agreement pursuant to the applicable 'umbrella clauses'.[432] However, it held that Argentina cannot be held liable for the non-payment of debts governed by its laws in the absence of evidence showing denial of justice.[433] There was no indirect expropriation as a result of the emergency measures and no violation of the standard of full protection and security.[434] The claim of payment through bonds also was not substantiated.[435] Although Argentina violated FET standard, the tribunal noted that 'investor's expectations must be balanced against the host state's need to take action in the public interest at a time of crisis'.[436]

Nevertheless, the tribunal rejected the defence of necessity. It first rejected the public order defence based on the Argentina-Luxemburg BIT

429 *EDFI* case (n 375) paras 909-911.
430 *EDFI* case (n 375) paras 909-914
431 As above.
432 *EDFI* case (n 375) para 941.
433 *EDFI* case (n 375) paras 941 & 963-1080.
434 *EDFI* case (n 375) paras 1108-1115.
435 *EDFI* case (n 375) paras 1084-1085.
436 *EDFI* case (n 375) paras 1005-1040.

as the claimants' substantive claims were not premised on the said BIT but on the Argentina-France BIT (that is, the governing *lex specialis*).[437] The defence in the latter BIT also was not meant to be 'a shield against host state liability for treaty violation'.[438] On the basis of the CIL necessity defence, the tribunal noted thus:

> [Although it] does not call into question respondent's good faith [that the emergency measures were] … enacted to safeguard the country's vital interests such as protecting of Argentina's indigent population, the tribunal is not convinced that those measures were the only means by which the respondent could have protected its population.[439]

This is because, according to the tribunal, the evidence showed that Argentina partly caused its debt crisis. Necessity, in the words of the tribunal, is not 'an easy escape hatch for host states wishing to avoid treaty obligations which prove difficult'. Argentina failed to show that its actions were necessary to protect its essential interests and that it did not contribute to the situation complained of.[440] Indeed, the tribunal held that '[a]lthough external factors may have aggravated the economic turmoil, Argentina was responsible at least in part, for creation of a poor economic climate, through the government's continued failure to achieve primary surpluses sufficient to stop an unsustainable debt ratio'.[441]

Therefore, it may be inferred that the tribunal has implicitly embraced the notion of socio-economic rights justification to suspend debt service. It thoroughly examined this in the context of the defence of necessity. Interestingly, the tribunal appears to have re-echoed the inconsistent ICSID jurisprudence on the substantive content of the defence of necessity in the context of SDC.[442]

The *Impregilo* case

This case concerned a contract for the provision of water and sewage services directly affected by the debt crisis. Argentina argued, among others, that the emergency measures it adopted to deal with the debt crisis were necessary 'in order to guarantee its inhabitants the human right to

437 *EDFI* case (n 375) paras 888-890 & 1150-1152.

438 *EDFI* case (n 375) paras 1157-1162.

439 *EDFI* case (n 375) paras 1165-1172.

440 *EDFI* case (n 375) para 1171.

441 *EDFI* case (n 375) paras 1171-1178.

442 See, eg, *LG & E Energy Corp & Others v Argentine Republic* (2007) 46 ILM 36 (ICSID); *CMS v Argentine Republic* (2005) 44 ILM 1205.

water... [as] … the obligations assumed by the Argentine Republic as regards investments do not prevail over the obligations assumed in treaties on human rights'.[443] Consequently, 'the obligations arising from the BIT must not be construed separately but in accordance with the rules on protection of human rights'.[444]

The tribunal held that the human rights obligation of Argentina to provide water to its citizens qualified as an 'essential interest' under CIL defence of necessity.[445] It agreed that the debt default and the ensuing crisis were so 'grave and imminent' as to warrant the adoption of these measures. Indeed, it noted that 'so alarming was the situation that the United Nations General Assembly resolved to suspend the payment of Argentina's membership dues on account of the crisis, which was the first case in history where this was done'.[446] It held thus:

> [T]he term 'essential interest' can encompass not only the existence and independence of a state itself, but also other subsidiary but nonetheless 'essential' interests, such as the preservation of the state's broader social, economic and environmental stability, and *its ability to provide for the fundamental needs of its population*. It follows that, in addition to Argentina's overall stability, *the need to provide the population with water and sewage facilities represented an "essential interest"* … The situation was indeed critical … Argentina's crisis of 2001-2002 resulted in a massive default on the public debt, on the domestic as well as the international level … The Arbitral Tribunal accepts that there was a grave and imminent peril to the 'essential interest' of Argentina's economic and social stability.[447]

Despite accepting 'the fundamental needs of its population' such as the right to water as 'essential interests' and the fact that 'international market forces and events taking place in, inter alia, Mexico, Southeast Asia, and Russia affected adversely the economy of Argentina, culminating in the crisis of the early 2000s', the tribunal, however, held that Argentina 'contributed significantly' to the debt crisis by years of fiscal indiscipline and subsidising provincial governments'.[448] This is troubling in light of the above findings. Nevertheless, the strict interpretation given to the defence of necessity on policy ground seems to have been extended to the socio-economic rights 'defence' because, like in the *EDFI* case, the tribunal fused

443 *Impregilo* case (n 375) paras 230-231.

444 *Impregilo* case (n 375) para 230.

445 *Impregilo* case (n 375) paras 230-239.

446 *Impregilo* case (n 375) para 241.

447 *Impregilo* case (n 375) paras 346-350 (my emphasis).

448 *Impregilo* case (n 375) paras 358-359.

socio-economic rights into the CIL defence of necessity. The tribunal also treated the BIT defence within the context of CIL defence.

The *Urbaser* case

In the *Ubaser* case, a case with similar facts as the *Impregilo* case except for the BIT, the defence of necessity and a socio-economic rights-based counterclaim were raised following the debt crisis that, as in the above cases, instigated the investment claim.[449] Interestingly, the case also raised issues of norm conflict. Argentina decided to put the claimants in the spotlight. The counterclaim relates to the legitimate expectations of Argentina's citizens arising from the claimant's failure to discharge its investment obligations, thereby affecting the 'basic human rights, as well as the health and the environment of thousands of persons, most of which lived in extreme poverty'.[450]

Argentina argued that its BIT obligations were not to be interpreted in isolation from its other rights and obligations under international law.[451] Consequently, it acknowledged that, as a signatory to ICESCR, it has an obligation to ensure the right of everyone to an adequate standard of living, including adequate food, clothing and housing but that, by articles 29 and 30 of the Universal Declaration, the International Labour Office (ILO)'s Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy (as amended in 2017),[452] the UN Draft Code of Conduct on Transnational Corporations,[453] the ESCR Committee's General Comments, 'the rules contained in the Universal Declaration of Human Rights and the corresponding International Covenant are applicable to multinational companies'.[454]

The claimants objected to the counterclaim arguing that as human rights are directly binding on states and not private companies under IHRL, Argentina is the true guarantor of its citizens' rights to water,

449 *Urbaser* case (n 375).

450 *Urbaser* case (n 375) para 1156.

451 *Urbaser* case (n 375) para 1158.

452 ILO Tripartite declaration of principles concerning multilateral enterprises and social policy (amended in 2017), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf (accessed 22 July 2019).

453 UN Commission on Transnational Corporations UN Draft Code of Conduct on Transnational Corporations (1984) 23 (3) ILM 626-640.

454 *Urbaser* case (n 375) para 1160.

health and decent environment, not the claimants.[455] Besides, they argued, BITs do not protect states from breach by a private investor but protect the latter from violations by the former.[456] This is because their obligations are contractual, not treaty-based and, therefore, they cannot be held responsible for any alleged harm on the population arising from the non-fulfilment of their contractual obligations.[457] By pleading necessity, they argued, the counterclaim has been rendered nugatory because 'circumstances that allegedly caused the state of necessity would have affected both parties.'[458]

The tribunal held that it was wrong to assume that only investors have rights under a BIT because, by the dispute resolution provision of the Spain-Argentina BIT (that is, the *lex specialis*) 'there is no provision stating that the … host state would not have any right under the BIT … No distinction is made in respect of the party entitled [to] the rights that are at the basis of the dispute … They can be rights of the investor as they can be rights of the host state.'[459] The tribunal further reasoned thus:

> As far as recourse to the 'general principles of international law' is concerned, such reference would be meaningless if the position would be retained that the BIT is to be construed as an isolated set of rules of international law for the sole purpose of protecting investments through rights exclusively granted to investors … The BIT does not represent … a set of rules defined in isolation without consideration given to rules of international law external to its own rules.[460]

Based on the above, the tribunal recognises the idea of corporate human rights responsibility as advanced in this book (chapter 3).[461] It rejects the notion of state-centrism in the context of socio-economic rights responsibility. The assertion that 'guaranteeing the human right to water is a duty that may be born solely by the state, and never borne also by private companies like the claimants' is no longer tenable because it has the effect

455 *Urbaser* case (n 375) para 1157.

456 *Urbaser* case (n 375) paras 1167-1169.

457 *Urbaser* case (n 375) paras 1167-1172.

458 *Urbaser* case (n 375) para 1173.

459 *Urbaser* case (n 375) paras 1183-1187.The tribunal pointedly raised the question 'whether any host state's rights under the BIT shall be denied because of the very nature of BITs deemed to constitute investment law in isolation, fully independent from other sources of international law that might provide for rights the host state would be entitled to invoke and to claim before an international arbitral tribunal'. See *Urbaser* case (n 375) para 1186.

460 *Urbaser* case (n 375) paras 1189-1192.

461 *Urbaser* case (n 375) paras 1193-1198.

of excluding private parties from human rights obligations.[462] Similarly, it rejects the argument based on non-subjectivation of companies in international law because '[w]hile such principle had its importance in the past, it has lost its impact and relevance in similar terms and conditions'.[463] It concludes thus:

> [I]nternational law accepts corporate social responsibility as a standard of crucial importance for companies operating in the field of international commerce. This standard includes commitments to comply with human rights in the framework of those entities' operations conducted in countries other than the country of their seat of incorporation. In light of this more recent development, it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law … The focus must be, therefore, on contextualising a corporation's specific activities as they relate to the human right at issue in order to determine whether any international law obligations attach to the non-State individual.[464]

This supports the proposition advanced earlier in chapter 3 that focusing on the character of the violators rather than the violation itself belittles the significance of socio-economic rights.[465] Indeed, the tribunal specifically referred to the UN Guiding Principles on Business and Human Rights, the Universal Declaration, ICESCR, ILO's Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy and VCLT. Because of the significance of the tribunal's pronouncement, it will help to quote it *in extenso* here. It concludes thus:

> The 1948 Universal Declaration of Human Rights proclaims … that 'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social service' (Art 25(1)) … [I]n order to ensure that such rights be enjoyed by each person, it must necessarily also be ensured that no other individual or entity, public or private, may act in disregard of such rights, which then implies a corresponding obligation, as stated in Article 30 of the Declaration … The Declaration may also address multinational companies … Similarly, the 1966 International Covenant on Economic, Social and Cultural Rights states that States Parties recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (Arts 11(1) and 12) … [Therefore] the human right for everyone's dignity and its

462 *Urbaser* case (n 375) para 1193.

463 *Urbaser* case (n 375) paras 1193-95.

464 As above.

465 See part 3.4 of ch 3.

> right for adequate housing and living conditions are complemented by an obligation on all parties, public and private parties, not to engage in activity aimed at destroying such rights … The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.[466]

However, the tribunal declined to hold the claimants accountable for Argentina's failure to ground the claimant's alleged obligation on IHRL (but on contract) especially because the provision of socio-economic rights is an obligation of performance.[467] Nevertheless, it affirms the corporate *duty to respect* by holding that the claimants may be responsible 'in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon states, but equally to individuals and other private parties.'[468]

The counterclaim failed specifically because Argentina could neither concretise nor support its arguments with factual evidence showing harms to specific individuals or group of individuals.[469] It, thus, is a question of causation.

Finally, with respect to the defence of necessity, Argentina argued that external shocks, raising of US interest rates and IMF's admission of wrong diagnosis and erroneous policy prescriptions were the causes of the debt crisis.[470] In particular, 'the measures adopted by the Argentine Republic prevented the human right to water from being adversely affected and, with it, the right to an adequate standard of living, food and housing'.[471] It argued:

> Unlike other countries, the Argentine Republic did not receive any external aid to avoid or manage its crisis. On the contrary, on December 5, 2001, the IMF denied the release of funds in the amount of USD 1 260 million … It maintained public order, protected its essential security interests, preserved the essential human rights and the existence of the financial system. There is no obligation, either under domestic or international law, which may override

466 *Urbaser* case (n 375) paras 1196-1202.

467 *Urbaser* case (n 375) paras 1209-1210.

468 *Urbaser* case (n 375) para 1210.

469 *Urbaser* case (n 375) paras 1220-1221. See also Crow & Escoba (n 4) 87-118; Briercliffe (n 14) 1-3.

470 *Urbaser* case (n 375) para 701.

471 *Urbaser* case (n 375) para 702.

> Argentina's duty to guarantee the free and full exercise of the rights of all persons who are subject to its jurisdiction.[472]

However, the claimants argue that such defence was not recognised under the Spain-Argentina BIT or CIL. This, according to the claimants, cannot preclude liability arising from the measures adopted following the debt crisis. This is because Argentina caused the crisis by its 'excessive public spending over recurring revenues that led to unsustainable accumulation of public debt and ultimately to sovereign default that fatally undermined the basis for Argentina's financial and economic stability.'[473] They argued that Argentina can fulfil its human rights obligations to its citizens and the obligations to its investors simultaneously.[474]

The tribunal held that there was a situation of necessity warranting the adoption of measures complained of, but it cannot exist permanently, that is, beyond a specific period.[475] It doubts the strict interpretation often given to article 25 of the ILC Draft with respect to rights which 'may accrue directly to any person or entity other than a state'.[476] According to the tribunal, both internal and external factors caused the crisis but there must be a direct causal connection showing that 'the government's acts were such that they either were directed towards a crisis resulting in the emergency situation that the country experienced in early 2002, or at least of such a nature that the government must have known that such crisis and emergency must have been the outcome of its economic and financial policy'.[477] In other words, 'an allegation stating that the Argentine government substantially contributed to these events requires a showing of a link of causality between such conduct and the outbreak of the crisis'.[478] The tribunal reasoned that Argentina had no option but to suspend its debt payments and adopt the emergency measures complained of.[479]

It also examined the issue of norm-conflict in the context of human rights and investors' obligations thus:

472 *Urbaser* case (n 375) paras 704-706.
473 *Urbaser* case (n 375) paras 686-688.
474 *Urbaser* case (n 375) para 694.
475 *Urbaser* case (n 375) paras 718-719.
476 *Urbaser* case (n 375) para 717.
477 *Urbaser* case (n 375) paras 710-711.
478 *Urbaser* case (n 375) para 714.
479 *Urbaser* case (n 375) para 716.

> [T]he question whether 'other means' were available has to be captured in both perspectives: the wide one, taking into account the needs of Argentina and its population nation-wide, and the narrower one of the situation of investors engaged in performing contracts protected by the international obligations arising out of one of the many BITs. Claimants have not addressed the first part of the question. Respondent has made more than a prima facie showing that the emergency measures taken were the only ones available to the Argentine government at the time, taking into account the extreme economic, institutional and social disturbances suffered by the country and its population. It would have been incumbent on claimants to offer at least a serious indication as to the nature of other measures that had been available to the government at that time. Claimants' focus was exclusively on its own interests and the protection they allegedly derive from the BIT.[480]

In other words, prioritising BIT protected rights (that is, 'narrow state obligations') over human rights (that is, 'general obligations') simply is disingenuous. Insisting that the two can be fulfilled simultaneously in the face of an unprecedented debt crisis is equally disingenuous. Both depend upon limited (perhaps non-existent) resources. In the words of the tribunal:

> [The] claimants' argument is too short. It does not resolve the conflict between the obligation to guarantee the [investors'] right and the access of the poor and vulnerable population to water when this cannot be ensured otherwise than by failing to comply with the host state's obligations toward the Concessionaire … In respect of the emergency measures … the same legal structure is to be observed: the government of Argentina [is] under an obligation, based on Constitutional Law as well as on elementary policy of protecting the population's health, to preserve their access to drinking water.[481]

Some important points are worth noting here. First, although the lack of evidence to substantiate the counterclaim led the tribunal to reject Argentina's position, the tribunal expressly admitted the pre-eminence of socio-economic rights responsibilities in the context of competing international obligations during a sovereign debt crisis. Hence, private creditors' rights cannot override socio-economic rights. The latter are essential, fundamental needs of the citizens. It is their essentiality that makes the corresponding obligations non-derogable at least to satisfy the minimum core of the relevant socio-economic rights.

Second, as in the above two cases, the tribunal also situated socio-economic rights within the context of CIL defence of necessity. In other

480 *Urbaser* case (n 375) paras 716-725.

481 As above.

words, the status of socio-economic rights should be understood in the context of the emergency measures adopted to deal with the debt crisis. Third, unlike in the above cases, the tribunal here expressly recognised corporate socio-economic rights responsibilities supported by both hard and soft laws. This unarguably extends to private creditors adopting investment arbitration to enforce their rights. Finally, it may be implied that with the necessary evidence, there can be socio-economic rights-based counterclaims in an investment arbitration-based SDA. The implication of this is to put the rights holders in the middle of this form of adjudication. This could redefine socio-economic rights litigation, especially from the procedural angle.

The *Sempra* case

In this case the tribunal did not consider the debt crisis as 'grave and imminent' despite citing the non-derogable socio-economic rights obligations under the American Convention and considered a 'loan' to be a protected investment.[482] The case involved, among others, the non-payment of subsidy costs and claims for compensation arising from the claimants' inability to access international market to cancel a bonded loan due for maturity during the debt crisis.[483] While observing that the defence 'raises the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners', the tribunal held that the survival of the state was not 'imperiled by the crisis … [as] the constitutional order was not on the verge of collapse'.[484] This is curious because if proven political instability, rioting, loss of lives and properties, unemployment and severe malnutrition and deaths, were not 'grave' enough, then one wonders what would qualify as 'grave peril'. Perhaps the tribunal had in mind external aggression and civil wars that may not suit the ISDS mechanism. Arguably, even a small riot can imperil credit and investment activities.

Nevertheless, the tribunal considered the defence of necessity from multiple angles: domestic law, BIT, human rights, and CIL perspectives.[485] On the latter, it held that the conditions must be cumulatively satisfied. However, the available evidence showed that the crisis did not compromise the existence of the state, it did not involve essential state interest and that it was caused by both endogenous and exogenous factors.[486] Under

482 *Sempra* case (n 375) paras 214-398.

483 *Sempra* case (n 375) paras 214-269.

484 *Sempra* case (n 375) paras 332-338.

485 *Sempra* case (n 375) paras 325-332.

486 *Sempra* case (n 375) para 348.

the BIT's defence precluding measures designed to maintain public order, international peace and 'essential security interests' in safeguarding investors' rights, the tribunal used the above CIL standards to reject the defence because, it reasoned, 'international law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle'.[487]

Thus, by adopting these conditions, it means determining 'essential security interests' is not 'self-judging' (that is, a state determining its own essential interests).[488] Curiously, however, it held that the 'essential interests' of the claimants would be impaired by the necessity defence because 'in the context of investment treaties there is still the need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations'.[489] Yet, the tribunal did not at all examine the human rights obligations under the American Convention. Interestingly, one fundamental issue raised by Argentina was the legitimate expectations of the state and its citizens from the investors.[490] The tribunal, however, was silent on the issue. It only noted but downplayed the argument in favour of lowering investment protection standards during the debt crisis and held thus:

> The manner in which the law has to be applied cannot ignore the realities resulting from a crisis situation, including how a crisis affects the normal functioning of any given society. This is the measure of justice that the Tribunal is bound to respect. The Tribunal will accordingly take into account the crisis conditions affecting Argentina when determining the compensation due for the liability found in connection with the breach of the Treaty standards.[491]

This case only confirms the inconsistencies of ICSID tribunals on this issue. It seems curious to use CIL requirements on the defence of necessity where a BIT makes provisions for this particular defence. This is because of the obvious variations in standards and wordings. For instance, while CIL uses 'essential interests', most BITs use 'essential security interests'. Of course, CIL can be invoked to fill a vacuum but only where the relevant treaty is silent.

487 *Sempra* case (n 375) paras 374-378.

488 *Sempra* case (n 375) paras 382-389.

489 *Sempra* case (n 375) paras 390-397.

490 *Sempra* case (n 375) paras 289-318.

491 *Sempra* case (n 375) para 397.

4.2.5 Postova Banka AS & Another v Hellenic Republic (Postova Banka case)

Unlike the Argentine SDC, this case illustrates the complexity of a debt crisis within a highly-integrated currency union.[492]

Facts and parties' positions

This is a 'bank-bondholder' ICSID arbitration claim brought pursuant to the Slovakia-Greece BIT of 1991 and Cyprus-Greece BIT of 1992 following the Greek debt crisis of 2010. The claimants purchased Greek government bonds governed by Greek law in 2010 when Greek bonds were already downgraded in 2009 and the country had begun implementing austerity measures prescribed by IMF, EC and ECB.[493] The bonds contained no collective action clause (CAC).[494] According to the governing Greek law, the bonds were syndicated, that is, they were issued to some recognised participants to deliver to primary dealers who then transferred to third parties on the secondary market.[495] By 2011 the Greek economy deteriorated and IMF concluded that a private sector haircut was necessary to ensure debt sustainability.[496] On this account, a private creditor committee negotiated a 53 per cent haircut but the claimants did not participate in the negotiation.[497] Since none of the bonds contains a CAC clause, a Greek Bondholder Act (Law 4050/2012)[498] was enacted cramming down on non-participants (hold-outs) on the condition that half of the eligible bondholders participated and two-thirds voted in favour of the haircut.[499] Upon launching the restructuring by way of an exchange offer, over 90 per cent of the bondholders participated and over 94 per cent voted in favour. The claimant's representative, however, voted against the exchange offer. The claimant reclassified their bonds from tradable to 'hold to mature' bonds.

492 *Postova Banka AS and Istrokapital SE v The Hellenic Republic* ICSID Case ARB/13/8 (9 April 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4238.pdf (accessed 20 October) (*Postova Banka* case).

493 *Postova Banka* case (n 492) paras 45-51.

494 *Postova Banka* case (n 492) para 57.

495 *Postova Banka* case (n 492) paras 52-59.

496 *Postova Banka* case (n 492) paras 61-64.

497 *Postova Banka* case (n 492) paras 65-66.

498 Bondholder Act (Law 4050/2012) approved by the Greek Parliament on 23 February 2012.

499 *Postova Banka* case (n 492) para 67.

Apart from the defences against the substantive claims, Greece raised objections, among others, that the obligations assumed under Greek law cannot violate BIT standards and that the bonds were not protected investments under the relevant BITs and the ICSID Convention; hence, there was no *prima facie* violation of the treaty guarantees.[500] Using the *Salini* requirements and *Abaclat's* dissenting opinion, it argued that debt instruments were outside the province of ICSID arbitration.[501] According to Greece, a bond is different from a loan 'in so far as loans imply contractual privity and are usually tied to a specific operation or to an underlying investment in the host state'.[502] The relevant BITs exclude sovereign bonds in their definitions of 'investments' and the said bonds had no territorial nexus with Greece, nor were they meant to contribute to its development.[503] It argued that the reclassification exposes the true character of the claimants as vulture funds and speculators seeking to cash in on an impending IMF and EU bailout despite the imposition of austerity measures, and also in order to protect their balance sheet in compliance with their domestic banking regulations.[504]

On the contrary, the claimants argued that sovereign bonds were the same as loans since they are monetary and contractual claims and, therefore, according to the VCLT and other principles of treaty interpretation, bonds traded on the secondary markets qualify as 'investments' under the ICSID Convention and the relevant BITs.[505] In addition, the funds derived from the bonds were made available to the Greek government.[506]

The decision

While declining jurisdiction, the tribunal referred to VCLT for interpretive guidance and held that simply because parties to a BIT desire to create a conducive investment climate for investors, 'does not mean that, in case of doubts, the treaty must be interpreted in favour of the investor, or that promoting investment is the sole purpose of the treaty'.[507] It held that unlike in the *Abaclat* and *Ambiente* cases, the parties to the BIT here did not intend to include sovereign debt as covered investment for protection and

500 *Postova Banka* case (n 492) paras 91-97 & 213-217.

501 *Postova Banka* case (n 492) paras 98-99.

502 *Postova Banka* case (n 492) para 99.

503 *Postova Banka* case (n 492) paras 100-103 & 110-116.

504 *Postova Banka* case (n 492) paras 107-118 & 158-168.

505 *Postova Banka* case (n 492) paras 127-131 & 212.

506 *Postova Banka* case (n 492) paras 142-143.

507 *Postova Banka* case (n 492) paras 310 & 249-292. The tribunal distinguished the case from the *Abaclat* case. See paras 300-364.

adjudication purposes.[508] Importantly, the tribunal considered sovereign debt as 'an instrument of government monetary and economic policy and its impact at the local and international levels makes it an important tool for the handling of social and economic policies of a state'.[509] According to the tribunal it possesses the following features:

> First, it is clearly a method of financing government operations, from investments in infrastructure to ordinary government expenditures … Second, it is a key instrument of monetary and economic policy … *Third, sovereign debt is subject to a high degree of political influence and risk. A sovereign state engages in much more complex decisions, both in negotiating and structuring the debt and in payment thereof, and repayment is subject not only to the normal credit risk of any credit operation, but also to political decisions that are extremely sensitive for the inhabitants of the given state, such as a tax increase or a reduction in public expenditure or investment to repay the sovereign debt* … Fourth, while ordinary credits generally embody the interest of the main parties to the credit agreement – debtor and creditor – and the influence of third parties is limited, sovereign debt is highly influenced to different degrees by both internal and external factors.[510]

The above distinguishing features expose the inadequacies of the private law paradigm in sovereign debt governance. There are multiple, often conflicting interests that defy the exclusive contractual governance framework.

Finally, the tribunal held that there are two forms of sovereign bonds: sovereign bonds that are used for general budgetary funding purposes and those used for public works or services.[511] This classification follows some decisions of mixed claims commissions.[512]

Socio-economic rights in the *Postova Banka* case

The case was terminated *in limine* as it did not proceed to the merit phase, hence, the respondent's defences were never examined.[513] In its defence to the merit phase, however, Greece raised issues of fiscal austerity measures

508 *Postova Banka* case (n 492) paras 332-340.

509 *Postova Banka* case (n 492) para 324.

510 *Postova Banka* case (n 492) paras 318-323 (my emphasis).

511 *Postova Banka* case (n 492) para 364.

512 *Postova Banka* case (n 492) paras 364-365.

513 V Argyropoulou 'International arbitration and Greek sovereign debt: *Postova Banka v Hellenic Republic*, what if? Investors' protection in the case of the Greek sovereign default under investment treaties and customary law' (2018) 19 *Oregon Review of International Law* 179-222.

and the impact of the financial crisis on its population's welfare. Socio-economic rights were directly impacted by these measures. Although the tribunal did not allude to these issues for procedural reasons, its conceptualisation of sovereign debt (as noted above) recognises that 'repayment is subject … to political decisions that are extremely sensitive for the inhabitants of the given state, such as a tax increase or a reduction in public expenditure or investment to repay the sovereign debt'.[514] Interestingly, this recognition aligns with the decisions and findings of the European Court of Human Rights (ECrtHR) and the Greek Financial Crisis Commission.[515] It also aligns with our stakeholder, citizens approach to sovereign debt governance.

4.2.6 Gramercy v Peru (Gramercy case)

This is the most recent sovereign debt arbitration case.[516] In early 2018, Gramercy Funds commenced investment arbitration against the Republic of Peru under the Peru-US BIT and UNCITRAL Arbitration Rules 2010.[517] The case involves the Peruvian government land bonds issued to compensate for the 1969-79 expropriation of more than 9 million hectares of land. Claimants purchased 9 700 of these bonds between 2006 and

514 *Postova Banka* case (n 492) paras 318-323.

515 See *Koufaki & Adedy v Greece* ECtHR 57665/12 and 57657/12 (7 May 2013), https://hudoc.echr.coe.int/app/conversion/pdf/library=ECHR&id=002-7627 (accessed 23 July 2019) (*Koufaki* case); *Mamatas & Others v Greece* 2016 ECtHR 63066/14, 64297/14 and 66106/14 (21 July 2016); ECtHR 2016 *Information Note on Mamatas v Greece* ECtHR No 198, 21 (July 2016), https://www.echr.coe.int/Documents/CLIN_2016_07_198_ENG.pdf (accessed 23 July 2019) (*Mamata's* case). See also *Greece Truth Committee on Public Debt: Preliminary report* (2016) 38-41, https://auditoriacidada.org.br/wp-content/uploads/2014/06/Report-Greek-Truth-Committee.pdf (accessed 12 February 2019).

516 *Gramercy Funds Management LLC & Gramercy Peru Holdings LLC v Peru* ICSID Case UNCT/18/2 (2016) UNCITRAL, https://www.italaw.com/cases/3879 (accessed 12 February 2019); *Gramercy Funds Management LLC & Gramercy Peru Holdings LLC v Peru* ICSID Case UNCT/18/2 (2016) Award (6 December 2022), https://www.italaw.com/sites/default/files/case-documents/italaw170945.pdf (accessed 25 October 2023) (*Gramercy* Award); *Gramercy* dissenting opinion by Prof Brigitte Stern, https://www.italaw.com/sites/default/files/case-documents/italaw170972.pdf (accessed 25 October 2023) (*Gramercy* Dissenting Opinion).

517 *Gramercy* case (Statement of Claim) paras 11-27. See also UNCITRAL Arbitration Rules (amended in 2018 – incorporating UNCITRAL Rules on Transparency in Treaty-based Investor State Arbitration 2014), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html (accessed 23 July 2019). The transparency rules seek to address the transparency deficit of the ISDS system. See also UN Convention on Transparency in Treaty-based Investor-State Arbitration (adopted 10 December 2014, came into force 18 October 2017), http://www.uncitral.org/uncitral/uncitral_texts/arbitration/ 2014Transparency_Convention.html (accessed 23 July 2019).

2008. Peru decided not to use the consumer price index to assess and pay the holders of the land bonds as compensation. This followed a constitutional court order and executive policies on the payment of these land bond compensation to holders. The claimants, therefore, alleged that the value of their bonds was expropriated, and that Peru violated FET and other guarantees under the said BIT.[518]

Peru argued that the claimants are vulture funds and that, unlike in the *Postova Banka* and *Abaclat* cases, the land bonds are not the same as sovereign bonds.[519] Importantly, it specifically advanced defences based on its socio-economic rights obligations to its citizens. It argued that since the Peru-US BIT allowed for protection of legitimate welfare objectives, the bondholder process and other measures complained of by the claimants were in accord with Peru's fundamental obligations to its citizens to promote their welfare and implement basic services 'bearing in mind that it is financially impossible to make a payment of this nature [that is, debt servicing] and magnitude in a single sum without impacting fiscal resources, and consequently the basic services for the poorest population of our country'.[520] It implemented measures 'in a manner consistent with other relevant constitutional principles, including the state's obligation to promote general welfare to its citizens and the principles of budgetary balance and substantiality'.[521] On violation of national treatment standard, Peru argued that the measures it adopted reflect 'a legitimate policy decision to protect vulnerable citizens, for instance, distinguishing between elderly and young bondholders, physical persons and legal entities, and in general, prioritising payment of those bondholders that require special protection'.[522]

In December 2022 the tribunal, by a majority decision, delivered its award partly in favour of the claimants and held, relying on *Abaclat*, *Ambiente*, *Alemanni* and *Postova Banka*, that the land bonds qualified as protected investments.[523] It accepted that the said bonds were peculiar and different from other forms of sovereign debt having been issued in Peru to Peruvian citizens but that '[b]onds come in many variations and do not lose their status by being denominated in domestic currency, by being issued in the local market or by originating from the expropriation

518 *Gramercy* case (Statement of Claim) paras 261-262.

519 *Gramercy* case (Statement of Defence) paras 55-58 & 207-211.

520 *Gramercy* case (Statement of Defence) paras 240-241.

521 *Gramercy* case (Statement of Defence) para 747.

522 *Gramercy* case (Statement of Defence) para 753.

523 *Gramercy* Award (n 516).

of land'.[524] The underlying treaty excluded state-state loans as 'public debt' but not 'bonds'.[525] The majority held that the claimant's bonds qualified as 'protected investment' under the BIT. They argue that 'by selling the securities to Gramercy, the bondholders were able to "reduce [their] poverty" and to improve their "living standards" – two of the stated purposes of the Treaty which undoubtedly concern the overall economic development of the state'.[526]

The tribunal rejected the allegation of sovereign debt profiteering but expressed 'sympathy for the ill-feelings that these efforts may have at times caused to a sovereign state'.[527] While admitting that the investor engaged in 'highhanded techniques' to secure a favourable settlement, the majority tribunal held that 'excessive lobbying and public relations campaign is not a cause capable of turning otherwise admissible claims into inadmissible claims'.[528]

In her dissenting opinion, Professor Stern considers the claimants 'a vulture fund'[529] whose 'business was to develop legal activity and lobbying in order to pressure the Government to resuscitate dead Bonds'.[530] The bonds had no value when the claimant purchased them from 2006 to 2009. The default occurred in 1987 but the claimant took advantage of a BIT signed in 2006, internationalised and manufactured a dispute by purchasing 'speculative rights'. Describing the claim as 'scandalous',[531] Professor Stern stated that 'the focus of Gramercy was on the claims attached to the Bonds and the possible profit it could draw from them… The idea behind this acquisition was to transform, if necessary, this domestic claim into an international claim.'[532] Investment arbitration is not designed (nor should it be employed) to validate vulture funds' activities to frustrate debt restructuring. Professor Stern states thus:

> Gramercy acquired the Bonos, with the view to pursue a Treaty claim or at least to threaten Peru with such a Treaty claim, in order to obtain a windfall, ie, the difference between what it paid and what it expected to obtain, either by lobbying in order to modify the national law, or by court proceedings or

524 *Gramercy* Award (n 516) para 197.
525 *Gramercy* Award (n 516) para 214.
526 *Gramercy* Award (n 516) para 201.
527 *Gramercy* Award (n 516) 438.
528 *Gramercy* Award (n 516) 438-440.
529 *Gramercy* Dissenting Opinion (n 516) para 62.
530 *Gramercy* Dissenting Opinion (n 516) paras 35-42.
531 *Gramercy* Dissenting Opinion (n 516) para 54.
532 *Gramercy* Dissenting Opinion (n 516) paras 43-45.

> through international litigation … Their only goal was to obtain a maximum sum of money from the Peruvian Government and ultimately from the Peruvian people.[533]

In rejecting the majority's view that by selling the securities the original bondholders were able to 'reduce [their] poverty' and to improve their 'living standards', the dissenting arbitrator argues that

> even if we consider that the Claimants participated in the reduction of poverty resulting from the token price offered to the landowners (USD 33,2 million), their ultimate goal was to ask from Peru USD 1,8 billion plus interests, which, unless I do not understand economics or mathematics, would result in a severe reduction of the Peruvian economic development.[534]

Although the majority did not address Peru's socio-economic rights concerns, the dissenting opinion did. Both the claimants and respondent made copious references to, among others, the *Abaclat*, *Postova Banka* and *Ambiente* cases. The tribunal also relied heavily on these cases. The *Gramercy* case, therefore, indicates the growing relevance of socio-economic rights-based 'defences' following the above cases on the debt crises in Argentina and Greece. Both the majority and dissenting opinion arguments reinforce the growing consensus that vulture funds sovereign debt profiteering directly undermine states efforts toward progressive realisation of socio-economic rights. The private law paradigm clearly allows investors to manufacture a sovereign debt dispute with no legal accountability whatsoever.

4.3 Human rights-based SDAs

There had been SDC-instigated complaints lodged at the UN human rights treaty bodies but, as noted earlier, the focus here is on adjudication.[535] In particular, some private creditors instituted claims against Greece at the ECrtHR as a result of the sovereign debt crisis resolution measures it

533 *Gramercy* Dissenting Opinion (n 516) paras 50 & 60.

534 *Gramercy* Dissenting Opinion (n 516) para 97.

535 *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece* (2012) ECSR 80; Human Rights Committee 'Decision adopted by the Committee under the Optional Protocol, concerning Communication No 2868/2016' (30 November 2017), www.docstore.uhchr.org/FilesHandler.ashx?/6QkGID%2FPPRiCAqhKb7yhsjvfljqil84 (accessed 9 January 2019).

adopted.[536] There is one prominent case in this respect: the *Mamatas* case.[537] In this case, over 6 000 hold-out creditors filed three separate applications at the ECrtHR challenging the Greek government's post-default legal measures (that is, Law 4050 of 2012 which compelled a forcible haircut) as expropriation and interference with their possession, thereby violating their rights to property and non-discrimination under ECHR.[538]

The ECrtHR assumed jurisdiction and recognised the property rights of the claimants but held that the Greek government should be allowed a margin of appreciation to deal with its debt crisis without obstruction by private creditors. Using its jurisprudence on discrimination and interference with property, the Court held that the measures adopted by Greece under the circumstances were reasonable and proportionate. It held that although there was interference with possession of property, such 'interference pursued a public-interest aim, that is to say preserving economic stability and restructuring the national debt, at a time when Greece was engulfed in a serious economic crisis'.[539] This was necessary otherwise Greece 'would have been unable to honour its obligations under the old bonds'.[540] The Court held thus:

> If dissident bondholders had feared that the value of their bonds would decrease … they could have exercised their rights as bondholders and sold their bonds on the market … It thus transpired that the collective action clauses and the consequent restructuring of the public debt had been an appropriate and

536 *Mamatas* case (n 515) and *Koufaki* case (n 515). The latter is not a creditor claim, hence it will not be examined here. In the case, public servants challenged the Greek government's measures of cutting salaries of public sector workers following the debt crisis as amounting to discrimination and interference with possession of their property. The Court held that the government had a margin of appreciation and the aim of the adopted measures complained of 'was not merely to remedy the immediate acute budgetary problem but also to strengthen the country's financial stability in the long term' and that the complainants failed to show that 'their situation had deteriorated to such an extent that their very subsistence was in jeopardy'. See Information Note on the Court's case law No 163 (May 2013). See also Argyropoulou (n 513) 165-205.

537 There is also the recent ECJ decision on the Cypriot sovereign debt crisis. See *Chrysostomides & Others v Council of European Union* Case T-680/13 (13 July 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013TJ0680&from=EN (accessed 9 May 2018).

538 *Mamatas* case (n 515) 1-2.

539 *Mamatas & Others v Greece* ECrtHR (2016) 256 (holding that 'haircut on bonds held by individuals geared to restructuring Greek public debt during the crisis did not violate their property rights').

540 *Mamatas* case (n 515) 4.

> necessary means of reducing the Greek public debt and saving the respondent state from bankruptcy.[541]

The ECrtHR exhibits a negative attitude towards hold-out litigation. The priority is public rather than private creditor, interests. This agrees with the prioritisation of 'essential interest' over property rights of creditors. However, this attitude reinforces the public-private divide and the underlying sentiments around it. Nevertheless, it was refreshing to see a human rights court adjudicating a sovereign debt dispute. It strengthens the case for a human rights-based sovereign debt tribunal.[542]

5 Discerning the attitudes of courts and arbitral tribunals

Despite the factual and contextual variations in the above cases, there are discernible trends and attitudes that can be deduced here. This can be seen in the following areas:

5.1 Pro-creditor disposition and other legitimacy issues

In the state-state and investment arbitration-based SDAs, the priority of the courts and tribunals had almost consistently been the creditors' interests. This is understandable because the state-state claims were espoused by their home states while investment arbitration has traditionally been pro-investors. Interestingly, since both parties in the former are states, it seems plausible to argue that socio-economic rights obligations cannot be downplayed in the name of commercial interests. Unfortunately, respondents in these cases did not specifically raise socio-economic rights defences, nor can the socio-economic rights obligations of the espousing state be engaged immediately or automatically without a concrete counterclaim. In other words, courts and tribunals are confined to issues raised by the parties. Nevertheless, the parties before these tribunals were subjects of IHRL and signatories to ICESCR and other related instruments. A socio-economic rights justification or counterclaim may be raised especially in view of the extraterritorial reach of these rights. Importantly, however, in the period when most of the espousal cases were instituted, IHRL was at its infancy. This might explain the non-invocation of socio-economic rights issues and the rare employment of the CIL-based defence of necessity.

541 As above.

542 Bantekas (n 234) 10.

In addition, in all but one of the recent investment treaty sovereign debt disputes so far adjudicated, the decisions favoured the creditors. This means that studies suggesting that respondent states were favoured in ISDS proceedings[543] cannot be supported as far as sovereign debt-related investment arbitrations are concerned. It also confirms the popular notion that the ISDS system prioritises the protection of investors' interests, hence capital-exporting states must sign BITs to ensure the safety of their nationals' capital abroad. As noted above, the tribunal in the *Ubaser* case has rejected this asymmetric notion of ISDS by holding that states, like investors of the other contracting states, have rights under any BITs and may initiate counterclaims in any treaty-based claim or proceeding. Indeed, the tribunal only rejected the counterclaim on account of lack of evidence of human rights violations, not on account of impropriety. The same tribunal equally upheld the investors' socio-economic rights responsibilities.

Unsurprisingly, the human rights-based SDA favoured the debtor. The regime is intrinsically public and pro-citizens, and the disposition of the adjudicators naturally reflects this. This clearly raises concerns around *forum non convenience*. It, however, confirms the creditors' push for adjudicative options and the tendency for regime interaction and norm conflict.

The above arbitral tribunals were not clear regarding the status of sovereign debt as a form of investment. Indeed, it is still unsettled whether creditor claims were intended as covered investments (that is, to warrant 'tribunalisation' of sovereign debt) by the architects of the ISDS regime. Although the tribunal in *Alemanni* case insisted that these were part of the original ISDS framework, there are views from some of the architects of ICSID and inferences from the *trevoir* suggesting otherwise.[544]

In addition, despite the quality and reasoning in the awards, the inconsistencies and lack of unanimity were so pronounced as to raise doubt regarding the 'justice' of the decisions.[545] Other 'justice' concerns include divergent interpretations and application of treaty standards, arbitrators' independence and impartiality, over-theorising of sovereign debt disputes and huge costs (preventing complete determination of two cases – the

543 UNCTAD *World investment report* 2015, http://unctad.org/en/PublicationChapters/wir2015ch3_en.pdf (accessed 20 October 2023).

544 Waibel (n 3) 209-251.

545 UNCITRAL Draft report of Working Group III (Investor-State Dispute Settlement Reform) (6 November 2018) paras 25-134, https://uncitral.un.org/sites/uncitral.un.org/files/draft_report_of_wg_iii_for_the_website.pdf (accessed 14 October 2023).

Ambeinte and *Alemanni* cases). The genuineness of consent to investment arbitration-based SDAs equally raises doubt because most IIAs grounding these decisions were old-generation treaties with little appreciation of the complexity of modern sovereign financing.[546] All these are legitimacy impeaching factors. Unsurprisingly, some recent treaties (for instance, the Morocco-Nigeria BIT) have explicitly excluded sovereign debt from the province of ISDS.

5.2 Rising hold-out creditors and vulture funds arbitrations

In some of the above investment treaty cases, the tribunals completely ignored the policy implications of allowing so-called 'activist investors' who purchased bonds after debt default primarily to recover through investment arbitration. For instance, despite being raised in the *Postova Banka*, *Ambiente* and *Alemanni* cases, no pronouncements were made on this issue. Sovereign debt profiteering was unmistakable in the *Gramercy* case, yet it was left to the dissenting voice. This raises fundamental concerns. First, one of the implications of this attitude is that the non-payment of debt now is capable of engaging sovereign debtors' international responsibility contrary to a longstanding state practice.[547] Second, despite efforts by specific countries such as Belgium and UK to tackle, albeit insufficiently, vulture funds' purchase of poor countries' distressed debts and several resolutions of the UN General Assembly and the UN Human Rights Council on the same, investment arbitration has clearly opened another avenue for sovereign debt profiteering behavior thereby defeating these initiatives. This further reinforces our argument that the private law paradigm does not adequately respond to the dynamism of current sovereign debt landscape because profiteering from sovereign debt is not a problem for domestic law alone.

Third, with this attitude, the Guiding Principles on Foreign Debt and Human Rights (GPFDHR) may have little or no effect on curbing vulture funds behaviours. Moreover, the huge cost of arbitration would inevitably add to the debtor's financial burden. The *Abaclat* case, for instance, resulted in a settlement of over US $1 billion payable to hold-outs by a recovering

546 UNCTAD 'IIA Issue note: Recent developments in the International Investment Regime' (2018) 2, https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf (accessed 9 January 2019).

547 *Noble Ventures v Romania* (2005) IIC 179 (it was held that 'the Tribunal recalls the well-established rule of general international law that in normal circumstances *per se* a breach of a contract by the state does not give rise to direct international responsibility on the part of the state'). See also *Azurix v Argentina* (2004) 43 ILM 262.

debtor with huge budgetary demands including the compelling need to fulfil its socio-economic rights obligations.[548]

As evidenced by *Postova Banka* case, hold-outs might deliberately frustrate SDR on account of perceived gains from international bailout funds. *Gramercy* shows how socio-economic rights obligations can be undermined by debt-profiteering behaviour in the name of contractual obligations. It undermines the drive towards debt sustainability and could heighten the severity of austerity measures. Indeed, as noted earlier, an empirical study has found that hold-out creditors often get a better deal due to the costly consequences of not paying them: lack of access to capital market and attachment of goods outside the sovereign debtor's jurisdiction.[549] For instance, as of January 2018, Greece continued to service the €64 billion claims of hold-outs that avoided the restructuring.[550]

The approach of the human rights court (the *Mamatas* case) is to balance creditors' rights with public interests that informed the adoption of the post default measures complained of thereby giving some margin of appreciation to states to avoid liability and to adopt policies designed to return the governments to debt sustainability. The court frowns at holding out of SDR in the name of private property right. This stark contrast (between investment arbitration and human rights-based approach), to say the least, is confusing but understandable given their distinct orientations, focus and objectives.

Finally, despite the ICSID Convention's disapproval of espousing claims upon filing complaints by creditors, it seems that there is room for multiplicity of creditors' claims because of the unstructured horizontality of international adjudication. Indeed, by affirming jurisdiction in all but one ICSID case (*Postova Banka*), the tribunals simply transformed the sovereign debt restructuring efforts of the concerned debtors as not only treaty violations but also capable of grounding a contractual cause of action.

548 *Abaclat & Others v Argentina* (Settlement Agreement of 29 December 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8023.pdf (accessed 10 January 2018); *Abaclat & Others v Argentina* (Consent Award), https://www.italaw.com/sites/default/files/case-documents/italaw8024.pdf (accessed 10 January 2018). See 'Press release: Task Force Argentina announces final Argentina settlement for Italian bondholders' (2016), http://www.tfargentina.it/download/TFA%20Comunicato%2022%20aprile%202016_eng.pdf (accessed 20 July 2019).

549 Schumacher and others (n 66) 3.

550 Schumacher and others (n 66) 3-20.

5.3 Norm conflict and VCLT principles of treaty interpretation

Virtually in all the above investment arbitration cases, the tribunals relied heavily on VCLT and CIL principles on state responsibility for wrongful acts as embodied in the ILC's Draft. In their interpretations, the tribunals (except in the *Ubaser* case) did not refer to VCLT's requirement that international courts and tribunals should have regard to the need to respect universal human rights in their interpretive jurisdiction.[551] Except in *Diallo* and *Ubaser*, the adjudicators were more focused on the BIT grounding the treaty claims.

There were few remarks on the norm conflict between debt-servicing obligations and creditors' rights. For instance, *Ambiente's* dissenting arbitrator briefly touched on norm conflict but emphasised on the alignment between primary consent and secondary consent to satisfy the *pacta sunt servanda* principle. However, in the *Ubaser* case the tribunal extensively discussed norm conflict favouring socio-economic rights of citizens and suspension of debt servicing during SDC over BIT obligations.[552] It reaffirms *jus cogens* as the topmost norm.

5.4 Socio-economic rights, defence of necessity and counterclaims

In both espousal and investment arbitration cases, the tribunals were relatively silent on socio-economic rights and ICESCR despite arguments on that ground, especially in the ITA cases. The arguments advanced by the sovereign debtors in this regard were all rejected. Nevertheless, there were infrequent references to the Universal Declaration, ICESCR, ICCPR, ACHR and ECHR. Interestingly, the tribunals, especially in the Argentina cases, seem to situate these rights within the context of the defence of necessity. Other investment treaty cases seem to dwell more on this issue. For instance, in the *Imbreglio* case the tribunal rejected the defence of necessity, yet it held that socio-economic rights may qualify as 'essential interests' for the purpose of the defence of necessity. However, on almost similar facts but different BITs, the tribunal in the *Ubaser* case upheld the defence of necessity and framed the causality test which requires evidence showing that the debtor directly caused the debt crisis. It places the burden of proof on the claimants.

However, all the tribunals appear to have treated both the BIT and the CIL necessity defences as the same. This was also the position in the *Sempra*

551 VCLT 1969 (n 6) Preamble and art 31(3)(c).

552 *Urbaser* case (n 375) paras 1183-1187.

and *EDFI* cases. It may be observed that fusing these distinct defences into one seems implausible because, first, of distinct legal basis and, second, BIT defences, comparatively, are always party-determined and measured. In addition, equating socio-economic rights founded on treaties and CIL with CIL-based defence of necessity might create a misalignment of sorts. Jurisprudentially, the 'defence of necessity' is a *defence* to liability claims while socio-economic rights are in the category of *claims* (complaints) by rights holders. More so, the requirements of the defence of necessity must be satisfied cumulatively.

However, in all the cases where the defence of necessity was raised, there was an implicit (in some cases express) recognition that fulfilling a socio-economic rights obligation qualifies as an 'essential interests', although the strict application of the necessity requirements resulted in a rejection of the defence in most of the cases. This seems questionable because the essentiality of these rights arguably is rooted in treaties, CIL, general principles, and *jus cogens*.

Notwithstanding this strict approach, raising socio-economic rights in counterclaims to sovereign debt claims is plausible. It dilutes the efficacy of the strict, cumulative requirements of the CIL-based defence of necessity. It is also plausible to specifically situate the interests of the rights holders within the counterclaim by way of evidence. Raising them as basis for suspending conflicting obligations of debt servicing at a given time places them not as *defences* to *liabilities per se* but as *priorities* in the discharge of competing obligations. The life and dignity premises upon which they are founded demand this prioritisation. Indeed, as argued in chapters 3 and 4, most socio-economic rights contained in the Universal Declaration and ICESCR have now assumed the status of CIL and *jus cogens*. Therefore, raising the latter as a counterclaim to sovereign debt claims is plausible. It is also plausible to specifically situate the interests of the rights holders within the counterclaim. It is a matter of proof.

Interestingly, the *Ubaser* tribunal gives a nodding approval to socio-economic rights-based counterclaims. This certainly is a significant development. It is, for instance, in line with the intention of the architects of the ICSID to cover 'disputes involving claims *by* as well as *against* states.'[553] If creditors insist on invoking ICSID in a sovereign debt dispute despite the legitimacy cloud hovering over it, then it seems logical to allow

553 The World Bank observed that the 'Convention permits the institution of proceedings by host states as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases'. See ICSID History 2009 (n 197) 21.

such counterclaims. Although it is doubtful whether the framers intended the states' claims to be founded on human rights, it seems fair to argue that the framers must have realised that a state's complaint against investors must be linked to the well-being of its population. This seems plausible for three reasons. First, it aligns with the unity of sovereignty advanced in this book (chapter 2). Second, both the ICSID Convention and the twin covenants (ICCPR and ICESCR) were generationally linked, that is, they were adopted within the same period (that is, 1965-1966). Third, the property rights of investors, the core value requiring safeguards in the form of standards for full protection and security, FET and national treatment, were already part of IHRL.

5.5 Creditors' socio-economic rights responsibilities

In most of the espousal and investment arbitration cases reviewed, the socio-economic rights responsibilities of businesses were not directly raised. For ITA, this probably is because of the predominant notion that investment arbitration protects investors and not the primary consenting, contracting states. However, in virtually all the cases, there is an explicit and implicit recognition of the dilemma facing sovereign debtors and their obligations towards their citizens in the event of debt crisis. Importantly, in the 2016 *Ubaser* case the tribunal recognised that state-centrism is no longer tenable and that corporate human rights obligations are now well-recognised in the face of the explosive growth of UN-based initiatives on business and human rights. Although there were no specific pronouncements on GPFDHR and UNCTAD's PRSLB with respect to creditor human rights responsibilities, these are all considered as complements to the GPBHR (that is, the Ruggie Framework) as shown in the previous chapter.

Therefore, the arbitral tribunal's affirmation of corporate human rights responsibilities further consolidates on this emerging legal framework. Although this is far from entrenching a creditor socio-economic rights accountability framework, it, however, recognises the imperative for suspending debt servicing during debt crisis, prioritising human life and dignity over creditor rights. This perhaps is the crux of the justice of sovereign debt governance.

However, the justice of sovereign debt governance was not examined in most of the recent investment arbitration cases. It seems that economic necessity overrides the quest for justice. Nevertheless, it is fair to argue that the balancing of obligations raises a critical issue of justice. It seems that, the tribunals' broad recognition of necessity in the face of the dilemma facing sovereign debtors is also a question of justice.

Finally, in none of the above cases was the issue of the human rights obligations of bondholders specifically raised or pronounced upon. The corporate human rights responsibilities recognised in the *Ubaser* case seem to extend to them. Of course, there were non-corporate entities among these creditors. It is unarguable that individuals equally shoulder responsibilities not to undermine the realisation of socio-economic rights anywhere.

5.6 Responsibility for debt crisis

In the Argentine cases, virtually all the tribunals recoginsed that debt crisis is usually caused by a combination of both internal and external factors. Yet, the tribunals concluded that Argentina bears exclusive responsibility for its excessive indebtedness and fiscal profligacy that plunged it into debt crisis while the creditors bear no responsibility whatsoever. This is astonishing, especially in light of the growing call for responsible lending. It takes a multitude of lenders and the sovereign borrower to create excessive indebtedness. Responsible lending entails careful lending due diligence on the part of creditors. A creditor that extends loans to a recalcitrant, rogue, and highly-indebted borrower cannot turn away and claim ignorance. Excusing an irresponsible lender from the debt crisis simply is unpersuasive. Therefore, the tribunals' conclusion that Argentina alone contributed to its financial woes contravenes the notion of responsible lending.

6 Conclusion

In the foregoing analysis, I have tried to demonstrate the gradual recognition of human rights in creditors' espousal actions. The old cases appear to recognise the possibility of conflicting obligations and the notion of necessity within sovereign debt governance. There is evident expansion of creditor claims beyond the contractual forum to international courts, arbitral and human rights fora. The absence of a regime-specific court is at the heart of these unrestrained creditor actions beyond the contractual instrument. Regardless of the 'unspecificity' of forum, courts and tribunals have been playing crucial roles in the evolving sovereign debt regime. Since the self-help era of gun-boat diplomacy and forced receivership ended, they have become critical arbiters between creditors and sovereign debtors sitting in domestic courts, mixed claim commissions, international courts, and arbitral tribunals. Interestingly, the human rights system strengthens their positions as the vanguards of the rule of law. However, the multitude of adjudicating fora and the increasing expansion of creditors' dispute resolution avenues has further widened the already-existing power imbalance in favour of creditors. This

is evident in the resort to investment arbitration and human rights courts by hold-out creditors despite the legitimacy crisis bedeviling the former dispute settlement system.

The availability of secondary debt markets allows vulture funds to be employing investment arbitration to reclaim the full values of distressed debts mostly through out-of-court settlements. Creditors have been experimenting with the sovereign debt regime through the judicial process, creatively resorting to new adjudicatory avenues. This creates uncertainty in SDA and arguably exposes the shortcomings of the underlying private, contractual governance paradigm.

The implication of the uncertainty and increased debt profiteering using tribunals is that the budgetary capacity of sovereign debtors is being constrained and this has been shown to consistently thwart the sustained implementation of socio-economic rights-based programmes. Another effect of this is the roll-back of the legislative gains recorded around the world and the UN-based soft laws on SDR aimed at curbing vulture fund activism in the sovereign debt regime.

However, despite these problems, it should be admitted that courts and tribunals can give legitimacy to an otherwise legitimacy-deficient system. Coherent and consistent jurisprudence might strengthen the sovereign debt regime. Even more legitimacy conferring is the court's recognition of socio-economic rights during debt crisis. The recent arbitral awards and human rights-based decisions on SDC have emphasised prioritising restoring debt sustainability over continued debt servicing. Importantly, the tribunals now recognise that socio-economic rights responsibilities extend to businesses, including private creditors. These, in a sense, are legitimacy-conferring steps.

The growing trend of expanding creditors' SDA options (from the espousal of creditors' claims to investment arbitration and human rights-based adjudications) is evidence of the limitations of the private law paradigm in sovereign debt governance. There is a conscious avoidance of contractual forum to transnational fora. This has been undermining the growing consensus against sovereign debt profiteering by hold-outs and vulture funds. The creditor-diktat narrative seems to support this process. It does not matter as long as creditors' interests are advanced and protected. Because of this expansionary trend and its implications, it may, thus, be argued that contracts should no longer be the basis of precluding observance of human rights standards in any form of SDA. There should be no doctrinal gap in advancing the essential needs of human beings in the face of devastating debt crisis.

Although the recognition of socio-economic rights-based counter-claims in investment arbitration might give voice to debtors' citizens and expand the debtors' options, it comes with deep complications: Establishing socio-economic rights violations by the debtor because citizens are strictly non-parties and the substantive instruments invocable (that is, ICESCR, ICCPR, ACHPR, BITs, and so forth) are state-focused. Added to these are the extent of creditors' liability and the quantum of damages claimable.