Investors right in case of sovereign default

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Publication date:
2018

Document Version
Publisher's PDF, also known as Version of record

Investors' Rights in case of sovereign Default: Recent Lessons from the EU Financial Crisis

A Collection of Essays

"Proefschrift ter verkrijging van de graad van doctor aan Tilburg University op gezag van de rector magnificus, prof.dr. E.H.L. Aarts, in het openbaar te verdedigen ten overstaan van een door het college voor promoties aangewezen commissie in de aula van de Universiteit op woensdag 7 februari 2018 om 14.00 uur door Venetia Argyropoulou, geboren te Thessaloniki, Griekenland".

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ACKNOWLEDGEMENTS

This Thesis would not have been possible without my supervisors Professor Panos Delimatsis and Professor Pierre Larouche. I am extremely thankful to them for accepting to supervise me and granting me the opportunity to research and gain expertise in a field of such interest to me. I would especially like to thank Professor Panos Delimatsis, as despite his extremely busy schedule and significant research obligations, he greatly assisted and supported me in my research, while his contribution was pivotal in the completion of my PhD.

I would also like to thank the other member of my thesis committee: Prof. Dr. Robert Howse, Prof. Dr. Tarcisio Gazzini, Prof. Dr. Freya Baetens and Prof. Dr. Merris Amos, for their insightful comments and encouragement, which incented me to widen my research.

I am grateful to Tilburg University for providing me with an excellent academic environment and facilitating the publication of my Articles. I am particularly grateful to Mrs. Hanny Pentinga, Mrs. Isle Streng and Mrs. Sylvia Strikker for their untiring and invaluable support in all administrative procedures. Their stamina is truly remarkable.

Additionally, I would like to thank my family: my parents and my sister for the constant and unending support and love. I especially would like to thank my mother for the constant encouragement and motivation in completing my PhD.

Last, but not certainly not least, I would like to thank my husband, John, for patiently supporting me through these years and tolerating my long hours of work, lack of time and attention. He is equally deserving of this accomplishment, as none of it would be possible without his support. John you are my strength, please hold my hand forever.

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CHAPTER ZERO

INTRODUCTION

I. European Union and Financial Stability

The European Union ("EU") and, even more, the Eurozone, was created with the intention of formulating a strong monetary union that would not only ensure cooperation between member states, but also, safeguard peace, price stability and economic growth. To this end, the founding treaties of the EU contain several provisions regulating the financial standing of member states, aiming, inter alia, to ensure that the Member States' economies will be financially sound and be able to contribute to the aforementioned EU goals. Thus, for example, in order to qualify for the Eurozone, EU imposes a reference value of the public debt that should not surpass 60% of the Member's Growth Domestic Product ("GDP").[1] Additionally, an EU Member State's financial position needs to be "sustainable".[2] Furthermore, Article 126 para. 1 of the Treaty of Functioning of the EU ("TFEU"), prescribes that the Member States of the EU "shall avoid excessive government deficits".

However, although, EU primarily law provides several safeguards to ensure financial stability and avoid financial crisis and sovereign default in the EU,[3] nonetheless, it does not regulate the implications in case such default does, indeed, occur. This became obvious during the financial crisis that "hit" the global community in the summer of 2007.

II. The Financial Crisis in Europe

The financial crisis was undoubtedly an unprecedented phenomenon both in terms of proportion as well as in terms of implications. Most analysts failed to realize the seriousness of the situation and categorized the crisis as a mere liquidity shortage that would limit itself in the US and would not greatly affect the "strong" and "healthy" European economies that were based on solid fundamentals, such as rapid export growth and sound financial positions of households and businesses.[4] These perceptions dramatically changed in September 2008, due to the rescue of Fannie Mae and Freddy Mac, the "shocking" Lehman Brothers bankruptcy and the worries for the

[1] Article 126(2) of the Treaty on the Functioning of the European Union ("TFEU") and Protocol No 12

[2] Article 140 (1) indent 2 TFEU

[3] See H. Siekmann, 'Life in the Eurozone With or Without Sovereign Default?—The Current Situation, 'Politics, Economics and Global Governance: The European Dimensions' (PEGGED) Contract no. 217559 Deliverable N. 46, Policy Report (WP1) 2011, pp. 18-23

[4] Directorate-General for Economic and Financial Affairs of the European Commission, Economic Crisis in Europe: Causes, Consequences and Responses, Economy in Europe 7/2009, BU24, B-1049, (2009) p.4

insurance company AIG taking down major US and EU financial institutions in its way.[5]

As a result, the Member States began to realize that they could not handle the crisis individually and that a common response was required. Firstly, the European G8 members,[6] at their summit in Paris on 4 October 2008, undertook to act jointly and take all necessary measures in order to secure their banking and financial systems. Not too long after that, at the Economic and Financial Affairs Council's (ECOFIN)[7] meeting of October 7, 2008 all Member States came together to plan common principles to guide their respective reactions to the crisis.[8] These principles were turned into a concrete action plan on October 10, 2008 by the Eurogroup,[9] which was thereafter endorsed by the European Council on October 15, 2008. In particular, at the Eurogroup summit, the Eurozone countries, along with the United Kingdom, urged all European governments to adopt a common set of principles to combat the crisis.[10] The measures suggested included, inter alia, the following practices, mostly in relation to strengthening the banks:[11]

a) Recapitalization: Governments undertook to provide funds to banking institutions that faced liquidity problems and further to re-structure the management and monitoring mechanisms;
b) State Ownership: Governments indicated that they would acquire part of the share capital of those financing institutions seeking recapitalization;
c) Government Debt Guarantees and
d) Improved Regulatory System

In November 2008, the European Commission formulated a recovery plan (the "Plan") that was based in two interdependent main elements. The first element entailed short-term measures to boost demand, save jobs and help restore confidence. The second element referred to "smart investments" to yield higher growth and sustainable prosperity in the long-term. The Plan called for a timely, targeted and temporary fiscal stimulus of around €200 billion or 1.5% of the 2008 EU Growth Domestic Product (GDP), stemming from both national budgets (around €170 billion, 1.2% of GDP) as well as the EU and European Investment Bank budgets (around €30 billion, 0.3% of GDP)[12] and aimed to enhance the purchasing power of consumers in the economy, to protect jobs and address the long-term job prospects of those losing

[5] Directorate-General for Economic and Financial Affairs of the European Commission, Economic Crisis in Europe, ibid p.8
[6] France, Germany, Italy and the United Kingdom
[7] EU organ composed of the Economics and Finance Ministers of the 27 EU Member States monitoring, inter alia, the budgetary policy and public finances of the Member States.
[8] Conclusions of the ECOFIN Council held in Luxembourg on October 7, 2008 (Doc. 13784/08)
[9] Meeting of those EU countries that share the Euro as currency
[10] "Declaration on a concerted European action plan of the eurozone countries", October 10, 2008, available at www.ue2008.fr; European Council of October 15 and 16, 2008, Presidency Conclusions (doc.14368/08).
[11] James K. Jackson, The European Crisis: Impact on and Responses by the European Union, CRS Report for Congress, June 24, 2009
[12] IP/08/1771, Brussels, 26 November 2008

their jobs. The Plan was, finally, adopted on December 11-12th, 2008 and, in conjunction with some unused EU resources, and an additional 15 billion investments per year for two years by the European Investment Bank, a sum equivalent to 1.8% of the 2008 EU GDP was raised. This sum would act as a fiscal stimulus over a period of 2 years (2009-2010) with 1.1% of the EU GDP occurring in 2009 and remaining 0.7% in 2010.

Having, as mentioned, underestimated the financial crisis, EU's response to it was delayed. Furthermore, when the EU finally responded, the Plan taken was rather "small-scale" in comparison to the extent of the crisis.[13] That, in conjunction with the very high direct fiscal costs that the measures of the Plan entailed, along with the fact that the economic activity was at unprecedented low levels, led to a rapid rise in government deficits and debt in all the Eurozone countries. In fact, given that national fiscal policies remained unchanged, the rise in government debt-to-GDP ratios continued, even as the recovery proceeds and the short-term fiscal stimulus measures were phased out.

This led many EU states on the verge of bankruptcy with their deficits reaching up to 160% of their GDP. In 2009, the government deficit and government debt of both the Eurozone (EU16) and the EU increased compared with 2008, while the respective GDP fell. In the Eurozone, the "Government deficit/GDP" ratio increased from 2.0% in 2008 to 6.3% in 2009, and in the EU27 from 2.3% to 6.8%. In the Eurozone, the government debt to GDP ratio increased from 69.4% at the end of 2008 to 78.7% at the end of 2009, and in the EU27 from 61.6% to 73.6%.[14] Soon thereafter, Greece, Ireland, Portugal, Spain and Cyprus requested the assistance of the EU/ International Monetary Fund ("IMF") "bailout" mechanism, taking several measures that proved detrimental to investors' rights.

Indeed, the aftermath of the financial crisis of 2009 in the EU, investors in the EU found out the "hard way" that the financial system of the EU was not immune to crisis, as it had been previously envisioned. During the financial crisis, we witnessed the collapse of EU banks, with devastating implications, not only for shareholders, but also for depositors. Indicatively, in the case of the Cyprus Banking Haircut, depositors in Bank of Cyprus incurred a loss of 47.5% on their deposits over €100.000,[15] while Cyprus Popular Bank's depositors faced losses reaching up to 80% on their deposits over €100.000.[16] Apart from the Banking Crisis, however, we also witnessed states

[13] E. Luce, C. Freeland, Financial Times published: March 8 2009 22:03 available at http://www.ft.com/cms/s/0/5d8b5e18-0c14-11de-b87d-0000779fd2ac.html#ixzz1YsnQRuoH/> accessed 10 September 2017

[14] Provision of deficit and debt data for 2009 - first notification Eurostat News release, 55/2010 - 22 April 2010, (2010) available at http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-22042010-BP/EN/2-22042010-BP-EN.PDF/> accessed 10 September 2017

[15] M. Hadjicostis, 'Bank Of Cyprus Depositors Lose 47.5% Of Savings' (USA TODAY, 2017) available at <https://www.usatoday.com/story/money/business/2013/07/29/bank-of-cyprus-depositors-lose-savings/2595837/> accessed 10 September 2017.

[16] 'Cypriot Finmin "Uninsured Popular Bank Depositors Could Face 80% Haircut" - Keep Talking Greece' (Keep Talking Greece, 2017) available at

heavily indebted unable to repay the principal and interests of the loans already contracted, with the notorious Greek haircut being the most indicative example. The losses sustained by investors in such cases were immense.

III. Definition and Legal Framework for sovereign default

In most cases, if an individual or a company does not have sufficient funds to meet its financial obligations, it will file for insolvency or bankruptcy. When a country does not make its payments to its creditors on time, it is termed a "default", which is, in essence, is similar to going bankrupt.[17] The debt incurred by governments is termed as sovereign debt. However, this is where most of the similarity to individual insolvency and corporate bankruptcy ends. That is because when faced with a sovereign default, creditors have a much more difficult time in attempting to reclaim their dues or investments from a sovereign entity.

More precisely, while a natural or legal person's insolvency is de jure subject to national and international rules and regulations, that contain specific details on the procedure to be followed for the insolvency to proceed, the priority of creditors, the person who will manage the firm etc.,[18] there is not a similar regime for states in default.[19]

In fact, there is not even a uniform definition of sovereign default. Instead, the latter can be defined in several different ways.[20] From a strictly legal perspective, a sovereign default would be defined as a failure of the state to repay a scheduled debt service within the specified period of repayment, including any grace period provided in the sovereign bond contract.[21] Investment treaties follow this definition to a large extend, but they also contain a list of events that constitute "events of default", which list varies from one treaty to the other. Additionally, the term of sovereign default has been defined differently from a financial and/or political perspective. Various economic researchers, mostly economists, list certain credit events that would constitute default.[22] In the financial world, credit-rating agencies, such as the "Big

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<http://www.keeptalkinggreece.com/2013/03/27/cypriot-finmin-uninsured-popular-bank-depositors-could-face-80-haircut/> accessed 10 September 2017.

[17] 'What Happens When a Country Goes Bust' (Economist.com, 2014) <http://www.economist.com/blogs/economist-explains/2014/11/economist-explains-20> accessed 4 November 2017.

[18] M. Guzman, J.E. Stiglitz, "Creating a Framework for Sovereign Debt Restructuring That Works: The Quest to Resolve Sovereign Debt Crises" in M. Guzman, J. A. Ocampo, J. E. Stiglitz "Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises (Initiative for Policy Dialogue at Columbia: Challenges in Development and Globalization)", (2016), p. 28

[19] *Ibidem*. The article points to the exceptional situation of an unarmed Argentinean naval ship that was held in Ghana for 10 weeks in 2012.

[20] P. Manasse, N. Roubini, "Rules of Thumb" for Sovereign Debt Crises, Working Paper, International Monetary Fund, (2005), p.6

[21] L. B. Smaghi, "Sovereign Risk" in A. R. Dombret, O. Lucius, *Stability Of The Financial System: Illusion Or Feasible Concept?*, Edward Elgar Publishing (2013), p.237, See also R. W. Kolb, Sovereign Debt: From Safety To Default, Wiley (2011).

[22] P. Manasse, N. Roubini, "Rules of Thumb" for Sovereign Debt Crises, Working Paper, International Monetary Fund, (2005), p.6.

Three" ones - Moody's, S&P, and Fitch Ratings -, rate as a "technical" default any instance where a sovereign entity makes a debt restructuring offer on terms less favorable than those provided for in the original agreement.[2324] International tribunals in determining if a sovereign default has taken place, have used this technical definition.[25] Under this technical definition, sovereign default does not consist in the total repudiation of an outstanding debt, but it suffices that, following a negotiation between the country's creditors and its government vis a vis debt restructuring, this leads to a rescheduling of payments, lower principal instalments, reduced interest rates and/or the lengthening of the payment general terms.[2627] For the purposes of this Thesis, unless another Chapter contains a more specific definition, the term sovereign default shall refer to the meaning followed by the Credit Agencies described above.

IV. Definition of Investors

Apart from the definition of sovereign default, it is equally important to define the terms "investor". Despite the fact that the term is often used in our everyday language, it is not an easy one to define, as there is no uniform definition used in investment treaties. Indeed, with over 2.500 BITs and multilateral treaties there are several variations of the definition of the term.[28] This is partly intentionally; as many States considered that a set and rigid definition of the term could negatively affect their nationals' ability to invest abroad.[29] Hence, the interpretation of the term "investor" has puzzled investments tribunals in several occasions.

In the case of Fedax v Venezuela[30] and most notably in the case of Salini v Morocco[31], the ICSID Tribunal set the long-standing test for the determination of a protected investment under the ICSID as having four elements: (1) a contribution of money or assets (2) a certain duration over which the project was to be implemented (3) an element of risk and (4) a contribution to the economic development of the host

[23] J. C. Hatchondo, L. Martinez, and H. Sapriza, '*The Economics of Sovereign Default's*, 93 ECON. QTR. 163 (2007), at 163-164.

[24] As to what constitutes a debt restructuring see Udaibir S. Das, Michael G. Papaioannou, Christoph Trebesch, "Sovereign Debt Restructurings 1950–2010: Concepts, Literature Survey, and Stylized Facts", IMF Working Group, (2012) where it is defined as "an exchange of outstanding sovereign debt instruments, such as loans or bonds, for new debt instruments or cash through a legal process".

[25] See indicatively Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, (2007), para.28

[26] *Ibidem*. Credit-rating agencies define the duration of a default event as the time between the default event and when the debt is restructured, even if there are holdout creditors.

[27] Although for the deifferences between a default and a debt restructuring see Udaibir S. Das, Michael G. Papaioannou, Christoph Trebesch, "Sovereign Debt Restructurings 1950–2010: Concepts, Literature Survey, and Stylized Facts", IMF Working Group, (2012)

[28] Michael Waibel, The Backlash Against Investment Arbitration (Wolters Kluwer Law & Business 2010), p.11

[29] Michael Waibel, The Backlash Against Investment Arbitration (Wolters Kluwer Law & Business 2010), p.11

[30] Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3 (1997), para 43

[31] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4 (2001)

state.[32] However, despite the adoption of the Salini test by several tribunals, it does not meet uniform acceptance and, in fact, it has recently been the object of questioning as well as rejection by several tribunals.[33] Hence, to respond to the question of what constitutes an investment and subsequently who is an investor, there are several elements to consider, while each case needs to examined separately.

For the purposes of this Thesis, unless otherwise mentioned in any one separate Chapter, the definition of investor will not follow the Salini test. Instead, a broader definition will be followed in keeping with recent trends in international investment law,[34] where a growing number of investment treaties contain a wide, open ended phrase, stating that investment refers to "every kind of asset" or "any kind of asset", including, inter alia, an illustrative list of categories of assets, interest and rights.[35] This is particularly true for the BIT entered by Member States of the EU that cover any kind of asset having an economic value.[36] Hence, under this broad definition of investment, investors will include all persons, both legal and natural, that make an investment, including therefore all portfolio investors in sovereign bonds, as well as deposit-holders holding deposits above the threshold of secured deposits. Additionally, this Thesis will examine the rights of both foreign as well as domestic investors.

V. Available Remedies for investors

Aside from investors receiving less than the full amount of the loans they agreed upon, a sovereign default, as defined above, can also be extremely stressful for the financial well-being of the borrowing country. A fall in the value of a country's currency will quickly trigger a money-flight from local banks, leading to a banking crisis that can further affect investors' rights. In response, in order to avoid a run on its banks, the borrowing government may close the financial institutions and impose increased capital controls in an effort to avoid further currency depreciation.[37] In light

[32] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4 (2001), para 52

[33] See Alex Grabowski, "The Definition of Investment under the ICSID Convention: A Defense of Salini," Chicago Journal of International Law: Vol. 15: No. 1, (2014) as well as the case of Deutsche Bank AG v Sri Lanka (ICSID Case No ARB/09/02) (2012) para. 294, where the Tribunal noted that that the Salini criteria "are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention."

[34] Malik Mahnaz, 'Recent Developments in the Definition of Investment in International Investment Agreements', 2nd Annual Forum for Developing Country Investment Negotiators [2008].

[35] Malik Mahnaz, 'Recent Developments in the Definition of Investment in International Investment Agreements', 2nd Annual Forum for Developing Country Investment Negotiators [2008].

[36] Anna De Luca, Bank Rescue Measures under international investment law: What Role for the principle of causation, in Christian J. Tams, Stephan W. Schill, Rainer Hofmann (eds.) International Investment Law and the Global Financial Architecture. Edward Elgar, p. 214

[37] See J. A. Cordero and J. A. Montecino, *Capital Controls and Monetary Policy in Developing Countries,* Center for Economic and Policy Research, Washington, D.C. (2010), pp.12-13,

of the above, it is evident that, mutatis mutandis, all investors' situation – be they small or big, private or public, institutional or sovereign (e.g. sovereign wealth funds) – might worsen, too. All these concerns materialized in the case of the Greek sovereign default of 2012,[38] which also had spillover effects and contributed to the development of the Cyprus banking crisis.

In the aftermath of the Greek sovereign default and the Cyprus' banking crisis affected investors, who sustained loses, resorted to litigation almost immediately. However, given the lack of a regulatory framework, investors' options were limited and specific. Such remedies could be founded on the general legal framework founded in national law as well as EU and international law. Primarily, investors both foreign and nationals invoked national law before national courts both in Greece and Cyprus respectively, as well as in their home states. Additionally, they have resorted to the Court of Justice of the European Union claiming breach of EU law. Moreover, foreign investors have raised claims before international arbitration tribunals based on international investment treaties, claiming for breach of treaty standards. Last, but not least, investors have resorted to the European Court of Human Rights claiming for breach of human rights. As indicated, to date, none of these venues and legal instruments has been sufficient to restore investors' damages.

Hence, this raises the question if the existing legal framework, both in the EU as well as internationally, is appropriate and sufficient to safeguard investors' rights and award reparation for the loses sustained by them in cases of extreme financial crisis and sovereign default. This is the issue examined by the present study.

VI. Scope of Research and Significance of the Project

The aim of this study is twofold. Primarily it explores the measures taken by investors to date, in response to the losses they sustained as part of the EU Financial Crisis. In particular, this study deals particularly with the case of the Cyprus Banking Crisis and the Greek Financial Crisis and explores the steps taken by investors in each case, examining the procedural issues faced by investors, the arguments produced by them on the substantive law, the counterarguments raised etc. The Thesis critically reviews the courts and/or tribunals' rulings. Based on this, this study reaches conclusions on the anticipated outcome of pending investors' cases that have yet to be decided on the above facts. Additionally, it examines the effectiveness of these measures to rectify the damages sustained by investors, taking into account investors' accessibility to such measures and investors' ability to enforce them.

Secondly, by highlighting the vacuum existing in investors' protection in cases of sovereign default or extreme financial crisis, this study argues that a more efficient and specific legal framework is required in order to address investors' losses in such

<http://www.cepr.net/documents/publications/capital-controls-2010-04.pdf> accessed 29 October 2017.

[38]Deutsche (www.dw.com), 'Greek Creditors Receive Official 'Haircut' Notification | Business | DW | 24.02.2012' (*DW.COM*, 2012) <http://www.dw.com/en/greek-creditors-receive-official-haircut-notification/a-15767530> accessed 11 July, 2015.

cases. Considering that circumstances of sovereign default can lead to aggrieved violations of investors' rights, it is imperative that investors have a legal way to react and lessen their losses. The main idea is to research – by extrapolating the conclusions in the Greek Sovereign Default and the Cyprus Banking Haircut– how and how much investors' interests are protected by means of international and EU legal instruments. The study reaches wider conclusions about investors' rights in the EU and identifies and establishes a minimum threshold of protection that should be awarded to investors. At the same time, it proposes ways in order to achieve such harmonised protection within the EU.

Hence, this study aims to respond to the following research questions:
In cases of sovereign default and severe financial crisis in the EU, where a sovereign takes measures detrimental to investors' rights:

1) Can investors raise claims against the EU for such measures?
2) Is Investment Law as provided under Investment Treaties sufficient to safeguard and restore investors' rights?
3) Similarities of Investment and Human Rights Law. Is Human Rights Law able to safeguard and restore investors' rights and/or offer additional remedies to investors?
4) What are the procedural hurdles faced by investors when resorting to claim against states in sovereign default and how to overcome these?

VII. Methodology

In light of the fact that the Greek and Cyprus Haircut have recently taken place and their effects had not yet fully unfolded, there is limited scholarly research on this topic. To this end, my Thesis primarily follows a descriptive approach, detailing the facts of the Greek and Cyprus Haircut as well as legal measures taken by investors to date and the outcome of such measures. Additionally, this Thesis evaluates the effectiveness of such measures and extracts wider conclusions as to whether the relevant legal remedies are adequate to safeguard investors' rights and compensate their losses. To this end, I examine relevant case law of Investment Tribunals, the European Court of Human Rights ("ECtHR"), the Court of Justice of the European Union ("CJEU") as well as national courts in specific cases. Furthermore, I examine applicable International Treaties that relate to the research questions and examine how these were interpreted by Courts and Tribunals in similar cases. Lastly, in certain instances, conceptual research is used, by analyzing concepts like sovereignty, and extracting relevant conclusions as to the practical applicability of such concepts for the examination of the research questions.

VIII. How this study is structured.

This study consists of five separate articles that have been accepted for publication in peer reviewed academic journals. These articles explore and address the aforementioned research questions. Each of the articles will address one of the above research questions, highlighting all aspects of all proceedings and reaching useful

conclusions about the effectiveness of such proceedings to award reparation to investors. Examining the articles together, they offer a comprehensive analysis of the substantive remedies available to investors in case of sovereign default and financial crisis in the EU, depicting the need for a specifically designed framework for sovereign default that will set specific rules, proceedings and principles and will take into account investors' rights beforehand and not when it is "too late". Hence, this study offers a complete review of the legal framework available to safeguard investors rights in crisis such as the Greek Sovereign Crisis and the Cyprus Banking Crisis, aspiring to make a contribution to the body of knowledge of the existing literature on the matter.

Firstly, it needs to be stipulated that despite the fact that both the Greek Sovereign Crisis and the Cyprus Financial Crisis had substantial repercussions on investors, nonetheless, sovereign default is different from banking default and banking crisis. Hence, despite the fact that investors rights are, to a large extent, based on the same legal bases, available remedies will be presented separately, and each will be discussed against the background of the facts that led to each crisis. Hence, the first chapter will mostly deal with the facts of the Cyprus Banking Crisis, making only a small reference to the Greek Sovereign Debt Crisis, by exploring the implications of the Greek Sovereign Default on the Cyprus Banking Crisis and the judgment of the European Court of Justice in the case Alessandro Accorinti and Others v European Central Bank.[39] Similarly, the second and third chapter will refer to the investors' remedies from a human rights perspective, with the second chapter referring to the Cyprus Banking Crisis and the third chapter referring the Greek Sovereign Crisis. The fourth chapter will explore investment treaty protection awarded to investors in case of sovereign default specifically referring to the Greek Sovereign default while the fifth chapter will explore sovereign default from a contractual perspective. This study ends with general conclusions and a brief discussion of a proposed framework for investors' protection in in Chapter 6.

The detailed presentation of each chapter is as follows:

Chapter One seeks to determine if there is a legal basis for EU's Institutions to be held accountable for measures taken by an EU Member State in case of financial distress. It begins by exploring the concept of sovereignty and then evaluates the limitations placed on such sovereignty to States by participation in the EU. Furthermore, it explores the notions of economic coercion and countermeasures within the context of the Cyprus Banking Haircut and considers whether the actions taken by EU institutions within the said context can fall within the above definitions. Lastly, the paper studies whether EU law can provide a basis for liability of EU institutions in case of actions of States in financial distress that target investors' rights and, in particular, in the Cyprus Banking Haircut.

The Second Chapter explores the measures taken by investors affected by the Cyprus Banking Haircut to date. It explores the arguments produced by both the

[39] Alessandro Accorinti and Others v. European Central Bank, T-79/13, (2015)

Republic of Cyprus as well as investors before national courts in the Republic of Cyprus, the European Court of Justice ("CJEU") and international tribunals, such as the International Centre for Settlement of Investment Disputes ("ICSID") and considers the reasoning of the Court or Tribunal respectively. Recognising that all such proceedings are founded on human rights' considerations, but have to date been unsuccessful in effectively dealing with the substantive elements of the Cyprus Haircut, this Chapter explores the implications of the Cyprus Banking Haircut on bondholder from a human rights perspective, reviewing investors' rights and remedies once a claim is brought before the Court most appropriate to deal with human rights' violations, namely the European Court of Human Rights ("ECtHR"). On the basis of such analysis, this Chapter concludes on the suitability of Human Rights Law to properly address investors' rights in banking crisis.

Similarly, the Third Chapter explores the events of the Greek Debt Restructuring of 2012 from a human rights perspective and studies the human rights implications of such actions. In particular, this chapter draws an analogy between protection awarded by human rights law and investment law by exploring the Greek Sovereign Default as well as other cases of debt structuring reviewing caselaw from both human rights' venues, as well as in international investment tribunals. This chapter depicts the interrelation between human rights and investment law and demonstrates that, despite, the tendency to distinguish the evolution of human rights law from that of investment law, these fields are not completely dissimilar as, inter alia, they both aim to safeguard investors' right to property, promote respect for due process and address the undisputed position of power of the State against the individual. This chapter finally concludes by examining the suitability of Human Rights Law to address investors' claims in case of sovereign default.

On the other hand, Chapter Four explores the actions taken by investors in Greek sovereign bonds to date to reconcile the losses sustained due to the Greek Debt Restructuring. It recognizes, that despite Human Rights' Law importance to secure investors rights, to date the ECtHR has not awarded investors the desired compensation. This Chapter explores the reasons that led to the failure of bondholder's cases and explores if there is room for a different result for bondholders before investment tribunals under investment treaty law for breach of standards of treatment (including Most Favoured Nation, Fair and Equitable Treatment, Expropriation and Umbrella Clauses). Additionally, this Articles explores the defaulting state's available defenses, making specific reference to Greece. Lastly, the Article aims to suggest alternative ways for bondholders to obtain reparation, including Credit Default Swaps.

Chapter Five addresses sovereign default and, in particular bond restructuring, from a contractual perspective and explores investors' remedies for breach of bond contract's provisions. This Chapter analyses the issue of applicable law in State contracts and particularly in sovereign bonds. Additionally, the chapter explores how applicable law affects the competent venue and how the latter affects enforcement, especially due to State immunities. All such findings are explored in the context of the

Greek Sovereign Default aiming to assess investors ability to enforce a potentially successful judgement and gain true reparation.

Finally, Chapter Six provides the general conclusions of this study and demonstrates the linkage that exists between the chapters in demonstrating the deficiencies in investors' protection on the current legal framework for both banking default as well as sovereign default. This chapter also discusses the need for the establishment of an efficient and equitable framework that will specifically address sovereign debt restructurings.

CHAPTER ONE

Acts of financial distress in the EU; Is EU to blame? Liability of EU Institutions in case of acts of default within the EU-

(accepted for publication by Washington International Law Journal to be published in Volume 27, Issue 2, April 2018)

I. ABSTRACT

Founded on the allegation made by the Cyprus Government that it was coerced to take legal measures to enforce a haircut on deposits in Cyprus' two major Banks; this Article seeks to determine if there is a legal basis for European Union ("EU") Institutions to be held accountable for measures taken by an EU Member State in case of financial distress. It begins by exploring the concept of sovereignty and then evaluates the limitations placed on such sovereignty to States by participation in the EU. Furthermore, it explores the notions of economic coercion and countermeasures within the context of the Cyprus Banking Haircut and considers whether the actions taken by EU institutions within the said context can fall within the above definitions. Lastly, this Article studies whether EU law can provide a basis for liability of EU institutions in case of acts of financial distress that target investors' rights and, in particular, in the Cyprus Banking Haircut.

Key Words: Sovereignty, Countermeasures, Sanctions, Financial Distress, Cyprus Haircut, Economic Coercion, Liability of EU Institutions

I. INTRODUCTION

There is no question that in case of extreme financial crisis, investors' expectations and the value of their investments may be greatly affected by measures taken to avert or minimise the results of the crisis. Seeking recourse, however, is not always an easy task. Apart from the procedural and substantive law hurdles an investor will face, he must, most importantly, decide on the most suitable defendant. This question is of material importance, as it will determine competent courts, applicable law and available property for enforcement. The question, "who is the responsible party," appears, at first sight, easy to answer, as, in most cases, the States adopted the negative measures themselves.

However, in the recent case of the Cyprus banking haircut that took place in 2013 and lead to the haircut of deposits in the two largest banks in Cyprus, this answer has been challenged. Indeed, it was proclaimed that the decision for the haircuts were actually imposed by European Institutions.[40] This article explores such allegations and attempts to answer the question of whether, in the case of sovereign

[40] See Anastasiades redress to the people of Cyprus on March 17th, where he stated that Eurogroup had given him two blackmail-style options, either disorderly bankruptcy or the depositors' bail in.

default within the European Union ("EU"), the latter can be held accountable for investors' loses. To respond to the above question, I first explore the concept of sovereignty in Part II. In particular, this Article will review the concept of sovereignty vis a vis a State's participation in international organisations and in particular the European Union. In Part III, I study the negative aspect of sovereignty, namely the principle of non-intervention, by virtue of which a State is free from any external interference by other sovereign States. In this context, I review the notion of economic coercion and examine whether economic coercion falls within such prohibited intervention. I then explore whether the recent banking haircut in the Euro zone and especially the Cyprus banking haircut can be attributed to the EU and its institutions on the basis of economic coercion in Part III. Lastly, I explore if the EU and its institutions can be held liable for the Cyprus banking haircut under EU Law.

II. THE NOTION OF SOVEREIGNTY

A. The History of the Concept of Sovereignty

As noted, to explore whether liability can be attributed to the EU for the Cyprus banking haircut, the notion of sovereignty is of vital importance. The notion of sovereignty is controversial and has puzzled law scholars and political scientists almost since the inception of international law itself.[41] The concept of sovereignty first arose in Rome, although without a definite theory for what creates sovereignty.[42] The traditional concept of sovereignty arose much later, in the 16th and 17th centuries.

In the 16th century, Jean Bodin, in his work Les Six Livres de République, recognized sovereignty as the absolute and perpetual power of a State to set binding laws, limited only by the laws of God and natural law.[43] Thomas Hobbes, a century later, indicated that the sovereignty of the State is an absolute power superior to all, having a right over all.[44] While both these theories conceptualize sovereignty as the absolute power of the State, they differ with respect to sovereignty as it relates to powers outside that of the State. Specifically, Jean Bodin's theory identifies sovereignty as an unlimited power not subject to external powers, nor human laws[45] and Thomas Hobbes considers sovereignty as an absolute power within the State's territory, but fails to address the relation of sovereignty with international law and international organizations.[46]

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[41] Helmut Steinberger, "Sovereignty", in Encyclopedia of Public International Law, Vol. IV 501 (Rudolph Bernhardt 1 ed. 2000).

[42] C. H. McIlwain, A Fragment on Sovereignty, 48 Political Science Quarterly 96 (1933)..

[43] Richard McKeon, The Six Books of a Commonweal. Jean Bodin, 74 Ethics 74-75 (1963)..

[44] Thomas Hobbes, "De Cive" (1651) translated from Latin into English by Thomas Hobbes, Ch 6 pars 12-15

[45] Urmila Sharma & Sudesh Kumar Sharma, Principles and theory of political science 145 (2000), see also William C. van Vleck & Charles Grove Haines, The Revival of Natural Law Concepts, 44 Harvard Law Review 317 (1930)., where it is stipulated that Bodin philosophy "tended to discredit the old natural law ideas and to make the state the sole source of law".

[46] For an analysis of how what Hobbes considered international relations and the causes for the war among nations, see Howard Warrender, The political philosophy of Hobbes 119 (1970).

The majority of scholars[47] trace the modern concept of sovereignty to the end of the thirty-year war with the conclusion, and the Treaty of Westphalia.[48] The Treaty of Westphalia laid the ground for States to become "sovereign and independent" from the Holy Roman Empire.[49] These States were sovereign in the sense that they enjoyed "supreme authority" within their territory in relation to their both internal affairs, but also independence in their external relations.[50] Such authority was secular, derived out of self-assertion and survival, rather than stemming from religious grounds.[51] The Treaty of Westphalia recognized States were equal regardless of their allegiance with the Catholic or the Protestant Church or their form of governance.[52] As a consequence of these concepts of sovereignty and equality, the principle of non-intervention, or the idea, that other States cannot interfere in a State's internal affairs, became a well-established principle of international law.[53].

B. The Current Concept of Sovereignty

Since the Treaty of Westphalia, case law and scholarly research more extensively explored the principles of sovereignty and non-intervention. However, despite this analysis, both continue to be fluid and puzzling notions. The first case to set out a widely accepted definition of sovereignty, which is accepted to date, was the Island of Palmas Arbitral Award of 1928 where it was stipulated that: "*Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State*".[54] As the Palmas case indicates, independence is inherently linked with the element of territory, in the sense that, for an entity to be independent, it should be able to freely dispose of its own territory without external interferences.[55]

This definition also directly linked sovereignty with the concept of statehood, although the two concepts are not identical. Indicatively, Art.1 of the Montevideo Convention on Rights and Duties of States of 1933 that echoes customary

[47]Although elements of statehood can be traced before that time, see Robert Roswell Palmer & Joel Colton, A History in the Modern World 148 (7 ed. 1992). For a dissenting opinion see K. J. Holsti, Stephen D. Krasner, Sovereignty: Organized Hypocrisy, Princeton: Princeton University Press, 1999., 1 Japanese Journal of Political Science 157-172 (2000).

[48]G. John Ikenberry & Daniel Philpott, Revolutions in Sovereignty: How Ideas Shaped Modern International Relations, 80 Foreign Affairs 157 (2001).

[49] D. W. Greig, International Law in a Divided World. By Antonio Cassese. Oxford: Clarendon Press, 1986. xv + 429 pp. 45, 58 British Yearbook of International Law 366-368 (1988)

[50] Ninčić Djura, The Problem of Sovereignty in the Charter and in the Practice of the United Nations" 5 (1 ed. 1970)

[51] Helmut Steinberger, "Sovereignty", in Encyclopedia of Public International Law, Vol. IV 501 (Rudolph Bernhardt 1 ed. 2000)

[52] BRIAN R URLACHER, INTERNATIONAL RELATIONS AS NEGOTIATION 19 (1 ED. 2016).

[53] Michael Wood, Non-Intervention (Non-interference in domestic affairs) | Encyclopedia Princetoniensis Pesd.princeton.edu, https://pesd.princeton.edu/?q=node/258 (last visited Nov 27, 2017).

[54] Island of Palmas Case (or Miangas), United States v Netherlands [1928] Permanent Court of Arbitration, II RIAA 829, ICGJ 392 (Permanent Court of Arbitration) p. 838

[55] Geert Van Calster, International Law and the age of Globalisation, in International Law and Institutions 106 (Aaron Schwabach & John Cockfield 1 ed. 2009)

international law, defines a State as a person of international law which possesses: (a) a permanent population; (b) a defined territory; (c) government in the sense of dominion; and (d) capacity to enter into relations with other States". [56] Indeed, it is a principle of international law that sovereign States enjoy absolute dominion within their territory not subject to extrovert interventions, being in a relationship of parallel equality with each other.

C. The Sovereignty of International Entities

These definitions focus on States. However, they do not indicate whether international entities other than States may enjoy sovereignty in the sense described above. This question is of particular relevance in relation to international organizations, particularly the European Union (EU), which is the subject of this study. In particular, this section aims to review whether the sovereignty of Member States in the EU ia affected by their participation in the EU.

EU institutions possess unusual powers and traits, including, inter alia, citizenship, the lack of internal borders within member States, and the development of a supranational legal system of "EU law".[57] Such powers and traits, however, were awarded to EU by the Member States through international conventions rather than arising as inherent EU characteristics. In particular, the Treaty of Rome,[58] the Treaty of Maastricht[59] and the Treaty of Lisbon[60] created the EU institutions which enjoy these powers, and thus played a large role in the creation of the EU.

These powers were, prior to these treaties, exercised by the governments of each Member State. Through these treaties, States agreed to award such powers to EU institutions. As with any other international treaty, the obligations assumed by the States through these treaties are mandatory on the basis of States' consent and on the well-established international law principle "pacta sunt servanda".[61] In this sense, no Member State can enjoy sovereignty in the manner described above of an absolute power free from extrovert interventions, as, inter alia, within the EU, member States have delegated parts of their sovereignty to the EU and they now share sovereignty in many policy areas.

The creation of the EU has led scholars to question the previous definition of sovereignty and to seek alternative theories of sovereignty that will adequately include the EU in their ambit. This is because Bodin's unitary and indivisible nature of sovereignty does not allow for delegation of powers by a State to an external

[56] Art.1 of the Montevideo Convention on Rights and Duties of States of 1933

[57] See Costa v ENEL [1964] ECJ *"…the EEC Treaty has created its own legal system which…became an integral part of the legal systems of the Member States and which their courts are bound to apply.*"

[58] European Union, Treaty Establishing the European Community, Rome Treaty, 25 March 1957

[59] European Union, Treaty on European Union, Treaty of Maastricht, 7 February 1992,

[60] European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01

[61] Fabrizio, Capogrosso, "Shared Sovereignty and Denationalisation of Statehood in the European Union" 11 (1 ed. 2008)..

authority and could not, therefore, address the current situation with the EU. [62] Scholars, in response, invoke other theories of sovereignty, such as that of pooled sovereignty.[63] Indeed, EU is considered a prominent example of pooled sovereignty,[64] i.e. a "poly-centred sovereignty" where the powers are disaggregated, in the sense that the state does not enjoy exclusive authority over its policies,[65] as well as reaggregated, due to EU Regulations and Directives that are adopted by the EU institutions and apply uniformly to all member states. .[66] In pooled sovereignty, States, while they remain sovereign, contractually delegate their powers to an external Institution which operates collectively, since it is comprised by all member States, and will set policies that may differ from each individual State's ideal standpoint, in the interest of international cooperation.[67]

Some commentators suggest that pooled sovereignty is not an appropriate concept for the EU because this type of sovereignty is exercised by several actors, and is therefore unable to address the current status of the EU, and especially of the Economic Monetary Union ("EMU").[68] On one hand, transfer of sovereignty exceeds mere "pooling" in the area of monetary policy, as monetary authority is exercised almost exclusively at an EU level, while on the other, in areas such as fiscal policy, the power is, for the most part, exercised by the States independently.[69] It is argued that in such case, sovereignty is divided, in a sense that certain competences are prerogatives of the State, while others belong to the EU. [70]

Even this notion, however, appears simplistic and falls short of addressing the shared competencies that belong both to the States and the EU.[71] In response, scholars developed the theory of co-operative sovereignty. Here, sovereign States collaborate with other sovereign entities while applying the same rules and principles in a pluralist constitutional order.[72] These rules are applied without operating in a

[62] Stephen D Krassner, Sovereignty: Organized Hypocrisy (1st edn, Princeton University Press 1999)

[63] See Nannerl O Keohane, Philosophy and the State in France (1st edn, Princeton University Press 1980). p.71, (stating "we see the principal point of sovereign majesty and absolute power to consist in giving laws to subjects in general, without their consent"); Robert Keohane, Ironies of Sovereignty: The European Union and the United States, 40 Journal of Common Market Studies 743-765 (2002).

[64] pooled sovereignty - oi, Oxfordindex.oup.com (2017), http://oxfordindex.oup.com/view/10.1093/oi/authority.20110803100336931 (last visited Nov 30, 2017).

[65] Hadii M. Mamudu, Donley T. Studlar, Multilevel Governance and Shared Sovereignty: European Union, Member States, and the FCTC, 22 Governance 73-97 (2009).

[66] Thomas W. Pogge, Cosmopolitanism and Sovereignty, 103 Ethics 48-75 (1992)., See also Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), Sovereignty in Transition (Hart Publishing 2006) p. 15.

[67] Nicolas Jabko, Which economic governance for the European Union? Facing Up the Problem of Divided Sovereightny", Swedish Institute for European Policy Studies 13 (2011), http://www.sieps.se/sites/default/files/2011_2_1.pdf (last visited Apr 10, 2017).

[68] Samantha Besson, Sovereignty in Conflict (1st edn, British Institute of International and Comparative Law 2006)

[69] Jabko, ibid at p.13

[70] Jabko, supra

[71] Enzo Cannizzaro, The European Union as an actor in international relations xiv (1 ed. 2002)

[72] Neil MacCormick, Questioning Sovereignty (1st edn, Oxford University Press 2008).

hierarchical order, but by working towards the same end, namely the fulfilment of their shared sovereign values, including, inter alia, common market free from internal borders, common agriculture and fishery policies, common minimum standing on human rights etc.[73] This notion has been criticized as "unsound," on the basis that sovereignty in itself cannot be divided. [74] Dividing a sovereignty would undermine the nature of sovereignty as an absolute power, as only competences can be limited. [75] Nonetheless, this notion supports that delegation of competencies through international treaties is nothing other than the demonstration and reaffirmation of this sovereignty.[76]

While it is clear that the concept of sovereignty, in particular as it relates to the EU continues to be unresolved, a few conclusions can be drawn. Specifically, it can be concluded that sovereignty allows a State, in such fields and policy areas where it has not delegated authority to other institutions, to regulate its internal affairs at will free from external interferences. The EU is a unique case, enjoying sui generis powers, similar to the sovereignty awarded by the member States through international conventions.

III. THE NEGATIVE ASPECT OF SOVEREIGNTY

A. The Non-Intervention Principle

As noted above, sovereignty entails the absolute dominion over a State's territory, free from any external interference by other sovereign States. The definition of sovereignty, thus, implies that sovereign States have a negative obligation not to interfere in the internal affairs of other States, as all States are equal. The principle of non-intervention echoes customary international law, constituting one of the fundamental norms of international law, and is argued, by scholars such as Antonio Cassese and Jianming Shen, to enjoy the status of "jus cogens".[77] The principle is embodied, inter alia, in the Charter of the United Nations, although non-explicitly, but it can be inferred from Art. 2(4) and 2(7).[78] It can also be inferred from the Friendly Relations Declaration.[79]

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[73] *Id*., Besson, ibid at. 14

[74]Richard Rawlings, Peter Leyland and Alison L Young, Sovereignty and The Law: Domestic, European And International Perspectives (1st edn, OUP Oxford 2013).

[75] Rawlings, supra.

[76] *Id.*

[77] See Antonio Cassese, International Law in A Divided World (1st edn, Clarendon Press ua 1986). "[t]he importance of this principle [i.e., the principle of nonintervention] for States leads one to believe that it has by now become part and parcel of jus cogens". Additionally, see Jianming Shen, The non-intervention principle and humanitarian interventions under international law, 7 International Legal Theory 5 (2001), See also L Oppenheim, R. Y Jennings & Arthur Watts, Oppenheim's international law 428 (1 ed. 2008). where it was stated that the principle "is a corollary of every state's right to sovereignty, territorial integrity and political independence".

[78] Philip Kunig, Intervention, Prohibition of Opil.ouplaw.com (2008), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434?prd=EPIL (last visited Apr 10, 2017)..

[79] UNGA res. 2625(XXV) 1970

The principle of non-intervention is explicitly identified in the UN General Assembly Declaration on the Inadmissibility of Intervention and Interference in the Domestic Affairs of States.[80] Furthermore, Art. 32 of the Charter of Economic Rights and Duties of States prohibits "the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights".[81] The principle was also recognized by the International Court in its very first case, Corfu Channel, United Kingdom v Albania.[82]

Finally, it was emphasized in the renowned judgment in Nicaragua vs. United States where the Court determined that:

> "The principle of non-intervention involves the right of every sovereign State **to conduct its affairs without outside interference**; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law".[83]

(emphasis added).

The Court later stated:

> "[T]he principle forbids all States or groups of States to intervene directly **or indirectly in the internal or external affairs of other States**" and that "a prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. **Intervention is wrongful when it uses methods of coercion** in regard to such choices, which must remain free ones. […] the element of coercion […] defines, and indeed forms the very essence of, prohibited intervention"[84]

(emphasis added).

According to Professor Tzanakopoulos, the court in the Nicaragua case recognized that States enjoy an area of freedom where each respective State, alone, may act in the manner it pleases, stemming from that State's own sovereignty.[85] That area includes, inter alia, various policy areas, including fiscal, tax, foreign policy and the free choice of political, economic, social and cultural system.[86] Within that area, as discussed above, no external intervention is permissible. That freedom may be

[80] UNGA resolution 2131 (XX) 1965

[81] Res. 3281 (X X IX) of December 12, 1974 (A.J.I.L., 1975, pp. 484 sq.).

[82] Corfu Channel Case (United Kingdom v. Albania); Merits, International Court of Justice (ICJ), (1949), available at: http://www.refworld.org/docid/402399e62.html p. 35 where the Court proclaimed "the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given right to the most serious abuses and as such cannot, whatever be the present defects in international organization, find a place in international law"

[83] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), (1986), available at: http://www.refworld.org/docid/4023a44d2.html p.106, para. 202

[84] Supra, para 205

[85] Antonios Tzanakopoulos, The Right to Be Free from Economic Coercion, 4 Cambridge Journal of International and Comparative Law, 8 (2015).

[86] *Id.*

circumcised, however, due to the obligations assumed by such States by the execution of international treaties.

Despite the seemingly established status of the principle of non-intervention however, as will be demonstrated below, not only is its content unclear, [87] but the principle has also been set aside or abused several times by States with significant economic power, exercising economic coercion.[88].

In relation to the issue of clarity of the principle of non-intervention, case law is limited to specific cases with very specific fact patterns. Indicatively, the International Court of Justice has only examined three cases relating to the principle of non-intervention, namely the Corfu Chanel Case,[89] the case of Nicaragua v. United States of America[90] and the case of DRC v. Uganda,[91] all of which had very particular facts that related to the use of military force.[92]Thus, for the most part, there is no consensus on what constitutes intervention and is therefore not allowed under international law.[9394] For the purposes of this study, I shall focus only on examining the notion of "economic coercion" that may constitute a form of prohibited intervention.

B. Economic Coercion

Defining economic coercion is not an easy task, as, undoubtedly, a large part of the actions taken by a State in optimizing their economic self-interests lead to detrimental consequences to other States.[95] Economic coercion can include all methods traditionally used for economic compulsion.[96] In fact, since World War II, economic relations among States have been shaped by the practice of economic coercion.[97] Clearly not every such action can be deemed illegal and prohibited. Rather, only these that are unnecessarily or unreasonably destructive to the essential

[87] Oliver J. Lissitzyn, Myres S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion, 76 Harvard Law Review 668 (1963).

[88] T. Akinola Aguda, Miroslav Nincic & Peter Wallensteen, Dilemmas of Economic Coercion: Sanctions in World Politics., 81 The American Journal of International Law 284 (1987).

[89]See Corfu Channel, United Kingdom v Albania, 1 I.C.J. Reports 1949 4 (1949), which referred to UK unauthorized entry into the territorial waters of Albania, so as to look for mines that would be brought as evidence before the ICJ.

[90] See Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1986 14 (1986), which related to armed activities taken by US military forces against the Nicaraguan Government.

[91] See Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda);, I.C.J. Reports 168 (2005), which related to the presence and action of the military forces of Uganda on the borders of eastern Congo.

[92] Natalino Ronzitti, Coercive diplomacy, sanctions and international law 6 (2016).

[93] John Charvet & Elisa Kaczynska-Nay, The liberal project and human rights 275 (2008).

[94] One exception is the use of force which is specifically prohibited under Art. 2.4 of the UN Charter.

[95] Oliver J. Lissitzyn, Myres S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion, 76 Harvard Law Review 668 (1963)..

[96] The Use of Nonviolent Coercion: A Study in Legality under Article 2(4) of the Charter of the United Nations, 122 University of Pennsylvania Law Review 983 (1974).

[97] T. Akinola Aguda, Miroslav Nincic & Peter Wallensteen, Dilemmas of Economic Coercion: Sanctions in World Politics., 81 The American Journal of International Law 284 (1987).

values of an innocent target State, or which might significantly endanger international peace, are prohibited.[98]

Professor Bowett has suggested that the decisive element of whether various economic measures should be considered illegal coercion is whether the action taken by the involved State can be attributed to an improper motive or intent.[99] Put simply, an act on its own cannot be coercive, but it may become illegal coercion upon proof of improper motive or purpose.[100] Since a State's mens rea is not easy to deduct, let alone prove, Professor Bowett indicates that "it will require a great deal of practice, of "case-law", to give the concept of illegal economic coercion substance and definition".[101]

Another criterion that was suggested to determine whether economic measures could constitute illegal coercion is based on whether the State imposing the measures does so to obtain "advantages of any kind" while subordinating the sovereignty of the state upon which the coercion is inflicted. [102] Again, however this criterion is vague as economic measures cannot be deemed illegal on the sole basis that they convey advantages to a State while damaging the interests of another State, particularly given the competition existing between various economies.[103] According to Professor Tzanakopoulos, a decisive conclusion can be inferred from Article 52 of the Vienna Convention on the Law of Treaties, which refers to the case when a State is coerced to enter into an international treaty. In such case, the treaty is nonetheless valid, unless coercion was exercised by the threat or use of force.[104]

"Force" certainly refers to any military force or physical force, used or threatened. However, it is unclear whether economic or political force is included in the definition of "use of force". The definition of "force" becomes of the essence in such case, as a literal interpretation of the word might lead to the conclusion that force is tantamount to armed force, while a broader, liberal interpretation of the term would factor inclusion of political and economic force in this definition. This matter troubled the States when negotiating the Vienna Convention on the Law of Treaties[105] but the

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[98] Paul Stephen Dempsey, Economic Aggression & Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto, 9 Case Western Reserve Journal of International Law 10 (1977), http://abstract=2734243.

[99] Derreck Bowett, "Economic Coercion and Reprisals by States" (13 VA. J. INT'L L. 1977), 1 Virginia Journal of International Law 15 (1977).

[100] Nwogugu Ifeanyichukwu, Legal problems of foreign investments in "Recueil Des Cours, Collected Courses 260 (1 ed. 1976).

[101] Derreck Bowett, Self-defense in international law 13 (1 ed. 1958).)

[102] See for example A/RES/3171| Permanent sovereignty over natural resources, Refworld (1973), http://www.refworld.org/docid/3b00f1c64.html Beirlaen, Andre "Economic Coercion and Justifying Circumstances (last visited Apr 12, 2017).

[103] Andre Beirlaen, Economic Coercion and Justifying Circumstances, 18 Revue beige de droit international 69 (1984).

[104] Antonios Tzanakopoulos, The Right to Be Free from Economic Coercion, 4 Cambridge Journal of International and Comparative Law, 8 (2015).

[105] In the First session of the International Conference held to formulate the draft Articles on the Law of Treaties into an International Treaty in 1968, the meaning of coercion was deliberated in great detail . In this regard, Art. 49 of the Draft Articles (current Art.51) was proposed to be amended by the

choice of words of Art. 52 thereto demonstrates their lack of willingness to clear up this matter.[106]

As might be expected, the views of scholars on this topic are divided. Some commentators have supported the view that political and economic pressure is not included in the notion of force.[107] Others argue that the term "force" should not be limited to military action, but should also include economic and political coercion that may endanger international peace, security or justice.[108] This view is supported by the Separate Declaration on the Prohibition of Military, Political and Economic Coercion in the conclusion of Treaties, which was separately adopted in 1969 by the delegates of the UN Conference on the Law of Treaties.[109] The said declaration specifically condemns "the threat or use of pressure in any form whether military, political or economic by any State in order to coerce…"[110]

In all cases, the equation of coercion with illegal intervention should be interpreted to mean that anything short of coercion, e.g. mere interference with a State's choices, is lawful so long as the interfering State does not breach any of its own obligations under international law.[111] Thus, identifying the scope of what is considered coercion is necessary to identify whether the recent haircuts in the Euro zone, and especially the Cyprus Banking haircut, can be attributed to the EU and its institutions on the basis of coercion.

IV. THE FACTS OF THE CYPRUS HAIRCUT

Cyprus is the third smallest country in the EU and is situated in the north-eastern Mediterranean Sea, to the south of Turkey. Although it joined the EU as a de facto divided island, the entire country is part of the EU territory.[112] Cyprus is a well-established financial and investment center due to its investor-friendly tax regime and, up to 2013, had a strong financial and service sector.

19th Amendment so that economic and political pressure would be included. This issue was discussed in detail in the Fiftieth meeting, held on 3rd May 1968 but no consensus could be reached, see K.R. Vivek, Coercion: Economic and Political Presure i, Ugdam Vigyati- The origin of knowledge (2015)..

[106] Olivie Corten, The Vienna Conventions on the Law of Treaties: A Commentary. Edited by Olivier Corten and Pierre Klein. Oxford, New York: Oxford University Press, 2011. 2 vols. Pp. lxxxiii, 2071. Index. $750., 106 The American Journal of International Law 898-903 (2012)..

[107] See e.g. Lassa Francis Lawrence OPPENHEIM, Hersch LAUTERPACHT and Arnold Duncan MACNAIR, International Law. A Treatise: Disputes, War and Neutrality (7th edn, Longmans, Green & Co 1952) and Waldock, C.H.M. "The Regulation of the Use of Force by Individual States in International Law", in (81 Hague Recueil 1952), p. 455, 492.

[108] See e.g. Stone, Julius "Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes-and-War-Law" p. iv, 851 (New York: Rinehart and Com pany, 1954)

[109] Catherine Brölmann & Yannick Radi, Research handbook on the theory and practice of international lawmaking 95 (2016).

[110]Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties (A/Conf. 39/26, 1969)

[111] Tzanakopoulos supra, p.9

[112] 'EU Immigration | Cyprus Is A Member Of The European Union' (Euimmigration.org, 2015) <https://www.euimmigration.org/eu_cyprus.html> accessed 12 April 2017.

In March 2013, Cyprus was shocked by the decision to close the second largest Bank, Cyprus Popular Bank ("CPB"), the imposition of a depositor bail-in on the deposits in the largest bank, namely Bank of Cyprus ("BOC") and the imposition of capital controls on all deposits in Cyprus Banks. Other authors have explored reasons behind the financial and banking crisis in the Republic of Cyprus.[113] This article focuses on the facts leading to the decision for the Cyprus' banking haircut to explore whether it was a product of coercion by the EU's Institutions, especially the ECB and the Council of the European Union, as was contemplated by the President of Cyprus, Mr. Anastasiades.[114]

The problems faced by the two major banks in Cyprus did not appear unexpectedly. Indeed, there were several signs that the banks were in distress well before March 2013, but these were neglected. Indicatively, as part of a Capital Exercise conducted on October 26, 2011 by the European Banking Authority (EBA) and the Central BOC, BOC identified a capital buffer shortfall of EUR 1,472 million (EUR 1.5 billion) and CPB identified a capital buffer shortfall of EUR 2,116 million (EUR 2.1 billion).[115] As a result, at the beginning of November 2011, the Credit Ratings Agency Moody's downgraded three Cypriot banks. In particular, BOC was downgraded by one notch to Ba2 from Ba1, Hellenic Bank by one notch to Ba2 from Ba1 and Marfin Popular Bank Public Co Ltd. by three notches to B2 from Ba2.[116] Not long after the downgrades, EBA issued its recommendation on the creation and supervisory oversight of temporary capital buffers to restore market confidence.[117] This recommendation required national supervisory authorities of participating EU member State banks to raise their Core Tier 1 Capital to 9% after accounting for an additional buffer against stressed sovereign risk holdings by June 30, 2012.

Both BOC and CPB needed to source additional funding. Correspondingly, on March 2, 2012, CPB announced a capital-raising plan, but the Greek PSI had immediate and devastating implications for both banks. Indeed, the two banks had purchased vast amounts of Greek Government Bonds and lost billions of Euros with

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[113] For information on this matter see Orphanides, Athanasios, "What Happened in Cyprus? The Economic Consequences of theLast Athanasios Orphanides, What Happened In Cyprus? The Economic Consequences Of The Last Communist Government In Europe (1st edn, MIT Sloan Research Paper No 5089 2014).

[114] See Anastasiades redress to the people of Cyprus on March 17th, where he referred that Eurogroup had given him two blackmail-style options, either disorderly bankruptcy or the depositors' bail in.

[115] See Fiona Mullen, 'Greek Haircut: Cyprus Banks Announce EUR 3.6 Bln Buffer Need' (Financialmirror.com, 2013) <http://www.financialmirror.com/news-details.php?nid=24841> accessed 12 April 2017.

[116] See Moody's Rating action at 'Moody's Downgrades Three Cypriot Banks Following Cyprus Sovereign Downgrade; Banks On Review For Further Downgrade' (Moodys.com, 2011) <https://www.moodys.com/research/Moodys-downgrades-three-Cypriot-banks-following-Cyprus-sovereign-downgrade-banks--PR_229745> accessed 12 April 2017.

[117] See 'EBA/REC/2011/1' (Eba.europa.eu, 2011) <https://www.eba.europa.eu/documents/10180/16460/EBA+BS+2011+173+Recommendation+FINAL.pdf/b533b82c-2621-42ff-b90e-96c081e1b598> accessed 12 April 2017.

the Greek PSI.[118] In particular, BOC announced losses of 1 billion euro, while CPB announced losses of 2.5 billion euro,[119] something that further increased the needs for additional capital buffer. Cyprus could have requested support for its banks by the European Union, but same would have required agreeing to a Memorandum of Understanding with the Troika, something that the Cyprus government was not prepared to do at the time. Instead, in an attempt to help salvage CPB, the Cyprus Parliament agreed on May 18, 2012 to underwrite the rights issue of capital of an amount of €1.8 billion for the bank's recapitalization, in case the latter was unable to raise funds from private sources. This underwriting raised state aid concerns, but it was approved by the European Commission on 13th September 2012, on the precondition that the Cyprus Authorities would submit a plan no longer than within 6 months from the date of the European Commission's approval, to demonstrate how the bank would become viable with the assistance of the State.[120]

By the deadline of June 30th, 2012, CPB had only raised €3 million, although the Cyprus government acquired bank shares amounted for the equivalent of about €1.8 billion.[121] The State paid CPB by transferring to it a 12-month sovereign bond, which would be rolled over for a period of five years. By that time, all three major credit rating agencies had downgraded Cyprus' sovereign debt to junk status, thus eliminating the possibility that the ECB ("ECB") could accept Cypriot bonds as collateral for a loan.[122]

On June 25, 2012, Cyprus entered the European Stability Mechanism without specifying the amount of money it required. Unfortunately, a settlement wasn't reached until after the Eurogroup meeting on March 15, 2013. In the meantime, both major banks in Cyprus required Emergency Liquidity Assistance ("ELA") from the Central BOC. This was approved by both the Central BOC and by the ECB. The details of this provision were unknown at the time as neither the ECB nor the National Central Banks, including the Cyprus Central Bank, publish details on their collateral

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[118] See Demetriades, Panicos. "Cyprus Financial Crisis: The Framework for an Economic Recovery within the Eurozone." Discussion Organised by the Hellenic American Bankers Association and the Cyprus-US Chamber of Commerce. USA, New York. 11 December 2012. Speech, available at http://www.centralbank.gov.cy/nqcontent.cfm?a_id=13457&lang=en, where it stipulated that "The Greek PSI alone cost Cypriot banks nearly 25% of the country's GDP, because of excessive concentration of Greek debt in the balance sheets of the two largest Cypriot banks."

[119] George Psyllides, '2.5 Billion Euro Loss For Marfin - Lawyers In Cyprus | Cyprus Law Portal' (Lawyersincyprus.com, 2013) <http://www.lawyersincyprus.com/el/news-read/25-billion-euro-loss-for-marfin> accessed 12 April 2017.

[120] See European Commission Press Release, IP/12/958 (Sep. 13,2012) and Response to State Aid Case EN/SG/98/89590000 (Sep. 13, 2012) available at http://ec.europa.eu/competition/state_aid/cases/245846/245846_1367342_82_1.pdf

[121] Ministry of Finance, Recapitalisation Of CPB Public Co Ltd And BOC Public Co Ltd, Press Release, September 2, 2012 available at http://www.mof.gov.cy/mof/mof.nsf/All/EC07188B34FB4349C2257A2F0030149D/$file/%CE%91%CE%BD%CE%B1%CE%BA%CE%BF%CE%B9%CE%BD%CF%89%CF%83%CE%B7%20%CE%9A%CE%B5%CF%86%CE%B1%CE%BB%CE%B1%CE%B9%CE%B1%CE%BA%CE%B7%20%CE%95%CE%BD%CE%B9%CF%83%CF%87%CF%85%CF%83%CE%B7%20%CE%A4%CF%81%CE%B1%CF%80%CE%B5%CE%B6%CF%89%CE%BD%20english%20020712.pdf

[59] *'Cyprus Requests Eurozone Bailout, [2012] Financial Times*).

holdings that are part of the monetary policy operations of the Eurosystem.[123] As was later revealed, CPB had resorted to ELA already from September 27, 2011[124] requesting initially 300 million. That amount constantly grew to 1.8 billion on January 2012, 3.8 billion in May 15, 2012, 4.2 billion by February 2013 and to a staggering 9.1 billion Euros by the time the Bank was led into resolution.[125]

The two Banks received ELA from the Central BOC until March 21, 2013, with the consent of the Governing Council of the ECB. On 21 March 2013, the ECB's Governing Council announced that, in accordance with prior decisions, it would on March 25, 2013 cease to provide ELA to both Cypriot banks, due to "the lack of clear and binding policy decisions on behalf of the Cypriot side to implement a preliminary agreed financial assistance programme".[126] However, it was clear already from 2012, that CPB would become insolvent by the end of 2012, as it was in no position to service ELA past June 2012.[127]

This fact appears to have been known to the ECB, as in response to a request for an opinion on the Cypriot's government's plan for the recapitalization of CPB, the ECB stated on July 2, 2012, that 'the objectives pursued by the support measures may be better achieved through bank resolution tools'.[128] The Central BOC's, with the ECB's consent, continued provisioning of ELA was questionable given that it is contrary to the ECB rule that ELA is awarded only to solvent institutions.[129] The Central BOC, in an attempt to defend its actions, argued that not assisting CPB would lead to same going bankrupt something that would cause panic and threaten the entire banking system.[130]

In addition to the problems with the two major banks, Cyprus had also to address its own debt. It is estimated that at March 2013, the country was in need of seventeen billion Euros, which corresponded approximately to the size of the

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[123]Willem Buiter, Jürgen Michels & Ebrahim Rahbari, "ELA: An Emperor without Clothes?", 21 Citi Investment Research & Analysis, Global Economics View 4 (2011).

[124] *Athanasios Orphanides, What happened in Cyprus? The Economic Consequences of the Last Communist Government in Europe (1 ed. 2014).*.

[61] Gikas A. Hardouvelis, Overcoming the crisis in Cyprus (2014), http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.hardouvelis.gr%2FFILES%2FPROFESSIONAL%2520WORK%2F20January2014Q.pdf&ei=uQLtU-nLD4fA7AbN7ICIBw&usg=AFQjCNGky3diUBdN2Q70zfues9Eon8u-OA&sig2=C2sFLURIxg4H43b1jjFIcA&bvm=bv.72938740,d.Z GU (last visited Nov 29, 2017)..

[126] Provision of Emergency Liquidity Assistance to the two largest Cypriot banks - Central Bank of Cyprus, Centralbank.gov.cy (2013), http://www.centralbank.gov.cy/nqcontent.cfm?a_id=12850&lang=en (last visited Apr 12, 2017)..

[127] Orphanides, supra p.18

[128] European Bank, European Central Bank European Central Bank (2012), http://www.ecb.europa.eu/ecb/legal/pdf/en_con_2012_50_f_sign.pdf. (last visited Apr 12, 2017)..

[129] European Bank, Emergency liquidity assistance (ELA) and monetary policy European Central Bank (2016), https://www.ecb.europa.eu/mopo/ela/html/index.en.html (last visited Apr 11, 2017).

[130] Sofronis Clerides, The Collapse of the Cypriot Banking System: A Bird's Eye View, 8 Cyprus Economic Policy Review 29 (2014).

country's entire economy.[131] Thus, in March 2013, the newly appointed Cyprus Government was faced with the following difficult choice: either accept the terms of the bailout programme offered by Troika "as is" or delay further the negotiations to achieve a better deal and face a possible collapse of its banking system and overall collapse of its economy. The initial deal negotiated by European finance ministers, the ECB, and the IMF, provided for a one time "haircut" of 6.75% for deposits of up to €100,000 and 9.99% for deposits above €100,000. This included all deposits (in current and deposit accounts, interest bearing or not) and all banks (including branches of international banks) operating in Cyprus.[132] The said measure was strongly criticized as a "disastrous precedent",[133] and on March 18, 2013, the bill for the said measure was debated in the Cypriot parliament and was rejected on March 19, 2013.[134]

On March 21, 2013, the Governing Council of the ECB decided to maintain the current level of ELA until March 25, 2013. After that, ELA could only be considered if an EU/IMF program were put in place that would ensure the solvency of the concerned banks. Thus, the deadline for the Cypriot Government to reach a bailout program was March 25, 2013, following which "Pandora's Box" would open.

On March 22, 2013, the Cypriot Parliament started focused negotiations to find a way to reach a bailout deal before the 25 of March, but this required that Cyprus would gather six billion Euros to fund its share of the bailout.[135] During that period, the Cyprus banking system remained closed while the terms of the bailout required the Cyprus Parliament to enforce capital controls. In response to these developments, the Cyprus government enacted eight distinct laws aimed at emergency assistance for the economy and banks (the "Bank Resolution Framework"), including Law 17(I)/2013 for the Consolidation of the Banks. These provisions awarded the Central BOC extensive powers to take a series of measures to assist in the consolidation or liquidation of financial institutions in Cyprus. The law further provided for the creation of a Consolidation Authority that would act as a "Receiver Manager" with extensive authority for the consolidation of the banks.

Finally, on March 25, 2013, a deal was reached. In fact, on March 25, 2013 the Euro Group made a statement that an agreement had been reached with the Cypriot authorities on the key elements necessary for a future macroeconomic

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[131] Kambas, Michele and Babington Deepa, "After Election Win, Anastasiades Faces Cyprus Bailout Quagmire" in (REUTERS, Feb. 24, 2013) <http://www.reuters.com/article/2013/02/24/us-cyprus>

[68] *See 'A Better Deal, But Still Painful,' (Economist.com, 2013) <http://www.economist.com/blogs/charlemagne/2013/03/cyprus-bail-out> accessed 12 April 2017.*

[133] Tim Worstall, 'The Cyprus Bank Bailout Could Be A Disastrous Precedent: They'Re Reneging On Government Deposit Insurance' (Forbes.com, 2013) <http://www.forbes.com/sites/timworstall/2013/03/16/the-cyprus-bank-bailout-could-be-a-disastrous-precedenttheyre-reneging-on-government-deposit-insurance.> accessed 12 April 2017.

[70] See 'Walking Back From Cyprus | VOX, CEPR'S Policy Portal' (Voxeu.org, 2013) <http://www.voxeu.org/article/walking-back-cyprus> accessed 12 April 2017.

[135] Graeme Wearden, 'Cyprus Crisis: Mps Approve Bank Restructuring And Solidarity Fund—As It Happened' [2017] The GUARDIAN <http://eurozone-crisiscyprus-bailout-russia-vote> accessed 12 April 2017.

adjustment programme and same was supported by all euro area Member States and by the Commission, the ECB and the IMF. The statement contained an annex with the terms of the Agreement; the annex provided inter alia the following[136]:

- It was agreed that Cyprus would receive Euro 10 billion as financial assistance; such assistance would not be used to recapitalize either CPB or BOC. All other Banks in Cyprus would be provided with unlimited funds as needed.
- Additionally, the Annex provided for certain measures to be taken immediately in relation to the two problematic banks:
    - CPB would be resolved immediately — with full contribution of equity shareholders, bond holders and uninsured depositors — based on the Bank Resolution Framework. CPB would be separated into a good bank and a bad bank; the good bank will be folded into BOC along with 9 billion of ELA, while the bad bank will be run down over time.
    - BOC would be recapitalized through a deposit/equity conversion of uninsured deposits with full contribution of equity shareholders and bond holders, so that a capital ratio of 9% would be secured by the end of the programme.

On March 25, 2013, the Governor of the Central BOC placed both banks into resolution. On March 26, 2016 the Memorandum of Understanding was adopted by the ESM and the Republic of Cyprus reiterating the terms of the Eurogroup's announcement. Shortly thereafter, on 29 March 2013, two decrees were published by the Cyprus Central Bank, decrees no. 103 and 104, materializing the agreement reached with the European Stability Mechanism ("ESM").

V. THE CYPRUS HAIRCUT, COERCION OR JUST HARD POLITICS?

The Cyprus Banking haircut was unprecedented. It is unclear, however, whether the bail-out terms were willfully accepted by the Cypriot Government or whether the latter was coerced and forced to accept same as a "take it or leave it plan" with the alternative being financial collapse of the Country.

A. Coercion

Undoubtedly, Cyprus was "forced" to accept some difficult decisions. However, does this mean that the banking haircut in the two major Banks in Cyprus was a product of economic coercion? To analyze whether the facts of the Cyprus banking haircut satisfy the aforementioned criteria for economic coercion I focus on the decision of the Governing Council of the European Central Bank ("ECB") of March 21, 2013. As a result of this decision, the provision of ELA to BOC and CPB was to be stopped on March 25, 2013 unless and until Cyprus agreed to a bailout programme. To respond to this question, we must first examine the legal framework surrounding ECB's decision. This is the topic that we now turn.

[136] See 'Statement On Cyprus' (2013) <http://ec.europa.eu/spain/pdf/acuerdo-eurogrupo-chipre.pdf> accessed 12 April 2017.

Primarily, the legal nature of ELA must be identified. ELA is a temporal measure to support solvent credit institutions that are facing temporary liquidity problems.[137] The provision of ELA is a competence enjoyed by each Member State through their National Central Banks ("NCBs"),[138] separately from their functions that arise from their membership in the European System of Central Banks ("ESCB") or Eurosystem.[139] ELA is therefore not a monetary policy instrument, nor is it an ESCB or Eurosystem function, but it is awarded by the NCBs. Hence, to a large extent the provision of ELA facilities is a national matter governed by the national laws of the NCB's state of incorporation, under the national NCB legal framework.[140]

As the NCBs are responsible for granting ELA, they enjoy wide discretion to decide the terms and conditions on which ELA is offered. In particular, Article 14.4 of the Statute of the ESCB and the ECB explicitly stipulates that NCBs may perform functions other than those specified in the Statute… "*Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB.*"

That said, such discretion should not be exercised in contravention with other legal obligations of the States or the NCBs. In particular, the granting of ELA facility to a specific banking institution should not be contrary to the rules on state aid. The European Commission has, to this end, issued Guidelines on how state aid rules apply in case of ELA, recognizing four conditions which, if met, indicate there is no violation of the state aid rules. These conditions are: a) an ELA should be awarded only to solvent but illiquid banking institutions,[141] and should be part of a larger "rescue package" but a limited and exceptional temporary case, b) the facility should be secured by adequate collateral, c) the Central Bank should impose a punitive interest rate to the beneficiary institution and d) lastly, ELA should be provided at NCB's discretion and should not be supported on/by State's guarantees.[142]

Furthermore, although ELA is not provided within the ESCB framework, nonetheless it should not interfere with the objectives and tasks of the ESCB and it should be consistent with the 'monetary financing prohibition' as defined under Article 123 of the Treaty of the Functioning of the European Union, which prohibits overdraft facilities or any other type of credit facility with an NCB in favour of the public sector, including 'any financing of the public sector's obligations vis-à-vis

[137] 'The Financial Risk Management of the Eurosystem'S Monetary Policy Operations' (Ecb.europa.eu, 2015) <http://www.ecb.europa.eu/pub/pdf/other/financial_risk_management_of_eurosystem_monetary_policy_operations_201507.en.pdf?1d4d4f0b310c1b536dea6b5acc1e7aa2,> accessed 11 April 2017. p.34

[138] Christoph Herrmann, Markus Krajewski and Jörg Philipp Terhechte, European Yearbook Of International Economic Law 2014 (1st edn, Springer 2013)

[139] ECB ibid p. 34

[140] Willem Buiter, Jürgen Michels and Ebrahim Rahbari, '-An Emperor Without Clothes' [2011] Citi Investment Research & Analysis, Global Economics View.

[141] European Bank, 'Emergency Liquidity Assistance (ELA) And Monetary Policy' (ECB, 2016) <https://www.ecb.europa.eu/mopo/ela/html/index.en.html> accessed 11 April 2017.

[142] Andreas Hackethal, Financial Regulation (1st edn, Cambridge University Press 2015).

third parties.[143] The ECB has in several opinions stressed the criteria that should be followed by ELA under Art. 123; these are: a) the credit provided by the NCB should be provided for as short term as possible; b) there must be systemic stability aspects at stake; c) there must be no doubts as to the legal validity and enforceability of the State guarantee under applicable national law; and d) there must be no doubts as to the economic adequacy of the State guarantee, which should cover both principal and interest on the loans, thus fully preserving the NCB's financial independence.[144]

Lastly, Article 14.4 of the Statute of the ESCB and the ECB grants the Governing Council of the ECB the right to stop or restrict an ELA facility from operating. This can occur if the ECB considers that ELA is interfering with the objectives and tasks of the Eurosystem, and at least two thirds of the votes cast oppose to further ELA. It is for these reasons that a NCB granting ELA must inform the ECB with all relevant details within 2 days.[145]

The decision of the Governing Council of the ECB of March 21, 2013 deciding to maintain the level of ELA granted to Cyprus Banks until Monday, 25 March 2013, at which time it would be abruptly terminated unless a financial stability pact was reached with Troika, was founded exactly on this Article 14.4. As can be determined from the wording of Art. 14.4, there are two conditions that should be met for the Governing Council to decide to terminate or otherwise restrict ELA. The first one is procedural and dictates that such a decision should be taken and ratified by at least two thirds of the votes. The second one is substantive and provides that the decision should be based on the premises that the continuance of ELA would impair some specific object and task of the Eurosystem. Clearly, the second condition cannot be subject to review by any State or other European Institution for that matter and is decided solely on the Governing Council's discretion. So, to the extent that the procedural condition of receiving at least 2/3 of the votes was met, the Decision of the Governing Council of March 21st, 2013 can be considered justified. However, it is necessary to examine whether the exercise of such discretion constitutes coercion. This is the topic we now turn to.

a. Theories of Coercion

As discussed, the definition of economic coercion is not yet settled in international bibliography and the consideration of this issue is complicated and requires examination of several factors. Nonetheless, we are going to examine whether the facts of the Cyprus banking haircut can satisfy the aforementioned criteria that have been recognized by the different scholars as ingredients of economic coercion.

[143] See for example ECB, Opinion of the ECB of 24 January 2012 on a guarantee scheme for the liabilities of Italian banks and on the exchange of lira banknotes (CON/2012/4), p.6 para. 5

[144] See for example ECB, Opinion of the ECB, Opinion CON/2008/42, paragraph 4.11

[145] Scott Haul, Connectedness and Contagion: Protecting the Financial System from Panics 110 (1 ed. 2016).

The first criterion, proposed by Professor Bowett, requires an improper motive or intent on the part of the State exercising the coercive act. [146] Such intent should be primarily for the purpose of damaging the economy of another State, or as a means of coercing another State.[147] The question here, therefore, is whether the ECB acted with an improper motive for the purpose of damaging the Cyprus economy, when it decided to suddenly stop the provision of ELA to Cyprus' second largest banks. As discussed above, the intent of a State or an EU Institution, as in this case, is not easy to detect, let alone prove, something that would require a thorough examination of the surrounding situations. In the case of the Cyprus banking haircut, the decision of the Governing Council of the ECB was taken at a time when CPB had already been insolvent for several months, something that might raise suspicions as to the choice of the timing. That stated, at that period the Cyprus Government's 6-month deadline to present to the EU Commission the viability plan for CPB had just expired. Furthermore, the ECB, as will be discussed below in detail, acted legally and in accordance with its policy when it decided to stop funding the insolvent CPB. Thus, although the timing of the decision, the very short notice given by ECB prior to the implementation of the decision, and the unprecedented terms Cyprus of the bailout programme, certainly raise some questions regarding ECB's motives, these motives do not clearly demonstrate coercive intent. It is, therefore, very difficult to persuasively demonstrate that the ECB intended to damage the Cyprus economy. Furthermore, it is also not demonstrably within ECB's interest to inflict this damage since it would ultimately only end up hurting ECB's goals of price stability.

For ECB's decision to constitute coercion under the second criterion, ECB must have imposed the decision to obtain some benefits of any kind by way of subordinating the Cypriot sovereignty. Any claim that the ECB aimed to obtain specific benefits from exercising pressure on the Cypriot Government is not supported by any official documentation. The decision was taken in accordance with Art.14 of the ECBS Statute to safeguard Eurosystems tasks and goals and it was taken to restore legality under ECB's statute. Furthermore, it cannot be effectively claimed that the ECB subordinated the sovereignty of the Cyprus State, as Cyprus has itself awarded such powers to the ECB.

The last criterion requires that the coercion is tantamount to force in the sense that it can endanger the coerced State's security, economy and other structures. Certainly, the collapse of the Cypriot Banking System that was imminent upon CPB's collapse, was a credible threat to Cyprus' social security, safety and economy and could be directly linked with the ECB's decision. Even so, ECB was not responsible for the financial position of CPB and the latter's insolvency, nor for the dire State of the Cyprus economy which was clearly attributable to the inadequate management of the Bank and of the Cyprus Government. Professor Farer argues that non-concession

[146] Derreck Bowett, '"Economic Coercion and Reprisals By States" (13 VA. J. INT'l L. 1977)' (1977) 1 Virginia Journal of International Law.).
[147] *Id.*

of assistance or aid to another State falls short of coercion in every case.[148] In this case, therefore the ECB's decision to cease providing ELA to the Cypriot Banks cannot be classified as coercive.

As such, it does not appear clear that the Cyprus Government was coerced to agreeing the bailout program. Even if such was the case, however, as indicated below, not all forms of coercion are illegal under international law.

b. Retorsion and Reprisals

Not all hostile and unfriendly competitive acts can be considered as illegal coercion. Indeed, international law recognizes that a State is free to respond to an injurious act done by another State through a hostile, yet legal, act.[149] Such acts of retorsion are considered as a State's means of self-help, when it is subjected to an illegal act. Retorsions aim to compel the party acting illegally to rescind such act.

Overall acts of retorsion are deemed to be legal, even in the absences of a previous injurious act, since States retain the right to be unfriendly to one another in pursuit of their interests.[150] It has, however, been argued that if retorsion is in pursuit of a wrongful end, such as an act for the sole aim of causing harm to another State, it becomes illegal.[151] Once an act ceases to be legal it no longer constitutes retorsion. Hence, retorsion falls short of coercion in the legal sense of the term. If a hostile act is of such degree so as to constitute coercion it is considered a prohibited/illegal intervention under international law and thus no longer qualifies as retorsion.[152] Retorsion is distinguished from reprisals in exactly this sense, i.e. that reprisals are in themselves illegal acts, which are justified under international law as they constitute a response to a previous violation of the law by the State to which the reprisal is directed.[153] Reprisals are allowed under international law allowing States to respond to a prior illegal act as means of "self-help".

Self-help is a necessary remedy since international law does not provide an effective enforcement mechanism.[154] There is no "Court [or] central authority above the Sovereign States which could compel a delinquent State to give reparation".[155]

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[148] Tom J. Farer, Political and Economic Coercion in Contemporary International Law, 79 The American Journal of International Law 405 (1985)..

[149] Jan Klabbers, "International Law", 168 (1 ed. 2013)..

[150] Robert Piedelievre, Precis de droit international public ou droit de gens (1 ed. 1894)..

[151] Angelo Labella & Benedetto Conforti, An Introduction to International Law 24 (1 ed. 2012).

[152] Tzanakopoulos, Antonios "Legal Mechanisms to Assess and Mitigate Adverse Human Rights Impact of Unilateral Sanctions Through Accountability" (UN Human Right, Office of the High Commissioner, Workshop on the impact of the application of unilateral coercive measures on the enjoyment of human rights by the affected populations, in particular their socioeconomic impact on women and children, in the States targeted, 2014)

[153] Klabbers, Jan, supra p.168

[154] Andrew D. Mitchell, Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law, Military Law Review 155 (2001)..

[155] Lassa Francis Lawrence OPPENHEIM, Hersch LAUTERPACHT & Arnold Duncan MACNAIR, International Law. A treatise ... (7 ed. 1952)..

The arbitration Naulilaa case has provided the classic definition of the tem reprisal and its elements, providing that:

> "Reprisals are an act of self-help on the part of the injured states, responding after an unsatisfied demand to an act contrary to international law on the part of the offending State . . . They would be illegal if a previous act contrary to international law had not furnished the reason for them. They aim to impose on the offending State reparation for the offense or the return to legality in avoidance of new offenses".[156]

Reprisals can constitute a form of coercion. The Institut de Droit International, in fact, defines reprisals as:

> "[M]easures of coercion, derogating from the ordinary rules of the law of the people, determined and taken by a State, following the commission of illicit acts against it by another State, and having as their aim to impose on the second State, through pressure exerted by means of harm, a return to legality."[157]

Traditionally, reprisals included any illegal act, including measures of economic coercion as well as armed attacks.[158] The term, however, has been replaced by two concepts, belliquent, or self-defence, reprisals used in armed conflict, and countermeasures, or those of a non-forcible nature.[159] Economic coercion can be considered a type of countermeasures.

Countermeasures are an exception to the rule that coercion constitutes an illegal intervention, in that they are illegal per se, but they can be justified provided certain conditions are met. [160] This is recognized by the Draft Articles on Responsibility of States for Internationally Wrongful Acts, ("DASR"), which although do not constitute a multinational convention, nonetheless the codify customary law.[161] Indeed, Art. 22 of the DASR provides that "*The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure*", provided certain substantive and procedural conditions are met.[162] Such substantive and procedural conditions constitute the limits of countermeasures. If these conditions are not met, countermeasures are illegal as coercive acts. The same principle is reiterated

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[156] Naulilaa Incident Arbitration (Portugal v. Germany), (1928) 2 R.I.A.A,at 1026

[157] Institut de Droit International, Session de Paris 1934, Régime de répresaillies en temps de paix, Article 1

[158] Colin Warbrick, Peacetime Unilateral Remedies: An Analysis of Counter-Measures. By Elizabeth Zoller. [Dobbs Ferry, New York: Transnational Publishers. 1984. xviii + 196 pp. $35], 35 International and Comparative Law Quarterly 202-203 (1986).

[159] Michael Wood & Arnold Pronto, The International Law Commission 1999-2009: Volume IV: Treaties, Final Draft Articles and Other Materials 329 (1 ed. 2010).

[160] Makio Miyagawa, Do Economic Sanctions Work? (1st edn, Springer 2016).

[161] Susan Breau, The Responsibility to Protect in International Law: An Emerging Paradigm Shift 68 (1 ed. 2016).

[162] Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]) UN Doc A/56/10, 43, UN Doc A/RES/56/83, Annex, UN Doc A/CN.4/L.602/Rev.1, GAOR 56th Session Supp 10, 43

on Art. 22 of the Draft Articles on Responsibility of International Organizations ("DARIO"), which aim to clarify the circumstances under which an International Organization is liable for breach of an international obligation and the consequences of such breach. It must be stipulated that DARIO does not enjoy the status of customary law, as is the case with DASR. In fact, DARIO has been met with skepticism by States, International Organizations and academia. Nonetheless, as argued by Ass. Professor Kristina Daugirdas, DARIO can lead to the formation of customary law.[163] Thus, these conditions provide a means for testing the potential for the Cyprus bank haircut to be the result of coercive actions. We shall now examine such substantive and procedural conditions that constitute the limits of countermeasures

c. Limits of Countermeasures

Initially, arbitral tribunals, such as in the Naulilaa case above, set out certain conditions that had to be met for countermeasures to be legal.[164] The Naulilaa indicates that for countermeasures to be legal (1) they must be executed only by a State through its institutions; (2) they must be proportionate and (3) they must follow an illicit act where negotiations to restore legality have failed.[165]

These criteria were re-affirmed in the arbitration case Air Service Agreement, which referred exclusively to countermeasures. [166] This case examined the decision of the United States to ban certain French flights from landing to the United States, following France's decision to not allow Pan American passengers to disembark in Paris. France's decision was due to an alleged breach of the 1946 bilateral Agreement between France and the US, which provided for civil air flights between the two countries. The tribunal reaffirmed States' right to resort to countermeasures, but noted that such measures should 1) be relevant to a previous violation by the state receiving the countermeasures and 2) be proportionate in light of the previous violation. In relation to the third requirement that was upheld in the Naulilaa case, namely that a countermeasure should constitute the last resort following failed negotiations, the Tribunal in the Service Agreement case resolved that starting countermeasures during negotiations was not prohibited. Similar recognition of the legitimacy of countermeasures was indicated in the "Gabcíkovo-Nagymaros Project"[167] case and the "Cysne"[168] case.

These conditions were codified in Art.22 of the DASR, which as stipulated, echoes customary law. Furthermore, Art. 49-51 of the DASR outline the limits of

[163] Kristina Daugirdas, Reputation and the Responsibility of International Organizations, 25 European Journal of International Law 991-1018 (2014).

[164] See Naulilaa Incident Arbitration (Portugal v. Germany), (1928) 2 R.I.A.A, p. 1026

[165]See Naulilaa Incident Arbitration (Portugal v. Germany), (1928) 2 R.I.A.A, p. 1028 see also Edward K Kwakwa, The International law of armed conflict (1 ed. 1992));

[166] Air Services Agreement of 27 March 1946 (United States v. France), UNRIAA, vol. XVIII, (1979).

[167] Gabčikovo-Nagymaros Project, Hungary v Slovakia [1977] International Court of Justice, GL No 92 Rep 7 (International Court of Justice).]

[168]Portugal v Germany (The Cysne) [1930] UNRIAA, II (UNRIAA).,

economic countermeasures. These are distinguished between substantive and procedural limits; the procedural limits are set in Art. 49, while Art. 50 and 51 set out the substantive limits. According to Art. 49 countermeasures are permissible if taken by an injured State so as to induce the responsible State to cease its internationally wrongful conduct. This upholds the principle initially set out in the GabčÌkovo-Nagymaros Project case[169], by virtue of which, the existence of an internationally wrongful act is a prerequisite for the justification of a countermeasure.[170] This leads to the following conclusions:

- Primarily, countermeasures may only be taken against the violating State alone and therefore acts directed against third States would not be justified as countermeasures. That said, if countermeasures taken against the violating State also indirectly or consequently affect third States, this alone does not necessarily render a countermeasure illegal under the scope of article 22 of the DASR.[171]
- Secondly, countermeasures can only be taken by an injured State, meaning that non-injured States may not affect countermeasures. That said, in case there is a serious violation of an obligation owed to the international community as a whole, any State may take countermeasures.[172]
- Lastly, countermeasures can be taken to induce a State to cease its internationally wrongful conduct. Hence a countermeasure cannot be justified if it goes beyond the goal of economic inducement to (economic) coercion to force the other State to do something it is not obligated to do under international law.[173] This also means that countermeasures should cease as soon as their aim of inducement is met, and shouldn't continue thereafter as they would no longer constitute a response to an illegal act.

The wrongfulness of an international act can only be judged retrospectively, so a State resorting to countermeasures due to alleged wrongful violations, does so at its own peril.[174]

Apart from the procedural limits described above, Art. 50 and 51 of the DASR set various substantive conditions for counter measures to be justified. Art. 50 provides that countermeasures should refrain from violating international obligations regarding the use of force, fundamental human rights, obligations of a humanitarian character prohibiting reprisals, and obligations under obligations under peremptory norms of general international law.

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[169] Gabčikovo-Nagymaros Project, Hungary v Slovakia [1977] International Court of Justice, GL No 92 Rep 7 (International Court of Justice). para. 83.

[170] Commentaries to the draft articles on Responsibility of States for internationally wrongful acts, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2)

[171] Idid

[172] Gaja, Giorgio, "The protection of the General Interests in the International Community" 131 (364 Recueil des Cours, 2014)

[173] Tzanakopoulos, supra p.10

[174] See the Air Service Agreement case (op. cit.) p.433 para.88

Lastly, Art. 51 sets a substantive limit on the nature and extent of countermeasures providing that countermeasures should respect the principle of proportionality. Proportionality essentially requires that adoption of countermeasures does not lead to inequitable results. Hence, for countermeasures to be proportionate they should assess both the amount of injury suffered, but also the nature of the rights in question and the seriousness of the breach.[175] The reference to "the rights in question" should be broadly interpreted so as to refer not only to the rights infringed but also on the rights of the violating State. Considering this, punitive countermeasures will never be permitted under international law.

In relation to the limits set to countermeasures taken by an International Organization against a State, DARIO do not specifically regulate this issue, but instead Art. 22 of DARIO refers to the "substantive and procedural conditions required by international law". As per the Commentary of DARIO, Art. 49 to 54 of DASR should be applied respectively.[176]

I shall now examine whether the decision of March 21, 2013 of the Governing Council of the ECB, if deemed to be coercive can be justified as countermeasure or an act of retorsion. As we have already established the decision of March 21, 2013 was legal, so this would render it an act of retorsion that, as advised, is permitted under international law, even if it is punitive and/or hostile to the extent that it's not disproportionately hostile.

Only if ECB's Decision was illegal, would we examine coercion, but, as examined, we cannot classify ECB's decision as illegal under any of the coercion criteria, given that ECB acted within its scope of powers, rightfully exercising its discretion. Even, however if ECB's decision was deemed illegal, again the ECB could raise the defense of countermeasures given that all the respective conditions are met, namely Cyprus was in breach of an obligation due to the European Union under the Stability and Growth Pact, by a rising government debt ratio well over the 60% of GDP reference value in 2010, 2011, 2012 and reaching 102% in 2013. It can be argued further that ECB's decision of March 21st, 2013 that "ELA would be continued if and only if a program was in place that would ensure the solvency of the banks concerned,177 was taken as a direct consequence of that breach, given that ELA could not be continued to be given to an insolvent bank, as this would be a credit facility aimed to defer government-funded recapitalization, in breach of Art. 123 of

[175] Commentaries to the draft articles on Responsibility of States above p. 135

[176] Commentary to Art. 22 of A/66/10, "Draft articles on the responsibility of international organizations, with commentaries", International Law Commission (2011); See also Mirka Möldner, Responsibility of International Organisations, Introducing ILC's DARIO, 12 Max Planck Yearbook of United Nations Law 281-328 (2012).

[177] European Central Bank, Introductory Statement by Asmussen, Member of the Executive Board of the ECB, European Central Bank (2013), https://www.ecb.europa.eu/press/key/date/2013/html/sp130508.en.html ((last visited Jun 11, 2017).

Treaty of the Functioning of the European Union ("TFEU"), which prohibits the financing of public budgets in Member States through the ECB and the NCB.[178]
To conclude, establishing liability of European Institutions on the above grounds appears to be a very difficult task for Cyprus, while investors would be barred from even bringing such claims as, not only is DARIO not binding at its present state, but also DARIO can only be invoked by States and International Organizations and not by individuals.

This analysis indicates that it is a very difficult task for investors to render the European Institutions liable or co-liable for such loses.

B. Basing Liability on other grounds

Due to these difficulties, it is worth exploring if investors can base their claim against European Institutions for loses associated with financial distress 'measures on other grounds and especially on the Treaty for the Functioning of the European Union ("TFEU"). To this end I will examine available remedies under the TFEU.

1. Art 263 TFEU-Annulment of Illegal actions

Art 263 TFEU contains a provision on judicial review of the acts of EU institutions. In particular, it allows, inter alia, individuals to bring actions in the Court of Justice of the European Union against EU institutions that have acted illegally.[179] However, before individuals can demonstrate that the EU institutions' act is illegal, they must first demonstrate they have fulfilled the locus standi preconditions set out in the relevant article. It is worth mentioning that before the Lisbon Treaty, Art 263 had been scarcely used as means of enforcing individual rights, due to the onerous requirements, which individual applicants must meet, namely that they must prove the act was a matter of "direct and individual concern" to them.[180] Indeed, in the leading Plaumann case, the Court held that an applicant would be successful in showing that they had direct and individual concern by a Decision, only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.[181]

[178] Willem Boiter, Ebrahim Rahbari, The European Central Bank as Lender of Last Resort for Sovereigns in the Eurozone, 50 JCMS: Journal of Common Market Studies 6-35 (2012), See also 'Letter of the ECB President to Matt Carthy MEP Dated 17 February 2015 Re: Your Questions (QZ55-60)' (2015), https://www.ecb.europa.eu/pub/pdf/other/150218letter_carthy.en.pdf (last visited Jun 11, 2017).
[179] The Article distinguishes between the so called "Privileged Applicants" which consists of states and EU institutions, which are granted unlimited locus standi, and "Non-privileged" applicants, including individual applicants, who are a given restricted locus standi.
[180] Vaughne Miller, Taking a complaint to the Court of Justice of the European Union, Standard Note SN05397 6 (2010).
[181] Case 25/62 (Plaumann & Co v Commission) [1963] Court of Justice of the European Union (Court of Justice of the European Union); For an extensive presentation and analysis of former caselaw see Antony Arnull, 'Private Applicants and The Action For Annulment Under Article 173 Of The EC Treaty' (1995) 32 Common Market Law Review.

Following the Lisbon Treaty, the conditions for the admissibility of actions brought by individuals have been eased, depending on the act challenged, so that individual applicants can now challenge:

- An act addressed to them;
- An act addressed to another person, which was of direct and individual concern to them; or
- A regulatory act which was of direct concern to them and did not entail implementing measures.[182]

In relation to what constitutes regulatory act, De Witte argues that same is tantamount to non-legislative acts, i.e. "acts not adopted in accordance with the ordinary or special legislative procedure".[183] For such acts, according to Girón Larrucea, there is no need that they directly affect an addressee, except for the sole reason that they are one of the participants in a certain area of activity for the general regulation of which the act was adopted."*[184]*

Decisions of EU Institutions taken in the framework of sovereign default, which constitutes exceptional circumstances, are likely to be regulatory acts, although this is not always the case. This issue was examined by the General Court when distressed depositors from the Cyprus Bank that had sustained haircuts in their bank deposits, resorted to the Court requesting the cancellation of the sale of operation in CPB in cases T-327/13 until T-331/13.[185] The Applicants in all five cases turned against the European Commission and the ECB, as according to the applicants the decision of the Eurogroup of 25 March 2013 should be attributed to them. In their view, the decrees issued by the Cyprus Central Bank were simply materializing Eurogroup's statement. Their main argument was that the Eurogroup's decision of 25th of March, which was materialized through the Banking Resolution Framework [Decree No. 103 and 104 of the Governor of Cyprus Central Bank as the representative and/or agent of the European System of Central Banks], was in excess of Eurogroup's power and authorities and thus intervening on Cyprus' sovereignty. The General Court initially examined whether the Eurogroup Statement could, in fact be attributed to the ECB or the European Commission as otherwise the application would be inadmissible. The General Court concluded that the Eurogroup is an informal discussion forum, at ministerial level, between representatives of the Member States whose currency is the Euro, without any legislative decision-making competences. The General Court noted that despite ECB's participation in its meetings, nonetheless its actions could not be attributed to the ECB or the European

[182] Richard Lang, Quite a Challenge: Article 263(4) TFEU and the Case of the Mystery Measures, SSRN Electronic Journal 2 (2011)..

[183] Floris De Witte, The European Judiciary after Lisbon, 15 Journal of European and Comparative Law 43, 47 (2008).

[184] JA Girón Larrucea, *El sistema jurídico de la Unión Europea: la reforma realizada en el Tratado de Lisboa* 267, (Tirant lo Blanch, Valencia 2008) although for a opposite view see F de Witte, op. cit. 47

[185] T-327/13 Mallis and Mallis v Commission and ECB, T-328/13 Tameio Pronoias Prosopikou Trapezis Kyprou v Commission and ECB, T-329/13 Chatzithoma v Commission and ECB, T-330/13 Chatziioannou v Commission and ECB and T-331/13 Nikolaou v Commission and ECB.

Commission. The General Court, further, considered if the statement could be attributed to the ESM, rather than to the Euro Group. The applicants claimed that in such case, the act would be attributable to the ECB. The General Court ruled, however, that, even in such case, this fact would still not allow the inference that the Commission or the ECB instigated the adoption of that statement. As such, it ruled that an annulment was not possible under Art. 263 TFEU and that the application was inadmissible. The case would be different if the statement was issued by the Council under its ECOFIN configuration, as in such a case, the Degrees 103 and 104 would in fact be implementing EU law.[186]

The decision of the General Court was appealed (Joined Cases C-105/15 P to C-109/15 P), but the CJEU upheld the dismissal. The CJEU reiterated that the Eurogroup's Statement could not be regarded as a joint decision of the Commission and the ECB, as, under the ESM framework, these did not have the power to make decisions of their own under the ESM Treaty and the mere participation of the EU Commission and the ECB in the meetings of the Eurogroup was not sufficient to alter the nature of Eurogroup's statements and render such statements the expression of a decision-making power of the ECB and the EU Commission. Finally, CJEU noted that as Cyprus adopted the legal framework for the banks' restructuring, this cannot be regarded as having been imposed by an alleged decision joint taken by EU Commission and the ECB expressed in the Eurogroup statement.

Therefore, only in cases where investors can prove an act addresses to them or with direct and individual concern to them or a regulatory act, can investors challenge the legality of an act of an EU Institution taken within the framework of sovereign default, to the extent, of course, that such act directly affects the interests of such investors. However, for investors to succeed they must further demonstrate that such act actually contradicts to EU Law, something that seems difficult to do given the wide discretion that is enjoyed by EU institutions in this field.

2. Art. 265 TFEU-Complaint for failure to Act

Art. 265 TFEU provides that in cases where a European Institution has an affirmative duty, and not just discretionary power, to act, but it omitted to do so, such inaction can be deemed an infringement of the TFEU and as such an illegal omission.[187] This article applies specifically in cases of inaction of European Institutions, when there was a legal obligation to act and thus "inaction" means non-

[186] Anastasios Antoniou, 'Original Sin: The EU Tampering with The Right To Property In Cyprus Is An Unprecedented Departure From EU Norms And Shared Constitutional Rights' (eutopialaw, 2013) <https://eutopialaw.com/2013/03/19/original-sin-the-eu-tampering-with-the-right-to-property-in-cyprus-is-an-unprecedented-departure-from-eu-norms-and-shared-constitutional-rights/> accessed 12 April 2017.

[187] See Case No 427/12, (European Commission v. European Parliament and European Council), [2014], European Union Court of Justice para 76.

adoption of a legal act[188]. Additionally, the term "inaction" also includes the case when an EU institution abuses its discretion.[189]

In case the European Court rules that there was in fact an infringement of EU law due to inaction, it will order the respective Institutions to take all necessary acts to remedy the omission.[190] Art. 265 differentiates between privileged and non-privileged applicants, with the former comprising Member States and institutions of the EU and the latter private parties who have a limited right of locus standi.[191] In that they must have a personal interest in taking action in order to bring proceedings before the Court of Justice.[192] In particular, the Court has stressed in several occasions that applications by individuals should be limited to Decisions addressed to such individuals.[193]

An action based on Art. 265 can be brought only against an EU institution (i.e. against any of the European Parliament, the European Council, the Council, the Commission or the ECB)[194]. This course of action might be used by investors in case any EU institution failed to take action it was legally required to have taken to avert or minimize investors' losses due to sovereign default. The crucial element for investors is to demonstrate that the EU institution has unlawfully failed to act, when such action was required by EU law. In such case, Investors could resort to the European Court of Justice, provided they had followed the procedural conditions provided for in Art. 265, including the preliminary procedure.[195]

To explore if investors can resort to this alternative, I will once again explore the case of CPB. In the latter case, it is striking that although CPB was insolvent and that this was known to the ECB, the Cyprus NCB continued to provide ELA to it, contrary to Art 123 TFEU and ECB's policy. It is therefore questionable whether the ECB had a duty to intervene and stop ELA before the situation evolved so dramatically. The answer to this question is negative; the ECB had no duty to intervene, because, as stipulated above, the provision of ELA is a national matter, while national central banks and respective national authorities maintain ultimate responsibly for prudential supervision of Eurozone banks.[196] Indeed, in accordance with TFEU, ECB had no duty to maintain financial stability[197]; instead ECB's

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[188] See Case no. 125/78 (GEMA v. European Commission), [1979], European Union Court of Justice, para 5.

[189] Case no. C-68/95 (Port v. Bundesanstalt) [1996], European Union Court of Justice, paras 38-40.

[190] Elspeth Berry, Matthew J Homewood & Barbara Bogusz, Complete EU law 259 (1 ed. 2015).

[191] Nigel Foster, Foster in EU Law 220 (1 ed. 2015)..

[192] See 265(3) TFEU which provides "*Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion*".

193 See Case 15/70 (Amedeo Chevalley v Commission of the European Communities) [1970] Court of Justice of the European Union (Court of Justice of the European Union).

[194] Art. 13 TFEU

[195] For an extensive analysis on the procedural requirements of Art.265 TFEU Inga Daukšienė & Arvydas Budnikas, Has the Action for Failure to Act in the European Union Lost its Purpose?, 7 Baltic Journal of Law & Politics 209-226 (2014)..

[196] Daniel Wilsher, Ready to Do Whatever it Takes? The Legal Mandate of the European Central Bank and the Economic Crisis, 15 Cambridge Yearbook of European Legal Studies 503-536 (2013)..

[197] Sahoko Kaji & Eiji Ogawa, "Europe's financial Maturity and Asia's Financial Might" 62 (1 ed. 2013).

authority is limited to "*contribute to the smooth conduct of policies pursued by the competent authorities*".[198] To this end, ECB had no duty to stop ELA from being granted to CPB by the Cyprus NBC and in fact the Decision of the Governing Council of March 21st 2013 was a negative action that does not justify the use of Art.265 TFEU.

It is therefore difficult to imagine that in matters of extreme financial distress, where national States still enjoy exclusive sovereignty to decide, there will be situations where EU institutions will have a duty to act to prevent a decision or situation personally affecting investors.

3. Non-contractual liability of EU institutions

Finally, it is worth examining the non-contractual liability of EU institutions, which can be found in Article 340 TFEU. The latter article provides that the EU shall make good damage caused by its institutions. Within the definition of an attributable act, they are included also wrongful omissions.[199] In the case C-352/98 Bergaderm, the CJEU set a set of conditions that must be met for establishing the existence of liability under Article 340 TFEU. [200] These are:

- The rule of law which has been breached must be one which is intended to confer rights on individuals. Here, later case law has adopted a more liberal approach. [201] In particular, the Kampffmeyer case[202] established that it suffices to show that the rule infringed was intended generally for the protection of individuals, and not necessary for the that the applicant was 'directly and individually concerned' as required in Article 263 TFEU. Indicatively, in the more recent case, Camos Grau v Commission, the requirement of impartiality into the conduct of Commission employees, was found to aim not only to the respect of the public interest, but also to confer a right to individuals to see that the corresponding guarantees are complied with. [203]
- the breach must be sufficiently serious to merit an award of damages;[204] and,

[198] Article 127(5) TFEU

[199] See Case C-40/71 (Richez-Parise v Commission) [1972] Court of Justice of the European Union (Court of Justice of the European Union).

[200] Case C-352/98 (Bergaderm and Groupil v Commission), [2000] Court of Justice of the European Union.

[201] Case C-13-24/66 (Kampffmeyer and others v Commission) [1967], Court of Justice of the European Union

[202] Case C-13-24/66 (Kampffmeyer and others v Commission) [1967], Court of Justice of the European Union

[203] Case T-309/03 (Camos Grau v Commission), [2006] General Court of the European Union

[204] Case T-241/09 (Kalliopi Nikolaou v Court of Auditors of the European Union),[2013] General Court of the European Union

- there must be a direct causal link between the infringement of the rule and the damage suffered by the claimant.

All three conditions governing the EU's liability must jointly be satisfied. If one of them is not fulfilled the application is dismissed in its entirety without the necessity for the Union courts to examine the remaining conditions for such liability. The Case T-79/13 Accorinti v ECB is indicative of this matter.[205] The case revolved around the Greek Sovereign Bonds Haircut through Private Sector Involvement (PSI). It was filed by Allessandro Accortini along with over 200 plaintiffs from Italy, all holders of Greek Sovereign bonds.

Plaintiffs claimed that, by virtue of the Exchange Agreement of 15 February 2012 and the ECB's Decision 2012/153/EU which provided that Greek bonds had to be guaranteed by the Greek Government in favour of the ECB and the NBCs in order to be eligible for Eurosystem operations, ECB and the NBCs received preferential treatment over all other holders of Greek Sovereign bonds. Plaintiffs claimed the above constituted a breach of the principle of equal treatment amongst private creditors, while the fact that the ECB was buying Greek sovereign bonds, while issuing calming statements for private investors was infringing their legitimate expectations and the principle of legal certainty. For these they claimed damages of more than 12.5 million Euros in accordance with Article 268 and 340 TFEU.

As noted above, Art. 340 TFEU provides the cumulative conditions that must be satisfied for the European Union to be liable under non-contractual liability; in particular these are: a) that the institution must act unlawfully, b) actual damage must have been suffered and c) lastly, there must be a causal link between the unlawful and the damage pleaded.[206] The General Court in the Accorinti Case concluded that the first condition of Art. 340, namely the existence of an unlawful conduct was not fulfilled as the ECB acted within the discretion awarded to it by Art. 127 and 282 TFEU and, therefore, acted in compliance with EU law. The General Court concluded that bond holders' losses could not be attributed to the ECB, as economic risks are inherent in the commercial activities carried out in the financial sector. To this end private investors could not rely on the principle of the protection of legitimate expectations or on the principle of legal certainty.

Furthermore, the General Court found that ECB's statements were generic and bondholders, as diligent and well-informed investors, should have had knowledge of the highly unstable economic circumstances the Greek sovereign bonds. The Court further concluded that in all cases, the decision of the Greek sovereign debt restructuring was taken by the Greek Government, which enjoyed exclusive competence on this matter and could not be attributed to the ECB. Lastly, the General Court rejected that the general principle of equal treatment could apply between

[205] Case T-224/12 (Alessandro Accorinti and Others v. ECB); [2014] General Court of the European Union (Fourth Chamber)

[206] See Case T-309/10 (Christoph Klein v European Commission) [2014] General Court of the EU (First Chamber).

private investors and the ECB as same were not in a comparable situation, given the different motives that driven them, namely public interest in the case of ECB and the pursuit of private profit in the case of private investors. Greece, and not the ECB, was only bound under pari passu clauses in the Greek Sovereign Bonds to ensure equal treatment of investors by ensuring that bonds were treated on "the same level footing without preference or priority among themselves…".[207] On the above grounds, the General Court dismissed the application.

The same result was also reached in the case Nausicaa Anadyomène SAS and Banque d'escompte v ECB,[208] which was based on the same set of facts. The General Court found that the ECB had not infringed the legitimate expectations of the private holders of Greek bonds, the principle of legal certainty and the principle of equal treatment of private creditors. The Court said that in a field such as that of monetary policy, which is subject to constant changes, commercial banks may not rely upon the principle of the protection of legitimate expectations or upon the principle of legal certainty.[209] Hence, as the ECB had not actively encouraged investors to acquire or retain Greek debt instruments through its acts or statements, the General Court held that the ECB is not bound to compensate the loss sustained by commercial banks, holding Greek debt instruments by the restructuring of Greek debt.[210]

CJEU also examined the partial annulment of the Memorandum of Understanding of 26 April 2013 entered between Cyprus and the ESM in the Ledra Joined Cases T 289-/13 to T-291/13. In the said cases, applicants were depositors that claimed specific provisions of the Memorandum was in breach of human rights considerations, referring to the European Convention of Human Rights and the EU Charter of Human Rights. Initially, the General Court did not proceed to examine the merits of the cases, but ruled the claim in admissible as, notwithstanding that the EU Commission signed the Memorandum, it had done so on behalf of the ESM and so as with the activities pursued by the Commission and the ECB in the context of the ESM, only the ESM is committed. As such as "neither the ESM nor the Republic of Cyprus is among the institutions, bodies, offices or agencies of the European Union, the General Court has no jurisdiction to examine the legality of acts which they have adopted together".[211] The cases were appealed in the Court of Justice of the European Union ("CJEU") and on September 20, 2016 the CJEU set aside the previous

[207] Francis Beaufort Palmer, Company Precedents, 109-110 (8 ed. 1900).

[208] Case T-749/15 (Nausicaa Anadyomène SAS and Banque d'escompte v ECB) [2017] General Court of the EU

[209] PRESS RELEASE No 5/17, General Court of the European Union, Judgment in Case T-749/15 Nausicaa Anadyomène SAS and Banque d'escompte v ECB

[210] PRESS RELEASE No 5/17, General Court of the European Union, Judgment in Case T-749/15 Nausicaa Anadyomène SAS and Banque d'escompte v ECB

[211] Case T-289/13 Ledra Advertising Ltd v European Commission and European Central Bank (ECB), [2013] General Court of the EU, para 58

judgement and proceeded to examine the case on its merits.[212] On the grounds of admissibility, CJEU held that, as the EU Commission acts as the guardian of the EU Treaties, it must therefore refrain from signing a Memorandum of Understanding, whose consistency with EU law is questionable, as would be the case in the event of breach of the EU Charter of Fundamental Rights. On the merits, CJEU examined held that the Commission, considering the imminent risk of financial losses that would have been sustained by depositors if the banking system had collapsed, absent an agreement for Cyprus bailout, the measures do not constitute a disproportionate and intolerable interference with the appellants' right to property and that therefore the wasn't a breach of the Charter. Hence, CJEU found that the EU Commission was not in breach and thus the conditions of Art.340 were not met.

The above case demonstrates the large discretion enjoyed by EU institutions and the difficulties to attach liability to them for actions related to measures taken in case of sovereign default, especially when such institutions have acted lawfully within their wide discretionary powers.

VI. **Conclusion**

In cases of sovereign default, investors often sustain significant loses and are left looking for remedies. Recognizing the responsible actors is of paramount importance as it dictates the available remedies for investors. In particular, in case a measure can be attributed to more actors this grant investors additional legal recourses. Additionally, the party responsible will also determine competent Courts, applicable law, and available property for enforcement.

In the recent case of the Cyprus Banking haircut investors were told by the Cypriot President that the measures that led to the haircut were in fact attributable to the EU and its institutions. To this end, several investors brought claims against Eurogroup and the ECB.

This paper examined whether in fact liability could be attributed to the EU for the acts of a member state. As demonstrated above there are several bases upon which investors can claim compensation from EU institutions in the framework of sovereign default within the EU. However, none of these conditions is easy to identify or fulfil.

Primarily, investors can examine whether sovereign actions can be attributed to EU institutions through coercion. As noted above, this will be very difficult to prove, since economic coercion is not as clear as military coercion, and its definition is vague and subject to interpretation on a case-by-case basis. Even if coercion is indeed found, investors might still not be able to achieve in their claim, if such coercion was triggered as countermeasures, which can justify an illegal act. In this

[212] Case C-8/15 Appeal brought on 12 January 2015 by Ledra Advertising Ltd against the order of the General Court (First Chamber) delivered on 10 November 2014 in Case T-289/13: Ledra Advertising Ltd v Commission and European Central Bank [2016] Court of Justice of the European Union

respect, TFEU might offer some other alternatives, but once again, case law seems too restrictive on such claims which must be examined in each separate case.

The above demonstrate that investors are unlikely to succeed in their claims against EU institutions in case of measures taken during extreme financial crisis as the concept of sovereignty sets several obstacles on investors seeking remedies against EU institutions in case of sovereign default.

References (2018)

Aguda, T., Nincic, M. and Wallensteen, P. (1987). Dilemmas of Economic Coercion: Sanctions in World Politics. The American Journal of International Law, 81(1), p.284.

Antoniou, A. (2013). Original Sin: the EU tampering with the right to property in Cyprus is an unprecedented departure from EU norms and shared constitutional rights. [online] eutopialaw. Available at: https://eutopialaw.com/2013/03/19/original-sin-the-eu-tampering-with-the-right-to-property-in-cyprus-is-an-unprecedented-departure-from-eu-norms-and-shared-constitutional-rights/ [Accessed 12 Apr. 2017].

Arnull, A. (1995). Private applicants and the action for annulment under Article 173 of the EC Treaty. Common Market Law Review, 32(1), pp.7β€“49.

Beirlaen, A. (1984). Economic Coercion and Justifying Circumstances. Revue beige de droit international, 18, p.69.

Berry, E., Homewood, M. and Bogusz, B. (2015). Complete EU law. 1st ed. Oxford: Oxford University Press, p.259.

Besson, S. (2006). Sovereignty in Conflict. 1st ed. London: British Institute of International and Comparative Law, p.13.

Bowett, D. (1958). Self-defence in international law. 1st ed. Machester: University Press, p.13.

Bowett, D. (1977). Economic Coercion And Reprisals By States. Virginia Journal of International Law., 13(1), p.15.

Breau, S. (2016). The Responsibility to Protect in International Law: An Emerging Paradigm Shift. 1st ed. Routledge, p.68.

Buiter, W. And Rahbari, E. (2012). The European Central Bank as Lender of Last Resort for Sovereigns in the Eurozone. JCMS: Journal of Common Market Studies, 50, pp.6-35.

Buiter, W., Michels, J. and Rahbari, E. (2011). -An Emperor Without Clothes. Citi Investment Research & Analysis, Global Economics View, (21).

Calster, G. International Law and the age of Globalisation. In: A. Schwabach and J. Cockfield, ed., International Law and Institutions, Eolls Publishers, (2009), 1st ed.. p.106.

Cannizzaro, E. (2002). The European Union as an actor in international relations. 1st ed. The Hague: Kluwer Law International, p.xiv.

Capogrosso, F. (2008). Shared Sovereignty and Denationalisation of Statehood in the European Union. 1st ed. Grin Verlag, p.11.

Cassese, A. (1986). International law in a divided world. 1st ed. Oxford u.a.: Clarendon Press u.a., p.147.

Clerides, S. (2014). The Collapse of the Cypriot Banking System: A Birdβ€™s Eye View. Cyprus Economic Policy Review, 8(2), p.29.

Corten, O. (2012). The Vienna Conventions on the Law of Treaties: A Commentary. Edited by Olivier Corten and Pierre Klein. Oxford, New York: Oxford University Press, 2011. 2 vols. Pp. lxxxiii, 2071. Index. $750. The American Journal of International Law, 106(4), pp.898-903.

Daugirdas, K. (2014). Reputation and the Responsibility of International Organizations. European Journal of International Law, 25(4), pp.991-1018.

Daukšienė I. and Budnikas, A. (2014). Has the Action for Failure to Act in the European Union Lost its Purpose?. Baltic Journal of Law & Politics, 7(2), pp.209-226

De Witte, F. (2008). The European Judiciary after Lisbon. Journal of European and Comparative Law, 15(1), pp.43, 47.

Dempsey, P. (1977). Economic Aggression & Self-Defense in International Law: The Arab Oil Weapon and Alternative American Responses Thereto. Case Western Reserve Journal of International Law, [online] 9, p.10. Available at: http://abstract=2734243.

Djura, N. (1970). The Problem of Sovereignty in the Charter and in the Practice of the United Nations, 1st ed. The Hague: Martinus Nijhoff, p.5.

Farer, T. (1985). Political and Economic Coercion in Contemporary International Law. The American Journal of International Law, 79(2), p.405.

Foster, N. (2015). Foster in EU Law. 1st ed. Oxford: Oxford University Press, p.220.

Gowa, J. (1989). Bipolarity, Multipolarity, and Free Trade. The American Political Science Review, 83(4), p.1245.

Greig, D. (1988). International Law in a Divided World. By Antonio Cassese. Oxford: Clarendon Press, 1986. xv + 429 pp. B 45. British Yearbook of International Law, 58(1), pp.366-368.

Hackethal, A. (2015). Financial Regulation. 1st ed. Cambridge: Cambridge University Press, p.115.

Haul, S. (2016). Connectedness and Contagion: Protecting the Financial System from Panics. 1st ed. Cambridge: MIT Press, p.110.

Herrmann, C., Krajewski, M. and Terhechte, J. (2013). European Yearbook of International Economic Law 2014. 1st ed. Berlin, Heidelberg: Springer, p.4.

Holsti, K. (2000). Stephen D. Krasner, Sovereignty: Organized Hypocrisy, Princeton: Princeton University Press, 1999. Japanese Journal of Political Science, 1(1), pp.157-172.

Ifeanyichukwu, N. (1976). Legal problems of foreign investments in Recueil Des Cours, Collected Courses. 1st ed. Martinus Nijhoff Publishers, p.260.

Ikenberry, G. and Philpott, D. (2001). Revolutions in Sovereignty: How Ideas Shaped Modern International Relations. Foreign Affairs, 80(5), p.157.

Jabko, N. (2011). Which economic governance for the European Union? Facing Up the Problem of Divided Sovereignty. Swedish Institute for European Policy Studies, [online] p.13. Available at: http://www.sieps.se/sites/default/files/2011_2_1.pdf [Accessed 10 Apr. 2017].

Jianming, S. (2001). The Non-Intervention Principle and Humanitarian Interventions under International Law. International Legal Theory, 7(1).

Kaji, S. and Ogawa, E. (2013). “Europe's financial Maturity and Asia's Financial Might”. 1st ed. Springer, p.62.

Keohane, N. (1980). Philosophy and the state in France. 1st ed. Princeton, N.J.: Princeton University Press, p.71.

Keohane, R. (2002). Ironies of Sovereignty: The European Union and the United States. Journal of Common Market Studies, 40(4), pp.743-765.

Klabbers, J. (2013). "International Law",. 1st ed. Cambridge: Cambidge University Press, p.168.

Krassner, S. (1999). Sovereignty: Organized Hypocrisy. 1st ed. Princeton: Princeton University Press.

Kunig, P. (2008). Intervention, Prohibition of. [online] Opil.ouplaw.com. Available at: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434?prd=EPIL [Accessed 10 Apr. 2017].

Kwakwa, E. (1990). Belligerent Reprisals in the Law of Armed Conflict. Stanford Journal of International Law,, 27(1).

Kwakwa, E. (1992). The International law of armed conflict. 1st ed. Dordrecht: Kluwer Academic Publishers.

Labella, A. and Conforti, B. (2012). An Introduction to International Law. 1st ed. Martinus Nijhoff Publishers, p.24.

Lang, R. (2011). Quite a Challenge: Article 263(4) TFEU and the Case of the Mystery Measures. SSRN Electronic Journal, p.2.

Lissitzyn, O., McDougal, M. and Feliciano, F. (1963). Law and Minimum World Public Order: The Legal Regulation of International Coercion. Harvard Law Review, 76(3), p.668.

MacCormick, N. (2008). Questioning sovereignty. 1st ed. Oxford [etc.]: Oxford University Press, p.104.

McIlwain, C. (1933). A Fragment on Sovereignty. Political Science Quarterly, 48(1), p.96.

McKeon, R. (1963). The Six Books of a Commonweale. Jean Bodin. Ethics, 74(1), pp.74-75.

Miller, V. (2010). Taking a complaint to the Court of Justice of the European Union. Standard Note SN05397, p.6.

Mitchell, A. (2001). Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law. Military Law Review, (170), p.155.

Miyagawa, M. (2016). Do Economic Sanctions Work?. 1st ed. Springer, p.80.

Modner, M. (2012). Responsibility of International Organisations, Introducing ILC's DARIO. Max Planck Yearbook of United Nations Law, 12, pp.281-328.

Oppenheim, L., Jennings, R. and Watts, A. (2008). Oppenheim's international law. 1st ed. Oxford: Oxford University Press, p.428.

Oppenheim, L., Lauterpacht, H. And Macnair, A. (1952). International Law. A treatise .... 7th ed. London: Longmans, Green & Co.

Orphanides, A. (2014). What happened in Cyprus? The Economic Consequences of the Last Communist Government in Europe. 1st ed. MIT Sloan Research Paper No. 5089.

Palmer, F. (1900). Company Precedents. 8th ed.

Palmer, R. and Colton, J. (1992). A History in the Modern World. 7th ed. McGraw-Hill, p.148.

Piedelievre, R. (1894). Precis de droit international public ou droit de gens. 1st ed. Paris: Librairie Cotillon F. Pichon, Testo Monografico.

Pogge, T. (1992). Cosmopolitanism and Sovereignty. Ethics, 103(1), pp.48-75.

Press, T. (2013). Bank of Cyprus depositors to lose 47.5% of savings in bailout. [online] Financial Post. Available at: http://business.financialpost.com/2013/07/29/bank-of-cyprus-depositors-to-lose-47-5-of-savings-in-bailout/ [Accessed 12 Apr. 2017].

Psyllides, G. (2013). 2.5 billion euro loss for Marfin - Lawyers in Cyprus | Cyprus Law Portal. [online] Lawyersincyprus.com. Available at: http://www.lawyersincyprus.com/el/news-read/25-billion-euro-loss-for-marfin [Accessed 12 Apr. 2017].

Rapoza, K. (2013). Russian Oligarchs Lose Friend in Cyprus Banks. Forbes. [online] Available at: http://www.forbes.com [Accessed 12 Apr. 2017].

Rawlings, R., Leyland, P. and Young, A. (2013). Sovereignty and the Law: Domestic, European and International Perspectives. 1st ed. Oxford: OUP Oxford, pp.195-209.

Refworld. (1973). A/RES/3171| Permanent sovereignty over natural resources. [online] Available at: http://www.refworld.org/docid/3b00f1c64.html Beirlaen, Andre Economic Coercion and Justifying Circumstances [Accessed 12 Apr. 2017].

Shen, J. (2001). The non-intervention principle and humanitarian interventions under international law. International Legal Theory, 7(1), p.5.

Steinberger, H. (2000). "Sovereignty". In: R. Bernhardt, ed., Encyclopedia of Public International Law, Vol. IV, 1st ed. Amsterdam: Elsvier, p.501.

Stevis, M. (2013). The Unintended Consequences of Cyprus. [online] WSJ. Available at: http://online.wsj.com/news/articles/SB10001424127887324110404578627881459300990 [Accessed 12 Apr. 2017].

Tzanakopoulos, A. (2015). The Right to Be Free from Economic Coercion. Cambridge Journal of International and Comparative Law, 4(No. 41/2015), p.8.

Urlacher, B. (2016). International Relations as Negotiation. 1st ed. Abingdon, Oxon: Routledge, p.19.

Vincent, R. (2016). Nonintervention and international order. 1st ed. [Place of publication not identified]: Princeton University Press, p.15.

Vivek, K. (2015). Coercion: Economic and Political Presure i. Ugdam Vigyati- The origin of knowledge.

Warbrick, C. (1986). Peacetime Unilateral Remedies: An Analysis of Counter-Measures. By Elizabeth Zoller. [Dobbs Ferry, New York: Transnational Publishers. 1984. xviii + 196 pp. 35]. International and Comparative Law Quarterly, 35(01), pp.202-203.

Wearden, G. (2017). Cyprus Crisis: MPs Approve Bank Restructuring and Solidarity Funds"as it Happened. The GUARDIAN. [online] Available at: http://eurozone-crisiscyprus-bailout-russia-vote [Accessed 12 Apr. 2017].

Wilsher, D. (2013). Ready to Do Whatever it Takes? The Legal Mandate of the European Central Bank and the Economic Crisis. Cambridge Yearbook of European Legal Studies, 15, pp.503-536.

Wood, M. and Pronto, A. (2010). The International Law Commission 1999-2009: Volume IV: Treaties, Final Draft Articles and Other Materials. 1st ed. Oxford: University Press, p.329.

Worstall, T. (2013). Forbes Welcome. [online] Forbes.com. Available at: http://www.forbes.com/sites/timworstall/ 2013/03/16/the-cyprus-bank-bailout-could-be-a-disastrous-precedenttheyre-reneging-on-government-deposit-insurance [Accessed 12 Apr. 2017].

Worstall, T. (2013). The Cyprus Bank Bailout Could Be a Disastrous Precedent: They're Reneging On Government Deposit Insurance. [online] Forbes.com. Available at: http://www.forbes.com/sites/timworstall/ 2013/03/16/the-cyprus-bank-bailout-could-be-a-disastrous-precedenttheyre-reneging-on-government-deposit-insurance. [Accessed 12 Apr. 2017].

CHAPTER TWO

The Cyprus Banking Haircut and Human Rights, the way to go?

(accepted for publication in Pepperdine Dispute Resolution Law Journal, Vol. 18 to be published in February 2018)

Keywords: Cyprus, Banking Haircut, ECHR, Right to Property, Non-Discrimination, Right to Due Process, Depositors' rights

I. ABSTRACT

The Cyprus Banking Haircut of 2013 was unprecedented and had devastating implications for investors, be they shareholders, bondholders or depositors. However, although more than 4 years have passed from the Cyprus banking haircut, depositors and shareholders in Cyprus' two largest banks at the time, namely Bank of Cyprus and Cyprus Popular Bank, are still trying to find restitution. Indeed, several depositors have during the Cyprus Banking Crisis sustained significant loses reaching up to 80% of their deposits and despite these significant loses, depositors have still not been able to find compensation.

To this end, depositors have resorted to national courts in the Republic of Cyprus, the European Court of Justice ("CJEU") and international tribunals, such as the International Centre for Settlement of Investment Disputes ("ICSID"). However, none of these forums has effectively dealt with the substantive elements of the Cyprus Haircut to date.

What is common in all these proceedings brought to date is that depositors, in one way or another, have relied to human rights considerations, as a basis for their claims and have to date been unsuccessful to demonstrate a breach has occurred. This Paper will explore the implications of the Cyprus Banking Haircut on bondholders from a human rights perspective, reviewing investors' rights and remedies once a claim is brought before the Court most appropriate to deal with human rights' violations, namely the European Court of Human Rights ("ECtHR").

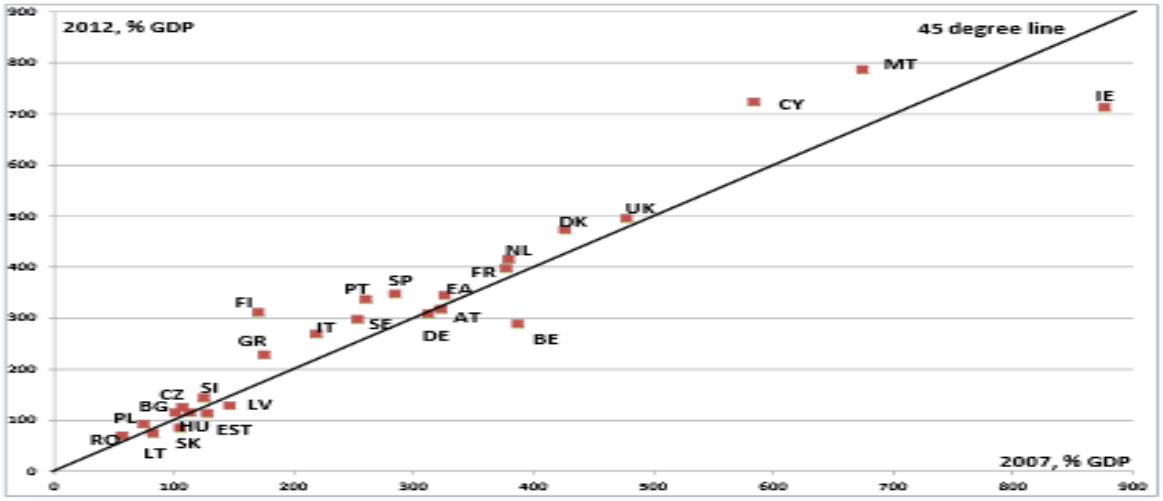
II. The Cyprus Haircut- Factual Background

A. Summary of Facts

Before we establish depositors' rights due to the Cyprus financial crisis, it is first imperative to examine the facts that led to such crisis and the measures taken by the Cyprus Government in such context.

The Cyprus economy largely has and continues to rely heavily on the tourism and services sector. In fact, Cyprus has managed to become a reputable business center, taking advantage of its competitive tax system and stable political regime. Consequently, its tax, fiduciary, legal and banking services flourished. Indicatively, the size of the banking sector in Cyprus was such, that the assets of the entire banking sector in Cyprus exceeded the Cypriot GDP more than eight times in 2011. As evident from the table below, which demonstrates the size of the banking sector, in 2012 Cyprus had one of the largest banking sectors amongst the EU Member States, with its banking sector becoming larger each year.

Size of the Banking Sector across the EU-27
(Assets, % of GDP)



Source: ECB, Eurostat, Eurobank Research.

However, as it was evidenced shortly thereafter "big banks" meant "big problems".

The two major banks in Cyprus, namely Bank of Cyprus and Cyprus Popular Bank, began to face problems from the midst of the financial crisis in Europe. However, despite the signs of economic problems, the two Banks continued "business as usual". Indeed, as part of a capital exercise conducted by the European Banking Authority (EBA) and the Central Bank of Cyprus on October 26th, 2011, Bank of Cyprus identified a capital buffer shortfall of EUR 1.5 billion and Cyprus Popular Bank identified a capital buffer shortfall of EUR 2.1 billion. Earlier that year, EBA had announced that the two banks combined needed to find EUR 3.6 billion. As a result, in early November 2011, the Financial House Moody's downgraded three Cypriot Banks immediately following the Cyprus sovereign downgrade. In particular, Bank of Cyprus was downgraded by one notch to Ba2 from Ba1, Hellenic Bank by one notch to Ba2 from Ba1 and Marfin Popular Bank Public Co Ltd by three notches to B2 from Ba2.

Shortly thereafter, Bank of Cyprus Public Co. Ltd. announced a capital-raising plan through the issuance of shares to the public. The capital-raising plan of Bank of Cyprus resulted in an increase of its share capital by EUR 592 million that managed to keep the Bank going for a short period. However, not long thereafter, in December 2011, EBA issued a Recommendation by virtue of which all-participating EU banks

had to raise their Core Tier 1 ratio to 9% after accounting for an additional buffer against stressed sovereign risk holdings by end-June 2012.[213] This meant that Bank of Cyprus and Cyprus Popular Bank needed to find additional funding by 30 June 2012.

To this end, on 2nd of March 2012 Cyprus Popular Bank Public Co. Ltd. announced a capital-raising plan. Again, however, the Greek PSI[214] devastated the plan's chances of success and resulted in further worsening of the financial position of both Banks. Indeed, the two Banks had purchased huge amounts of Greek Government Bonds ("GGBs) from the secondary market and lost billions of Euros with the Greek PSI.[215] In particular, Bank of Cyprus announced losses of 1 billion euro, while Cyprus Popular Bank announced losses of 2.5 billion leading to further increases in their capital buffer. Indicatively, as evidenced in the table below, the losses sustained by the Cyprus banks from the Greek PSI were the most significant within the EU in comparison with Cyprus' GDP.

	Cyprus	Greece	Germany	Belgium	France	Portugal
Haircut loss bil. euro	4,14	24,3	3,6	2,1	5,04	0,42
% of GDP	23.03	11.65	0.14	0.56	0,25	0,25

Source: Stavros A Zenios[216]

As a result, of these losses, it became clear that, at least Cyprus Popular Bank was insolvent. In an attempt to help salvage Cyprus Popular Bank, the Cyprus Parliament, on 18th May 2012, decided to underwrite a capital increase equal to one billion and eight hundred million euro (€1.800.000.000) for the bank's recapitalization, in case the latter was unable to raise funds from private sources. By the deadline of 30th June the bank had only raised €3 million and consequently the Cyprus Government acquired shares in Cyprus Popular Bank for the equivalent of EUR one billion seven hundred and ninety-six million nine hundred and eighty-six thousand four hundred and thirty-nine (€ 1.796.986.439). The State paid the bank by transferring to the latter a 12-month sovereign bond, which would be rolled over for a period of five years. Notably, by that time, all three major credit rating agencies had downgraded Cyprus sovereign debt to junk status, thereby eliminating the possibility that the European Central Bank could accept Cypriot bonds as collateral for loans.[217]

The above re-capitalization of Cyprus Popular Bank through the State's participation raised state aid concerns with the European Commission. However, in

[213] European Banking Authority, Recommendation on the creation of temporary capital buffers to restore market confidence, (2011)

[214] The Greek Private Sector Involvement ("PSI") was a bond exchange program aiming to restructure the Greek sovereign debt held by private investors.

[215] "Cyprus requests Eurozone bailout," *Financial Times*, June 25, 2012.

[216] S. A Zenios, "Fairness and reflexivity in the Cyprus bail-in" Empirica, Springer (2016), Volume 43, Issue 3, pp 579–606.

[217] "Cyprus Requests Eurozone Bailout," *Financial Times*, June 25, 2012.

early September 2012, the European Commission approved the above rescue re-capitalization of Cyprus Popular Bank on the premise that the Cypriot authorities would submit a restructuring plan for Cyprus Popular Bank within six months from the decision. The plan would demonstrate how Cyprus Popular Bank would be viable without continued state support, although by that time, both Bank of Cyprus and Cyprus Popular Bank had requested Emergency Liquidity Assistance ("ELA") from the Central Bank of Cyprus. The initial amounts and terms of such ELA request have not been officially announced, but it is estimated that Cyprus Popular Bank obtained 1.8 billion in January 2012, 3 billion in May 2012, and 4.2 billion by February 2013.[218]

Negotiations of a bailout between the Troika and Cyprus occurred during the summer and fall months of 2012. Preliminary terms of a bailout were made public on November 23, 2012, and included strict austerity measures, including cuts in government employee salaries, social benefits, and pensions, and increases in taxes and health care charges.[219] On the financial system the memorandum, inter alia, instructed the Central Bank of Cyprus to update the liquidity regulations such that minimum requirements will be established for: i) diversifying investments in eligible liquid assets by imposing concentration limits of 25% of regulatory capital and 50% for the domestic sovereign; ii) investing at least 50% of the required liquidity into instruments of high credit quality with a maturity of up to 3 months and iii) non-resident deposits (euro and foreign) such that the minimum liquidity ratio is set at 60%.

Complicating and delaying the management of the crisis the former President Dimitris Christofias declared the terms were difficult to accept and as of December 2012, no bailout had yet been signed, the Cyprus Government resorted to borrowing from the public authority pension funds to cover its monetary needs for December.

In the early months of 2013, despite Cyprus' urgent need for financing, negotiations for a bailout package continued slowly. It was only following the Eurogroup meeting on March 15th, 2013, that a preliminary agreement was reached. According to the latter, Troika would provide Cyprus with €10 billion in funds, while, as part of the deal, there would be a levy imposed on deposits at a rate of 6.75% for deposits of up to €100,000 and at a rate of 9.99% for deposits above €100,000. This included all deposits (in current and deposit accounts, interest bearing or not) and in all banks (including branches of international banks) operating in Cyprus.[220]

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[218] I. Gikas A. Hardouvelis, Overcoming the crisis in Cyprus Eurobank Economy and Markets Volume IX, 2014 available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.hardouvelis.gr%2FFILES%2FPROFESSIONAL%2520WORK%2F20January2014Q.pdf&ei=uQLtU-nLD4fA7AbN7ICIBw&usg=AFQjCNGky3diUBdN2Q70zfues9Eon8u-OA&sig2=C2sFLURIxg4H43b1jjFIcA&bvm=bv.72938740,d.ZGU

[219] *Bloomberg.com*, November 30, 2012.

[220] "A better deal, but still painful," *The Economist*, published at March 25, 2013 available at http://www.economist.com/blogs/charlemagne/2013/03/cyprus-bail-out

On March 18, 2013, the above proposal was up for discussion at the Cypriot parliament. The Cypriot government voted against the levy on March 19, 2013.[221] Consequently, on 21 March 2013, the Governing Council of the European Central Bank decided to maintain the current level of ELA until Monday, 25 March 2013. Thereafter, ELA could only be considered if an EU/IMF program was put in place that would ensure the solvency of the concerned banks.

In light of the above developments, the Republic of Cyprus enacted 8 Laws for the emergency assistance of the economy and the banks, including, inter alia, Law 17(I)/2013 for the Consolidation of the Banks. The relevant law awards the Central Bank of Cyprus extensive powers to take a series of measures to assist in the consolidation or liquidation of financial institutions in Cyprus. The Law further provided for the creation of a Consolidation Authority that would act as a "Receiver Manager" with wide authorities for the consolidation of the Banks and appointed the Cyprus Central Bank to act such Consolidation Authority. Needless to mention that for the period from the 15th of March and until the 26th the banking system remaining closed for 11 days.

Finally, on March 25, 2013, a Memorandum of Understanding was signed between Cyprus and the Troika (the "Memorandum of Understanding") that provided for the below measures which were enforced via decrees based on the Bank Resolution Framework:

1) Primarily, it was agreed that Cyprus would receive an amount of Euro 10 billion, as financial assistance. Such assistance would not be used to recapitalize either Cyprus Popular Bank or Bank of Cyprus, while all other Banks in Cyprus would be provided with unlimited financial support, if same was needed.
2) Especially for the two problematic banks, the deal provided for the measures described below.

A.1. For Cyprus Popular Bank

The Central Bank of Cyprus, in its capacity as consolidation Authority together with the Minister of Finance, issued inter alia, three decrees for Cyprus Popular Bank, namely Decree 94/2013 dated 25.03.2013 (Sale of Banking Operations of Cyprus Popular Bank), Decree 97/2013 dated 26.03.2013 (Sale of Banking Operations in Greece of Cyprus Popular Bank) and 104/2013 (Sale of Certain Operations of Cyprus Popular Bank). By virtue of the said Decrees Cyprus Popular Bank entered into liquidation. For this to happen, it was split into two parts, namely what is called a "good bank" and a "bad bank". Bank of Cyprus Ltd absorbed the "good bank" together with the insured deposits up to the amount of Euro 100,000.00 (one hundred thousand Euros) and all performing loans (viable assets), while all uninsured assets of approximately €4.2 billion – including deposits over €100,000 –

[221] "Walking Back from Cyprus," published at March 20, 2013available at www.voxeu.org/article/walking-back-cyprus,

were placed in the "bad bank."[222] Effectively, therefore equity shareholders, bondholders and uninsured depositors (deposits with over Euro 100.000) fully contributed to the resolution of Cyprus Popular Bank, These depositors of Cyprus Popular Bank were given shares of equity in the Bank of Cyprus as "compensation," amounting to an 18% equity interest in the Bank of Cyprus.[223]

A.2. For Bank of Cyprus

Additionally, the aforementioned Consolidation Authority had on the 29th of March, 2013 issued a decree for the salvation of Bank of Cyprus by its own funds. The relevant decree 103/2017 (Bailing in of Bank of Cyprus by own means) provided for the following:

1) Deposits up to €100.000 would not be affected.
2) For deposits over €100.000 depositors in the Bank of Cyprus would receive shares of value EUR 1, - for every euro over €100.000 and up to 37.5% of their overall deposits. Of the 62.5% of uninsured deposits, not converted to bank shares, about 40% would continue to accrue interest, but would not be repaid, unless the bank's performance was well (or the Bank went bankrupt at which time Art. 300 of the Companies Law Cap.113 would apply), while the final 22.5% would cease to attract interest. This 22.5% would either be converted into shares as per 2 above or it would be frozen and returned to the depositors' accounts with interest. Uninsured deposits would remain frozen until recapitalization has been effected through deposit/equity conversion of uninsured deposits. Finally, in late 2013 it was decided that the final haircut sustained by unsecured deposits would not exceed 47.5%.[224] Moreover, to "protect the stability of both the Greek and Cypriot banking systems" the Greek branches of Cypriot banks were sold very quickly, excluding such depositors from the haircut[225].

Bondholders were also negatively affected. On July 31, 2013, the Bank of Cyprus announced that holders of "convertible bonds" and various types of securities

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[222] Wound down *The Economist*, published at March 25, 2013 available at http://www.economist.com/blogs/schumpeter/2013/03/money-talks-march-25th-2013

[223] Matina Stewis, "The Unintended Consequences of Cyprus," *The Wall Street Journal*, July 26, 2013 available at http://online.wsj.com/news/articles/SB10001424127887324110404578627881459300990; "Milder than expected final terms for Cyprus bail-in unveiled," *Financial Times*, published at July 30, 2013 available at http://www.ft.com/cms/s/0/85eb3cea-f943-11e2-a6ef-00144feabdc0.html#axzz3BU0umFoW; "Cyprus bank's bailout hands ownership to Russian plutocrats," *The New York Times*, published at August 22, 2013 available at http://www.nytimes.com/2013/08/22/world/europe/russians-still-ride-high-in-cyprus-after-bailout.html?pagewanted=all&_r=0

[224] "Bank of Cyprus Depositors to Lose 47.5% of Savings in Bailout," *Financial Post*, published at July 29, 2013 available at http://business.financialpost.com/2013/07/29/bank-of-cyprus-depositors-to-lose-47-5-of-savings-in-bailout/ *See also* Bank of Cyprus Announcement, "Recapitalisation through Bail-in and Resolution Exit Bank of Cyprus Announcement," July 31, 2013 (explaining that 47.5% of "eligible deposits" (i.e., exceeding €100,000) were converted to equity).

[225] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/136487.pdf

would be converted to Class D shares of the bank at a conversion rate of €1 nominal amount for each €1. This is in principal amount of such subordinated debt claims, while the nominal value of Class D shares would be reduced from €1 to €0.01 (reduction to 1/100th of value).[226]

Finally, the total bailed-in amount for both Banks turned out to be approximately €9.4bn, spread in accordance with the table below.

Bail-In Amounts (€ bn)

	BoC	Laiki	Total
Uninsured deposits	3.9	4.0	7.8
Senior debt	0.0	0.1	0.2
Subordinated debt	0.6	0.8	1.3
Total	4.5	4.9	9.4

Source: IMF Country Report No. 13/293 page 13, Central Bank of Cyprus, Eurobank Research.

The above procedure was novel in Europe that never before had made savings accounts, bond and shareholders pay for the bank deficit. Certainly, many elements allowed this to happen in Cyprus. The small size of the Republic's economy, the non-systemic nature of its debt, the need for Germany to set an example for larger countries and finally the wide belief that the money held in Cyprus Banks belonged to Russian oligarchs that engaged in money laundering, However, the fact remains that depositors sustained unprecedented damages which begs the question if and what form of protection is available to them.

III. Review of measures taken by investors to date.

Depositors resorted to several legal measures in pursuit of available remedies resorting to national Courts in Cyprus, the European Court of Justice ("CJEU") as well as claiming protection under bilateral investment treaties before the International Centre for Settlement of Investment Disputes ("ICSID") and other Tribunals. To examine if the European Court of Human Rights would be a more suitable venue for depositors, it is imperative to examine the measures they have resorted to thus far and evaluate their results.

[226] *See* Bank of Cyprus "Notice to holders of debt securities of Bank of Cyprus as of 29 March 2013," dated July 31,
2013.

A. Resort to National Courts

Following the Cyprus Banking Haircut, Cypriot Courts were flowed with petitions from depositors. Indeed, more than 4.000 petitions[227] for judicial review were filed by virtue of Art.146[228] of the Cyprus Constitution, requesting the cancellation of the decrees No. 103 and 104/2013 issued by the Central Bank of Cyprus in its capacity as the resolution authority for banking institutions.

The depositors claimed that the said Decrees were unconstitutional, violating several Articles of the Cypriot Constitution. Primarily, depositors argued the Decrees were violating Article 6 of the Cypriot Constitution that prescribes that laws or administrative acts may not discriminate between any person on grounds of his Community, as well as Article 28 that sets the principle of equality. As per the depositors, the Decrees discriminated between account holders in Cyprus and abroad, as well as between accountholders of the two problematic banks and accountholders in all other banks in Cyprus. In particular, as the Decrees aimed to safeguard Cyprus' financial system as a whole, depositors contested that accountholders of all banks in Cyprus should have been asked to contribute, as well as accountholders who maintained deposits in branches of Cypriot Banks abroad. Therefore, in line with the applicants' reasoning, the fact that only accountholders from the two problematic banks in Cyprus sustained losses denoted discriminatory treatment and, thus, a breach of the right of equal treatment.

Additionally, depositors argued that the Decrees violated their right to property, as there was an illegal taking of their possessions (deposits) without notice nor adequate compensation in breach of Article 23 of the Cyprus Constitution pertaining to the right of property. Lastly, accountholders claimed that the termination of the contractual relation that existed between account holders and the two Banks was abruptly terminated in breach of Art. 26 of the Constitution that regulates freedom to contract, without state intervention.

Due to the significance and the gravity of the cases, the Supreme Court, sitting in full bench, decided to hear the petitions themselves on the merits and dismiss the interim injunctions. The first 53 applications submitted were chosen for hearing. Regretfully, however, the majority of the Full Bench of the Supreme Court (7 out of the 9 judges) rejected the applications without examining the merits of the case. The Supreme Court raised the preliminary objection of whether the Decrees' nature was of private or public law and thus whether the Decrees could be subject to a judicial review procedure before the Supreme Court and proceeded to examine the nature of account holders' rights and whether these were affected by the Decrees. The majority of the Supreme Court held that the relevant Decrees affected the legitimate interests of affected account holders only indirectly and as such, the depositors did not have a

[227] George Yiangou LLC, Legal Actions in Cyprus following the Haircut, available at http://yiangou.com.cy/news-read/80 last access 18.07.2017

[228] Art.146 of the Cypriot Constitution awards parties that have a legal interest the possibility for judicial review of administrative acts that affects their rights.

legitimate interest, and therefore legal standing, to petition recourse under Article 146 of the Constitution for judicial review of the said Decrees.

The Court reached the said conclusion as it noted that neither Degree regulated the relation between the State and individuals, but instead the Degrees referred to the Cyprus Popular Bank and Bank of Cyprus. Depositors were contractually linked with the two Banks and as the Banks' contractual obligations were affected, depositors could launch civil lawsuits against the Banks. Hence, the Supreme Court concluded that account holders that might have been affected by the sale of the Cyprus Popular Bank's assets sale and the haircut in deposits maintained with Bank of Cyprus, should resort to the district courts, as their claims for breach of contractual rights do not fall within the ambit of the Supreme Court's jurisdiction. As the Supreme Court noted, civil actions may also be extended against the Republic of Cyprus, as the latter issued the Decrees that affected depositors' rights.

Following the said judgement, several depositors filled civil suits against Bank of Cyprus, the Central Bank and the Republic of Cyprus but to date, 5 years later, no judgement has been issued in any of the cases. That stated, District Courts have heard applications for interim injunctions and have often ruled in favor of such applications. Indicatively, in the case of M. Constantinou v. Bank of Cyprus & others (Case Number 2147/14), the District Court of Limassol ruled in favor of the continuation of an interim injunction against Bank of Cyprus relating to claim for damages or restitution on the grounds that the haircut was incorrectly implemented.[229] This is important as for a District Court to grant an interim injunction, the Court must be persuaded that there is "a probability" that plaintiff is entitled to relief,[230] although the district Court may decide to reject the plaintiff's claim in the end.

It is difficult to predict what the outcome of the civil cases will be, but it is hard to imagine that the Cyprus Courts will award monetary damages to the claimants equal to the haircut they sustained plus interest, as something like that is likely to endanger the Cyprus banking and financial system. In fact, the Supreme Court of Justice, despite the fact that, as stated, it did not examine the substance of the plaintiffs' arguments, it went on to examine the issue of the assessment of damages and noted that damages may only be the loss sustained by the depositors, to the extend they would be able to prove that they are in worse condition than if the two banks in question were under liquidation. Without a final determination of such civil cases, depositors may not resort to ECtHR as exhausting all available local remedies is a precondition for filing a petition before the ECtHR.

B. Resort to CJEU

Following the Supreme Court's Ruling, several accountholders decided to resort to the General Court of the EU and subsequently to the CJEU. We may divide

[229] A.G. Erotocritou LLC, Landmark decision on the "haircut" of bank deposits, available at http://erotocritou.com/en/publications/79-landmark-decision-by-the-limassol-district-court-on-the-haircut-of-bank-deposits.html, last access 22.07.2017

[230] Odysseos Andreas v A Pieris Estates Ltd, Supreme Court of Cyprus (1982) 1 CLR 557.

the cases in to two broad categories, those challenging the validity of the Eurogroup's decision of March 25th, 2013 in cases T-327/13 until T-331/13[231] and those requesting the annulment of the Memorandum of Understanding dated March 25th, 2013 and compensation in cases T-289/13, T-291/13 and T-293/13.[232] In all cases, the applicants, who had sustained financial losses of more than 100,000 Euros each, as a result of the Decrees issued by the Central Bank of Cyprus, turned against the European Commission and the European Central Bank.

According to the Applicants in cases T-327/13 until T-331/13, the damages they had sustained were caused by Eurogroup's decision of March 25th, 2013 that contained the terms of the deal reached between Cyprus and the Troika. Furthermore, the applicants contested that the said Eurogroup's decision should be attributed to European Commission and the European Central Bank ("ECB"). Applicants claimed that any action taken by the Republic of Cyprus following the aforementioned Eurogroup's decision, including the decrees issued by the Cyprus Central Bank, were only implementing the Eurogroup's decision.

Applicants argued that the Eurogroup statement of 25th of March 2013 exceeded the powers conferred to both the European Central Bank and also the European Commission by the Treaty on European Union. To examine if the said claim was admissible, General Court of the EU initially examined whether the Eurogroup Statement could, in fact, be attributed to the ECB or the European Commission. General Court noted that Eurogroup is not a formal institution of the European Union, but only an informal discussion forum between ministers of the Euro area, without any legislative decision-making competences. General Court further noted that ECB and the European Commission's participation in Eurogroup's meetings could not in and of itself lead to the conclusion that the Eurogroup acted on their instructions or acted as their representative. As such, Eurogroup's actions could not be attributed to the ECB or the European Commission.

General Court further proceeded to consider if the statement could be attributed to the European Stability Mechanism ("ESM"), rather than to the Eurogroup, and whether in such case the Eurogroup's statement could be credited to the ECB and the European Commission. General Court ruled that, even if it could be inferred that the statement was attributable to the ESM, this would not lead to the conclusion that the Commission or the ECB instigated the adoption of the said statement. General Court dismissed this argument, on the basis of Articles 4, 5, 6 and 13 of the ESM Treaty, noting that neither the ECB nor the European Commission conferred any powers to the ESM and therefore, none of the two institutions was able to control or instruct the ESM. This was in line with CJEU prior ruling in the Case of

[231] Court of Justice of the European Union, T-327/13 Mallis and Malli v Commission and ECB, T-328/13 Tameio Pronoias Prosopikou Trapezis Kyprou v Commission and ECB, T-329/13 Chatzithoma v Commission and ECB, T-330/13 Chatziioannou v Commission and ECB and T-331/13 Nikolaou v Commission and ECB, General Court of EU (2014)

[232] T-289/13 Ledra Advertising v Commission and ECB, T-291/13 Eleftheriou and Others v Commission and ECB and T-293/13 Theophilou v Commission and ECB, General Court of EU (2014)

Pringle v Government of Ireland,[233] where it noted that the acts of the ESM are only binding on the ESM. As such, it ruled that the application was inadmissible and did not proceed to examine the substance of the case.

Similarly, in cases T-289/13, T-291/13 and T-293/13, General Court ruled the applications were partly inadmissible and partly unfounded. General Court noted that the Commission signed the Memorandum of Understanding on behalf of the ESM therefore only binding on the ESM. General Court further held that the applicants had not managed to prove with certainty that they had sustained damage due to the Commission's inaction.

The decision of the General Court in cases T-327/13 until T-331/13 was appealed (Joined Cases C-105/15 P to C-109/15 P), but the CJEU upheld the dismissal. CJEU reiterated that the Eurogroup's Statement could not be regarded as a joint decision of the Commission and the ECB, as, under the ESM framework, the said institutions did not enjoy the power to make decisions of their own under the ESM Treaty, but participated in the ESM as "observers".[234] In fact, the ECB and the European Commission, when acting within the context of the ESM, they act as agents of the ESM. Hence, mere participation of the EU Commission and the ECB in the meetings of the Eurogroup, was not sufficient to alter the nature of Eurogroup's statements and render such statements the expression of the decision-making power of the ECB and the EU Commission.

General Court's judgement in cases T-289/13, T-291/13 and T-293/13, were also appealed (Joined Cases C-105/15 P to C-109/15 P). However, in the said case, CJEU reiterated that acts of ESM acts do not fall within the scope of EU law,[235] but the Commission signs on behalf of the ESM in accordance with Art. 13(4) of the ESM Treaty. CJEU noted that the Commission as the "guardian of the Treaties", should refrain from signing an act that is inconsistent with EU law.[236] Indeed, as CJEU stipulated, the Commission has a positive duty to refrain from adopting an ESM Memorandum of Understanding, when the latter is in breach of EU law, including the Charter of Fundamental Rights of the European Union (the "Charter"). Hence, failure to abide by such positive duty may render the European Commission liable for damages due to non-contractual liability under Article 340 of the Treaty of the Functioning of European Union ("TFEU").

Within this context, CJEU proceeded to examine if the Commission had, through the adoption of the Memorandum of Understanding, contributed to a sufficiently serious breach of the appellants' right to property under Art.17 of the Charter. Referring to Art. 52 of the Charter, CJEU noted that the right to property may

[233] Case C-370/12, (Pringle v Government of Ireland), [2012] Court of Justice of the European Union

[234] Article 6 para. 2 of the ESM Treaty

[235] See Case C-128/12 (Sindicato dos Bancários do Norte and Others v BPN - Banco Português de Negócios, SA), [2012] Court of Justice of European Union,

[236] Joined cases C-8/15 P to C-10/15 P (Ledra Advertising, Andreas Eleftheriou, Eleni Eleftheriou, Lilia Papachristofi, Christos Theophilou and Eleni Theophilou v. European Commission and ECB), [2016], Court of Justice of European Union par. 58.

be subject to limitations, to the extent that such limitations on the exercise of the right to property satisfy an objective of general interest pursued by the EU and do not violate the very substance of the right. CJEU concluded that both these conditions were met at present, as there was both an objective of general interest, namely to ensure the stability of the Euro areas' banking system, while also the interference with the appellant's deposits was not disproportionate in light of the imminent risk of financial losses that the appellants would have sustained had the two banks failed.

Although the above ruling was disappointing for depositors, it, nonetheless, revealed another way for depositors to gain compensation in case of EU institutions' actions taken in the course of the financial crisis, that of an action for damages for EU's institution non-contractual liability.

C. Resort to Arbitration

Several depositors also resorted to arbitration proceedings, claiming protection under bilateral investments treaties for breach of treaty standard. In particular, depositors claimed that Decree No. 103/2013 (Salvation of Bank of Cyprus by own means) issued by the Cyprus Central Bank in its capacity as consolidation authority, constituted an illegal interference with their property rights tantamount to illegal expropriation.

Indicatively, the Arbitration Court in Stockholm has recently issued its judgement on the claim raised by two Polish investors against the Republic of Cyprus[237] on the basis of the Bilateral Investment Treaty between Cyprus and Poland. The said investors were shareholders in pharmaceutical company, which sustained significant damages due to the haircut. The two investors claimed that, by virtue of the Decree No. 103/2013, their investment's value was expropriated. To this end, they requested from the Arbitration Court to award them the amount of PLN 1,319,794 as direct damages for loss of funds due to the "haircut" imposed on their deposits, as well the amount of PLN 16,720,000 as loss of profit, plus interest.[238]

The Arbitration Court rejected the claim of the two investors noting that no expropriation had taken place and ordered the investors to pay 70% of the legal fees of the Republic of Cyprus amounting to 1.1 million Euros as well as 114,300 Euros to the arbitration court.[239] Regretfully, there aren't any additional information available on the case as all parties had agreed to confidentiality at the beginning of the procedure and thus the Arbitration Court's judgment was not published.

There are two additional cases of investors founded on the facts of the Cyprus Banking Haircut, brought by Greek investors before ICSID, namely Theodoros

[237] Thomasz Czescik and Robert Aleksandrowice v. the Republic of Cyprus, the Arbitration Institute of the Stockholm Chamber of Commerce, 2017

[238] 'Arbitration Court Rejects Appeal Against Cyprus' Recapitalization Measures In 2013' (Cna.org.cy, 2017) <http://www.cna.org.cy/WebNews.aspx?a=15d269cf67c1430fa0658dec08da3c98> accessed 23 July 2017.

[239] 'Arbitration Court Rejects Appeal Against Cyprus' Recapitalization Measures In 2013' (Cna.org.cy, 2017) <http://www.cna.org.cy/WebNews.aspx?a=15d269cf67c1430fa0658dec08da3c98> accessed 23 July 2017.

Adamakopoulos and others v. Republic of Cyprus[240] and Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus[241], both of which are still pending. The former case is founded on the Bilateral Investment Treaty between Greece and Cyprus as well as the Bilateral Investment Treaty between Belgium-Luxembourg and Cyprus, while the latter case is based on the Bilateral Investment Treaty between Greece and Cyprus alone. The arguments made in each case are presented below.

In particular, in the case of Theodoros Adamakopoulos and others v. Republic of Cyprus, the application was raised 954 investors, out of which 953 were natural persons, nationals of Greece, while there was one only corporate investor founded in Luxembourg. Investors that maintained deposits in Bank of Cyprus and/or Cyprus Popular Bank claimed that the Cyprus Banking Haircut and, in particular the two Decrees No. 103 and 104/2013, were violating treaty standard on numerous grounds. Primarily, they claimed that the fact that the Cypriot government did not impose the haircut on the deposits of government entities, while also ELA was being repaid to the Central Bank of Cyprus, was a breach of the non-arbitrary and discriminatory treatment treaty standard. Secondly, investors claimed that the fact that deposits in Bank of Cyprus were partly converted into shares in Bank of Cyprus was a prohibited transformation of the type of investment under Article 2(3) of the Greece-Cyprus BIT. Lastly, investors claimed the deposits' haircut was tantamount to an unlawful expropriation in breach of Article 4 of the Greece-Cyprus BIT.[242]

In the case of Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus, the applicants Marfin Investment Group holdings S.A, and another 18 Greek nationals, were shareholders in Cyprus Popular Bank. They claimed that the Cyprus Government, through various acts, including the decree 104/2013, increased the Government's participation in Cyprus Popular Bank and lead to the illegal take-over of Cyprus Popular Bank's management control and its subsequent insolvency.[243] Based on these facts, they claimed that their investment in Cyprus Popular Bank was expropriated and they were subject to arbitrary, unreasonable and/or discriminatory measures requesting compensation of 823,000,000 Euros.

It is difficult to predict what the outcome of the above cases will be, but as discussed, the Arbitration Court in Stockholm has already concluded on the same

[240] Theodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No. ARB/15/49

[241] Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus, ICSID Case No ARB/13/27

[242] Jay W. Eisenhofer, Geoffrey C. Jarvis, K. William Kyros, Esq., Potential Arbitration Against Cyprus, draft letter available at 'Διεθνής Διαιτησία Κύπρου - Έγγραφα | Αποζημίωση - Apozimiosi.Gr' (Apozimiosi.gr, 2017) <http://www.apozimiosi.gr/eggrafa> accessed 23 July 2017.

[243] 'Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others V. Republic of Cyprus (ICSID Case No. ARB/13/27)' (Ipfsdhub-dev.blink-dev.ro, 2017) <http://ipfsdhub-dev.blink-dev.ro/ISDS/Details/521> accessed 23 July 2017.

facts, that no expropriation has taken place. [244] Indeed, as it stems from ICSID's prior caselaw, the burden of proof of expropriation is high. What's more, cases pertaining to rescue measures for Banks are particular also in the following sense, as correctly stipulated by Anna De Luca:[245]

1. Primarily, investors' losses are not so apparent, in the sense that their investment was already of no value prior to the State's intervention, and, in this respect, the State's measure did not in fact cause any loss to the investor. This is of particular importance for investors in Cyprus Popular Bank, where as stipulated the Bank was already insolvent, before the Decree 104/2013 (Sale of Certain Operations of Cyprus Popular Bank) was issued. Indicatively, a similar case with that of Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus, although under United States law, was examined by the United States Court of Federal Claims in the cases of Starr International Co. Inc. v. United States.[246] The case related to decision taken by the Federal Reserve and the Treasury, which demanded 79.9% of AIG's stock in exchange for an $85 billion loan during the financial crisis. The Court in such case did find that the Federal Reserve and the Treasure had acted outside the scope of their authority; nonetheless it concluded that claimants were not entitled to recovery as they hadn't sustained any loss.
2. Additionally, one cannot overlook the fact that State's intervention is often needed to "salvage" the Bank from its own risky exposure to the financial market, and not, from any State-induced measure. Thus, Anna de Luca argues that in such cases issues of causation might arise, as causation will break in case of intervening factors attributable to the victim.[247] In such case, where the causal link between the State's measure and the investors' loss is interrupted, the State will not be held liable for such loss.[248] This is also of relevance in the case of the Cyprus Banking Haircut, where both Bank of Cyprus and Cyprus Popular Bank acted recklessly by purchasing Greek Sovereign Bonds

[244] For a more detailed discussion on the possible outcome of those cases see Maurice Mendelson QC and Dr Martins Paparinskis, 'Bail-Ins and The International Investment Law of Expropriation: In and Beyond Cyprus' [2013] Butterworths Journal of International Banking and Financial Law.

[245] Anna De Luca, Bank Rescue Measures under international investment law: What Role for the principle of causation, in Christian J. Tams, Stephan W. Schill, Rainer Hofmann (eds.) International Investment Law and the Global Financial Architecture. Edward Elgar, p. 214

[246] Starr Int'l Co. v. United States, No 11-779C (United States Court of Federal Claims, June 15, 2015)

[247] Anna De Luca, Bank Rescue Measures under international investment law: What Role for the principle of causation, in Christian J. Tams, Stephan W. Schill, Rainer Hofmann (eds.) International Investment Law and the Global Financial Architecture. Edward Elgar, p. 227

[248] See indicatively Art. 1(1) of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961).

from the secondary markets, at a time when Greece was already in financial distress.[249]

To this end, we shall now turn to examine if depositors may have better chances to obtain some recourse before the European Court of Human Rights based on breach of the European Convention of Human Rights ("ECHR").

IV. Human Rights Considerations in case of Extreme Financial Crisis

A. The right to property

As evident from above, depositors have contested to all proceedings to date, that the banking haircut was interfering with their property rights. The ECHR regulates the right to property in Article 1 of Protocol 1 of the ECHR ("Article 1").

As per ECtHR's caselaw, the said Article comprises of three sentences, each of which contains a separate rule for protection.[250] The first sentence of the first paragraph is general, denoting everyone's right to peaceful enjoyment of his possession and serves as a "catch all" clause attempting to include under its scope cases which do not fall within the other two rules.[251] The second sentence of the first paragraph refers to cases of deprivation of one's possessions and regulates when such deprivation can be justified subject to fulfilment of certain conditions. The second sentence is the most commonly used form of protection. Lastly, the third sentence, in the second paragraph of the Article, refers to the States' right to regulate the use of property in accordance with general interest, reflecting the limitations of protection awarded under the previous sentences.

Hence, we may see that each sentence and rule refers to a different kind of interference with property rights, with the first rule covering "interference with possessions", the second dealing with deprivation of property, and the third with the regulation of the use of property.[252] Provided, there is an interference that falls with any one of the above rules, we should examine whether such interference can be justified. To this end, ECtHR examines three questions to analyze whether an interference can be justified, namely: (1) whether the interference is lawful; (2) whether it is in the public interest; and (3) whether it is proportionate.[253] The positive

[249] See the Report by the Committee of Institutions of May 2014 on the causes that led to the collapse of the Cypriot economy that finds that Bank Officials were aware of the high risk of Greek Sovereign Bonds, but continue purchasing them, despite proving different assurances to the Central Bank, available at

[250] Sporrong and Lönnroth v. Sweden, ECtHR (1982) A52

[251] Christos Rozakis, The right to property in the Case Law of the European Court of Human Rights, Athens Property Day, January 2016

[252] Laurent Sermet, The European Convention on Human Rights and property rights, Volume 88, Council of Europe Press, 1998

[253] Rachel Zemke, "The Right to Property and Bank Nationalizations," Chicago Journal of International Law: Vol. 16: No. 2, (2016)

answer to such questions must be shown by the State, which bears the burden of proof to demonstrate that the interference serves a legitimate purpose in service of public or general interest.[254] Additionally, the State should not only demonstrate that a legitimate objective is served, but further the ECtHR will examine ad hoc whether the measure is proportionate, in the sense that it must strike a "fair balance" between the demands of the general interest of the community and the protection of property rights.[255]

As can be seen from the wording of Article 1, this refers to peaceful enjoyment of possessions. To this end, prior to examining if the Cyprus haircut constitutes a violation of the above article we need to first establish what constitutes possessions under Article 1 and examine if deposits in the two major Cyprus banks fall within the said definition.

The concept of possessions has been broadly interpreted by the European Human Rights Court's jurisprudence, so as not to only include the right of ownership, but also a whole range of pecuniary rights. These include such rights as arising from patents,[256] shares,[257] arbitration awards, established entitlements to a pension, entitlements to rent, and even rights arising from running of a business,[258] provided the object of possession may be specifically defined. Indicatively, in Pine Valley Developments Ltd v. Ireland[259], the European Court of Human Rights held that a legitimate expectation that a certain state of affairs will occur constituted a component of the property and was therefore eligible for protection under Article 1. Of course, the term legitimate expectation should be interpreted narrowly. A mere hope is not worthy of protection; instead a "legitimate expectation" must have a more concrete nature and it must be based on a legal provision or a legal act.[260]

At present, we need to explore if the affected deposits in Bank of Cyprus and Cyprus Popular Bank constitute possessions within the above meaning. ECtHR has examined the question of whether bank accounts fall within the concept of possessions in several cases. In Benet Czech, Spol. S R.O. V. the Czech Republic[261] the ECtHR found that a seizure of the applicant's corporate bank accounts for a prolonged period of time, was an interference with the applicant's possessions. Similarly, in Appolonov v Russia[262], the Court reiterated that bank deposits fall within the notion of possessions. In fact, in Gayduk v Ukraine, ECtHR stipulated that bank deposits "undoubtedly constitute "possessions" within the meaning of Article 1 of

[254] James v. the United Kingdom, ECtHR A98 (1986), para. 46.
[255] see, among other authorities, Sporrong and Lönnroth v. Sweden, EctHR (1982), A52, p. 26, para. 69
[256] Eur. Comm. H.R., Smith Kline and French Laboratories v. Netherlands, (dec.), 1990, DR 66.
[257] Eur. Comm. H.R., Bramelid and Malmstrom v. Sweden, (dec.) 1982, DR 29
[258] Aida Grgiæ, Zvonimir Mataga, Matija Longar and Ana Vilfan, A guide to the implementation of the European Convention on Human Rights and its protocols, European Council, Human rights handbooks, No. 10, European Council (2007)
[259] ECtHR, *Pine Valley Developments Ltd* and Others *v Ireland*, , (1992) A 222, para. 379
[260] ECtHR, *Pressos Compania Naviera SA and others v. Belgium,* (1993), para. 31.
[261] ECtHR, Benet Czech, spol. s r. o. v Czech Republic, (2010)
[262] ECtHR Appolonov v. Russia, (2002)

Protocol No. 1."[263] Hence, as deposits have monetary value and are an established medium of safekeeping of monetary property, deposits in the two banks in Cyprus constituted possessions.

Having considered that the bank deposits in Bank of Cyprus and Cyprus Popular Bank do constitute "possessions", it needs to be examined if the Cyprus banking haircut falls within any of the rules contained in Article 1. As discussed, each rule refers to a separate form of interference with possessions. Given that the first rule refers to any interference, the second rule, relating to deprivation of property, and the third rule that regulates the control on the use of property, are entailed thereat.[264] Hence, in most likelihood ECtHR will first examine whether a deprivation or a control on the use of property has taken place.[265] As per the caselaw of ECtHR deprivation refers to the state in which the legal rights of the owner are extinguished, usually though transfer of ownership.[266] In essence, ECtHR will examine if the measure resulted to a direct or de facto expropriation, looking into the actual effects and implications of the measure.[267] However, in case the measure aims to regulate and not expropriate, ECtHR is reluctant to accept an expropriation has taken place, despite the fact that it might have significant implications.[268] The distinction between expropriation and regulation will determine the range of compensation, as in case of the former, full compensation is awarded, while in the latter only partial. [269] That stated, distinction between deprivation and regulation is not clearly defined.[270]

Following the establishment that a form of interference has occurred, ECtHR will examine if such interference can be justified in the sense that it serves "a legitimate objective in the public or general interest".[271] As to what contributes a legitimate objective in the public or general interest, unlike articles 8 to 11 of the ECHR, that contain a catalogue of objectives which may justify interferences, Article 1 does not contain a similar list and instead each case is examined separately.[272] To this end, ECtHR has many times upheld that States and their respective authorities enjoy a wide discretionary power in determining if the public or general interest is served. Indicatively, in the AGOSI v. the United Kingdom case the Court noted, "*The State enjoys a wide margin of appreciation with regard both to choosing the means of*

[263] *ECtHR Gayduk and Others v. Ukraine,* (2002)
[264] ECtHR, James and others v. United Kingdom, (1968) A 98, para. 37
[265] Tom Allen, Property and The Human Rights Act 1998, Hart Publishing (2005), p. 110
[266] Matthias Haentjens, Bob Wessels, "Research Handbook on Crisis Management in the Banking Sector". Edward Elgar Publishing (2015), p. 382
[267] ECtHR, Sporrong and Lönnroth v. Sweden, (1982), A52,
[268] See e.g ECtHR, Tre Traktörer Aktiebolag v Sweden, (1991), A13
[269] Matthias Haentjens, Bob Wessels, "Research Handbook on Crisis Management in the Banking Sector". Edward Elgar Publishing (2015), p. 382
[270] Matthias Haentjens, Bob Wessels, "Research Handbook on Crisis Management in the Banking Sector". Edward Elgar Publishing (2015), p. 382
[271] ECtHR, James v. the United Kingdom, (1986), A98, Para. 46.
[272] 'Deprivation of Property and Control of Use' (Echr-online.info, 2018) <http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/control-of-use-and-deprivation-of-property/> accessed 6 January 2018.

enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question."[273] Similarly, in the Belgian Linguistic Case,[274] ECtHR noted that "the national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention".[275] ECtHR will usually not interfere with such determination, unless same is profoundly unjustifiable. This is understandable, if one takes into account the principle of subsidiarity, which is implied in the ECHR.[276] Indeed, as it was stipulated in the case of Handyside v. United Kingdom[277] "the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights ...".[278] Hence, "it is for national authorities to make initial assessment" if a particular action or law complies with ECHR and in so doing States enjoy a certain margin of appreciation.[279]

In addition to serving the public or general interest, the interference needs to also be proportional, in the sense that it must strike a "fair balance" between the demands of the general interest of the community and the protection of property rights.[280] In other words, the interference should not impose an excessive or disproportionate burden on the affected rights of the individual.[281] To determine if a fair balance was reached, ECtHR will not limit its examination to the public interest grounds, but will also examine the extent of the interference with the owner's right, as well as the amount of compensation awarded to the owner, to ensure that the disputed measure does not impose a "disproportionate burden" on the owner. In relation to the aspect of compensation, generally a "taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference".[282] On the contrary, payment of compensation equal to the fair market value of the property should normally be proportionate, although, in certain circumstances, the amount of compensation can be less if so justified by public interest considerations, which may include measures designed to achieve greater social justice[283]. Notably, even a complete lack of compensation may be justified in certain circumstances, but only if they are exceptional.[284] It is therefore evident that ECtHR critically examines state measures and evaluates them based on their

[273] ECtHR, Agosi v the United Kingdom A 108, (1986), A9, Para. 52

[274] ECtHR Belgian Linguistic, (1968) A6

[275] ECtHR Belgian Linguistic, (1968) A6, para.10

[276] Murat Tümay, "Margin of Appreciation Doctrine" Developed by the Case Law of the European Court Of Human Rights, Ankara Law Review Vol. 5 No. 2 (Winter 2008), pp. 201-234, p. 203

[277] ECtHR, Handyside v. United Kingdom, (1976)

[278] ECtHR, Handyside v. United Kingdom, (1976) para. 48

[279] ECtHR, Handyside v. United Kingdom, (1976) para. 48

[280] see, among other authorities, EctHR, Sporrong and Lönnroth v. Sweden, (1982), A52, p. 26, para.69

[281] ECtHR, Valkov and Others v. Bulgaria (2011)

[282] ECtHR, Scordino v. Italy, (2006), para, 116.

[283]ECtHR, James v. United Kingdom op. cit., para. 54.

[284] ECtHR, Former King of Greece and others v. Greece (2000).

significance to pursue the common good and achieve greater social justice.[285] Measures that achieve such goals to a greater extent, can be pursued by states at a lesser cost, in the sense that no or at least not full compensation would need to be paid. Hence, one can see that the ECtHR is in this manner specifying the normative weight between the interests at stake, namely individual rights and the common good.[286]

B. The Right to Property in case of the Cyprus Haircut

Following the above, we need to examine if the Cyprus haircut constitutes a violation of Article 1 of Protocol No. 1 ECHR. To this end, we shall examine first the case of Bank of Cyprus and thereafter the facts of Cyprus Popular Bank.

In relation to the measures taken in Bank of Cyprus, there are two aspects that need to be examined primarily the obligatory conversion of deposits into shares, and the restrictions posed on the depositors to access their monies deposited. Both these acts can be deemed to constitute an interference with the right to property and must therefore meet the criteria described above to be deemed legal.

It is here worth referring to the case of Trajkovski v. the former Yugoslav Republic of Macedonia,[287] which referred to similar facts. In the said case, the applicant was a citizen of FYROM, which was at the time part of Yugoslavia. The applicant had deposited various funds in foreign currencies in a state-owned bank. In 1991, the Government passed a law by virtue of which withdrawals of funds in foreign currency were restricted for a specific period of time. This situation continued even after FYROM gained its independence in 1991 and only in 2000, was a new law regarding foreign currency deposits enacted. According to new law, the applicant's deposits in foreign currency were partly converted into Euros, while he obtained Government bonds for the remainder. The ECtHR took into account that despite the restrictions, the Applicant continued to have partial access to his account. Additionally, ECtHR considered that the funds remained in the Applicant's account, as well as the fact the Government's bonds yielded interest. Based on these facts, ECtHR concluded that the freezing of the account and the conversion did not constitute a deprivation of property and it proceeded to examine the case on the basis of the first sentence of Article 1. Although ECtHR recognised that there was an interference with possessions, nonetheless it concluded this was justified. ECtHR came to this conclusion, as there was a legitimate purpose, while also a fair balance was struck as, inter alia, the measure did not place a disproportionate burden on the applicant. ECtHR noted that the applicant had the possibility to withdraw funds for specific purposes, that the restrictions on foreign currency were already in place in Yugoslavia and that the applicant had accrued interest on his balance. These facts in

[285] ECtHR, Scordino v. Italy, (2006), para, 116.

[286] Alain Zysset, "The ECHR and Human Rights Theory: Reconciling the Moral and the Political Conceptions", Taylor & Francis, (2016), p. 141

[287] ECtHR, Trajkovski v. the Former Yugoslav Republic of Macedonia, (2002)

conjunction with the difficult economic situation that FYROM was at the time, rendered the freezing of foreign currency accounts reasonable.

The same result was reached in other similar cases.[288] Indicatively, the case of Merzhoyev v. Russia[289], the applicant was temporarily unable to withdraw his savings deposited in the with the Grozny branch of the Chechen Savings Bank, which constituted a part of the USSR Savings Bank. During the period when the applicant's funds were unavailable, his savings had significantly depreciated because of inflation. The ECtHR accepted the Russian's Government argument that in light of the difficulties encountered by the Russian Government because of the hostilities in the Chechen Republic, the limitations imposed on access to deposits was in the general interest. It therefore proceeded to examine if the principle of proportionality (fair balance) was met. In this note, ECtHR noted that the applicant's inability to make use of his deposits was of a temporary nature, having lasted just over two years,[290] while the applicant could also be reimbursed for the losses incurred due to inflation. Given those factors, ECtHR found a fair balance had been struck between the general interest of the community and the applicant's property interests. Thus, it concluded that the interference was justified and proportional.

On the contrary, a violation of the right to property was found to exist in the case of Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia.[291] The facts of the said case are similar with the Trajkovski v. the Former Yugoslav Republic of Macedonia case. In particular, the applicants, citizens of Bosnia and Herzegovina, maintained foreign currency bank deposits with Banks in the Socialist Federal Republic of Yugoslavia. Following the fragmentation of the Socialist Federal Republic of Yugoslavia, foreign-currency deposits, deposited before the fragmentation, were frozen, until the successor States could come to an understanding as to which State would be liable to repay them to domestic banks and to what percentage. Regretfully the negotiations between the successor states failed in 2001 while the applicants' deposits remained frozen. ECtHR recognised that there was an interference with applicants' possession and, although it recognised that the freezing of the deposits occurred for the general interest, nonetheless it concluded that there was a breach of Article 1 of Protocol 1, as a fair balance was not struck. Indeed, ECtHR noted that the fact that the applicants could not access and freely dispose their deposits for more than 20 years was a disproportionate burden on the applicants.

Similarly, in Zolotas v Greece case,[292] ECtHR concluded that there was a breach of Article 1 of Protocol 1 of ECHR in a slightly different set of facts, which however, related to bank deposits' retention. In particular, the said case referred to a

[288] See indicatively, ECtHR, Gayduk and Others v. Ukraine, ECtHR (2002) and ECtHR, Appolonov v Russia, (2002)

[289]ECtHR, Merzhoyev v. Russia, (2009)

[290] ECtHR, Merzhoyev v. Russia, (2009), para 56

[291] ECtHR Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia, (2014)

[292] ECtHR, Zolotas v Greece, 2 (2013)

depositor with the General Bank of Greece, whose claims in relation to his account, including the claim to withdraw his deposits, was time-barred, due to a statute of limitation established by the Greek civil code for all civil claims. ECtHR noted that the time-barring of the applicant's claims vis a vis his own account was an interference with the applicant's possessions under the first sentence of the first paragraph of Article 1 and proceeded to examine if it served the general or public interest. Agreeing with the Greek Government's argument, ECtHR noted that the twenty-year limitation period for civil claims was justified on public interest, namely to maintain certainty in the interests of the community, by terminating legal relationships that were created so long before that their existence was now uncertain.[293] However, given the special trust relation between a bank and the holder of a bank account, ECtHR maintained that Greece had a positive duty to require banks to notify account holders of dormant accounts prior to the expiration of the limitation period and hence allow them to stop the completion of the limitation period. Thus, failure to uphold such duty placed an excessive and disproportionate burden on the applicant not reaching a fair balance between the general interest and the interference with the applicant's possessions.

It therefore becomes clear from the examination of the above caselaw that ECtHR primarily examines the effect and the burden imposed on individuals by the measure in question, by taking into account factors such as the extent of the interference and its duration, as well the availability and the extent of any compensatory measure. Additionally, ECtHR examines the objective pursued by the measure and examines whether in its application the measure is grossly disproportionate to the measure's aim.[294]

In light of the above case law, in examining whether the Cyprus haircut constituted a violation of Art.1 of Protocol No. 1, ECtHR would first examine which of the three rules of Article 1 to apply.[295] As evidenced, in the majority of the cases mentioned above the Court proceeded to apply the first rule. This is also likely for depositors in Bank of Cyprus, where depositors received a form of compensation in the form of shares in the Bank, while further the retention of funds accrues interest and is for a specific period. In the case of Cyprus Popular Bank where there was a forced sale of the Banks' assets, it is more likely that ECtHR will use the second rule, although as advised the burden of proof of expropriation is high.

Following its determination that there was an interference with or deprivation of possessions, ECtHR will first examine if the measures taken were in the public or general interest. As explained above, states enjoy a wide margin of appreciation to determine what constitutes public or general interest and ECtHR will challenge such determination only if it is "manifestly without reasonable foundation".[296] In the case

[293] ECtHR, Zolotas v Greece, (2013) 2 para 48

[294] ECtHR, X v. Austria, (1978), para 30

[295] Although, as ECtHR has indicated in the case of Beyeler v. Italy (2000), these three rules should not be viewed in isolation, but rather as forming one concept of property protection

[296] ECtHR, Grainger and others v. UK, (2012), para 39

of Cyprus, considering that the sudden collapse of the two biggest banks in Cyprus would have had devastating implications on the entire banking sector in Cyprus, as well as the Cypriot economy, an aim in the public interest is likely to succeed. This was also found in the case of Ledra Advertising v Commission and ECB,[297] where the CJEU examined this issue under the EU Charter of Fundamental Rights.

The question therefore arises if a fair balance was stuck between the public interest to safeguard the economy and the banking system, and the interference sustained by depositors in Bank of Cyprus and Cyprus Popular Bank.

In relation to Bank of Cyprus, ECtHR will examine the restriction, whether it was absolute or not, the duration of the restriction, and the possibility for full compensation of the investors. As stipulated above, the restrictions were not absolute, they lasted for approximately one year and, as the deposits were converted into shares, investors may in time get full compensation plus interest. All this considered, it is the author's view that the haircut does not constitute a disproportionate burden on depositors in breach of Article 1 of Protocol No. 1.

This might also be the case for the shareholders of Bank of Cyprus and CPB who saw the majority of their shares be eradicated. Indeed, in Grainger and other v. the UK[298], ECtHR dealt with a similar case, i.e. the nationalization of Northern Rock bank following its collapse and default. Following the nationalization, England introduced a compensation scheme for investors, which took into account the actual situation of the said Bank and more specifically the fact that the Bank could only sustain its operations on account of the very extensive financing by public institutions. On this basis, the independent valuer arrived at the conclusion the value of the shares of the investors in the said Bank was zero and that therefore no compensation would be awarded to the shareholders. ECtHR endorsed the approach and rulings of the English Courts, dismissing the case. As per the ECtHR, states, in the context of banking and financial crises enjoy a wide margin of appreciation in setting macro-economic policy and in the resolution of Banks.[299] To this end, the ECtHR concluded that the parameters for compensation of investors fell within the state's margin of appreciation.

For uninsured depositors in Cyprus Popular Bank on the other side, the case is more complicated. What is clear is that the case will be decided based on whether a fair balance was struck between the public interest objective to safeguard the banking system and ultimately the economy, and the losses sustained by uninsured depositors that in certain cases reached 80%.[300] It is difficult to assess how the ECtHR will rule,

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[297] C-8/15 (Ledra Advertising v Commission and ECB), [2016], CJEU

[298] ECtHR, Grainger and others v. UK, (2012), para 40.

[299] Michael Waibel, ECHR leaves Northern Rock shareholders out in the cold, EjilTalk! (2012), available at https://www.ejiltalk.org/echr-leaves-northern-rock-shareholders-out-in-the-cold/, accessed 27 July, 2017

[300] A. Makris, 'Cyprus Finance Minister: Uninsured Laiki Depositors Could Face 80% Haircut | Greekreporter.Com' (Greece.greekreporter.com, 2017) <http://greece.greekreporter.com/2013/03/27/cyprus-finance-minister-uninsured-laiki-depositors-could-face-80-haircut/> accessed 27 July 2017.

but, to the author's view, that ECtHR will not limit its analysis to the extent of the loses sustained by depositors and the limited compensation warded to them by means of shares in Bank of Cyprus, but it will also examine the inherent risk assumed by all depositors in case of insolvency of the banking institution[301] and the imminent and detrimental implications of the unregulated collapse of Cyprus Popular Bank. ECtHR will, as in the case of Northern Rock Bank, examine the position of depositors had the state not intervened. In such case, as Cyprus Popular Bank was insolvent already before the State's intervention and there was no specific regime for insolvency of banking institutions, had the State not intervened, the Cyprus Company Law, Cap. 113 would apply. Under the latter, the order for distribution of the assets in a winding up is the following: 1) the costs of the winding up; 2) preferential debts, such as ELA and government debts; 3) any amount secured by a floating charge; 4) the unsecured ordinary creditors; and 5) any deferred debts.[302] Hence, depositors, as unsecured creditors, would, in all likelihood, still sustain a very significant haircut in their deposits this way. Hence, it is the author's view that ECtHR would not find a breach of Article 1 of Protocol 1 even in the case of Cyprus Popular Bank.

C. Right of Due Process (Art.6 and Art.13 ECHR)

Another potential legal argument that could be raised by depositors affected by the Cyprus haircut stems from the right of due process. The said right relates to depositors' legitimate expectations, it the sense that, prior to any interference with their rights, the properly established and sanctioned rules, and procedures should be followed. The concept of due process includes two distinct rights, namely the right to a "fair trial" and the right to an "effective remedy",[303] which although are regulated by two different articles of the ECHR, nonetheless they are closely related. These are discussed here successively.

C.1 Fair Trial

The right to a fair trial under Art.6 (1) ECHR, provides that: "In the determination of his civil rights and obligations […] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]". Article 6 therefore aims to create a procedural guarantee in relation to the determination of civil and criminal rights, by setting a framework of procedural safeguards during the judicial process.

As evident from its wording, the said Article applies to everyone, namely both individuals and legal persons.[304] It, however, applies only in cases pertaining to

[301] See mutatis mutandis ECtHR Mamatas and Others v Greece, (2016)

[302] A. Neocleous in the chapter "Cyprus" in Bruce Leonard, Cassels Brock & Blackwell LLP Getting the Deal Through: Restructuring & Insolvency, 2015,

[303]http://www.humanrights.is/thehumanrightsproject/humanrightscasesandmaterials/comparativeanalysis/therighttodueprocess/process/

[304] M. Emberland, *"The Usefulness of Applying Human Rights Arguments in International Commercial*

criminal or civil rights. The latter term is autonomously defined by the ECtHR, which although will consider the classification of rights in national law, nonetheless it will not be bound by it. Indicatively, under ECtHR's caselaw, proceedings, which would come under "public law" in national law, could still fall within the scope of Article 6(1) provided they have a decisive impact on private rights.[305] This is the case for the retention and haircut on deposits that have an important impact on property rights. Hence, depositors' rights affected by the Cyprus haircut would be deemed as "civil rights" for the purposes of Art. 6.[306] Thus, depositors should be granted access to be heard by an independent, impartial tribunal, in public, and within a reasonable amount of time.[307]

Reviewing whether the above safeguards were met in the Cyprus haircut we should take into account that, despite the assurances by the Cypriot Government for the formation of a special judicial body/tribunal comprised of financial law experts that would deal with the depositors' claims in a comprehensive and time efficient manner, no such tribunal has been formed. Furthermore, as indicated above, the Supreme Court of Cyprus had, on July 7th, 2013, rejected the judicial review petitions of depositors ruling that the judicial review proceedings are outside the scope of its provisional jurisdiction, as the said decrees do not fall in the ambit of public law, but that of private law. Thus, according to the Supreme Court depositors could only pursue their rights by means of civil lawsuits before the District Courts, turning against Cyprus Popular Bank, Bank of Cyprus and/or the Central Bank of Cyprus and/or other authorities of the Republic of Cyprus for breach of contract and/or tortuous acts.

However, even before the Cyprus haircut, Cypriot District Courts were notoriously known for the delay in hearing the cases and issuing judgements.[308] In fact, Cyprus has several times been found to have violated Articles 6 and 13 of the ECHR due to the long delays in the award of its justice system[309] and was due to this placed under the supervision of the ministerial Committee of the Council of Europe. Therefore, it comes as no surprise that, on account of the large number of suits filed in conjunction with the Cyprus haircut, along with the fact that Cyprus Courts are understaffed, depositors' claims filed in 2013 have still not been heard, although more than 4 years have passed since the filing of such claims. It is therefore questionable if

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Arbitration – A Comment on Arbitration and Human Rights by Alexander Jaksic," Journal of International Arbitration. 355, 361 (2003).

[305] 'Guide on Article 6 Of The European Convention On Human Rights' (http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf, 2017) <http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf> accessed 1 August 2017.

[306] Although, in Ferrazzini v. Italy, ECtHR (2001), ECtHR concluded that taxation, although it intervenes with private rights, nonetheless it continued to constitute part of the hard-core prerogatives of the public authorities acting in the exercise of their public powers and therefore Art. 6 was in admissible.

[307] Article 6: The right to a fair trial - Equality and Human Rights" N.P., published at August 9th, 2014 available at <http://www.equalityhumanrights.com/sites/default/files/documents/humanrights

[308] Corina Demetriou, The impact of the crisis on fundamental rights across Member States of the EU, Country Report on Cyprus, European Parliament, Directorate General for Internal Policies (2015)

[309] See indicatively Clerides and Kynigos v. Cyprus, ECtHR (2006)

such timeframe can be deemed "reasonable", as there aren't any set timeframes laid down by the ECtHR. Instead, each case is evaluated separately based on several criteria, as follows: (i) the complexity of the case; (ii) the behaviour of the applicant; (iii) the behaviour of the national (judicial) authorities; and (iv) whether there is a reason for special diligence.[310] Notably, each factor should be examined separately, but the cumulative effect of such factors should also be taken into account.[311]

Generally, however, as it was stipulated in the case of Dumanovski v the Former Yugoslav Republic of Macedonia "the workload in the national Courts cannot be considered as a factor that can excuse the protracted length of the proceedings'.[312] In addition, in cases where the subject matter of the case is of particular importance to the applicant, as is the case here, where the accounts of many depositors entailed their lifetime savings, the Courts are required to act more promptly to avoid being in violation with Art.6.[313] Hence, it is questionable if a timeframe of more than 4 years for the issuance of a judgement in first instance and possibly 8 years until the issuance of the appeal judgement could be deemed reasonable, but depositors must wait until the exhaustion of all legal remedies before they can make such a claim.[314]

It is here worth noting that in February 2010 the Cypriot Parliament adopted Law on Effective Remedies for violation of rights in civil rights and duties' proceedings within reasonable time, No. 2(1)/2010, which provides that aggrieved parties whose civil or administrative claims have been delayed beyond a reasonable time at any level of jurisdiction, may institute a complaint for such delay before the Supreme Court, regardless if the proceedings are still pending. Although the law has not been widely used to date, nonetheless the Supreme Court in the case of Maria Prokopiou v. General Attorney of Cyprus[315] found that 7 years for the completion of the proceedings in question was reasonable time. Clearly, this would not be binding for the ECtHR, which will decide the case on the basis of the aforementioned set criteria.

[310] Ejtn.eu. (2004). The Right to a Fair Trial: effective remedy for excessively lengthy proceeding. [online] Available at: http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20and%20Access%20to%20Justice%20Seminar/KUIJER_Martin_Presentation_Krakow_2013.pdf [Accessed 5 Nov. 2017]. See also ECtHR, Frydlender v. France, (2001)

[311] DJ Harris, M O' Doyle, C Warbrich, Law of the European Convention on Human Rights, (2009) p.223

[312] ECtHR, Dumonovski v the former Yugoslav Republic of Macedonia (2005), Para 45; ECtHR, Docevski v The former Yugoslav Republic of Macedonia (2007), Para 34, see however DJ Harris, M O' Doyle, C Warbrich, supra in page 282 where they argue that an unexpectedly large number of claims should be taken into account.

[313] Grabenwarter, Europaeischen Menschenrechtskonvention (European Convention of Human Rights), 2nd edition, p.313

[314] See mutatis mutandis Vlad and Others v. Romania, ECtHR (2013)

[315] Maria Prokopiou v. General Attorney of Cyprus, Supreme Court, (2015)

C.2 Effective Remedy under Article 13 ECHR

Article 13 ECHR aims to safeguard the rights and freedoms of the ECtHR by ensuring that there are available remedies, at national level, that can enforce the substance of such rights at the domestic legal order.[316] As evident, Article 13 aims to increase protection offered to nationals in case of violation of the rights protected under ECHR in the sense that, in case an individual has an arguable claim as the victim of a violation of the rights set forth in ECHR, he should have access before a national authority in order to have his claim decided and, if appropriate, to obtain effective redress.[317] The said Article embodies the principle of subsidiarity, as it provides that states should be the ones that should initially protect ECHR's rights through their national authorities.[318] Such authority need not be a judicial authority, but should the said authority not be judicial then the powers and the guarantees, which are afforded to it would be considered in determining whether the remedy before it is effective.[319]

To determine if an available remedy is in fact effective, several factors should be taken into account, including the nature of the right,[320] the availability of other rights and the level of compensation.[321] However, as per ECtHR's caselaw a civil action for monetary actions against the State will be deemed effective remedy, provided that such action is not restrictive due to high cost, low speed, lack of reasoning and difficulties in execution.[322]

In the case of the Cyprus Haircut, depositors could once again refer to the long duration of the proceedings, especially in light of the subject matter of the cases being an interference with deposits, that is the most immediate form of property and for some depositors, such deposits were their lives' savings. As stated, the determination of such claim, will vary on numerous factors, including the complexity of the case, so the findings of ECtHR vis a vis Art. 6 will have a bearing on this claim as well.

Additionally, depositors in Cyprus Popular Bank could also argue lack of effective remedy based on the fact that following the aforementioned judgement of the Supreme Court, depositors could only resort to civil proceedings which, however, can only award pecuniary damages and not lead to the cancellation of the haircut. Given than Cyprus Popular Bank, no longer has any assets (as same were sold via the Decrees, whose legality cannot be challenged) any order by the national court for restitution would have little opportunities for enforcement (provided the Court rules

[316] Annabel Lee, Focus on Article 13 ECHR, Judicial Review, 20(1), (2015)
[317] Silver and 0thers judgment, Series A no. 61, p. 42, § 113
[318] A. Mowbray, 'Subsidiarity And The European Convention On Human Rights' (2015) 15 Human Rights Law Review, p. 314
[319] See e.g. ECtHR, Silver V. the United Kingdom, (1983)
[320] Clare Ovey and Elizabeth Wicks, The European Convention on Human Rights, Oxford Publishing, (2009) p. 390
[321] M. Kuijer, 'The Right To A Fair Trial And The Council Of Europe's Efforts To Ensure Effective Remedies On A Domestic Level For Excessively Lengthy Proceedings' (2013) 13 Human Rights Law Review, p.284
[322] See ECtHR, Mostaccioulo Giusepe v. Italy, (2006)

that only Cyprus Popular bank breached its contractual obligations). Similarly, in the case of Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia,[323] ECtHR decided there was a breach of Art. 13, inter alia, due to the fact that the old Ljubljanska Banka no longer had any assets in Croatia to satisfy depositors' claims. Still however the latter case was substantially more complicated, while at present, as per the Supreme Court's judgment, depositors may also turn against the Republic of Cyprus, as the latter has, through the issuance of the Decrees, led to the potential violation of the contractual terms.

Based on the above, perhaps depositors' strongest argument would before breach of the right of equality. This is the right we now turn to.

D. Right of Equality

The right of equality is set at Art.14 ECHR which provides that there shouldn't be any discrimination "*on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*" vis a vis "*the enjoyment of the rights and freedoms set forth in [the] Convention".* As evident from the above, Art.14 is directly linked with the rights regulated in ECHR and cannot be raised on its own, i.e. for rights and freedoms not protected by the ECHR, but only in conjunction with the other substantive rights provided for in the ECHR. In fact, failure to refer to the relevant substantive right will lead to the claim being rejected as being manifestly ill founded.[324] That being said, ECtHR has been willing to extend the ambit where Art.14 applies, noting that Article 14 is an "autonomous" provision, which can be violated even where the substantive article relied upon to invoke Art. 14 has not been violated.[325] In the Belgian Linguistic case[326] the Commission referred to its opinion of 24th June 1965, where it was stipulated that, although Article 14 is not at all applicable to rights and freedoms not guaranteed by the Convention and Protocol, its applicability *"is not limited to cases in which there is an accompanying violation of another Article".*[327]

In the Belgian Linguistic case, ECtHR also noted that discrimination is meant as a difference in treatment between persons in comparable positions in the context of the exercise of rights set out in ECHR, with "no reasonable and objective justification".[328] To this end, the first step in determining if there has been a

[323] ECtHR, Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia, (2014)
[324] ECtHR,Silih v. Slovenia, (2003).
[325] ECtHR Belgian Linguistic, (1968) A6, and see O'Connell, Rory, Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR, Legal Studies, Issue No. 2, 2009. Available at SSRN: http://ssrn.com/abstract=1328531
[326] Belgian Linguistic case supra
[327] Belgian Linguistic case supra, p. 33, see also Frédéric Edel, The Prohibition Of Discrimination Under The European Convention On Human Rights (Council of Europe Publ 2010), paragraph 18
[328] Belgian Linguistic Case, paragraph 10.

discrimination is to establish if there is a comparator, i.e. a person in an analogous position. This can sometime be obvious, while in other cases it can be less direct. In the latter cases, for ECtHR to establish if and who is the comparator, it will examine the justification of the measure or treatment in question.[329] Secondly, it must be examined if there is a less favorable treatment of the claimants vis a vis the comparator on grounds of discrimination. ECtHR has also followed an extensive approach on the grounds of discrimination, given the Article's reference to "other status". Based on this wording, the list of grounds referred to in Article 14 are deemed only indicative and ECtHR has referred to other grounds for discrimination, such as indicatively, fatherhood on rebuttable presumption,[330] sexual preferences,[331] health[332] etc.

Such difference in treatment, however, will not always be prohibited. Indeed, a difference in treatment can be justified if two conditions are met. Firstly, the state demonstrates that the difference in treatment stems from a rational and reasonable policy.[333] Secondly, the difference in treatment strikes a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by ECHR.[334] It is here worth noting that the ECtHR has stipulated in several occasions that states enjoy a margin of appreciation "in assessing whether differences in otherwise similar situations justify a different treatment in law".[335] The extent of such margin of appreciation will be examined by ECtHR based on the "circumstance, the subject-matter and its background".[336]

Based on the above, in the context of the Cyprus haircut Art. 14 can be invoked in relation to the right of property (Art.1 of Protocol No.1) and the right to equality of arms and due process (Art.6) even if no violation of these Articles exists. In particular, Art.14 reinforces and guarantees the rights set in the ECHR extending the states' obligations for action or inaction. In this case, Article 14 read in conjunction with Art.1 of Protocol No. 1 requires each Contracting State not only to secure the enjoyment of the right to property, but also to secure such right for everyone without discrimination. The same is true for Article 14 read in conjunction with Art. 6, which requires that all parties to a dispute, without discrimination, will be given equal opportunity to present their views and arguments.

[329] See e.g. ECtHR, Ismailova v. Russia, (2004)
[330] ECtHR, Paulik v. Slovakia, (2007)
[331] ECtHR, Salguerro da Silva Mouta v. Portugal, (2003)
[332] ECtHR, V.A.M v. Serbia, (2007)
[333] Steven C Greer, The European Convention On Human Rights (Cambridge Univ Press 2008), p. 43
[334] Steven C Greer, The European Convention On Human Rights (Cambridge Univ Press 2008), p. 43
[335] Stubbings and Others v. The United Kingdom, ECtHR (1996) see also Oddný Mjöll Arnardóttir, Equality and Non-Discrimination Under the European Convention on Human Rights, Martinus Nijhoff Publishers (2003), p. 39
[336] ECtHR, Rasmussen v. Denmark, (1984), A 87, paragraph 40.

D.1. Right of Property in conjunction with the Right of Equality in the context of the Cyprus Haircut

The Cyprus haircut poses significant issues for possible discriminatory treatment of investors for two reasons.

Primarily, in accordance with the Decree No. 103 "Bailing-in of Bank of Cyprus Public Company Limited Decree of 2013," dated March 29, 2013, certain Cypriot public facilities would not be subject to the terms of the bailout. Such specifically exempted depositors included Credit Institutions, Insurance companies, Public Authorities (the Cypriot government, municipalities, municipal councils and other public entities), domestic financial auxiliaries; charitable institutions and schools/educational institutions.[337] Adding to the discriminatory treatment between investors, none of the €10 billion in bailout funds from Troika was used to assist the recapitalization of the Bank of Cyprus. Instead, the shareholders (many of them former Cyprus Popular Bank depositors), bondholders, and depositors exceeding €100,000 born the entire burden of recapitalization.[338] Additionally, depositors in other local banks, but also depositors in the Greek branches of the two affected banks, Bank of Cyprus and Cyprus Popular Bank, were not subjected to any haircut. The above cases will be separated and presented separately to better examine if discrimination has taken place.

a) **Exempted Account Holders**

Primarily, we need to examine whether the exempted account holders were in analogous situations with depositors whose deposits were subject to the haircut and if the latter sustained less favorable treatment. In this respect, it is important to note that exempted accounts were similar in nature with the accounts maintained by all other affected account holders and were opened with the same standard bank forms and under the same terms. Furthermore, the former Governor of the Central Bank has declared

"*Possibly, with the inclusion of other groups of depositors who are excluded from the conversion process of uninsured deposits to shares in financial, accounting terms, this involves the transfer of additional liabilities on the balance sheet of the Bank of Cyprus. This creates more financial obligations,"...."For every additional exemption, while the contribution of uninsured depositors increases*".[339]

Therefore, since the accounts' terms were the same for all account holders, there are no reasons to assume the exempted account holders were not in analogous

[337]'Central Bank of Cyprus' (Centralbank.gov.cy, 2013) <http://www.centralbank.gov.cy/media/pdf_gr/BankofCyprus_GR_Diatagma.pdf> accessed 5 November 2017.See also "Cyprus Bailout Revisited," *The Wall Street Journal*, May 7, 2013. *See also,* "ECB conflicted by Cyprus bail-in," *Centralbanking.com*, August 12, 2013.

[338] "Cyprus Bailout Deal: at a Glance," *The Guardian*, March 25, 2013.

[339] http://www.enet.gr/?i=news.el.article&id=356197

situations with all other account holders.[340] Hence, it appears, that there is a prima facie case of discrimination on social or political grounds, especially in light of ECtHR's position not to insist strictly on the formal requirement to demonstrate the comparator.[341]

Therefore, we should examine if this discrimination can be justified by a rational and reasonable policy. It is important to note here that, unlike Articles 8-11 of the ECHR where "public interests" are used as a defense/immunity ,"rational and reasonable policy" in the context of Article 13 is used as an element in determining whether the practice in question constituted discriminatory treatment.[342]As per the Minutes of the Plenary Session of the Cyprus Parliament when adopting Law 17(I)/2013, the reasoning for these exceptions was none other than the very nature of these account holders having a public or a quasi-public function, or being part of specific very sensitive groups (like the survivors of the Helios accident).[343] Hence, the exception was put in place on grounds of social policy, to shield these public institutions and minimize any further loss of the Cypriot Government that would otherwise have to intervene to financially assist these institutions.

As per ECtHR in cases involving economic or social strategy, states enjoy a wide margin of appreciation.[344] Indicatively, in the case Darby v. Sweden,[345] ECtHR noted that Art. 14 shall not in any way impair a State's right to enforce such rights as it deems necessary to control the use of property for the general interest. In this context, state practice will be decisive as to whether there is common state practice considering measures as the ones in question as discriminatory. Where there is no uniform state practice, ECtHR will rarely consider a particular treatment as being "discriminatory" rather than "different" to the extent that some plausible connection with a legitimate policy objective can be identified.[346] At present, there is little, if any, state practice in similar circumstances, especially between the member states of the Council of Europe. Of course, in other cases involving different treatment between private and public or non-governmental functions, ECtHR has been willing

[340] Although the CJEU in the case of T 79-13 (Alessandro Accorinti and Others v European Central Bank) [2015] found that ECB served a public purpose and was therefore not in comparable situation with private investors that pursued private profit.

[341] Oddný Mjöll Arnardóttir, "Multidimensional Equality from within, Themes from the European Convention on Human Rights" in Dagmar Schiek, Victoria Chege "European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law" (2009), p. 60

[342] Nicolas F Diebold, 'Standards of Non-Discrimination in International Economic Law' (2011) 60 International and Comparative Law Quarterly.

[343] See the Minutes of the Parliament's Plenary Session of 21 and 22 March 2013 available at http://www2.parliament.cy/parliamentgr/008_01_01/008_01_IB.htm

[344] See ECtHR, Carson and Others v. the United Kingdom, (2010) as well as Oddný Mjöll Arnardóttir, "Discrimination as a magnifying Lens", in Eva Brems, Janneke Gerards "Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights" Cambridge University Press (2013), p. 345

[345] ECtHR, Darby v. Sweden, (1988),

[346] Steven Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights International, Journal on Minority and Group Rights, (2009), 16, p.13

to find there was a rational and reasonable policy justifying the difference in treatment.[347] Therefore, to the extent that the stability of the banking and financial system as well as social policy are legitimate objectives, a rational and reasonable policy would most likely be found.

Lastly, ECtHR will examine if a fair balance was stricken, by examining the additional burden sustained by the affected depositors due to the exemption of the certain depositors from the haircut. Given the relatively small number of exempted depositors and the large number of affected depositors who collectively sustained the additional contribution, it is likely that ECtHR will consider a fair balance was stricken. Therefore, it is the author's view that ECtHR will determine that the exemption is not discriminatory, but only a different treatment.[348]

b) Account holders in Greek branches of BOCY and Cyprus Popular Bank

We shall now examine the difference in treatment between depositors of Cyprus Popular Bank and Bank of Cyprus in Cyprus and depositors of the same banks in Greece.

At the time of the Cyprus Banking haircut, the total amount of deposits found in the Greek branches of the two affected Banks amounted to €15 billion, while the equivalent number of deposits in the two Banks in Cyprus did not exceed €26 billion. Hence, approximately 1/3 of the deposits of the two Banks were located in branches in Greece, which if included in the haircut could have contributed roughly €3bn.[349] Despite, however this fact and despite that the said Greek branches had more liabilities in comparison to the Cyprus branches, deposits in the Greek branches of the affected Banks did not participate in the haircut. Instead, the branches were sold to the Greek Piraeus Bank free from any liabilities (including ELA).

Therefore, the question arises if depositors in Greece and depositors in Cyprus are in analogous situations. In other words, the question is if depositors from Greece and depositors from Cyprus that have deposited their funds in the same banks and under similar terms, can be considered to be in comparable positions. The answer would appear to be in the positive and given that deposits with the Greek branches of Bank of Cyprus and Cyprus Popular Bank were shielded from the bank levy and instead depositors in Cyprus had to bear a bigger haircut on their deposits to compensate the approximately 3 billion that were lost, depositors in Cyprus sustained a less favorable treatment. Thus, once again there is a prima facie case of discrimination.

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[347] See indicatively Iglesia Bautista 'El Salvador' and Ortega Moratilla v. Spain, App. No. 17522/90 (1992)

[348] As stated in the Belgian Linguistics case (Case "Relating to certain aspects of the laws on the use of languages in
education in Belgium" v. Belgium ECtHR (1968)) difference and discrimination are two distinct notions and a difference in treatment is not necessarily discriminatory, provided a reasonable and objective basis can be found

[349] Louis Christophides, Sofronis Clerides, Alex Michaelides, and Marios Zachariadis, A better deal for Cyprus
(2013) available at http://homepages.econ.ucy.ac.cy/~mzachari/A%20better%20deal%20for%20Cyprus.pdf

As stated, ECtHR would now proceed to examine if there is a rational and reasonable justification for the difference in treatment. However, this case is different than in the case of exempted depositors. At present, affected depositors from Cyprus could claim that the discrimination was based on grounds of nationality. Discrimination on grounds of nationality is deemed as a suspect reason, in the sense very "weighty reasons" would need to be demonstrated to ECtHR for the latter to come to the conclusion that the difference in treatment based solely on nationality is not a discrimination.[350]

The said sale took place to safeguard the fragile Greek Banking Sector, as the potential fled of funds from Greek Banks could have systemic consequences for the entire Eurozone.[351] Hence, Cyprus could in this case demonstrate that there was a rationale and reasonable justification that in light of the imminent risk of collapse of the Cyprus and Greek financial system with spillover effects to the entire EU. Additionally, in light of this catastrophic consequences, fair balance between the interests of the community and respect for Cyprus depositors' property rights appears to have been met. The statement of the Cyprus Central Bank is indicative in this respect: "*the sale of the branches of the three Cypriot banks in Greece had been set by the Troika as a condition for the approval of Cyprus's financial support programme. If the Cypriot government had not agreed to this sale, the negotiations with the Troika for the finalisation of the Memorandum of Understanding would have been terminated, with the consequent disorderly collapse of the financial system and of the country itself*".[352] Hence, in light of the above it appears there are weighty reasons to rule that there was no discrimination.

The ECtHR would thereafter proceed to explore if a fair balance was struck between the protection of the interests of the community by the protection of financial stability in the EU and the avoidance of the systemic risk on the one hand, and the respect of the affected depositors' rights to property. As indicated, had the account holders of Greek branches participated in the bail-in, the haircut would less by 3 billion Euros, which amount is significant. Again, however, it is the authors' view that the ECtHR would rule that a fair balance was reached in light of the extreme financial situations, as was the ECtHR's ruling also in the Mamatas v. Greece case, presented in Chapter 3.

V. Conclusion

Although four years have passed since the events of the Cyprus Banking Crisis in March 2013, depositors are still trying to find restitution. Indeed, several depositors

[350] Gaygusuz v. Austria, ECtHR (1996), see also Frans Pennings, "Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?", Utrecht Law Review, (2013) Vol. 9 (1), p. 121

[351] Andrew Duff, 'Cyprus Débâcle: Commission And ECB Reply To My Questions' (Andrew Duff - On Governing Europe, 2013) <https://andrewduff.blogactiv.eu/2013/05/14/replies-to-the-questions-by-the-members-of-the-econ-commitee/> accessed 1 August 2017.

[352] http://www.centralbank.gov.cy/nqcontent.cfm?a_id=12677&lang=en

have during the Cyprus Banking Crisis sustained significant loses reaching up to 80% of their deposits and despite these significant loses, depositors have still not been able to find compensation.

Depositors have to date resorted to several forums. In particular, they have resorted to national courts in the Republic of Cyprus, CJEU, arbitration tribunals and are getting ready to resort to ECtHR. What is common in all these proceedings brought to date is that depositors, in one way or another, have relied to human rights considerations as a basis for their claims and have to date been unsuccessful to demonstrate a breach has occurred.

In this Article, I have examined depositors' main arguments that may be put forward before the ECtHR and examined how the latter is likely to rule on these arguments, based on its previous caselaw. The main arguments I have recognised, pertain to potential violations of the right to property (Article 1 of the 1st Protocol of the ECHR), the right to a fair trial (Art. 6 ECHR), the right to an effective remedy (Art. 13 ECHR) and the right to non-discrimination (Art.14 ECHR). However, none of these Articles awards absolute protection. Instead, protection awarded by such rights may be subject to limitations. Such limitations can be justified on grounds of general or public interest to the extent that a fair balance is struck between the interests of public as a whole and that of the individual. As I have demonstrated in this paper, in times of extreme financial crisis, as was the Cyprus Banking Crisis, the scale is more likely to weight in favour that a fair balance was reached, despite the significant and often catastrophic implications, that a measure as the Banking Haircut, can have on the individual depositors.

To this end, it is the author's view that neither ECtHR will grant depositors affected from the Cyprus haircut the restitution they aspired. Which therefore begs the question, are depositors in such cases unsecured, have they no available recourse?

Regretfully, for depositors in Bank of Cyprus and Cyprus Popular Bank, the answer may sadly be yes. That stated, the European Union recognising this vacuum in depositors' protections has started to put into places mechanisms to avert similar cases like the one that led to the Cyprus Banking Crisis, like the European Banking Union, including the Single Resolution Mechanism and the aspired European Deposit Insurance Scheme (EDIS). It is the authors' view that for such specialised economic crisis, specific regulations need to be in place to safeguard depositors' rights as human rights may not be adequate for such occasions.

References (2018)

Books and Journals

Aida Grgiæ, Zvonimir Mataga, Matija Longar and Ana Vilfan, A guide to the implementation of the European Convention on Human Rights and its protocols, European Council, Human rights handbooks, No. 10, European Council

Andreas Neocleous in the chapter "Cyprus" in Bruce Leonard, Cassels Brock & Blackwell LLP Getting the Deal Through: Restructuring & Insolvency, 2015,

Blundell, A., & Slovik, P. (2010). A Market Perspective on the European Sovereign Debt and Banking Crisis. *OECD Journal*. Retrieved 25 August 2014, from http://www.oecd.org/greece/46970598.pdf

Christos Rozakis, The right to property in the Case Law of the European Court of Human Rights, Athens Property Day, January 2016

Economic Crisis in Europe: Causes, Consequences and Responses. (2014). EUROPEAN ECONOMY 7|2009. BU24, B-1049 Brussels, p.4. Retrieved from http://ec.europa.eu/economy_finance/publications/publication15887_en.pdf

EU (2008). "Declaration on a concerted European action plan of the eurozone countries", October 10, 2008, Available at www.ue2008.fr

Gikas A. Hardouvelis, Overcoming the crisis in Cyprus Eurobank Economy and Markets Volume IX, 2014 European Banking Authority, Recommendation on the creation of temporary capital buffers to restore market confidence, (2011)

Human Rights Council, The effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social, and cultural rights, UN Doc. A/HRC/RES/20/10, 18 July 2012, operative Para. 2.

Laurent Sermet, The European Convention on Human Rights and property rights, Volume 88, Council of Europe Press, 1998

Matthias Haentjens, Bob Wessels, "Research Handbook on Crisis Management in the Banking Sector". Edward Elgar Publishing (2015)

Marius Emberland, "The Usefulness of Applying Human Rights Arguments in International Commercial Arbitration – A Comment on Arbitration and

Human Rights by Alexander Jaksic," Journal of International Arbitration. 355, 361 (2003).

Clare Ovey and Elizabeth Wicks, The European Convention on Human Rights, Oxford Publishing, (2009)

Corina Demetriou, The impact of the crisis on fundamental rights across Member States of the EU, Country Report on Cyprus, European Parliament, Directorate General for Internal Policies (2015)

DJ Harris, M O' Doyle, C Warbrich, Law of the Eupopean Convention on Human Rights, (2009)

Frans Pennings, "Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?", Utrecht Law Review, (2013) Vol. 9 (1)

Grabenwarter, Europaeischen Menschenrechtskonvention (European Convention of Human Rights), 2nd edition,

Louis Christophides, Sofronis Clerides, Alex Michaelides, and Marios Zachariadis, A better deal for Cyprus (2013) available at http://homepages.econ.ucy.ac.cy/~mzachari/A%20better%20deal%20for%20Cyprus.pdf

Maurice Mendelson QC and Dr Martins Paparinskis, 'Bail-Ins and The International Investment Law Of Expropriation: In And Beyond Cyprus' [2013] Butterworths Journal of International Banking and Financial Law.

Nicolas F Diebold, 'Standards of Non-Discrimination in International Economic Law' (2011) 60 International and Comparative Law Quarterly.

Oddný Mjöll Arnardóttir, "Discrimination as a magnifying Lens", in Eva Brems, Janneke Gerards "Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights" Cambridge University Press (2013).

Oddný Mjöll Arnardóttir, "Multidimensional Equality from within, Themes from the European Convention on Human Rights" in Dagmar Schiek, Victoria Chege "European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law" (2009).

Stavros A Zenios, "Fairness and reflexivity in the Cyprus bail-in" Empirica, Springer (2016), Volume 43, Issue 3, pp 579–606.

Steven C Greer, The European Convention On Human Rights (Cambridge Univ Press 2008),

Steven Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights International Journal on Minority and Group Rights 16, 2009

Steven Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights International, Journal on Minority and Group Rights, (2009),

Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale L. J. 443, 459 (2001)

Tom Allen, Property and The Human Rights Act 1998, Hart Publishing (2005),

CHAPTER THREE

Convergence and divergence between international investments law and human rights law, in the context of the Greek sovereign debt restructuring

(accepted for publication in Journal of Business Entrepreneurship and the Law, Vol. 18 to be published in February 2018)

Key Words: Sovereign Default, Greek Haircut, Debt Restructuring, Investor Protection, Human Rights, Right to Property, Equal Treatment, Mamatas and Others v. Greece, ECHR

I. ABSTRACT

International investment law developed separately from and was, for a long period, perceived as incompatible with human rights law.[353] Despite the tendency to distinguish the evolution of these two fields of international law, however, they are not completely dissimilar.[354] Inter alia, they both aim to safeguard investors' rights to property, to promote respect for due process,[355] and to address the undisputed position of power of the state against the individual.[356] In situations of sovereign default, the asymmetry between the powers of the state and the rights of investors is even more clearly demonstrated, even within the European Union.[357] Indeed, although the European Union Primary Law provides several safeguards to avoid sovereign default,[358] it does not regulate the implications if such a default occurs, leaving investors confronted with a regulatory vacuum subject to states' willingness for "collaboration."[359] Protection awarded by Investment Treaties is not always sufficient.

[353] Shannon Lindsey Blanton & Robert G. Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, 69 THE J. OF POL. 143, 143–55 (2007).
[354] *Id.* at 148.
[355] Ursula Kriebaum, *Foreign Investments & Human Rights - The Actors and Their Different Roles*, TDM 1 TRANSNAT'L. DISP. MGMT (2013).
[356] Moshe Hirsch, *Investment Tribunals and Human Rights: Divergent Paths,* HUM. RTS. IN INT'L INV. L. AND ARB. 98, 114 (Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann eds., Oxford U. Press 2009).
[357] *Id.*
[358] *See* HELMUT SIEKMANN, LIFE IN THE EUROZONE WITH OR WITHOUT SOVEREIGN DEFAULT? 13, 18–23 (Franklin Allen, Elena Carletti, & Giancarlo Corsetti eds., FIC Press 2011).
[359] *Id.* at 23.

There is considerable variation in the terms of the various Bilateral Investment Treaties (BITs) negotiated by different countries, where investors are often not covered by the applicable investment treaty.[360]

This paper explores the developments brought about by the Financial Crisis of 2007, the actions taken by Greece affecting foreign investors, and the study of human rights implications of such actions as examined in cases of debt structuring, both in human rights venues as well as in international investment tribunals.[361] This paper additionally explores how such developments can arise through the interpretation of human rights treaties, such as the European Court of Human Rights (ECtHR), in the context of investment law.[362] This article demonstrates the need for human rights law to complement investment treaties and to effectively safeguard investors' rights.[363]

II. Sovereign Debt Default and International Investment Treaties

Sovereign default, i.e., the situation where a sovereign state can no longer satisfy its financial obligations, may lead to situations where investors' rights are violated with very little or no effective remedies.[364] This has been the case for centuries, and despite several legal developments, the position of investors remains troublesome.[365]

Initially, defaulting states addressed sovereign defaults in a minimal or negligible manner, with creditors having few, if any, options for negotiations.[366] It was not long ago that states dealt with sovereign defaults as a game of "*bras de fer*,"[367] where states avoided paying their debts by resorting to opportunistic defaults.[368] Meanwhile, more powerful states occasionally resorted to exercising severe political pressure, even using force, to protect their citizens' interests jeopardized by the default.[369] Such was the case in *Venezuelan Preferential Treatment*

[360] *Id.*
[361] *See infra* Parts II–VIII.
[362] *Id.*
[363] *Id.*
[364] *See* Siekmann, *supra* note 358, at 14–15.
[365] *See id.* at 26.
[366] *See id.* 14.
[367] Michael Waibel, Sovereign Defaults Before International Courts and Tribunals, CAMBRIDGE STUDIES IN INT'L AND COMP. L. (Cambridge U. Press 2011) at 22.
[368] *See* Siekmann, *supra* note 358, at 16.
[369] *See id.*

of Claims of Blockading Powers where, following several failed attempts to settle the dispute by diplomatic negotiations, the British, German, and Italian governments declared a blockade of Venezuelan ports.[370] Similarly, in 1902, the Argentine Minister of Foreign Affairs, Luis María Drago, in a diplomatic note to the United States, argued that the public debt of Latin American states should not give rise to a right of armed intervention.[371]

The lack of adjudication, exercise of political influence, and broad immunities, both from adjudication and from enforcement enjoyed by state actors in sovereign default scenarios, act as deterrents to investment in foreign countries.[372]

Indeed, customary investment law appeared insufficient to protect and therefore attract foreign investors.[373] Thus, many states, recognizing that foreign investment could assist their economic development and growth, began adopting investment treaties to provide additional protection.[374] This led international investment law to develop into treaty law.[375] As referenced below in discussions of particular BIT provisions, the treaties in some respects appear to codify public international law.[376] One view, however, holds that there are so many BITs precisely because they derogate from otherwise prevailing standards of customary international law.[377] Ultimately, there is room for debate on the issue of whether BIT provisions strengthen customary law standards or merely codify them.[378] What *is* abundantly clear is that, even those BIT provisions that facially reiterate customary international

[370] Germany et al. v. Venezuela (Preferential Claims Case), Tribunal of the Permanent Court of Arbitration (1904).
[371] Luis M. Drago, *State Loans in Their Relation to International Policy*, 1 AM. J. INT'L L. 692 (1907); *see also* Michael Waibel, *Sovereign Defaults Before International Courts and Tribunals*, CAMBRIDGE STUDIES IN INT'L AND COMP. L. (Cambridge U. Press 2011).
[372] *See* Siekmann, *supra* note 358, at 23.
[373] Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity Of Bilateral Investment Treaties* 38 VA. J. INT'L L. 639, 660 (1998).
[374] *Id.* at 639–88 (discussing reasons why especially developing States began adopting BITs).
[375] *Id.* at 652.
[376] Patrick Dumberry, *Are BITs Representing The 'New' Customary International Law In International Investment Law?* 28 PA. ST. INT'L L. REV. 675, 675–701 (2010).
[377] Paul Peters, *Investment Risk and Trust: The Role Of International Law*, INT'L L. & DEV., 131, 153 (1988).
[378] Andrew T. Guzman, *Saving Customary International Law* 161–63 (UC Berkeley Public Law Research Paper 2005); *see also* Bernard Kishoiyian, *Utility of Bilateral Investment Treaties In The Formulation Of Customary International Law* 14 NY J. INT'L L. & BUS. 327 (1993).

law have a greater impact on state capacity to enforce human rights, in practice, than customary law doctrines.[379]

III. Sovereign Debt Default and Human Rights

Around the same time as the rapid development of BITs, international human rights law began to grow significantly and obtained international recognition. This significant metamorphosis primarily manifested itself in the recognition of negative rights that awarded protection against abuses of state power impacting individual and group rights. The development of negative rights can be viewed as analogous to the way investment treaties set certain substantial and procedural guarantees limiting state interference with investment.[380] Of course, the scope of protection of human rights law is much broader than that of investment law; still, however, these fields of law can intertwine.[381]

While the clear majority of International Investment Agreements (IIAs) are silent on the way human rights and investment rights may be functionally intertwined, there are some examples in which human rights issues are raised in investment treaties.[382] In particular, we can broadly divide existing IIAs into two eras: pre-1990 and post-1990.[383] Pre-1990 IIAs, which comprise about one-third of the total IIAs, are solely focused on investor rights, while the majority of the post-1990 IIAs make some

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[379] *See generally* Stephen M. Schwebel, *Investor-State Disputes and the Development of International Law: the Influence of Bilateral Investment Treaties on Customary International Law*, 98 AM. SOC'Y INT'L L. PROC. 27 (2004); Steffen Hindelang, *Bilateral Investment Treaties, Custom and a Healthy Investment Climate: The Question of Whether BITs Influence Customary International Law Revisited*, 5 J. WORLD INV. & TRADE 789 (2004); Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 COLUM. J. TRANSNAT'L L. 123 (2003).

[380] Kathryn Gordon, Joachim Pohl & Marie Bouchard, Investment and human rights – Investors rights and human rights – interactions under investment treaty law Blogs.lse.ac.uk (2014), http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/investors-rights-and-human-rights-interactions-under-investment-treaty-law-by-kathryn-gordon-joachim-pohl-and-marie-bouchard/ (last visited Dec 1, 2017).

[381] Marc Jacob, International Investment Agreements and Human Rights, INEF Research Paper Series on Human Rights - Corporate Responsibility and Sustainable Development 10 (Mar. 2010) http://humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf.

[382] *See generally* Marc Jacob, *International Investment Agreements and Human Rights*, *in* INEF Research Paper Series: Human Rights, Corporate Responsibility And Sustainable Development 9 (2010) (discussing how IIAs can address the issue of human rights in two ways: (1) by providing express provisions outlining the state's duty to protect and promote human rights, which is accomplished through the policy provisions or regulatory and enforcement clauses; or (2) by including specific provisions mandating the observance of human rights standards commonly found in other international human rights instruments).

[383] *Id.*

reference to human rights.[384] Of course, other multilateral investment treaties, like the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT), make no reference to human rights at all.[385] This raises the question of whether it is possible to regulate, directly or indirectly, the human rights aspects of foreign investors' conduct under human rights treaties.

This article explores the ways in which human rights considerations can be used by, and against, investors within the framework of the Greek Default.[386] This article further demonstrates how, given the lack of binding international rules on debt restructuring and the wide discretion enjoyed by states in this framework, a consistent interpretation of human rights norms may prove to be a sustainable protection tool for private investors in sovereign debt restructuring workouts.[387]

IV. The Factual Background of the Greek Default

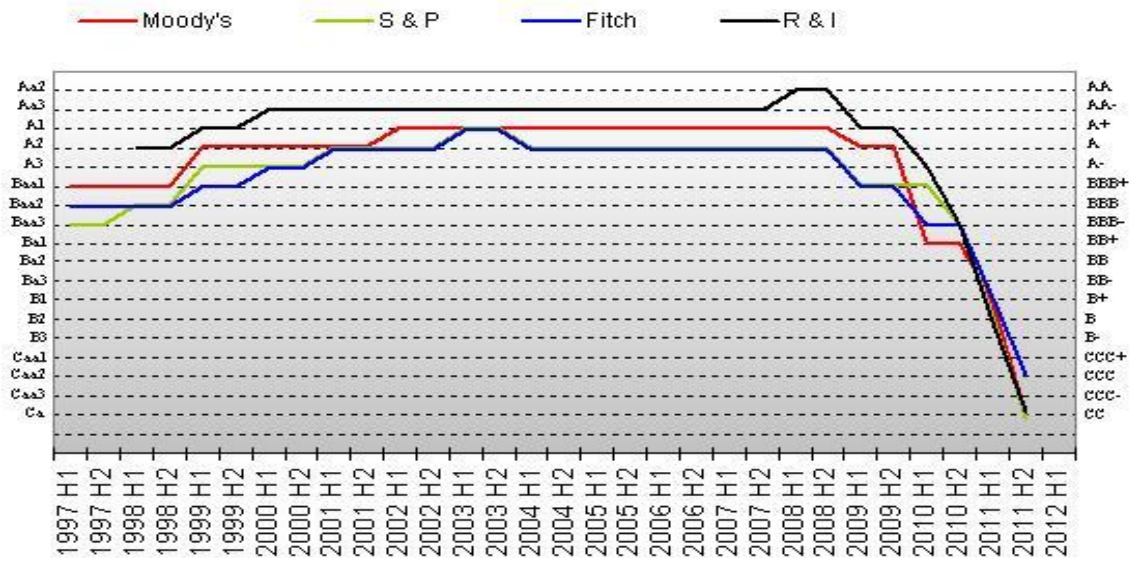
IV(A). The Greek Financial Crisis

IV(A)(1). The Economic Situation in Greece

The Greek government has a long history of problems with its public debt.[388] However, in 2009, the Greek debt increased by an additional EUR 34 billion, delivering the final blow to the Greek economy.[389] By the end of 2009, the Greek economy faced the second highest deficit in percentage of GDP in the EU with an astonishing -13.6%, just behind Ireland, whose relevant rate was a dismal -14.3%.[390] These existing and rising debt levels led to elevated borrowing costs, resulting in a severe economic crisis.[391] Undoubtedly, the situation was exacerbated by individual institutions and other speculators that profited from the economically turbid

[384] Howard Mann, *International Investment Agreements, Business and Human Rights: Key Issues and Opportunities*, INT'L INST. SUSTAINABLE DEV., 11 (2008).
[385] C. Reiner, C. Schreuer, 'Human Rights in International Investment Law and Arbitration', Human Rights in International Investment Law and Arbitration (Oxford Publishing 2009), p. 83
[386] *See infra* Parts I–III, and *supra* Parts IV–VII.
[387] *Id.*
[388] Matthew Lynn, Bust (Bloomberg Press 2013).
[389] Nicos Christodoulakis, 'Crisis, Threats And Ways Out For The Greek Economy' (2010) 4, Cyprus Economic Policy Review, p.90
[390] *See Provision of Deficit and Debt Data for 2009 - First Notification*, EUROPEAN COMM'N, http://ec.europa.eu/eurostat/documents/2995521/5046142/2-22042010-BP-EN.PDF/0ff48307-d545-4fd6-8281-a621cbda385d (last visited June 28, 2017).
[391] Chris O'Malley, Bonds Without Borders (John Wiley & Sons 2014), p.223

climate.[392] The case of the Greek Government Bonds (GGBs) is indicative of this challenging environment. In late 2009, GGBs faced continuous rating downgrades by the three major credit rating agencies, namely Standard and Poor's, Moody's, and Fitch.[393] Greece's rating suffered an unprecedented downgrade to "junk status," the lowest rating possible.[394]



Source: Greek Public Debt Management Agency

It bears mentioning that before the crisis, the ten-year GGB yields were ten to forty basis points above German ten-year bonds; during the crisis, in January 2010, the spread increased to 400 basis points.[395] The graph below further demonstrates the variation of GGB's spreads in relation to the German bond spreads.

[392] Stathis N Kalyvas, Modern Greece (Oxford University Press 2015), p 175

[393] Stathis N Kalyvas, Modern Greece (Oxford University Press 2015). 175

[394] 'Greece Debt Downgraded To Junk Status By Moody's' (Cbsnews.com, 2010) <https://www.cbsnews.com/news/greece-debt-downgraded-to-junk-status-by-moodys/> accessed 2 December 2017.

[395] *See* Ian Chua, *Fiscal Woes To Dog Greek Bonds Even If Aid Offered*, REUTERS, http://www.reuters.com/article/2010/03/22/us-markets-bonds-peripheral-analysis-idUSTRE62L3XB20100322 (last visited June 28, 2017).

GGB's Spreads, 1993-2011

Spreads on ten-year GGBs relative to ten-year German Bonds (%)

Source: Global Financial Data, http://www.globalfinancialdata.com/index.html

Greece's total debt as of the end of April 2010 was approximately EUR 319 billion.[396] During that same year, Greece consequently turned to both the EU and the International Monetary Fund (IMF) for financial assistance.[397] The EU delayed making any commitment because there was an unwillingness by individual member states to support such an extraordinary undertaking.[398] Also, at the time, the Maastricht Treaty did not provide for any crisis management mechanism, and thereafter, it did not predict the possibility of bailing out a member state that was saddled with high external debt.[399]

Finally, the EU and IMF constructed a bailout package, and on May 2, 2010, the Eurogroup agreed to provide Greece with bilateral guarantees pooled by the European Commission totaling EUR 80 billion to be disbursed over the period May 2010 to June 2013.[400] The financial assistance provided by the European Economic and Monetary Union (EMU) member states was part of a joint package, with the IMF

[396] Lee C. Buchheit and G. Mitu Gulati, 'How To Restructure Greek Debt' (2010) Paper 47 Duke Law Working Papers, p.1

[397] 'Financial Assistance To Greece' (European Commission - European Commission, 2014) <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece_en> accessed 2 December 2017.

[398] Michelle Cini and Nieves Pérez-Solórzano Borragán, European Union Politics (Oxford University Press 2016), p.371

[399] Thiess Buettner and Wolfgang Ochel, The Continuing Evolution of Europe (The MIT Press 2012), 2

[400] 'Financial Assistance to Greece' (European Commission - European Commission, 2014) <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece_en> accessed 2 December 2017.

financing an additional EUR 30 billion under a standby arrangement.[401] Furthermore, in an attempt to prevent the spread of the financial crisis to other member states, in June 2010, EU leaders created a new European mechanism and fund, the European Financial Stability Facility (EFSF), to provide financial assistance for EMU member states with severe financial problems.[402] The EFSF consisted of two temporary, three-year lending facilities capable of loaning a total of EUR 500 billion.[403] EU leaders also suggested that the IMF could provide additional support.[404]

The Greek economy has since been almost exclusively supported by the bailout mechanism; primarily on account of the fear that a possible Greek default could contaminate the banking and financial system of other EU member states.[405] As time has passed, however, the situation in Greece has remained largely unaltered, despite the measures taken by the Greek government, and the Greek deficit has remained perilously high.[406] This ongoing problem precipitated decisions in relation to the haircut of the Greek debt.[407]

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[401] *The Economic Adjustment Programme for Greece: Third Review - Winter 2011*, EUROPEAN COMM'N (2011), http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp77_en.pdf.

[402] Rodrigo Olivares-Caminal, 'The EU Architecture To Avert A Sovereign Debt Crisis' (2012) 2011 OECD Journal: Financial Market Trends.

[403] REBECCA M. NELSON, PAUL BELKIN, & DEREK E. MIX, CONG. RES. SERV., GREECE'S DEBT CRISIS: OVERVIEW, POLICY RESPONSES, AND IMPLICATIONS11 (2010).

[404] 'Financial Assistance To Greece' (European Commission - European Commission, 2014) <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece_en> accessed 2 December 2017.

[405] Vítor Constâncio, 'Contagion And The European Debt Crisis' (European Central Bank, 2011) <https://www.ecb.europa.eu/press/key/date/2011/html/sp111010.en.html> accessed 2 December 2017.

[406] 'Financial Assistance To Greece' (European Commission - European Commission, 2014) <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece_en> accessed 2 December 2017.

[407] 'Financial Assistance To Greece' (European Commission - European Commission, 2014) <https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece_en> accessed 2 December 2017.

IV(A)(2). The Way to the Haircuts

In mid-2011, Greek debt reached approximately 150% of its GDP, an unsustainable figure.[408] At this debt level, even if Greece succeeded in fully cutting its public sector deficit resulting in public sector surpluses, its then current debt level could not be wholly financed from the surplus, even at a relatively low interest rate of 5%.[409] This implied that the yearly interest could not be fully paid from the surplus and would result in increases of the accumulated debt.[410] As such, it was necessary for Greece to continue with severe measures in consideration of being granted loans to satisfy its current needs and pay off its debts.[411] Therefore, Greece could no longer remain at its fiscal status quo.

It became increasingly apparent that the solution for Greece was to restructure its debt; preferably through a voluntary exchange of old debt with new debt—otherwise known as a "haircut."[412] Previously considered to be a taboo, echoes of the word "haircut" began to be heard more loudly in connection with Greek debt.[413] A haircut, i.e. a debt restructuring, is a renegotiation between a state and its creditors whereby the creditors agree to accept less than what they would be entitled on the fear of default.[414] A haircut may often involve a reduction of interest rates and/or principal and the extension of a repayment period.[415] In relation to the reduction of principal

[408] IMF, 'PRELIMINARY DEBT SUSTAINABILITY ANALYSIS— UPDATED ESTIMATES AND FURTHER CONSIDERATIONS' (Imf.org, 2016) <https://www.imf.org/external/pubs/ft/scr/2016/cr16130.pdf> accessed 2 December 2017.

[409] Nicholas Economides, 'The Greek Crisis, Why Bankruptcy Is A Bad Option, And Why Leaving The Euro Is The Worst Option' (Stern School of Business, New York University 2012) <http://www.stern.nyu.edu/networks/Economides_Greek_Debt_Crisis_02122012.pdf> accessed 2 December 2017.

[410] Nicholas Economides, 'The Greek Crisis, Why Bankruptcy Is A Bad Option, And Why Leaving The Euro Is The Worst Option' (Stern School of Business, New York University 2012) <http://www.stern.nyu.edu/networks/Economides_Greek_Debt_Crisis_02122012.pdf> accessed 2 December 2017.

[411] Nicholas Economides, 'The Greek Crisis, Why Bankruptcy Is A Bad Option, And Why Leaving The Euro Is The Worst Option' (Stern School of Business, New York University 2012) <http://www.stern.nyu.edu/networks/Economides_Greek_Debt_Crisis_02122012.pdf> accessed 2 December 2017.

[412] Kevin Gallagher, 'Restructuring Greece's Debt Crisis | Kevin Gallagher' (the Guardian, 2011) <https://www.theguardian.com/commentisfree/cifamerica/2011/jul/05/greece-debt-crisis-default> accessed 2 December 2017.

[413] 'Greek Debt Restructuring No Longer Taboo' (Fin24, 2011) <https://www.fin24.com/Economy/Greek-debt-restructuring-no-longer-taboo-20110522> accessed 2 December 2017.

[414] Sue Wright, The Handbook Of International Loan Documentation (Palgrave Macmillan 2014)..

[415] Sue Wright, The Handbook Of International Loan Documentation (Palgrave Macmillan 2014).

and interest rates, a review of recent haircuts revealed on balance a post-default recovery rate of between 50% and 70%.[416] Greece was no exception to the rule. Indeed, although it was initially announced that there would be a 21% haircut, an additional 50% haircut followed soon thereafter.[417]

4(A)(2)(1). The First Haircut

Despite the initial bailout package and the many revenue-raising measures adopted in Greece, the Greek debt was simply too sizeable to be satisfied.[418] By the end of June 2011, Greece's total debt was approximately EUR 353,693 billion out of which approximately EUR 283,000 billion was in the form of bonds while the remaining EUR 70,693 billion corresponded to debt on account of loans.[419] It is important to note that up to Greece's entrance in the bailout mechanism, the largest share of Greek public debt (about 75% of the total stock) had been held by foreign banks.[420] These banks were mostly German and French and were combined with mutual funds, pension funds, hedge funds, and other categories of investors who also owned GGBs.[421] However, thereafter the allocation of Greek debt changed significantly.[422] The EU, IMF, and the European Central Bank (ECB) currently hold a significant proportion of Greek Government bonds, but European banks continue to be major holders of non-Greek bonds while a few GGBs have fallen into the hands of individual, non-institutional, investors; though this number is relatively small.[423] The largest holders of GGBs up to December 2011 are presented in Appendix 2.[424]

Given the conditions above, the risk of financial contagion to other EU countries and the implications of a possible unregulated Greek insolvency led to the

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[416] Russian restructuring haircuts were in the range of 45%–63%; Ukraine non-resident 30%–56%; Pakistan 31%; Ecuador 27%; Argentina 42%–73%; Uruguay external debt 13% and domestic 23%, see Adrian Blundell-Wignall and Patrick Slovik, 'A Market Perspective On The European Sovereign Debt And Banking Crisis' (2011) 2010 OECD Journal: Financial Market Trends, p.13

[417] Georgios Karyotis and Roman Gerodimos, The Politics Of Extreme Austerity (Springer 2015), p.21

[418] *See infra* Appendix No. 1.

[419] *See* Greek Ministry of Finance, *June 2011 Debt Report*, EUROPEAN COMM'N, http://ec.europa.eu/economy_finance/sgp/deficit/countries/greece_en.htm (last visited Sept. 10, 2017).

[420] CPIS in Costas Lapavitsas et al. The Eurozone Between Austerity and Default (2010)

[421] CPIS in Costas Lapavitsas et al. The Eurozone Between Austerity and Default (2010)

[422] Josephine Vanden Broucke and Ralf Drachenberg, 'Extraordinary European Council Meeting On Greece, 12 July 2015' (European Parliamentary Research Service Blog, 2015) <https://epthinktank.eu/2015/07/11/12-july-extraordinary-european-council-meeting-on-greece/> accessed 2 December 2017.

[423] *See infra* Appendix No. 2.

[424] *Id.*

Agreement of July 2011 (the Agreement), when the second Greek bailout package of up to 109 billion was concluded between the heads of state or governments of the Eurozone and the EU institutions.[425] The Agreement was presented as the final solution to the Greek financial crisis and consequently Europe's financial crisis.[426] It provided for the lengthening of the maturity of future European Financial Stability Facility's (EFSF) loans to Greece to the maximum extent possible—from the current 7.5 years to a minimum of fifteen years and up to thirty years with a grace period of ten years—and at the same time for the substantial extension of the maturities of the existing Greek facility.[427]

In addition, GGB bondholders were also called upon to accept partial repayment of their owed sums and to calculate a 21% Net Present Value (NPV) loss for all products based on an assumed discount rate of 9%.[428] The net contribution of the private sector was estimated at EUR 37 billion.[429] Although the banks ultimately agreed to the haircut voluntarily, they stated that they would not be willing to accept a further reduction.[430] However, this haircut was too small to effectively assist in accommodating Greece's debt and/or solving Greece's credit problems.[431] As such, little time passed before the Agreement was questioned and subsequently revised.[432]

4(A)(2)(2). The Second Haircut

Because all previous measures had essentially failed, Eurozone leaders finally agreed on a structured Greek default wherein bonds would lose 50% of their value

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[425] *See Statement by the Heads of State or Gov't Of The Euro Area and EU Institutions*, COUNCIL OF THE EUROPEAN UNION (July 21, 2011), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/123978.pdf

[426] *Id.* at 6.

[427] *See The European Council in 2011*, EUROPEAN COUNCIL (Jan. 2012), http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/QCAO11001ENC.pdf.

[428] *See* Press Release, Institute of International Finance, Press Release of the IIF Board of Directors (July 21, 2011), http://webcache.googleusercontent.com/search?q=cache:Q12Sor3NZUgJ:www.dbresearch.com/PROD/DBR_INTERNET_DE-PROD/PROD0000000000276168/IIF_Financing_Offer_for_Greece.pdf+&cd=1&hl=en&ct=clnk&gl=us; *see also* Jeromin Zettelmeyer, Christoph Trebesch & Mitu Gulati, *The Greek Debt Restructuring: An Autopsy*, DUKE U. L. SCH. 1, 6–7 *(*July 2013*),* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5343&context=faculty_scholarship.

[429] OECD Publishing, OECD Economic Surveys- Greece (Organisation for Economic Co-operation and Development 2011), p.72

[430] John Peet and Anton La Guardia, Unhappy Union (Profile Books 2014), p.37

[431] John Peet and Anton La Guardia, Unhappy Union (Profile Books 2014), p.39

[432] *See* The Associated Press, *IMF Seeks Radical Changes to EU Debt Strategy*, CBS NEWS (Oct. 5, 2011 10:58 AM), https://www.cbsnews.com/news/imf-seeks-radical-changes-to-eu-debt-strategy/.

and short and medium-term debt would be converted into a long-term debt obligation.[433] The decision was adopted on October 27, 2011, and it contained specific provisions.[434]

The Agreement called for wider Private Sector Involvement (PSI) and participation in establishing the sustainability of the Greek debt.[435] In this regard, it invited Greece, private investors, and all other parties concerned to develop a voluntary bond exchange with a minimum discount of 50% (plus 29% to the already agreed 21% haircut) on national Greek debt held by private investors.[436] As an incentive to attract private investors and especially banks, Eurozone Member States would contribute to PSI a package of up to EUR 30 billion, while the public sector would grant an additional EUR 100 billion until 2014 for bank recapitalization.[437]

The exchange required a wide PSI of approximately 85%-90% or a write-off in the order of EUR 100 billion.[438] This PSI, together with an ambitious reform program, was expected to assist Greece in reaching a debt level of 120% by 2020.[439] The Greek coalition government finally released its official proposal on February 25, 2012, asking investors to accept a haircut of approximately 53.5%.[440]

To achieve this goal, the Greek government passed the Bondholders' Law 4050/2012 ("Bondholders' Law") that introduced collective action clauses (CACs), which allowed the restructuring of the GGBs with the consent of a qualified majority of bondholders.[441] This was based on a quorum of votes representing at least 50% of bond's face value and a consent threshold of two-thirds of the face-value holders taking part in the vote,[442] i.e. a majority of more than 66.7% of the bondholders. In particular, in March 2012, the participation of bondholders in the bond exchange reached 152 billion worth of Greek law governed GGBs out of the approximately 177

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[433] *Id.*
[434] *Id.*
[435] *Id.*
[436] See *Euro Summit Statement of Ministers*, COUNCIL OF THE EUROPEAN UNION (Oct. 26, 2011), https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf.
[437] *Id.*
[438] *Id.*
[439] *Id.*
[440] Press Release, General Ct. of the EU, PRESS RELEASE No. 119/15 (Oct. 7, 2015), https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150119en.pdf.
[441] *Id.*
[442] *See* Zettelmeyer, *supra* note 428, at 11.

billion,[443] approximately 85.9%. It allowed Greece to trigger the collective action clauses—which required a two-thirds majority of bondholders—and to compel all Greek law GGB holders to consent to the terms of the bond exchange. In addition, foreign law governed GGB holders also participated in the bond exchange in a percentage of 69%.[444] As such, more than 95% of the issued GGBs participated in the bond exchange; EUR 196.7 billion worth of GGBs out of EUR 205.5 billion GGBs.[445] The remaining GGBs bondholders, approximately EUR 6.4 billion, were given until April 2012 to accept the Greek government's offer to exchange their GGBs.[446] Finally, another EUR 2,4 billion worth of GGBs were exchanged manifesting a participation percentage rate of 96.9%.[447]

Out of the total EUR 205.5 billion in eligible paper, holders of EUR 199 billion worth of bonds participated in the PSI and exchanged for:

(i) New bonds issued by the Hellenic Republic with an aggregate face value of EUR 62.4 billion—31.5% of the principal amount of the Bonds tendered for exchange;

(ii) PSI Payment Notes issued by the EFSF in two series maturing on March 12, 2013 and March 12, 2014, respectively, with an aggregate face amount of EUR 29.7 billion—15% of the principal amount of the bonds exchanged; and

(iii) Detachable GDP-linked securities of the Hellenic Republic with an amount equal to the principal amount of the new Bonds issued.[448] Following the PSI, Greece's sovereign debt was reduced by approximately EUR 107 billion or 52% of the eligible debt.[449]

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[443] Press Release, Hellenic Republic Ministry of Finance (Mar. 9, 2012), http://www.pdma.gr/attachments/article/78/9%20MARCH%202012.pdf.

[444] *Id.*

[445] *Id.*

[446] *Id.*

[447] Greece Country Study Guide: Strategic Information and Developments (International Business Publications, USA 2012), p.175

[448] *Report on the Recapitalisation and Restructuring of the Greek Banking Sector*, BANK OF GREECE (Dec. 2012), http://www.bankofgreece.gr/BogEkdoseis/Report_on_the_recapitalisation_and_restructuring.pdf.

[449] *See* Zettelmeyer, *supra*, note 428, at 13.

However, holders of EUR 6.4 billion in face value debt held out and are now being repaid in full to reduce the chances of litigation.[450]

V. Human Rights Considerations in the Case of Sovereign Defaults

5(A). Expropriation and its Impact on Foreign Investors

The act of expropriation—where a government takes a privately-owned property for public benefit—is inherently tied to property rights and is regulated both under Investment Treaties as well as Human Rights Law.[451]

Investment tribunals, when exploring the concept of expropriation, have followed a broad approach to cover interference with various economic rights.[452] Indicatively, the partial award of *Amoco International Finance v. Iran* stated, "[e]xpropriation, which can be defined as a compulsory transfer of property rights, may extend to any rights which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value."[453] The same approach was adopted in the Iran–U.S. Court Tribunal in the interlocutory award of *Starrett Housing*, where it was declared that "[i]t is a well-settled rule of customary international law that a taking of one property right may also involve a taking of a closely connected ancillary right."[454] However, IIAs do not offer absolute protection against expropriation, but they allow states to interfere with foreign investors' property rights provided that certain conditions are met.[455] Namely, the expropriation must be for a public purpose, it should be according to domestic law, and it cannot be discriminatory.[456] Additionally, prompt and adequate compensation should be paid to the investor in exchange for the interference with the rights.[457]

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[450] Jeromin Zettelmeyer, Christoph Trebesch and Mitu Gulati, *The Greek Debt Restructuring: An Autopsy,* 28 ECON. POL. 513 [page 13 on pdf document] (2013).
[451] *See generally* Amoco Int'l Fin. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 220 (1987).
[452] *Id.*
[453] *Id.*
[454] Starrett Hous. Corp. v. Iran, 16 Iran-US Cl. Trib. 112, 230 (1987).
[455] Rudolf Dolzer & Margrete Stevens, BILATERAL INVESTMENT TREATIES 114–15 (1995).
[456] *Id.*
[457] *Id.* at 97.

The same principle is reiterated in human rights' conventions at both the international level as well as the EU level.[458] However, unlike BITs that usually award protection only against expropriation, EU Law provides wider protection against any type of interference with investments.[459] Indicatively, Article 1 of Protocol No. 1 of the European Human Rights Convention (ECHR) provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws, as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.[460]

This similarity between IIAs and human rights treaties in the field of expropriation is why the decisions of the ECtHR, as well as the decisions of other regional human rights courts, are important and should be considered by investment tribunals in determining the customary international law of expropriation.[461] To this end, examining the right to property in accordance with the ECHR's Article 1 of Protocol Number 1, can assist investors both before Investment Tribunals, but can also award them an additional remedy before human rights courts such as the ECtHR.[462] We shall now turn to examine the application of Article 1 of Protocol Number 1 of the ECHR in the context of sovereign default.[463]

5(B) Expropriation in Human Rights Law

As analysed in the second Article, ECHR's Article 1, Protocol Number 1 ("Article 1") is generally interpreted to entail three rules.[464] Primarily, the first sentence of the

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[458] *See generally* European Human Rights Convention protocol 1, art. 1, March 20, 1952, http://www.refworld.org/docid/3ae6b38317.html (last visited Sep. 11, 2017).

[459] Pierre-Marie Dupuy, Francesco Francioni, Ernst-Ulrich Petersmann, Human Rights in International Investment Law and Arbitration, Oxford University Press (2009), p.239

[460] *See* European Human Rights Convention protocol 1, art. 1, March 20, 1952, http://www.refworld.org/docid/3ae6b38317.html (last visited Sept. 11, 2017).

[461] Campbell McLachlan, Laurence Shore & Matthew Weiniger, INT'L INV. ARB. 288 (2d ed. 2017).

[462] *Id.*

[463] *See infra* Part V(b).

[464] ECtHR, Sporrong v. Sweden, (1982), paras 35, 50

first paragraph is more general and it provides the right to peaceful enjoyment of one's possessions and free from the state's intervention.[465] In addition, Article 1 has been interpreted to include two more rules, namely the right not to be deprived of one's property—subject to certain conditions set out in the second sentence of the first paragraph—but also the authority of a State to control the use of property in accordance with the general interest.[466] As evident from the latter rule, not every state interference with property rights will constitute an illegal interference of the rights to peaceful enjoyment of possessions; states are free, however, to take administrative measures that may affect such peaceful enjoyment.[467]

To determine if a state measure is an unlawful interference or a lawful regulation of the right to property, the ECtHR's case law has set certain conditions.[468] Such conditions primarily require that the measure is lawful. Indeed, for any state measure interfering with property rights to be justified, the latter must be, primarily, prescribed by internal law, which is "compatible with the rule of law".[469] Although, the said requirement is expressly stated only in the second rule of Article 1 (which mentions "subject to conditions provided for by law"), the requirement is perceived as being applicable on all 3 rules, as it is based on the principle of legal certainty, one of the fundamental principles of a democratic society which is inherent in the entirety of the ECHR.[470] Additionally, for there to be a lawful interference, the measure must also be justified on grounds of "public interest."[471] Indeed, under ECtHR case law, interference is justified if it serves "a legitimate objective in the public or general interest."[472] As to what constitutes "public interest," as indicated in Article 2, states have wide discretion to determine such grounds.[473] Indicatively, in *James v. United*

[465] *Id.*
[466] *Id.* at 35.
[467] *Id.*
[468] *See generally* ECtHR, James v. U.K., (1986), paras 123, 142.
[469] ECtHR, Malone v. United Kingdom, (1984), para. 67, see also Geranne Lautenbach, The Concept of the Rule of Law and the European Court of Human Rights, Oxford University Press, (2013), p. 76
[470] Aida Grgiæ, Zvonimir Mataga, Matija Longar and Ana Vilfan, A guide to the implementation of the European Convention on Human Rights and its protocols, European Council, Human rights handbooks, No. 10, European Council (2007), p.12
[471] *Id.*
[472] *See James*, 8 Eur. Ct. H.R at 142.
[473] *Id.*

Kingdom, the ECtHR argued that such determination will be challenged only in the case that it is "manifestly without reasonable foundation."[474]

Public or general interest alone, however, will not suffice. The ECtHR has many times reiterated that when a state's administrative powers interfere with the peaceful enjoyment of one's possessions, a fair balance must be struck between the demands of the general interest of the community and the protection of property rights.[475] Indeed, in addition to serving the public or general interest, the interference needs to also be proportional in the sense that there needs to be "a reasonable relationship of proportionality between the means employed and the aim sought to be realized."[476] Hence, the interference will not be proportional when the individual property owner is made to bear "an individual and excessive burden".[477]

5 (B) (1) Greek Government Bonds as Possessions

Before examining whether takings of resources and property in times of sovereign default, especially in the Greek Haircut, constitute a violation of Article 1 of Protocol Number 1 ECHR (Article 1), we need first to establish what constitutes possessions under Article 1. The concept of possessions has been broadly interpreted within the ECtHR's jurisprudence, so as to include not only the right of ownership, but also a whole range of pecuniary rights, including all acquired rights.[478] These include rights arising from shares,[479] patents,[480] arbitration awards, established entitlements to a pension, entitlements to rent, and even rights resulting from running a business,[481] provided the object of possession may be precisely defined. In *Pine Valley Developments Ltd v. Ireland*,[482] the ECtHR held that even a "legitimate expectation" that a certain state of affairs will occur constituted a component of the property and

[474] *Id.* at 123.
[475] *Sporrong*, 5 Eur. Ct. H.R. at 52.
[476] *James*, 8 Eur. Ct. H.R. at 142.
[477] Aida Grgiæ, Zvonimir Mataga, Matija Longar and Ana Vilfan, A guide to the implementation of the European Convention on Human Rights and its protocols, European Council, Human rights handbooks, No. 10, European Council (2007), p.13
[478] Dirk Ehlers, EUROPEAN FUNDAMENTAL RIGHTS AND FREEDOMS 132, 132–33 (2007).
[479] Bramelid v. Sweden, App. No. 8588/79, 5 Eur. Comm'n H.R. Dec. & Rep. 249 (1982).
[480] Kline v. Netherlands, App. No. 12633/87, 66 Eur. Comm'n H.R. Dec. & Rep. 70 (1990).
[481] AIDA GRGIĆET AL., THE RIGHT TO PROPERTY UNDER THE EUROPEAN CONVENTIONS ON HUMAN RIGHTS: A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS PROTOCOLS (June 2007), http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-10(2007).pdf.
[482] Pine Valley Developments Ltd. v. Ireland, 16 Eur. Ct. H.R. 379 (1992).

was, therefore, eligible for protection under Article 1. A "legitimate expectation", however, should be interpreted narrowly, must have a more concrete nature than a mere hope, and must be based on a legal provision or a legal act.[483]

In the recent case of *Mamatas*,[484] the ECtHR examined how the application of Collection Action Clauses (CACs) can interfere with an applicant's property right by converting bonds into instruments of lesser value without consent. The applicants argued that the Bondholders' Law unilaterally introduced CACs and that the CACs' forcible conversion of their bonds to notes of lesser nominal value constituted a violation of Article 1 taken alone or in conjunction with Article 14 of the ECHR.

To determine the applicability of Article 1 of Protocol 1, the ECtHR first examined whether GGBs constitute "possessions," although the parties did not dispute this. The legal nature of GGBs is that of contractual loan agreements where investors pay the state the nominal value of a bond in exchange of repayment of that nominal value plus interest at a specified date in the future. Under this construction, bondholders may legitimately expect payment of the bonds on the repayment date, at which time unpaid dates would constitute enforceable debts. In this regard, although many GGBs were not due at the time of the Greek Haircut, GBBs would fall under the concept of "possessions," as contemplated under Protocol Number 1 of the ECHR, since bondholders had a legitimate expectation to receive payment of the bond value plus interest.[485]

Indeed, in *Mamatas*, the ECtHR noted that bonds "are tradeable in stock markets, they can be transferred from one bearer to the other, [and] their value depends on various factors," but at the end of the day, "upon maturity, bonds are expected to return their nominal value."[486] Based on this reasoning, the ECtHR concluded that GGBs are in fact possessions. This view was also upheld in the former ECtHR case of *Fomin and Others v. Russia* in 2013.[487] It should be noted, however, that one could argue that at the time of the Greek Haircut, Greece was already in a default, and as such, investors' claims against Greece could hardly give rise to legitimate expectations that the debt would be repaid considering insolvency is one of

[483] Pressos Compania Naviera S.A. v. Belgium, 21 Eur. Ct. H.R. 301 (1996).
[484] Mamatas v. Greece, App. No. 63066/14, Eur. Ct. H.R. (2016).
[485] ECtHR, Stran Greek Refineries v. Greece, (1994).
[486] ECtHR, Mamatas v. Greece, (2016).
[487] ECtHR, Fomin v. Russia, (2013); *see also* Malysh v. Russia (2010); Tronin v. Russia, (2010); Lobanov v. Russia, (2010); Andreyeva v. Russia, (2012).

the risks inherent in any investment."[488] Based on this reasoning, as there were no legitimate expectations to be protected, it could be argued that there were no possessions.

5 (B) (2) Greek Haircut Interfering with Possessions?

Having determined that GGBs do constitute "possessions," we turn to whether the Greek Haircut constitutes arbitrary interference with such possessions. To this end we first examine the ECtHR's findings in *Mamatas*.

5 (B) (2a) The Court's Reasoning in Mamatas v. Greece

The applicants in the *Mamatas v. Greece* case claimed that the unilateral amendment of the terms regulating their GGBs via law the Bondholders' Law 4050/2012, and the subsequent forcible conversion of their bonds based on CCAs, was tantamount to expropriation.[489] The ECtHR agreed that the conversion was imposed without their consent, and was, therefore, an interference with their right of peaceful enjoyment of their property under the first rule.[490] The ECtHR, however, held that this, in and of itself, was not necessarily an illegal interference in breach of Article 1,[491] nor did it automatically amount to expropriation. Indeed, ECtHR rejected the applicants' argument that the conversions were tantamount to expropriation under the second rule, noting that the unilateral amendment of the GGBs' terms did not constitute a deprivation of bondholders' property, as investments in sovereign bonds are inherently risky investments whose value fluctuates per market's risks.[492]

Thereafter, the ECtHR proceeded to examine whether the above measures were justified on grounds of public interest. In line with the margin of appreciation doctrine, the ECtHR concluded that the PSI aimed to maintain economic stability and restructure Greece's sovereign debt in a time of great economic recession, therefore, acting in the general interests of the public.[493]

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[488] Matthias Goldmann, HUMAN RIGHTS AND SOVEREIGN DEBT WORKOUTS (Apr. 9, 2014), https://ssrn.com/abstract=2330997 or http://dx.doi.org/10.2139/ssrn.23309977.
[489] *See Mamatas*, App. No. 63066/14, Eur. Ct. H.R.
[490] *Id.*
[491] *Id.*
[492] *Id.*
[493] *Id.*

Lastly, the ECtHR examined the conversion considering the principle of proportionality and concluded that the "haircut" sustained by the applicants was not large enough to amount to a legislative "termination of or an insignificant return" on their investment.[494] It was noted that the value of the bonds after the conversion should not be compared to their previous nominal value, since it does not represent the bond's real monetary value on the date of the introduction of Law 4050/2012.[495] Instead, the ECtHR ruled that there was no violation of Article 1 because the significantly reduced monetary value of the bonds on such date should be taken into account as means of comparison.[496]

5 (B) (2a) Analysis of the Court's Reasoning in Mamatas v. Greece

Now we examine whether the ECtHR's aforementioned reasoning was well founded.

We shall primarily examine if the ECtHR's finding that there was no expropriation, was in line with ECtHR's previous caselaw. Under Article 1, for an expropriation of property to have occurred, a total deprivation of property is needed.[497] In other words, expropriation involves the direct transfer of a property title from the owner to a public body or another private individual.[498] Alternatively, ECtHR has also recognized the possibility of de facto expropriation,[499] that may take place when the owner is not formally expropriated, but his ability to exercise his property rights is limited in such a grave way that he factually does not have ownership anymore.[500] In the case of the Greek Haircut, there wasn't any direct transfer of ownership of GGBs to the State, hence no direct expropriation had occurred. As to whether, the introduction of CACs could be interpreted as indirect expropriation, there should not remain any possible use or economic value to the

[494] *See* ECtHR*, Mamatas* v. Greece (2016).
[495] *Id.*
[496] *Id.*
[497] Pierre-Marie Dupuy, Francesco Francioni, Ernst-Ulrich Petersmann, Human Rights in International Investment Law and Arbitration, Oxford University Press, (2009), 238
[498] Laurent Sermet, The European Convention on Human Rights and property rights, Human rights files, No. 11 rev, Council of Europe Publishing (1999)
[499] ECtHR, Sporrong v. Sweden, (1982)
[500] 'Deprivation of Property and Control of Use' (Echr-online.info, 2018) <http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/control-of-use-and-deprivation-of-property/> accessed 6 January 2018.

bondholders of Greek law governed GGBs.[501] In the present case, the GGBs maintained an economic value that still entitled investors to partial repayment of the value of the GGBs at the specified period. Hence, it seems that ECtHR was correct to determine that no expropriation had taken place.

Moving on, we shall examine if the ECtHR was correct to find that there was a justifiable interference with the property rights of bondholders. To this end, we shall examine if the introduction of CACs by the Greek Government to all Greek-law governed GGBs was lawful, in the public interest and whether a fair balance was struck.

In relation to whether the introduction of CACs was lawful, primarily we must examine if the measure was prescribed by internal law. At present, the introduction of CACs was prescribed by the Bondholders' Law, which was adopted by the Parliament and published in the Government's Gazette. However, the existence of an internal law is not sufficient to conclude the measure was lawful, but it must also be examined whether the Bondholders' Law and its provisions were stipulated with sufficient precision to enable the persons concerned to foresee, to a reasonable degree vis a vis the circumstances, the consequences which a given action might entail.[502] In the Mamatas v. Greece, ECtHR held that the Bondholders' Act, as well as all other legal texts relating to the debt restructuring, were known to the bondholders prior to the debt restructuring.[503] Additionally, ECtHR noted that the consequences of the refusal of the bond exchange were also predictable in advance and to this end ECtHR concluded that introduction of CACs and the subsequent bond exchange was lawful. However, one must note that ECtHR did not examine the fact that the Bondholders' Law was introduced only a few days before the sovereign bond exchange. Additionally, the ECtHR did not refer to the arbitral and unilateral amendment of the bond terms, that, in essence, constitute a contractual instrument, whose amendment was not foreseeable by the investors.

[501] See ECtHR, Papamichalopoulos v. Greece (1993) as well as ECtHR, Popov v. Moldavia (2005) and ECtHR, Karagiannis and others v. Greece (1993)

[502] Aida Grgiæ, Zvonimir Mataga, Matija Longar and Ana Vilfan, A guide to the implementation of the European Convention on Human Rights and its protocols, European Council, Human rights handbooks, No. 10, European Council (2007), p.13

[503] Aida Grgiæ, Zvonimir Mataga, Matija Longar and Ana Vilfan, A guide to the implementation of the European Convention on Human Rights and its protocols, European Council, Human rights handbooks, No. 10, European Council (2007), p.13

We proceed to explore if the ECtHR was right to find that the introduction of CACs served a legitimate aim in the general (public) interest. As already indicated, this is a field where States enjoy a margin of appreciation, as the definition of general and public interest may vary from country to country over time.[504] This is in line with the ECtHR's previous case law awarding broad discretion to states in determining what constitutes public interest.[505] In a similar case,[506] the ECtHR referred to the difficult financial state of the Russian Federation and noted, "[d]efining budgetary priorities in terms of favoring expenditures on pressing social issues to the detriment of claims with purely pecuniary nature was a legitimate aim in the public interest."[507] This was reiterated also in the case of Koufaki and Adedy v. Greece[508] that related to the Greek financial crises and the ECtHR stated that unless the State measure is manifestly devoid of any reasonable foundation, ECtHR will not interfere with the State's determination that it serves the public interest.

Lastly, we shall examine ECtHR's reasoning in relation to whether a "fair balance" was struck, i.e. whether the measure was proportionate. The principle of proportionality requires that there is a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective.[509] As previously stated, the ECHR has many times reiterated the need for a "fair balance" between the demands of the general interest of the community and the protection of individual property rights, when a state's administrative powers interfere with the peaceful enjoyment of property.[510]

Unlike the Court of Justice of the European Union, where the principle of proportionality can be broken down in three rules: i) the principle of suitability, ii) the

[504] Laurent Sermet, The European Convention on Human Rights and property rights, Human rights files, No. 11 rev, Council of Europe Publishing (1999), p.33

[505] Indicatively, see ECtHR *Lithgow and others v. the United Kingdom*, (1986) para. 102 where the Court noted that in light of States' direct knowledge of the society and due to the fact that decisions re nationalisation legislation usually involved issues where there was a range of opinions within any democratic society, the national authorities were in a better position to establish what was appropriate in the circumstances and had therefore a wide margin of appreciation.

[506] *See* ECtHR, *Malysh v. Russia*, (2010)

[507] *Id.*

[508] ECtHR, Koufaki and Adedy (2013)

[509] Richard Clayton and Hugh Tomlinson, The Law of Human Rights (Oxford University Press 2009). p.278

[510] *See, e.g.*, ECtHR Sporrong v. Sweden, (1982), para. 35

principle of necessity, and iii) the principle of stricto sensu proportionality[511], in determining whether a balance has been struck, the ECtHR's case law seems to examine whether a measure is "both appropriate for achieving its aim and not disproportionate thereto".[512] Indeed, the principle of stricto sensu proportionality, is rarely examined by the ECtHR.[513] Instead, in examining the test described above, ECtHR takes into account several factors, including, inter alia, "the character of the interference, the aim pursued, the nature of property rights interfered with and the behavior of the Applicant and the interfering State authorities".[514] These elements are important in examining whether a fair balance has indeed been reached.[515] Therefore, it is important to examine whether the retroactive introduction of CACs into GGBs via Law 4050/2012 meets the above proportionality test.

Primarily, we must examine if the measure is appropriate for achieving its aim. This principle is satisfied when the measure introduced to the state is causally linked with the legitimate aim pursed by it.[516] Thus, we should examine if the introduction of CACs is relevant to maintaining economic stability, as was found in the *Mamatas* case. As already indicated in the presentation of the factual background of the Greek Default, the introduction of CACs, at the very least, facilitated the achievement of a wide debt restructuring in line with the decision of October 27, 2011.[517] It therefore directly contributed to Greece receiving financial aid and in reducing its debt by about 107 billion euros. In light of the previously indicated factual background of the Greek Default and the pressing financial circumstances, the introduction of CACs and subsequent bond exchange was justifiably found appropriate.

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[511] *See* Olivier Corten, L'UTILISATION DU "RAISONNABLE" PAR LE JUGE INTERNATIONAL - DISCOURS JURIDIQUE, RAISON ET CONTRACIDTIONS 571 (1997); Jan H. Jans, *Proportionality Revisited*, 3 LEGAL ISSUES OF ECON. INTEGRATION 239 (2000).

[512] ECtHR, James v. United Kingdom (1994)

[513] Sybe A. de Vries, *Balancing Fundamental Rights with Economic Freedoms according to the Court of Justice of the European Union*, 9 UTRECHT L. REV. 1 (2013).

[514] ECtHR, Forminster Enterprises Limited v. the Czech Republic, (2009), para.75

[515] *See* Jonas Christoffersen, *Straight Human Rights Talk — Why Proportionality does (not) Matter?*, 55 SCANDINAVIAN STUD. IN L. 17 (2010).

[516] Thomas Kleinlein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, 12 GERMAN L. J. 1141, 1149 (2011).

[517] Miranda Xafa, 'Greek Debt Restructuring: Lessons Learned | VOX, CEPR'S Policy Portal' (Voxeu.org, 2014) <http://voxeu.org/article/greek-debt-restructuring-lessons-learned> accessed 2 December 2017.

Notably, however, ECtHR did not take into account the availability of alternative solutions, in the sense that there were no alternative, less onerous measures available.[518] Although, this test is not strictly interpreted, as it was indicated in *James v. United Kingdom*,[519] "the availability of alternative solutions . . . constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a 'fair balance".[520] The fact that the ECtHR did not however take this test into account is, however, understandable in this instance, that relates to complex financial measures related to Greece's economy. After all, to satisfy the above test, the State needs only to demonstrate that there are sufficient relevant reasons to justify the measure as reasonable.[521]

We therefore proceed to examine if the unilateral introduction of CACs and the subsequent bond exchange introduced in order to achieve financial stability stroke a fair balance vis a vis the losses sustained by bondholders. The principle requires courts to "scale" the objective pursued against the interference sustained by the prejudiced investors.[522] Here as well, the States enjoy a margin of appreciation, in light that State authorities are better placed to assess both the existence of the general interest and of the necessity of the restriction of the rights, in light of their direct contact with the social process of their country.[523] Still, however, such margin of appreciation is not unlimited, as this would render the protection awarded under Article 1 of the Protocol 1 illusive.[524] Hence, the essence of the rights should be guaranteed, during the exercise of the State's margin of appreciation.[525]

It would be interesting to examine how the ECtHR has dealt with large scale interference with property rights in other cases relating to extreme situations and fundamental changes. Indicatively, we may refer to the case of Broniowski v.

[518] *See Kleinlein*, *supra* note 516.
[519]ECtHR, *James v. United Kingdom*, (1994).
[520] ECtHR, James v. United Kingdom, (1994), para.51, see also ECtHR, Mellacher and other v. Austria (1989), ECtHR Blecic v. Croatia (2004)
[521] ECtHR, Sunday Times v. United Kingdom, (1992).
[522] *Id.*
[523] Aida Grgiæ, Zvonimir Mataga, Matija Longar and Ana Vilfan, A guide to the implementation of the European Convention on Human Rights and its protocols, European Council, Human rights handbooks, No. 10, European Council (2007), p.13
[524] Sebastián López Escarcena, Indirect Expropriation in International Law, Edward Elgar Publishing. (2014), p.61
[525]

Poland[526] that took place in the aftermath of the re-establishment of local self-government in Poland. The case related to an alleged failure by the Polish authorities to satisfy the applicant's compensatory claim in relation to property in Lwów (now Lviv, in Ukraine).[527] This property previously belonged to his grandmother, who was the owner at the time the area was still part of Poland, prior to the Second World War. In the aftermath of the Second World War, when Poland's eastern border had been redrawn, the applicant's grandmother, along with many other residents of the eastern provinces of Poland, was repatriated. To this end, already in 1946, Poland enacted a law providing for compensation in kind for those that had been repatriated. However, 44 years later the applicant had not yet received compensation, as due to various transfers of state owned land to local authorities, the State Treasury had insufficient land to offer such compensation.[528] ECtHR accepted that in complex political and economic situations, stringent limitations on compensation may be justified, but noted that the stringer the limitations, the more persuasive the reasons for the imposition of such limitations must be.[529] To this end, ECtHR found that the Polish State had failed to provide satisfactory justifications as to the extensive and continuous failure to implement the compensatory payments to the applicant and other eligible claimants. By the time of the hearing of the case, the applicant had received approximately 2% of the compensation's value. Hence, as the relation between the value of the property taken and the compensation paid was manifestly disproportionate, the Court found a violation of Article 1 of Protocol No. 1.

The same result was also reached in the case of Maria Atanasiu and Others v. Romania,[530] that related to the issue of restitution or compensation in respect of properties nationalised or confiscated by the Romanian State following the establishment of the communist regime in Romania in 1947. ECtHR found that the fact that the applicants had obtained no compensation for the nationalization of their property and it was uncertain when they might receive same, placed a disproportionate burden on them, in breach of Article 1 of Protocol No. 1.

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[526] ECtHR, Broniowski v. Poland (2004)

[527] *Id.*

[528] *Id.*

[529] Elizabeth Wicks, Bernadette Rainey, Clare Ovey, "Jacobs, White and Ovey: the European Convention on Human Rights", Oxford University Press (2017), p. 567

[530] ECtHR, Maria Atanasiu and Others v. Romania, (2011)

Similarly, in the case of Yuriy Lobanov v. Russia involving depreciated bond values impairing full bond redemption, ECtHR found that, while the interference was lawful and was conducted pursuant to a legitimate aim, a fair balance was not struck between the interests of the bondholders and those of the state. [531] The claim in question related to the action taken by the government of the Russian Federation to suspend payments under the 1982 state premium bonds.[532] The claim was brought after the federation enacted a series of legislative and regulatory Acts,[533] which provided for the conversion of Soviet securities, including 1982 state premium bonds, into special Russian promissory notes. Despite, however, the enactment of the said legislation already from several years, by the hearing of the case the framework had not still been established to enable the conversion.[534] ECtHR once again found that, although the radical reform of Russia's political and economic system, as well as the state of the troubled Russian economy at the time, may have justified stringent financial limitations on rights of a purely pecuniary nature, nonetheless it found that that the Russian Government had failed to adduce satisfactory justifications for non-implementing the conversion and thus not allowing applicants to get compensation.[535] This was also the finding of the ECtHR in Malysh and Others v. Russia,[536] that related to the absence of implementing regulations for redemption of a different type of Russian bonds, namely Urozhay-90, as well as in the case of Tronin v. Russia[537] and SPK Dimskiy v. Russia[538], that were also founded on the same facts.

As evident from the above cases, although ECtHR acknowledged the radical political and economic situations in the relevant states, nonetheless to examine if a fair balance was struck, the ECtHR considered if the applicants had received compensation and if the latter was satisfactory (although it was recognized that such compensation need not correspond to full market price). If no compensation was paid, the ECtHR examined whether the State had produced justifying grounds for the non-payment of satisfactory compensation. This is an important distinction between

[531] ECtHR, Yuriy Lobanov v. Russia, (2010) para 37.
[532] *Id.*
[533] *Id.*
[534] *Id.*
[535] *Id*. para 52
[536] ECtHR, Malysh and Others V. Russia (2010)
[537] ECtHR, Tronin v. Russia, (2010).
[538] ECtHR, SPK Dimskiy v. Russia (2010)

human rights law and investment law, as in the latter the measure of compensation is not taken into account to establish if an expropriation has taken place, but, instead once an expropriation has been found, the payment of compensation determines if the expropriation is legal.[539]

In the case of Mamatas v. Greece however, ECtHR did not follow those steps. Instead, ECtHR stated that bondholders could not rely on the previous caselaw and claim they received no or only nominal compensation, as one need not take into account the repayment value of the bonds at maturity, but the market value of the bonds at the time of the bond exchange, when already their market value was very low. To support this, ECtHR referred to the inherent risky nature of the bond market, due to the relatively long maturity date that may be affected by unpredictable events that can have a bearing on the State's creditworthiness. In fact, ECtHR referred to the case of the European Court of Justice, *Accorinti v. ECB,*[540]only to denote that bondholders were aware of the increased risks associated with GGBs during the financial crisis.

This is not surprising, if one takes into account ECtHR's caselaw throughout the financial crisis in the EU. As indicated in the second Article, ECtHR had taken an approach similar to that in *Mamatas* case, in the case of Dennis Grainger and others v. UK.[541] In such case, ECtHR took note that the two largest claimants were hedge funds incorporated in the Cayman Islands, that had bought their shares when the financial difficulties of Northern Rock were widely apparent. In this regard, ECtHR had resolved that the decision taken in the legislation that the former shareholders of Northern Rock should not be entitled to take the value which had been created by the Bank of England's loan was justified as "had the Northern Rock shareholders been permitted to benefit from the value which had been created and maintained only through the provision of State support, this would encourage the managers and

[539] Moshe Hirsch, Investment Tribunals and Human Rights: Divergent Paths, HUM. RTS. IN INT'L INV. L. AND ARB. 98, 114 (Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann eds., Oxford U. Press 2009).

[540] Alessandro Accorinti and Others v. European Central Bank, T-79/13, (2015)

[541] ECtHR, Dennis Grainger and others v. UK (2012)

shareholders of other banks to seek and rely on similar support, to the detriment of the United Kingdom economy".[542]

However, in the *Mamatas* case ECtHR does not specify why the repayment value of the bonds should not be taken into account, when bondholders' legitimate expectations related to that repayment price upon maturity. Similarly, it is unclear why in the previous caselaw related to bonds' depreciation, this factor was not taken into account. It is the authors' view that this is a normative determination. To support, such determination, the ECtHR denoted that Greece was in the brick of insolvency, implying the measures were taken due to economic necessity.[543] Thus, unlike previous cases, where the ECtHR did take into account the radical financial conditions, only to grant wide margin of appreciation to the state authorities, noting at the same time that the state authorities must provide solid justifications for any interference with property rights, in the case of *Mamatas v. Greece*, ECtHR viewed the financial crisis as justification.

Of course, one should take in to account, that the aforementioned cases against Russia (Lobanov, Maylysh, Tronin etc), were however characteristically different because the claims in question were brought several years after the events of radical political and economic transform. Clearly, the financial situation of the Russian Federation in 2000 was substantially different than the financial situation of Greece in 2012, when Greece was on the verge of disorderly insolvency and the measure of a bond exchange to reduce Greece's debt at that period of imminent insolvency can be more easily justified. Hence, the ECtHR's judgment in *Mamatas* would probably have been the same if the court had applied the aforementioned test.

Lastly, it is interesting to compare the *Mamatas* judgment with other cases decided by the ECtHR pertaining to the financial crisis. The case of Koufaki and Adedy v. Greece[544] is indicative in this instance. Although, the facts of that case were different relating to austerity measures adopted by the Greek Government including cuts in pensions and public servants' salaries, what is important is to review ECtHR's

[542] ECtHR, Dennis Grainger and others v. UK (2012). In fact, in the said case, the ECtHR noted that the 1500 small shareholders of Northern rock were rather misfortunate that their case was consolidated with that of the two hedge funds (!), see more Michael Waibel, "ECHR leaves Northern Rock shareholders out in the cold", EjilTalk! (2012) available at https://www.ejiltalk.org/echr-leaves-northern-rock-shareholders-out-in-the-cold/

[543] ECtHR, Mamatas and Others v. Greece, (2016) at para. 118

[544] ECtHR, Koufaki and Adedy v. Greece (2013)

stance over the financial crisis in the EU. ECtHR noted that measures taken in this context will commonly involve considerations of political, economic and social issues. Thus, State authorities enjoy a "wide margin of appreciation" in such matters. Invoking the principle of subsidiarity, the ECtHR self-limited its powers stipulating that it is not its role to make economic policy and it will, thus, not interfere with or second-guess the State's decisions, unless these are arbitrary or unreasonable.[545] This decision has been cited several times in other cases relating to austerity measures with the EU,[546] and it is the author's view that it is indicative of the ECtHR's treatment of all cases relating to the financial crisis in the EU. This is rather disappointing, if one takes into account that in times of "exceptional crisis without precedent"[547], the interferences with property rights are more common and more extreme and wide-scale and it would be in such cases where ECtHR's role would be more integral.

VI. Non-Discriminatory Treatment - Investment Law

In sovereign debt restructuring, a differentiated treatment of creditors of the same class may be necessary to achieve an optimum result during reorganization. As such, when examining cases involving breach of the treaty standard for non-discriminatory treatment, investment tribunals often find that difference in treatment is not discrimination.[548] This is so only if the discrimination is not justified by a rational policy.[549] *Occidental Exploration and Production Co. v. Ecuador* (*Occidenta*l) provides an illustration of the process followed by investment tribunals. There, Ecuador was held by the tribunal to have breached a National Treatment clause because the claimant oil company was denied the refund for value-added tax, which domestic seafood and flower producers were receiving.[550] In reaching its conclusion, the tribunal held that because each company was an exporter, they were

[545] Linos-Alexandre Sicilianos, The European Court of Human Rights at a time of crisis In Europe, SEDI/ESIL Lecture, European Court of Human Rights, (2015) available at http://www.esil-sedi.eu/sites/default/files/Sicilianos_speech_Translation.pdf

[546] *Id*.

[547] ECtHR, Koufaki and Adedy v. Greece (2013), para. 37

[548] See OECD, Fair and Equitable Treatment Standard in International Investment Law (OECD Publishing, Working Paper 2004/03 2004), http://dx.doi.org/10.1787/675702255435.

[549] *See Albania Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania,* ICSID Case No. ARB /11/24.

[550] *Ecuador v. Occidental Exploration & Prod. Co*., 2005 WL 1104120.

comparable.[551] The second step was to determine how the subjects had been treated comparatively.[552] If there was a divergence in treatment, the tribunal would then decide whether the challenged governmental action could be justified or whether the governmental action had a reasonable connection with its rational policy.[553]

VI.(A). Right of Equality - Human Rights Law

Discrimination between equally ranked creditors can also be highly contentious from a human rights perspective. The applicants in *Mamatas v. Greece* also invoked Article 14 of the ECHR (Article 14).[554] Article 14 imposes a positive duty on the state when it discriminates on grounds set forth by the ECHR or on "other status" unless the discrimination can be justified.[555] Discrimination exists when persons in relatively comparable situations are treated differently, or where individuals in incomparable situations are treated alike.[556] Indeed, in the leading case Thlimenos v. Greece,[557] ECtHR recognized indirect discrimination and inflicted a positive duty upon States to accommodate different situations. Such duty is breached, when alike treatment on persons in non-comparable situations leads to discrimination.

Protection under Article 14 cannot be raised on its own, but only within the ambit of the rights and freedoms protected by the ECHR.[558] That being said, the ECtHR has been willing to extend the reach of Article 14 and has noted that Article 14 is an "autonomous" provision which can be violated even where the substantive article relied upon to invoke Article 14 has not been violated.[559]

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[551] *Id.*

[552] *Id.*

[553] Marc Jacob*, International Investment Agreements and Human Rights*, INEF Research Paper Series on Human Rights - Corporate Responsibility and Sustainable Development (Mar. 2010) http://humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf.

[554] Rory O'Connell, *Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR*, 29 LEGAL STUD. 211 (2009).

[555] *Id.*

[556] *See* Adami v. Malta, 44 Eur. Ct. H.R. 3 (2006); Coster v. United Kingdom, 33 Eur. Ct. H.R. 20 (2001) ("The right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."). *Id.*

[557] Thlimmenos v Greece, Eur. CT. H.R (2000)

[558] *See* Janneke Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, 13 HUM. RTS. L. REV. 99 (2013).

[559] *See* O'Connell, *supra* note 555; *see also* Belgian Linguistic case (No. 2) (1968)1 EHRR 252, Eur. Ct. H.R

Evaluating an Article 14 claim is particularly difficult, as illustrated in *Stübing*,[560] and they are judged on a case-by-case basis. For a violation of Article 14 to exist, the key element is that of a difference in treatment of persons in analogous or relevantly similar situations or similar treatment of persons in non-comparable situations.[561] It must be shown that the treatment in question was less favorable than that received by other groups in "analogous situations," the identity of which will usually be determined objectively on the face of the complaint itself.[562] However, not every different treatment will be discriminatory.[563] Indeed, the State bears the burden to demonstrate that its practice was reasonable and rational in light of its policy goals.[564] The state also bears the burden of proving that the treatment was proportionate regarding the pursuit of the policy objective by striking "a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention."[565]

Accordingly, as private investors were obliged to accept the PSI (as opposed to certain public investors who were excluded from CACs and whose rights remained untouched), Article 14 may be applicable to investors in analogous situations who were treated unequally or to investors in dissimilar situations who were treated alike. The list of grounds for discrimination enumerated in Article 14 is more inclusive than it is exclusive. Article 14 has been successfully invoked in cases based on sexual orientation[566] and wedlock.[567] The ECtHR proclaimed in *Rasmussen v. Denmark*, "[t]here is no call to determine on what ground this difference was based, the list of grounds appearing in Article 14 not being exhaustive,"[568] therefore, any differentiation may fall under Article 14 ECHR, despite not being listed in the Article.[569]

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[560] *See, e.g.*, Stübing v. Germany, App. No. 43547/08, Eur. Ct. H.R. (2012).
[561] *See Gerards*, *supra* note 558.
[562] Abdulaziz v. the United Kingdom, 7 Eur. Ct. H.R. 471 (1985).
[563] *See Belgian Linguistic Case*, *supra* note 559 (stating in the case that the "difference and discrimination are two distinct notions and a difference in treatment is not necessarily discriminatory, provided a reasonable and objective basis can be found."). *Id.*
[564] *See Abdulaziz,* 7 Eur. Ct. H.R. 471, at ¶¶ 74–83.
[565] *Id.* at ¶¶ 83–86.
[566] *See*, *e.g.*, Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, 1999-IX Eur. Ct. H.R. at § 11, 28.
[567] *See*, *e.g.*, Marckx v. Belgium, (No. 31), Eur. Ct. H.R. (ser. A) (1979); Inze v. Austria, (No. 126), Eur. Ct. H.R. (ser. A) at § 41 (1987); Eur. Ct. H.R. (sec. 3).
[568] Rasmussen v. Denmark, App. No. 8777/79, 87 Eur. Comm'n H.R. (1984).
[569] Rasmussen v. Denmark, App. No. 8777/79, 87 Eur. Comm'n H.R. (1984

6(A)(1). The Right of Property in Conjunction with the Right of Equality in the Context of the Greek Haircut

We now turn to examine the application of the right of equality in the context of the Greek Default. To this end, we shall first examine the ruling of the ECtHR in *Mamatas*.

6(A)(1a). The ECtHR's Reasoning in *Mamatas* with Respect to Article 14

In *Mamatas*, the applicants contended that the same treatment toward individual investors and professional investors breached Article 14 as they were not in analogous circumstances, given individual investors' lack of detailed professional insights.[570] The ECtHR noted that, in light of the high volatility of the bond market, it was very difficult to differentiate between the various investors and to examine each investor separately.[571] This would require significant time, which was not available to Greece at the time, because of the country's urgent financial needs.[572] Secondly, the ECtHR noted that laying down criteria to differentiate between bond holders would be problematic in light of the "pari passu" principle entailed in GGBs and accepted by all investors contractually.[573] This principle requires equal treatment between investors and would, therefore preclude investors from being treated differently.[574] Lastly, the ECtHR noted that distinguishing between investors would have also been practically difficult, given the volatility of investors.[575] The ECtHR also considered that any exemption of specific categories of bond holders from the PSI would have devastating consequences for the Greek economy and the PSI itself, and might have even led to

[570] Mamatas and Others v. Greece, App. No. 63066/14, 64297/14 and 66106/14, Eur. Ct. H.R (2016) at § 124
[571] Mamatas and Others v. Greece, App. No. 63066/14, 64297/14 and 66106/14, Eur. Ct. H.R (2016) at § 130
[572] Mamatas and Others v. Greece, App. No. 63066/14, 64297/14 and 66106/14, Eur. Ct. H.R (2016) at § 137
[573] Mamatas and Others v. Greece, App. No. 63066/14, 64297/14 and 66106/14, Eur. Ct. H.R (2016) at § 134
[574] Mamatas and Others v. Greece, App. No. 63066/14, 64297/14 and 66106/14, Eur. Ct. H.R (2016) at § 130
[575] Mamatas and Others v. Greece, App. No. 63066/14, 64297/14 and 66106/14, Eur. Ct. H.R (2016) at § 137

Greece's bankruptcy.[576] Consequently, the ECtHR found that there had been no violation of Article 14 taken in conjunction with Article 1.[577]

The above one-size-fits-all approach adopted by the ECtHR has two main shortcomings. Primarily, the ECtHR did not consider the differences between investors.[578] Indeed, the haircut sustained by investors was largely diversified as the bonds differed greatly in the maturity and yield.[579] According to Jeromin Zettelmeyer,[580] the Greek Haircut contained the greatest variation between investor losses of all haircuts, with some investors holding bonds with extremely long maturity dates (e.g. in 2057) who sustained a haircut close to zero, or even negative.[581] Given the radical difference in the level of interference to their property, investors subject to the Greek Haircut were not in analogous situations.

Additionally, the ECtHR referred to the fact that several investors acted in a reckless, speculative fashion by purchasing their bonds at a significant discount when Greece was already facing financial distress.[582] Nonetheless, it did not take this into account when determining whether to differentiate between investors.[583] Previous case law of the ECtHR took into account investors' speculative nature of an investment.[584] In *De Dreux-Breze v. France*, for example, the court stated that the investor bought the bonds randomly without considering the profits and risks.[585] ECtHR's omission to take into account is of particular importance, as speculators are protected under the ECHR and therefore extending non-protection even to investors that invested prudently and had legitimate expectations to receive payment is a breach of the obligation not to treat persons in non-comparable situations alike.

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[576] Mamatas and Others v. Greece, App. No. 63066/14, 64297/14 and 66106/14, Eur. Ct. H.R (2016) at § 138

[577] Mamatas and Others v. Greece, App. No. 63066/14, 64297/14 and 66106/14, Eur. Ct. H.R (2016) at § 142

[578] See Mamatas and Others v. Greece, App. No. 63066/14, 64297/14 and 66106/14, Eur. Ct. H.R (2016) at § 137

[579] Christoph Trebesch et al., The Greek Debt Restructuring: An Autopsy, 28 ECON. POL'Y. 16 (2013).

[580] Christoph Trebesch et al., *The Greek Debt Restructuring: An Autopsy*, 28 ECON. POL'Y. 16 (2013).

[581] Christoph Trebesch et al., The Greek Debt Restructuring: An Autopsy, 28 ECON. POL'Y. 16 (2013).

[582] Mamatas and Others v. Greece, App. No. 63066/14, 64297/14 and 66106/14, Eur. Ct. H.R (2016) at § 118

[583] Mamatas and Others v. Greece, App. No. 63066/14, 64297/14 and 66106/14, Eur. Ct. H.R (2016) at § 130-142

[584] See Maya Sigron, Legitimate Expectations Under Article 1 Of Protocol No. 1 To The European Convention On Human Rights (Intersentia 2014).

[585] De Dreux-Breze v. France, Eur. Ct. H.R., at 9.

The *Mamatas* court should have taken into account the above elements in determining whether investors with such different backgrounds and losses should be treated alike. It should be noted that *Mamatas* has not been appealed, and therefore the Grant Chamber will not have the opportunity to correct these shortcomings.

6(A)(1b). Different Treatment of Private and Institutional Investors

The context of this discussion spurs an examination of the issue of whether official creditors, such as the European Central Bank (ECB), the largest holder of GGBs, and private investors are in "analogous situations" and should, therefore, have been treated alike under Article 14. For there to be direct discrimination, there must be a "difference in the treatment of persons in analogous, or relevantly similar situations," which is "based on an identifiable characteristic."[586] Although this argument was not raised in the Mamatas case, nonetheless it was raised by bondholders in a recent case before the Human Rights Committee of the UN, namely case S.A. et Al. v. Greece, which however was held inadmissible for non-exhaustion of domestic remedies.

In the Greek Haircut, only private investors were affected, as opposed to certain public investors holding GGBs who were not included in the PSI.[587] In particular, the ECB announced, on February 17, 2012, a swap of its GGBs for new bonds exempted from the collective action clauses (which essentially meant that ECB was senior to private-sector bondholders).[588] In the context of Article 14, reference to the announcement of the ECB's Outright Monetary Transactions (OMT) program is illuminating. It expressly stipulates that:

[t]he Eurosystem intends to clarify in the legal act concerning Outright Monetary Transactions that it accepts the same (pari passu) treatment as private or other creditors with respect to bonds issued by [E]uro area countries, and purchased

[586] Carson v. United Kingdom (2010), Eur. Ct. H.R., ¶ 61. *See also* D.H. v. the Czech Republic (2007), Eur. Ct. H.R., ¶ 175; Burden v. The United Kingdom (2008) Eur. Ct. H.R., ¶ 60.

[587] 'Asmussen: ECB Not Part Of Greek PSI Debt Deal' (U.K., 2012) <https://uk.reuters.com/article/eurozone-greece-ecb/asmussen-ecb-not-part-of-greek-psi-debt-deal-idUKB4E7HT01S20120127> accessed 2 December 2017.

[588] Patrick R. Wautelet, *The Greek Debt Restructuring And Property Rights. A Greek Tragedy For Investors?*, SSRN ELECTRONIC JOURNAL (2014).

by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds.[589]

Thus, when the ECB obtained GGBs, it perceived itself, and was perceived as, an equal-ranking creditor with other private GGBs holders with the same rights and obligations as private investors.[590] One must, therefore, examine if the difference in treatment is discriminatory, i.e. if it "has no objective and reasonable justification" and is without a "reasonable relationship of proportionality between the means employed and the aim sought to be reali[z]ed."[591] "States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment."[592] The margin varies according to the circumstances, subject matter, and background of each case.[593] However, it is generally acknowledged that, due to the state's direct knowledge of society and its needs, the state is well positioned to define the exact nature of a legitimate aim in matters of economic or social strategy.[594]

Thus, to comply with Article 14, Greece would have to demonstrate legitimate reasons to treat the ECB differently and that such special treatment was proportionate to the policy goal sought to be realized. It is difficult to foresee what such reasons would be, but one may refer to the statement made by the ECB's President regarding the participation of the ECB in Greek debt restructuring. He stated that "any voluntary restructuring of our [the ECB's] holdings would be monetary financing" and would, therefore, interfere with the ECB's independence and impartiality.[595] Such restructuring would de facto constitute financing of an EU Member State's government.[596]

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[589] European Central Bank, *Technical Features of Outright Monetary Transactions* (2012) http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (last visited Mar. 19, 2017).
[590] *See id.*
[591] *See* Marckx v. Belgium (1982) Eur. Comm'n. H.R., ¶ 33.
[592] Van Raalte v. Netherlands Eur. Ct. H.R. (1997) ¶ 39; Larkos v. Cyprus (1999) Eur. Ct. H.R.; *see also* Stec v. United Kingdom (2006) Eur. Ct. H.R..
[593] *See* Petrovic v. Austria (2001) 33 Eur. Ct. H.R., ¶ 307.
[594] See Handyside v. The United Kingdom, (1976) Eur. Ct. H.R, ¶ 48-49.
[595] *See* European Central Bank, *Introductory Statement to the Press Conference (With Q&A)* (2012) http://www.ecb.europa.eu/press/pressconf/2012/html/is121004.en.html. (last visited Mar. 19, 2017).
[596] *See id.*

This argument was tested in *Accorinti v. ECB* by 200 Italian investors who claimed that the ECB received preferential treatment over all GGB holders.[597] The General Court of the EU rejected the general principle of equal treatment that could apply between private investors and the ECB.[598] The court held the two investor groups to be distinguishable (not in comparable situations), because the ECB was working in the public's interest while private investors were in the pursuit of profit.[599] *Accorinti* was examined by the General Court of the EU based on liability of EU institutions, so the findings of the ECtHR may not match the Greek Haircut.[600] To date, this issue has not been examined by the ECtHR.

VII. The Right of Due Process - Article 6 and Article 13 ECHR

The investors in *Mamatas* could have raised additional arguments, which are addressed herein. In the context of sovereign default and debt restructuring, it is often the case that due process is not followed. In this context, due process relates to the investors' legitimate expectations, which dictate that properly established and sanctioned rules and procedures must be followed prior to interference with investors' rights.[601] Due process includes the right to a fair trial as well as the right to an adequate remedy, as these rights are intimately related.[602] Those rights are discussed here successively.

VII.(A)(1). Fair Trial - Investment Tribunals

The right to a fair trial under Article 6 of the ECHR is an essential component of investor rights, and has been analyzed by investment tribunals outside the ECHR framework. In *Mondev v. United States*, the tribunal considered the concept of a fair trial without making specific reference as to why the application of Article 6 was

[597] 2015 E.C.R. 756 (Ct. of First Instance).
[598] *Id.*
[599] *Id.*
[600] *See id.*
[601] See Giacinto Della Cananea, Due Process Of Law Beyond The State (Oxford University Press 2016).
[602] *The Right to Due Process*, ICELANDIC HUMAN RIGHTS CENTRE, http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-due-process (last visited July 11, 2017).

necessary.[603] This prompts a discussion of how Article 6 is relevant to investors in cases of sovereign default, and specifically in the case of the Greek Default.[604]

VII.(A)(2). Review of Article 6 of ECHR

Primarily, it should be noted that Article 6 of the ECHR applies to both physical persons as well as legal entities[605] and establishes a legal framework of procedural safeguards during the judicial process.[606] Article 6 refers only to the judicial process relating to "civil rights and obligations" as well as criminal cases.[607] In relation to what constitutes "civil rights" in the context of this Article, it will suffice to say that according to the ECHR, civil rights are defined as proceedings which, in domestic law, come under "public law," and whose result is decisive for private rights and obligations.[608] Hence, given the nature of GGBs as a form of loan agreements, the unilateral amendment of the terms of such agreements through the introduction of CACs via Law 4050/2012 would affect investors' "civil rights" for the purposes of Article 6(1).[609] The European Court of Justice ("CJEU") in *Stefan Fahnenbrock v. Hellenische Republik* examined a similar question—namely, whether the losses sustained by investors through the introduction of CACs in GGBs fall within the meaning of "civil or commercial matters" in Regulation No 1393/2007.[610] In *Fahenenbrock*, the CJEU noted that the Regulation was applicable because judicial proceedings brought by private persons holding state bonds against the issuing state for compensation for disturbance of ownership and property rights, contractual performance, and damages do not appear not to fall within the meaning of "civil or commercial matters" in Regulation No 1393/2007.[611]

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[603] Mondev International Ltd. v. United States (2002) ICSID Case No. ARB(AF)/99/2.

[604] *See infra* Part VII(A)(2).

[605] Marius Emberland, *The Usefulness of Applying Human Rights Arguments in International Commercial*
Arbitration – A Comment on Arbitration and Human Rights by Alexander Jaksic, 20 J. OF INT. ARB. 355, 361 (2003).

[606] Dr hab. Jacek Chlebny, 'Standards Of The Provisional Protection Against Expulsion' (Echr.coe.int, 2013) <http://www.echr.coe.int/Documents/Speech_20130611_Chlebny_ENG.pdf> accessed 2 December 2017.

[607] See 'Guide On Article 6 Of The European Convention On Human Rights' (Echr.coe.int, 2017) <http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf> accessed 2 December 2017, p.6

[608] *See Guide on Article 6 of the European Convention on Human Rights,* ECHR (Apr. 30, 2013), www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.

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[610] Fahnenbrock v. Hellenische Republik [2015], 2014 E.C.R. 2424.

[611] *Id.*

One of the most fundamental principles and procedural safeguards contained in Article 6 is one's right to be heard by an independent and impartial tribunal in public within a reasonable amount of time before a litigant's rights are jeopardized.[612] This principle has been broadly interpreted by ECtHR caselaw to include all stages of the judicial process from the pre-trial phase through the execution of judgment.[613] Indeed, as it was stated in *Delcourt v. Belgium*:[614] "In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and the purpose of that provision."[615]

Thus, the question arises whether the unilateral imposition of CACs just thirteen days before the close of offers for participation in the PSI raises the question if investors had the opportunity to be heard by an independent tribunal before their rights were jeopardized. The ECtHR examined a similar question in *Adorisio v. the Netherlands.*[616] In *Adorisio*, bondholders complained they were denied the right to a fair trial when the Dutch government granted them only ten days to challenge the expropriation of assets investors held in SNS Reaal, a banking and insurance conglomerate.[617] The ECtHR ruled that the investors' case was inadmissible because the short window granted to investors to challenge the government's expropriation measures did not place investors at an unfair disadvantage.[618] The ECtHR noted that investors could still bring an effective appeal within such time window, which was justifiably short in light of the urgent need for the Dutch government to intervene in SNS Reaal to prevent serious harm to the national economy.[619]

In light of the above, judgment investors' claim of an Article 6 breach due to the introduction of CACs is unlikely to succeed given that the introduction of CACs did not change the payment terms of the GGBs and investors had the opportunity both to appeal and to participate voluntarily at the PSI.

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[612] *See Article 6: The Right To a Fair Trial - Equality and Human Rights*, EQUALITY AND HUM. RTS. COMMISSION (Aug. 9, 2014) https://www.equalityhumanrights.com/sites/default/files/strategic_plan_-_web_accessible.pdf (last visited Sept. 11, 2017).

[613] F. Kuitenbrouwer, *Eerlijkheid alleen in toga?*, DD 334–36 (1972); E.A. Alkema, *Telt de 'voorfase' mee voor de redelijke termijn?*, NJB, 604 (1994).

[614] Delcourt v. Belgium, 1 Eur. H.R. Rep. 355 (1979-1980).

[615] *Id*. at ¶ 25.

[616] Adorisio v. Netherlands, App. No. 47315/13, 61 Eur. H.R. Rep. SE1 (2015).

[617] *Id.*

[618] *Id.*

[619] *Id.*

VIII. Human Rights Arguments to Defend Investors' Claims

As discussed above, human rights laws can be used in defense of investors' rights in a case of sovereign default; however, human rights laws also impose obligations on states that may very well require them to take actions which infringe on investors' rights.[620] In such cases, the state maintains conflicting obligations under international law: 1) its human rights obligations on the one hand, whether derived from treaties or customary international law, and 2) its BIT obligations on the other hand.

Indicatively, in *Suez v. Argentina*,[621] Argentina invoked the public's access to water against the investors' wish to modify tariff rates under the economic equilibrium clause in a concession agreement.[622] Argentina argued that imposing a price freeze on the water was legitimate, and in fact necessary, because of the basic human rights obligations imposed on Argentina under the International Covenant on Economic, Social, and Cultural Rights (and General Comment 15 thereto), the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women.[623] Thus, possible breach was justified on the grounds of necessity.[624] The tribunal recognized that the circumstances of the dispute, namely Argentina's default, were likely to "raise a variety of complex public and international law questions, including human rights considerations."[625]

But it also stated that Argentina could use other means to protect the people's right to water without infringing on investors' rights. Indeed, the tribunal noted:

> Argentina is subject to both international obligations *i.e.* human rights *and* treaty obligations [sic], and must equally respect both of them. Under the circumstances of these cases, Argentina's human rights obligations and its investment treaty obligations are not inconsistent,

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621 Suez v. Argentine Republic, ICSID Case No. ARB/03/19 (2005), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C19/DC516_En.pdf.

622 *Id.*

623 *Id.*

624 *Id.*

625 Suez v. Argentine Republic, Order in Response to a Petition for Transparency and Participation as amicus curiae, ¶ 19 (May 19, 2005), 21 ICSID Rev. – FILJ 351 (2006).

> contradictory, or mutually exclusive. Thus, as discussed above, Argentina could have respected both types of obligations.[626]

The same result was also reached by the tribunal in *Impreglio v. Argentina*,[627] where, although the tribunal acknowledged the people's right to water and the imminent peril posed to that right by the financial crisis, it noted that because Argentina had contributed to the financial crisis, it could not invoke the necessity defense.[628]

Notably, the *Suez* and *Impreglio* have been criticized as falling short of addressing human rights considerations and protecting human rights.[629] However, they are nonetheless indicators of how investment tribunals address human rights issues.[630] The cases are important in the sense that they indirectly introduce a method of addressing human rights when they appear to conflict with investors' rights, the proportionality analysis,[631] a concept "borrowed" from human rights law. The analysis in question, although sometimes problematic because of the somewhat incomparable nature of conflicting rights, can be used to resolve conflicts between BIT standards and human rights obligations.[632]

This proportionality analysis comprises three elements: first, the measure taken must have been suitable for the goals sought; second, the measure must have been necessary, in the sense that it was the least restrictive and burdensome to achieve

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[626] Suez v. Argentine Republic, Decision on Liability, ¶ 262 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf.

[627] Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17 (2011), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C109/DC2171_En.pdf.

[628] *Id.*

[629] *See* Edward Guntrip, *International Human Rights Law, Investment Arbitration And Proportionality Analysis: Panacea Or Pandora's Box?* EJIL: Talk! (Jan. 7, 2014), http://www.ejiltalk.org/international-human-rights-law-investment-arbitration-and-proportionality-analysis-panacea-or-pandoras-box/.

[630] *See, e.g.*, Biloune v. Ghana, 95 I.L.R. 183, UNCITRAL (1989) (one of the few cases where the tribunal explicitly declined to deal with human rights issues); Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (2008) (Where although the tribunal did not award any compensation to the consortium on account of causation issues, it did rule that Tanzania was liable for breach of BIT). The conjoined cases, Border Timbers Ltd. v. Republic of Zimbabwe, ICSID Case No. ARB/10/25, Award (2012), and Bernhard von Pezold v. Republic of Zimbabwe ICSID Case No. ARB/10/15, Award (2012) (Where the tribunal noted that the proceedings may have a bearing upon the rights of the affected indigenous communities, but concluded that international human rights have no relevance to the dispute) (ECCHR 2012).

[631] *See* Stephen W. Schill, *Cross-Regime Harmonization Through Proportionality Analysis: The Case Of International Investment Law, The Law Of State Immunity And Human Rights,* 27 ICSID REV. 1, 87 (2012).

[632] Benedict Kingsbury & Stephen W. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality*, INT'L. INV. L. AND COMP. PUB. L. (Stephen W. Schill ed., Oxford University Press 2010).

the targeted goals; third, the measure must have been *stricto sensu* proportional.[633] This structured approach allows tribunals to assess public and private interests, which may be simultaneously at issue. For investors, it may involve protecting themselves by constraining the state's police powers as a justification for measures taken. For the state, it provides room to take measures in good faith with genuine and legitimate objectives.[634]

For instance, in *SD Myers, Inc. v. The Government of Canada*,[635] the tribunal was of the view that the concept of expropriation takes into account, among other factors, the impact of a regulation, its purpose, the legitimate investor expectations, the degree and intensity of interference, the importance of the interests at stake, and the even-handedness exhibited in the application of state measures.[636] It recognized that these elements need to be balanced and thus it implicitly assessed within the notion of proportionality.[637] The first case where the structured proportionality analysis was used was *Tecnicas Medioambientales Tecmed SA v. Mexico*,[638] where the tribunal noted that to establish whether the measure in question constituted an expropriation, the proportionality of the measure vis a vis public interest should be taken into account.[639]

Although *Tecnicas* was the only case where the proportionality test was directly invoked, other tribunals have decided investor disputes mainly based on the above principle, thus allowing states to invoke human rights considerations to demonstrate that a state act was legitimate and fair. *Continental Casualty v. Argentina*[640] was such a case. *Continental Casualty* involved a claim for expropriation due to emergency measures taken by the Argentinean government during the 2001 financial crisis.[641] The *Continental Casualty* tribunal did not explicitly refer to the

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[633] For further analysis, see ROBERT ALEXY, THEORIE DER GRUNDRECHTE (Suhrkamp, 5.A. ed. 1995).

[634] Jasper Krommendijk & John Morijn, '*Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration* (Sept. 30, 2009). HUM. RTS. IN INT'L INV. L. AND ARB. 421–55 (Pierre-Marie Dupuy et al. eds., Oxford University Press 2009), http://ssrn.com/abstract=2333550.

[635] SD Myers, Inc. v. Government of Canada (Myers), Partial Award, 13 November 2000, 40 ILM 1408, ¶¶ 282–83, (2001).

[636] *Id.*

[637] *Id.*

[638] Tecnicas Medioambientales Tecmed SA v. Mexico*,* 638, ICSID Case No. ARB (AF)/00/2 (2004), Award, ¶ 122 (2003).

[639] *Id.*

[640] Cont'l Cas. Co. v. Argentina, ICSID Case No. ARB/03/9, Award, (2008).

[641] *Id.*

concept of proportionality.[642] Instead, it followed a similarly structured balancing approach and concluded that the measures in question were proportionate as they "were in part inevitable, or unavoidable, in part indispensable and in any case material or decisive in order to react positively to the crisis' and hence there undoubtedly existed 'a genuine relationship of end and means in this regard.'"[643]

As such, in the case of Greece, the government could invoke human rights as a defense to the possible breach of BITs. However, it is difficult to predict the result, as the majority of tribunals have not favored the use of human rights to escape liability for breach of the BIT.[644] Nonetheless, *Continental Casualty* is an example of how measures to protect human rights can be successfully used as a defense for possible BIT breaches when such actions meet the proportionality test.[645]

In the absence of explicit human rights provisions in a BIT, a direct invocation of international human rights appears problematic. However, such invocation has been made through choice of law provisions. For instance, Article 40 of the Canadian Model BIT provides that tribunals shall decide matters "in accordance with this agreement and the applicable rules of international law."[646] It bears noting that most BITs concluded by Greece refer disputes with investors to the International Centre for Settlement of Investment Disputes (ICSID),[647] whose rules, Article 42(1) in particular, proclaim that, besides the law of the contracting state party to the dispute, "such rules of international law as may be applicable" shall govern the dispute.[648]

With the exception of only three Greek BITs (with Germany, Zaire, and Morocco), all BITs concluded by Greece provide for the application of obligations under international law existing at present or established between the contracting

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[642] *Id.*

[643] *Id*. at ¶¶ 197, 232.

[644] *See* MAKING SOVEREIGN FINANCING AND HUMAN RIGHTS WORK 90 (Juan Pablo Bohoslavsky and Jernej Letnar Cernic eds., 2014).

[645] Cont'l Cas. Co., *supra* note 640.

[646] Canadian 2004 Model BIT art. 40 (2004).

[647] *See* Nicholas Moussas & Stratos Voulgaridis, *Greece Investment Treaty Report*, (2013), http://globalarbitrationreview.com/jurisdiction/1004661/greece. However, there are certain BITs concluded by Greece that provide for: a) an ad hoc tribunal constituted in accordance with the arbitration rules of UNCITRAL, (e.g., BITs with Argentina, Croatia, Russia, Latvia, Serbia, etc., where international law is taken into account), b) the Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm (Hungary, where international law is taken into account on account of the BIT), c) the Arbitral Tribunal of the ICC in Paris (Hungary and Turkey where again international law is only taken into account if agreed by the contracting States) or d) the ICSID Additional Facility.

[648] *Jacob*, *supra* note 382, at 27.

parties.[649] This is not the only available mechanism by which human rights can be invoked in an investor-state dispute. Provided the above procedural requirement is met, tribunals have, on their own initiative, referred to case law relied upon within the jurisprudence of human rights courts, such as the ECtHR in determining whether the rights of an investor have been breached.[650] For instance, in *Tecnicas*, the tribunal referred to ECtHR case law in assessing whether an expropriation took place.[651] Similarly, the UNCITRAL tribunal in *Lauder v. Czech Republic* noted that "[BITs] generally do not define the term of expropriation and nationalization, or any of the other terms denoting similar measures of forced dispossession ('dispossession', 'taking', 'deprivation', or 'privation')."[652] On the other hand, in his separate opinion in *Int'l Thunderbird Gaming Corp. v. United Mexican States*, Thomas Wälde noted that the ECtHR creates "the judicial practice, most comparable to treaty-based investor-state arbitration."[653]

As such, the human rights of a larger population can be used as a defense against individual human rights cases brought by investors against the state within the context of public interests.[654] In *De Dreux-Brézé v. France*, a case involving debt restructuring between France and Russia for a debt incurred by the Tsarist regime, the ECtHR emphasized that Article 1 of the First Additional Protocol did not give a right to full repayment.[655] It further stated that the public interest might require a reduction of the repayments or even their complete suspension, noting that Russia was under an obligation to fulfil its citizens' economic and social rights.[656] What is more, in the case of *Malysh v. Russia*, the ECtHR for the first time moved ahead to recognize "people's rights" as a legitimate defense for a potential breach of investors rights,

[649] *Moussas*, *supra* note 647.
[650] Eric De Brabandere, "Human Rights Considerations in International Investment Arbitration" in M Fitzmaurice and Panos Merkouris, The Interpretation And Application Of The European Convention Of Human Rights (Martinus Nijhoff Publishers 2013), p. 7-8
[651] *Tecnicas*, *supra* note 638.
[652] Ronald S. Lauder v. Czech Republic, 2001 WL 34786000, ¶ 200 (UNCITRAL Final Award Sept. 3, 2001).
[653] Int'l Thunderbird Gaming Corp. v. United Mexican States (U.S. v. Mex.), 2006 WL 247692, ¶ 141 (NAFTA Ch. 11 Arb. Trib. 2006) (separate opinion by Wälde, J.).
[654] See Tamar Meshel, 'Human Rights In Investor-State Arbitration: The Human Right To Water And Beyond' (2015) 6 Journal of International Dispute Settlement.
[655] De Dreux-Breze v. France (Dec.), No. 57969/00 Eur. Ct. H.R. (2000).
[656] *Goldmann*, *supra* note 488.

ruling that it was legitimate to temporarily put off debt repayment for the purpose of paying urgent expenditures to address social issues.[657]

These cases are of particular importance to the case of Greece, as the alternative to the Haircut was the disorderly default of Greece, which could severely threaten several economic and social rights of the public.

IX. Conclusion

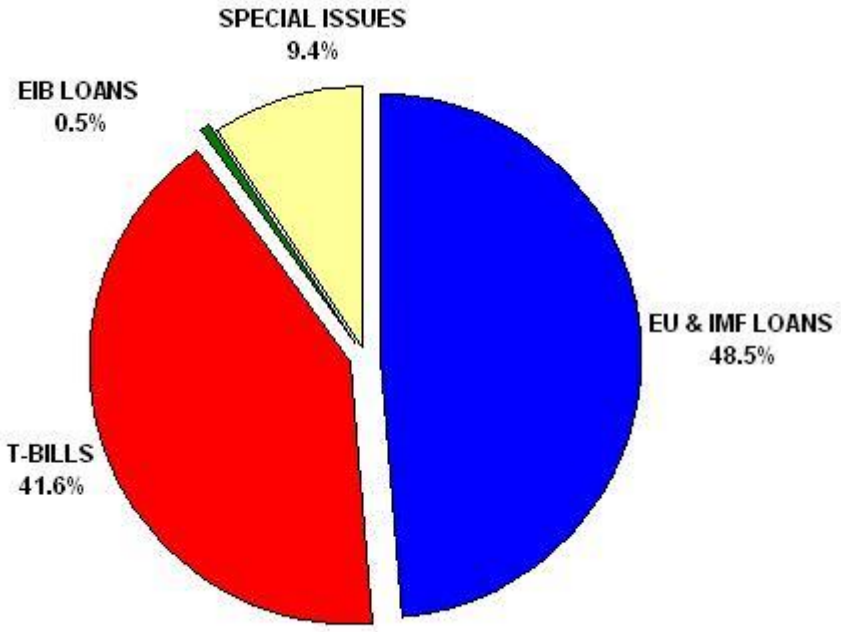
Sovereign defaults can have significant implications on investors' rights. The lack of an international mandatory legal framework for sovereign debt restructuring has demonstrated that investors are often left without effective remedy when their rights are prejudiced. To this end, human rights law can provide additional tools for the protection of investors, to the extent that human rights norms are uniformly applied.

The ECtHR recently dealt with investors' rights in the case of a sovereign default in *Mamatas* which revolved around the Greek Haircut. Although the ECtHR's judgment in *Mamatas* has several deficiencies, it nonetheless demonstrated the applicability of human rights norms in investors disputes. This article reviewed the arguments made by the *Mamatas* investors, and explored additional human rights considerations that may be invoked by investors in similar occasions. Such notions are also taken into account by investment tribunals, and to this end, the study of human rights implications in cases of sovereign defaults is important for investors, not only in the context of cases before human rights courts, but also to support cases before investment tribunals.

In this context, human rights law can be invoked both to support the claim of an investor asserting that the restructuring violated his human rights, or to bolster the state's position as a defense to any possible breach of protection owed to the investors that could have an adverse effect upon human rights in that country. In this context, it is evident that human rights and investment law are not mutually exclusive, but instead they can be viewed and addressed concurrently to establish a more secure and balanced environment for investments and to provide guidelines for the fair treatment of investors in cases of sovereign default.

[657] *See* Malysh v. Russia, App. No. 30280/03 Eur. Ct. H.R. (2010).

Appendix “1”



Source Greek Public Debt Management Agency

Data: 31.12.2011

Appendix 2

Figure 1: Barclays Capital estimated top 40 holders of Greek government bonds and Greek debt

Rank	Country	Name	Bonds and bills (€ bn)	Loans (€ bn)	Cumulative bonds holdings (€ bn)	Cumulative % of bonds	Cumulative debt (€ bn)	Cumulative % of debt	As of
1	Euro	Eurosystem SMP*	45.0	-	45	16%	45	13%	Q1 11
2	Euro	EU loans		38.0	45	16%	83	23%	Q1 11
3	Greece	Greek public sector funds	30.0	-	75	26%	113	31%	Q1 11
4	SWF	RoW official institutions (probably 3-5, Asia)*	25.0	-	100	35%	138	38%	Q4 09
5	IMF	IMF loans		15.0	100	35%	153	43%	Q1 11
6	Greece	National Bank of Greece	13.2	5.4	113	40%	172	48%	Q1 11
7	Euro	Euro area NCBs (BoG, BdF, BoP, BoI, etc)*	13.1	-	126	44%	185	51%	Q4 09
8	Greece	Eurobank EFG	9.0	-	135	47%	194	54%	Q4 10
9	Greece	Piraeus (net)	8.0	-	143	50%	202	56%	Q1 11
10	Germany	FMS (ex Depfa/Hypo Real Estate)	6.3	-	150	52%	208	58%	Q4 10
11	Greece	Bank of Greece legacy loans		6.0	150	52%	214	59%	Q1 11
12	France	BNP	5.0	-	155	54%	219	61%	Q4 10
13	Greece	ATE	4.6	-	159	56%	224	62%	Q4 10
14	Greece	AlphaBank	3.7	-	163	57%	227	63%	Q1 11
15	Bel/Lux/France	Dexia	3.5	-	166	58%	231	64%	Q4 10
16	Greece	Hellenic Postbank	3.1	-	169	59%	234	65%	Q4 10
17	Italy	Generali	3.0	-	172	61%	237	66%	Q4 10
18	Germany	Commerzbank	2.9	-	175	62%	240	67%	Q4 10
19	France	Societe Generale	2.9	-	178	63%	243	67%	Q4 10
20	Greece	Marfin	2.3	-	180	63%	245	68%	Q4 10
21	France	Groupama	2.0	-	182	64%	247	69%	Q4 10
22	France	CNP	2.0	-	184	65%	249	69%	Q4 10
23	Greece	Bank of Cyprus	1.8	-	186	65%	251	70%	Q1 11
24	Germany	Deutsche Bank/Deutsche Postbank	1.6	-	188	66%	252	70%	Q4 10
25	Germany	LBBW	1.4	-	189	66%	254	70%	Q1 10
26	Netherlands	ING	1.4	-	191	67%	255	71%	Q1 11
27	Germany	Allianz	1.3	-	192	67%	256	71%	Q4 10
28	France	BPCE	1.2	-	193	68%	258	72%	Q4 10
29	Belgium	Ageas	1.2	-	194	68%	259	72%	Q1 11
30	France	AXA	1.1	-	195	69%	260	72%	Q4 10
31	UK	RBS	1.1	-	197	69%	261	73%	Q4 10
32	Germany	DZ Bank	1.0	-	198	69%	262	73%	Q4 10
33	Italy	Unicredito	0.9	-	199	70%	263	73%	Q4 10
34	Italy	Intesa San Paolo	0.8	-	199	70%	264	73%	Q4 10
35	Austria	KA Finanz	0.8	-	200	70%	265	73%	Q4 10
36	UK	HSBC	0.8	-	201	71%	265	74%	Q4 10
37	Austria	Erste Bank	0.7	-	202	71%	266	74%	Q4 10
38	Germany	Munich Re	0.7	-	202	71%	267	74%	Q1 11
39	Netherlands	Rabobank (gross)*	0.6	-	203	71%	268	74%	Q4 10
40	France	Credit Agricole	0.6	-	204	71%	268	74%	Q4 10
41	Belgium	KBC	0.6	-	204	72%	269	75%	Q4 10
		Others	80.7	10.6	285	100%	360	100%	
		Total	285.0	75.0	285	100%	360	100%	

Note: this is not including some of the asset management companies, which may have some exposures above €500mm. "*" in the fourth column indicates that these are Barclays Capital best estimates, rather than publicly available data.
Source: Barclays Capital, Bank of Greece, EU, IMF, company reports, media reports

Source: www.ftd.de/download/binary/.../file.../bin-pdf-european-rates.pdf

References (2018)

Books and Journals

Aida Grgiæ, Zvonimir Mataga, Matija Longar and Ana Vilfan, A guide to the implementation of the European Convention on Human Rights and its protocols, European Council, Human rights handbooks, No. 10, European Council

Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, 26 June 2012.

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB 05/22, Award, 24 July 2008.

Blundell, A., & Slovik, P. (2010). A Market Perspective on the European Sovereign Debt and Banking Crisis. OECD Journa. Retrieved 25 August 2014, from http://www.oecd.org/greece/46970598.pdf

Border Timbers Limited and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/25, Award, 26 June 2012.

Brabandere, E.D. (2013) Human Rights Considerations in International Investment Arbitration, Grotius Centre Working Paper, Leiden University, The Netherlands.

CCIA (2007) Investment Agreement for the COMESA Common Investment Area, 2007.

COMESA,Availablefrom<http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf> (n.d.).

Chen, A. (2006). Should the Four Great Safeguards in Sino-Foreign BITs be Hastily Dismantled-Comments on Provisions concerning Dispute Settlement in Model US and Canadian BITs.

CHUA, I. (2010). Fiscal woes to dog Greek bonds even if aid offered. [online] Reuters. Available at: http://www.reuters.com/article/2010/03/22/us-markets-bonds-peripheral-analysis-idUSTRE62L3XB20100322 [Accessed 25 Aug. 2014].

ECCHR (2012) Human Rights inapplicable in International Investment Arbitration? : A commentary on the non-admission of ECCHR and Indigenous Communities as Amici Curiae before the ICSID tribunal. ECCHR, Berlin, July 2012

Economic Crisis in Europe: Causes, Consequences and Responses. (2014). EUROPEAN ECONOMY 7|2009. BU24, B-1049 Brussels, p.4. Retrieved from http://ec.europa.eu/economy_finance/publications/publication15887_en.pdf

Edward Guntrip, International Human Rights Law, Investment Arbitration, and Proportionality Analysis:

EMBERLAND, Marius, "The Usefulness of Applying Human Rights Arguments in International Commercial Arbitration – A Comment on Arbitration and Human Rights by Alexander Jaksic," 20 J. of Int. Arb. 355, 361 (2003).

EU organ composed of the Economics and Finance Ministers of the 27 EU Member States monitoring, inter alia, the budgetary policy and public finances of the Member States.

EU (2008). "Declaration on a concerted European action plan of the eurozone countries", October 10, 2008, Available at www.ue2008.fr

European Council of October 15 and 16, 2008, Presidency Conclusions (doc.14368/08).

F. Kuitenbrouwer, "Eerlijkheid alleen in toga?" in: DD 1972, pp. 334-336 and E.A. Alkema, "Telt de 'voorfase' mee voor de redelijke termijn?" in: NJB 1994, p. 604.

Grabenwarter, Europaeischen Menschenrechtskonvention (European Convention of Human Rights), 2nd edition, p.313

Human Rights Council, The effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social, and cultural rights, UN Doc. A/HRC/RES/20/10, 18 July 2012, operative Para. 2.

Hirsch, M. (2009) Investment Tribunals and Human Rights: Divergent Paths in Human Rights in International Investment Law and Arbitration, eds. P-M Dupuy, F. Francioni, and E-U Petersmann, Oxford University Press, Oxford 2009

Ioannis Glinavos Redefining the Market-State Relationship: Responses to the Financial Crisis, Routledge

Jacob, M. (2010) International Investment Agreements and Human Rights, Institute for Development and Peace (INEF) Research Paper Series, Human Rights, Corporate Responsibility and Sustainable Development, 03/2010. Duisburg: Institute for Development and Peace, University of Duisburg- Essen.

James K. Jackson, The European Crisis: Impact on and Responses by the European Union, CRS Report for Congress, June 24,2009

Kingsbury and Schill 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality' in Schill (ed.) International Investment Law and Comparative Public Law (OUP, 2010)

Krommendijk, Jasper and Morijn, John (2009) 'Proportional' by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration (September 30, 2009).

Lee C. Buchheit & Mitu Gulati, How to restructure Greek debt, http://ssrn.com/abstract=1603304

Luce, E., & Freeland, C. (2009). Summers backs state action - FT.com. Financial Times. Retrieved 25 August 2014, from http://www.ft.com/cms/s/0/5d8b5e18-0c14-11de-b87d-0000779fd2ac.html#ixzz1YsnQRuoH

Mann, H. (2008) International Investment Agreements, Business and Human Rights: Key Issues and Opportunities. OECD Global Forum on International Investment: International Institute for Sustainable Development, Canada.

Mann, H., Moltke, K.v., Cosbey, A., Peterson, L. (2006) IISD Model International Agreement on Investment for Sustainable Development, Negotiator's Handbook, Second edition, International Institute for Sustainable Development.

Michael G. Arghyrou, The accession of Greece to the emu: initial Estimates and lessons for the new EU Countries, Economics Section, Cardiff Business School

Minfin.gr,. (2011). Greek Ministry of Finance's Debt report. Retrieved 25 August 2014, from http://www.minfin.gr/portal/el/resource/contentObject/contentTypes/genericContentResourceObject,fileResourceObject,arrayOfFileResourceTypeObject/topicNames/publicDebtBulletin/resourceRepresentationTemplate/contentObjectListAlternativeTemplate#fragment-0

Moses, A. (2012). Greece Collective Action Clauses risk triggering default swaps.Businessweek.com. Retrieved 25 August 2014, from http://www.businessweek.com/news/2012-02-25/greece-collective-action-clauses-risk- triggering-default-swaps.html

Nicholas Moussas and Stratos Voulgaridis Greece Investment Treaty Report (2013) available at http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/12/greece/

Panacea or Pandora's Box? (2014) available at http://www.ejiltalk.org/international-human-rights-law-investment-arbitration-and-proportionality-analysis-panacea-or-pandoras-box/

Paul Peters, (1988) Investment Risk and Trust: The Role of International Law, in Paul de Waart et al., eds., International Law and Development 131, 153.

Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (eds.) (2009), Human Rights in International Investment Law and Arbitration, Oxford: Oxford University Press (2009), pp. 421-455.. Available at SSRN: http://ssrn.com/abstract=2333550

Piero Foresti, Laura de Carli and others v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1.

R. Alexy, Theorie der Grundrechte (1986);

Rebecca M. Nelson, Paul Belkin, Derek E. Mix Greece's Debt Crisis: Overview, Policy Responses, and Implications Congressional Research Service7-5700, p.11

Revisiting Sovereign Bankruptcy by Lee C. Buchheit, Lee C. and Gelpern, Anna and Gulati, G. Mitu and Panizza, Ugo and Weder, Beatrice and Zettelmeyer, Jeromin, (2013)

Russian Mission (1997) Agreement on Partnership and Cooperation. L/CE/RU/en 3, Available from <http://www.russianmission.eu/userfiles/file/partnership_and_cooperation_agreement_1997_english.pdf>

S Greer, The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights International Journal on Minority and Group Rights 16, 2009

Schill, 'Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights' 27 ICSID Review – FILJ (2012) 87

SD Myers, Inc. v. Government of Canada (Myers), Partial Award, 13 November 2000, 40 ILM 1408 (2001).

Servaas, D. (2011). The Economic Adjustment Programme for Greece Third Review - Winter 2011.EUROPEAN ECONOMY. Retrieved from http://ec.europa.eu/economy_finance/publications/occasional_paper/2011/pdf/ocp77_en.pdf

Shannon Lindsey Blanton and Robert G. Blanton, What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment, The Journal of Politics, Cambridge University Press Vol. 69, No. 1 (Feb., 2007), pp. 143-155

Sönke Häseler Collective Action Clauses in International Sovereign Bond Contracts – Whence the Opposition? European Association of Law And Economics Working Paper No. 007-2009, p.5

Sornarajah, M. (1996) The International Law on Foreign Investment. Grotius Publications: Cambridge University Press, New York.

Stavros A Zenios Fairness and reflexivity in the Cyprus bail-in The Wharton School, University of Pennsylvania, PA. Working paper #14--- 04. Posted on14/3/14.

Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 Yale L. J. 443, 459 (2001)

Tecnicas Medioambientales Tecmed SA v. Mexico, ICSID Case No ARB (AF/00/2 (2004), Award, 29 May 2003.

UN Commission on Human Rights, Effects on the full enjoyment of human rights of the economic adjustment policies arising from foreign debt and, in particular, on the implementation of the Declaration on the Right to Development, Resolution 1999/22, 23 April 1999, UN Doc. E/CN.4/RES/1991/13.

UNCTAD (2009) Recent Developments in International Investment Agreements (2008 – June 2009). UNCTAD/WEB/DIAE/IA/2009/8: IIA Monitor No. 3 (2009), Geneva.

UNGA (2007) Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts (Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights

and transnational corporations and other business enterprises). A/HRC/4/035, United Nations General Assembly.

Zettelmeyer, J., Trebesch, C., & Gulati, M. (2013). The Greek debt restructuring: an autopsy. Economic Policy, 28(75), P.11.

CHAPTER FOUR

International Arbitration and Greek Sovereign Debt: Poštová Banka v. Hellenic Republic, What if? Investors' Protection in the Case of the Greek Sovereign Default under Investment Treaties and Customary Law

(accepted for publication in Oregon International Law journal, Volume 19, Issue 1 to be published in April 2018)

International Arbitration and Greek Sovereign Debt: Poštová Banka v. Hellenic Republic, What if? Investors' Protection in the Case of the Greek Sovereign Default Under Investment Treaties and Customary Law

I. ABSTRACT

The Greek Debt Restructuring of 2012 has had a significant impact on bondholders that have sustained onerous losses. Despite, however, having resorted to the justice system to find reparation for such losses, to date, neither the European Court of Human Rights nor the International Centre for Settlement of Investment Disputes (ICSID) have awarded investors the desired compensation. This Article explores the reasons that led to the failure of bondholders' cases against Greece and explores whether there is room for a different result for bondholders before investment tribunals. This Article evaluates and analyses the possible outcome of bondholders' claims under investment treaty law for breach of standards of treatment (including Most Favored Nation, Fair and Equitable Treatment, Expropriation and Umbrella Clauses) and investigates potential defenses that could be raised by Greece to such claims. Lastly, this Article suggests alternative ways bondholders may obtain reparation, including Credit Default Swaps.

II. INTRODUCTION

Greece has been facing financial difficulties for the greater part of its latest history.[658] Therefore, it comes as no surprise that the Greek economy was not prepared to face the great financial crisis of 2009. Spending more than it could afford,

[658] See Carmen M. Reinhart, Christoph Trebesch, The Pitfalls of External Dependence: Greece, 1829-2015, NBER Working Paper No. 21664 (2015), where it is stipulated that "Since its independence in 1829, the Greek government has defaulted four times on its external creditors, and it was bailed out in each crisis" p.1

it quickly faced growing budgetary deficits that led a sky-rocketing public debt.[659] Hence, in 2012, Greece shocked the global financial markets by announcing the largest sovereign bond haircut in history.[660] The term "haircut" refers to the restructuring of the terms of sovereign debt instruments, by way that there is a reduction in the recovery value of such instruments.[661] To date, there have been two cases brought by investors against Greece for the events of the Greek Haircut of 2012 and, in particular, for the forcible introduction of collective action clauses (CACs) through the Greek Bondholder Law, No. 4050/2012. Both cases are founded on the similar facts.

Claimants, in both cases, were holders of Greek sovereign bonds which, at the time of purchase, did not include CACs. Instead, the Greek State unilaterally introduced CACs, through Law 4050/2012, just a few days before the "haircut" of the bonds' value.[662] As per the CACs, a restructuring of the bonds could be approved by a qualified majority of more than 66.7% of the bondholders.[663] In both cases, the claimants did not approve the restructuring of their bonds but were nonetheless bound by the restructure due to collective action clauses. Indeed, as the participation of bondholders in the bond exchange reached 152 billion Euros' worth of sovereign bonds governed by Greek law out of the approximately 177 billion Euros,[664] this percentage (85.9%) allowed Greece to trigger the collective action clauses and compel all holders of sovereign bonds governed by Greek law to consent to the terms of the bond exchange.[665] As a result, in both cases, the claimants' bonds were exchanged for new bonds of a lesser face value equal to only 31.5% of the principal amount of the face amount of the old bonds.[666]

However, the two cases were filed and heard by two different judicial bodies and on different legal bases. In particular, the first case, *Mamatas and Others v. Greece*,

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[659] R. M. Nelson, P. Belkin, D. E. Mix, Greece's Debt Crisis: Overview, Policy Responses, and Implications, CRS Report for Congress (2011)

[660] Miranda Xafa, Lessons from the 2012 Greek debt restructuring (2014) available at http://voxeu.org/article/greek-debt-restructuring-lessons-learned

[661] Federico Sturzenegger, Jeromin Zettelmeyer, Debt Defaults and Lessons from a Decade of Crises, (MIT Press, 2006) p. 324

[662] Arturo C. Porzecanski, 'Behind The Greek Default And Restructuring Of 2012', Sovereign Debt and Debt Restructuring (Globe Business Publishing, 2013).

[663]Based on a quorum of votes representing at least 50 per cent of bond's face value and a consent threshold of two-thirds of the face-value holders taking part in the vote, see Jeromin Zettelmeyer, Christoph Trebesch and Mitu Gulati, 'The Greek Debt Restructuring: An Autopsy' (2013) 28 Economic Policy.p.11.

[664]Hellenic Republic, Ministry of Finance Press Release, (March 09, 2012), *available at* http://av.r.ftdata.co.uk/files/2012/03/9-MARCH-2012.pdf.

[665] Zettelmeyer, Christoph Trebesch and Mitu Gulati, 'The Greek Debt Restructuring: An Autopsy' (2013) 28 Economic Policy.p.11.

[666] Bank of Greece, Report on the Recapitalisation and Restructuring of the Greek Banking Sector, December 2012, at http://www.bankofgreece.gr/BogEkdoseis/Report_on_the_recapitalisation_and_restructuring.pdf.

was filed before the European Court of Human Rights (ECtHR) by 6,320 Greek investors claiming that the above introduction of CACs and subsequent haircut of their bonds constituted a violation of their human rights.[667] The second case, *POŠTOVÁ BANKA, A.S. and ISTROKAPITAL SE v. the Hellenic Republic*, was filed before the International Centre for Settlement of Investment Disputes (ICSID) on the grounds that the unilateral introduction of CACs and subsequent haircut constituted a breach of a standard of protection awarded by the Bilateral Investment Treaty between Greece and Slovakia, and Greece and Cyprus.[668]

Despite appealing to two different judiciary bodies under different legal frameworks, in both cases, the judgment issued was in favor of Greece, leaving both group of investors in a worse position than before. This brought up the question: what is the optimum venue and framework for distressed investors to bring sovereign default claims? This Article will examine the reasons that led to the dismissal of the investors' claims while addressing whether investment tribunals could still prove a suitable venue for Greek investors under different circumstances.

III. The Case of Mamatas and Others v. Greece

Mamatas and Others v. Greece originated from three applications, namely application Nos. 63066/14, 64297/14, and 66106/14, which were all addressed against the Hellenic Republic.[669] These applications were filed by 6,320 Greek nationals between September 17th and October 1st, 2014.[670] The applications were all founded on the aforementioned facts, namely the unilateral introduction of CACs in the bonds held by the applicants and their forcible participation in the Greek bond exchange whereby their bonds were exchanged for other debt instruments of lesser value.[671]

The ECtHR rejected the Greek Government's objection that local remedies had not been exhausted. Thus, the ECtHR declared the applicant's complaint admissible and proceeded to examine the merits of the complaint.

The applicants had invoked two rights recognized by the European Convention of Human Rights (ECHR), namely the right to property (Article 1 of Protocol 1 of ECHR) and the right to non-discrimination (Article 14 ECHR).[672] As per the applicants, the forcible exchange of their bonds by virtue of the Bondholders' Law,

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[668] See Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8

[669] 'European Court Of Human Rights Information Note 198' (Echr.coe.int, 2016) p. 21 <http://www.echr.coe.int/Documents/CLIN_2016_07_198_ENG.pdf> accessed 25 November 2017.

[670] 'European Court Of Human Rights Information Note 198' (Echr.coe.int, 2016) <http://www.echr.coe.int/Documents/CLIN_2016_07_198_ENG.pdf> accessed 25 November 2017, p.21

[671] Mamatas and Others v. Greece [2016] ECHR, 694, para 25

[672] 'European Court Of Human Rights Information Note 198' (Echr.coe.int, 2016) <http://www.echr.coe.int/Documents/CLIN_2016_07_198_ENG.pdf> accessed 25 November 2017, p.22

No. 4050/2012, amounted to a *de facto* expropriation of their bonds and, therefore, of their property or, alternatively, an interference with their possessions in contravention of Article 1 of Protocol 1 ECHR (Article 1).[673] Additionally, the applicants contended that they had sustained discrimination vis-a-vis other major corporate creditors,[674] as despite the vast differences between the experience and resources available between the two categories of investors, the investors were treated alike.[675]

The ECtHR concluded that there was no *de facto* expropriation that would, in and of itself, suffice to establish a breach of the right to property.[676] Instead, the ECtHR proceeded to examine the case under the first rule of Article 1.[677] The first rule refers to the peaceful enjoyment of possession and, given its generic wording, is applied by the ECtHR to cases where the other two rules of Article 1, namely the second rule relating to deprivation of property and the third rule relating to regulation of the use of property, do not apply.[678]

As per the first rule, contained in the first sentence of Article 1, an interference with a person's possessions is prohibited when such interference cannot be justified via the public or general interest. What's more, such interference needs to also strike a fair balance between the interests of the community and those of the affected person. Indeed, an interference with possessions, in and of itself, does not constitute a violation of Article 1, but the ECtHR will examine whether such interference is founded on a law serving the public interest.[679] If there is a law that serves the public interest, the ECtHR will consider whether a fair balance between public interest and the right of property is reached.

The ECtHR applied this analysis in the *Mamatas* case. After it established a *prima facie* interference with the applicants' possessions, the ECtHR proceeded to examine whether such interference was imposed by law.[680] The ECtHR then established that the forcible haircut was imposed by the Bondholders Law, No. 4050/2012.[681] Thereafter, the ECtHR considered whether the Bondholders Law was serving the public interest.[682] Related to this requirement, states also enjoy a wide margin of appreciation "because of their direct knowledge of their society and its needs, national authorities are in principle better placed than the international judge to

[673] Mamatas and Others v. Greece [2016] ECHR, 694, para 73

[674] Mamatas and Others v. Greece [2016] ECHR, 694, para 125

[675] Mamatas and Others v. Greece [2016] ECHR, 694 para 124

[676] See Papamichalopoulos v. Greece, ECtHR, (1993)

[677] Mamatas and Others v. Greece [2016] ECHR, 694, paras 84-85

[678] For an extensive analysis of Article of Protocol 1 ECHR see Laurent Sermet, The European Convention on Human Rights and Property Rights, Council of Europe, Volume 88, 1998

[679] Christos Rozakis, The right to property in the Case Law of the European Court of Human Rights, Athens Property Day, (2016) available at: http://uipi.com/new/wp-content/uploads/2014/12/Athens-Property-Day-2016.-Keynbote-speech.-The-Property-Right-in-the-Case-Law-of-the-ECHR.pdf

[680] Mamatas and Others v. Greece [2016] ECHR, 694, paras 94

[681] Mamatas and Others v. Greece [2016] ECHR, 694, para 92

[682] Mamatas and Others v. Greece [2016] ECHR, 694, paras 101-105

appreciate what is in the "public interest.""[683] Especially in cases relating to complex economic or social policies, the ECtHR will question the legislature's determination that a measure serves the public interest only when such determination is "manifestly without reasonable foundation."[684] Hence, the ECtHR easily concluded that the Bondholders Law, No. 4050/2012 was, in fact, pursuing a goal in the public interest, namely the preservation of economic stability at a time when Greece was overwhelmed by a serious economic crisis.[685]

Thereafter, the ECtHR proceeded to examine the last, but most pivotal criterion to establish whether there was a violation of the right to property. The ECtHR examined whether a fair balance was struck between the law's public interest goal and the investors' right to property.[686] As per ECtHR case law, for a fair balance to be struck, there must exist a proportional relation between the means used and the aim sought to be achieved.[687] Such proportionality is absent when the affected individual sustains an excessive burden.[688] To consider the extent of such burden, the ECtHR takes into account the duration of the interference, the severity of the interference, and the terms of the compensation.[689] However, per ECtHR case law, the threshold for establishing that the individual sustained an "excessive burden" is difficult to prove.[690] In the *Mamatas* case, the ECtHR noted the extreme financial distress that faced Greece at the time while noting that, unless a Memorandum of Understanding was signed, Greece would be unable to pay any debts since it would likely enter into unregulated bankruptcy.[691] To this end, in evaluating the burden sustained by investors, one should consider that the market value of such bonds at the time before the exchange was very low, rather than the then current nominal value of the bonds. Hence, the ECtHR concluded that the losses incurred by the applicants were not excessive, especially considering the nature of the bonds as inherently risky transactions, the same risks which should have been known by the applicants.[692]

Similarly, the ECtHR concluded there was no breach of Article 14 of the ECHR, which prohibits discrimination, despite the *prima facie* case of discrimination.[693] Nonetheless, the equal treatment of all investors during the bond exchange was justified by the difficulties in locating all of the affected investors: the difficulty

[683] Brannigan and McBride v. The United Kingdom, ECtHR (1993) para 43 and Ireland v. the United Kingdom, ECtHR (1978), para 48.

[684] Stec v United Kingdom, ECtHR (2006) para 43

[685] Mamatas and Others v. Greece [2016] ECHR, 694, paras 101-105

[686] Mamatas and Others v. Greece [2016] ECHR, 694, paras 106-120

[687] Sporrong and Lönnroth v. Sweden, ECtHR (1982)

[688] Sporrong and Lönnroth v. Sweden, ECtHR (1982)

[689] Yutaka Arai, Yutaka Arai-Takahashi, The Margin of Appreciation Doctrine and the Principle of Proportionality in the ECHR (2002), p. 161

[690] Frans Pennings, Gijsbert Vonk, Research Handbook on European Social Security Law, Edward Elgar Publishing, (2015), p. 59

[691] Mamatas and Others v. Greece [2016] ECHR, 694, paras 117-118

[692] Mamatas and Others v. Greece [2016] ECHR, 694, para 117

[693] Mamatas and Others v. Greece [2016] ECHR, 694, para 142

involved in setting precise criteria for differentiating between bondholders in a very volatile market; the possibility of endangering the effectiveness of the bond exchange; and the need to swiftly address the difficult financial situation in Greece at the time.

This Article articulates certain shortcomings in the judgment, being that of interference with the applicant's property rights and the non-existence of discrimination. The ECtHR did not fully examine whether a fair balance was actually reached by conducting a proportionality analysis and reviewing the burden sustained by the specific applicants.[694] Instead, the ECtHR referred solely to economic necessity and quickly concluded that any interference was justified.[695] In contrast, in the case of *Malysh and Others v. Russia*[696] that pertained to Russia's inability to repay sovereign bonds' nominal value and interest, the ECtHR noted that an appropriate balancing exercise was required, while taking into account the amount owed by the State to bondholders vis-a-vis other pressing budgetary expenses of priority.[697] Similarly, ECtHR, although it did in fact found that there was great volatility and difference between bondholders that would require a different treatment amongst them, nonetheless it found this was justified due to the urgent situation Greece was in, even making reference to the "pari passu" clause that is indifferent for human rights considerations.

This judgement has not been appealed to the Grand Chamber. That stated, it is the author's view that, even if the judgement had been appealed before the Grand Chamber, although the latter might have corrected such shortcomings, nonetheless, be unlikely to come to a different conclusion. This is because it has become evident through the ECtHR's case law that when dealing with issues of financial crisis, the ECtHR will refrain from challenging state decisions that reflect major political choices relating to economic matters by resorting to the subsidiarity principle.[698] Hence, the ECtHR will not challenge state decisions that are closely related to the sovereign power of a state, such as decisions relating to economic policy and sovereign default. This, in conjunction with the ECtHR's prior case law stating that legitimate objectives of 'public interest' may justify a compensation below the full market value,[699] demonstrates that in light of the extreme circumstances of a

[694] See Mamatas and Others v. Greece [2016] ECHR, 694, paras 106- 120

[695] See Mamatas and Others v. Greece [2016] ECHR, 694, para 120

[696] Malysh and Others v. Russia, ECtHR (2010)

[697] See also Stephan M. Schill, Yun I-Kim, Sovereign Bonds in Economic Crisis, in Karl P. Sauvant (ed), Yearbook on International Investment Law & Policy 2010-2011, OUP USA, (2013)

[698] Linos-Alexandre Sicilianos, The European Court of Human Rights at a time of Crisis in Europe, SEDI/ESIL Lecture, European Court of Human Rights, (2015) available at http://www.esil-sedi.eu/sites/default/files/Sicilianos_speech_Translation.pdf

[699] Lithgow et al. v. UK, ECtHR, (1986) see also Patrick Wautelet, The Greek Debt Restructuring and Property Rights. A Greek Tragedy for Investors? (2013) available at https://orbi.ulg.ac.be/bitstream/2268/160460/1/Wautelet.pdf

sovereign default, a bond exchange would most likely be upheld despite the severe haircut it might impose.[700]

Thus, it is worth exploring whether investors would have a better chance of succeeding in their claims if they were to resort to investment tribunals by invoking investment treaty standards.

IV. Claiming Protection under Bilateral Investment Treaties

A. Definition: General Discussion

Bilateral investment treaties (BITs) are legally binding international agreements between two states establishing the terms and conditions mutually applicable for investments made by natural or legal persons.[701]

Most BITs include guarantees and other provisions that regulate the terms and extent of the standard treatment to be awarded to foreign investors.[702] Those guarantees are both general – referring to the standard treatment the investor would receive in the host State, and specific – particularly granting protection against specific types of danger that might occur in the host State.[703] From a legal perspective, the treatment of the investor and his investment by the host State is evaluated based on the guarantee made by the host State to investors vis-a-vis a specific standard of treatment.[704] The most common standards of treatment provided for under international investment treaties and investment codes are: (i) the most favored nation treatment, (ii) fair and equitable treatment, and (iii) treatment in accordance with the rules of international law.[705]

B. Conditions for Claiming Protection under BITs

For an investor to be able to claim protection under a BIT, the following conditions have to be cumulatively met: (i) the entrepreneur must qualify as a foreign investor under the BIT; (ii) the investment must qualify as an investment under the BIT; and (iii) a breach of the standard of treatment provided for by the BIT must have

[700] See also Andreas Witte, The Greek Bond Haircut: Public and Private International Law and European Law Limits to Unilateral Sovereign Debt Restructuring, Manchester Journal of International Economic Law (2012), Vol 9 Issue 3

[701] Fabio Bassan, Research Handbook On Sovereign Wealth Funds and International Investment Law (Edward Elgar Pub Ltd 2015), p.124

[702] Fabio Bassan, Research Handbook On Sovereign Wealth Funds and International Investment Law (Edward Elgar Pub Ltd 2015), p.124

[703] Panagiotis Gklavinis, International Economic Law, Sakkoulas Publications, (2009), p. 609

[704] Fiona Beveridge, The Treatment and Taxation of Foreign Investment under International Law, Juris Publishing, (2000), pp. 232-234.

[705] Panagiotis Gklavinis, *International Economic Law,* Sakkoulas Publications, (2009), p. 611

occurred.[706] While the first two conditions are mainly of a procedural nature, the third one is a substantive issue.

At this point, it is important to note that, despite significant differences among various BITs, there is a very strong trend towards their harmonization. If one takes into consideration that developed States – usually acting as the investors' state – have the power to, and do, impose their terms on host states, one can begin to see that there are clear patterns evident in almost all BITs.

C. Foreign Investor under the BIT

To bring a claim under a BIT, a natural or legal person must qualify as a foreign investor from a country, which is party to a BIT with the host state. For natural persons, the decisive factor to determine whether they are a foreign investor is their nationality,[707] while for legal persons both their place of incorporation and the place of effective management and control are taken into account.[708] Hence, the investors in the *Mamatas* case, who were nationals of Greece, would not qualify as foreign investors and thus could not claim protection under any investment treaty.

D. Protected Investment under the BIT

Here, I believe, the scope of the term "investment" requires further explanation as it relates to BITs. Most BITs contain broad definitions of protected investments and often include language such as "every kind of asset," or "every kind of investment in the territory."[709] Such broad definitions usually include investments in real estate, stocks and bonds, monetary claims, intellectual property, etc.[710] It is questionable, however, whether portfolio investments are included in this definition. Indeed, portfolio investors assume commercial risks and are, consequently, not usually protected by the host state.[711]

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[706] Ursula Kriebaum, The Law & Practice of International Courts and Tribunals, Volume 10, Issue 3, pages 383 – 404 (2011)

[707] Although some BITs make reference to other criteria such as a requirement of residency or domicile, see Organisation for Economic Co-operation and Development. (2008). International investment law: Understanding concepts and tracking innovations. Paris: OECD.

[708] Muthucumaraswamy Sornarajah, The International Law on Foreign Investment (2014), Cambridge University Press pp. 132-134.

[709] Indicatively, the Greek-German BIT covers all capital investments that include "any kind of asset" and are by way of indication and not of limitation defined as: (i) interests on movable and immovable property and all other liens such as mortgages and hypothecations and other similar rights; (ii) shares and various interests in companies; (iii) fiscal claims or offers of an economic value; (iv) intellectual or industrial property rights, technical methods, trademarks; (v) rights deriving from allotments/concessions.

[710] See e.g. José E. Alvarez, The Public International Law Regime Governing International Investment, Martinus Nijhoff, (2011), p. 58

[711] See e.g. the South African Development Community Model Bilateral Investment Treaty Template of 2012 which expressly excludes portfolio investments, see also Sara Pendjer, Investment status of sovereign bonds: recent developments in the case law of ICSID, Central European University, (2016)

Including portfolio investments in the definition of investments under BITs would allow investors with a small percentage in a company who do not have an interest or stake in the company's management but only aspire to receive a return on their investment, to claim protection under a BIT.

Until recently, tribunals had not offered a definitive answer as to whether portfolio investments could be included in the definition of investments under BITs.[712] That, however, changed with the ICSID tribunal's (Tribunal) award in *CMS v. Argentina* in which the old criterion of the exercise of effective management and control was set aside, and the language of the US-Argentina BIT was analyzed with great attention. As the latter did not entail an exhaustive definition of what constituted an investment, both portfolio and FDI investments were deemed to be included in the definition of investment.[713] This decision is indicative of the trend to broadly interpret the definition of investments under BITs so that they include portfolio investments.

Under such trend, the notion of investment does not connect the essence of investment with the exercise of effective management and control.[714] Indeed, "many ICSID and other arbitral decisions . . . have progressively given a broader meaning to the concept of investment,"[715] while in *Abaclat et al. v. the Argentine Republic*,[716] the Tribunal specifically found that portfolio investments were included within the scope of protection of the BIT.[717] This, however, was questioned in the recent case of *POŠTOVÁ BANKA, A.S. and ISTROKAPITAL SE v. the Hellenic Republic*.[718] This is the case we now turn to.

E. POŠTOVÁ BANKA, A.S. and ISTROKAPITAL SE v. the Hellenic Republic

Poštová Banka A.S., a banking institution registered in Slovakia and owned by Istrokapital S.E., a Cypriot entity, filed a claim against Greece in May 2013 before the ICSID.[719] In early 2010, Poštová Banka purchased Greek bonds equal to €504 million from the secondary market and deposited such bonds in an account with the depository Clearstream Banking of Luxembourg, without retaining rights in any specific instrument but to a pool of fungible interests.[720] At the time of purchase, these

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p.16, which discusses the debate of whether portfolio investments in all forms should constitute protected investments.

[712]Mahnaz Malik, '*Recent Developments in the Definition of Investment in International Investment Agreements*' Second Annual Forum of Developing Country Investment Negotiators, (2008).

[713] CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, para. 56

[714]Noah Rubins, 'The Notion of Investment in International Investment Arbitration, Arbitrating Foreign Investment Disputes, Procedural and Substantive Legal Issues', in Nobert Horn (edit), *Kluwer Law International*, Volume 19, 2004, p. 318

[715] Joy Mining Machinery Limited v Arab Republic of Egypt, ICSID Case No ARB/03/11 (2004)

[716]*Abaclat et al. v. the Argentine Republic*, ICSID Case No.ARB/07/5

[717] Abaclat et al. v. the Argentine Republic, ICSID Case No.ARB/07/5, para 65

[718] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015)

[719] See https://www.italaw.com/cases/2073

[720] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 59.

bonds did not contain CACs; CACs were forcibly introduced by the Bondholders Law No. 4050/2012. As a result, Poštová Banka was required to participate in the bond exchange, despite having expressed a dissenting opinion.[721]

Before examining the merits of the case, the ICSID proceeded to examine the jurisdictional objections that the Greek government had raised.[722] Greece argued that the ICSID's tribunal lacked subject matter, personal, and temporal jurisdiction;[723] Greece also maintained that the claimants had abused the tribunal's process.[724] In particular, Greece presented two arguments to contest the tribunal's *ratione materiae* jurisdiction: (i) first, it claimed that Istrokapital's shareholding in Poštová Banka was not an investment under the Cyprus-Greece BIT,[725] and (ii) that Poštová Banka's interests in Greek bonds did not fall within the scope of protected investments under the Slovakia-Greece BIT.[726] ICSID examined these arguments in turn.

E(1). Istorkapital's Investment Under the Cyprus- Greece BIT

Istrokapital countered Greece's objection and argued that it had, in fact, made an investment within the definition of the Cyprus-Greece BIT, which was not the shareholding in Poštová banka, but the Greek bonds obtained by Poštová Banka.[727] Indeed, Istorkapital claimed it had indirectly invested in Greek bonds through Poštová Banka.[728] As per Istorkapital, such investment fell within the scope of Art. 1.1. (c) of the Cyprus-Greece BIT as assets comprising monetary claims and contractual claims with an economic value.[729]

The tribunal examined previous case law on whether shareholders may raise claims for rights in assets held by companies whose share capital they own.[730] From such examination, the tribunal noted that there was no available case law to support such an argument.[731] In fact, in previous cases, arbitral tribunals had adopted a rather different view, namely that a company should be distinct from its shareholders.[732]

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[721] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 63.

[722] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 91.

[723] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 91

[724] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 91

[725] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 95.

[726] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 119.

[727] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 100

[728] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 100

729 Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 228.

[730] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 228-242

[731] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 246

732 HICEE, B.V. v. Slovak Republic, UNCITRAL, PCA Case No. 2009-11, (2011)

Indicatively, in *BG. v. Argentina*,[733] the tribunal found that BG had no direct claims stemming from the license agreements entered into by one of its subsidiaries.[734] The same conclusion was also reached by the tribunal in *El Paso v. Argentina*[735] and *Urbaser v. Argentina*.[736]

Based on this case law, the tribunal noted that while Istorkapital could pursue claims against "measures taken against such company's assets that impair the value of the claimant's shares impairment of its shareholding in Poštová banka,"[737] nonetheless it did not have standing to claim damages for the assets held by Poštová Banka.[738] Consequently, as Istorkapital had based its claim for jurisdiction solely on the basis of its indirect investment in Greek bonds, the tribunal dismissed all of Istrokapital's claims for lack of jurisdiction, noting that the sole investor of Greek bonds was Poštová Banka.[739]

E(2). Poštová Banka Investment Under the Greece-Slovakia BIT

In examining whether Poštová Banka's interests in the Greek bonds fell within the meaning of investment, the tribunal primarily took note of the process by which Poštová Banka acquired the Greek bonds, noting that it was in the secondary market.[740] Thereafter, the tribunal examined the wording of Art. 1 of the Greece-Slovakia BIT and, in particular, they examined the definition of the term "investment" provided in the BIT:

> "Investment" means every kind of asset and in particular, though not exclusively includes:
>
> a) movable and immovable property and any other property rights such as mortgages, liens or pledges,
>
> b) shares in and stock and debentures of a company and any other form of participation in a company,
>
> c) loans, claims to money or to any performance under contract having a financial value,
>
> d) intellectual property rights, goodwill, technical processes and know-how,

733 BG Group Plc. v. Argentine Republic, UNCITRAL, Final Award of December 24, 2007 (2007)

734 BG Group Plc. v. Argentine Republic, UNCITRAL, Final Award of December 24, 2007, para 144

735 El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, (2011)

736 Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26 (2012)

737 Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 245

738 Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 245

739 Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 246

740 Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 250-251

e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.[741]

The claimants contended that their interest in the Greek bonds was included in the above definition of investment, which referred to "every kind of asset," and in particular, referred to "loans" or "claims to money."[742] Claimants noted that international law did not ascribe any particular meaning to the term "investment" and as such, the tribunal should refer solely to the wording of Art. 1 of the BIT.[743] Greece, on the other hand, argued that the term had an ascribed meaning under international law, and that the tribunal should not search for a special definition under the BIT.[744]

The Tribunal primarily acknowledged that, as per the claimant's argument, the definition of the term "investment" is broad, noting however, that this should not be interpreted so that any and all categories of assets fall within such definition automatically.[745] The fact that the list of assets is non-exhaustive did not allow the Tribunal to indefinitely expand the types of protected assets intended by the contracting states. Therefore, to discover whether the claimants' rights in the Greek Bonds were in fact included within the meaning of investment, as per the Vienna Convention on the Law of Treaties (VCLT), the tribunal was required to interpret the term in good faith, taking into account the text, context, and the object and purpose of the Greece-Slovakia BIT.[746] The non-exhaustive list of protected assets contained in the definition, therefore, should be considered within the context of the BIT. Otherwise, such indicative list would be meaningless and useless, and to this end, the different wording of the protected assets found in the various Greek and non-Greek investments would be redundant.[747]

The tribunal noted that this indicative list of assets was the distinctive factor vis-a-vis *Abaclat et al. v. the Argentine Republic*.[748] In this case, the tribunal founded its judgement that portfolio investments constitute protected investments by reviewing the wording of a similar indicative list in the Italy-Argentina BIT.[749] Such wording

[741] Greece Slovakia Bilateral Investment Treaty Art.1

[742] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 279

[743] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 280

[744] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 280

[745] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), paras 284-285

[746] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 285

[747] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 287

[748] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 300

[749] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 300

was significantly different from the Greece-Slovakia BIT as the list in the Italy-Argentina BIT was construed in a much more generic and broad manner.[750] As the tribunal noted in *Abaclat* in reference to the indicative list in Art. 1 of the Italy-Argentina BIT:

Firstly, this list covers an extremely wide range of investments, using a broad wording and referring to formulas such as 'independent of the legal form adopted,' or 'any other' kind of similar investment. It even contains a residual clause in lit. (f), encompassing 'any right of economic nature conferred under law or contract.' In other words, the definition provided for in Article 1(1) is not drafted in a restrictive way.[751]

In fact, the Italy-Argentina BIT made specific reference to "obligations, private or public titles," which was invoked by the claimants in *Abaclat*.[752] As no such reference was made in the Greece-Slovakia BIT, which only refers to debentures issued by companies and not by the state, the claimants in the current case categorized their claim as "loans" and "claims to money."[753] To this end, the tribunal in *Poštová Banka AS and Istrokapital SE v. The Hellenic Republic* asked whether Greek bonds were equivalent to loans.[754] The tribunal answered in the negative as, unlike loan agreements where the parties are identified in the loan agreement, bonds are held by several investors anonymously and often exchange hands several times.[755] The tribunal also declined the claimants' assertion that their interests in Greek bonds could be considered "claims to money."[756] The tribunal noted that according to Art.1(1)(c) of the BIT, for a claim to money to arise, it must stem from a contract between the parties.[757] In the present case, Poštová Banka had not entered into a contract with Greece because it acquired the Greek bonds from the secondary market.[758]

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[750] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 307

[751] Abaclat and others v. Argentina, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (2011), par. 354

[752] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 302

[753] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 308, 342

[754] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 285

[755] For a commentary on the reasoning of the Tribunal for the similarities between loans and bonds see Anna O. Mitsou, 'Greek Debt Restructuring and Investment Treaty Arbitration: Jurisdictional Stumbling Blocks for Bondholders' Journal of International Arbitration, (2016) 33, 6, pp. 687–721

[756] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 285

[757] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 306

[758] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 307

Hence, the tribunal concluded that Poštová Banka's interests in Greek bonds were not an investment under the Greece-Slovakia BIT.[759] Therefore, the tribunal did not have jurisdiction to hear the merits of the application.[760]

In 2015, Poštová Banka filed an application requesting the partial annulment of the Award rendered by the ICSID on April 9, 2015 by virtue of Articles 48(3) and 52(1)(e) of the ICSID Convention.[761] Poštová Banka claimed that the tribunal had not stated the reasons on which the award was based because it had not explained why the proprietary rights acknowledged by the tribunal did not fall within the wide definition of "investment."[762] In particular, Poštová Banka put forth three main arguments: (i) that the reasoning of the tribunal did not allow the reader to follow how the tribunal proceeded from point A to point B, (ii) that the tribunal's reasoning was so contradictory so as to amount to no reasoning at all and (iii) that the tribunal's errors were outcome-determinative.[763]

On September 29, 2016, the ICSID ad hoc Committee delivered its decision on Poštová Banka AS's application for partial annulment of the Award, dismissing the application.[764]

As is evident from the above, the wording of a BIT is decisive as to whether sovereign bonds fall within the protective scope of investments under the given BIT and allow the bondholder to claim compensation on these premises. The tribunal's findings in *Poštová Banka, AS and Istrokapital, SE v. the Hellenic Republic* are in line with the ICSID's previous ruling in *Ambiente Ufficio S.p.A. and others v. Argentine*[765] where the tribunal (although it stipulated that tribunals should refrain from a restrictive reading of the jurisdictional provisions of the ICSID Convention, when such reading cannot be founded on the Convention itself) noted that a restrictive reading is required, "if the consent given by a state indicates that certain types of investment should be excluded from the protection of the ICSID arbitration mechanism to tackle difficulties relating to the substantive side of a case."[766] Although such decision is not binding on other Tribunals, as the doctrine of precedent

[759] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 350

[760] Poštova Banka SA and Istrokapital SE v Hellenic Republic, ICSID Case No. ARB/13/8, (2015), para 350

[761] Poštová banka, a.s. and ISTROKAPITAL SE v. The Hellenic Republic (ICSID Case No. ARB/13/8) – Annulment Proceeding

[762] Poštová banka, a.s. and ISTROKAPITAL SE v. The Hellenic Republic (ICSID Case No. ARB/13/8) – Award on Annulment Proceeding, para 86

[763] Poštová Banka, A.S. and ISTROKAPITAL SE v. The Hellenic Republic, ICSID Case No. ARB/13/8 – Annulment Proceeding (2016) para.88

[764] Poštová banka, a.s. and ISTROKAPITAL SE v. The Hellenic Republic (ICSID Case No. ARB/13/8) – Award on Annulment Proceeding, para 160

[765] Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9 (2013)

[766] Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9 (2013), para. 461

does not exist under international investment law, nonetheless this award is expected to affect tribunal's decisions on the said topic.[767]

This award has received criticism for it's very restrictive interpretation, especially in relation to its finding that bonds are not loan agreements. As demonstrated in Chapter 5, sovereign bonds constitute a form of financing for the States and, in particular, a form of loan agreements. Hence, the award's reasoning appears to be overly restrictive unjustifiably.[768]

F. Greece's Main Types of BITs

According to the United Nations Conference on Trade and Development database, Greece is comparatively advanced in its use of various categories of investment treaties.[769] Indeed, Greece has signed forty-seven BITs, one of which was terminated and replaced (Romania) and four of which have been signed but are not yet in force (Argentina, Kongo, Kuwait, and Kazakstan).[770] Most of the BITs are either with countries outside the EU or with Central and East European countries, which became EU members after 2000 (there are eleven such BITs, the majority of which were pre-existing, but renegotiated in line with EU requirements). As an EU member state, Greece is party to some seventy-five other International Investment Agreements (IIAs), entered into by the EU in keeping with association and free trade agreements, as well as with (or in the framework of) various international organizations and agencies.[771]

Out of the forty-seven BITs that Greece has signed and are currently in force, none contain as extensive of wording as the Italy-Argentine BIT. Twenty-one of Greece's BITs[772] have wording similar to the Greece-Slovakia BIT. Two of Greece's BITs make absolutely no reference to loans or claims in money,[773] sixteen BITs[774] refer to "loans connected to an investment," and two BITs entail specific exclusions from claims to money and loans.[775] In light of the ICSID's award in *Poštová Banka*

[767] Anna O. Mitsou, 'Greek Debt Restructuring and Investment Treaty Arbitration: Jurisdictional Stumbling Blocks for Bondholders' (2016) 33 Journal of International Arbitration, Issue 6, pp. 687–721

[768] For a deeper analysis see Anna O. Mitsou, 'Greek Debt Restructuring and Investment Treaty Arbitration: Jurisdictional Stumbling Blocks for Bondholders' (2016) 33 Journal of International Arbitration, Issue 6, pp. 687–721

[769] See the list of the respective IIAs at www.investmentpolicyhub.unctad.org/IIA/

[770] http://investmentpolicyhub.unctad.org/IIA/CountryBits/81

[771] *Ibidem.*

[772] BITS with Albania, Algeria, Argentina, Bosnia, Bulgaria, Chile, China, Cyprus, Czech Republic, Germany, Hungary, Korea, Serbia, Russia, Poland, Morocco, Montenegro, Slovakia, Slovenia, Tunisia, Turkey

[773] Egypt-Greece BIT and Iran-Greece BIT

[774] BITs with Azerbaijan, Croatia, Cuba, Estonia, Georgia, India, Syria, South Africa, Moldova, Lithuania, Lebanon, Latvia, Jordan, Uzbekistan, United Arab Emirates (although the BIT also refers to Rights Granted under Public Law or Contract) and Romania (although this BIT refers to long term Loans

[775] Mexico and Vietnam

AS and Istrokapital SE v Hellenic Republic, investors will have difficulty demonstrating that bonds acquired from the secondary market fall within the protective scope of BITs, although the reference to loans connected to an investment is very closely linked to sovereign debt,[776] which makes it more likely that a tribunal will accept such reference as a protected investment. However, if investors manage to overcome this hurdle, will they be able to finally gain compensation? This is the question we now turn to.

G. BIT's Standard of Treatment

As explained above, the third condition for an investor to be able to effectively claim protection under a BIT is that he must demonstrate there was a breach of a treaty standard that has negatively affected his investment. In practical terms, a standard of treatment consists of a set of principles to be observed in their letter and spirit by the host state in its relations with foreign investors.[777] In other words, standards of treatment are meant to govern the contracting parties' behavior and, more specifically, to preserve and protect investors' rights. However, this is not always the case; quite a number of breaches of the respective principles occur, leading to disputes among parties to investment treaties.

The standard of treatment provided for by BITs mainly consists of:[778]

- national treatment (non-discrimination between domestic and foreign investors in light of the fiscal regime and other related measures);
- most favoured nation treatment – MFN (equal treatment of all foreign investors acting in same or similar conditions; no less favourable treatment on the basis of investors' nationality);
- fair and equitable treatment for all parties concerned;
- full protection and security for the foreign investment.

Most BITs also stipulate the need for:

- not allowing any direct or indirect expropriation without providing adequate and effective compensation;
- allowing the repatriation and general transfer of investors' capital out of the host country;
- not imposing conditions based on performance requirements; for example, employment and training requirements; and
- allow for neutral arbitration as the main means for the settlement of disputes, if and when treaty standards of protected is not upheld.[779]

[776] Rachel D. Thrasher, Kevin P. Gallagher, Mission Creep: The Emerging Role of International Investment Agreements in Sovereign Debt Restructuring, Boston, CFLP WORKING PAPER 003, 2/2016 (2016)

[777] See Dispute Settlement: State-State, United Nations Conference On Trade and Development, UNCTAD Series on issues in international investment agreements (2003) p.13

[778] See, for a more detailed analysis, Muthucumaraswamy Sornarajah., *op.cit.* pp. 201-205.

H. Salient Features of Greece BITs[780]

As previously stated, Greece has signed over forty BITs that contain both similar as well as differing language. Some of the common standards of treatment found in BITs entered into by Greece, include the following:

Non-discrimination

All BITs explicitly limit the application of the Most Favored Nation (MFN) principle, insofar as the benefits resulting from Greece's EU membership are concerned.[781] Also, some BITs, entered into mostly with developing countries, stipulate the non-application of MFN to preferences or privileges extended to developing countries in line with the international agreements in the field.[782]

While the large majority of the BITs provide that non-discrimination is applicable only to "investments," several of them have a larger scope, this principle covering the "returns on investment," too.[783]

Fair and Equitable Treatment

Most Greek BITs broadly describe the fair and equitable treatment standard (FET) as being applicable to the investments made by investors of each party to the treaty. It is interesting to note, however, that in the German-Greek BIT, there is no explicit reference to the FET.

Expropriation

Out of all of Greece's BITs which expressly provide for protection against direct expropriation, only four of them contain similar protective provisions for indirect expropriation. While the large majority of Greek BITs require that any expropriation be subject to the "due process of law," three of them (including the one with Germany) do not contain such a requirement, stipulating only that expropriation may be done in the public interest.[784] As to the right of compensation, in general, it

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780 See for a detailed presentation, Nicholas Moussas, Stratos Voulgaridis and Charalampos Kondis, Investment Treaty Arbitration 2016, Greece, Overview of investment treaty programme (2016) available at http://globalarbitrationreview.com/jurisdiction/2000114/greece

781 In particular, the wording provided in the MFN clause of BITs signed by Greece reads as "Such treatment shall not relate to privileges which either Contracting Party accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market, a free trade area or similar institutions."

782 See e.g. Art. 3(4) of the Greece-South Africa BIT as well as 4(3) of the Greece-Cuba BIT

783 See e.g, Art. 2(4) of the Greece-Russia BIT, as well as 2(b) of the Greece-Turkey BIT

784 See Art.3(2) of the Greece-Germany BIT, as well as Art 4(1) of the Greece-Morroco BIT, see also Nicholas Moussas, Stratos Voulgaridis and Charalampos Kondis, Investment Treaty Arbitration 2016, Greece, Overview of investment treaty programme (2016) available at http://globalarbitrationreview.com/jurisdiction/2000114/greece, where they make reference also to the Greece-Albania BIT, that however does make reference in Art. 4(2) that "The legality of any such expropriation.

must be equivalent to the market value of the tangible or intangible object of expropriation and must be "prompt, adequate and effective."[785]

Other Substantive Protections

Greek BITs also contain other provisions related to investor protection. One such provision deals with the free transfer of payments: all BITs provide for unrestricted and immediate transfer of investments, including their returns, in freely convertible currencies.

It should also be noted that according to most Greek BITs, the contracting parties have the obligation not to unjustifiably intervene in the management, use, disposal, etc. of investments made by investors from the other state.[786]

We shall now briefly examine, below, the contents of the aforementioned standards of treatment found in the majority of BITs signed by Greece, as well as their potential infringement.

I. Potential Breaches of the Standards of Treatment

Non-discrimination

The non-discrimination principle has two components meant primarily to ensure full and fair competition among all investors, be they domestic or foreign, namely: (i) national treatment (regime), and (ii) the most-favored-nation clause.

National Treatment

According to the national treatment (NT) principle, foreign investors shall be treated no less favorably than domestic ones.[787] A key element in examining the difference of treatment awarded to investors of the defaulting state versus those awarded to foreign investors is the terms of the restructuring. Consequently, in cases of sovereign debt default and restructuring, an NT breach may occur when domestic bondholders receive better terms than those offered to foreign bondholders (e.g., they sustain a smaller haircut).

There are various policy reasons for a state to award preferential treatment to domestic investors, including reviving the domestic financial system, providing liquidity, and managing financial and monetary risk during a subsequent economic recovery.[788] These policy measures exist because their absence may trigger a banking crisis which can entail significant foreign exchange outflows and deposit flight, as we have seen in the case of Greece. Evidence of this can be seen in the cases relating to

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nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law."

[785] See e,g. Art. 4(1) of Greece-Croatia BIT as well as Art 6 (1c) of Greece-Chile BIT

[786] See e.g. Art. 3(2) and 4(2) of Greece-United Arab Emirates, Art. 3(2) of Greece-Korea BIT

[787] Nicolas F Diebold, Standards Of Non-Discrimination In International Economic Law, The International and Comparative Law Quarterly,Vol. 60, No. 4 (OCTOBER 2011), pp. 831-865

[788] Ann Gelpern and Brad Setser, 'Domestic and External Debt: The Doomed Quest for Equal Treatment', Georgetown Journal of International Law, (2004), Vol. 35(4), p. 796.

the Russian and Argentinean financial crisis, where domestic investors were treated more favorably than foreign investors.[789]

Such was also the case when, during the 1997 financial and monetary crisis of the peso in Mexico, Mexico facilitated the purchase of financial instruments denominated in Mexican pesos and not similar financial instruments denominated in U.S. dollars. Notably, instruments denominated in Mexican pesos were owned by Mexican investors alone, and thus, foreign investors were indirectly excluded from the purchase.[790] Although, the ICSID Tribunal did not examine the merits of such arguments in the case *Fireman's Fund Insurance Company v. The United Mexican States*,[791] it did note that "such claim might have given rise to a claim by an investor under Articles 1102 (National Treatment) . . . or Article 1405 (National Treatment) of the NAFTA."[792]

However, concluding that a national investor is awarded preferential treatment within the context of sovereign restructuring is easier said than done given the wide diversity between the terms of the various bonds.[793] For example, in the case of the Greek Haircut, as was demonstrated in the case of *Mamatas and Others v. Greece*, Greek creditors did not receive any different or preferential treatment.[794] In this case, it can be said that Greek creditors in fact received less favorable treatment than foreign investors,[795] as they were subjected to a 'double-adjustment.' A double adjustment occurred in that, not only were Greek Creditors affected by the Bond Exchange and the reduction in the face value of their bonds, but they were also affected by the negative repercussions of the financial crisis, including, among other things, slow growth, growing unemployment, and high interest rates.[796]

Most-Favored-Nation

The MFN clause, which can be found in virtually all BITs and most other international investment treaties (IITs), requires that all foreign investors be treated

[789] Ann Gelpern and Brad Setser, *op.cit.* p. 788.

[790] Fireman's Fund Insurance Company v. The United Mexican States, ICSID Case No. ARB(AF)/02/1, (2002), para. 56.

[791] Fireman's Fund Insurance Company v. The United Mexican States, ICSID Case No. ARB(AF)/02/1, (2002)

[792] Fireman's Fund Insurance Company v. The United Mexican States, ICSID Case No. ARB(AF)/02/1, (2002) para. 203

[793] Michael Waibel, 'Sovereign Defaults before International Courts and Tribunals' , Cambridge University Press, 2011, p. 274

[794] Supra at FN 4

[795] Julian Schumacher, Marcos Chamon, Christoph Trebesch, Foreign Law Bonds: Can They Reduce Sovereign Borrowing Costs?, Beiträge zur Jahrestagung des Vereins für Socialpolitik (2015), Ökonomische Entwicklung - Theorie und Politik - Session: Asset and Bond Markets, No. B09-V3

[796] Aldo Caliari, 'Risk Associated with Trends in the Treatment of Sovereign Debt in Bilateral Trade and Investment Treaties', Debt Sustainability and Development, Geneva: UNCTAD, 2009.

alike in the same or similar circumstances, and that no less favorable treatment is awarded to any foreign investor on the basis of their nationality.[797]

In the case of Greece, for instance, the European Central Bank (ECB), its largest creditor at the time of the bond exchange, holding 16.3% of Greece's debt, was exempted from the bond exchange.[798] The same applies for the IMF and EU member states' central banks which did not take analogous haircuts on their Greek bonds, as all other bondholders did.[799]

Indeed, the ECB's Outright Monetary Transactions (OMT) program announcement stipulated, "The Eurosystem intends to clarify in the legal act concerning Outright Monetary Transactions that it accepts the same (pari passu) treatment as private or other creditors, with respect to bonds issued by Euro area countries, and purchased by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds."[800] The ECB exchanged its previous GGBs with new ones, with the same nominal value and terms, and without any Collective Action Clauses (CACs), as opposed to all other bondholders that participated in the haircut which received a steep reduction on the face value of their bonds.[801]

This discrimination between institutional investors and other investors holding the same instruments may amount to a breach of the MFN standard.[802] Although, it is questionable whether Greece actually had a choice or the power not to accept such discrimination.

Fair and Equitable Treatment

An alternative basis of claim for investors is the well-established treaty standard of fair and equitable treatment (FET). Despite the long and general application of FET, the content of such a standard is not clearly defined.[803] The FET clause, which is included in most of the more recent IIAs, typically grants investors protection of their reasonable expectations that they have relied upon to make the

[797] Peter Muchlinski, Federico Ortino, Christoph Schreuer, The Oxford Handbook of International Investment Law

[798] The Economist. (2017). Ready for the ruck?. [online] Available at: http://www.economist.com/node/21533368/all-comments [Accessed 26 Nov. 2017].

[799] The Economist. (2017). Ready for the ruck?. [online] Available at: http://www.economist.com/node/21533368/all-comments [Accessed 26 Nov. 2017].

[800] See http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

[801] Ioannis Glinavos, Redefining the Market-State Relationship: Responses to the Financial Crisis and the Future of Regulation, Routledge Research in Finance and Banking Law, (2013), p. 143

[802] Ioannis Glinavos, Redefining the Market-State Relationship: Responses to the Financial Crisis and the Future of Regulation, Routledge Research in Finance and Banking Law, (2013), p. 143

[803] K. J. Vandevelde, A Unified Theory of Fair and Equitable Treatment, New York University Journal of International Law and Politics, (2010), Vol. 43 (1).

investment, freedom from interference and coercion, transparency, due process, and good faith conduct.[804]

With respect to bond exchanges, a concern has been expressed that, although such bond exchanges are now common practice in debt restructurings they may, nonetheless, violate the FET. There are a number of justifications for such concern. Significantly, bond exchanges could face allegations of lack of transparency and that they are coercive. Most scholars, in addition, consider the 'take-it-or-leave-it' approach followed in restructuring proceedings as being in breach of the good faith and due process principle in the absence of serious restructuring negotiations.[805]

In other words, the FET aims to create a stable and secure environment for investments. The above standard has been reiterated many times by various tribunals and courts.[806] Indicatively, the UNICITRAL (United Nations Commission on International Trade Law) in its case of *OEPC v. Ecuador*[807] stated that there is "an obligation not to alter the legal business environment in which the investment has been made."[808] In addition, in the cases relating to Argentina's sovereign default, the tribunals expressly stated the importance of a stable and transparent economic environment and the need for the reasonable expectations of investors to be upheld. Specifically, in *LG&E v. Argentina*,[809] the tribunal referred to the time element of those expectations and noted that investor expectations are founded on the circumstances present in the host state at the time the investment was made.[810]

It is important to mention here that before the beginning of the Greek crisis, the yields of the ten-year Greek bonds were 10 to 40 basis points above the ten-year German bonds, only to explode to 400 basis points in January 2010.[811] Indicatively, in 2007, the interest spreads of the ten-year Greek bonds were at approximately 0.2 percentage points, while they rose to 1.5 percentage points in late 2008, and to 8.0 percentage points in the second half of 2010.[812] As such, the investors that bought

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[804] Michael Waibel, *op.cit.,* pp. 711-759. See also, Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, para 420

[805] *Michael Waibel, op.cit., pp. 711-759.*

[806] Chiara Giorgetti, The Rules, Practice, And Jurisprudence Of International Courts And Tribunals (BRILL 2012).

[807] *Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11 (2004)

[808] Occidental Petroleum Corporation, Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11 (2004), para 240

[809] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1(2007)

[810] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1(2007), para 127

[811] Heather D. Gibson, Stephan G. Hall, George S. Tavlas, The Greek financial crisis: growing imbalances and
sovereign spreads Bank of Greece, Working Paper,(2011)

[812] Gunther Tichy, Credit Rating Agencies: Part of the Solution or Part of the Problem? Intereconomics (2011)

Greek bonds before the crisis reasonably anticipated to be paid the entire face value of their bonds plus interest on maturity, and were greatly surprised by the Greek haircut that completely annulled their expectations, undermining the legal framework of Greek bonds. These bondholders may have a claim against Greece for breach of fair and equitable treatment.

The same cannot be said for bondholders that bought or continued to buy Greek bonds after the Greek economic crisis had begun to unfold. Indeed, an investor cannot disregard and must take into account that the host state faces significant economic problems. Indicatively, in *Olguin v. Republic of Paraguay*[813] the tribunal noted that an experienced businessman could and should have conducted thorough research prior to investing and that he should have been more conservative in investing in a country suffering serious economic problems.[814] This principle was reiterated in the aforementioned case, *CMS v. Argentina*,[815] where the tribunal held that, in order to determine the scope of protection that should be granted to an investor by virtue of a BIT, the results of abnormal conditions caused by the financial crisis in Argentina should be taken in account.[816] The tribunal specifically noted that the effects of the financial crisis should, to a certain extent, be taken into account as part of the business risk that was assumed by the claimant when he invested in Argentina.[817] The tribunal also noted that not considering such effects within the business risk taken by the investor would lead to an unjustifiably unequivocal result, as the investor would not share any of the costs of the crisis, but would instead receive immunity from such costs, and that this would be tantamount to an insurance policy against business risk.[818]

In addition to the disappointment of an investors' expectations, the unilateral and retroactive introduction of the CAC to all Greek-law governed bonds is also troubling. Indeed, the imposition of new conditions, placed retroactively through law has troubled investment tribunals on several occasions. In the case of *Total S.A. v. The Argentine Republic*, Argentina retroactively eliminated, through the enactment of the Emergency Law in early 2002, a tax exemption from applying export customs duties to production in Tierra del Fuego.[819] This was considered a breach of FET. Similarly, in the case of *ATA Construction Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, the tribunal found that the retroactive application of the new Jordanian Arbitration Law, which effectively led to the extinguishment of the

[813] *Olguin v. Republic of Paraguay*, Case No. ARB/98/5 (2001)

[814] Olguin v. Republic of Paraguay, Case No. ARB/98/5 (2001) para 75

[815] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8 (2005)

[816] *CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8* (2005) para 244. See also Peter Muchlinski, 'Caveat Investor.? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard, *ICLQ,* Vol 55, July 2006 p. 543.

[817] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8 (2005) para 248

[818] *CMS Gas Transmission Company v. The Republic of Argentina, idem,* para 248

[819] Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01 (2010)

arbitration clause in the contract in question, was in breach of treaty standards.[820] Hence, investors in Greek bonds could effectively claim that the retroactive introduction of CACs in their bonds, which forced approximately 20 percent of dissenting investors to accept a haircut on their bonds, was a breach of FET[821] due to the disappointment of investors' expectations, the lack of due process, and the lack of good faith.[822]

Finally, it is worth mentioning that the standard of FET is also found in customary international law.[823] Initially, there was much debate as to the level of protection secured by customary law as compared to the one provided by BITs, but investment treaties often merely restate duties recognized by customary international law using slightly different language.[824] The doctrine of "fair and equitable treatment" established by customary law would however, be of little relevance to the case of the Greek haircut, as customary law did not protect portfolio investors that, as mentioned, ought to be aware of commercial risks and protect themselves accordingly.[825]

Expropriation

Another standard of treatment that may be violated in cases of sovereign debt restructuring or default is that of the prohibition of direct or indirect expropriation—unless appropriate compensation is paid. Although BITs always provide special protection against expropriation and codify a *lex specialis* against expropriation,[826] they nonetheless hardly ever contain a definition of the term, relying on the interpretation granted by customary international law or arbitration tribunals.[827] According to the Organisation for Economic Co-operation and Development (OECD), expropriation is defined as "substantial wealth deprivation."[828] The ICSID considers

[820] ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2 (2010)

[821] Andrea Carlevaris, Rocio Digon, "The Argentinean Bonds Saga" in Tanzi, A., Asteriti, A, Turrini, P. and Polanco, R., eds. International Investment Law in Latin America: Problems and Prospects. (2016) p. 630

[822] Michael Waibel, *op. cit.* p.752

[823] See OECD (2004), "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03, OECD Publishing.http://dx.doi.org/10.1787/675702255435
Although see opposite opinion in Patrick Dumberry, The Formation And Identification Of Rules Of Customary International Law In International Investment Law (Cambridge University Press 2016), p. 161

[824]Fritz Alexander Mann, *The Legal Aspects of Money*, Clarendon Press, (1982), 4th edition p. 510

[825]Muthucumaraswamy Sornarajah, *op.cit*., p. 10

[826] W. Michael Reisman & Robert D. Sloane, 'Indirect Expropriation and Its Valuation in the BIT Generation', *The British Yearbook of International Law,* (74) 2004*, p.* 115

[827] Sebastián López Escarcena

[828] Organisation for Economic Cooperation and Development, *Indirect Expropriation and the Right to Regulate in International Investment Law*, Working Papers on International Investment No.4/2004, OECD, Paris, p. 9.

expropriation as a "taking" of any kind, which can be *direct* in case of nationalization, title, or physical seizure, or *indirect* in such cases where the ownership of the investment remains with the investor, but the investments value is diminished.[829] Indirect expropriation can be difficult to recognize; hence, international jurisprudence has set out certain criteria that are deemed conclusive to the existence of indirect expropriation. One such decisive criterion refers to the impact of a state measure on the investor and the rights stemming from the investment.[830] Such criterion was used by the tribunal in *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*[831] to decide whether an indirect expropriation had occurred.[832] Similarly, Professor G. C. Christie, in analyzing two decisions of the Permanent Court of International Justice (PCIJ), *Certain German Interests in Polish Upper Silesia*[833] and the *Norwegian Shipowners Claims*,[834] used these criteria to conclude that indirect expropriation might exist. In other words, although a state may purport not to interfere with property rights when, by the state's actions or measure, such rights are rendered so useless, those rights may be considered expropriated.[835]

In light of the above, the consequences of the state measures and the degree of interference sustained by investors because of such measures are decisive in determining whether a direct expropriation exists. Further, more criteria have been adopted in the OECD legal framework, including the character of governmental measures, including the purpose and context of the respective measures, as well as, the interference of those measures with reasonable investment expectations.[836] As discussed, Greece has entered into very few BITs which reference indirect expropriation, but the standard may still be covered by the protection provided by such BITs on the basis of the "tantamount clause."[837]

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[829] Allahyar Mouri, The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribuna, Martinus Nijhoff Publishers (1994) p. 70

[830] As noted by the Tribunal in the case of Tippets v. Iran indirect expropriation "may occur under international law through interference by a State in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected." Starrett Housing Corporation, Starrett Systems, Inc., Starrett Housing International, Inc., v. Iran, Bank Oman, Bank Mellat, Bank Markazi, (1983), Iran–US CTR, vol. 4, p. 225.

[831] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2 (2003)

[832] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2 (2003), para 115

[833] Certain German interests in Polish Upper Silesia, Germany v Poland, Merits, Judgment, PCIJ Series A no 7, ICGJ 241(1926)

[834] Norwegian Shipowners' Claims, Norway v United States, Award, PCIJ, I RIAA 307, ICGJ 393(1922),

[835] G.C. Christie, What Constitutes a Taking Under International Law, 1962, 38, BYBIL, p.37

[836]Apurba Khatiwada Indirect Expropriation of Foreign Investment, 2008 p.18. Retrieved at http://www.ksl.edu.np/cpanel/pics/indirect_expropriation_apurba.pdf . Also available as the working paper *'Indirect expropriation"the "right to regulate" in international investment law*', Working Papers on International Investment, number 2004/4, p.9

[837] W. Michael Reisman & Robert D. Sloane, *op.cit*., p.117

However, not every measure interfering with an investor's right will be tantamount to expropriation.[838] In fact, state measures will, *prima facie*, be a lawful exertion of the government's powers,[839] despite that they might significantly affect foreign interests.[840] To this end, foreign investments can be subjected to taxation and trade restrictions, including quotas, licenses, or devaluation.[841] Similarly, the American Law Institute noted in the Third Restatement of Foreign Relations Law of the United States, that actions commonly accepted as falling within the police power of the states shall not amount to an expropriation and therefore will not allow an affected investor to claim compensation to the extent that such measures are not discriminatory."[842] The above was fully reiterated in the context of the Iran-United States Claims Tribunal in *Too v. Greater Modesto Insurance Associates*, which added that, apart from not being discriminatory, a state measure should also not be designed "to cause the alien to abandon the property to the state or to sell it at a distress price.."[843] so as not to amount to expropriation.[844]

At this point, an important question must be raised: can Greece's debt haircut be considered an indirect expropriation? We shall venture an answer to this question by making a parallel presentation of cases involving Greece and Argentina.

In exploring this question, the first issue to be clarified is whether the Greek measure of swapping initial bonds for bonds with a lower face value was indeed a sovereign act. In this respect, it is important to refer to the ruling of the ICSID in *Consortium R.F.C.C. v. Morocco*, where it was, *inter alia*, held that only unilateral measures specifically adopted as an expression of public authority could result in expropriation and mere breach of contractual obligations by the host state does not give rise to a claim for expropriation.[845] Indeed, unless it is demonstrated that the state has acted beyond its role as contractual party, and has also acted as a sovereign exercising authority, any breach on the host state's part would only result in a breach of contract.[846]

In this regard, it is worth revisiting the case of the Argentine Restructuring and the cases brought under the Italy-Argentina BIT, and more particularly the *Abaclat et*

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[838] Ian Brownlie, Public International Law, Oxford University Press, 6th Edition, 2003 p. 509

[839] But see also opposite theory of "Sole Effects Doctrine", whereby the purpose of the regulatory measure is irrelevant and should not be taken into account to establish indirect expropriation, but solely whether the measure significantly deprives investors of his rights from the investment. For more information on this, see Miguel Solanes Andrei Jouravlev Revisiting privatization, foreign investment, international arbitration, and water, United Nations Publications, 2007, p. 60

[840] Ian Brownlie, Public International Law, Oxford University Press, 6th Edition, 2003 p. 509

[841] Ian Brownlie, *Public International Law*, Oxford University Press, 6th Edition, 2003 p. 509

[842] ReStatement of the Law Third, the Foreign Relations of the United States, American Law Institute, Volume 1, 1987, Section 712.

[843] '*Indirect expropriation and the "right to regulate" in international investment law*', p. 19

[844] Sebastián López Escarcena, Indirect Expropriation in International Law, Leuven Global Governance series (2014), p. 95

[845]*Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6 par.278

[846]*ImpregiloS.p.A. v. Islamic Republic of Pakistan,* ICSID Case No.ARB/03/3, par. 261

al. v. the Argentine Republic case.[847] This case revolved around the Argentine financial crisis of 2001- 2005 and in particular, around the bonds restructuring that occurred.[848] The Tribunal also carefully examined the question of whether the Argentine haircut was nothing more than a breach of contract or whether Argentina's acts could constitute breach of certain standards of protection awarded by the BIT.[849] The Tribunal reasoned that BITs are not meant to set aside or correct contractual remedies, but rather are meant to further impose general treaty obligations for the protection of foreign investors.[850] As such, the Tribunal found that the underlying dispute did not merely relate to a contractual breach of Argentina's payment obligations from 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."[851] The Tribunal acknowledged that there was no justification for such modifications on the basis of the contract. Thus, Argentina's actions were the expression of sovereignty and investors' claims arising from such were treaty claims.[852]

The same conclusion may also be reached in Greece's case, where not only was the second haircut the result of extensive pressure from Greece and the EU institutions on major bondholders, but also (and perhaps more importantly) because Greece retroactively imposed and triggered CACs, thus compelling all Greek-law bondholders to accept and participate in the bond exchange. In this regard, it is obvious that Greece exercised its sovereign power, especially when imposing CACs, and that there was no contractual justification for the bondholders "being forced" to accept the haircut. As such, Greece's decision will most likely be deemed a sovereign act; consequently, there is a need to examine if such an act can be considered as being within Greece's legitimate state powers. The Tribunal will determine if this act so falls within legitimate state powers, taking into account the extreme financial crisis that Greece was facing and the urgent need to secure funding, which was only possible if the bond exchange was successful. That stated, it is still questionable whether the retroactive modification of the bond terms through the introduction of CACs can be considered to fall within Greece's legitimate state powers, as this would allow states to escape liability for not honoring their assumed obligations.

As previously stipulated, for arbitral tribunals to conclude there was an indirect expropriation, each case is examined *ad hoc* and several elements are taken into account, including and most importantly, the effect and degree of interference that the measure had on the investor.

As discussed above, under the FET, the Greek haircut greatly interfered with the reasonable and investment-backed expectations of the bondholders to retrieve the

[847] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly Giovanna a Beccara and Others v. The Argentine Republic (2011)

[848] Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5, para 8.

[849] Abaclat et al. v. the Argentine Republic op.cit. para. 316 etc

[850] Abaclat et al. v. the Argentine Republic op.cit. para. 316

[851] *Abaclat et al. v. the Argentine Republic* op.cit. para. 325

[852] *Idem,* par. 326

entire face value and interest of their bonds. Hence, if the effect the haircut had on investors (especially opposing investors) was significant, then bondholders (especially opposing bondholders) might have a prima facie case against Greece for expropriation.

The decisive element in determining whether the imposition of CACs and the haircut can constitute an indirect expropriation is whether or not the sovereign act resulted in substantial economic loss of the value of the investment, even if the state did not actually obtain title or right over the investment.[853] In order to determine the effect a state measure has had on investors, tribunals often conduct a "substantial deprivation" test[854] to explore the degree of diminished value in a haircut, and would thus in this case evaluate the size of the Greek haircut.[855] To calculate the losses investors would incur as a consequence of the recent Greek debt restructuring, the most appropriate formula is the one suggested by Federico Sturzenegger and Jeromin Zettelmeyer.[856] The formula calculates the actual losses *(H*) sustained by the investors when a country (*i*) exits default at time (*t*) and issues new debt in exchange for the old debt at an interest rate (r_t^i) at the exit from default, the following equation could be used:[857]

$$H = 1 - \frac{\text{Present value of New Debt } (r^i_t)}{\text{Present value of Old Debt } (r^i_t)}$$

The above formula is most suited for restructurings that occur prior to a country's default (when no acceleration of payment has taken place) and, therefore, there is no reason to take the face value of the old debt into consideration.[858] Based on such calculations, the losses sustained by investors vary greatly depending on the maturity of the bond and how they acquired it. For example, several investors have acquired the bond in the secondary market below face value. Generally speaking, the losses sustained by investors reached 70%, although, as stipulated by the ECtHR in the *Mamatas and Others v. Greece* case, to calculate the losses sustained by investors, the value of the bonds at the date of the bond exchange should have been taken into account, a value which, at the time, was below face value.[859] This criterion is of particular importance, since, if the interference is not significant the Tribunal is unlikely to find expropriation has taken place. Indicatively, in the case *Waste*

[853] Ian Brownlie, *op. cit.*, p. 534

[854] Peter D. Isakoff, Defining the Scope of Indirect Expropriation for International Investments, 3 Global Bus. L. Rev. 189 (2013) available at http://engagedscholarship.csuohio.edu/gblr/vol3/iss2/4

[855]Andrew Newcombe, Lluís Paradell, *Law and Practice of Investment Treaties – Standards of Treatment*, The Hague, Kluwer Law International, 2009 p. 2004

[856] Federico Sturzenegger and Jeromin Zettelmeyer, *op. cit.* p.6

[857] Federico Sturzenegger and Jeromin Zettelmeyer, op. cit. p.6

[858] Federico Sturzenegger and Jeromin Zettelmeyer, op. cit. p.6

[859] Federico Sturzenegger and Jeromin Zettelmeyer, op. cit. p9

Management v. Mexico,[860] the Tribunal noted that non-payment of debts was not sufficient to constitute expropriation.[861]

If an expropriation is indeed found, the Tribunal will examine whether such expropriation is lawful under the applicable BIT.[862] This question is critical, as it will determine the extent of compensation that investors are entitled to.[863] In the case of unlawful expropriation, the investor is entitled to reparation for all damages sustained, as opposed to lawful expropriation where the investor is only entitled to "fair compensation."[864] The majority of BITs provide that for an expropriation to be lawful, the state measure must serve a public purpose, must not be discriminatory, must follow due process, and must grant the investor appropriate compensation.[865] At present, the measures taken by the Greek government, including both the introduction of CACs as well as the bond exchange have already been considered to be for a legitimate public purpose by the ECtHR, namely financial stability.[866] However, as previously discussed, the implementation of the bond exchange can be deemed discriminatory and in violation of due process given the lack of actual negotiations for the debt restructuring.

In conclusion, as shown above, bondholders will have difficulty proving that an indirect expropriation did, in fact, take place. This will largely depend on the effects of the bond exchange on investors. If, however, an indirect expropriation is found to have taken place in the case of the Greek haircut or the imposition of CACs, then Greece would be obligated to pay compensation to all investors.

"Umbrella" clauses

Apart from the aforementioned specific protection against expropriation awarded under practically all BITs, investors may also be able to invoke BIT protection on other bases. One test followed by case law is the existence of a *pacta sunt servanda*, also known as an umbrella clause in BITs.[867] Under this clause, a host state undertakes to abide by other obligations it has assumed in relation to protected

[860] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (2004)

[861] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Award (2004) para.177

[862] See Suzy H. Nikièma, Compensation for Expropriation, The International Institute for Sustainable Development, Best Practise Papers (2013) p.4. See also Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, para. 94

[863] See Suzy H. Nikièma, Compensation for Expropriation, The International Institute for Sustainable Development, Best Practise Papers (2013) p.4.

[864] See Factory At Chorzów, Germany v Poland, Judgment, Claim for Indemnity, Merits, Judgment No 13, PCIJ Series A No 17(1928)

[865] Expropriation - UNCTAD Series on Issues in International Investment Agreements II, (UNCTAD/DIAE/IA/2011/7).

[866] Mamatas and Others v. Greece, ECtHR, (2016), para, 71

[867] Thomas W. Wälde, The "Umbrella" (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases, Transnational Dispute Management, October (2004), p.1

investments.[868] All commitments undertaken by the host state towards the investors must be observed.[869] Umbrella clauses are intended to place all contractual terms under the "umbrella" of international law, granting investors protection under the BIT and not merely under domestic law.[870]

The very existence of an umbrella clause elevates any contractual commitment to a treaty commitment, allowing a bondholder to bring a fully judicable claim under investment arbitration.[871] Hence, under such clause, sovereign bond restructuring might constitute a wrongful international act *ipso facto*.[872] Indeed, a unilateral amendment of the terms of the bonds might be considered as a breach by the host state insofar as its contractual obligations for repayment of the bonds' face value plus the due interest is concerned.[873] Consequently, in keeping with the umbrella clause, such a breach could also be considered a breach of the respective BIT.[874]

V. Greece's Defenses: The Doctrine of Necessity

The doctrine of necessity stems from customary international investment law.[875] It stipulates that a state cannot be held liable for actions taken in order to avert a State of emergency.[876] As to what constitutes a State of emergency, Art. 25 of the Articles on the Responsibility of States for Internationally Wrongful Acts, provides that the wrongfulness of action by the state will be precluded if two conditions are met.[877] Primarily, the state must have acted in order to secure an essential interest from a significant and imminent peril; and secondly, such actions should not have significantly prejudiced the interests of the state or the international community towards which the obligation exists, or of the international community as a whole.[878]

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[868] Thomas W. Wälde, The "Umbrella" (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases, Transnational Dispute Management, October (2004), p.1

[869] Thomas W. Wälde, The "Umbrella" (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases, Transnational Dispute Management, October (2004), p.3

[870] Jeswald W. Salacuse, *The Law of Investment Treaties*, Oxford University Press, 2010, p. 275.

[871]Todd Weiler, *International Investment Law and Arbitration, Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law,* Cameron May, 2005 p.407

[872] Michael Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Investment Arrangements', *The American Journal of International Law*, Vol. 101, No. 4 (Oct., 2007), p. 733

[873] Lise Johnson, Oleksandr Volkov, Investor State Contracts, Host State "Commitments" and the Myth of Stability in International Law, ARIA Vol. 24, No. 3, 2013, p.366

[874] UNCTAD, *op.cit.*, p. 5

[875] Boed, Roman (2000) "State of Necessity as a Justification for Internationally Wrongful Conduct," Yale Human Rights and Development Journal, Vol. 3: Iss. 1, Article 1., p.13

[876] See Art. 33 of the Articles of State Responsibility

[877] Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, (2001)

[878] Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, (2001)

Importantly, this doctrine cannot be invoked by a state if the state has contributed to the situation that caused the necessity.[879]

The above statutory language was examined by the Tribunal in the Russian Claim for Interest on Indemnities case,[880] wherein the Tribunal concluded that the non-payment of public debt may be justifiable in extreme economic circumstances.[881] The above defense was also used by Argentina in cases brought against it for measures taken during the financial crisis of 2001.[882] Nevertheless, in 2008, when the ICSID tribunals issued their decisions on four cases, the awards did not shed much light as to how the doctrine of necessity is to be applied in cases of extreme financial crises. These awards have been criticized as being founded on poor legal reasoning and having several flaws in the sense that the tribunals interpreted the BIT in a questionable manner, while the awards contradict one another although they refer to similar facts.[883] In fact, three of the four tribunals[884] have rejected the necessity defense and have held Argentina fully responsible for its course of action during the financial crisis, while the fourth tribunal exonerated Argentina of its liability for those acts to a great extent.[885]

Greece could argue that the haircut was the only way to avoid unregulated insolvency and that the rights of investors and their respective states have not been disproportionately affected. Moreover, Greece would have to prove the above claim because the party invoking the affirmative defense has the burden of proof to evince its elements are met.[886] It is, however, questionable whether such assertion would be sufficient to preclude liability for the retroactive implementation of CACs and the haircut in general. Surely, it must be taken into account that the Greek crisis was the immediate aftermath of a global financial crisis that was unprecedented in terms of proportion and, therefore, unpredictable to a certain extent. However, it should not be forgotten that this was also the biggest haircut worldwide, with investors losing approximately 75% of their investment.[887] It is further worth exploring whether investors may counterclaim that Greece contributed to the financial crisis, but such

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[879] *'Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries'*, U.N. Doc. A/56/10, 2001, art. 2. Retrieved at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

[880] *Russia v. Turkey* (Russian Indemnity), Perm. Ct. ARB, Hague Ct. Rep. (Scott), 1912.

[881] Michael Waibel, op.cit. p. 88

[882] See generally Glinavos, Ioannis, Investors vs. Greece: The Greek 'Haircut' and Investor Arbitration Under BIT's (2012). Available at SSRN: https://ssrn.com/abstract=2021137 or http://dx.doi.org/10.2139/ssrn.2021137

[883] William W. Burke-White, 'The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System' *Scholarship at Penn Law* Paper 202, 2008, p. 23. Retrieved at http://lsr.nellco.org/upenn_wps/202 on July 15, 2015.

[884] *CMS v. Argentina, Enron v. Argentina, Sempra v. Argentina*

[885] *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1 , (2008)

[886] Gabčíkovo-Nagymaros Project case, ICJ Rep. 1997, 7, at 40, para 51.

[887] Jeromin Zettelmeyer, Christoph Trebesch and Mitu Gulati, 'The Greek Debt Restructuring: An Autopsy' [2013] SSRN Electronic Journal, p.2

argument would be very difficult to prove given that no forum would have the authority to judge the merits of such claim that challenge to the fiscal policy of a state.[888]

VI. General Remarks

As already mentioned, if GGBs are deemed to fall under the protection of BITs, there are various arguments that investors may use in order to invoke a breach of the standard of such protection. These arguments have also been used in Argentina's jurisprudence with relative success by the investors.[889] Greece might be able to escape liability from such arguments and claims by invoking the doctrine of necessity, the applicability of which in such cases is not yet definite.

In addition to bringing a claim on the basis of the BIT, bondholders have the opportunity to formulate a claim based upon a breach of contract referring to the GGBs. This is due to the fact that treaty violations go hand-in-hand with contract claims.[890] Of course, whether there has been a breach under a BIT is a different question than whether there has been a breach under the contract, and consequently, it is to be examined on the basis of different legal frameworks. Thus, in the case of breach of BIT, international law will be of relevance, while national law will be considered when establishing the existence of a breach of contract.[891] In any case, even if an investor's claim is based on a BIT, the Tribunal may still determine that the claim is essentially contractual,[892] although, there isn't always a clear distinction between treaty and contractual claims.

As evident from the above, although in cases of sovereign default investors can incur significant losses, nonetheless finding reparation can be a strenuous and lengthy procedure which may ultimately not lead to the desired result due to the inability to enforce an award in an investor's favor. That is why investors are resorting to various mechanisms of added protection against such events. One of the most used mechanisms is the claim for credit default swaps. Credit default swaps (CDS) will be briefly examined below.

VII. Remedies for Risks Incurred

CDS are insurance contracts aimed to transfer credit risk. They are entered into between a buyer and a seller, by virtue of which the seller undertakes to protect

[888] *Enron Corporation and Ponderosa Assets, L.P. v. the Argentine Republic*, ICSID Case No. ARB/01/3 (2007)

[889] See generally Glinavos, Ioannis, Investors vs. Greece: The Greek 'Haircut' and Investor Arbitration Under BIT's (2012). Available at SSRN: https://ssrn.com/abstract=2021137 or http://dx.doi.org/10.2139/ssrn.2021137

[890] Christophe Schreuer, 'Travelling the BIT route of waiting routes, umbrella clauses and forks in the road', *Journal of World Investment and Trade*, Vol.5, 2004, p. 231

[891] *Vivendi v. Argentina* op. cit. para 96

[892] Woodruff Case (*USA v. Venezuela*)

the buyer from the risk of default of a specific entity or asset, in exchange for the payment of a fee or premium by the buyer throughout the swap's duration or until a credit event takes place.[893] In return, the protection seller will pay the protection buyer an agreed amount if a specified credit event occurs during the life of the swap.[894] In other words, CDS constitutes a form of insurance against certain credit events. As per the International Swaps and Derivatives Association's (ISDA) Credit Derivative Definitions, a credit event occurs in one of seven instances, including, *inter alia*, debt restructuring (individual CDS contracts may provide protection against all or some of the seven credit events).[895]

Many investors, for example, noticing Greece's worrisome declining course, have purchased CDS in order to minimize their loss or even make a profit. Consequently, these investors may be eligible for compensation in keeping with their CDS contractual arrangements.

Conditions for Compensation

As explained above, in order for a CDS to become active, one of the specifically named credit events must occur. Amongst the circumstances that constitute credit events, ISDA has included the sovereign debt restructuring, i.e. a sovereign haircut.

Although, based on the above, one could easily come to the conclusion that the Greek haircut should have triggered a CDS, the decision for that was not an easy one to take. The ISDA had expressed a preliminary view according to which, as long as the restructuring is voluntary, it does not constitute a credit event.[896] Although the CDS definitions do not make a distinction between voluntary and involuntary events, this line of thinking is valid, since the meaning of restructuring implies an event that is binding on all bondholders, i.e. even those that voted against it.[897] On these grounds, in October 2011, the ISDA announced that the Greek restructuring was not likely to trigger payments under CDS contracts.[898] Based on such reasoning, CDS would not be used, adding further to investors' losses as they would not only be

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[893] Charles S. Tapiero, Risk Finance and Asset Pricing: Value, Measurements, and Markets, Wiley Finance, 2010, p. 357

[894] Charles S. Tapiero, Risk Finance and Asset Pricing: Value, Measurements, and Markets, Wiley Finance, 2010, p. 357

[895] The six credit events under ISDA Credit Derivative definitions are (1) bankruptcy, (2) obligation acceleration, (3) obligation default, (4) failure to pay, (5) repudiation/moratorium, and (6) restructuring and following the 2014 amendment there was one new event added, namely (7) intervention credit.

[896] ISDA, 'Update on Greek Sovereign Debt Q&A', October 2011. Retrieved at http://www2.isda.org/news/isda-updates-greek-sovereign-debt-qampa

[897] ISDA, *'Update on Greek Sovereign Debt Q&A'*, October 2011. Retrieved at http://www2.isda.org/news/isda-updates-greek-sovereign-debt-qampa

[898]ISDA, 'Update on Greek Sovereign Debt Q&A', October 2011. Retrieved at https://www.isda.org//2011/07/25/greek-sovereign-debt-qa-update

unable to collect insurance but, furthermore, they would be obliged to continue to pay the premium for the remaining years of the insurance policy.

The above dilemma was resolved following Greece's decision to retroactively implement CACs on all Greek law-governed GGBs. Indeed, in March 2012, the ISDA announced that the introduction of CACs by the Greece, unilaterally amending the terms of Greek law governed bonds, constituted a Restructuring Credit Event, as the latter was no longer a voluntary event."[899]

Receiving compensation is, however, not as easy as it sounds. Indeed, many legal issues could arise that may hinder compensation. Some of those issues are presented below.

Document risk

The document risk refers to the industry's reliance on the documentation of CDS Agreements.[900]

To illustrate the issues that might be raised, the case of Argentina is once again indicative. In November 2001, Argentina announced a "one-time offer" for bond exchange.[901] According to Argentina, the bond swap was voluntary, and as such, did not constitute a credit event.[902] Rating agencies disagreed with the voluntary nature of the bond exchange, given that the prior attitude of the Argentine government did not leave much room for restructuring negotiations, leaving those who did not accept the exchange at greater risk than those who did.[903] Despite the rating agencies' statement, however, it was considered by ISDA that the agency's declaration and a CDS credit event were not connected.[904] Consequently, many protection sellers refused to pay compensation on CDS on the basis that the restructuring was voluntary.[905] This was not left unanswered by the buyers and many cases were brought before the Tribunals.

A common theme in all the rulings was that the Tribunal first addresses the agreement between the parties to see if the issue of a sovereign debt restructuring may be considered, under the existing circumstances, tantamount to coercive obligation

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[899]EMEA DC Statement, 9th March 2012. Retrieved at http://www.isda.org/dc/docs/EMEA_Determinations_Committee_Decision_09032012.pdf

[900]Lily Tijoe, *Credit Derivatives: Regulatory challenges in an exploding industry*, 2007, p. 405. Available at http://128.197.26.4/law/central/jd/organizations/journals/banking/archives/documents/vloume26/tijoe.pdf

[901] Andrew F. Cooper, Bessma Momani, Negotiating Out of Argentina's Financial Crisis: Segmenting the International Creditors, New Political Economy, Vol. 10, No. 3, (2005)

[902] David Vines and C.L Gilbert, The IMF And Its Critics (Cambridge University Press 2004).

[903] Alfaro, Laura. "Sovereign Debt Restructuring: Evaluating the Impact of the Argentina Ruling." Harvard Business Law Review (forthcoming)

[904] ISDA, *'Update on Greek Sovereign Debt Q&A'*, *op.cit.* p.2

[905] Louise Bowman, 'ISDA: 50% Greek Haircut ' Voluntary', Likely No Credit Event For CDS' (Euromoney, 2011) <https://www.euromoney.com/article/b12kjfhmd2654z/isda-50-greek-haircut-39voluntary39-likely-no-credit-event-for-cds> accessed 24 November 2017.

exchange.[906] One, however, should not overlook that it is not for the Tribunals to decide upon such an issue.[907] This would require the tribunals to foresee whether the parties in question will elect to participate in an obligation exchange, and, consequently, to conduct an economic analysis of the obligation exchange.[908]

One can also understand the difficulties encountered by tribunals when interpreting ambiguous terms in a credit derivatives agreement. They may provide the protection seller with an opportunity to argue that the triggering event did not occur and no payment is due. Consequently, the wording of each CDS agreement is extremely important in each and every case.

Short Squeeze Risk

Another risk that may jeopardize bondholders' right to compensation was demonstrated in the case of the Delphi Corp. bankruptcy in 2005.[909] In this case, the excellent market position of Delphi Corp's CDS prior to Delphi Corp's petition for bankruptcy did not change after such petition, but certain persons, eager to make quick money, continued to massively purchase Delphi Corp's CDS.[910] Consequently, when parties to these CDSs attempted to buy Delphi Corp's bonds in order to obtain coverage payment, the bonds' prices had climbed back up.[911] It should be stated that in many cases without ownership of the reference bonds, protection buyers will be unable to make physical deliveries for settlement and hence will not be able to receive compensation.[912] In the case of Delphi Corp, after months of negotiations between CDS holders, an auction was held to determine the remuneration the protection buyers were entitled to.[913] It was then decided to price the bonds "according to the market participants' open positions and not as a result of speculation in the open market"[914] and that no physical deliveries were required.

Short squeeze risk is also of relevance in the Greek Haircut case. Since Greece entered into the bailout mechanism, the number of CDSs purchased increased significantly, partly because of fear of Greece defaulting and partly on account of

[906] Anna Gelpern and Mitu Gulati, 'CDS Zombies' (2012) 13 European Business Organization Law Review.

[907] Anna Gelpern and Mitu Gulati, 'CDS Zombies' (2012) 13 European Business Organization Law Review.

[908] *ISDA, 'Update on Greek Sovereign Debt Q&A', op.cit. p.2*

[909] Lily Tijoe, 'Credit Derivatives: Regulatory Challenges In An Exploding Industry' (2007) 26 Annual Review of Banking Law.

[910] Lily Tijoe, 'CREDIT DERIVATIVES: REGULATORY CHALLENGES IN AN EXPLODING INDUSTRY' (2007) 26 Annual Review of Banking Law.

[911] Richard Beales, 'Uncertain Road ahead for Delphi', *Financial Times*, Nov. 8, 2005.

[912] Richard Beales, 'Uncertain Road ahead for Delphi', Financial Times, Nov. 8, 2005

[913] Richard Beales, 'Uncertain Road ahead for Delphi', Financial Times, Nov. 8, 2005

[914] Lily Tijoe, *op.cit.* p. 403

speculators looking for quick gains.[915] This demonstrates the absence of supervision and regulation in this field, as well as the unregulated and unsettled state of payments procedures.

VIII. Conclusions and Perspectives

When it comes to investors' protection in such cases as sovereign debt default and the subsequent sovereign debt restructuring, it is obvious that the international community lacks a comprehensive, consolidated, and binding legal framework. There is a very large number of BITs, each of them – despite their similarities – attempting to prevent or solve specific bilateral investment-related issues, aiming to protect the investment by the establishment of mandatory standards of treatment. That stated, due to the large number and variety of BITs, the extent of protection offered may vary significantly from one BIT to another.

All the above is verifiable in the case of Greece's recent sovereign debt crisis. Spending more than it could afford in a period of global economic and financial crisis and, consequently, running growing budgetary deficits, Greece accumulated a sky-rocketing public debt.[916] Moreover, refinancing this debt proved to be extremely difficult due to the almost "dry" financial market and significantly higher interest rates.[917] To this end, Greece resorted to two debt restructurings in 2011 and 2012, severely jeopardizing bondholders' rights that were, to a certain extent, forced to take part in the restructuring due to the unilateral introduction of CACs by the Bondholders Law, No.4050/2012, and sustained significant losses as a result.

Six years after the bond exchange, bondholders have still been unable to obtain reparation, despite having appealed both to the ECtHR and ICSID. In the former, substantive human rights law appeared to allow states much discretion to take measures in response to economic or social crisis, even when this can affect bondholders' rights that should be aware of the risks. In the latter, ICSID did not rule on the merits, but instead denied jurisdiction on the basis of the BIT's wording of the term investment. Although such a ruling may seem discouraging for investors, nonetheless, a large part of the BITs signed by Greece contain more favorable wording that could permit a different interpretation.

If such hindrance is overcome, and bonds are deemed to fall under the protection of BITs, there are various arguments that investors may use in order to invoke a breach of the standard of such protection. These arguments have also been used in Argentina's jurisprudence with relative success by investors. Greece might be

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[915] See Darrell Duffie, Is there a case for banning short speculation in sovereign bond markets? Banque de France, Financial Stability Review, No. 14 – Derivatives – Financial innovation and stability, (2010)

[916] R. M. Nelson, P. Belkin, D. E. Mix, Greece's Debt Crisis: Overview, Policy Responses, and Implications, CRS Report for Congress (2011)

[917] Stratfor, 'Greece Postpones A Crisis' (Forbes.com, 2015) <https://www.forbes.com/sites/stratfor/2015/02/26/2052/2/#3c5e87e66c9f> accessed 24 November 2017.

able to escape liability from such claims by invoking the doctrine of necessity, although its applicability is not yet definite in sovereign debt restructuring cases.

Aware of these significant shortcomings, governments endeavor to continue negotiations for reaching an agreement capable of covering the most important aspects of FDI, including sovereign debt, sovereign default, and sovereign debt restructuring. Unfortunately, the pace of such negotiations is still very slow and has not yet adapted to the real world's developmental speed.

References (2018)

Beveridge, F. (2000), The Treatment and Taxation of Foreign Investment under International Law, Juris Publishing

Bouras, S., 'Greek lawmakers approve new economic overhauls', Wall Street Journal, December 15, 2015.

Brownlie, I. (2003), Public International Law, 6th edition, Oxford University Press

Caliari, A. 'Risk Associated with Trends in the Treatment of Sovereign Debt in Bilateral Trade and Investment Treaties', in Debt Sustainability and Development, Geneva: UNCTAD, 2009.

Center for Strategic and International Studies, 'Investor – State Dispute Settlement: A Reality Check' (Working Paper), CSIS, Washington, D.C., 2010. Retrieved on November 6, 2015 at http://csis.org/files/publication/141029_investor_state_dispute_settlement.pdf

Committeri, M. and Spadafora, F., 'You Never Give Me Your Money? Sovereign Debt Crises, Collective Action Problems, and IMF Lending', (IMF Working Paper), International Monetary Fund, January 2013, pp. 38-39. Retrieved at http://www.imf.org/external/pubs/ft/wp/2013/wp1320.pdf on July 12, 2015.

Cordero, J. A. and Montecino J. A.., Capital Controls and Monetary Policy in Developing Countries, Center for Economic and Policy Research, Washington, D.C. April 2010, pp. 12-13. Retrieved at http://www.cepr.net/documents/publications/capital-controls-2010-04.pdf on July 12, 2015.

Das, U. S., Papaioannou, M. G. and Trebesch, C., 'Sovereign Debt Restructurings 1950-2010: Literature Survey, Data, and Stylized Facts', (IMF Working Paper) WP/ 203 (2012)

Davis, E. P., Steil, B. (2001), Institutional Investors, MIT Press.

Eilmansberger, Th., 'Bilateral Investment Treaties and EU Law', Common Market Law Review 46, 2009

European Union (2015), Maastricht debt as a percentage of GDP. Retrieved on October 28, 2015 at http://ec.europa.eu/eurostat/statistics-explained/index.php/Structure_of_government_debt

Gallagher, K. P., 'Financial Crises and International Investment Agreements: The Case of Sovereign Debt Restructuring', Global Policy, Vol.3, Issue 3, September, 2012

Gelpern, A. and Setser, B., 'Domestic and External Debt: The Doomed Quest for Equal Treatment', Georgetown Journal of International Law, Vol. 35(4), 2004

Gklavinis, P. (2009), International Economic Law, Sakkoulas Publications

Guzzo, V., 'The Prospects for the Cypriot Economy in 2015', IMF, November 14, 2014. Retrieved at https://www.imf.org/external/country/CYP/rr/2015/020615.pdf on July 10, 2015.

Hatchondo, J. C., Martinez, L. and Sapriza, H., 'The Economics of Sovereign Defaults', 93 Economic Quarterly, 163 (Spring 2007).

Held, D. et al. (1999), Global Transformations. Politics, Economics and Culture, Policy Press, Cambridge

Hirst, T., 'This is what happens when countries default on their debts', Business Insider, March 5, 2015. Retrieved at http://www.businessinsider.com/a-history-of-sovereign-debt-defaults-2015-3#ixzz3fVc5ja9s on July 10, 2015

Holodny, E., 'A Brief Timeline of the Greek Debt Crisis since 2009', Business Insider, July 9, 2015. Retrieved on November 4, 2015 at http://www.businessinsider.com/greek-debt-crisis-timeline-2015-7

Hope, K. & Wolf, M., 'Alexis Tsipras pushes for IMF to stay out of next Greek bailout', FinancialTimes, December 20, 2015.

Huang, D., 'Don't Cry for Them: The World's Biggest Sovereign Defaults Since 2000', Wall Street Journal, July 2, 2014. Retrieved at http://blogs.wsj.com/moneybeat/2014/07/02/dont-cry-for-them-the-worlds-biggest-sovereign-defaults-since-2000/ on July 10, 2017.

ICSID, International Centre for the Settlement of Investment Disputes. Retrieved on 28 November 2016 at https://icsid.worldbank.org/apps/icsidweb/about/pages/default.aspx

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), ch.IV.E.1. Retrieved on December 7, 2016 at http://www.refworld.org/docid/3ddb8f804.html

James, R. C., Neuger, G. and Donahue, P., 'Cyprus Salvaged After EU Deal Shuts Bank to Get $1.3 B', March 25, 2013. Retrieved on October 30, 2016 at http://www.bloomberg.com/news/articles/2013-03-25/cyprus-to-chop-banking-system-to-win-aid-avoid-default

Jansen, M., 'View from Cyprus: Greek financial crisis', Irish Times, July 10, 2015. Retrieved at http://www.irishtimes.com/news/world/europe/view-from-cyprus-greek-financial-crisis-1.2279508 on July 10, 2017

Kim, J., 'From Vanilla Swaps to Exotic Credit Derivatives: How to Approach the Interpretation of Credit Events', Fordham Journal of Corporate & Financial Law Volume 13, Issue 5, 2008

Kimberly, A., 'Sovereign Debt: Definition, Importance and Rankings. Why Sovereign debt is a Good Thing - Up to a Point'. Retrieved on October 28, 2015 at http://useconomy.about.com/od/worldeconomy/p/Sovereign-Debt.htm

Lee, D., 'Greece is not alone when it comes to sovereign defaults', Los Angeles Times, July 7, 2015. Retrieved at http://www.latimes.com/world/europe/la-fg-debts-defaults-other-countries-20150707-story.html on July 10, 2015.

Lindert, P. H., (1991), International Economics (9th Ed.), Irwin, Boston, MA.

Malik, M., Recent Developments in the Definition of Investment in International Investment Agreements, Second Annual Forum of Developing Country Investment Negotiators, 3-4 November 2008, Marrakech, Morocco.

Mann, F. A. (1982), The Legal Aspects of Money, Oxford: Clarendon Press

Moussas, N. and Voulgaridis, S., 'Investment Treaty Arbitration: Greece', Global Arbitration Review, September 18, 2015. Retrieved on January 4, 2016 at http://globalarbitrationreview.com/know-how/topics/66/investment-treaty-arbitration/

Muchlinski, P., 'Caveat Investor.? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard', ICLQ, Vol. 55, July, 2006.

Newcombe, A., Paradell, L. (2009), Law and Practice of Investment Treaties – Standards of Treatment, The Hague, Kluwer Law International.

Noack, R., 'Greece isn't the first nation to default on a sovereign debt', Washington Post, July 1, 2015. Retrieved at https://www.washingtonpost.com/blogs/worldviews/wp/2015/07/01/map-greece-isnt-the-first-nation-to-default-on-a-sovereign-debt/ on July 10, 2015.

Nye, J. S. (2005), Understanding International Conflicts: An Introduction to Theory and History, Pearson Education

O'Brien, M., 'Everything you need to know about Argentina's weird default', Washington Post, August 3, 2014. Retrieved at http://www.washingtonpost.com/blogs/wonkblog/wp/2014/08/03/everything-you-need-to-know-about-argentinas-weird-default/ on July 12, 2017.

Organisation for Economic Cooperation and Development, 'Indirect Expropriation and the Right to Regulate in International Investment Law', Working Papers on International Investment No.4/2004, OECD, Paris

Owen, B. J., 'What can Greece learn from Argentina's default experience?', BBC News, June 30, 2015. Retrieved at http://www.bbc.com/news/world-europe-33324363 on July 12, 2017.

Paris, K., 'Binding bids Greece's Piraeus Port expected Next week', Wall Street Journal, December 17, 2017.

Pollack, E. R., 'Assessing the Usage and Effect of Credit Derivatives', Harvard Law School International Finance Seminar, April 28, 2003

Reisman, M. W. et al (2004)., International Law in Comparative Perspective, McMillan.

Reisman, M. W. & Sloane, R. D., 'Indirect Expropriation and Its Valuation in the BIT Generation', 74 The British Yearbook of International Law, 2004

Rodrik, D. (1997), 'Has Globalisation Gone Too Far?,' Institute for International Economics, Washington, DC.

Rubins, N., 'The Notion of Investment in International Investment Arbitration, Arbitrating Foreign Investment Disputes, Procedural and Substantive Legal Issues, edited by Nobert Horn, Kluwer Law International, Volume 19, 2004

Sauvant, K. P., 'The Negotiations of the United Nations Code of Conduct on Transnational Corporations. Experience and Lessons Learned', The Journal of World Investment and Trade, 16 (2015), p.27. Retrieved at http://ccsi.columbia.edu/files/2015/03/KPS-UN-Code-proof-2-Journal-of-World-Investment-and-Trade-March-2015.pdf on 29 November 2016.

Schreuer, Ch., 'Travelling the BIT route of waiting routes, umbrella clauses and forks in the road', Journal of World Investment and Trade, Vol.5, 2004, pp. 231-256.

Sornarajah, M. (2010), The International Law on Foreign Investment, 3rd Edition, Cambridge University Press.

Sturzenegger, F. and Zettemeyer, J., Haircuts: Estimating Investor Losses in Sovereign Debt Restructuring, 1998-2005, IMF Working Paper, WP/05/137, July 2005.

Tijoe, L. (2007), 'Credit Derivatives: Regulatory challenges in an exploding industry'. Retrieved at: http://128.197.26.4/law/central/jd/organizations/journals/banking/archives/documents/vloume26/tijoe.pdf

United Nations Conference on Trade and Development, Sovereign Debt Restructuring and International Investment Agreements, IIAs, No.2, July 2011

United Nations Conference on Trade and Development, Nobel Economist Joseph Stiglitz Backs UNCTAD's Work on Debt Workouts, UNCTAD, Geneva, April 10, 2015. Retrieved on November 6, 2016 at http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=970

United Nations Conference on Trade and Development, Sovereign Debt Workouts: Going Forward. Roadmap and Guide, UNCTAD, Geneva, April 2015. Retrieved on November 7, 2016 at http://unctad.org/en/PublicationsLibrary/gdsddf2015misc1_en.pdf

United Nations Conference on Trade and Development, Modernising Key Provisions in IIAs, UNCTAD, Geneva. Retrieved on November 5, 2016 at http://investmentpolicyhub.unctad.org/IIA/KeyIssueDetails/43

US Council on Foreign Relations, Timeline: Greece's Debt Crisis. Retrieved on November 4, 2015 at http://www.cfr.org/greece/timeline-greeces-debt-crisis/p36451

US Legal website, Legal Definitions, Default. Retrieved at http://definitions.uslegal.com/e/entry-of-default/ on July 11, 2017.

Waibel, M., 'Opening Pandora's Box: Sovereign Bonds in International Arbitration', The American Journal of International Law, Vol. 101, No. 4 (Oct., 2007)

Weiler, T. (2005), International Investment Law and Arbitration, Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law, Cameron

Wolf, M., 'Hope and fear in the endless Greek crisis', Financial Times, December 22, 2015.

World Trade Organisation, The WTO Dispute Settlement Procedures. A Collection of Legal Texts, WTO, Geneva, August 1995.

World Trade Organisation, Understanding on Rules and Procedures Governing the Settlement of Disputes (summary), 2010. Retrieved on 23 November 2016 at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding .

'Greece's Debt Crisis Explained', The New York Times, October 31, 2015. Retrieved on November 5, 2016 at http://www.nytimes.com/interactive/2015/business/international/greece-debt-crisis-euro.html?_r=0

'Greek creditors receive official 'haircut' notification', DW Akademie February 24, 2012. Retrieved at http://www.dw.com/en/greek-creditors-receive-official-haircut-notification/a-15767530 on July 11, 2017.

'Greek Debt Crisis :Timeline of Main Events', The Telegraph (UK). Retrieved on November 4, 2017 at http://www.telegraph.co.uk/finance/financialcrisis/9098026/Greek-debt-crisis-timeline-of-main-events.html

'I.M.F. Won't Support New Loan for Argentina', The New York Times, December 6, 2001. Retrieved at http://www.nytimes.com/2001/12/06/world/imf-won-t-support-new-loan-for-argentina.html on July 12, 2017.

'Moody's releases 2013 sovereign default study', Moody's Investment Service, April 29, 2015. Retrieved at https://www.moodys.com/research/Moodys-releases-2013-sovereign-default-study--PR_275317 on July 12, 2017.

'Moody's Says Cypriot Debt Exchange Amounts to a Default'. Retrieved on October 28, 2015 at https://www.moodys.com/research/Moodys-says-Cypriot-debt-exchange-amounts-to-a-default--PR_276966

'What happens when a country goes bust', The Economist, November 24, 2014. Retrieved on July 10, 2017 at http://www.economist.com/blogs/economist-explains/2014/11/economist-explains-20

CHAPTER FIVE

Sovereign Bond restructuring from a contractual perspective, caveat bond-holder?

(Accepted for publication by California Western International Law Journal, Vol. 48 to be published in April 2018)

Keywords: sovereign default, Bond restructuring, Greece, Collective Action Clauses, Immunity, Applicable law

I. ABSTRACT

This paper explores the nature of sovereign bonds as contracts and studies whether contractual terms contained in sovereign bond contracts may offer sufficient protection to investors in case of sovereign bond restructuring or sovereign default. This paper focuses on the contractual terms found in Greek sovereign bonds prior to the Greek sovereign bond restructuring of 2012 and explores whether such terms were sufficient to award protection to bondholders that sustained losses due to the restructuring. Special attention is given to the ramifications of the governing law on the interpretation of all contractual terms. Lastly, the paper explores the development of contractual terms following the Greek sovereign bond restructuring of 2012 and how newly issued Greek sovereign bonds have additional or modified terms to address bondholders' concerns and award them a more comprehensive contractual framework for the protection of their rights.

II. INTRODUCTION

Sovereign default is a paradox in and of itself; primarily because of the undeniable state power over the creditors, but also on account of the fact that creditors would need to overcome States' sovereignty to secure their rights.[918]

Looking through history one can see that not so long ago, prior to the Second World War, creditors would rely to diplomatic protection by their national state to secure their rights. Of course, that required that they were not nationals of the defaulting state and their national state had the willingness to pursue or force return of investments through diplomatic or military means.[919] Indicatively, the Drago Porter Convention of 1907 provided that states should first attempt to arbitrate peacefully claims raising from sovereign indemnity before resorting to military means.[920] If

[918] K. H. F. Dyson, "States, Debt & Power: 'Saints' & 'Sinners' in European History & Integration", Oxford University, 1995 p. 240

[919] M. Winkler, "Foreign Bonds: An Autopsy", Beard Books, 1999, p.146, See also J. P. Bohoslavsky, M. Goldmann, "An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law", the Yale Journal of International Law Online, Vol. 41(2), 2016

[920] K. H. F. Dyson, op.cit. p. 240

creditors' national states were unwilling or unable to assist in the pursuance of the creditors' claims, lenders were left with no recourse, other than to negotiate an acceptable settlement by trying to assert pressure on the state through the threat of denial of future lending.[921]

Resorting to litigation was not an option available for creditors, as states enjoyed absolute immunity from suit in national courts, which essentially rendered it impossible for a creditor to find a venue to pursuit his claims, other than the courts of the defaulting state, an option that seemed to provide little comfort with creditors.[922] Following 1945, however, as several studies[923] seem to suggest, there has been a shift away from this approach and more and more cases of sovereign default have been brought before national Courts. This is partially because there was a change in the terms of sovereign bonds, so that it is now common practice for States to waive in advance their right to claim immunity from jurisdiction in the terms of issuance.[924] Additionally, the developments in international law, where the right to resort against States in national courts has been widely recognized,[925] have also contributed to that shift. That stated, the issue of enforcement of judgement against States is still a thorny issue and it comes as no surprise that it has been a long-standing belief in international macroeconomics that sovereign debt cannot be enforced.[926]

Hence, claiming and enforcing investors' rights against sovereign states is not an easy task. Indeed, unlike insolvency of other entities, there is not any uniform legal framework regulating insolvency of sovereign states. Therefore, there is a regulatory vacuum not only in relation to substantive law, but also on all enforcement.

This paper will address investors' rights in case of sovereign default from a contractual perspective and will examine if the legal framework available for breach of contract suffices to provide an efficient and complete framework for the satisfaction of investors' claims in case of sovereign default. This paper will primarily focus in the Greek bonds' restructuring of 2012, but will draw wider conclusions for bondholders' protection.

III. The Legal Nature of Sovereign Bonds

The legal nature of sovereign bonds can be difficult to define, as bonds can be understood in a number of ways, including as investments, capital rising tools,

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[921] W. Mark C. Weidemaier, "Sovereign Immunity and Sovereign Debt", University Of Illinois Law Review, Vol. 2014, p.68

[922]W. Mark C. Weidemaier supra p. 68

923 See J. Schumacher, C. Trebesch, H. Enderlein, Sovereign Defaults in CourtThe Rise of Creditor Litigation 1976 – 2010", working paper, 15 February 2013.

[924]W. Mark C. Weidemaier, A. Anna Gelpern "Injunctions in Sovereign Debt Litigation", (draft dated November 15, 2013) available at http://scholarship.law.georgetown.edu/facpub/1319/, last accessed 02.02.2016

[925] Republic of Argentina v. Weltover, 504 U.S. 607

[926]C. M. Reinhart, K. S. Rogoff, The Aftermath of Financial Crises, American Economic Review, American Economic Association, vol. 99(2), pages 466-72, (2009)

financial instruments, on balance-sheet debt security etc..[927]Additionally, sovereign bonds can take several forms including, inter alia, conventional bonds, convertible bonds, zero-coupon bonds floating rate notes etc.[928] To better evaluate the legal nature of sovereign bonds, it is best we review how these are issued and the modus by which, these are offered to the public.

Generally, the legal framework regulating the issuance of bonds is different in each state. That stated, in light of the establishment of the international bond market, one can notice several similarities in the bond-issuance process set by such frameworks. Especially, within the Eurozone the process followed for the issuance of sovereign bonds by the Member States is, to a large extent, similar. Such process can be broken down in roughly 3 phases: the pre-issuance, the issuance and the closing. On the pre-issuance phase, the issuer will select a Lead Manager, which most likely will be an investment bank that will undertake to approach and negotiate with prospective underwriters for the formation of a syndicate,[929] following the preparation of the legal documentation and prospectus for the new bonds. The involvement of a Lead Manager is necessary in light of the fact that states do not have their own banking facilities. [930] At this stage, the Issuer will also proceed to announce the new issue and will send formal invitations, along with the preliminary Offering Circular and timetable, to prospective underwriters to take part in the syndicate. The underwriters will normally be investment and commercial banks as well all other institutional investors. Following such announcement and in line with the timetable provided, the Lead Manager will liaise with other underwriters to form a Managing Group. The Managing Group will negotiate and finalize the terms of the issuance together with the issuer, following which the syndicate will need to accept or reject the finalized issuance terms within approximately 24 hours.[931] This is where the issuance stage begins. If the terms are accepted, the Syndicate will enter into a Subscription Agreement together with the Issuer that will contain all details pertaining to the issuance. Once the Subscription Agreement is entered into, the underwriting syndicate (I.e. members of the syndicate that have agree to underwrite the bonds offered at the issuance) will "underwrite" the bonds by guarantying to the Issuer the payment of the previously agreed price for the shares.[932] The Lead Manager will notify the members of the underwriting syndicate of their allotments and the final

[927]S. Weber, The law applicable to bonds, in Hans Van Houte (ed), The Law of Cross-Border Security Transactions, Sweet and Maxwell, 1999, p.29

[928]For an analysis of the features of each bond instrument see M. Choudhry, The Eurobond Market in F. J. Fabozzi, Handbook of Finance, Financial Markets and Instruments, John Wiley & Sons, Inc. (2008) pp. 276-278

[929]Although notably a large number of countries no longer use syndicates, but instead these have been replaced by auctions, see G.J. Schinasi, R.T. Smith, Fixed-Income Markets in the United States, Europe and Japan: Some Lessons for Emerging Markets", IMF Working Paper, 98/173, (1998)

[930] E. Borchard, J. S. Hotchkiss State Insolvency and Foreign Bondholders: General Principles, Volume 1 Beard Books, (1951), p. 45

[931] M. Choudhry, Bond and Money Markets: Strategy, Trading, Analysis Butterworth-Heinemann p.387

[932] S. Heffernan, Modern Banking, John Wiley & Sons, (2005) p. 560

Offering Circular will be distributed.[933] Following this, at the closing state, the bonds are offered in the secondary market by the members of the selling group, usually sold over the counter,[934]and the underwriting syndicate needs to pay the Issuer that agreed amount.

Hence, despite the complexity of the legal framework and the many intermediaries that exist during the bond issuance process, we can summarize that bonds are generally treated as loan contracts between the issuer and the subscriber,[935] demonstrated by transferrable debt securities that the issuer issues to the initial subscribers,[936] by virtue of which the subscriber acquires the bonds, thus providing medium or long-term financing to the issuer, in exchange for payment of the nominal amount plus interest upon maturity.[937] This is confirmed by the wording found in several sovereign bonds when referring to the status of the bonds where it is stipulated that: "The Notes constitute direct, unconditional, unsubordinated and unsecured obligations of the Issuer".[938]

For the purposes, of this paper, only the closing stage is of relevance as this is the time sovereign bonds are granted to investors. Sovereign bonds are usually issued to investors by virtue of the following legal documents: 1) a fiscal agency agreement or trust agreement,[939] 2) a contract which entails the terms and conditions applicable to the bonds; 3) a prospectus disclosing the information necessary under applicable legislation to in relation to the issue of the bonds as well the issuer and the country itself and 4) a registration statement[940] and based on such documentation investors purchase bonds that are sold/assigned to them.

Therefore, the relation between the issuer and the bondholders is contractual. Hence, to explore bondholders' rights under such contracts, primarily, we shall examine the law applicable to state contracts and sovereign bonds in particular. Applicable law is of the utmost importance to determine investors' rights in case of sovereign default. It regulates both substantive and procedural issues and as will be

[933] M. Choudhry, Bond and Money Markets: Strategy, Trading, Analysis Butterworth-Heinemann p.387

[934]As to the reasons, bonds are usually sold over the counter see https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Secondary-Markets/Bond-Market-Transparency-Wholesale-Retail/So-why-do-bonds-trade-OTC-/last accessed 02.09.2017

[935] S. Weber, The law applicable to bonds, in H. Van Houte, The Law of Cross-Border Security Transactions, Sweet and Maxwell, 1999, p.29

[936] P. R. Wood, International Loans, Bonds, Guarantees, Legal Opinions, Sweet & Maxwell, (2007) p. 193

[937] J. Downes, J. E. Goodman, Barron's Finance & Investment Handbook. Barron's Educational Series, (2003), p. 12

[938]See e.g, Greek Offering Circular dated 10 of April 2014 available at: https://ftalphaville-cdn.ft.com/wp-content/uploads/2015/03/Greece-Final-Offering-Circular-dated-10-April-2014.pdf

[939]See Y. Liu, The Design and Effectiveness of Collective Action Clauses (2002) available at https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/liu.pdf

[940]C. Stefanescu, Collective Action Clauses in International Sovereign Bond Contracts and Their Effect on Spreads at Issuance (2016) available at http://www.efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2016-Switzerland/papers/EFMA2016_0442_fullpaper.pdf , p. 10

demonstrated it can be a powerful weapon either in the hands of the state or of the investor. This explains why it is one of the "most sensitive legal issues".[941]

IV. Applicable law

To determine applicable law governing the relation between the State and the investor(s), we must first explore how this relation was created, in other words what is the legal basis of such relation. As already stipulated, in the case of bond issuance, the underlying relation between investors and the issuing state stems from sovereign bond contracts.

The legal treatment of State contracts has been extensively discussed and although opposite views have been expressed,[942] State contracts are generally treated differently from ordinary commercial contracts between non-state entities.[943]The reasons underlying such difference relate to the strong public policy considerations that usually apply in State contracts, while also the fact that a State differs from any other contractual party due to its exorbitant powers.[944] These considerations are often interpreted in the application of public law and, in particular, administrative law,[945] and the exercise of State's discretion on the negotiation, conclusion, operation and termination of such contracts.[946]Although, different states may regulate State contracts differently within their national law, nonetheless the distinction between ordinary commercial contracts between private parties and State contracts appears to be recognized universally in several national legal systems.[947]

Hence, the question of the law applicable to such contracts is one that has raised questions amongst scholars as well as arbitral tribunals, with various theories coming forward. According to such theories we can distinguish between the following laws that can be applicable to state contracts: 1) national law, 2) international law 3) the law chosen by the parties and 4) lex fori.

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[941] R. Dolzer, Ch. Schreuer, "Principles of International Investment Law", OUP, (2008), p. 74

[942]See for example P. R. Wood, "Conflict of Laws & International Finance", Sweet & Maxwell, 2007, p.60, where it is stipulated that "there are no special rules applying to state commercial contracts".

[943] UNCTAD, "State Contracts", UNCTAD Serieson issues in international investment agreements, UN Publication, 2004, p. 5

[944] P. Wautelet, International Public Contracts: Applicable Law and Dispute Resolution, available at https://orbi.ulg.ac.be/bitstream/2268/136404/1/Wautelet%20-%20Applicable%20Law%20(final).pdf, last visited 09.02.2017

[945]Ch. Leben, La théorie du contratd'Etat et l'évolution du droit international des investissements», RCADI, 2003, t. 302, p. 197.

[946]UNCTAD, ibid. p.5

[947]UNCTAD supra. See also C. Turpin, Government Contracts, Penguin,1972., although see, P. R. Wood, "Conflict of Laws & International Finance", Sweet & Maxwell, 2007, p. 60 where he argues that state contracts entered into between a sovereign government and non-state entity, should not be treated fundamentally differently than private contracts.

A. National Law as applicable to State Contracts

The application of national law in State Contracts, absent a "choice of law provision" to the contrary, has been supported by several scholars.[948] This opinion was reinstated by the judgment of the Permanent International Court of Justice in its early case concerning *the Payment of Various Serbian Loans Issued in France*, where the Court ruled that:[949] "*Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country. The question as to which this law is forms the subject of that branch of law which is at the present day usually described as private international law or the 'doctrine of the conflict of laws*". According to the above, the law applicable to State contracts would be the law of the host State.[950]

There are various reasons to support such a claim. Primarily, according to the gravity test, by virtue of which, a contract is governed by the law with which the contract is most closely connected to. Indicatively, in a sovereign bond agreement, the issuer's country is most likely the place where the bonds will be issued and the agreement will be signed and delivered, where the funds will be remitted to and from where they will be repaid.[951] Hence the issuing State's law should also be applicable.[952]Additionally, a sovereign bond agreement is very closely related to the financial interests of the State.[953] Furthermore, applying the law of the issuing State is in line with the notion of sovereignty.[954] In fact, the Committee established by the League of Nations to study international law contracts, concluded that: "every contract which is not an international agreement-i.e. a treaty between States- is subject

[948]Indicatively see: F.V. Garcia Amador, State Responsibility: Fourth Report by the Special rapporteur in International Responsibility, Y.B. Int'l L. Comm'n, U.B. Doc A/CN.4/119, 1959, p. 126 and F.A. Mann, State Contracts and State Responsibility in Studies in International Law, Oxford, Clarendon Press, 1973 p. 302

[949] Caseconcerning the Payment of Various Serbian Loans Issued in France, Permanent Court of International Justice Judgment Series A No. 20 (1929) at p. 41

[950]H. E.Kjos, Applicable Law in Investor-State Arbitration: The Interplay Between National and international law, Oxford University Press, [Oxford Monographs in International Law] 2013, p.172, See also G. Schwarzenberger, International Law, Stevens, 1957 about the conflict of laws criteria used by international Courts and Tribunals.

[951]D. Sommers, A. Broches, G. Delaume, Conflict Avoidance in International Loan and Monetary Agreements, Lam &Contem. Prob. 21 (1956) p. 466

[952] T.Gazzini,E. De Brabandere, International Investment Law: The Sources of Rights and Obligations, MartinusNijhoff Publishers, 2012, p.223

[953]But see criticism of this view by T.W. Wälde, The Serbian Loans Case - A Precedent for Investment Treaty Protection of Foreign Debt?, TDM 4, 2004 p. 383 and also the outcome of the case Alsing Trading Co. v. Greece, Python (Sole Arbitrator), 1954, Rev. Arb., 1980, where despite Greece's argument that Greek law should apply to the loan agreement the tribunal ruled in favor of the application of the law of the tribunal's seat, as indirectly chosen by the parties along with the seat of the tribunal.

[954] H. E. Kjos, ibid p.172

(as matters now stand) to municipal law".[955] Thus, it is often the case that the governing law of such State contracts is in fact their national law.[956]

This is also supported by the International Law Commission's Articles on State Responsibility, but also by tribunals' case law.[957] Indicatively, in the F. Wintershall A.G. v. Qatar case[958], which concerned a claim for expropriation of contractual rights by the Government of Qatar due to an alleged termination of an Exploration and Production Sharing Agreement, the Tribunal applied the gravity test and ruled that the law of Qatar was applicable. The same conclusion was reached by ICSID in the Société Ouest Africaine des BétonsIndustriels v. Senegal case[959] where the Tribunal considered that the law applicable "*in respect of a project that was to take place in Senegal, can only be Senegalese law".*[960]It should moreover be stated, that ICSID Convention particularly regulates this matter in Art. 42(1). The latter provides that, in the absence of a choice of law clause in the State Contract, the Tribunal will apply the "*law of the Contracting State Party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable*"[961] In fact, in the Noble Ventures Inc. v. Romania case[962] the ICSID Tribunal explicitly stated that there is a distinction between national law and international law, while in the Sea-Land Service, Inc v. The Government of the Islamic Republic of Iran, Ports and Shipping Organization[963] the Tribunal applied Islamic law as the law more relevant to the facts.[964]

Currently, the large majority of sovereign bonds in Member States in the Eurozone are governed by the national law of the respective state, as part of a choice of law clause.[965] The graph below is revealing to this end:

[955]Report on the Committee for the Study of International Loan Contracts, League of Nations Publication II, Economic and Financial, 1939, p. 21

[956]UNCTAD, ibid p.5.

[957] H. E. Kjos, ibid p.173

[958] F. Wintershall A.G. v. Qatar, Partial Award of 5 February 1988 and Final Award of 31 May 1988, I.L.M. 795, 1989.

[959] Société Ouest Africaine des BétonsIndustriels v. Senegal, ICSID Case No. ARB/82/1,1988

[960] Société Ouest Africaine des BétonsIndustriels v. Senegal, supra par. 5.02

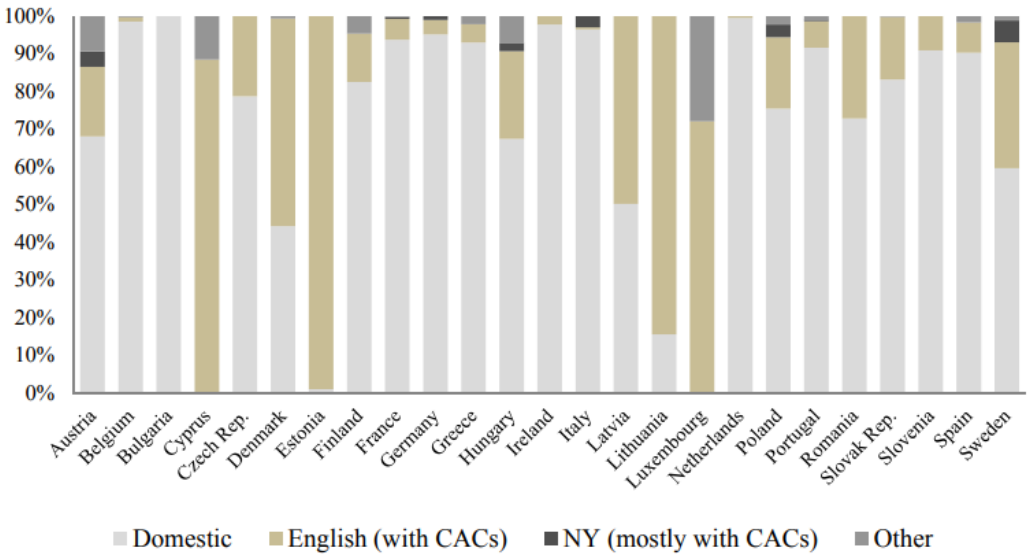
[961]ICSID Basic Documents, Doc. ICSID/15, 1985

[962] Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11.

[963] Sea-Land Service, Inc v. The Government of the Islamic Republic of Iran, Ports and Shipping Organization, Award No. 135-33-1 of 22 June 1984

[964]But see also Anaconda-Iran, Inc. v Iran and NICIC, 1986 where the ICSID Tribunal found that in the absence of a choice of law clause it could be inferred that that the parties had explicitly refuted the other party's national law.

[965]I. Tirado, Current EU Mechanisms to confront Sovereign Insolvency in C.Espósito, Y. Li, Juan P.Bohoslavsky, Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing, Oxford University Press, (2013), p. 317



Source: IMF Working Paper[966]

It must be stated that in cases of sovereign bonds, applying the national law of the Debtor State can be highly prejudicial for investors' rights, as the State will maintain the legislative power to amend the law and frustrate investors' rights.[967]This is what happened in the case of the Greek Sovereign Bond Exchange. On February 23, 2012, just days before the Exchange, Greece enacted the Greek Bondholders' Law, No. 4050/2012 partially amending the terms of Greek sovereign bonds issued prior to December 31, 2011, through the introduction of Collective Action Clauses (CACs). Such clauses allowed the majority of 2/3 of the total number of Greek law governed bondholders, to bind all other bondholders with their decisions and not allow individual investor(s) to act solely by accelerating the bond or initiating litigation in the event of default.

B. International Law as applicable to State Contracts

Another theory that had recently gained some grounds in relation to the law applicable to state contracts is that of the internationalization of state contracts. This theory suggest that regardless of the application of national law to a state contact, this cannot "entirely exclude the direct applicability of international law in certain situations".[968] Hence, as per the theory of internalization of state contracts, international law is automatically applicable to state contracts as overriding, regardless of the provisions of national law.[969] The application of international law to

[966] U. S. Das, M. G. Papaioannou, C. Trebesch, Sovereign Debt Restructurings 1950–2010: Concepts, Literature Survey, and Stylized Facts, IMF Working Paper, Monetary and Capital Markets Department (2012) p. 42

[967]M. Gruson, R. Reisner, Sovereign Lending: Managing Legal Risk, Euromoney Publications, (1984).

[968] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, 1993, para. 80

[969]A.F.M. Maniruzzaman, State Contracts in Contemporary International Law; Monist versus Dualist Controversies, EJIL (2001) Vol.12 (2) pp. 309-328

override applicable national law is of particular importance to safeguard investors' rights, as, as indicated, otherwise states may simply "adjust" their national law to better suit their interests at the expense of investors' rights.

To avoid such instances and ensure the application of international law, state contracts often provide "stabilization clauses", which aim to make the terms of a state contract stable and fixed, not subject to changes by legislation or other means, and therefore minimizing non-commercial risks.[970] Indicatively, in the case of Revere Copper & Brass, Inc. v. OPIC[971], the Tribunal concluded that despite the prohibition of national law for State Executives to enter into agreements in breach of the constitutional principle of separation of powers, the State Contract was still valid and binding under public international law, by virtue of a stabilization clause. Similarly, in the Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic,[972] the Tribunal held that the contracts fell within the sphere of international law and national regulatory measures, including nationalization, could not nullify the effects of the contracts.[973]

Despite, however, the importance of such clauses for enhanced protection of foreign investors from regulatory changes, such clauses are hardly -if at all- found in sovereign debt instruments.

C. Choice of Law

However, not all scholars favour the view that state contracts should be treated in a different manner than private commercial agreements from a conflict of laws perspective. Indicatively, Phillip R. Wood noted that state contracts, are not governed by specific rules and therefore the law of the state is not necessarily applicable.[974] In accordance with the conflict of laws rules in most countries in the event the contract contains a choice of law provision, such term will be upheld.[975] Indicatively, Article 1 of the Resolution adopted in 1979 by the International Law Institute with respect to State contracts provides that State contracts "shall be subjected to the rules of law chosen by the parties or, failing such a choice, to the rules of law with which the contract has the closest link".[976] This seems to indicate that the applicable law is not based a new theory designed to extend the reach of international law or impose the

[970]L. Cotula, Stabilization Clauses and the Evolution of Environmental Standards in Foreign Investment Contracts, in O. Kristian Fauchald, D. Hunter, Yearbook of International Environmental Law, Volume 17; Volume 2006, Oxford University Press, 2008, p. 120

[971] Revere Copper & Brass, Inc. v. OPIC, AAA Award of August 24, 1978, 17 I.L.M. 1321 (1978)

[972] The Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic, Ad Hoc Tribunal, (1977)

[973]For an in-depth analysis see A. A.Fatouros, "International Law and the Internationalized Contract" Articles by Maurer Faculty. Paper 1859,(1980) available at http://www.repository.law.indiana.edu/facpub/1859

[974] Philip Wood, Conflict of Laws & International Finance, The Law & Practice of International Finance, Vol. 1 (2007).

[975]Indicatively, see Art. 3 Rome I Regulation.

[976] P. Wautelet, International Public Contracts: Applicable Law and Dispute Resolution in M. Audit & S., Schill at The Internationalization of Public Contracts, Bruylant. (2013).

application of the State's national law to contracts concluded by States, but instead the application of classical rules of private international law,[977] whereby the parties' choice would be prevalent.

Hence, the starting point would in such case be the will of the parties as same is expressed in the terms of the contract, in other words the choice of law clauses are of outmost importance. Indeed, arbitral tribunals as well as national Courts will uphold the parties' choice vis a vis applicable law, adhering to the universally accepted principle of the "proper law of the contract".[978] Such choice of law clauses are autonomously upheld, regardless of the provisions of the international private law of the state[979], as this is permissible under international law.[980] Based on such clauses, the law applicable to state contracts can be a law different than that of the national law of the state involved,[981] which therefore raises the question of which law can/should be chosen by the parties.

Initially the choice of another states' national law appeared an unpopular one, due to states' unwillingness to submit to the laws of another state. Indicatively, prior to introduction of the Greek Bondholders' Law, only 10% of Greek bonds were governed by other national legislation, mostly English law.[982] This is what allowed the Greek Government to retroactively introduce CACs to Greek law-governed sovereign bonds and achieve such high participation in the bond exchange. Instead, Greek Sovereign Bonds governed by foreign law, were not affected by the Greek Bondholders Law No. 4050/2012, and thus bondholders of such foreign law bonds were able to not accept the terms of the bond exchange and hold out instead. In fact, more than half of such bonds under English, Japanese and Swiss law were not subject to the exchange and have serviced according to their original terms.[983] Similarly, other larger economy states within the EU, such as the UK and Germany, issue almost all of their bonds under national law.[984]

Hence, this raises the question under which circumstances a state will accept to be subject to a foreign state's law. This can be answered easily, if one reviews the applicable law to Greek sovereign bonds at present. Greece re-entered the capital markets on July 25th, 2017 after three years, by offering five-year sovereign bonds

[977] J. Verhoeven, 'Droit international des contrats et droit des gens',Revue Belge de droit international, 203-203 (1978-79)

[978] See Dalmia Cement Ltd. v. National Bank of Pakistan, International Chamber of Commerce, Arbitration Tribunal (1976), para 130

[979] Julian D. M. Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards, Oceana Publications, 1978, p. 96

[980] R. D. Bishop, J. Crawford, W. M.Reisman, Foreign Investment Disputes: Cases, Materials, and Commentary, Kluwer Law International, 2005 p. 259

[981] M.Sornarajah, The International Law on Foreign Investment, Cambridge University Press, Cambridge University Press, (2010), p. 284

[982] See M.Gulati, L.C. Buchheit, How to Restructure Greek Debt, Duke Law Working Papers, Paper No. 47, (2010), available at http://scholarship.law.duke.edu/faculty_scholarship/2336.

[983] M.Chamon, J. Schumacher, C.Trebesch, Foreign Law Bonds:Can They Reduce Sovereign Borrowing Costs (2015) available at https://events.barcelonagse.eu/live/files/801-icf15-chamonpdf

[984] A. Clare, N. Schmidlin, The Impact of Foreign Governing Law on EuropeanGovernment Bond Yields, (2014)available at https://ssrn.com/abstract=2406477 or http://dx.doi.org/10.2139/ssrn.2406477

equal to €3 billion, all of which were governed by English law. In fact, Finland proposed to all EU members that were experiencing financial crisis to increase the number of foreign law bonds they would issue to remain attractive for investors in the capital markets.[985]Similarly, countries with smaller economies where the domestic investor base is not so developed (e.g. like Cyprus), tend to issue foreign law bonds, to render their bonds more attractive to foreign investors that view foreign law as a security element.[986] On the contrary, countries where there is an abundancy of domestic investors, mainly due to the financial stability and economic growth of the economy of such countries, tend to issue national law bonds. The prime example here would be Germany. This goes to show that despite the fact that governments bonds are not negotiated; nonetheless, foreign investors may indirectly avert pressure to secure better terms for their interests, but only when the interest from domestic investors is low.

To this end, currently a large number of sovereign bonds worldwide are issued under foreign law.[987] Out of such bonds, the large majority, approximately 90 percent of the foreign law bonds, are governed by New York or English law by virtue of an underlying choice of law provision.[988] The choice of the applicable foreign law is important for many reasons. Primarily, because, in all likelihood, apart from choosing a foreign law as applicable to the bond contract, the courts of the foreign state whose law was chosen, will also be selected as competent. This is so, as the national courts of the foreign state are deemed to be in a better position to interpret and implement their own law.[989] As it will be further discussed below, the competent courts are important not only for granting a favorable judgement for investors' rights, but also for allowing investors to enforce such judgement. Additionally, depending on the applicable law, bonds may or may not contain certain clauses, while also the interpretation of some clauses maybe different from one jurisdiction to another. Indicatively, we shall explore below the treatment of the *pari passu* clause under US and English Law.

For now, it suffices to say that regardless the governing law, so long as this is not the national law of the issuing state, this is a safeguard for investors. This way they can resist a forced restructuring and hold out, insisting on full repayment, as was the case with foreign law bondholders in the Greek Debt restructuring, or at the very

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[985] M. Chamon, J. Schumacher, C. Trebesch, Foreign Law Bonds: Can They Reduce Sovereign Borrowing Costs (2015) available at https://events.barcelonagse.eu/live/files/801-icf15-chamonpdf

[986]SA. Clare, N. Schmidlin, The Impact of Foreign Governing Law on European Government Bond Yields, (2014) available at https://ssrn.com/abstract=2406477 or http://dx.doi.org/10.2139/ssrn.2406477

[987] Frankel, Jeffrey, Sovereign debt at square one, Project Syndicate (2014).

[988] THE WORLD BANK, «Legal aspects of sovereign issuance in international capital market», Debt Management Forum 2014, Background Note for Breakout Session 8, available at http://treasury.worldbank.org/documents/BREAKOUTSESSION8final_1.pdf, see also R.W. KOLB, *Sovereign Debt: From Safety to Default*, John Wiley & Sons, 2011, as well as R. LA PORTA, F. LOPEZ-DE-SILANES, A. SHLEIFER, R.W. VISHNY, «Legal Determinants of External Finance», in *The Journal of Finance*, n. 3, 1997.

[989] F. PARISI, *Public Law and Legal Institutions*, Oxford University Press, 2017, p. 493.

least negotiate from a better standing. It is for this reason that, in times of financial distress, foreign law bonds of the distressed state are often sold at a premium.[990]

D. Lex Fori

Last but not least, in cases where state contracts, including sovereign bonds, have no underlying provisions regulating the choice of law, but the investment treaty contains arbitration clauses rendering one or more tribunals as competent to adjudicate a dispute stemming from a contract, arbitral tribunals under ICSID, UNICITRAL and ICC adopt an almost identical simplified approach.[991] In particular, if the investment treaty does not offer guidance on the applicable law for disputes between the host state and the investor, the tribunals will apply lex fori, i.e. the law applicable to the relevant tribunal.[992]

Contrary to the global Bilateral Investment Treaty ("BIT") practice, most BITs signed by Greece do not contain a reference to ICSID but provide for investor-State provisions that are purely ad hoc clauses[993]. Indicatively, the Germany-Greece BIT specifically provides for the creation of an ad hoc arbitrary body with 3 arbitrators, 2 of which will be designated by each contracting party, while the third will be chosen by the 2 pre-chosen arbitrators. The aforementioned BIT further provides that if it does not become possible for the Parties to choose the Arbitrators, same will be decided by the President of the International Court of Justice (ICJ) or the vice President if the former is unavailable. In such cases, the rules of procedure and the steps to be followed are prescribed in the BIT text and the investors must act accordingly.

V. Basic Contractual Clauses

However, apart from the above, applicable law is also of the utmost importance in the interpretation of contractual terms and thus to investors' case for breach of contract. To examine bondholders' rights in case of sovereign default, we need to examine the common contractual terms found in sovereign bond contracts that may be affected from such default. For the purposes of this paper, we shall limit our analysis to the clauses found in Greek Sovereign Bonds.

[990]SeeM. Chamon, J. Schumacher, C. Trebesch, Foreign Law Bonds: Can They Reduce Sovereign Borrowing Costs (2015) available at https://events.barcelonagse.eu/live/files/801-icf15-chamonpdf

[991]O.Dörr, K.Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary, Springer Science & Business Media, (2011), p.78

[992]O.Dörr, K. Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary, Springer Science & Business Media, (2011), p.78

[993]Rudolf Dolzer, Margrete Stevens, Bilateral Investments Treaties, International Center for Settlement of Investment Disputes, Kluwer Academic Publishers Group, p. 129

A. The "pari passu" clause

Sovereign Bond Contracts will, most likely include a pari passu clause that will usually state that the bonds rank "pari passu" with one another without any preference among themselves and with the other unsecured obligations of the issuer.[994] The meaning of the said clause has recently puzzled both academia as well as practitioners, in light of recent adjudication re its interpretation.

Summarily, the pari passu clause has been interpreted in two ways: in a narrow sense whereby, all obligations assumed under the bond rank and will rank pari passu with all other unsecured debt, and in a broad sense by virtue of which if a debtor is unable to pay all its obligations, such obligations will be paid on a pro-rata basis.[995]

The meaning of pari passu in the context of sovereign default was first examined in 1936 in the case of AB Obligationsinteressenter v. Bank for International Settlements,[996] although pari passu clauses were introduced in sovereign bonds as early as 1871.[997] In the said case, the Swiss Federal Court, judging under Swiss Law, had no difficulty interpreting the pari passu clause under the broad sense, as a promise that payment to investors would be made pro rata.[998]However, despite this interpretation, nonetheless, the Swiss Court was not willing to enforce such finding.[999] It was for this reason that the clause, until recently, did not receive much attention, considered as a "harmless relic of historical evolution",[1000] while the predominant belief amongst practitioners was that the clause should be interpreted in the narrow sense.

However, the Elliott Associates v. Peru[1001]case changed this belief by reaffirming the Swiss Courts judgement. In the said case, the Court of Appeal of Brussels, examining New York law sovereign bonds, ruled that the version of the clause,[1002] where the word "payment" was used in relation to the "pari passu," could be used by investors to effectively claim that a state is not allowed to pay certain investors before it pays others. In fact, the Court of Appeal concluded that the pari

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[994] R. Olivares-Camina, The paripassu clause in sovereign debt instruments: developments in recent litigation, BIS Papers No 72 (2013) available at http://www.bis.org/publ/bppdf/bispap72u.pdf

[995] Financial Markets Law Committee, PariPassu Clauses, Issue 79, (2005) p. 2

[996]AktiebolagetObligationsinteressenter v. The. Bank for International Settlements, Swiss Federal Tribunal, (1936)

[997]P. Mauro, Emerging Market Spreads: Then Versus Now, 117 Q.J. ECON. 695,695-96 (2002)

[998] A. Gelpern,Courts and Sovereigns in the Pari Passu Goldmines, Capital Markets Law Journal, Vol. 7b(2016), p.2

[999] A. Gelpern, Courts and Sovereigns in the PariPassu Goldmines, Capital Markets Law Journal, Vol. 7b (2016), p.3

[1000] M. Gulati,R. E. Scott, The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design, University of Chicago Press, 2013, p.46

[1001] Elliott Associates, L.P. v. Republic of Peru, Court of Appeal of Brussels, 8th Chamber, (2000).

[1002]The wording of the 1983 sovereign bond contract provided that "The obligations of the Guarantor hereunder dorank and will rank at least pari passu **in priority of payment** with all otherExternal Indebtedness of the Guarantor, and interest thereon", Declaration of Professor A. F. Lowenfeld, 'll'll I, 8, Elliott Assocs., L.P. v. Banco de la Nacion, Southern District of New York, (2000)

passu clause "has as a result that the debt should be paid down equally towards all creditors in proportion to their claim."[1003] To this end, the Court of Appeal granted an injunctive relief to Elliot Assocs. by virtue of which, Chase Manhattan and, most importantly, Euroclear were barred from making interest payment on Peru's Brady bonds to European bondholders, as Elliot Associas. had a right of pro rate payment. Faced with a potential new default on its restructured Brady Bonds, Peru entered into an agreement and paid Elliott Associas. in full.[1004]

Similarly, the District Courts of New York were asked to examine the meaning of the "pari passu" clause in the context of the recent Argentine sovereign default that concerned bonds of over $100 billion. The case was brought by NML Capital, an affiliate of Elliot Associas, who held sovereign bonds issued under a Fiscal Agency Agreement. Argentina was unable to fully repay the nominal value and interest of such bonds, that amounted approximately to 1,33 billion USD and to thus resorted to two offers of bonds' exchange, whereby investors that held bonds under the Fiscal Agency Agreement could exchange their existing bond for new, unsubordinated and unsecured debt instruments[1005] of lesser value reduced at approximately ¼ of the original value.

To ensure the success of such bond exchanges, Argentina passed a law restricting payment to bonds that did not participate in the exchange. NML Capital argued this was breaching the pari passu obligations of Argentina under the sovereign bond contracts. The pari passu clause that was examined by the New York courts was two-pronged; the first prong related to the securities themselves, while the second prong related to the payment obligations of the Republic under the Securities. The District Court looking at the language of the clause, in line with US law standard principles of contract interpretation, noted that the second prong of the clause meant that Argentina was prohibited from making any payments on other bonds, unless payments were made also on the defaulted FAA bonds. As such, the Court concluded that Argentina had breached the pari passu clause. To reach such conclusion, the District Court relied solely on the wording of the clause and did not make any reference to previous caselaw. The results of the said judgement were monumental for Argentina, as, in essence, Argentina was barred from issuing new bonds or servicing its restructured debt instruments.[1006]

It should be stated that the outcome of the above cases might have been different, had these been examined under English law. Indeed, the Financial Markets

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[1003] Elliott Associates, L.P. v. Republic of Peru, Court of Appeal of Brussels, 8th Chamber, (2000), para. 6.

[1004] R. Olivares-Caminal, "The Pari Passu Interpretation in the Elliott Case: A Brilliant Strategy but an Awful (Mid-LongTerm) Outcome?," Hofstra Law Review, Vol. 40 (1) (2011), p. 44

[1005] 'The PariPassu Clause As Applied In Argentina Sovereign Bonds Litigation' (Financier Worldwide, 2017) <https://www.financierworldwide.com/the-pari-passu-clause-as-applied-in-argentina-sovereign-bonds-litigation/#.WcQFVbJJbIU> accessed 21 September 2017.

[1006] M. Voris, M.Porzecanski, 'Argentina Debt Injunction To Be Lifted In Blow To Hedge Funds' (Bloomberg.com, 2017) <https://www.bloomberg.com/news/articles/2016-02-19/argentina-bonds-judge-says-he-will-lift-injunctions-on-debt-iku9ykz3> accessed 21 September 2017.

Law Committee issued a report on the role and meaning of pari passu clauses under English law. The report was triggered after the Elliott Associates v. Peru case and the Committee noted that apart from the literal interpretation of the wording of the clause, also the consequences of each interpretation should be considered. To this end, the Committee noted that as "a matter of English law the ranking (narrow) interpretation is the proper interpretation of the pari passu clause in sovereign debt obligations."[10071008] After all, English Courts ruled differently on the examination of the above facts, noting that Euro-denominated bonds were not subject to the rulings of US Courts as they were governed by English law.[1009]

In the context of the Greek sovereign bond restructuring, such clause could not be used by the majority of investors, as, with a few exceptions, almost all Greek-law governed bonds, did not contain such "pari passu" clauses.[1010] In fact, even in the new English law bonds that have been recently issued by Greece,[1011] that contain pari passu clauses, Greece has introduced specific wording to avert the broad interpretation of such clauses by specifically denouncing the pro rata payment to bondholders, in line with the new pari passu model clause proposed by the International Capital Market Association ("ICMA"). ICMA's proposed clause aims to exclude a pro-rata interpretation of the pari passu clause issuing explicit language to this end. In particular, the proposed clause reads:

"*The Notes are the direct, unconditional and unsecured obligations of the Issuer and rank and will rank pari passu, without preference among themselves, with all other unsecured External Indebtedness of the Issuer, from time to time outstanding, provided, however, that the Issuer shall have no obligation to effect equal or rateable payment(s) at any time with respect to any such other External Indebtedness and, in particular, shall have no obligation to pay other External Indebtedness at the same time or as a condition of paying sums due on the Notes and vice versa*."[1012]

[1007] Financial Markets Law Committee, Pari Passu Clauses, Issue 79, (2005) p. 25

[1008]See also L. Burn, Paripassu clauses: English law after NML v Argentina, Capital Markets Law Journal, Vol. 9 (1), (2014), where the author reaches the same conclusion in the context of the NML v. Argentina dispute.

[1009] See Knighthead Master Fund et al v. The Bank of New York Mellon et al (2014) as well as M. Guzman, J. Antonio O campo, J. E. Stiglitz, Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises, Columbia University Press (2016), p.51

[1010]M. Gulati & J. Zettelmeyer, Making a Voluntary Greek Debt Exchange Work, 7 Capital Markets Law Journal 169-183 (2012)

[1011]Although, the paripassu clause contained in the terms and conditions of the exchanged bonds in the 2012 restructuring did not contain such specification and instead simply provided that "*The Bonds rank, and will rank, pari passu among themselves and with all unsecured andunsubordinated borrowed money of the Republic. The due and punctualpayment of the Bonds and theperformance of the obligations of theRepublic with respect thereto arebacked by the full faith and credit of the Republic*.", which again is different from the wording found in Argentina bonds and would not allow a pro-rate interpretation.

[1012] G. Makoff, R.Kahn, Sovereign Bond Contract Reform Implementing the New ICMA Pari Passu and Collective Action Clauses, CIGI PAPERS, NO. 56 (2015), p.5

Hence, although the pari passu clause, can prove invaluable for the protection of some investors (usually the holdouts), nonetheless such clause is not always present in sovereign bonds, while even when such clause exists the wording and applicable law can diminish the broad interpretation of the clause, contrary to the holdouts aspiration. This was required so as to facilitate sovereign bond restructurings and therefore allow non-holdout bondholders to receive some compensation on their bonds, while also to limit the wide powers creditors enjoyed by holdouts under the broad interpretation of the clause that literally allowed creditors to hold states "hostages" in a state of financial duress.[1013]

B. Collective Action Clauses

As demonstrated in the case of Argentina, holdout creditors can have negative implications not only for the state and its ability to issue new bonds, but also for the entire restructuring process and therefore for other bondholders. To this end, an effective tool to minimize hold-out creditors are CACs.

CACs take various forms but, despite their form, they all aim to resolve coordination problems between bondholders, especially in times of bond restructuring. CACs can be in the form of collective modification clauses, which allow a qualified majority of bondholders to decide for all bondholders, including dissenting bondholders, vis a vis modification of bonds' terms, as well as in the form of acceleration clauses, whereby bondholders can accelerate or instigate legal action against the state only after a qualified majority of the bondholders has consented to this. Additionally, there also other less prominent forms of CACs, such as representation clauses, aggregation clauses and disfranchisement clauses.[1014]

The importance of CACs was demonstrated after the peso crisis in Mexico, where CACs were promoted as a contractual tool to facilitate sovereign debt restructurings and eliminate the increasing cost of adjudication.[1015] To this end, in 1995 the Ministers and of the G10 countries formed a working group to study sovereign defaults and the problems faced in the said context. The Group issued its report in 1996 and it noted that introducing CACs into sovereign bond contracts might prove beneficial in smoothing negotiations during sovereign debt crises.[1016] Despite however the Group's recommendation, States met CACs with hesitation and

[1013] Elmar B. Koch, Challenges at the Bank for International Settlements: An Economist's (Re)View, Springer Science & Business Media, (2007), p.91

[1014] C. Stefanescu, Collective Action Clauses in International SovereignBond Contracts and Their Effect on Spreads at Issuance (2016) available at http://www.efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2016-Switzerland/papers/EFMA2016_0442_fullpaper.pdf , p. 14

[1015] S. Haeseler, Collective Action Clauses in International Sovereign Bond Contracts – Whence the Opposition? German Working Papers in Law and Economics from Berkeley Electronic Press (2007)

[1016] J. Drage, C. Hovaguimian, Collective Action Clauses (CACS): an analysis ofprovisions included in recent sovereign bond issues, Bank of England (2004), p.1

especially in bonds issued under local law, CACs were absent.[1017]Indicatively, before January 2013, the vast majority of sovereign bond contacts issued by Eurozone members were governed by each state's national law and did not contain CACS.[1018]

Greece was not an exception to this rule. As indicated, prior to the adoption of the Greek Bondholders' Law, No. 4050/2012, the Greek sovereign bonds contained no collective action clauses and instead Greece unilaterally introduced such clauses retroactively by the Greek Bondholders' Law. This unilateral modification of Eurozone sovereign bonds' terms by legislative intervention of the issuing state, was what prompted the revision of the Treaty Establishing the European Stability Mechanism. The latter, inter alia, provides for a model CAC, developed by a sub-committee of the Economic and Financial Committee on EU Sovereign Debt Markets, which must be mandatorily included in all Eurozone sovereign bonds with a maturity of greater than one year issued as of January 1st, 2013.[1019]As per Gelpern and Gulati, this revision was led by mostly two reasons; primarily the need for bonds to aspire security to investors that such unilateral acts, as that of the Greek Government, would not take place again in the future, but instead bondholders could rely on the terms of the sovereign bond contracts; secondly, the potential of CACs reducing bail-outs, as defaulted states had the ability to restructure their debts.[1020]

Similarly, in 2014 the International Monetary Fund as well as ICMA both stressed the importance of CAC in facilitating restructuring processes and to this end suggested the reformation of sovereign bond contacts accordingly.[1021] In fact, ICMA published proposed terms for aggregated CACs, which in revised again in May 2015.[1022]

At present, we are going to review briefly the model CAC introduced in sovereign bonds in the Eurozone and shall explore if this can facilitate investors rights in the future, as, as indicated, it was used against investors in the case of Greece.

Primarily, the model CAC is mandatorily applicable to issues of bonds internationally, as well as domestically, regardless if offered in the stock market or offered privately[1023] and it can refer to a single bond or series of bonds. The model

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[1017] C. Hofmann, Sovereign-Debt Restructuring in EuropeUnder the New Model Collective ActionClauses, Texas International Law Journal, Vol. 49 p. 390

[1018] E.Carletti, P.Colla, M. Gulati, S.Ongena, The Price of Law: The Case of the Eurozone Collective Action Clauses, available at: http://scholarship.law.duke.edu/faculty_scholarship/3543 (2013)

[1019]'Collective Action Clauses in Euro Area - Economic and Financial Committee - European Commission' (Economic and Financial Committee - European Commission, 2017) <https://europa.eu/efc/collective-action-clauses-euro-area_en> accessed 24 September 2017.

[1020]A, Gelpern, M. Gulati,"The Wonder-Clause", Georgetown Law Faculty Publications and Other Works. (2013) available at http://scholarship.law.georgetown.edu/facpub/1281

[1021] C. Stefanescu, Collective Action Clauses in International Sovereign Bond Contracts and Their Effect on Spreads at Issuance (2016) available at http://www.efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2016-Switzerland/papers/EFMA2016_0442_fullpaper.pdf, p. 14

[1022] 'Sovereign Debt Information' (Icmagroup.org, 2017) <https://www.icmagroup.org/resources/Sovereign-Debt-Information> accessed 24 September 2017.

[1023]M. NíDhonncha, EU publishes mandatory Collective ActionClause for use in eurozone sovereign bondsfrom 1 January 2013, Linklaters (2012)

CAC sets a series of processes that need to be followed prior to the adoption of a binding modification on all bondholders. Primarily, the model CAC distinguishes between reserved matters, that are matters pertaining to the most crucial terms of the bonds, such as the payment date, interest rate etc., and non-reserved matters that relate to less crucial terms of the bonds. In the case of amendment of a reserved matter, a meeting of bondholders should be duly convened, in which bondholders holding at least 75% of the aggregate principal amount of outstanding bonds should vote in favor of the amendment. The percentage drops at 66 2/3% of the aggregate principal amount of outstanding bonds in case of written resolution. On the contrary, an amendment of a non-reserved matter can be achieved by the positive vote of bondholders' holdings more than 50% of the aggregate principal amount of outstanding bonds present, either at a duly convened meeting, or in the form of written resolution.[1024] The model CAC also provides rules for the conveyance of the bondholders' meetings as well as the procedure to be followed during the meeting.

As explained, the introduction of CACs in sovereign bonds' issuance is a step in the right direction, both for the defaulting states, but mostly for bondholders. Especially the latter can now facilitate debt-restructuring negotiations, take binding decisions on issues that have a crucial bearing on the restructuring process and reduce the threat of holdouts that may lead to the inability of all other bondholders to collect, even partially. Indeed, even in the case of the Greek debt restructuring, where, as indicated, CACs were unilaterally and retroactively introduced by the Greek State, without the introduction of such clauses the restructuring of the sovereign debt might not have been possible,[1025] something that could lead to Greece's unregulated default.

However, despite the fact that, indeed in the case of the Greek debt restructuring CACs allowed the successful completion of the restructuring, nonetheless the fact remains that bondholders sustained significant losses, which raises the question of whether there is a contractual term that may address such losses. To this end, we shall explore the use of "events of default" clause in such cases.

C. Events of Default

The "Events of Default" clause is of particular importance to bondholders as it allows them to accelerate the maturity of their bonds and take enforcement measures over the issuer's assets in satisfaction of their claims.[1026] In other words, bondholders may initiate proceeding against the issuing state to recover the nominal value of the bond plus interest, only once an event of default has taken place. Provided such an event of default has indeed occurred, bondholders would be able to accelerate all

[1024]Economic and Financial Committee, 'Common Terms of Reference Supplemental Explanatory Note – 26 March 2012' (2017) <https://europa.eu/efc/sites/efc/files/docs/pages/cac_-_text_model_cac.pdf> accessed 27 September 2017.

[1025] A. E. Stolper, S. Dougherty, Collective action clauses: how the Argentinalitigation changed the sovereign debt markets, Capital Markets Law Journal (2017)

[1026]M. Gulati, G. Triantis, Contracts without Law: Sovereign versus Corporate Debt, University of Cincinnati Law Review, Vol. 75 (2007) p. 980

amounts owed under the sovereign bond contract. Notably, however, bondholders rarely resume to such acceleration as a result of an event of default. Instead, in most cases bondholders will refer to an event of default so as to improve their bargaining power, however small that power may be.[1027] Indeed, although in case of an event of default, bondholders have the right to accelerate and remove the issuing state's assets, investors may not select to exercise this right. Instead, they will often enter into negotiations with the issuing state towards a modification of the terms of the sovereign bond contracts, without however this meaning that they forfeit their right to accelerate and enforce their claims.

As to what constitutes an event of default, this will depend on the wording of each sovereign bond contract. That stated, we may broadly categorize events of default into two broad categories, whereby the first would include instances of non-payment of amounts due and the second would refer to certain events of anticipatory non-payment. Indicatively, the majority of Greek sovereign bonds prior to the 2012 restructuring would include the following definition of an event of default:[1028]

- Failure to pay interest or principal (usually after a 30-day grace period)
- Failure of other covenant obligation (usually a grace period is granted, and notice of default is required)
- A government order or presidential decree is issued preventing Greece from performing its obligations under the bonds
- A General Moratorium is declared on non-payment of principal.

The question that arises therefore is whether the sovereign bond restructuring may constitute an event of default. Notably although the two terms intertwine, nonetheless they are not identical. To this end, in most cases an event of default will precede a sovereign bond restructuring.[1029] Indeed, an event of default is directly linked to non-payment after the grace period has expired, when a restructuring is required. In the case of the Greek sovereign bond restructuring of 2012, however, there was no missed payment on the side of Greece vis a vis bondholders. However, what is of interest is whether the unilateral introduction of CACs can be deemed a "government order or presidential decree is issued preventing Greece from performing its obligations under the bonds".

A similar issue was examined by the International Swaps and Derivatives Association ("ISDA") that examined whether the unilateral introduction of CACs by the Bondholders' Law was a "credit event" in the context of marketed credit default swaps (CDS). Although credit events are not limited to the events of default listed above and in fact name restructuring as a credit event, nonetheless it is of importance to review how ISDA treated the Greek sovereign bond restructuring. Primarily, ISDA

[1027] P. Wood, How protective are Ukraine's international bonds? Allen &Overy, (2015), p. 8

[1028] E.g. See Hellenic Republic Offering Circular dated 21 February 2005 available at http://s3cdn.observador.pt/wp-content/uploads/2015/07/greece-ecb-bond1.pdf

[1029] U. S. Das, M. G. Papaioannou, C.Trebesch, Sovereign Debt Restructurings 1950–2010: Concepts, Literature Survey, and Stylized Facts, IMF Working Paper, Monetary and Capital Markets Department (2012) p. 8

took the view that given the voluntary nature of the bond exchange, the latter did not constitute a credit event. According to ISDA, no credit event is deemed to take place when the bond restructuring is voluntary. This reasoning does not stem from the CDS definitions which make no distinction between voluntary and involuntary events, but from the purposive interpretation of restructuring which intends to refer to an event binding on all bondholders, even those dissenting to it. On these grounds, ISDA ruled Greek restructuring of 2011 was not likely to entail payments under CDS contracts.[1030]On the contrary, in 2012 ISDA concluded that the introduction of CACs by Greece, which unilaterally amended the terms of Greek law governed bonds constituted a Restructuring Credit Event. This was in light of the effect of such CACs was that it rendered the sovereign bond restructuring binding on all bondholders of Greek-law governed bonds, even those dissenting to it.[1031]

However, despite this determination within the CDS context, contractually it is unlikely that the unilateral introduction of CACs could constitute an event of default and therefore be in a position to award bondholders an additional "card" on the restructuring negotiation table. Indeed, given the nature of CACs clauses, these do not constitute a change in the payment terms of the bonds, nor did they prevent Greece from performing its obligations under the bonds. Instead, it appears in the context of the Greek sovereign debt restructuring, the introduction of CACs was used to avert an event of default by Greece.

D. Other Clauses

Other clauses that can be found usually in sovereign bonds include clauses such as "negative pledge clauses" prohibiting the issuance of new collateralized debt unless existing debt is enhanced in the same way, "secured debt clauses" and "cross default clauses" that define a default on another government bond as a default event.

Prior to the Greek sovereign debt restructuring of 2012, Greek Bonds did not provide any security or other guarantees for the satisfaction of creditors in case of default. In addition, they did not entail negative pledge clauses protecting the bondholders who took out an unsecured loan. Negative pledge clauses provide that a State that has awarded unsecured loans cannot subsequently take out other loan(s) with a different lender, securing the subsequent loan(s) by the same specified assets. Use of the same assets as collateral would mean that the original lender would be disadvantaged because the subsequent lender may have a priority position to satisfy his claim by the assets in an event of default.

Following the restructuring, however, this has changed. Indeed, the bonds that were offered to bondholders at the time of the restructuring contained negative pledge clauses, therefore preventing Greece from issuing any secured bonds for as long as

[1030]'ISDA - International Swaps And Derivatives Association, Inc.' (Www2.isda.org, 2011) <http://www2.isda.org/news/greek-sovereign-debt-qampa-update> accessed 6 October 2017.

[1031] ISDA - International Swaps and Derivatives Association, Inc. 'ISDA EMEA Determinations Committee: Restructuring Credit Event Has Occurred with Respect to the Hellenic Republic, News Release dated 09 March, 2012 (2012)

any of the restructured bonds remained outstanding. Interestingly, in the bonds issued during the Greek bond exchange of 2012, a wider definition of event of default was adopted including any failure by the issuing state to comply with any of the covenants contained in the new bonds, subject to a thirty-day cure period. Hence, a violation of the negative pledge clause would, under the new exchanged bonds, also constitute an event of default.

Thus, such clause may be a useful tool for investors' protection in case of future default, but are not relevant for investors' rights prior to the 2012 restructuring.

E. Waiver of Immunity clauses.

One of the most important clauses for bondholders' protection is the clause that specifically waives issuing state's immunity for jurisdiction and enforcement. Enforcement is the motive for investors to pursue their claims against the Host State. It is the result of the judicial process. Nevertheless, enforcement against States is neither easy nor common. Indeed, up to the middle of the 20th century courts and scholars treated claims under sovereign bonds as unenforceable. Indicatively, in the English case of Twycross v. Dreyfus,[1032] Sir George Jessel noted that sovereign bonds are only "engagements of honour" and not enforceable contractual obligations as no tribunal would enforce them absent the consent of the issuing state. Indeed, States used to enjoy absolute immunity.[1033] However, since the late 20th century, there has been a shift from absolute to relative immunity.[1034]

We must here distinguish between immunity from jurisdiction and immunity from enforcement. The former provides that the national courts of a foreign state do not have jurisdiction to hear a lawsuit against another state, unless the letter has so consented. On the other hand, immunity from enforcement restricts the powers of enforcement of national courts or other organs of state against the property of another state found in its jurisdiction. Absolute immunity awards to a state both immunity from jurisdiction, as well as from enforcement. On the contrary, relative immunity provides that when a sovereign chooses to enter the international marketplace and act in the way a commercial actor would, it cannot escape liability through invoking sovereign immunity, but instead it shall be similarly accountable to the judicial process similarly to other commercial actors.[1035]

The issue of sovereign immunity from jurisdiction was recently examined by the Courts of Germany in the context of the Greek Sovereign Bond Exchange. Several German bondholders that had acquired Greek sovereign bonds from German Banks, in Germany, resorted to German Courts against Greece claiming damages for the unilateral introduction of CACs in their bonds that led to them sustaining a haircut on

[1032] Twycross v. Dreyfus LR 5 Ch D 605 (1877)

[1033] W. Mark C. Weidemaier, Mitu Gulati, Sovereign Debt and the "Contracts Matter" Hypothesis, Oxford Handbook of Law and Economics (2017), forthcoming

[1034] W. Mark C. Weidemaier, Mitu Gulati, Sovereign Debt and the "Contracts Matter" Hypothesis, Oxford Handbook of Law and Economics (2017) forthcoming

[1035] L. Buchheit, Sovereign debt restructurings: the legal context, BIS Papers No 72 (2013) p. 107

their bonds. Bondholders' claims were raised on two bases. Primary the claimed based on tort, asserting that the bond *exchange was wrongful exchange and breach of contract.* Secondly, bondholders raised claims for breach of contract. In all cases, German Courts examined whether they were barred from hearing any claims against the Greek state by virtue of sovereign immunity.

As per German law, sovereign immunity does not apply to a State's commercial acts, but only when a State is acting as sovereign. Hence, the German courts examined whether bondholders' claims related to sovereign or commercial acts. Based on this, the Federal Court of Justice concluded that claims in tort were inadmissible, as the Greek Bondholders Law and the subsequent decision of the Council of Ministers' ratifying the majority vote and extending its binding result on all bondholders, were acts taken by Greece as sovereign and therefore sovereign immunity applied.[1036] The Court however noted that this was not necessarily the case for claims brought for breach of contract.

Indeed, when German Courts examined bondholders' claims for breach of contract, two Higher Regional Courts in Oldenburg and Cologne noted that no sovereign immunity was applicable as the claims stemmed from a contractual relation and the Greek Bondholders' Law could not change this. However, the Schleswig Higher Regional Court contested that the significant point was not the non-payments by the Greek State, but the introduction of the Bondholders' Law, which was in fact a sovereign act. As per the Schleswig Court, the issue in question was whether the introduction of CACs by the Bondholders' Law was legal, and examining the legality of foreign legislative acts was falling with the scope of immunity. In all cases, however, German Courts did not proceed to examine the merits of the case, as even the Courts in Cologne and Oldenburg dismissed bondholders' claims as the Courts did not have jurisdiction under the old Brussels Regulation *(EC) 44/2001.*[1037] Similarly also the Austrian Courts ruled that Greece did not enjoy immunity on the introduction of CACs, but similarly the Austrian Court noted in did not have jurisdiction.[1038]

This matter was also examined by the CJEU, which issued a preliminary ruling in the case of Stefan Fahnenbrock v Hellenische Republik.[1039] The preliminary ruling was issued following the request by the Regional Court of Landesgericht Kiel in relation to the interpretation of Art. 1(1) of Regulation (EC) No 1393-2007 vis a vis the Greek Bondholder Act and in particular the unilateral introduction of CACs. CJEU noted that, despite the fact that the introduction of CACs was done through a legislative act, namely the Bondholders' law, this did not in and of itself suffice to render the introduction of CACs, a sovereign act. Hence, proceedings brought by

[1036] R. M. Buxbaum, Sovereign Debtors Before Greece: The Case of Germany, Kansas Law Review Vol. 65, Issue 1 (2017)

[1037] S. Grund, Enforcing Sovereign Debt in Court – A Comparative Analysis of Litigation and Arbitration Following the Greek Debt Restructuring of 2012, University of Vienna Law Review, Vol. 1 (2017), pp. 34-90

[1038] Case OGH 80b 125/15 (Austrian Courts)

[1039] Stefan Fahnenbrock and Others v Hellenische Republik (2015) All ER (D) 171 (Jun)

individual bondholders for violation of their right to property, fell within the scope of the Regulation in question, to the extent that such proceedings were not manifestly outside the concept of civil or commercial matters. Following this ruling, national Courts of other EU member state may rule on the legality of the Greek Bondholder Law under Greek law leading to holdout litigation.[1040] Of course the case of Stefan Fahnenbrock v Hellenische Republik related to Regulation (EC) No 1393/2007 that relates to the service of documents between authorities in different EU Member States and not the Brussels I Regulation that regulates the adjudication of cross-border (civil and commercial) lawsuits, which still leaves some ambiguity as to the whether this would still be applicable under the Brussels I Regulation.[1041]

The scope and content of State Immunity from enforcement is far more disputed than jurisdictional immunity and there is no uniform global practice. Indeed, different countries have adopted different approaches, and the practice of nationals Courts in Europe is anything but uniform in this field. Nevertheless, some common elements have emerged as most States have abandoned the notion of absolute sovereign immunity against enforcement and have adopted a more limited application of the aforementioned doctrine.

Most specifically, one of the most decisive factors to determine the extent of immunity from enforcement is prevailingly the purpose of the property against which enforcement measures are sought.[1042] Indeed, in the *Philippine Embassy Bank Account Case*, the German Constitutional Court stated that:[1043]

"There is a general rule of international law that execution by the State having jurisdiction on the basis of a judicial writ of execution against a foreign State, issued in relation to non-sovereign action (acta iure gestionis) of that State upon that State's things located or occupied within the national territory of the State having jurisdiction, is inadmissible without assent by the foreign State, insofar as those things serve sovereign purposes of the foreign State at the time of commencement of the enforcement measure".

As evident, the aforementioned decision differentiates between property serving for sovereign purposes that is immune from execution/enforcement and property for non-sovereign/commercial purposes that is not immune. This distinction is also found in the case law of other European countries, such as Spain, Italy and the Netherlands.[1044] The aforementioned principal was also upheld in a Belgian judgment, while even Swiss Courts that used to accept an absolute immunity have now accepted

[1040] J. P. Bohoslavsky, M. Goldmann, "An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law", the Yale Journal of International Law Online, Vol. 41(2), 2016, p.30

[1041] S. Grund, Enforcing Sovereign Debt in Court – A Comparative Analysis of Litigation and Arbitration Following the Greek Debt Restructuring of 2012, University of Vienna Law Review, Vol. 1 (2017), p.72

[1042] L. J. Bouchez, 'The Nature and Scope of State Immunity from Jurisdiction and Execution', 10 New York International Law (1979) p. 17

[1043]Philippine Embassy Bank Account Case, Bundesverfassungsgericht, 46 BVerfG 342; 65 ILR 146,(1977) p. 167

[1044] A. Reinisch, European Court Practice Concerning State Immunity from Enforcement Measures The European Journal of International Law Vol. 17 no.4, 2006; Vol. 17 No. 4, p. 803–836

that property used for commercial purposes may be the object of execution. France also acknowledges the aforementioned distinction between property used for sovereign as and property used for private/ commercial purposes but further requires that a link between the property against which execution is sought and the original claim is proven. The link need not be proven if the property is public but not national.

Another limitation to the doctrine of immunity from enforcement is the private law character of the transaction.[1045] French Law goes even further granting immunity only if the State's act is either an "acte de puissance publique" or that it have been carried out "dansl'intérêt d'un service public".[1046] It needs to be mentioned that if states could easily invoke the aforementioned doctrine to avoid their obligations out of awards, any action taken against them and in this case against Greece, would be without any purpose. Therefore, a State that successfully relies on the doctrine of State immunity from enforcement may be in violation of its obligation under Bilateral or Multilateral Investment Treaties or European Law. However, in cases of extreme financial distress, as in the case of Greece in 2012, where imminent default and collapse of the financial system was pending, it appears that the acts taken by the Greek State were in fact for the public interest.

In the case of ICSID adjudication, as in the case of Argentina, it would be a treaty violation for a Contracting State to refuse to enforce an award, and non-compliance with Article 54 would then carry the consequences of State responsibility, including the revival of diplomatic protection under Art.27(1) of the ICSID Convention. On account of the above, it comes as no surprise that since ICSID's creation, all countries have complied with their obligation to pay an arbitral award once its determination was finalized. [1047]

To address the issue and award bondholders' security that in case of default they would be entitled to enforce their claims, the new bonds that have been issued contain a waiver of immunity clause from both jurisdictional immunity as well as immunity from enforcement. Indicatively, the bond issued in 2015 provided that:[1048]

"13. Waiver of Immunity (a) The Republic hereby irrevocably waives, to the extent permitted by applicable law and international conventions, (i) any immunity from jurisdiction it may have in any Proceeding in the courts of England, and (ii) except as provided below, any immunity from attachment or execution to which its assets or property might otherwise be entitled in any Proceeding in the courts of England, and agrees that it will not claim any such immunity in any such Proceeding. (b)

[1045]D. Gaukrodger, Foreign State Immunity and Foreign Government Controlled Investors OECD Working Papers on International Investment 2010/2, p. 18

[1046] P. Mayer, V. Heuzé, Droit international privé 9th ed (2007) p. 325.

[1047] Although Argentina had repeatedly non-complied, and made public its intent to continue tonon-comply, with court orders designed to enforce a prior judgment issued by the US Courts, see an in-depth analysis on this by Amanda Tuninetti, "Limiting the Scope of the Foreign Sovereign Immunities Act After Zivotofsky II", Harvard Journal of International Law, Volume 57 (1), 2016

[1048] OFFERING CIRCULAR THE HELLENIC REPUBLIC (2015) http://docplayer.gr/981694-The-hellenic-republic.html

Notwithstanding the foregoing, the above waiver shall not constitute a waiver of immunity from attachment or execution with respect to: i. assets and property of the Republic located in the Republic; ii. the premises and property of the Republic's diplomatic and consular missions; iii. assets and property of the Republic outside the Republic not used or intended to be used for a commercial purpose; iv. assets and property of the Republic's central bank or monetary authority; v. assets and property of a military character or under the control of a military authority or defence agency of the Republic; or vi. assets and property forming part of the cultural heritage of the Republic. (c) For the purposes of the foregoing, "property" includes, without limitation, accounts, bank deposits, cash, revenues, securities and rights, including rights against third parties. (d) The foregoing constitutes a limited and specific waiver by the Republic solely for the purposes of the Notes, and under no circumstance shall it be construed as a general waiver by the Republic or a waiver with respect to proceedings unrelated to the Notes."

VI. Conclusion

Sovereign bonds, despite their particular nature of being contracts with the sovereign, nonetheless they continue to be contracts. To this end the terms included in such contracts are of importance, especially in cases of sovereign debt restructuring or sovereign default. Recent case law in sovereign default cases has demonstrated this importance and, although, undoubtedly, in cases where there is an event of default political concerns will also come into play; nonetheless contractual terms are still important. Perhaps, the most important clause in a sovereign bond contract is that of the choice of law, as it has wide ramifications on the entire interpretation of the sovereign bond contract. Traditionally, states used to "impose" their own national law, as this granted them power to control their debt. Indeed, in cases where the governing law of a sovereign bond contract is that of the issuing state, then the later retains the power to change that law to its favor.

This is what happened during the Greek Sovereign Debt Restructuring in 2012, when Greece adopted the Bondholder's Law unilaterally amending the terms of the sovereign bonds' contracts by the introduction of CACs that made the bondholder majority's resolution for restructuring binding even on dissenting bondholders. Indeed, prior to 2012 Greek bonds were issues under Greek law and contained no standard creditor protection clauses, such as pari passu clauses, secured debt, CAS, negative pledge or immunity waiver clauses.

However, since 2012 we have seen a significant change in the terms of the sovereign bonds that have been issued by the Greek Government. New bonds are issued under English law and contain pari passu, negative pledge and immunity waiver clauses. What's more, responding to the Greek unilateral amendment of the sovereign bond contract terms in 2012, the euro area Member States committed in the ESM Treaty signed on the 2 February 2012 that all Euro-denominated sovereign bonds will contain CACs. This reformation of contractual terms was brought about to

restore investors' faith in Greek bonds and demonstrates the importance and power of contractual terms.

As such, although bondholders of Greek sovereign bonds have not been successful in claiming for damages for losses they sustained by the Greek Bond Restructuring of 2012, nonetheless their position has been strongly reinforced given the changes brought about since to the terms of Greek bonds. Thus, in the unfortunate event of a new sovereign bond restructuring or sovereign default in the future, their rights, from negotiation to enforcement, would be better protected.

References (2018)

A. Clare, N. Schmidlin, The Impact of Foreign Governing Law on European Government Bond Yields, (2014) available at https://ssrn.com/abstract=2406477 or http://dx.doi.org/10.2139/ssrn.2406477

A. E. Stolper, S. Dougherty, Collective action clauses: how the Argentina litigation changed the sovereign debt markets, Capital Markets Law Journal (2017)

A. Gelpern, Courts and Sovereigns in the Pari Passu Goldmines, Capital Markets Law Journal, Vol. 7b (2016)

A. Reinisch, European Court Practice Concerning State Immunity from Enforcement Measures The European Journal of International Law Vol. 17 no.4, 2006; Vol. 17 No. 4, p. 803–836

A.F.M. Maniruzzaman, State Contracts in Contemporary International Law; Monist versus Dualist Controversies, EJIL (2001) Vol.12 (2) pp. 309-328

Bond Contracts and Their Effect on Spreads at Issuance (2016) available at http://www.efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2016-Switzerland/papers/EFMA2016_0442_fullpaper.pdf

C. M. Reinhart, K. S. Rogoff, The Aftermath of Financial Crises, American Economic Review, American Economic Association, vol. 99(2), pages 466-72, (2009)

C. Turpin, Government Contracts, Penguin,1972., although see, P. R. Wood, "Conflict of Laws & International Finance", Sweet & Maxwell, 2007,

C.Stefanescu, Collective Action Clauses in International Sovereign

Ch. Leben, La théorie du contratd'Etat et l'évolution du droit international des investissements», RCADI, 2003, t. 302.

D. Sommers, A. Broches, G. Delaume, Conflict Avoidance in International Loan and Monetary Agreements, Lam & Contem. Prob. 21 (1956)

E. Borchard, J. S. Hotchkiss State Insolvency and Foreign Bondholders: General Principles, Volume 1 Beard Books, (1951)

G. Schwarzenberger, International Law, Stevens, 1957

G.J. Schinasi, R.T. Smith, Fixed-Income Markets in the United States, Europe and Japan: Some Lessons for Emerging Markets", IMF Working Paper, 98/173,(1998)

Gaukrodger, Foreign State Immunity and Foreign Government Controlled Investors OECD Working Papers on International Investment 2010/2,

H. E.Kjos, Applicable Law in Investor-State Arbitration: The Interplay Between National and international law, Oxford University Press, [Oxford Monographs in International Law] 2013

I. Tirado, Current EU Mechanisms to confront Sovereign Insolvency in C.Espósito, Y. Li, Juan P.Bohoslavsky, Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing, Oxford University Press, (2013),

J. Downes, J. E. Goodman, Barron's Finance & Investment Handbook.Barron's Educational Series, (2003), p. 12

J. Drage, C. Hovaguimian, Collective Action Clauses (CACS): an analysis of provisions included in recent sovereign bond issues, Bank of England (2004), C. Hofmann, Sovereign-Debt Restructuring in Europe Under the New Model Collective Action Clauses, Texas International Law Journal, Vol. 49

J. Schumacher, C. Trebesch, H. Enderlein, Sovereign Defaults in CourtThe Rise of Creditor Litigation 1976 – 2010", working paper, 15 February 2013.

J. Verhoeven, 'Droit international des contrats et droit des gens',Revue Belge de droit international, 203-203 (1978-79)

Julian D. M. Lew, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards, Oceana Publications, 1978

K. H. F. Dyson, "States, Debt & Power: 'Saints' & 'Sinners' in European History & Integration", Oxford University, 1995

L. Buchheit, Sovereign debt restructurings: the legal context, BIS Papers No 72 (2013)

L. Cotula, Stabilization Clauses and the Evolution of Environmental Standards in Foreign Investment Contracts, in O. Kristian Fauchald, D. Hunter, Yearbook of International Environmental Law, Volume 17; Volume 2006, Oxford University Press, 2008,

L. J. Bouchez, 'The Nature and Scope of State Immunity from Jurisdiction and Execution', 10 New York International Law (1979)

M. Choudhry, Bond and Money Markets: Strategy, Trading, Analysis Butterworth-Heinemann

M. Choudhry, The Eurobond Market in F. J. Fabozzi, Handbook of Finance, Financial Markets and Instruments, John Wiley & Sons, Inc. (2008)

M. Gruson, R. Reisner, Sovereign Lending: Managing Legal Risk, Euromoney Publications, (1984).

M. Gulati,R. E. Scott, The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design, University of Chicago Press, 2013, p.46

M. Sornarajah, The International Law on Foreign Investment, Cambridge University Press, Cambridge University Press, (2010),

M. Winkler, "Foreign Bonds: An Autopsy", Beard Books, 1999

M.Chamon, J. Schumacher, C.Trebesch, Foreign Law Bonds:Can They Reduce Sovereign Borrowing Costs (2015) available at https://events.barcelonagse.eu/live/files/801-icf15-chamonpdf

P. R. Wood, "Conflict of Laws & International Finance", Sweet & Maxwell, 2007,

P. R. Wood, International Loans, Bonds, Guarantees, Legal Opinions, Sweet & Maxwell, (2007) p. 193

P. Wautelet, International Public Contracts: Applicable Law and Dispute Resolution in M. Audit & S., Schill at The Internationalization of Public Contracts,Bruylant. (2013).

P. Wood, Conflict of Laws & International Finance, The Law & Practice of International Finance, Vol. 1 (2007).

R. D. Bishop, J. Crawford, W. M.Reisman, Foreign Investment Disputes: Cases, Materials, and Commentary, Kluwer Law International, 2005

R. Dolzer& Ch. Schreuer, "Principles of International Investment Law", OUP, 2008,

R. W. Kolb Sovereign Debt: From Safety to Default, John Wiley & Sons, (2011)

S. Haeseler, Collective Action Clauses in International Sovereign Bond Contracts – Whence the Opposition? German Working Papers in Law and Economics from Berkeley Electronic Press (2007)

S. Heffernan, Modern Banking, John Wiley & Sons, (2005)

S. Weber, The law applicable to bonds, in Hans Van Houte (ed), The Law of Cross-Border Security Transactions, Sweet and Maxwell, 1999

S. Weber, The law applicable to bonds, in Hans Van Houte, The Law of Cross-Border Security Transactions, Sweet and Maxwell, 1999

T.Gazzini,E. De Brabandere, International Investment Law: The Sources of Rights and Obligations, MartinusNijhoff Publishers, 2012

T.W. Wälde, The Serbian Loans Case - A Precedent for Investment Treaty Protection of Foreign Debt?, TDM 4, 2004

U. S. Das, M. G. Papaioannou,C.Trebesch, Sovereign Debt Restructurings 1950–2010: Concepts, Literature Survey, andStylized Facts, IMF Working Paper, Monetary and Capital Markets Department (2012)

W. Mark C. Weidemaier, "Sovereign Immunity andSovereign Debt", University Of Illinois Law Review, Vol. 1(2014)

W. Mark C. Weidemaier, A. Anna Gelpern "Injunctions in Sovereign Debt Litigation",(draft dated November 15, 2013) available at http://scholarship.law.georgetown.edu/facpub/1319/

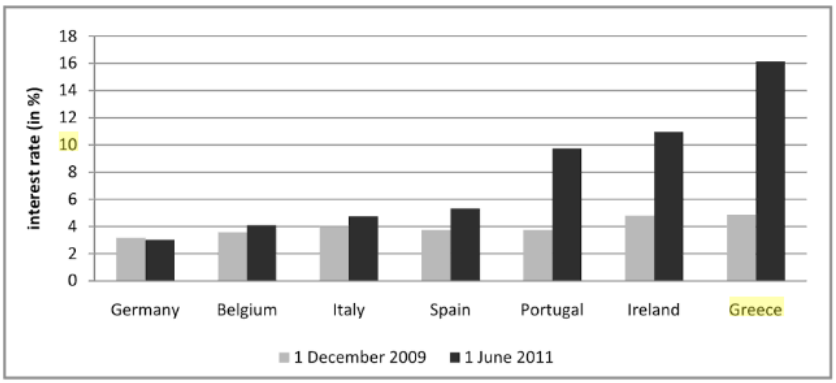
Y. Liu, The Design and Effectiveness of Collective Action Clauses (2002) available at https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/liu.pdf

CHAPTER SIX

I. Concluding Remarks

A. The vulnerabilities of the protection of investors

The recent financial crisis in Europe has demonstrated the vulnerability of investors, even when investing within the EU. Investments in sovereign bonds of Eurozone Member States, which were once considered as safe and prudent investment of funds, have proven to be a risky and potentially devastating business for bondholders. Indicatively, reviewing the development in interest rates of the 10-year Greek Government Bonds, one can see that the interest rate was steadily below 6% for almost a decade (between 2000 -2008), while it raised by 10 decimal points in a period of less than 3 years (2009-2012). [1049] This was the case not for Greece, but for other EU Member States as well. The graphic below is telling in this respect.



Source: Stijn Verhelst[1050]

The sudden and abrupt rise in interest rates is indicative of the unforeseen rise of interest rate risk, which has devastating consequences on the issuing State's ability to repay the interest and the principal.[1051] Hence, it was not surprising that in 2012, at the peak of Greek sovereign bonds' interest rates, Greece resorted to the infamous Greek sovereign bond restructuring, the largest sovereign bond restructuring in history.

The sovereign bond restructuring of 2012 had devastating consequences on bondholders, including foreign banking institutions that held Greek sovereign bonds. The case of Cyprus Banks is indicative, where the implications of the Greek sovereign default, greatly contributed to the Cyprus Banking Crisis, which in turn had overwhelming consequences on both depositors and shareholders. The above facts

[1049] Thomson Reuters Datastream

[1050] Stijn Verhelst, The Reform of European Economic Governance: Towards a Sustainable Monetary Union?, Egmont Papers 47, Academia Press, (2011), p.17

[1051] D. Wiedemer, R. A. Wiedemer, C. S. Spitzer, The Aftershock Investor: A Crash Course in Staying Afloat in a Sinking Economy, Wiley, (2014) p.163

demonstrated the weaknesses of the EU financial system to "shake off" external shocks, but also left investors with significant losses.

The negative implications of sovereign defaults on investors' rights have been heavily explored by academics already following Argentina's sovereign default. Moreover, following the financial crisis of 2009, the academic interest for the exploration of the ramifications of sovereign default has risen, both from academia as well as from various international institutions.[1052] Primary focus has, however, shifted from investors' rights, to averting sovereign defaults in the future, by ensuring "sustainable sovereign debt". As to what constitutes sustainable debt, the IMF has defined same as a status where a borrowing state is "expected to be able to continue servicing its debts without an unrealistically large future correction to the balance of income and expenditure".[1053] The principle of sustainable sovereign debt demands the need for expedient sovereign restructurings based on the principles of general law, i.e. good faith, transparency etc..[1054] This principle is now a recognized principle of public international law. [1055] However, despite the ambitious and important developments to this end, the fact remains that there is still a lack of binding regulatory norms to govern sovereign default and safeguard investors' rights.

II. CHAPTER ANALYSIS

This thesis set out to examine investors' rights in case of sovereign default in the EU as well as in case of banking crisis as a direct effect of such sovereign default. The factual background that prompted the relevant question was the recent Greek Sovereign Default and the Cyprus Banking Crisis that was, partly, a spillover effect of such default. In this context, this Thesis set out to respond to the below questions in case a sovereign takes measures detrimental to investors rights:

1) Can investors raise claims against the EU for such measures?
2) Is Investment Law as provided under Investment Treaties sufficient to safeguard and restore investors' rights?
3) Similarities of Investment and Human Rights Law. Is Human Rights Law able to safeguard and restore investors' rights and/or offer additional remedies to investors?
4) What are the procedural hurdles faced by investors when resorting to claim against states in sovereign default and how to overcome these?

[1052] Indicatively, see UN General Assembly Resolution 69/319 (2015), which proposes a list of basic principles to be followed during the process of sovereign debt restructuring, including sovereignty, good faith, impartiality, transparency, immunity, equitable treatment, sustainability, legitimacy, and majority restructuring.

[1053] International Monetary Fund, Assessing Sustainability, IMF Policy Paper 4 (2002)

[1054] J.P. Bohoslavsky, M. Goldmann, An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law, the Yale Journal of International Law Online Vol. 41(2), 2016, p. 42

[1055] J.P. Bohoslavsky, M. Goldmann, An Incremental Approach to Sovereign Debt Restructuring: Sovereign Debt Sustainability as a Principle of Public International Law, the Yale Journal of International Law Online Vol. 41(2), 2016, p. 26

Hence, this thesis is divided into two parts, one that explores Greek bondholders' rights as a consequence of the sovereign bond exchange of 2012; and the second part that explores depositors' rights due to the haircut of their deposits during the Cyprus Banking Crisis.

Chapter One examined the question of whether there is a legal basis for EU's Institutions to be held accountable for measures taken by an EU Member State in case of financial distress. In particular, this Chapter explores the allegations made by the Cyprus Government that it was "forced" to accept the measures effecting the haircut on banking deposits due to pressure exercised on it by the European Central Bank and Eurogroup. Hence, this Article examines if, in fact, a state can be coerced by an International Organization to which it has agreed to concede powers, by exploring the concept of sovereignty and its limitations, as well as the notions of economic coercion and countermeasures. As was demonstrated, however this is not an easy argument to make, let alone prove. Indeed, in the case of Cyprus even if, in fact, there was coercion, this was not forced through military use, but instead through economic pressure. Economic coercion is neither as established, nor as clear, as military coercion and it is subject to individual interpretation on a case by case basis.

Within this context, it appears unlikely that coercion may be found when an International Organization, such as the EU, is acting within its scope of competences. Even if coercion was, indeed, found, however, investors might still be barred from achieving a successful result in their claims, if such coercion was triggered as countermeasures, that are able to justify an illegal act, such as coercion. The Chapter also examined whether liability of EU institutions for the losses sustained by Cyprus depositors could be founded on EU law and, in particular, the TFEU. Again however, reviewing the relevant provisions of TFEU, as these have been interpreted by the case law of CJEU, it appears that these provisions could not also lead to liability for the EU institutions on the facts of the Cyprus haircut.

The Second Chapter continues, in the context of the Cyprus Banking Crisis, and explores depositors' rights against the Republic of Cyprus. In particular, the Chapter starts with reviewing the measures taken by depositors over the last 4 years. Depositors have to date resorted to national courts in the Republic of Cyprus, the European Court of Justice ("CJEU") and international tribunals, such as the International Centre for Settlement of Investment Disputes ("ICSID"). The common element in all such proceedings were the human rights' claims. Regretfully, however, none of these forums examined such claims, as all cases were rejected on procedural grounds. Hence, this Chapter explores why such proceedings have been unsuccessful and looks into whether a claim before the ECtHR might prove to be more successful. The Chapter explores whether the facts of the Cyprus Banking Haircut could be deemed a violation of the right to property (Article 1 of the 1st Protocol of the ECHR), the right to a fair trial (Art. 6 ECHR), the right to an effective remedy (Art. 13 ECHR) and the right to non-discrimination (Art.14 ECHR). However, as the analysis of the ECtHR's caselaw demonstrates, the protection awarded by all such Articles is not absolute and may be subject to restrictions. These restrictions will be allowed to the extent that these are justified on grounds of general or public interest and a fair

balance is struck between the interests of public as a whole and that of the individual. It appears, that in times of extreme financial crisis, as in the events of the Cyprus Banking Crisis, ECtHR is likely to find that both these conditions are met, despite the fact that depositors' right may be greatly aggrieved by the measures taken in the course of a banking crisis. Thus, this paper concludes that it is likely that depositors in Cyprus Banks may not be able to obtain restitution for the damages they have sustained, perhaps except for damages that might be awarded by the Cyprus courts in the civil cases. In light of this vacuum in depositors' protection, the introduction of the new Banking Resolution framework put in place by the EU, appears as a significant development towards the safeguarding of depositors' rights, although the aspired European Deposit Insurance Scheme (EDIS) would also be an important step in this direction.

As of the Third Chapter, we explore the events of the Greek Debt Restructuring. In particular, the Third Chapter examines Greek Bondholders' right from a human rights perspective and attempts to examine the interaction between human rights law and investment law. By the examination of ECtHR's and investment tribunal's caselaw, this chapter draws analogies between human rights law and investment law and the similarities between the remedies available to investors under these legal frameworks. From such examination, it becomes clear that these two fields of law have extensive similarities and they can be used jointly to offer a more complete framework of protection to investors. Hence, they should not be treated as opposite, but in fact complementary to one another towards the common aim of investors' protection against States' arbitral acts. This was made clear in the case of the Greek Sovereign Debt Restructuring, where despite the fact that ECtHR did not award the anticipated protection to investors, on the same grounds as analyzed for the Cyprus Banking Crisis, nonetheless, such decision had several shortcomings that allow investors to be more optimistic about the handling of similar claims in the future.

On the same context, Chapter Four presents the legal measures that have been taken by Greek Bondholders to date. This Chapter discusses once again the actions brought before Human Rights' venues and, although it recognizes their importance, nonetheless it explores why these have not awarded restitution to investors. Therefore, the Chapter studies if a claim before investment tribunals could be more successful. To respond to this question, the Chapter explores the case of Poštová Banka v. Hellenic Republic and critically discusses ICSID's ruling at the said case. The aforementioned case has limited investors' possibilities for an effective remedy, as ICSID ruled that sovereign bonds acquired in the secondary market did not constitute "investments" under the Greece-Slovakia BIT. That stated, the said ruling was directly linked to the wording of that specific Bilateral Investment Treaty. Hence, despite the discouraging effect of such Award for investors, nonetheless, other BITs may allow for a different interpretation. Should bonds be considered to constitute investments under BITs' protection, investors would be in a position to raise several arguments that have proven invaluable for investors in other sovereign default cases, as can be seen from Tribunal's caselaw. Such arguments might still be rejected by

Greece by invoking the doctrine of necessity, whose applicability, however, in such cases is still challenged.

Last but not least, Chapter Five explores bondholders' rights from a contractual perspective on the basis of the sovereign bond contract. This Chapter examines the legal nature of the sovereign bond contracts, as state contracts with the sovereign that, however, have a commercial background. On this basis, this Chapter examines the most common contract terms found in sovereign bond contracts and examines if they would be in a position to safeguard Greek bondholders' rights. This Chapter recognizes that the most important clause in a sovereign bond contract is that of the choice of law, whose ramifications affect all other provisions and their interpretation. It examines the choices of law made by the states and the circumstances under which states would select a foreign national law to govern their bonds. The Chapter finds that states with an abundancy of domestic investors are unlikely to select a foreign law as applicable, given that their own national law allows them to have effective control over their sovereign bonds and their terms.

This is demonstrated in the case of the Greek Sovereign Debt Restructuring in 2012, when Greece unilaterally amended the terms of its Greek-governed sovereign bonds contracts by the introduction of CACs though the Bondholder's Law. The Chapter finds that the terms of the Greek-governed sovereign bonds issued before 2012 could afford little or no protection to bondholders. Nonetheless, since 2012 the terms of Greek Sovereign Bonds have been significantly modified. New bonds are issued under English law and contain pari passu, negative pledge and immunity waiver clauses. Most importantly, not only Greek sovereign bonds' terms have been amended, but also all Euro-denominated sovereign bonds must now contain CACs. This revision of contractual terms brought about to restore investors' faith in Greek bonds demonstrates the importance and power of contractual terms, which have now strongly reinforced the position of investors in case of a new sovereign bond restructuring or sovereign default in the future.

III. LITERATURE CONTRIBUTION

Primarily, it needs to be stipulated that sovereign debt crises are neither a new phenomenon, nor an uncommon one. Instead, as it was demonstrated in the case of the Greek financial crisis, sovereign default is always likely, despite the mechanisms and regulations that might be in place to avert it. What's more, sovereign default has severe implications to the rights of millions of people including investors' rights. Especially in the case of sovereign default in the EU, this can have particularly devastating consequences; due to the spillover effect, such default might have to the economies of other EU states. The significance of the recurring event of debt default has been the subject of several theoretical and empirical literature on sovereign debt.[1056]

[1056] Indicatively, see Laura Alfaro & Ingrid Vogel, International Capital Markets and Sovereign Debt: Crisis Avoidance and Resolution, Harvard Business School Background Note 707–018 (2006), Mark

Despite, however, the many instances of sovereign default and the catastrophic repercussions of such instances, nonetheless there is no sovereign debt-restructuring framework nor sovereign default mechanism available at present. Indeed, if a country becomes insolvent, there are few, if any, applicable rules, in either national or international law, governing the relationship between the sovereign and its creditors.[1057] This is in stark contrast to corporate debt, which is governed by corporate bankruptcy law, rendering insolvency an essential feature of the functioning of the market economy on the national scale.[1058]

Academic literature has focused on the economic aspects of sovereign default, with part of the academic literature on sovereign debt claiming that law has little role to play.[1059] This thesis examines whether the existing legal framework at the time of the recent financial crisis can prove sufficient to protect investors' rights from infringing actions taken by the State, due to sovereign default. In particular, this Thesis examined the events of the Greek Sovereign Default and the Cyprus Banking crisis and explored actions taken by investors to date. This thesis offers a collective review of investors' remedies from a human rights, investment law, contract law and, to a certain extent, EU law in the aforementioned contexts, which cannot be found in other literature. This is the main contribution of this Thesis, which not only reviews available remedies, but also critically examines them to reveal possible shortcomings in investors' protection. Additionally, this Thesis displays subsequent developments in the protection of such rights, and critically explores the effectiveness of such developments to amend the shortcomings of the pre-existing legal framework. This thesis, has, however, not examined the recent changes in the EU Banking Law, brought about after the Cyprus Banking Crisis, due to the extensive nature of this subject that falls outside the scope of this study.

IV. WAY FORWARD

Although there have been significant changes and developments in the field of sovereign debt restructuring, nonetheless there are still steps that are required to be taken to ensure a comprehensive framework that would safeguard investors' rights. Indeed, it is the authors' view that neither investment law, nor human rights nor contract law alone suffice to offer a comprehensive framework for investors'

Aguiar & Manuel Amador, Sovereign Debt, in HANDBOOK OF INTERNATIONAL ECONOMICS 647,Elhanan Helpman et al. eds., 4th ed. (2014); Jonathan Eaton & Raquel Fernandez, Sovereign Debt, in G. Grossman & K. Rogoff, HANDBOOK OF INTERNATIONAL ECONOMICS (eds), (1995); Ugo Panizza, Federico Sturzenegger & Jeromin Zettelmeyer, The Law and Economics of Sovereign Debt, 47 J. ECON. LITERATURE 651 (2009)

[1057] Michael Wolfgang Waibel, Sovereign Debt Restructuring, Seminar Internationales Wirtschaftsrecht, (2003)

[1058] Michael Wolfgang Waibel, Sovereign Debt Restructuring, Seminar Internationales Wirtschaftsrecht, (2003)

[1059] See a review of this literature on W. Mark C. Weidemaier & Mitu Gulati, Sovereign Debt and the "Contracts Matter" Hypothesis, in Oxford Handbook of Law and Economics (forthcoming)

protection. The Greek and the Cyprus Financial Crisis has demonstrated the hurdles investors have to face in search of restitution that may never come, even after many costly and long procedures.

Hence, it is important that the issue of sovereign default is no longer treated as a "taboo". As the Greek Sovereign Default has shown, treating sovereign default as a taboo can prove to be very costly and potentially dangerous both for investors and for countries in default. Instead, investors' rights in case of sovereign default should be tackled by international law. However, although it appears that there is the necessary momentum and consensus to move towards this direction, nonetheless views seem to differ as to how sovereign default should be addressed.[1060]

On the one hand, as demonstrated in Chapter Five, an attempt has been made to strengthen investors' rights, while deterring phenomena of abuse, through the revision of the terms of bond contracts. Although the new terms that have been proposed and implemented (aggregation of CACs and clarification of the pari passu clause) have strengthened investors' bargaining position, nonetheless they do not suffice to safeguard investors' rights. On the other hand, the United Nations have instigated efforts in order to create a statutory mechanism for sovereign debt restructuring.[1061] Indicatively, the UN General Assembly in September 2015 adopted resolution A/RES/69/319 on Basic Principles on Sovereign Debt Restructuring Processes, which, inter alia, stresses "the importance of a clear set of principles for the management and resolution of financial crises that take into account the obligation of sovereign debtors and their creditors to act in good faith and with cooperative spirit to reach a consensual rearrangement of the debt of sovereign States".[1062]

To this end, it is the author's view that investors' rights in case of sovereign default should be addressed by the means of an international treaty. Such a treaty would be beneficial for States and investors as it could encourage them to come together to a mutual understanding, in analogy with the process followed in domestic bankruptcy regimes.

This Thesis has demonstrated some of the issues that this Treaty should particularly address. In particular, as it has been shown, such treaty must focus the contrasting interests of the different stakeholders and that of the debtor-State leaving ground for economic recovery and eventual repayment), while simultaneously

[1060] M. Guzman, J.E. Stiglitz, "Creating a Framework for Sovereign Debt Restructuring That Works: The Quest to Resolve Sovereign Debt Crises" in M. Guzman, J. A. Ocampo, J. E. Stiglitz "Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises (Initiative for Policy Dialogue at Columbia: Challenges in Development and Globalization)", (2016), p. 28

[1061] See M. Guzman, J.E. Stiglitz, "Creating a Framework for Sovereign Debt Restructuring That Works: The Quest to Resolve Sovereign Debt Crises" in M. Guzman, J. A. Ocampo, J. E. Stiglitz "Too Little, Too Late: The Quest to Resolve Sovereign Debt Crises (Initiative for Policy Dialogue at Columbia: Challenges in Development and Globalization)", (2016)

[1062] UN/ GA Resolution 68/304 (2014)

safeguarding the human rights of the both the people and the investors.[1063] Such treaty would need to ensure the negotiation process and guarantee that investors would have the right and effective opportunity to not only participate, but also effectively negotiate a debt restructuring. This process would therefore provide for a standstill period for negotiations whereby investors would refrain from taking actions against the State in exchange for some guarantees by the debtor state for repayment.

Most importantly, one of the most contentious issue that should be addressed by such Treaty would be to ensure that investors in sovereign debt restructurings receive equal treatment. As has been shown in Chapters Two, Three and Four ensuring equal and non-preferential treatment can be a highly contentious and difficult due to the high volatility of investors, the contractual obligation of "pari passu" treatment of investors and other factors. Regretfully, the courts and tribunals in the case of the Greek Sovereign Default and the Cyprus Banking Haircut, have not secured the equal treatment of investors, by reaching generic decisions, disregarding the difference and similarities between investors, all on the face of emergency.

Although such a Treaty is neither easy to enforce nor without problems,[1064] it would be the first step to cover the vacuum in investors' protection that exists today. Indeed, as it was stated by Adam Smith in 1976 "When it becomes necessary for a state to declare itself bankrupt, in the same manner as when it becomes necessary for an individual to do so, a fair, open and avowed bankruptcy procedure is always the best measure which is both least dishonorable to the debtor, and least hurtful to the creditor."[1065]

[1063] Michael Wolfgang Waibel, Sovereign Debt Restructuring, Seminar Internationales Wirtschaftsrecht, (2003)

[1064] See A. Krueger, A New Approach to Sovereign Debt Restructuring -- Address by Anne Krueger, First Deputy Managing Director, IMF (2001) <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp112601> accessed 29 October 2017.

[1065] , Adam Smith, The Wealth of Nations; Edited, with Notes, Marginal Summary, and Enlarged Index by Edwin Cannan. New York :Modern Library, 2000, p. 883