

**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**

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ABSTRACT

The Greek Debt Restructuring of 2012 has had a significant impact on bondholders that have sustained onerous losses. Despite 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.

INTRODUCTION

Greece has been facing financial difficulties for the greater part of its latest history.¹ 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, it quickly faced growing budgetary deficits that led to a sky-rocketing public debt.² Hence, in 2012, Greece shocked the global financial markets by announcing the largest sovereign bond haircut in history.³ The term “haircut” refers to the restructuring of the terms of sovereign debt instruments, by reducing recovery value of such instruments.⁴ To date, investors have brought two cases against Greece for the events of the Greek Haircut of 2012

¹ See Carmen M. Reinhart & Christoph Trebesch, *The Pitfalls of External Dependence: Greece, 1829-2015*, BROOKINGS PAPERS ON ECON. ACTIVITY 307–28 (Oct. 2015), https://www.brookings.edu/wp-content/uploads/2016/07/ConferenceDraft_ReinhartTrebesch_GreekDebtCrisis.pdf.

² See REBECCA M. NELSON, ET AL., CONG. RESEARCH SERV., R41167, GREECE'S DEBT CRISIS: OVERVIEW, POLICY RESPONSES, AND IMPLICATIONS (2011).

³ Miranda Xafa, *Lessons from the 2012 Greek Debt Restructuring*, VOXEU (June 25, 2014), <http://voxeu.org/article/greek-debt-restructuring-lessons-learned>.

⁴ FEDERICO STURZENEGGER & JEROMIN ZETTELMEYER, DEBT DEFAULTS AND LESSONS FROM A DECADE OF CRISES 324 (2006).

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 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.⁵ As per the CACs, a restructuring of the bonds could be approved by a qualified majority of more than 66.7% of the bondholders.⁶ 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,⁷ this percentage (85.9%) allowed Greece to trigger the CACs and compel all holders of sovereign bonds governed by Greek law to consent to the terms of the bond exchange.⁸ 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.⁹

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*, 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.¹⁰ The second case, *Poštová Banka, A.S. and Istrokapital SE v. the Hellenic Republic*, was

⁵ ARTURO C. PORZECANSKI, BEHIND THE GREEK DEFAULT AND RESTRUCTURING OF 2012, SOVEREIGN DEBT AND DEBT RESTRUCTURING 33 (Eugenio A. Bruno ed., Globe Business Publishing 2013).

⁶ Based on a quorum of votes representing at least fifty percent 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 et al., *The Greek Debt Restructuring: An Autopsy* (2013) 28 ECON. POL’Y 513, 524 (2013).

⁷ Press Release, Hellenic Republic, Ministry of Fin. (Mar. 9, 2012), <http://av.r.ftdata.co.uk/files/2012/03/9-MARCH-2012.pdf>.

⁸ Zettelmeyer et al., *supra* note 6.

⁹ BANK OF GREECE, REPORT ON THE RECAPITALISATION AND RESTRUCTURING OF THE GREEK BANKING SECTOR 12 (Dec. 2012), http://www.bankofgreece.gr/BogEkdoseis/Report_on_the_recapitalisation_and_restructuring.pdf.

¹⁰ Information Note on the Court’s Case Law, Eur. Ct. H.R., No. 198, 21 (July 2016) HUDOC, http://www.echr.coe.int/Documents/CLIN_2016_07_198_ENG.pdf [hereinafter Information Note].

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.¹¹

Despite appealing to two different judiciary bodies under different legal frameworks, in both cases, the judgment issued was in favor of Greece, leaving both groups of investors in a worse position than before. This raises the question: what is the optimum venue and framework for distressed investors to bring sovereign default claims? This Article examines 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.

I

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.¹² These applications were filed by 6,320 Greek nationals between September 17, 2014 and October 1, 2014.¹³ 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.¹⁴

The European Court of Human Rights (ECtHR) rejected the Greek Government's objection that local remedies had not been exhausted. Thus, the ECtHR declared the applicants' complaint admissible and proceeded to examine the merits of the complaint.

The applicants 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

¹¹ See *Poštová Banka, A.S. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Final Award, ¶ 170 (Apr. 9, 2015).

¹² Information Note, *supra* note 10, at 21.

¹³ *Mamatas et Autres c. Grèce (Mamatas and Others v. Greece)*, Judgment (Merits and Just Satisfaction), App. No. 63033/14, 64297/14, 66106/15, 2016 Eur. Ct. H.R. 256, ¶ 1, [https://hudoc.echr.coe.int/eng#{itemid}:\[\"001-164969\"\]](https://hudoc.echr.coe.int/eng#{itemid}:[\).

¹⁴ *Id.* ¶ 25.

(Article 14 of ECHR).¹⁵ As per the applicants, the forcible exchange of their bonds by virtue of the Bondholders' Law, 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).¹⁶ Additionally, the applicants contended that they sustained discrimination vis-à-vis other major corporate creditors,¹⁷ as despite the vast differences between the experience and resources available between the two categories of investors, the investors were treated alike.¹⁸

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.¹⁹ Instead, the ECtHR proceeded to examine the case under the first rule of Article 1.²⁰ 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.²¹

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 also needs to 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.²² If there is a law that serves the public interest, the ECtHR

¹⁵ Information Note, *supra* note 10, at 22.

¹⁶ *Mamatas and Others v. Greece*, 2016 Eur. Ct. H.R. ¶ 73.

¹⁷ *Id.* ¶ 125.

¹⁸ *Id.* ¶ 124.

¹⁹ See *Papamichalopoulos v. Greece*, App. No. 14556/89, 1992 Y.B. Eur. Conv. On H.R. (Eur. Ct. H.R.).

²⁰ *Mamatas and Others v. Greece*, 2016 Eur. Ct. H.R. ¶¶ 84–85.

²¹ For an extensive analysis of Article of Protocol 1 ECHR, see Laurent Sermet, *The European Convention on Human Rights and Property Rights*, Vol. 88, Council of Europe, ECHR, 1998.

²² Christos Rozakis, Former Vice President of the ECHR, Keynote Address on Athens Property Day, The Right to Property in the Case Law of the European Court of Human Rights (Jan. 30, 2016), <http://uipi.com/new/wp-content/uploads/2014/12/Athens-Property-Day-2016.-Keynote-speech.-The-Property-Right-in-the-Case-Law-of-the-ECHR.pdf>.

will consider whether a fair balance between public interest and the right of property is reached.

The ECtHR applied this analysis in the *Mamatras* case. After it established a *prima facie* interference with the applicants' possessions, the ECtHR proceeded to examine whether such interference was imposed by law.²³ The ECtHR then established that the forcible haircut was imposed by the Bondholders Law, No. 4050/2012.²⁴ Thereafter, the ECtHR considered whether the Bondholders Law was serving the public interest.²⁵ Related to this requirement, states also enjoy a wide margin of appreciation "[b]y reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it."²⁶ 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."²⁷ 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.²⁸

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.²⁹ 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.³⁰ Such proportionality is absent when the affected individual sustains an excessive burden.³¹ To consider the extent of such burden, the ECtHR takes into account the duration of the

²³ *Mamatras and Others v. Greece*, 2016 Eur. Ct. H.R. ¶ 94.

²⁴ *Id.* ¶ 92.

²⁵ *Id.* ¶¶ 101–05.

²⁶ *Brannigan v. United Kingdom*, App. No. 14553/89; 14554/89 1993 Eur. Ct. H.R., 43; *see also Ireland v. United Kingdom*, App. No. 5310/71 1978 Eur. Ct. H.R., 48.

²⁷ *Stec v. United Kingdom*, App. No. 65731/01; 65900/01 2006 Eur. Ct. H.R., 52.

²⁸ *Mamatras and Others v. Greece*, 2016 Eur. Ct. H.R. ¶¶ 101–05.

²⁹ *Id.* ¶¶ 106–20.

³⁰ RICHARD CLAYTON & HUGH TOMLINSON, *THE LAW OF HUMAN RIGHTS*, 278 (Oxford Univ. Press 2000).

³¹ *Id.*

interference, the severity of the interference, and the terms of the compensation.³² However, per ECtHR case law, the threshold for establishing that the individual sustained an “excessive burden” is difficult to prove.³³ 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.³⁴ 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.³⁵

Similarly, the ECtHR concluded there was no breach of Article 14 of the ECHR, which prohibits discrimination, despite the *prima facie* case of discrimination.³⁶ 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 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, such as 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.³⁷ Instead, the ECtHR referred solely to economic necessity and quickly concluded that any interference was justified.³⁸ In contrast,

³² YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 161 (Intersentia nv, 2002).

³³ RESEARCH HANDBOOK ON EUROPEAN SOCIAL SECURITY LAW 59 (Frans Pennings & Gijsbert Vonk eds., 2015).

³⁴ *Mamatas and Others v. Greece*, 2016 Eur. Ct. H.R. ¶¶ 117–18.

³⁵ *Id.* ¶ 117.

³⁶ *Id.* ¶ 142.

³⁷ *See id.* ¶¶ 106–20.

³⁸ *Id.* ¶ 120.

in the case of *Malysh and Others v. Russia*,³⁹ which 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-à-vis other pressing budgetary expenses of priority.⁴⁰ Similarly, although the ECtHR did in fact find that there was great volatility and difference between bondholders that would require a different treatment amongst them, the court nonetheless 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, which may have corrected such shortcomings, nonetheless the Grand Chamber would unlikely come to a different conclusion. This is because it is 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.⁴¹ 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,⁴² demonstrates that in light of the extreme circumstances of a sovereign default, a bond exchange would most likely be upheld despite the severe haircut it might impose.⁴³

³⁹ *Malysh and Others v. Russia*, App. No. 30280/03, 2010 Eur. Ct. H.R., ¶ 81.

⁴⁰ See also STEPHAN M. SCHILL & YUN I-KIM, *Sovereign Bonds in Economic Crisis*, Y.B. ON INT'L INV. L. & POL'Y 2010-2011 (Karl P. Sauvant ed., 2013).

⁴¹ Linos-Alexandre Sicilianos, Judge, Eur. Ct. H.R. Lecture before the European Society of International Law, The European Court of Human Rights at a Time of Crisis in Europe (Oct. 16, 2015), http://www.esil-sedi.eu/sites/default/files/Sicilianos_speech_Translation.pdf.

⁴² *Lithgow v. United Kingdom*, App. No. 9006/80; 9262/81; 9263/81; 9265/81; 9313/81; 9405/81, 1986 Eur. Ct. H.R.; see also Patrick Wautelet, *The Greek Debt Restructuring and Property Rights. A Greek Tragedy for Investors?* (2013), <https://orbi.ulg.ac.be/bitstream/2268/160460/1/Wautelet.pdf>.

⁴³ See also Andreas Witte, *The Greek Bond Haircut: Public and Private International Law and European Law Limits to Unilateral Sovereign Debt Restructuring*, 9 MANCHESTER J. INT'L ECON. L. 307 (2012).

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.

II 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.⁴⁴

Most BITs include guarantees and other provisions that regulate the terms and extent of the standard treatment to be awarded to foreign investors.⁴⁵ 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.⁴⁶ 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-à-vis a specific standard of treatment.⁴⁷ The most common standards of treatment provided for under international investment treaties and investment codes are: (1) the most favored nation treatment, (2) fair and equitable treatment, and (3) treatment in accordance with the rules of international law.⁴⁸

B. Conditions for Claiming Protection Under BITs

For an investor to be able to claim protection under a BIT, the following conditions must be cumulatively met: (1) the entrepreneur must qualify as a foreign investor under the BIT; (2) the investment must qualify as an investment under the BIT; and (3) a breach of the

⁴⁴ RESEARCH HANDBOOK ON SOVEREIGN WEALTH FUNDS AND INTERNATIONAL INVESTMENT LAW 124 (Fabio Bassan ed., Edward Elgar Publishing 2015).

⁴⁵ *Id.*

⁴⁶ PANAGIOTIS GKLAVINIS, INTERNATIONAL ECONOMIC LAW 609 (Sakkoulas Publications 2009).

⁴⁷ FIONA BEVERIDGE, THE TREATMENT AND TAXATION OF FOREIGN INVESTMENT UNDER INTERNATIONAL LAW 232–35 (Manchester Univ. Press 2000).

⁴⁸ GKLAVINIS, *supra* note 46, at 611.

standard of treatment provided for by the BIT must have occurred.⁴⁹ While the first two conditions are mainly of a procedural nature, the third 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,⁵⁰ while for legal persons both their place of incorporation and the place of effective management and control are taken into account.⁵¹ 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, 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.”⁵² Such broad definitions usually include investments in real estate, stocks and

⁴⁹ Ursula Kriebaum, *The Relevance of Economic and Political Conditions for Protection under Investment Treaties*, 10 LAW & PRAC. INT’L CTS. & TRIB. [i], 383–404 (2011).

⁵⁰ See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS (2008) (although some BITs refer to other criteria such as a requirement of residency or domicile).

⁵¹ MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 132–34 (Cambridge Univ. Press 2014).

⁵² 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.

bonds, monetary claims, intellectual property, etc.⁵³ 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.⁵⁴

Including portfolio investments in the definition of investments under BITs would allow investors with a small percentage in a company and 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.⁵⁵ 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 U.S.-Argentina BIT was analyzed with great attention. As the latter did not entail an exhaustive definition of what constituted an investment, both portfolio and foreign direct investments (FDI) were deemed to be included in the definition of investment.⁵⁶ 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.⁵⁷ Indeed, "many ICSID and other arbitral decisions . . . have progressively given a broader meaning to the

⁵³ See, e.g., JOSÉ E. ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* 58 (2011).

⁵⁴ See, e.g., INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (IISD), *THE MODEL BILATERAL INVESTMENT TREATY (BIT) TEMPLATE: INVESTMENT FOR SUSTAINABLE DEVELOPMENT* (2012) (which expressly excludes portfolio investments); see also, SARA PENDJER, *INVESTMENT STATUS OF SOVEREIGN BONDS: RECENT DEVELOPMENTS IN THE CASE LAW OF ICSID* 16 (Ctr. Eur. Univ. 2016) (which discusses the debate of whether portfolio investments in all forms should constitute protected investments).

⁵⁵ See Mahnaz Malik, *Recent Developments in the Definition of Investment in International Investment Agreement*, IISD (2008), https://www.iisd.org/pdf/2008/dci_recent_dev.pdf.

⁵⁶ *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Final Award, ¶ 56 (May 12, 2005).

⁵⁷ NOAH RUBINS, *THE NOTION OF INVESTMENT IN INTERNATIONAL INVESTMENT ARBITRATION, ARBITRATING FOREIGN INVESTMENT DISPUTES, PROCEDURAL AND SUBSTANTIVE LEGAL ISSUES* 318 (Nobert Horn ed., Kluwer Law Int'l 2004).

concept of investment,⁵⁸ while in *Abaclat et al. v. the Argentine Republic*,⁵⁹ the Tribunal specifically found that portfolio investments were included within the scope of protection of the BIT.⁶⁰ This, however, was questioned in the recent case of *Poštová Banka, A.S. and Istrokapital SE v. the Hellenic Republic*,⁶¹ where the Tribunal examined this question under the double-barreled test, namely it first examined the definition of investment under the wording of the specific BIT and, provided this test was met, it would proceed to examine the investment under the Salini criteria. 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.⁶² 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.⁶³ At the time of purchase, these 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.⁶⁴

Before examining the merits of the case, the ICSID proceeded to examine the jurisdictional objections that the Greek government raised.⁶⁵ Greece argued that the ICSID's tribunal lacked subject matter, personal, and temporal jurisdiction.⁶⁶ Greece also maintained that the claimants abused the tribunal's process.⁶⁷ In particular, Greece presented two arguments to contest the tribunal's *ratione materiae*

⁵⁸ Joy Mining Machinery Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/03/11, Final Award (Aug. 6, 2004).

⁵⁹ *Abaclat et al. v. Argentina*, ICSID Case No. ARB/07/5, Final Award (Dec. 29, 2016).

⁶⁰ *Id.* ¶ 65.

⁶¹ *Poštová Banka, A.S. and Istrokapital SE v. Hellenic Rep.*, ICSID Case No. ARB/13/8, Final Award (Apr. 9, 2015).

⁶² *Id.*

⁶³ *Id.* ¶ 59.

⁶⁴ *Id.* ¶ 63.

⁶⁵ *Id.* ¶ 91.

⁶⁶ *Id.*

⁶⁷ *Id.*

jurisdiction: (1) that Istorkapital's shareholding in Poštová Banka was not an investment under the Cyprus-Greece BIT,⁶⁸ and (2) that Poštová Banka's interests in Greek bonds did not fall within the scope of protected investments under the Slovakia-Greece BIT.⁶⁹ ICSID examined these arguments in turn.

1. Istorkapital's Investment Under the Cyprus-Greece BIT

Istorkapital countered Greece's objection and argued that it in fact made an investment within the definition of the Cyprus-Greece BIT, which was not the shareholding in Poštová Banka, but rather the Greek bonds obtained by Poštová Banka.⁷⁰ Indeed, Istorkapital claimed it indirectly invested in Greek bonds through Poštová Banka.⁷¹ 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.⁷²

The Tribunal examined previous case law on whether shareholders may raise claims for rights in assets held by companies whose share capital they own.⁷³ From this examination, the Tribunal noted that there was no available case law to support such an argument.⁷⁴ In fact, in previous cases, arbitral tribunals adopted a rather different view—namely that a company should be distinct from its shareholders.⁷⁵ Indicatively, in *BG. v. Argentina*,⁷⁶ the Tribunal found that BG had no direct claims stemming from the license agreements entered into by one of its subsidiaries.⁷⁷ The same conclusion was also reached by the Tribunal in *El Paso v. Argentina*⁷⁸ and *Urbaser v. Argentina*.⁷⁹

⁶⁸ *Id.* ¶ 95.

⁶⁹ *Id.* ¶ 119.

⁷⁰ *Id.* ¶ 100.

⁷¹ *Id.*

⁷² *Id.* ¶ 228.

⁷³ *Id.* ¶¶ 228–42.

⁷⁴ *Id.* ¶ 246.

⁷⁵ *HICEE, B.V. v. Slovak Rep.*, UNCITRAL, PCA Case No. 2009-11, Final Award (Oct. 17, 2011).

⁷⁶ *BG Grp. Plc. v. Argentina*, UNCITRAL, Final Award (Dec. 24, 2007).

⁷⁷ *Id.* ¶ 144.

⁷⁸ *El Paso Energy Int'l Co. v. Arg. Rep.*, ICSID Case No. ARB/03/15, Final Award (Oct. 31, 2011).

⁷⁹ *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Arg. Rep.*, ICSID Case No. ARB/07/26, Final Award (Dec. 8, 2016).

Based on this case law, the Tribunal noted that while Istorkapital could pursue claims against measures taken against its assets that impair the value of its shareholding in Poštová [B]anka,”⁸⁰ it did not have standing to claim damages for the assets held by Poštová Banka.⁸¹ Consequently, as Istorkapital based its claim for jurisdiction solely on the basis of its indirect investment, the Tribunal dismissed all of Istorkapital’s claims for lack of jurisdiction, noting that the sole investor of Greek bonds was Poštová Banka.⁸²

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.⁸³ Thereafter, the Tribunal examined the wording of Art. 1 of the Greece-Slovakia BIT and, in particular, it 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,
- e) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.⁸⁴

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

⁸⁰ Poštová Banka, A.S. and Istorkapital SE v. Hellenic Rep., ICSID Case No. ARB/13/8, Final Award, ¶ 245 (Apr. 9, 2015).

⁸¹ *Id.*

⁸² *Id.* ¶ 246.

⁸³ *Id.* ¶¶ 250–51.

⁸⁴ *Id.* ¶ 278.

money.”⁸⁵ 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.⁸⁶ 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.⁸⁷

The Tribunal primarily acknowledged that, as per the claimants’ 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.⁸⁸ 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.⁸⁹ The non-exhaustive list of protected assets contained in the definition should, therefore, 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.⁹⁰

The Tribunal noted that this indicative list of assets was the distinctive factor vis-à-vis *Abaclat et al. v. Argentine Republic*.⁹¹ In this case, the Tribunal predicated its judgement that portfolio investments constitute protected investments by reviewing the wording of a similar indicative list in the Italy-Argentina BIT.⁹² Such wording 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

⁸⁵ *Id.* ¶ 279.

⁸⁶ *Id.* ¶ 280.

⁸⁷ *Id.*

⁸⁸ *Id.* ¶¶ 284–85.

⁸⁹ *Id.* ¶ 285.

⁹⁰ *Id.* ¶ 287.

⁹¹ *Id.* ¶ 300.

⁹² *Id.*

manner.⁹³ 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.⁹⁴

In fact, the Italy-Argentina BIT made specific reference to “obligations, private or public titles,” which was invoked by the claimants in *Abaclat*.⁹⁵ 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.”⁹⁶ To this end, the Tribunal in *Poštová Banka AS and Istrokapital SE v. The Hellenic Republic* asked whether sovereign bonds were equivalent to loans.⁹⁷ 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.⁹⁸ The Tribunal also declined the claimants’ assertion that their interests in Greek bonds could be considered “claims to money.”⁹⁹ 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.¹⁰⁰ In the present case, Poštová Banka had not entered into a contract with Greece because it acquired the Greek bonds in line with Law 2198/1994 concerning the setting-up and operation of the dematerialized system for the clearing and settlement of securities transactions over Greek sovereign bonds.¹⁰¹

⁹³ *Id.* ¶ 307.

⁹⁴ *Abaclat et. al v. Argentina.*, ICSID Case No. ARB 07/5, Final Award, ¶ 354 (Dec. 29, 2016).

⁹⁵ *See Poštová Banka, A.S. v. Hellenic Rep.*, ICSID Case No. ARB/13/8, Final Award, ¶ 302 (Apr. 9, 2015).

⁹⁶ *Id.* ¶¶ 308, 336.

⁹⁷ *See id.* ¶ 285.

⁹⁸ 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*, 33 J. INT’L ARB., 687, 687–721 (2016).

⁹⁹ *Poštová Banka, A.S. v. Hellenic Rep.*, Final Award, ¶ 343.

¹⁰⁰ *See id.* ¶ 306.

¹⁰¹ *Id.* ¶ 345.

Hence, the Tribunal concluded that Poštová Banka's interests in Greek bonds were not an investment under the Greece-Slovakia BIT.¹⁰² Therefore, the Tribunal did not have jurisdiction to hear the merits of the application.¹⁰³

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.¹⁰⁴ 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."¹⁰⁵ 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 [T]ribunal's errors were outcome-determinative."¹⁰⁶

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.¹⁰⁷

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, A.S. and Istrokapital, SE v. Hellenic Republic* are in line with the ICSID's previous ruling in *Ambiente Ufficio S.p.A. and Others v. Argentine*,¹⁰⁸ where the Tribunal 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 (although it stipulated that tribunals should refrain from a restrictive reading of the jurisdictional provisions of the ICSID

¹⁰² *Id.* ¶ 350.

¹⁰³ *Id.*

¹⁰⁴ *Poštová Banka, A.S. v. Hellenic Rep.*, ICSID Case No. ARB/13/8, Annulment Proceeding, ¶ 86 (Sept. 29, 2016).

¹⁰⁵ *Id.* ¶¶ 86–87.

¹⁰⁶ *Id.* ¶ 88.

¹⁰⁷ *Id.* ¶ 160.

¹⁰⁸ *See Ambiente Ufficio S.p.A. and Others v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013).

Convention when such reading cannot be founded on the Convention itself).¹⁰⁹ Although this decision is not binding on other Tribunals, as the doctrine of precedent does not exist under international investment law, this award is expected to affect Tribunal's decisions on the said topic.¹¹⁰

This award received criticism for its very restrictive interpretation, especially in relation to its finding that bonds are not loan agreements. 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 unjustifiably overly restrictive.¹¹¹

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.¹¹² 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, Congo, Kuwait, and Kazakstan).¹¹³ Most of the BITs are either with countries outside the European Union (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-four 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.¹¹⁴

Out of the forty-seven BITs that Greece signed and are currently in force, none contain as extensive of wording as the Italy-Argentine BIT.

¹⁰⁹ *Id.* ¶ 461.

¹¹⁰ Anna O. Mitsou, *Greek Debt Restructuring and Investment Treaty Arbitration: Jurisdictional Stumbling Blocks for Bondholders*, 33 J. INT'L ARB., 687, 687–721 (2016).

¹¹¹ *See id.*

¹¹² *See* the list of the respective IIAs: *International Investment Agreements*, UNITED NATIONS: UNCTAD, <http://investmentpolicyhub.unctad.org/IIA/> (last visited Jan. 21, 2018).

¹¹³ *Greece: Bilateral Investment Treaties (BITs), International Investment Agreements Navigator*, UNITED NATIONS: UNCTAD, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/81> (last visited Jan. 21, 2018).

¹¹⁴ *EU: International Investment Agreements (IIAs), International Investment Agreements Navigator*, UNITED NATIONS: UNCTAD, <http://investmentpolicyhub.unctad.org/IIA/CountryGroupingTreaties/28#iiaInnerMenu>.

Twenty-one of Greece's BITs¹¹⁵ have wording similar to the Greece-Slovakia BIT. Two of Greece's BITs make absolutely no reference to loans or claims in money,¹¹⁶ sixteen BITs¹¹⁷ refer to "loans connected to an investment," and two BITs which either make no reference or entail specific exclusions from certain claims to money and specific loans.¹¹⁸ In light of the ICSID's award in *Poštová Banka 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,¹¹⁹ 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 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

¹¹⁵ BITS with Albania, Algeria, Argentina, Bosnia, Bulgaria, Chile, China, Cyprus, Czech Republic, Germany, Hungary, Korea, Serbia, Russia, Poland, Morocco, Montenegro, Slovakia, Slovenia, Tunisia, and Turkey.

¹¹⁶ See Agreement for the Promotion and Reciprocal Protection of Investments, Egypt-Greece, July 16, 1993, 1895 U.N.T.S. 32311; Agreement between the Government of the Hellenic Republic and the Government of the Islamic Republic of Iran, Greece-Iran, Mar. 13, 2002, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1464>.

¹¹⁷ 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).

¹¹⁸ Agreement Between the Government of the United Mexican States and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, Greece-Mex., Nov. 30, 2000, 2449 U.N.T.S. 44072; Agreement Between the Government of the Hellenic Republic and the Government of the Socialist Republic of Vietnam on the promotion and reciprocal protection of investments, Greece-Viet., Oct. 13, 2008, 2914 U.N.T.S. 50741.

¹¹⁹ Rachel D. Thrasher & Kevin P. Gallagher, *Mission Creep: The Emerging Role of International Investment Agreements in Sovereign Debt Restructuring*, 6 J. GLOBALIZATION & DEV. 257, 274 (2015).

its relations with foreign investors.¹²⁰ 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:¹²¹

- 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; and
- 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
- allowing for neutral arbitration as the main means for the settlement of disputes, if and when treaty standards of protected is not upheld.

H. Salient Features of Greece BITs¹²²

As previously stated, Greece 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:

¹²⁰ See United Nations, *Dispute Settlement: State-State*, United Nations Conference On Trade and Development, UNCTAD SERIES ON ISSUES IN INT'L INV. AGREEMENTS, 13 (2003), http://unctad.org/en/Docs/iteiit20031_en.pdf.

¹²¹ See generally Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment 201–05* (Cambridge Univ. Press, 3rd ed. 2010).

¹²² See generally Nicholas Moussas, Stratos Voulgaridis & Charalampos Kondis, *Greece: Overview of investment treaty programme*, GLOBAL ARB. REV., <http://globalarbitrationreview.com/jurisdiction/2000114/greece> (last updated Oct. 21, 2016).

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.¹²³ 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.¹²⁴

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.¹²⁵

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

¹²³ In particular, the wording provided in the MFN clause of BITs signed by Greece reads as "[s]uch 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." *Id.*

¹²⁴ See, e.g., Agreement Between the Government of the Republic of South Africa on the Promotion and Reciprocal Protection of Investments, art. 3 ¶ 4, Greece-S. Afr., Nov. 19, 1998, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1480>; see also Agreement Between the Government of the Hellenic Republic and the Government of the Republic of Cuba on the Promotion and Reciprocal Protection of Investments, art. 4, Cuba-Greece, June 18, 1996, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1480>.

¹²⁵ See, e.g., Agreement Between the Government of the Hellenic Republic and the Government of the Russian Federation for the Promotion and Reciprocal Protection of Investments, Greece-Russ., art. 2, ¶ 4, June 30, 1993, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/903>; see also Agreement Between the Republic of Turkey and the Hellenic Republic Concerning the Reciprocal Promotion and Protection of Investments, art. 1, ¶ 2(b), Greece-Turk., Jan. 20, 2000, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1477>.

may be done in the public interest.¹²⁶ As to the right of compensation, in general, it must be equivalent to the market value of the tangible or intangible object of expropriation and must be “prompt, adequate and effective.”¹²⁷

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.¹²⁸

We shall now briefly examine the contents of the aforementioned standards of treatment found in the majority of BITs signed by Greece, as well as their potential infringement.

¹²⁶ See Vertrag zwischen der Bundesrepublik Deutschland und dem Königreich Griechenland über die Förderung und den gegenseitigen Schutz von Kapitalanlagen, Ger.-Greece, art. 3, ¶ 2, Mar. 27, 1961, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1483>; Accord Entre Le Gouvernement De La Reublique Hellenique Et Le Gouvernement Du Royaume Du Maroc Concernant L' Encouragement Et La Protection Reciproques Des Investissements, Greece-Morocco, art. 4, ¶ 1, Feb. 28, 1994, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1329>; see also Nicholas Moussas, Stratos Voulgaridis & Charalampos Kondis, *Investment Treaty Arbitration: Greece*, GLOBAL ARB. REV., <http://globalarbitrationreview.com/jurisdiction/2000114/greece> (last visited Jan. 21, 2018) (referencing to the Greece-Albania BIT also; that, however, does make reference in art. 4(2) that “[t]he legality of any such expropriation nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law”).

¹²⁷ See, e.g., Agreement Between the Government of the Republic of Croatia and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, Croat.-Greece, art. 4, ¶ 1, Oct. 18, 1996, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/15>; see also Agreement Between the Government of the Republic of Chile and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, Chile-Greece, art. 6, ¶ 1(c), July 10, 1996, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/859>.

¹²⁸ See, e.g., Agreement Between the Government of the United Arab Emirates and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, Greece-U.A.E., art. 3, ¶ 2, art. 4, ¶ 2, May 6, 2014, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/679>; Agreement Between the Government of the Republic of Korea and the Government of the Hellenic Republic of the Mutual Promotion and Protection of Investments, Greece-S. Kor., art. 3, ¶ 2, Jan. 25, 1995, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/5357>.

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.¹²⁹ 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.¹³⁰ 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 the Russian and Argentinean financial crisis, where domestic investors were treated more favorably than foreign investors.¹³¹ 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,¹³² and thus, foreign investors were indirectly excluded from the purchase. Although, the ICSID Tribunal did not examine the merits of such arguments in the case *Fireman's Fund*

¹²⁹ Nicolas F Diebold, *Standards of Non-Discrimination in International Economic Law*, 60 INT'L & COMP. L.Q. 831, 831 (2011).

¹³⁰ See Ann Gelpern & Brad Setser, *Domestic and External Debt: The Doomed Quest for Equal Treatment*, 35 GEO. J. INT'L L. 795, 798 (2004).

¹³¹ *Id.* at 799.

¹³² *Fireman's Fund Ins. Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/1, (2002), ¶ 56 (July 17, 2003).

Insurance Company v. The United Mexican States,¹³³ 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.”¹³⁴

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.¹³⁵ 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.¹³⁶ In this case, it can be said that Greek creditors in fact received less favorable treatment than foreign investors,¹³⁷ 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.¹³⁸

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 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.¹³⁹

In the case of Greece, for instance, the European Central Bank (ECB), its largest creditor at the time of the bond exchange, holding more than twenty percent of Greece’s debt, was exempted from the bond exchange.¹⁴⁰ The same applies for the IMF and EU member

¹³³ *Id.*

¹³⁴ *Id.* ¶ 203.

¹³⁵ MICHAEL WAIBEL, *SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS* 274 (Cambridge Univ. Press 2011).

¹³⁶ *Mamatas and Others v. Greece*, 2016 Eur. Ct. H.R. ¶ 138.

¹³⁷ 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.

¹³⁸ Aldo Caliari, *Risk Associated with Trends in the Treatment of Sovereign Debt in Bilateral Trade and Investment Treaties*, UNCTAD 211 (2009).

¹³⁹ Pia Acconci, *Most-Favored Nation Treatment*, in *THE OXFORD HANDBOOK OF INT’L INV. LAW* 363 (Peter Muchlinski et al. eds., 2008).

¹⁴⁰ Anna O. Mitsou, *Greek Debt Restructuring and Investment Treaty Arbitration: Jurisdictional Stumbling Blocks for Bondholders*, 33 *J. INT’L ARB.*, 693, 687–721, (2016);

states' central banks which did not take analogous haircuts on their Greek bonds, as all other bondholders did.¹⁴¹

Indeed, the ECB's Outright Monetary Transactions (OMT) program announcement stipulated, "[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 Euro area countries, and purchased by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds."¹⁴² The ECB exchanged its previous Greek Government Bonds (GGBs) with new ones, with the same nominal value and terms, and without any CACs, as opposed to all other bondholders that participated in the haircut which received a steep reduction on the face value of their bonds.¹⁴³

This discrimination between institutional investors and other investors holding the same instruments may amount to a breach of the MFN standard.¹⁴⁴ It is questionable, however, whether Greece actually had a choice or the power not to accept such discrimination.

Similarly, a breach of the MFN Treaty can be found due to the difference in treatment of Greek-law governed sovereign bonds and foreign-law governed sovereign bonds, as the Greek Bondholders Act only affected the former bonds and not the latter.

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.¹⁴⁵ 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

see also Ready for the ruck?, THE ECONOMIST (2017), <http://www.economist.com/node/21533368/all-comments>.

¹⁴¹ *Id.*

¹⁴² See European Central Bank Press Release, Technical Features of Outright Monetary Transactions (Sept. 26, 2012), http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

¹⁴³ IOANNIS GLINAVOS, *Redefining the Market-State Relationship: Responses to the Financial Crisis and the Future of Regulation*, in ROUTLEDGE RESEARCH IN FINANCE AND BANKING LAW 143 (Routledge 2013).

¹⁴⁴ *Id.*

¹⁴⁵ Kenneth J. Vandavelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. INT'L L. & POL. (2010).

investment, freedom from interference and coercion, transparency, due process, and good faith conduct.¹⁴⁶

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.¹⁴⁷

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.¹⁴⁸ Indicatively, the UNICITRAL (United Nations Commission on International Trade Law) in its case of *OEPC v. Ecuador* stated that there is “an obligation not to alter the legal business environment in which the investment has been made.”¹⁴⁹ 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*,¹⁵⁰ 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.¹⁵¹

It is important to mention here that before the beginning of the Greek crisis, the yields of the ten-year Greek bonds were ten to forty basis points above the ten-year German bonds, only to explode to 400 basis points in January 2010.¹⁵² Indicatively, in 2007, the interest spreads of the ten-year Greek bonds were at approximately 0.2 percentage points,

¹⁴⁶ WAIBEL, *supra* note 135, at 711–59; *see also* Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award, ¶ 420 (Oct. 31, 2012).

¹⁴⁷ WAIBEL, *supra* note 135, at 711–59.

¹⁴⁸ CHIARA GIORGETTI, *THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS* 101 (Brill Njhoff 2012).

¹⁴⁹ Occidental Petroleum Corp., Occidental Exploration and Production Co. v. Rep. of Ecuador, ICSID Case No. ARB/06/11 (2004), Award, ¶ 240 (Oct. 5, 2012).

¹⁵⁰ LG&E Energy Corp., LG&E Capital Corp. and LG&E Int’l Inc. v. Argentina, ICSID Case No. ARB/02/1, Award (July 25, 2007).

¹⁵¹ *Id.* ¶ 127.

¹⁵² Heather D. Gibson, Stephan G. Hall, & George S. Tavlas, *The Greek financial crisis: Growing imbalances and sovereign spreads*, 31 J. INT’L MONEY AND FIN. 498, 503 (2012).

while they rose to 0.5 percentage points in late 2008, and to 6.7 percentage points in the second half of 2010.¹⁵³ As such, the investors that bought 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*,¹⁵⁴ 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.¹⁵⁵ This principle was reiterated in the aforementioned case, *CMS v. Argentina*,¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹

¹⁵³ See generally Gunther Tichy, *Credit Rating Agencies: Part of the Solution or Part of the Problem?*, INTERECONOMICS (2011).

¹⁵⁴ *Olguin v. Paraguay*, Case No. ARB/98/5, Award (July 26, 2001).

¹⁵⁵ *Id.* ¶ 75.

¹⁵⁶ *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Final Award (May 12, 2005).

¹⁵⁷ *Id.* ¶ 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, 543, July 2006.

¹⁵⁸ *CMS Gas Transmission Co.*, Final Award ¶ 248.

¹⁵⁹ *Id.*

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. Argentine Republic*, Argentina retroactively eliminated a tax exemption from applying export customs duties to production in Tierra del Fuego through the enactment of the Emergency Law in early 2002.¹⁶⁰ This was considered a breach of FET. Similarly, in the case of *ATA Construction Industrial and Trading Company v. 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 arbitration clause in the contract in question, was in breach of treaty standards.¹⁶¹ Hence, investors in Greek bonds could effectively claim that the retroactive introduction of CACs in their bonds, which forced approximately twenty percent of dissenting investors to accept a haircut on their bonds, was a breach of FET¹⁶² due to the disappointment of investors' expectations, the lack of due process, and the lack of good faith.¹⁶³

Finally, it is worth mentioning that the standard of FET is also found in customary international law.¹⁶⁴ 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.¹⁶⁵ 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

¹⁶⁰ *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Award (Nov. 27, 2013).

¹⁶¹ *ATA Constr., Indus. and Trading Co. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, (May 18, 2010).

¹⁶² Andrea Carlevaris, Rocio Digon, *The Argentinean Bonds Saga*, in *INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA: PROBLEMS AND PROSPECTS* 630 (Attila Tanzi et al. eds., 2016).

¹⁶³ WAIBEL, *supra* note 135, at 752.

¹⁶⁴ See OECD, *Fair and Equitable Treatment Standard in International Investment Law*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (OECD Publishing 2004), <http://dx.doi.org/10.1787/675702255435>. But see Patrick Dumberry, *The Formation And Identification Of Rules Of Customary International Law*, in *INTERNATIONAL INVESTMENT LAW* 161 (Cambridge Univ. Press 2016).

¹⁶⁵ FRITZ ALEXANDER MANN, *THE LEGAL ASPECTS OF MONEY* 510 (Clarendon Press 4th ed. 1982).

investors that ought to have been aware of commercial risks and protected themselves accordingly.¹⁶⁶

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,¹⁶⁷ they nonetheless hardly ever contain a definition of the term, relying on the interpretation granted by customary international law or arbitration tribunals.¹⁶⁸ According to the Organisation for Economic Co-operation and Development (OECD), expropriation is defined as “substantial wealth deprivation.”¹⁶⁹ The ICSID considers expropriation as a “taking” of any kind, which can be *direct* in cases 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.¹⁷⁰ 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.¹⁷¹ Such criterion was used by the Tribunal in *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*¹⁷² to decide whether an indirect expropriation had occurred.¹⁷³ Similarly, Professor G. C. Christie, in analyzing two

¹⁶⁶ Sornarajah, *supra* note 121, at 210.

¹⁶⁷ W. Michael Reisman & Robert D. Sloane, “*Indirect Expropriation*” and Its Valuation in the BIT Generation, 74 BRIT. Y.B. INT’L L. 115 (2005).

¹⁶⁸ SEBASTIÁN LÓPEZ ESCARCENA, *INDIRECT EXPROPRIATION IN INTERNATIONAL LAW* 95 (Edward Elgar Publishing 2014).

¹⁶⁹ OECD, *Indirect Expropriation and the Right to Regulate in International Investment Law* 9 (Working Papers on Int’l Inv. No. 2004/4, 2004).

¹⁷⁰ Allahyar Mouri, *The International Law of Expropriation as Reflected, in THE WORK OF THE IRAN-U.S. CLAIMS TRIBUNAL* 70 (Martinus Nijhoff Publishers 1994).

¹⁷¹ 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 Corp., Starrett Systems, Inc., Starrett Housing Int’l, Inc. v. Iran, Bank Oman, Bank Mellat, Bank Markazi, Iran–US CTR*, Case No. 24, Award at 225 (1983).

¹⁷² *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, (May 29, 2003).

¹⁷³ *Id.* ¶ 115.

decisions of the Permanent Court of International Justice (PCIJ), *Certain German Interests in Polish Upper Silesia*¹⁷⁴ and the *Norwegian Shipowners' Claims*,¹⁷⁵ used these criteria to conclude that indirect expropriation might exist.¹⁷⁶ In other words, although a state may purport not to interfere with property rights when, by the state's actions or measures, such rights are rendered so useless, those rights may be considered expropriated.¹⁷⁷

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, the purpose and context of the respective measures, as well as, the interference of those measures with reasonable investment expectations.¹⁷⁸ 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."¹⁷⁹

However, not every measure interfering with an investor's right will be tantamount to expropriation.¹⁸⁰ In fact, state measures will, *prima facie*, be a lawful exertion of the government's powers,¹⁸¹ despite that they might significantly affect foreign interests.¹⁸² To this end, foreign investments can be subjected to taxation and trade restrictions,

¹⁷⁴ *Certain German interests in Polish Upper Silesia* (Ger. v. Pol.), Judgment, 1926 P.C.I.J. (ser A) No. 7 (May 25, 1926).

¹⁷⁵ *Norway v. United States*, IRIAA 307 (Perm. Ct. Arb. 1922).

¹⁷⁶ G.C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 BRIT. Y.B. INT'L L. 307 (1962).

¹⁷⁷ *Id.*

¹⁷⁸ Apurba Khatiwada, *Indirect Expropriation of Foreign Investment* 18 (2008), http://www.ksl.edu.np/cpanel/pics/indirect_expropriation_apurba.pdf; see also OECD, *supra* note 169.

¹⁷⁹ Reisman & Sloane, *supra* note 167, at 118.

¹⁸⁰ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 509 (Oxford Univ. Press 6 ed. 2003).

¹⁸¹ *But see* MIGUEL SOLANES & ANDREI JOURAVLEV, *REVISITING PRIVATIZATION, FOREIGN INVESTMENT, INTERNATIONAL ARBITRATION, AND WATER* 60, U.N. Doc. [E/]LC/L.2827-P, U.N. Sales No. 07.II.G.151 (2007) (The 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.).

¹⁸² BROWNLIE, *supra* note 180.

including quotas, licenses, or devaluation.¹⁸³ 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.¹⁸⁴ 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 . . .”¹⁸⁵ so as not to amount to expropriation.¹⁸⁶

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.¹⁸⁷ 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.¹⁸⁸

In this regard, it is worth revisiting the case of the Argentine Restructuring and the aforementioned cases brought under the Italy-Argentina BIT, and more particularly the *Abaclat et al. v. Argentine*

¹⁸³ *Id.*

¹⁸⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (AM. LAW. INST. 1987).

¹⁸⁵ OECD, *supra* note 169, at 19.

¹⁸⁶ ESCARCENA, *supra* note 168.

¹⁸⁷ *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Arbitration Award, ¶ 278 (Dec. 22, 2003).

¹⁸⁸ *Impregilo S.p.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 261 (Apr. 22, 2005) 12 ICSID Rep. 297 (2007).

Republic case.¹⁸⁹ This case revolved around the Argentine financial crisis of 2001–2005 and in particular, around the bonds restructuring that occurred.¹⁹⁰ 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.¹⁹¹ 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.¹⁹² 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.”¹⁹³ 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.¹⁹⁴

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 Greece exercised its sovereign power, especially when imposing CACs, and 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

¹⁸⁹ *Abaclat and Others v. Argentina (formerly Giovanna a Beccara and Others v. Arg. Republic)*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011).

¹⁹⁰ *Id.* ¶ 8.

¹⁹¹ *Id.* ¶ 316.

¹⁹² *Id.*

¹⁹³ *Id.* ¶ 324.

¹⁹⁴ *Id.* ¶ 326.

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 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.¹⁹⁵ In order to determine the effect a state measure has had on investors, tribunals often conduct a "substantial deprivation" test¹⁹⁶ to explore the degree of diminished value in a haircut, and would thus in this case evaluate the size of the Greek haircut.¹⁹⁷ 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.¹⁹⁸ 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.¹⁹⁹

$$H = 1 - \frac{\text{Present value of New Debt } (r_t^i)}{\text{Present value of Old Debt } (r_t^i)}$$

¹⁹⁵ BROWNLIE, *supra* note 180, at 534.

¹⁹⁶ Peter D. Isakoff, *Defining the Scope of Indirect Expropriation for International Investments*, 3 GLOBAL BUS. L. REV. 189, 344 (2013).

¹⁹⁷ See ANDREW NEWCOMBE & LUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES – STANDARDS OF TREATMENT (Kluwer Law Int'l 2009).

¹⁹⁸ STURZENEGGER & ZETTELMEYER, *supra* note 4, at 6.

¹⁹⁹ *Id.*

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.²⁰⁰ 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 seventy percent, although, as stipulated by the ECtHR in the *Mamatras 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.²⁰¹ 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 Management v. Mexico*,²⁰² the Tribunal noted that non-payment of debts was not sufficient to constitute expropriation.²⁰³

If an expropriation is indeed found, the Tribunal will examine whether such expropriation is lawful under the applicable BIT.²⁰⁴ This question is critical, as it will determine the extent of compensation that investors are entitled to.²⁰⁵ 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.”²⁰⁶ 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.²⁰⁷ At present, the

²⁰⁰ *Id.*

²⁰¹ *Id.* at 9.

²⁰² *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, (Apr. 30, 2004).

²⁰³ *Id.* ¶ 177.

²⁰⁴ See Suzy H. Nikièma, *Compensation for Expropriation*, INT'L INST. FOR SUSTAINABLE DEV. 4 (Mar. 2013), http://www.iisd.org/pdf/2013/best_practice_compensation_expropriation_en.pdf; see also *Tradex Hellas S.A. v. Rep. of Alb.*, ICSID Case No. ARB/94/2, Award, ¶ 94 (Apr. 29, 1999), 5 ICSID Rep. 87 (2002).

²⁰⁵ See Nikièma, *supra* note 204.

²⁰⁶ See *Factory At Chorzów (Ger. v Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

²⁰⁷ U.N. CONF. ON TRADE AND DEV., EXPROPRIATION—UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, UNCTAD/DIAE/IA/2011/7, U.N. Sales No. E.12.II.D.7 (2012).

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.²⁰⁸ 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.²⁰⁹ Under this clause, a host state undertakes to abide by other obligations it has assumed in relation to protected investments.²¹⁰ All commitments undertaken by the host state towards the investors must be observed.²¹¹ 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.²¹²

The very existence of an umbrella clause elevates any contractual commitment to a treaty commitment, allowing a bondholder to bring a

²⁰⁸ *Mamatás et Autres c. Grèce (Mamatás and Others v. Greece)*, Judgment (Merits and Just Satisfaction), App. No. 63033/14, 64297/14, 66106/15, 2016 Eur. Ct. H.R. ¶ 71, [https://hudoc.echr.coe.int/eng#{itemid}:\[“001-164969”\]](https://hudoc.echr.coe.int/eng#{itemid}:[“001-164969”]).

²⁰⁹ Thomas W. Wälde, *The “Umbrella” (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, *TRANSNAT’L DISP. MGMT.* 1 (Oct. 2004).

²¹⁰ *Id.*

²¹¹ *Id.* at 3.

²¹² JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 275 (Oxford Univ. Press 1st ed. 2010).

fully judicable claim under investment arbitration.²¹³ Hence, under such clause, sovereign bond restructuring might constitute a wrongful international act *ipso facto*.²¹⁴ 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.²¹⁵ Consequently, in keeping with the umbrella clause, such a breach could also be considered a breach of the respective BIT.²¹⁶

In this context, a contentious question has been raised: is any contractual breach sufficient to raise a claim under the BIT, or must the breach arise from an exercise of the government's sovereign powers?²¹⁷ Under this reasoning, the case of a debt default or restructuring is very likely to be considered a sovereign act.

III

GREECE'S DEFENSES: THE DOCTRINE OF NECESSITY

The doctrine of necessity stems from customary international investment law.²¹⁸ It stipulates that a state cannot be held liable for actions taken in order to avert a state of emergency.²¹⁹ 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.²²⁰ 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

²¹³ TODD WEILER, *INTERNATIONAL INVESTMENT LAW AND ARBITRATION, LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* 407 (Cameron 2005).

²¹⁴ Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 733 (2007).

²¹⁵ Lise Johnson & Oleksandr Volkov, *Investor-State Contracts, Host State "Commitments" and the Myth of Stability in International Law*, 24 AM. R. INT'L ARB. 361, 366 (2013).

²¹⁶ U.N. CONF. ON TRADE AND DEV., *supra* note 207, at 5.

²¹⁷ NEWCOMBE & PARADELL, *supra* note 197, at 466–70.

²¹⁸ Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J., 1, 13 (2000).

²¹⁹ *See Responsibility of the States for International Wrongdoing*, art. 33, Int'l Law Comm'n, *Rep. on the Work of Its Fifty-Third Session* (2001).

²²⁰ *Id.* at art. 25.

obligation exists, or of the international community as a whole.²²¹ Importantly, this doctrine cannot be invoked by a state if the state contributed to the situation that caused the necessity.²²²

The above statutory language was examined by the Tribunal in the Russian Claim for Interest on Indemnities case,²²³ wherein the Tribunal concluded that the non-payment of public debt may be justifiable in extreme economic circumstances.²²⁴ The above defense was also used by Argentina in cases brought against it for measures taken during the financial crisis of 2001.²²⁵ 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.²²⁶ In fact, three of the four tribunals²²⁷ rejected the necessity defense and 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.²²⁸

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

²²¹ *Id.*

²²² Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Int'l Law Comm'n, U.N. Doc. A/56/10, 2001, art. 2, http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

²²³ *Russia v. Turkey (Russian Indemnity)*, Hague Ct. Rep. (Perm. Ct. Arb. 1912).

²²⁴ Waibel, *supra* note 214, at 88.

²²⁵ See generally Ioannis Glinavos, *Investors vs. Greece: The Greek 'Haircut' and Investor Arbitration Under BIT's* (Working paper, 2012).

²²⁶ See William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 22 PENN LAW FACULTY SCHOLARSHIP 193 (2008).

²²⁷ *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Award, (May 12, 2005); *Enron Co. and Ponderosa Assets, L.P. v. Arg. Rep.*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, (Jan. 14, 2004); *Sempra Energy Int'l v. Argentina*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007).

²²⁸ *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006).

are met.²²⁹ 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 seventy-five percent of their investment.²³⁰ It is further worth exploring whether investors may counterclaim that Greece contributed to the financial crisis, but such argument would be very difficult to prove given that no forum would have the authority to judge the merits of such claim that challenge the fiscal policy of a state.²³¹

IV 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.²³² 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.²³³ 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.²³⁴ In any case, even if an investor's claim is based on a BIT,

²²⁹ Gabčíkovo-Nagymaros Project case, 1997 ICJ Rep. 7, 40, ¶ 51 (Sept. 25).

²³⁰ Zettelmeyer et al., *supra* note 6, at 2.

²³¹ Enron Corp. and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3, Award (2007).

²³² See generally Glinavos, *supra* note 225.

²³³ Christophe Schreuer, *Travelling the BIT Route of waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE, 231, 236 (2004).

²³⁴ Vivendi v. Argentina, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 96 (July 3, 2002).

the Tribunal may still determine that the claim is essentially contractual,²³⁵ although, there is not 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, 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) are briefly examined below.

V 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 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.²³⁶ 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.²³⁷ 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).²³⁸

Many investors noticing Greece's worrisome declining course purchased CDS in order to minimize their loss or even make a profit.

²³⁵ See e.g., Woodruff Case (United States v. Venezuela) RIAA, Vol. IX, Hague ICJ Register, 213 (1903–1905).

²³⁶ Charles S. Tapiero, *Risk Finance and Asset Pricing: Value, Measurements, and Markets*, Wiley Finance, 357 (2010).

²³⁷ *Id.*

²³⁸ News Release, International Swaps and Derivatives Association, ISDA Publishes 2014 Credit Derivatives Definitions (Feb. 21, 2014), <https://www.isda.org/a/24DDE/2014-credit-definitions-release-final.pdf>. (The seven credit events under 2014 ISDA Credit Derivatives 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.)

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 conclude that the Greek haircut should have triggered a CDS, the decision for that was not an easy one to make. The ISDA expressed a preliminary view in which voluntary restructuring does not constitute a credit event.²³⁹ 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.²⁴⁰ On these grounds, in October 2011, the ISDA announced that the Greek restructuring was not likely to trigger payments under CDS contracts.²⁴¹ Based on such reasoning, CDS would not be used, adding further to investors' losses as they would not only be unable to collect insurance, but they would also 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 Greece, which unilaterally amended the terms of Greek law governed bonds, constituted a restructuring credit event.²⁴²

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.

²³⁹ Update, International Swaps and Derivatives Association, *Greek Sovereign Debt Q&A* (Oct. 27, 2011), <http://www2.isda.org/news/isda-updates-greek-sovereign-debt-qampa>.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² News Release, International Swaps and Derivatives Association, *Restructuring Credit Event Has Occurred with Respect to The Hellenic Republic* (Mar. 9, 2012), http://www.isda.org/dc/docs/EMEA_Determinations_Committee_Decision_09032012.pdf.

Document Risk

The document risk refers to the industry's reliance on the documentation of CDS Agreements.²⁴³

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.²⁴⁴ According to Argentina, the bond swap was voluntary, and as such, did not constitute a credit event.²⁴⁵ 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.²⁴⁶ Despite the rating agencies' statement, however, ISDA considered the agencies' declaration and a CDS credit event were not connected.²⁴⁷ Consequently, many protection sellers refused to pay compensation on CDS on the basis that the restructuring was voluntary.²⁴⁸ This was not left unanswered by the buyers and many cases were brought before the Tribunals.

A common theme in all the rulings is 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, which is tantamount to coercive obligation exchange.²⁴⁹ However, one should not overlook that it is not for the Tribunals to decide upon such an issue.²⁵⁰ This would require the Tribunals to foresee whether the parties in question will elect to participate in an obligation exchange,

²⁴³ Lily Tjioe, *Credit Derivatives: Regulatory challenges in an exploding industry*, 26 ANN. REV. BANKING & FIN. L. 387, 405 (2007).

²⁴⁴ Andrew F. Cooper & Bessma Momani, *Negotiating Out of Argentina's Financial Crisis: Segmenting the International Creditors*, 10 NEW POL. ECON. 309, 311 (2005).

²⁴⁵ THE IMF AND ITS CRITICS: REFORM OF GLOBAL FINANCIAL ARCHITECTURE (David Vines et al. eds., Cambridge Univ. Press 2004).

²⁴⁶ Laura Alfaro, *Sovereign Debt Restructuring: Evaluating the Impact of the Argentina Ruling*, 5 HARV. BUS. L. REV. 47, 55 (2015).

²⁴⁷ News Release, *supra* note 238, ¶ 2.

²⁴⁸ Louise Bowman, *ISDA: 50% Greek Haircut 'Voluntary' and Likely No Credit Event For CDS*, EUROMONEY (Oct. 27, 2011), <https://www.euromoney.com/article/b12kjfhmd2654z/isda-50-greek-haircut-39voluntary39-likely-no-credit-event-for-cds>.

²⁴⁹ Anna Gelpern & Mitu Gulati, *CDS Zombies*, 13 EUROPEAN BUS. ORG. L. REV. 347, 377-79 (2012).

²⁵⁰ *Id.*

and, consequently, to conduct an economic analysis of the obligation exchange.²⁵¹

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 2005.²⁵² 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.²⁵³ 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.²⁵⁴ 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.²⁵⁵ 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.²⁵⁶ 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"²⁵⁷ 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 speculators looking for quick gains.²⁵⁸ This demonstrates the absence of supervision and regulation

²⁵¹ News Release, *supra* note 238, ¶ 2.

²⁵² Tijoe, *supra* note 243, at 400.

²⁵³ *Id.*

²⁵⁴ Richard Beales, *Uncertain road ahead for Delphi*, FINANCIAL TIMES (Nov. 8, 2005).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Tijoe, *supra* note 243, at 403.

²⁵⁸ See Darrell Duffie, *Is there a Case for Banning Short Speculation in Sovereign Bond Markets? Banque de France*, 14 FIN. STABILITY REV. 55, 57 (2010).

in this field, as well as the unregulated and unsettled state of payments procedures.

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 growing budgetary deficits, Greece accumulated a sky-rocketing public debt.²⁵⁹ Moreover, refinancing this debt proved to be extremely difficult due to the almost “dry” financial market and significantly higher interest rates.²⁶⁰ To this end, Greece resorted to two debt restructurings in 2011 and 2012, severely jeopardizing bondholders' rights. The debt restructurings forced bondholders, to a certain extent, to take part in the restructuring, due to the unilateral introduction of CACs by the Bondholders Law, No.4050/2012, and resulted in significant losses for investors.

Five years after the bond exchange, bondholders have still been unable to obtain reparation, despite having appealed both to the ECtHR and the 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 who should be aware of the risks. The ICSID, however, 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, a large part of the BITs signed by Greece contain more favorable wording that could permit a different interpretation.

²⁵⁹ NELSON ET AL., *supra* note 2, at 2.

²⁶⁰ Stratfor, *Greece Postpones A Crisis*, FORBES (Feb. 26, 2015), <https://www.forbes.com/sites/stratfor/2015/02/26/2052/2/#3c5e87e66c9f>.

If such hindrance is overcome and bonds are deemed to fall under the protection of BITs, investors may use various arguments 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 able to escape liability from such claims by invoking the doctrine of necessity, the applicability of which 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.