SOVEREIGN DEFAULT AND PORTFOLIO INVESTORS' REMEDIES: THE GREEK DEFAULT

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LIST OF ABBREVIATIONS

AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
BIT	Bilateral Investment Treaty
BYBIL	British Yearbook of International Law
CAC	Collective Action Clauses
CDS	Credit Default Swap
ECHR, Ser. A	European Court of Human Rights, Series A (Judgments and Decisions)
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILC	International Law Commission
IMF	International Monetary Fund
PCA	Permanent Court of Arbitration
UNCITRAL	United Nations Commissions on International Trade Law

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CHAPTER 1

Introduction

1.1 Topic, issue and research questions

Over the last fifty years the international community has faced numerous events of sovereign default. Russia, Ukraine, Ecuador, Uruguay and Argentina are just a few of the many available examples. As those examples have shown, in cases of sovereign default, foreign investors are confronted with the regulatory vacuum that exists in such cases and are often marginalised by the defaulting States.

Currently, the global financial crisis, the economic depression as is often called, has yet again proven to the international plane that the global finance institutions may collapse at any time taking the economies of many states along with them. This scenario was validated in the case of Iceland that defaulted in 2008 and is going to be (has been?) re-validated in the case of Greece. Indeed, the latter was harshly hit by the financial crisis and now the country is at the verge of sovereign default, with a 50% haircut on its sovereign debt having been announced on October, 27th 2011 and having being materialised on March, 9th 2012.

My thesis will refer to the implications of such haircut on investors and shall explore if there are any remedies available to them to reconcile or diminish such implications. Prior to addressing these issues, I shall study the legal framework vis a vis foreign investments and more particularly portfolio investments, as the term will be defined below. Indeed, portfolio investments are most relevant in Greece's case and this paper will limit itself to this type of investments.

Portfolio investments are investment instruments, such as stocks and/or bonds that are usually less permanent and can be easily traded. The portfolio investor is, in most cases, interested in investing where he can get the maximum return for a given level of risk. Portfolio investments are faster to move in search of higher returns and/or lower risk, and have a shorter time horizon, making them, as such, more volatile[1]. Such volatility allows investors to liquidate or withdraw their investments in a relevantly quick pace in the event of a crisis. On account of the above volatility, portfolio investors are expected to take upon themselves the

[1] Kimberly Evans Foreign Portfolio And Direct Investment Complementarily, Differences and Integration; Global Forum on International Investment Attracting Foreign Direct Investment For Development Shanghai, 5-6 December 2002, OECD p.4

risks of making such investments[2] and it is still not clear if portfolio investments are protected by customary international investments law and/or investments treaties. These questions will be analysed in detail in this paper.

In addition, I shall explore EU law and study whether the latter offers any remedies to bondholders in such situations

To sum up, my thesis will mainly focus with the recourse that bond-holders (investors) of Greek Government Bonds (GGBs) have in light of the aforementioned haircut.

1.2 Legal Sources and Research method

In order to carefully examine investors' rights vis a vis Greece's default, it is necessary to examine a series of sources, i.e. both primary sources that include the Maastricht Convention, the Bilateral Investment Treaties that Greece has concluded, the Greek Law applicable for investments and bonds and secondary sources that refer to literature written on the topic of sovereign default and international investment law. It must be stated that, as the Greek financial crisis is an on-going phenomenon with daily radical developments, there is not a lot of bibliography on the matter and many of the recent bibliography is, in light of the above developments already outdated. It is for this reason that a comparison with the Argentine default is particularly useful, as it allows one to draw conclusions for the possible developments in the case of Greece.

1.3 Delimitation and Structure

My thesis is divided into three units. Firstly I will examine the factual background of the Greek financial crisis and the Investors' exposure to the latter. Thereafter I will study the legal framework for international investments and research whether portfolio investments, as the term is defined below, are included in the definition of foreign investments as those are defined in the Bilateral and Multilateral Investments Treaties. I shall thereafter examine the remedies available under the aforementioned treaties as well as under European Union's Law and Credit Default Swaps. In order to better understand bondholders' remedies, I contrast the Greek Default and its implications with the Argentine Default in 2001. Lastly, I refer to special enforcement issues to have a complete view as to the actual recourse available to bondholders.

[2] M. Sornarajah The International Law on Foreign Investment, Cambridge University Press, 3rd Edition, 2010, p. 8

CHAPTER 2

Foreign Investments and the current situation

2. The way towards the haircut

2.1. The Financial Crisis in Europe

The financial crisis "hit" the global community in the summer of 2007 and it was undoubtedly an unprecedented phenomenon both in terms of proportion as well as implications. Most analysts failed to realise the seriousness of the situation and categorised the crisis as a mere liquidity shortage that would limit itself in the US and would not greatly affect the "strong" and "healthy" European economies that were based on strong fundamentals, such as rapid export growth and sound financial positions of households and businesses[3].

These perceptions dramatically changed in September 2008, linked with the rescue of Fannie Mae and Freddy Mac, the "shocking" Lehman Brothers bankruptcy and worries for the insurance company AIG taking down major US and EU financial institutions in its way[4].

As a result, the Member States began to realise that they could not handle the crisis individually and that a common response was required. Firstly, the European G8 members[5], at their summit in Paris on 4 October 2008, undertook to act jointly and take all necessary measures in order to secure their banking and financial systems. Not too long after that, at the Economic and Financial Affairs Council's (ECOFIN[6]) meeting of October 7, 2008 all Member States came together to plan common principles to guide their respective reactions to the crisis[7]. These principles were turned into a concerted action plan on October 10, 2008 by the Eurogroup[8], which was then endorsed by the European Council on October 15, 2008. In particular, at the Eurogroup summit, the eurozone countries, along with the United Kingdom, urged all European governments to adopt a common set of principles to combat the crisis[9]. The

[3] Economic Crisis in Europe: Causes, Consequences and Responses, Economy in Europe 7/2009, Directorate-General for Economic and Financial Affairs of the European Commission, BU24, B-1049 Brussels, p.4
[4] Economic Crisis in Europe, ibid p.8
[5] France, Germany, Italy and the United Kingdom
[6] EU organ composed of the Economics and Finance Ministers of the 27 EU Member States monitoring, inter alia, the budgetary policy and public finances of the Member States.
[7] Conclusions of the ECOFIN Council held in Luxembourg on October 7, 2008 (Doc. 13784/08)
[8] Meeting of those EU countries that share the Euro as currency
[9] "Declaration on a concerted European action plan of the eurozone countries", October 10, 2008, available at www.ue2008.fr; European Council of October 15 and 16, 2008, Presidency Conclusions (doc.14368/08).

measures suggested included, inter alia, the following practices, mostly in relation to strengthening the banks[10]:

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

In November, 2008 the European Commission formulated a recovery plan (the "Plan") that was based in two interdependent main elements. The first element entailed short-term measures to boost demand, save jobs and help restore confidence. The second element referred to "smart investments" to yield higher growth and sustainable prosperity in the longer-term. The Plan called for a timely, targeted and temporary fiscal stimulus of around €200 billion or 1,5% of the 2008 EU Growth Domestic Product (GDP), stemming from both national budgets (around €170 billion, 1,2% of GDP) and EU and European Investment Bank budgets (around €30 billion, 0,3% of GDP)[11] in order to enhance the purchasing power into the economy, to protect jobs and address the long-term job prospects of those losing their jobs. The Plan was finally adopted on December 11-12th, 2008 and in conjunction with some unused EU resources and an additional 15 billion investments a year for two years by the European Investment Bank, a sum equivalent to 1,8% of the 2008 EU GDP was raised. This sum would act as a fiscal stimulus over a period of 2 years (2009-2010) with 1,1% of the EU GDP occurring in 2009 and remaining 0,7% in 2010.

Having, as mentioned, underestimated the financial crisis, EU's response to same was delayed. Furthermore, when EU finally responded, the Plan taken was rather "small-scale" in comparison to the extent of the crisis[12]. That, in conjunction with the very high direct fiscal costs that the measures of the Plan entailed, along with the fact that the economic activity was on unprecedented low levels led to a rapid rise in government deficits and debt in all the Euro Zone Countries. In fact, given that fiscal policies remained unchanged, the rise in government debt-to-GDP ratios continued, even as the recovery proceeds and the short-term fiscal stimulus measures were phased out.

This led many EU states in the verge of bankruptcy with their deficits reaching up to 160% of their GDP. In 2009, the government deficit and government debt of both the eurozone (EU16) and the EU increased compared with 2008, while their GDP fell. In the eurozone the government deficit to GDP ratio increased from 2,0% in 2008 to 6,3% in 2009, and in the EU27 from 2,3% to 6,8%. In the eurozone the government debt to GDP ratio increased from 69,4% at the end of 2008 to 78,7% at the end of 2009, and in the EU27 from 61,6% to

[10] James K. Jackson, The European Crisis: Impact on and Responses by the European Union, CRS Report for Congress, June 24,2009
[11] IP/08/1771, Brussels, 26 November 2008
[12] Edward Luce and Chrystia Freeland, Financial Times published: March 8 2009 22:03 http://www.ft.com/cms/s/0/5d8b5e18-0c14-11de-b87d-0000779fd2ac.html#ixzz1YsnQRuoH

73,6%[13]. Currently, Greece, Ireland and Portugal have requested the assistance of the EU/ International Monetary Fund ("IMF") "bailout" mechanism.

2.2 The Greek Financial Crisis

2.2.1. Economic Situation in Greece

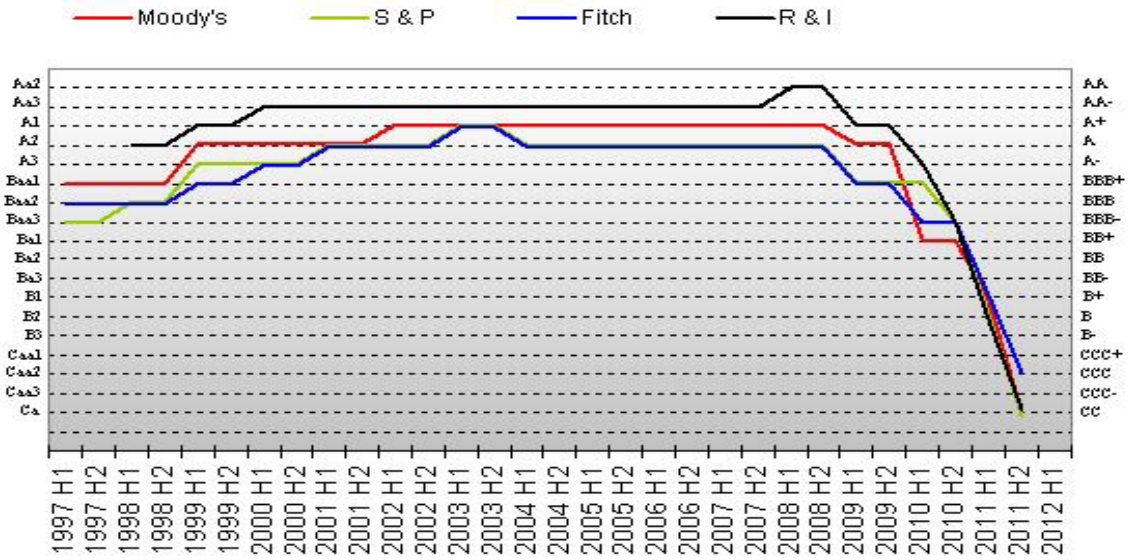
The Greek government has a long history of problems with its public debt. Indeed, Greece has for many years been living of foreign loans, borrowing on a continuous basis to cover the country's needs. In addition, for many years, its Governments have been badly managing the country's resources and have been borrowing money with very high interests. Since its accession in the European Monetary Union (EMU/Eurozone) in 2001 the country had consistently experienced higher inflation than the EMU average, resulting in substantial deviation from the Maastricht Criteria, in pronounced competitiveness losses and in record current account deficits[14]. Nevertheless, Greece had successfully managed to "hide" its debt from the EU authorities. In fact, as it was later discovered, Goldman Sachs had assisted the then Greek Government led by Mr. Konstantinos Simitis, to "tackle" its debt in order to enter into the EMU. Indeed, up until 2008, the increase of the Greek debt by approximately EUR 22 billion was comparable in size to the increases in debt levels in other countries that took part in the Plan. Nevertheless, the Greek debt continued to increase as Greece was sagging into recession, leading to a rise of an additional EUR 34 billion in 2009. This was the "final blow" to the Greek economy.

By the end of 2009, Greek economy faced the second highest deficit in percentage of GDP in the EU with an astonishing -13,6% closely following Ireland whose relevant percentage was at -14,3%[15]. These existing and rising debt levels led to rising borrowing costs, resulting in a severe economic crisis. Undoubtedly, the situation was made worse by certain institutions and other speculators that attempted to and did make profits out of the then current situation. The case of the Greek government bonds is indicative. In particular, in late 2009 GGBs faced continuous rating downgrades by the three major credit rating agencies, namely Standard and Poor, Moodys and Fitch. The status of the Greece's rating faced an unprecedented downgrade to "junk status", being the lowest in the world:

[13] Provision of deficit and debt data for 2009 - first notification Eurostat News release, 55/2010 - 22 April 2010, http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-22042010-BP/EN/2-22042010-BP-EN.PDF

[14] Michael G. Arghyrou, The accession of Greece to the emu: initial Estimates and lessons for the new EU Countries, *Economics Section, Cardiff Business School*

[15] Provision of deficit and debt data for 2009 - first notification Eurostat News release, 55/2010 - 22 April 2010, http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/2-22042010-BP/EN/2-22042010-BP-EN.PDF

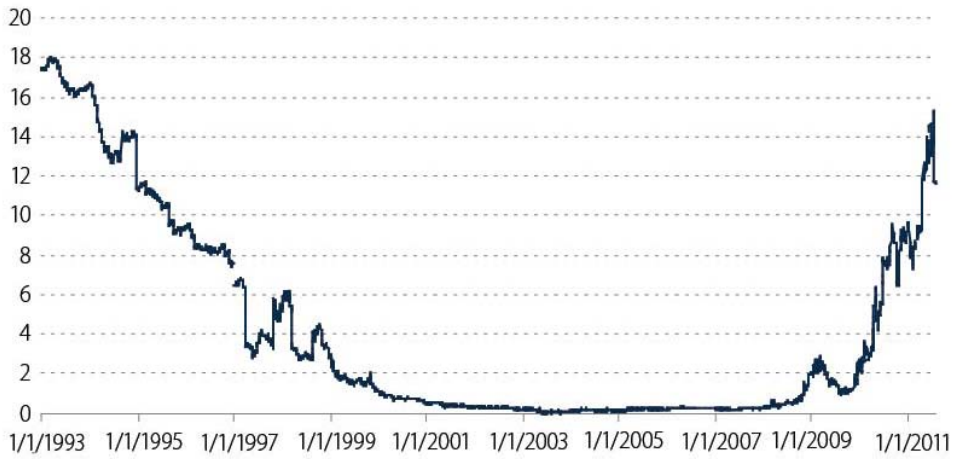


Source Greek Public Debt Management Agency

It is worth mentioning that before the crisis, 10-year GGB's yields were 10 to 40 basis points above German 10-year bonds while within the crisis, the spread increased to 400 basis points in January 2010[16]. The graph below further demonstrates the variation of GGB's spread vis a vis the German bonds Spreads.

GGB's Spreads, 1993-2011

Spreads on 10-year GGB's relative to 10-year German bonds (%)



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

Greece's total debt as of end-April 2010 was approximately €319 billion and as a result Greece, on 23 April 2010, turned to both the EU and the IMF for financial help. EU delayed to

[16] "Fiscal Woes to Dog Greek Bonds Even if Aid Offered," *Reuters*, March 22, 2010. 10 basis points = 0.1 percentage point.

commit as not only there was unwillingness by certain Member States to help but also the Maastricht Treaty did not provide for any crisis management mechanism and thereafter it did not provide for the possibility of "bailing out" a Member State with a high external debt. Some argue, of course that Article 122 of the Treaty could have been invoked by the European Council to assist a member state that is "seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control", but at this point no Member State was willing to pretend that Greece's high deficit was an anything but mismanagement.

Finally, the EU and IMF put together a bailout package. Indeed, on 2 May 2010, the Eurogroup agreed to provide to Greece bilateral loans pooled by the European Commission for a total amount of EUR 80 billion to be disbursed over the period May 2010-June 2013. The financial assistance provided by EMU Member States was part of a joint package, with the IMF financing additional EUR 30 billion under a stand-by arrangement[17]. In addition to that and in an attempt to prevent the spread of the financial crisis in other Member States, EU leaders created, in May 2010, a new European mechanism/fund, the European Financial Stability Fund ("EFSF"), for providing financial assistance to EMU member states with severe financial problems. ESFS consisted of two temporary, three-year lending facilities that could make loans totalling €500 billion[18]. EU leaders also suggested that the IMF could provide additional support.

Since then the Greek economy has been -almost exclusively- supported by the bail-out mechanism that continues to this date, mostly on account of the fear that a possible Greek default could contaminate the banking and financial system of other Member States. As time passed by, however, the situation in Greece remained unaltered and despite the measures taken by the Greek government, the Greek deficit remained sky high. This has led to the recent decisions vis a vis the haircut of the Greek debt.

In particular, in mid 2011, Greece's debt reached a level (150% of GNP) that was unsustainable. Indeed, at that stage even if Greece succeeded fully in cutting its public sector deficit and instead started having public sector surpluses, its then current debt level could not be fully financed from the surplus, even at a relatively low interest rate of 5%. This implied that the yearly interest could not be fully paid from the surplus and would result in increases of the accumulated debt. As such, the then current policy, whereby Greece would keep taking austerity measures in consideration for being granted loans to satisfy its current needs and pay off its debts, could no longer continue. Therefore, the "banned" up to that point word "haircut" begun to be heard more loudly, as it became more profound that the solution was for Greece to restructure its debt, preferably through a voluntary exchange of old debt with new.

A "haircut" is a partial default on a Country's debt, a renegotiation between a debtor-sovereign state and its creditors, whereby the creditors agree to accept less than what they are entitled on the fear that they may not collect any of their outstanding debts. A "haircut" may often involve a reduction of interest rates and/or principal and an extension of the repayment period. In particular, in relation to the reduction of principal and interest rates, history of latest

[17] The Economic Adjustment Programme for Greece Third Review -European Commission Directorate-General for Economic and Financial Affairs, Winter 2011

[18] Rebecca M. Nelson, Paul Belkin, Derek E. Mix Greece's Debt Crisis: Overview, Policy Responses, and Implications Congressional Research Service7-5700, p.11

haircuts indicates on balance a post-default recovery rate of between 50% and 70%[19]. Greece was no exception to the rule. Indeed, although it was initially announced that there would be one 21% haircut, soon thereafter a 50% haircut followed.

Prior, however, to analysing the meaning and implications of a haircut we must first examine the nature of GGBs, their terms of issuance and their legal treatment.

2.2.2. Greek Government Bonds

Sovereign Bonds are debt investments whereby an investor loans a certain amount of money, for a certain amount of time, with a certain interest rate, to a state. As such, bonds constitute commercial transactions between states and investors. The governing law of GGBs was until recently, almost exclusively Greek law and, in particular, Decision 2/4627/0023/25.01.2001 of the Ministry of Finance, with only 10% of GGBs being governed by other national laws, mostly English Law. On 23.02.2012 Greece enacted the Greek bondholders' law (Law No. 4050/2012) that regulated the bond exchange of GGBs issued prior to 31st December 2011 with news bonds.

The implications of GGBs being governed by Greek Law are the following:

1) Greek Law did not formerly provide for Collective Action Clauses (CAC), thus the majority of bond holders could not bind the minority of bond holders in the case of a default incident. Indeed, such clauses allow the majority of bondholders (a certain percentage needs to be reached) to bind other bondholders with their decisions and not to allow individual investor(s) to act solely by accelerating the bond or initiating litigation in the event of default etc. Their worth lies in reducing the "rogue creditors" ability to hold out by making it more difficult to enforce the contract against the interests of the majority[20]. The previous non-existence of CAC in Greek Law governed GGBs was modified by Art. 1(4) of the Law 4050/2012 that retrospectively applied on all Greek Law governed GGBs that were issued prior to 31.12.2011 and provided that if the decision for the bond exchange was supported by more than 2/3 of the total number of Greek Law governed GGBs' holders, such decision would be binding on all. Same is the case for bonds governed under English Law. Indeed, GGBs issued under English law, prior to 2004, contained CAC that appear to permit holders of 66 percent of an issue to modify payment terms in a manner that would bind all other holders, but after 2004, Greece altered this clause in its English law bonds, requiring a majority of at least 75%[21].
2) GGBs did not provide for any lien or other guarantee for the satisfaction of the creditors in case of default. In addition, they did not entail negative pledge clauses protecting the bondholders who have taken out an unsecured loan. Negative pledge clauses provide that a State that has awarded unsecured loans cannot subsequently take

[19] Russian restructuring haircuts were in the range of 45%-63%; Ukraine non-resident 30%-56%; Pakistan 31%; Ecuador 27%; Argentina 42%-73%; Uruguay external debt 13% and domestic 23%.

[20] Sönke Häseler Collective Action Clauses in International Sovereign Bond Contracts –Whence the Opposition? European Association of Law And Economics Working Paper No. 007-2009, p.5

[21] Lee C. Buchheit & Mitu Gulati, How to restructure Greek debt, http://ssrn.com/abstract=1603304

out another loan(s) with a different lender, securing the subsequent loan(s) on the specified assets as same would mean that the original lender would be disadvantaged, because the subsequent lender would be call firstly to satisfy his claim by the assets in an event of default. Same is not true for English Law governed GGBs that entailed negative pledge clauses.

3) In as far as the definition of an event of default is concerned, most GGBs entail the following circumstances as being tantamount to an event of default:
    - Failure to pay interest (usually a grace period is granted).
    - Failure to pay principal or other covenant obligation (usually a grace period is granted and notification of default is required)
    - A government order or presidential decree is issued preventing Greece from performing its obligations under bonds
    - General Moratorium is declared on non-payment of principal.

    In relation to acceleration clauses, same are not included in Greek Law governed bonds while they may be found in English Law governed bonds.

4) Lastly and perhaps most importantly, as most GGBs were governed by Greek Law, bond holders were subject to the Greek Government that could modify them at will. Such fear was to a certain extend materialised with the introduction of Law 4050/2012 that, as mentioned, retrospectively imposed some terms to Greek Law governed GGBs. In this respect, it is worth noticing that Law 4050/2012 provided, inter alia, that GGBs that will participate in the bond exchange will no longer be governed by Greek Law but by English law.

On the basis of the facts above, Greece firstly negotiated a 21% haircut on its issued GGBs and subsequently a second 53% haircut on same.

2.2.1.1 The first haircut

Despite the initial bailout package and the many revenue raising measures adopted in Greece, the Greek debt was simply too big too big to be satisfied. By the end of June 2011 Greece's total debt was approximately EUR 353,693 billion out of which approximately EUR 283,00 billion was in the form of bonds while the remaining EUR 70,693 billion corresponded to debt on account of loans[22]. In this respect it is important to note that up to the point that Greece entered to the bailout mechanism, the largest share of Greek public debt, about 75% of the total stock, had been held by foreign banks, mostly German and French, but mutual funds, pension funds, hedge funds and other categories of investors also owned GGBs. Due to the EU/IMF bailout package of EUR 110 billion and the direct bond purchase program by the European Central Bank, however, the allocation of Greek debt has changed significantly, as now EU/IMF and ECB currently hold a significant proportion of Greek Government bonds (Appendix No.1), but European Banks continued to be major holders of European bonds while

[22] Data derived from the Greek Ministry of Finance's Debt report published in June 2011, available at http://www.minfin.gr/portal/el/resource/contentObject/contentTypes/genericContentResourceObject,fileResourceObject,arrayOfFileResourceTypeObject/topicNames/publicDebtBulletin/resourceRepresentationTemplate/contentObjectListAlternativeTemplate#fragment-0

few GGBs have fallen into the hands of individuals (non-institutional) investors, but this number is relatively low. The top holders of GGBs up to December 2011 are presented in Appendix 2.

As such, the risk of contagion to other EU countries and the implications of a possible unregulated Greek insolvency, led to the Agreement of July, 21st 2011, when the second Greek bailout package of up to 109 billion was concluded between the heads of State or Governments of the Eurozone and the EU Institutions. The agreement was presented as the final solution to overcome the Greek financial crisis and consequently Europe's financial crisis and it provided for the lengthening of the maturity of future EFSF's loans to Greece to the maximum extent possible (from the current 7,5 years to a minimum of 15 years and up to 30 years with a grace period of 10 years) and at the same time for the substantial extension of the maturities of the existing Greek facility[23].

In addition to that however, GGBs bondholders were also called upon to accept partial repayment of their owed sums and to calculate a 21% Net Present Value (NPV) loss on all products based on an assumed discount rate of 9%[24]. The net contribution of the private sector was estimated at 37 billion euro. The Banks agreed to the haircut voluntarily, stating however that they would not be willing to accept further reduction.

This haircut was however too small to assist in accommodating Greece's debt and/or solving Greece's credit problem. As such, not a lot time passed before the Agreement of 21.07.2011 begun to be questioned and revised[25].

2.2.1.2. The second haircut

Currently, Greece is at a turning point. As all previous measures failed Eurozone leaders have finally agreed on a structured Greek default whereby bonds would lose 50% of their value and the short and medium-term debt would be converted into a long-term version. The decision was taken on October 27th, 2011 and it entailed the following:

The Agreement called for a wider Private Sector Involvement (PSI) participation in establishing the sustainability of the Greek debt. In this regard it invited Greece, private investors and all other parties concerned to develop a voluntary bond exchange with a minimal discount of 50% (plus 29% to the already agreed 21% haircut) on notional Greek debt held by private investors[26]. As an incentive to "allure" private investors and especially banks, Eurozone Member States would contribute to PSI a package of up to EUR 30 billion, while additional EUR 100 billion would be granted by the official sector until 2014 for the recapitalization of the Banks.

The exchange required wide PSI (approx. 85-90%) or a write off in the order of EUR 100 billion. This PSI, together with an ambitious reform programme, is expected to assist Greece reach a debt level of 120% by 2020. The terms of the PSI had been negotiated by the Greek coalition government that finally released its official proposal on February 25th, 2012

[23] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/123978.pdf
[24] Institute of international Finance (IFF), Thursday, July 21, 2011,
[25] Statement by Antonio Borges, Head of the IMF European Departments made on October 5, 2011
[26] Euro Summit Statement of Ministers, 27th October 2011

asking investors to accept a haircut of approximately 53,5%[27]. In order to achieve such goal, the Greek Government resorted to the use of CAC that, as mentioned, require that all bondholders follow the decisions taken by the majority (more than 66,7% of the bond holders). In particular, on March, 9th 2012, the participation of bondholders in the bond exchange reached 152 billion worth of Greek Law governed GGBs out of the approximately 177 billion[28], a percentage (≈85.9%) that allowed Greece to trigger the aforementioned CAC and oblige all Greek Law GGBs holders to consent to the terms of the bond exchange. In addition, foreign law governed GGBs holders also participated to the bond exchange in a percentage of 69%. As such, more than 95% of the issued GGBs participated in the bond exchange (€196.7 worth of GGBs out of €205.5 billion). The remaining 4.3% of GGBs (approximately €6.4 billion) was given until the 20th of April to accept the Greek Government offer to exchange their GGBs and finally another €522,33 worth of GGBs were exchanged, making the participation percentage 96,9%.

2.3. Summary

After two years of pessimistic and ominous predictions vis a vis Greece's unregulated insolvency and exit from the Eurozone, Greece, with the assistance of the EU, proceeded with re-negotiating its debt and "haircutting" same twice. The second haircut was the biggest bond exchange in global history and its immediate aftermath was that bondholders took a cut of approximately 75% on the real value of their investment[29].

In the following chapters, we shall investigate the available remedies offered to bondholders to reconcile their losses on account of such haircut. We shall first examine the protection offered by Investment Treaties and thereafter examine the EU framework and CDS.

[27] Abigail Moses, Greece Collective Action Clauses risk triggering default swaps, Bloomberg Business, February, 25th 2012, available at: http://www.businessweek.com/news/2012-02-25/greece-collective-action-clauses-risk-triggering-default-swaps.html

[28] Hellenic Republic, Ministry of Finance Press Release, 09 March 2012, available at http://av.r.ftdata.co.uk/files/2012/03/9-MARCH-2012.pdf

[29] Greece ends bond swap, participation at 96.9 pct, Associated Press *Wed, Apr 25, 2012 9:48 AM EDT*, available at: http://finance.yahoo.com/news/greece-ends-bond-swap-participation-134832139.html

CHAPTER 3

Protection under Investment Treaties

3.1 Claiming protection under Investment Treaties

A lot of the issues in relation to the promotion and the protection of foreign investments were left to multilateral or, usually, bilateral investments treaties ("BITs"). BITs are legally binding, international agreements between the state of the investor and the host state, whereby the latter guarantees a certain level of protection and a general standard of favourable treatment to investments/investors from the state of the investor in order to attract foreign investments.

As such, most BITs entail guarantees and other provisions that regulate the terms and extent of the aforementioned standard of treatment that will be awarded to foreign Investors. Those guarantees are both general, referring to the general standard of treatment that the investor will receive within the host state, and specific, particularly awarding protection against a specific type of danger that is/might be applicable in the host state. From a legal perspective the treatment of the host state towards the investor and/or his investment is evaluated on the basis of a legal principle according to which the host state guarantees a specific standard of treatment[30]. The three most common standards of treatment awarded under international investment treaties and investment codes are i) the most favoured nation treatment ii) fair and equitable treatment and iii) treatment according to International Law Rules[31]. These standards that will be examined later on, on the basis of their application to the specific circumstances are the points of reference in order to examine a Host State's treatment towards an Investor.

From the above it becomes obvious that in order for an Investor to claim protection under a BIT the following criteria need to be fulfilled:

1) He must qualify as a foreign investor under the BIT
2) His investment must qualify as an investment under the BIT
3) A breach of the standard of protection awarded by the BIT must have occurred

The first two criteria are mainly procedural issues while the third one is a substantive issue.

In the following sections, we shall examine if the above criteria are satisfied in the context of the Greek haircut and if so what are the remedies that may be available to GGBs bondholders under a BIT. In this point, it important to note that, although the various BITs differ from one another, the trend towards harmonisation of BITs is very strong. Especially, if one takes into consideration that developed states, that usually act as the investors' states, have the power and do impose their terms on host states, one can understand that there are clear

[30] Beveridge Fiona, The treatment and taxation of foreign investment under international law, Juris Publishing, 2000

[31] Panagiotis Gklavinis, International Economic Law, Sakkoulas Publications, 2009, p. 611

patterns that are evident in almost all BITs. Greece currently has signed and ratified 45 BITs with the countries mentioned in Appendix 3, whose provisions can be enforced via binding arbitrational procedures between the investor and Greece in a forum located outside its jurisdiction. On the basis of the above trend for harmonisation, there is no need for this paper to examine all 45 BITs signed by Greece but it will limit itself to the general principles found on all BITs.

3.2 Procedural Issues

In this section, specific legal issues relating to the jurisdiction and procedures of investor-State dispute settlement and their implications for the system are considered.

3.2.1 Foreign bondholders as "Investors" and GGBs as "Investments"

Firstly, it needs to be examined who is qualified to bring a claim under a BIT, i.e. who qualifies as a foreign investor. In as far as this criterion is concerned quite a lot of ink has been shed in order to determine who qualifies as a "foreign" Investor. This thesis will not elaborate this analysis, and will limit itself to state that for natural persons their nationality is the decisive factor in terms of determining the "foreign" element, while for legal persons both their place of incorporation and their place of effective management and control are decisive.

Secondly, the definition and scope of the term "investment" needs to be defined. In relation to this second criterion, most BITs have a broad definition of protected investments, and often include language such as "every kind of asset," or "every kind of investment in the territory[32]." Such broad definition of protected investments usually includes investments in real estate, stocks and bonds, claims to money or any performance having economic value, or intellectual property. It is questionable, however, if portfolio investments are included in such definition. Indeed, as mentioned above portfolio investors assume commercial risks and are not to be specifically protected by the host state.

To include portfolio investors in the definition of investors under BITs would allow investors with a small percentage (not management and control) in a company, whose only interest in a company's shares is as an investment rather than holding a stake for management purposes, to claim on the basis of a BIT if the host state failed to protect them. Tribunals had until recently not efficiently answered to whether portfolio investments could be included in the definition of investments under BITs[33]. That, however, changed with the Tribunal's award

[32] 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:

1) Interests on movable and immovable property and all other liens such as mortgages and hypothecations and other similar rights
2) Shares and various interests in companies
3) Fiscal Claims or offers of an economic value
4) Intellectual or Industrial Property Rights, Technical Methods, Trademarks and goodwill.
5) Right stemming from allotment/concession

[33]Mahnaz Malik, Recent Developments in the Definition of Investment in International Investment Agreements Second Annual Forum of Developing Country Investment Negotiators 3-4 November 2008 Marrakech, Morocco.

in *CMS v. Argentina* whereby the old criterion of the exercise of effective management and control was set aside and the language of the US-Argentina BIT was placed in forefront. As the latter did not entail an exhaustive definition of what constituted an investment, both portfolio and FDI were deemed to be included in the definition of investment. This decision is indicative of the trend to widely interpret the definition of investments under BITs so that they include portfolio investments and not to connect the essence of investment with the exercise of effective management and control[34]. Indeed, "many ICSID and other arbitral decisions… have progressively given a broader meaning to the concept of investment[35]" while in the *Abaclat et al. v. the Argentine Republic*[36] the Tribunal specifically found that portfolio investments were included within the scope of protection of the BIT.

Based on the above, GGBs may be entailed in the definition of investments under the BITs signed by the Greek Government and non-Greek bondholders qualify as foreign investors that may bring a claim under a BIT in case a breach of their standard of protection is breached.

3.2.2 Applicable Forum

Contrary to the global BIT practice, most BITs signed by Greece do not contain a reference to ICSID but provide for investor-State provisions that are purely ad hoc clauses[37]. Indicatively, the Germany-Greece BIT specifically provides for the creation of an ad hoc arbitrary body with 3 arbitrators, 2 of which will be designated by each contracting party, while the third will be chosen by the 2 pre-chosen arbitrators. The aforementioned BIT further provides that if it does not become possible for the Parties to choose the Arbitrators, same will be decided by the President of the International Court of Justice (ICJ) or the vice President if the former is unavailable. In such cases, the rules of procedure and the steps to be followed are prescribed in the BIT text and the investors must act accordingly. The substantive law on the basis of which the Arbitrators will rule is the BIT text, other Agreements that might exist between Greece and the investor's state and the general principles of international law.

3.3 Was the Greek Haircut a breach of substantive treaty standards?

To answer the above question, it would be worth examining how this issue was resolved in the case of Argentina. Indeed, since the Greek crisis started to unfold many were the analysts that pointed out that the Argentine default has many parallels with the Greek financial crisis. The facts of the Argentine default are briefly described below.

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[34]Noah Rubins, The Notion of Investment in International Investment Arbitration, Arbitrating Foreign Investment Disputes, Procedural and Substantive Legal Issues, edited by Nobert Horn, Kluwer Law International, Volume 19, 2004, p. 318

[35] Joy Mining Machinery Limited v Arab Republic of Egypt, ICSID Case No ARB/03/11 (2004)

[36]*Abaclat et al. v. the Argentine Republic*, ICSID Case No.ARB/07/5 available at http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf

[37] Rudolf Dolzer, Margrete Stevens, Bilateral Investments Treaties, International Center for Settlement of Investment Disputes, Kluwer Academic Publishers Group, p. 129

3.3.1 The Argentine Default

Argentina is an example of a country that although in the early 90s was in robust development; such development slowed down abruptly and it was followed by recession, an increase of the Debt/GDP ratio and finally led to the events of 2001. In particular, in November 2001, the Argentine Government was forced to proceed with a debt restructuring via a "voluntary" debt exchange. The aforementioned exchange entailed two stages, one ("Phase 1") that would target domestic residents and one ("Phase 2") that aimed at non-residents. The strategy of "Phase 1" was to offer local bond holders tax loans "guaranteed" by revenues collected through the financial transaction, in exchange for their bonds. In exchange for the granting of the guarantee, interest payments would be reduced and maturities extended. Creditors were given 1-3 options, depending on the instrument tendered[38].

Phase "I" resulted in the exchange of US$42 billion of debt instruments, or about 65% of the total eligible amount. Phase "II" never really materialized. Shortly thereafter, however, the Argentine Government, faced with a severe banking crisis, proceeded with additional measures closing the banks and announcing various banking and foreign exchange restrictions upon their re-opening. Finally, President Duhalde took office and proceeded with the following course of action[39]:

1) Firstly, on January 3, 2002, he confirmed the almost US$100 billion sovereign default announced by President Saá – the second largest, following the Greek haircut, sovereign debt default in recent history - suspending debt service payments to external creditors,
2) Secondly, he declared an official end to the convertibility regime, which was replaced by a dual exchange rate system.

Dehalde further proceed to devalue the peso and turn all USD guaranteed loans to Peso Guaranteed Loans. This was however just the "tip of the iceberg" for Investors. Indeed, the years that followed were unprecedented in terms of the loss that Investors sustained. In particular, between the years of 2002-2005, the Argentine government refused to negotiate any terms for restructuring of its debt with its bondholders. The main position of the Argentine Government was presented in 2003 in the September's summit in Dubai, where the Argentinean President, Mr. Kirchner asked creditors to write off 75% of Argentina's debt so as to ensure the remaining sum. This proposition was of course not met with enthusiasm by Investors.

In fact, to recover their losses, the European Creditors Alliance, an alliance of European institutional and retail investors, who together held almost half the $50 billion of defaulted private bonds in foreign hands, was created to overcome some of the potential difficulties arising from having such a diverse creditor base[40]. This creditor's alliance aimed to pressure the Argentine government in order to speed up the restructuring process. Despite the

[38] Federico Sturzenegger and Jeromin Zettelmeyer, Haircuts: Estimating Investor Losses in Sovereign Debt Restructurings,1998–2005 IMF Working Paper, WP/05/137, p.40

[39] Jwala Rambarran, Argentina's Sovereign debt Deafult and the IMF, Global Financial Governance in a Tailspin, p.7

[40] Albert Ko Argentina: The Default Option, An Alternative Solution to Restructuring Sovereign Debt International Finance Seminar

good intentions and the counter offers that the European Creditors Alliance made, very little progress was made in this regard. Indeed, President Kirchner and economy minister Lavagna had repeatedly said that they won't "yield to the Investor's pressure" and characterised their proposal unmovable. "They can pressure me all they want, but I will not change my position," Kirchner said after his meeting with U.S. President George W. Bush on January 12, 2004, during the two-day Summit of the Americas in Monterrey, Mexico. Despite appeals by the IMF for Argentine authorities to become more flexible and be open to alternatives and counter-proposals made by the creditor groups, Kirchner failed to take those appeals into consideration and continued with his unwilling position, condemning any negotiation to failure.

In 2005, the government issued a take-it or- leave-it unilateral offer on terms highly unfavourable to the creditors. In particular, on January 14th, 2005, the Argentine Government opened the bond exchange, offering to "swap" old bonds with new bonds. The new bonds were presented in Dubai and were the following three:1) a par bond with no face value reduction but with a maturity of 35 years, 2) a discount bond with a high reduction and 3) a "quasi par" bond in between, to be issued in a range of currencies[41]. The offer opened on January 12, 2005, and closed on February 25. Bondholders and the IMF criticised Argentina for its proposal as the later was clearly a process that stretched the accepted guidelines of sovereign debt negotiations. Nonetheless, participation was 76,15% of all holdings and out of the $81,8 billion face value of debt, $62,2 was exchanged for $35,2 billion of new bonds. As such Argentina successfully imposed its way out of debt, managing to reduce same by 19,6 billions, compelling investors to bear this reduction. Not all of the bond holders accepted the offer however. Indeed, nearly one-quarter of its creditors holding $19,4 billion in Argentine bonds declined the offer and turned to the Courts to satisfy their claims. Those creditors included U.S. lenders holding $2,1 billion in Argentine debt, the Paris Club holding $6,2 billion and the IMF holding $9,8 billion[42].

In November 2009, the Argentine Congress authorised a reopening of the bond exchange so that investors that had declined the offer in 2005 could participate.

Based on the above facts many were the bond holders that turned against the Argentine Government based on breach of their respective BITs. Only under the Italy-Argentina BIT and only in 2006 there were more than 180,000 bondholders that filed a claim for approximately $4.3 billion[43]. The bondholders supported that the Argentine restructuring amounted to expropriation and violated fair and equitable treatment standards under the BIT[44]. These two arguments will be examined in light of the Greek haircut by reference to the rulings of the Arbitrations in the Argentine case.

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[41] Jwala Rambarran, op. cit, p.9

[42] J. F. Hornbeck, Argentina's Defaulted Sovereign Debt: Dealing with the "Holdouts" Congressional Research Service, 7-5700 January 21, 2010, p.4

[43] Kevin P. Gallagher, Mission Creep: International Investment Agreements and Sovereign Debt Restructuring, January 12th 2012, available at: http://www.iisd.org/itn/2012/01/12/mission-creep-international-investment-agreements-and-sovereign-debt-restructuring-3/

[44] Michael Waibel, Two Worlds of Necessity in ICSID Arbitration: CMS and LG& E. Leiden Journal of International Law, 20, 2007 pp 640

3.3.2. Claim for indirect expropriation

BITs always provide special protection against expropriation, codifying a "lex specialis" against expropriation.[45] Indirect expropriation has also been interpreted to be entailed in the protection provided by BITs on the basis of the "tantamount clause[46]" as same will be explained below.

In so far as to what constitutes an indirect expropriation, it is worth mentioning that there is no specific definition. Nevertheless, international jurisprudence has set certain criteria that are conclusive to the existence of indirect expropriation. In particular, G. C. Christie in analysing two decisions of the Permanent Court of International Justice, namely *Certain German Interests in Polish Upper Silesia*, and the arbitral award in the *Norwegian Shipowners Claims* case concluded[47] (i) 'that a State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention, and (ii) 'that even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them.

Thus, based on the above analysis the following elements may be deemed decisive in terms of determining if a direct expropriation exists:

(a) the form of the government measure and the intent of the government are not determinative vis a vis the existence of indirect expropriation and

(b) the consequences of the measures and the loss suffered by investors on account of such measures are very decisive.

Further criteria have also been adopted by OECD case law; in particular those criteria are as follows[48]:

i. The degree of interference with the property right,
ii. The character of governmental measures, i.e. the purpose and the context of the governmental measure, and
iii. The interference of the measure with reasonable and investment-backed expectations.

In order therefore to conclude if the Greek haircut may constitute an indirect expropriation in the concept explained above, one must examine if the aforementioned criteria are met in its case; it must however be stated that a case of indirect expropriation will not be easy to prove.

Indeed, state measures, are prima facie a lawful exercise of powers of governments and although they may affect foreign interests considerably they may not amount to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation[49].

More particularly, the Third American Law Institute's Restatement of Foreign Relations Law of the United States, which constitutes persuasive authority, *inter alia*, in

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[45] W. Michael Reisman & Robert D. Sloane, "Indirect Expropriation and Its Valuation in the BIT Generation," 74 *The British Yearbook of International Law, 2004, p.* 115

[46] W. Michael Reisman & Robert D. Sloane, ibid, p.117

[47] G.C. Christie, What Constitutes a Taking Under International Law, 1962, 38, BYBIL, p.37

[48] Apurba Khatiwada Indirect Expropriation of Foreign Investment, 2008 p.18 available at http://www.ksl.edu.np/cpanel/pics/indirect_expropriation_apurba.pdf , also in the working paper "Indirect expropriation"the "right to regulate" in international investment law, Working Papers on International Investment, number 2004/4, p.9

[49] Ian Brownlie, "Public International Law", Oxford University Press, 6th Edition, 2003 p. 509

determining how to distinguish between an indirect expropriation and valid governmental regulation states "…a state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, …….. or other action of the kind that is commonly accepted as within the police power of the states, if it is not discriminatory[50]". The above was fully reiterated in the context of the Iran-United States Claims Tribunal, in the Too v. Greater Modesto Insurance Associates that stated "*A State is not responsible for loss of property or for other economic disadvantages resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States, provided it is not discriminatory and is not designed to cause the alien to abandon the property to the State or to sell it at a distress price…*[51]". Thus the main question to be answered in order to conclude if the Greek haircut constituted an indirect expropriation is whether the exchange of bonds with bonds of smaller face value is an exercise of general, legitimate state powers.

In exploring this question, it must first be examined if the Greek was indeed a sovereign act. In this respect, it is important to refer to the ruling of 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 to expropriation and mere breach of contractual obligations by the host state would not be deemed to give rise to a claim for expropriation[52]. Hence, it is questionable if the partial devaluation of bonds that, as mentioned, constitute forms of loan agreements between the host state and the investor could give rise to expropriation. Indeed, unless it is proven that the state has gone beyond its role as a mere party to the contract and has exercised specific sovereign powers any breach on the host state's part would only result in breach of contract[53]. 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. the Argentine Republic case. This case revolved around the facts of 2001- 2005 and in particular around the bonds restructuring.

To resolve the above dispute the Tribunal greatly engaged with the question as to whether the Argentine haircut was no more than a breach of contractual obligations or whether Argentina's acts could constitute breach of certain standard of protection awarded by the BIT. After making extensive reference to the fact that BITs are not meant to set aside or correct contractual remedies but to further impose general treaty obligations for the protection of foreign investors, the Tribunal examined the merits of the case and found that the underlying dispute "does not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors[54]". The Tribunal further acknowledged that there was no justification for such modifications on a contractual framework. Thus, Argentina's actions were "the expression of State power and not of rights or obligations Argentina had as a debtor under a specific contract" and therefore the claims

[50] Restatement of the Law Third, the Foreign Relations of the United States, American Law Institute, Volume 1, 1987, Section 712.
[51] Indirect expropriation" and the "right to regulate" in international investment law, op. cit, p. 19
[52] *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6 par.278
[53] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, para. 261
[54] *Abaclat et al. v. the Argentine Republic* op.cit. par. 325

stemming from such actions "are not pure contractual claims but treaty claims based on acts of a sovereign, which Claimants allege are in breach of Argentina's obligations under the BIT[55]".

The same may also be stated for Greece's case where not only was the second haircut the product of extensive pressure by the EU institutions on major bondholders in terms that without the haircut Greece would simply default and investors would lose all their money but also and perhaps most importantly, because Greece retrospectively imposed and triggered CAC obliging opposing bondholders to accept and participate in the bond exchange. In this regard it is obvious that Greece exercised sovereign power, especially when imposing CAC, and there is 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 and it needs to be examined, if such act will be considered to be within Greece's legitimate state powers. The Tribunal will determine the above in light of the circumstances, but given the nature of the haircut as an alteration of the repayment terms of GGBs, it is unlikely that the haircut will be considered to fall within the Greece's legitimate state powers, as this would allow States to escape liability for not honouring their agreements.

As such to decide if an indirect expropriation did in fact occur, we must refer to the case law criteria mentioned above. Undoubtedly, 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 and in particular on opposing investors been of great degree, then bond holders, and especially opposing bondholders, might have a prima facie case against Greece for expropriation.

It is here worth mentioning that there is ample case law determining that there is no need for a state to actually take possession of a tangible or make own use of an intangible right for expropriation to have taken place, but it will suffice that the State has taken such actions that would be tantamount to expropriation in terms of depriving the investor of his use or enjoyment of his investment, even if the state had no intention to use the property or right as its own. In the *Middle East Cement v. Egypt* case the Tribunal found that the investors had been deprived of the use and benefit of their investment even though they retained title over such investment[56]. In particular, the tribunal held: *When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a "creeping "or" indirect expropriation or, as in the BIT, as measures "the effect of which is tantamount to expropriation[57]."* Hence, the decisive element in concluding if an act is an indirect expropriation is if the sovereign act resulted in substantial loss of control or economic value of the investment, even if the state did not actually obtain title or right over the investment[58]. In determining the effect a state measure has had on investors, tribunals often conduct a "substantial deprivation" test to explore the degree of diminished value in a haircut,

[55] *Abaclat et al. v. the Argentine Republic* ibid par. 326
[56] Christoph Schreuer, The Concept of Expropriation under the ECT and other Investment Protection Treaties, 2005 p. 17, available at http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf
[57] Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt, ICSID Case No. ARB/99/6
[58] Ian Brownlie, op. cit. p. 534

and would thus in this case be examining the size of the Greek haircut[59]. In order to calculate the losses that investors will sustain on account of the recent Greek debt restructuring, the most appropriate formula to use is the formula suggested by Federico Sturzenegger and Jeromin Zettelmeyer[60]. According to same in order to calculate the actual losses sustained by the investors from a market approach *(H)* when a country (*i)* exits default at time (*t)* and issues new debt in exchange for the old debt facing an interest rate (r_t^i) at the exit from default, we must follow the below equation:

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

The above formula is the 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. According to the above formula the actual loses that investors sustained vis a vis the Argentine default are depicted in Appendix 4, while those of the GGB holders are likely to be of greater extend.

As shown above, bondholders will have a difficult case proving that an indirect expropriation did in fact take place. If, however, an indirect expropriation is found to have taken place in the case of the Greek Haircut and/or imposition of CAC then Greece would be obliged to pay compensation to all investors affected by the haircut and/or imposition of CAC.

3.3.3. Umbrella Clauses

Apart from the aforementioned specific protection against expropriation awarded under practically all BITs, investors may also be able to invoke BIT protection under other bases. One test followed by case law is the existence of a “pacta sunt servanda” (a.k.a. umbrella) clause in the BIT. Under such clauses all the commitments undertaken by the host state vis a vis investor(s) must be upheld. According to the aforementioned test, the existence of an umbrella clause elevates any contractual commitment to a treaty one, allowing therefore a bondholder to bring a fully judicable claim under investment arbitration[61]. Hence, under such clause a sovereign bond default could ipso facto constitute an internationally wrongful act[62]. This test was followed in Fedax v. Venezuela[63], but there was significant opposition to the generality of its use. In all events, it is worth mentioning that most BITs entered by Greece do not entail an umbrella clause, so the applicability of such clause would be very limited in Greece’s case.

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[59] Andrew Newcombe, Lluís Paradell, Law and Practice of Investment Treaties – Standards of Treatment, The Hague, Kluwer Law International, 2009 p. 2004

[60] Federico Sturzenegger and Jeromin Zettelmeyer op. cit. p.6

[61] Todd Weiler, International Investment Law and Arbitration, Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law, Cameron May, 2005 p.407

[62] Michael Waibel, Opening Pandora's Box: Sovereign Bonds in International Arbitration The American Journal of International Law, Vol. 101, No. 4 (Oct., 2007), p. 733

[63] Fedax N.V. the Republic of Venezuela, ICSID, Case No. ARB/96/3 (1998)

3.3.4 Claim for breach of fair and equitable treatment

An alternative basis of claim instead of expropriation is the well established treaty standard of fair and equitable treatment. Despite however the long and general application of the fair and equitable treatment standard, the content of such standard is not clearly defined. Indeed, each BIT may award a different content to the standard, while relying on the natural meaning of the words may be even more confusing. Case law, however, has identified certain factual circumstances that could amount to breach of the standard of fair and equitable treatment. In particular, in the ***TECMED S.A. v. the United Mexican States*** case, the Tribunal referred that the fair and equitable treatment standard stems from and is an expression of the good faith principle. This principle entails investors' basic expectations to be treated by the host state in a transparent, consistent, i.e. non arbitrary, manner[64] which would not *conflict with what a reasonable and unbiased observer would consider fair and equitable*[65].

The Tribunal further noted by reference to the findings of other tribunals' cases[66]:

"The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment".

The above standard was many times reiterated by various Tribunals and Courts. Indicatively, the UNICITRAL in its case of "*OEPC v. Ecuador*[67]" stated that there is "*an obligation not to alter the legal business environment in which the investment has been made"*. In addition, in the case of Argentina the tribunals expressly stated the importance of a stable and transparent economic environment and the importance that the reasonable expectations of investors be upheld. Specifically, in the case of *LG&E v. Argentina*[68] the Tribunal referred to the time element of those expectations and stated that investor's expectations are based on the circumstances present in the host state at the time of the investment. As such those investors that bought GGBs before the crisis and who reasonably anticipated to be paid the entire face value of their bonds plus interest on maturity were greatly surprised from the Greek haircut that totally defeated their expectations, transforming the business environment and/or undermining the legal framework of GGBs. Such bondholders may have a claim against Greece for breach of fair and equitable treatment. The same cannot be true for bondholders that bought or continued to buy GGBs after the Greek economic crisis had begun to reveal itself.

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[64] Fair And Equitable Treatment Standard In International Investment Law, *OECD* Working Papers on International Investment, Number 2004/3,*September 2004, p.38*

[65] *Mondev International LTD v. United States of America*, ICSID Case No. ARB(AF)/99/2

[66] *Técnicas Medioambientales Techmed S.A. v. the United Mexican States*, ICSID case No ARB(AF)/00/2, para.154

[67] Occidental Petroleum Corporation Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. Arb/06/11 (2004), para 240

[68] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1(2007)

Indeed, one must take into account, where the host state is facing serious economic problems. Thus, the Tribunal in the *Olguin v. Republic of Paraguay*[69] *case* noted that an experienced businessman could and should have conducted a thorough research prior to investing and that he should have been more conservative in investing in a country that has suffered severe economic problems. This principal was reiterated in the aforementioned case of *CMS v Argentina* where the Tribunal held that the effect of abnormal conditions resulting from the economic crisis in Argentina should be taken in account when assessing the scope of protection afforded to the investor by an investment treaty[70]. In particular, the Tribunal noted that: "The crisis had in itself a severe impact upon the Claimant's business, but this aspect must to some extent be attributed to the business risk the Claimant took on when investing in Argentina…... Otherwise both parties would not be sharing some of the costs of the crisis in a reasonable manner and the decision could eventually amount to an insurance policy against business risk, and outcome that, as the Respondent has rightly argued, would not be justified[71]".

In addition, to the defeat of Investors' expectations, however, there are other expressions of the standard of fair and equitable treatment, whose content is, as explained, not clearly defined. In particular, Waibel enlists a number of reasons that evidence that the standard of fair and equitable treatment is breached in the case of a forced haircut. In particular, Waibel claims that the "take-it-or-leave-it" nature of the haircut may be deemed as violating due process and being in contrast with good faith as the host state does not really take part in serious restructuring negotiations[72].

Lastly, it is worth mentioning that the standard of fair and equitable treatment is also found in customary international law. Initially, there was much debate as to the level of protection awarded by customary law in comparison to that of BITs, but as was stated by Mann already from the 80's "*In some cases, it is true, treaties merely repeat, perhaps in slightly different language, what in essence is a duty imposed by customary international law*[73]". The customary established doctrine of "fair and equitable treatment" would, however, be of little relevance to the case of the Greek haircut, as customary law did not protect portfolio investors that, as stated, ought to be aware of commercial risks and protect themselves accordingly[74].

3.3.5 Most Favoured-Nation (MFN)

Apart from the above standards that were also applicable in the case of Argentina, the Greek Haircut may also trigger yet another standard namely the most favoured nation. The latter, within the context of BITs, requires that all foreign investors are treated alike in the

[69] Olguin v. Republic of Paraguay, Case No. ARB/98/5 (2001) par. 75
[70] *CMS v Argentina* ICSID Case No ARB/01/8 (2005) para 244 and Peter Muchlinski.Caveat Investor.? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard, *ICLQ* Vol 55, July 2006 p. 543
[71] *CMS v Argentina* ibid para 248
[72] Michael Waibel, op. cit. p.752
[73] F.A. Mann, "The Legal Aspects of Money" Oxford: Clarendon Press 4th ed.,1982, p. 510
[74] M. Sornarajah op.cit., p. 10

same or similar circumstances and that no less favourable treatment is awarded to any investor on the basis of the nationality of the foreign investor.

In this case, creditors like the European Central Bank, the IMF and EU member state central banks did not/ were not even asked to take analogous haircuts on their GGBs, as with all other bondholders. Indeed, the European Central Bank exchanged its previous GGBs with new with the same nominal value and terms and without CAC, as opposed to all other bondholders that participated in the haircut that as mentioned accepted a 75% reduction on their GGBs. Such subordination of other investors may amount to breach of the MFN standard, but it is questionable if Greece actually had a choice and/or power not to accept such discrimination.

It is worth mentioning that bondholders considered this prejudicial treatment as a credit event in the context of the International Swaps and Derivatives Association's (ISDA) Credit Derivative Definitions that will be analysed below, but ISDA rejected such argument on March 1st, 2012.

3.4 Greece's Defence

3.4.1 Necessity

The doctrine of necessity is found in customary international investment law and it provides that a state may not be held liable for actions taken to "safeguard an essential interest against a grave and imminent peril", provided, however, that the criteria listed in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts are fulfilled. These criteria are: *(a) the (wrongful) actions were the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) the actions do not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity*[75].If the above criteria are met, the State will be exonerated from liability for its wrongful action. Indeed, as was stated by the Tribunal in the Russian Claim for Interest on Indemnities case[76], non-payment of public debt could be justified in extreme economic and financial circumstances. The above defence was also used by Argentina in light of the severe economic crisis that occurred in 2001. Nevertheless, the ICSID Tribunals' decisions in four cases against Argentina issued by early 2008 were problematic, partly on account of poor legal reasoning and questionable treaty interpretation and, in part, to the contradictory holdings in

[75] Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. Doc. A/56/10, 2001, art. 2, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

[76] Russia v. Turkey (Russian Indemnity), Perm. Ct. Arb, Hague Ct. Rep. (Scott) . 1912 ,

the awards[77]. In fact, three of the four Tribunals[78] have declined the necessity defence and have held Argentina fully responsible for her course of action during the financial crisis, whereas the remaining Tribunal[79] absolved Argentina of much of its responsibility for those acts.

Greece could sustain that the haircut was the only way Greece could avoid unregulated insolvency and that the rights of investors and their respective states have not been disproportionately affected. Greece would have to prove the above; as the one invoking this affirmative defence has the burden of proof to evidence its elements are met. It is, however, questionable if such assertion would be successful to preclude liability for the retroactive implementation of CAC and the haircut in general. Surely, it must be taken into account that the Greek crisis was the immediate aftermath of global financial crisis that was unprecedented in terms of proportion and unpredictable to a certain extent, but one should not forget that this was also the biggest haircut worldwide with investors losing approximately 75% of their investment. It is further worth exploring if investors may counterclaim that Greece had 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 refer to the fiscal policy of a state[80].

3.5 Summary

As shown above, if GGBs are found to fall under BITs' protection, there are various arguments/causes of action that investors may invoke to show breach of the standard of such protection. These arguments have also been used in Argentina's jurisprudence with relative success by the Investors. Greece might be able to escape liability from such arguments/claims by invoking the doctrine of necessity, whose applicability in such cases is not yet definite.

In addition, to bringing a claim on the basis of the BIT however, bondholders also have the possibility of bringing a claim on the basis of breach of contract re GGBs, as treaty violations go hand to hand with contract claims[81]. 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 it will be examined on the basis of different legal frameworks. In the case of breach of BIT, international law will be of relevance, while national law will be examined to establish breach of contract[82]. In all events, even if investors assert their claim is BIT based the Tribunal may still determine that the claim is essentially contractual[83], although, there isn't always a clear

[77] Burke-White, William W., "The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System" *Scholarship at Penn Law* Paper 202, 2008 p. 23, available at http://lsr.nellco.org/upenn_wps/202
[78] CMS v. Argentina, Enron v. Argentina, Sempra v. Argentina
[79] LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1 , (2008)
[80] Enron Corporation and Ponderosa Assets, L.P. v. the Argentine Republic, ICSID Case No. ARB/01/3 (2007)
[81] Christoph Schreuer, Travelling the BIT route of waiting routes, umbrella clauses and forks in the road, Journal of World Investment and Trade, p. 231
[82] Vivendi v. Argentina op. cit. par. 96
[83] Woodruff Case (USA v. Venezuela)

distinction between treaty and contractual claims. Indeed, as it is stated in Commentary of Article 12 of the Articles on State Responsibility:

International obligations may be established by a customary rule of international law, by a treaty or by a general principle applicable within the international legal order. States may assume international obligations by a unilateral act. An international obligation may arise from provisions stipulated in a treaty (a decision of an organ of an international organization competent in the matter, a judgment given between two States by ICJ or another tribunal, etc.). It is unnecessary to spell out these possibilities in article 12, since the responsibility of a State is engaged by the breach of an international obligation whatever the particular origin of the obligation concerned. The formula "regardless of its origin" refers to all possible sources of international obligations, that is to say, to all processes for creating legal obligations recognized by international law

The above briefly summarises the protection under Treaty protection; below we shall examine available remedies that bondholders may have under EU law in the event that Treaty protection is not an option.

CHAPTER 4

Protection under EU Law

4.1. General Framework

EU Law, although designed to lift administrative, bureaucratic or otherwise barriers between members states and allow the free movement of, inter alia, cash and subsequently investments; nonetheless it, does not accord much protection to Portfolio Investors. The basic framework vis a vis cash flow and protection of investments is laid out in the Maastricht Treaty that specifically prohibits any restriction vis a vis capital flow amongst Member States[84] or amongst Member States and third parties with the reservation of the provisions of Art.57 and 58 of the Treaty. According to the Annex 1[85]of the Directive 88/361/EEC[86] capital flows entail, inter alia, FDI and "securities investments (e.g. in shares, bonds, bills, unit trusts)" when carried out on a cross-border basis. Hence, portfolio investments are protected under this definition and a state may therefore not impede or restrict the right of bondholders to trade their bonds in accordance with their terms.

Although the above protection is very limited and could hardly apply to the case of the Greek haircut, general EU law might be of relevance to this case. In particular, EU law highly values the right to property and statutorily protects same. Indicatively, the Charter of Fundamental Rights of the EU provides that[87]:

Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

In addition, Article 1 of Protocol No. 1 to the European Human Rights Convention provides:

[84] Art. 56(1) of the Treaty
[85] http://ec.europa.eu/internal_market/capital/docs/nomenclature_en.pdf
[86] Council Directive 88/361/EEC of 24 June 1988 for the Implementation of Article 67 of the EEC Treaty.
[87] Charter of Fundamental Rights of the EU, (2000/C 364/01) Art. 17

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

It is therefore evident from the above that any arbitrary interference by the host state with the investors' property will not be allowed, in so far as same was not for the public interest. Prior to examining if the Greek haircut was an arbitrary interference and, if so, if it was justified for the protection of the public interest, we need to first establish what constitutes possessions under Protocol No. 1 to the European Human Rights Convention.

The concept of possessions has been broadly interpreted by the European Human Rights Court's jurisprudence so as not to only include the right of ownership, but also a whole range of pecuniary rights, such as rights arising from shares, patents, arbitration award, established entitlement to a pension, entitlement to a rent, and even rights arising from running of a business[88], provided the object of possession may be specifically defined. Indicatively, in *Pine Valley Developments Ltd v. Ireland*[89], the European Court of Human Rights held that **a legitimate expectation** that a certain state of affairs will occur constituted a component of the property and was therefore eligible for protection under Article 1. As such, it very likely that GGBs and the legitimate investor's expectation of re-payment will be found to constitute "possessions" under the above broad interpretation.

Having considered that GGBs do constitute "possessions", it needs to be examined if the Greek haircut constituted an arbitrary interference. In relation to the meaning of the term arbitrary, same is interpreted to mean unjustified. More particularly any interference has been held to be justified if it serves "a legitimate objective in the public or general interest[90]". In addition to serving the public interest the interference needs to also be proportional in terms that there would a fair balance between the protection and promotion of the public interest and the interference with the individual's fundamental human rights, as is the right to property.

4.2. Proportionality

As explained above a state may not arbitrary interfere with one's possessions, as the term has been interpreted. Of course the second paragraph of Article 1 reserves to the States the right to enact such laws as they deem necessary to control the use of property in accordance with the general interest. Furthermore, it has many times been upheld that the state and its respective authorities have a wide discretionary power in determining what is in the public or general interest and the European Court of Human Rights will usually not interfere with such

[88] Aida Grgiæ, Zvonimir Mataga, Matija Longar and Ana Vilfan, A guide to the implementation of the European Convention on Human Rights and its protocols, European Council, Human rights handbooks, No. 10, European Council
[89] *Pine Valley Developments Ltd* and Others *v Ireland* A 222, (1992) 16 EHRR para. 379
[90] James v. the United Kingdom, A98, (1986), 8 EHRR 123, para. 46.

judgment unless same is profoundly unjustifiable. Hence, Greece could easily claim that the haircut was in the public and general interest, an argument that will probably be upheld as according to the Greek Government and the Heads of other states and EU Institutions, the alternative to the haircut would be unregulated insolvency, something that would have catastrophic consequences for the People of Greece. Hence, the question that will define bondholder's case is the question of proportionality.

The European Court of Human Rights has many times reiterated the need of achieving "a fair balance" between the interest of the general public and the fundamental rights of individuals. That being stated, the Court accords, yet again, wide discretion to the state to determine the proportionality of a measure taken in light of the public interest. Indicatively, in the *AGOSI v. the United Kingdom* case the Court noted that "*the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question*[91]". This however does not mean that the State may act at will without taking into consideration the fundamental rights of the individuals being affected by its actions. Indeed, in a case against Greece, namely *Stran Greek Refineries and Stratis Andreadis v. Greece* that referred to an arbitration award that had via Greek legislative cct been rendered void and unenforceable, the Court decided that as the interference was neither an expropriation nor a control of use, it would have to be examined under the protection accorded by the first sentence of Article 1, i.e. as a prohibition to the peaceful enjoyment of one's possessions. The Court then proceeded with the examination of the merits of the case and in particular it examined if the standard of proportionality had been sustained by the Greek Government. Greece argued that the applicant's right emanated from a wrongfully preferential contract entered between the applicant and the illegal, military "HOUNTA" Government. The plaintiff counter argued that it would be unfair to render invalid every, otherwise valid, contractual relation that HOUNTA had entered into. The Court confirmed Greece's authority to terminate a contract which it deemed to be detrimental to the economic interests of the State. Such authority, however, did not extend to certain essential clauses of the contract, as was the arbitration clause; otherwise states would be allowed to escape jurisdiction in a dispute if arbitration had been agreed in same. In addition, Greece was the one that chose arbitration in the first place and was therefore prohibited to evade from same. Hence, the Court concluded that Greece's Government had not kept a fair balance between the public interest and the fundamental rights of the applicant and held that there was a violation of Article 1 of Protocol No. 1.

In the case of the Greek Haircut the Court's choice will not be an easy one. Indeed, the Court will have to balance between the interests of the Greek People who could have been hurt indescribably by the consequences of Greece's unregulated insolvency and the investors' right to peaceful enjoyment of their possession, in this case the GGBS. The Court must in light of these facts decide if the losses suffered by the bondholders were proportionate. It might be worth noticing that even if the Court did found that the haircut was not proportionate, same does not necessarily mean that Greece should have granted compensation to bondholders. Indeed, not all actions affecting property rights will be eligible for compensation, but only

[91] Agosi v the United Kingdom A 108,(1986), 9 EHRR 1, para. 52

those that completely remove essentially all or most of the economic value of the affected right. Indeed, the Court has found that if the investors' rights have not disappeared, but have only been substantially reduced and the situation is not "irreversible", there will be no "deprivation" under Article 1, Protocol 1 of the European Convention of Human Rights[92] and no compensation will need to be paid.

4.3 Procedural Issues

After having established that bondholders may have a case against Greece under the First Protocol of the European Human Rights Convention, it is of significance to examine how such case may be brought.

The European Human Convention allows two types applications that may be brought in light of the Convention to the European Court of Human Rights, namely individual applications that may be lodged by any natural person, group of persons, legal entity or NGO having a complaint about a violation of their rights by a Member State, and inter-State applications brought by one State against another. It is worth mentioning that, the first type of applications was widely used by individuals and up to date practically all applications have been brought by individuals.

In order, however, for an individual to be allowed to bring a claim against a member state in the European Court of Human Rights, there are two conditions that need to be met: a) a Member State must have violated one of the Articles of European Human Rights Convention and b) the individual must have first exhausted all available domestic remedies.

The meaning of exhaustion of local remedies refers to the individual/applicant's obligation to appeal to the highest domestic level of justice that could rectify the wrongful act and grand relief to the individual[93]. In the case of Greece, there are two levels of jurisdiction, namely Court of First Instance (Protodikeion) and Court of Second Instance (Efeteio) and the Supreme Court of Greece that merely reviews that due process has been followed. Initially, the case needs to be brought in the Court of First Instance that will examine the case in the first degree. The losing party will have a right to appeal the decision issued by the Court of First Instance both on the basis of procedural issues and on the merits. The appeal would be brought before the Court of Second Instance. After the latter issues its judgment, the case may no longer be examined on its merits, but the Supreme Court has jurisdiction to hear complaints on procedural issues raised by the decision of the Court of Second Instance. As such, investors that would like to bring a case on the basis of the European Convention on Human Rights, they would first have to apply in the Greek Courts and only after they would obtain a detrimental to their rights judgment by the Supreme Court of Greece may they bring a claim in the European Court of Human Rights. Taken into account the current pace of the service of the Greek Justice, it would not be inaccurate to say that the aforementioned procedure could take up to 12-15 years until the investors could have a judgment by the Supreme Court.

Investors might be able to escape the above procedure and subsequent delay if they would be able to prove that exhaustion of local remedies would be futile in their case on the

[92] Indirect expropriation" and the "right to regulate" in international investment law, op. cit, p. 10

[93] Dona Gomien, Short Guide to the European Convention on Human Rights, 3rd Edition, Council of Europe Publishing (2005) p.168

basis that Greek Courts would be biased against them. Such claim would, however, be very difficult to prove and would very difficulty grand to bondholders the right to escape all the levels of jurisdictions. Although, the Court has held that the rule of exhaustion of local remedies should be applied with flexibility and without excessive formalism but taking into account the facts of each case[94], the cases where the Court has accepted that exhaustion would be futile are very limited. Indicatively in the case of Katikaridis and others v. Greece, the court accepted that there was no reason for the applicants to exhaust all legal remedies, in concreto bring their claim in the fourth circuit of the Supreme Court, as same would be futile given the already existing decision of the Supreme Court that would be binding on the Fourth Circuit.

4.4. Summary

European Law, although does not accord specific protection to investors, nonetheless the broad interpretation of the notion of possessions found in Article 1 of the First Protocol of the European Human Rights Convention does allow investors to bring a claim against Greece for potential breach of their right to property. Of course, the outcome of that case would largely depend on how the Court will rule in relation to whether the haircut "imposed" on bondholders was proportionate in light of the circumstances. It is worth mentioning that there are no similar cases with bondholders complaining of expropriation under European Human Rights Convention's provisions, to give some guidance in relation to what would the Court take into consideration in this case.

In addition, it is important to note that before bondholders may bring their claim in the European Court of human rights they would first have to examine all remedies available by the Greek Justice.

Apart from the above remedies available under Investment Treaties and the EU Law, there is also another remedy to Investors that may be already available to them provided they had bought Credit Default Swaps. This remedy will be examined in the next chapter.

[94] *Akdivar and Others v. Turkey* , 99/1995/605/693 , Council of Europe: European Court of Human Rights, 30 August 1996, available at: http://www.unhcr.org/refworld/docid/3ae6b7224.html

CHAPTER 5

Claims for Credit Default Swaps (CDS)

5.1 CDS in the context of the Greek Financial crisis

A credit default swap is a contract in which a buyer (also known as the protection buyer) purchases protection from a seller (the protection seller) against the risk of default by a reference entity or a reference asset. The protection buyer pays a regular fee or premium to the protection seller for the life of the swap or until a credit event occurs. 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. In other words, CDS constitutes a form of insurance against certain credit events. A credit event exists, according to International Swaps and Derivatives Association's (ISDA) Credit Derivative Definitions, in 6 events including, inter alia, debt restructuring (individual CDS contracts may provide protection against all or some of the 6 credit events)[95].

As such many Investors that had seen Greece's declining course had proceeded with purchasing CDS to minimize their loss or even make profit. These investors may now be eligible for compensation according to their CDS.

5.2 Conditions for Compensation

As explained above in order for CDS to be triggered a credit event, as the term is defined in the ISDA Credit Derivatives Definition must occur. Amongst the circumstances that constitute credit events, ISDA has entailed the event of sovereign debt restructuring, i.e. a sovereign haircut. Although based on the above, one could easily come to the conclusion that the Greek haircut should have triggered CDS, nevertheless the decision for that was not an easy to reach. ISDA had expressed a preliminary view that so long as the restructuring is voluntary it does not constitute a credit event. Indeed, according to ISDA, a credit event is not deemed to have taken place when debt restructuring is on a voluntary basis. Although the CDS Definitions do not make a distinction between voluntary and mandatory events, same may be induced, as an important element of the definition of restructuring is that the event has to occur in a form that binds all holders of the "restructured" debt, i.e. even those that voted against it[96]. Based on

[95] The 6 Credit Events under ISDA Credit Derivative Definitions are:1) Bankruptcy, 2)Obligation Acceleration, 3)Obligation Default,4) Failure to Pay 5) Repudiation/Moratorium and 6) Restructuring

[96] ISDA, Update on Greek Sovereign Debt Q&A, October 2011, http://www2.isda.org/news/isda-updates-greek-sovereign-debt-qampa

these grounds ISDA had on October 2011 announced that "it does not appear to be likely that the Greek restructuring will trigger payments under existing CDS contracts".

If CDS were not triggered this would further add to investors' losses as not only will they not be collecting insurance but furthermore they would we obliged to continue to pay 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 issued prior to 31.12.2011. Indeed, on March 9th, 2012 ISDA announced that "*a Restructuring Credit Event has occurred under Section 4.7 of the ISDA 2003 Credit Derivatives Definitions (as amended by the July 2009 Supplement) following the exercise by the Hellenic Republic of collective action clauses to amend the terms of Greek law governed bonds issued by the Hellenic Republic (the* ***Affected Bonds****) such that the right of all holders of the Affected Bonds to receive payments has been reduced*[97]".

Receiving compensation is, however, not as easy as it sounds. Indeed, many legal issues might arise that may hinder compensation. Unfortunately, this thesis may not expand on all of those issues but some of them that are most relevant in Greece's case will be briefly discussed below.

5.3 Document Risk

Document risk refers to the industry's reliance on the documentation of CDS Agreements[98]. To demonstrate the issues that might be raised, the case of Argentina is yet again indicative.

In November 2001, Argentina announced a "onetime offer" to bond exchange. According to Argentina the bond swap was voluntary and as such did not constitute a credit event. 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 in greater risk that those who did. Despite what the rating Agencies state, however, there is no link between a rating agency declaration and a CDS Credit Event[99]. As such many protection sellers refused to pay compensation on CDS on the basis that the restructuring was voluntary.

This was however not left unanswered by the buyers and many cases were brought before the Court. Two of the most distinctive cases in the case of Argentina were HBK Master Fund L.P. v. JPMorgan Chase Bank and Eternity Global Master Fund L.P. v. Morgan Guaranty Trust Company of New York and JPMorgan Chase Bank. Those cases shall be examined below.

The facts in both cases are practically alike. In particular, both HBK Master Fund L.P ("HBK) and Eternity Global Master Fund L.P. ("Eternity") were private investment funds of the type commonly referred to as a "hedge funds." Both HBK and Eternity had bought CDS protection from JP Morgan Chase Bank whereby the designated credit events included, inter

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[97] EMEA DC Statement, 9th March 2012, available at http://www.isda.org/dc/docs/EMEA_Determinations_Committee_Decision_09032012.pdf

[98] Lily Tijoe, Credit Derivatives: Regulatory challenges in an exploding industry (2007) p. 405 available at: http://128.197.26.4/law/central/jd/organizations/journals/banking/archives/documents/vloume26/tijoe.pdf

[99] ISDA, Update on Greek Sovereign Debt Q&A, op.cit. p.2

alia, debt restructuring, as the term was defined in the 1999 CDS Definitions. According to the latter and in particular Paragraph 4.7(a), 'Restructuring' meant, "*with respect to one or more Obligations, including as a result of an Obligation Exchange, and in relation to an aggregate amount of not less than the Default Requirement, any one or more of the following events occurs, is agreed between the Reference Entity or a Governmental Authority and the holder or holders of such Obligations or is announced (or otherwise decreed) by a Reference Entity or a Governmental authority in a form that is binding upon a Reference Entity ...:*

(i) a reduction in the rate or amount of interest payable or the amount of scheduled interest accruals;

(ii) a reduction in the principal or premium payable at maturity or at scheduled redemption dates;

(iii) a postponement or other deferral of a date or dates for either (A) the payment or accrual of interest or (B) the payment of principal or premium;

(iv) a change in the ranking in priority of payment of any Obligation, causing the subordination of such Obligation; or

(v) any change in the currency of composition of any payment of interest or principal".

The term obligation Exchange was defined as the "mandatory transfer" of any securities, obligations, or assets to holders of Obligations in exchange for these existing obligations[100].

When the bond exchange in Argentina took place both HBK and Eternity gave written notice of a credit event to JP Morgan. The latter based on the above definitions maintained that a "Restructuring" Credit Event had not occurred because the restructuring was a voluntary one and no mandatory transfer had taken place and as such refused to pay. HBK and Eternity filed lawsuits against JP Morgan on the basis of breach of contract, fraud and/or negligent misrepresentation. The two cases had a different ending as the case of HBK was settled on May 6 2002 while the case of Eternity was partly dismissed[101]. Nevertheless the argumentation of the plaintiffs was similar in the two cases.

In particular, the plaintiffs' main argument was that in order to determine whether a Restructuring Credit Event had occurred one should focus on the effects of the exchange and not on whether an Obligation Exchange had actually occurred. According to HBK, an Obligation Exchange is not needed to trigger the Restructuring Credit Event as the result of the exchange led to a reduction in principal and interest and a deferral of the maturity dates that were all included in the definition of Restructuring[102].The Court refused to express a view as to whether a voluntary restructuring was an event of default and urged the parties to "resolve the matter in discover or if necessary a trier of fact". The same argumentation was also used in the Eternity case, where the Court of Appeals affirmed the judgment insofar as it dismissed Eternity's claims on fraud and negligent misrepresentation and reversed the judgment for breach of contract remanding for further proceedings.

In contrast with the above decisions it is also worth examining a case where JP Morgan acted as Plaintiff against Daehan Investment Trust Management ("DITM"). In this case DITM

[100] 1999 Credit Derivatives Definitions, at § 4.9

[101] As a result of this uncertainty as to whether voluntary exchanges would constitute Restructuring Credit Events, the term "Obligation Exchange" was not included in the 2003 CDS Definitions

[102] Emily R. Pollack Assessing the Usage and Effect of Credit Derivatives Harvard Law School International Finance Seminar April 28, 2003, p.20

signed a CDS agreement in 1996 for an emerging market basket note that entailed paying 10.2% of the original capital of $96 million every year as a premium to JP Morgan[103].The latter acted as the Buyer under the CDS contract while DITM acted as the Protection Seller. According to the terms of CDS, JP Morgan would not pay the principal or interest for the applicable part of the note if a credit event occurred in the relevant markets, which, inter alia, included the Argentinean market. Following, the announcement of the bond exchange in Argentina, JP Morgan Chase Bank provided notification on December 7, 2001 that it would not pay back the remaining interest and principal on the basis of the Argentine default. DITM did not accept same, and filed a law suit against JP Morgan. This case is of particular interest as in this case JP Morgan argued that the bond exchange was in fact a credit event. JP Morgan sustained that the definition of the credit event should be looked for at the applicable legal framework at the time of signing of the agreement. In particular, JP Morgan argued that, back in 1996, the term "restructuring" was used in a broader way. But its line of argumentation was not limited to that and JP Morgan proceeded with claiming that although the Argentine government had announced that the bond exchange was voluntary this was not really true from a practical perspective.

A common ground in all of these rulings, however, is that the Court first addressed the agreement between the parties to see if the issue of a sovereign debt restructuring may be considered tantamount to coercive obligation exchange on the face of the existing circumstances. One, however, may not overlook that it is not for the courts to decide such an issue. This compels the tribunals to forecast whether interested parties will choose to participate in an obligation exchange, and to perform an economic analysis of the obligation exchange[104].

From the aforementioned cases, one may understand the difficulty faced by the Courts when interpreting ambiguous terms in a credit derivatives agreement. Such uncertainty may provide the protection seller with a window to argue that the triggering event did not happen and no payment is due. Consequently, the wording of each CDS Agreement is very important in each case.

5.4 Short Squeeze Risk

Another risk that may jeopardise bondholders' right of compensation was demonstrated in the case of the Delphi Corp. bankruptcy in 2005. 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 fast money continued to massively purchase Delphi Corp's CDS. As such, when parties to these CDS attempted to buy Delphi Corp's bonds in order to obtain coverage payment, such bond's prices had climbed back up[105]. It needs to 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

[103] Jongho Kim From Vanilla Swaps to Exotic Credit Derivatives: How to Approach the Interpretation of Credit Events Fordham Journal of Corporate & Financial Law Volume 13, Issue 5 2008 Article 1, p. 34
[104] Jongho Kim ibid p. 34
[105] Richard Beales, Uncertain Road ahead for Delphi, FIN. TIMES, Nov. 8, 2005,

compensation. In the case of Delphi Corp, after months of negotiations between CDS holders an auction was held to determine the remuneration that protection buyers were entitled. 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[106]" and that no physical deliveries were required.

Short squeeze risk is also of relevance in the Greek Haircut case, where since Greece entered into the bail-out mechanism the number of CDS purchased was significantly increased partly because of fear of Greece defaulting and partly on account of speculators looking for a quick gain. This just goes to show, that lack of supervision and regulation in this field as well as the unregulated settlement of payments procedure.

5.4 Conclusion

Bondholders with CDS have been awarded the possibility of a prompt remedy or diminution of their damage via claims under CDS. Indeed, following ISDA's decision that a credit event has occurred investors were on the 19th of March called to participate in the action to determine bonds selling price. After such point the CDS policy of each bondholder may determine if compensation will be awarded.

[106] Lily Tijoe, op.cit. p. 403

CHAPTER 6

Special Enforcement Issues

Enforcement is the motive for investors to pursue their claims against the Host State. It is the result of the judicial process. Nevertheless, enforcement against states is neither easy nor common. Indeed, one of the issues that investors will be called to face is sovereign immunity. The implications of sovereign immunity will be analysed below.

6.1. Immunity from Enforcement

There has been a lot of debate whether a state may invoke the foreign nation immunity doctrine ("State Immunity") in order to avoid enforcement of the award. The doctrine of State Immunity against enforcement restricts the powers of enforcement of national courts or other organs of state against the property of another state found in its jurisdiction.

The scope and content of State Immunity from enforcement is far more disputed than jurisdictional immunity and there is no uniform global practice. Indeed, different countries have adopted different approaches, and the practice of nationals Courts in Europe is anything but uniform in this field. Nevertheless, some common elements have emerged as most States have abandoned the notion of absolute sovereign immunity against enforcement and have adopted a more limited application of the aforementioned doctrine.

Most specifically, one of the most decisive factors to determine the extent of immunity from enforcement is prevailingly the purpose of the property against which enforcement measures are sought[107]. Indeed, in the *Philippine Embassy Bank Account Case*, the German Constitutional Court stated that[108]:

[t]here is a general rule of international law that execution by the State having jurisdiction on the basis of a judicial writ of execution against a foreign State, issued in relation to non-sovereign action (acta iure gestionis) of that State upon that State's things located or occupied within the national territory of the State having jurisdiction, is inadmissible without assent by the foreign State, insofar as those things serve sovereign purposes of the foreign State at the time of commencement of the enforcement measure.

As evident, the aforementioned decision differentiates between property serving for sovereign purposes that is immune from execution/enforcement and property for non-sovereign/commercial purposes that is not immune. This distinction is also found in the case

[107] Bouchez, 'The Nature and Scope of State Immunity from Jurisdiction and Execution', 10 New York International Law (1979) p. 17

[108] Bundesverfassungsgericht, 13 Dec. 1977, 46 BVerfG 342; 65 ILR 146, p. 167

law of other European countries, such as Spain, Italy and the Netherlands[109]. The aforementioned principal was also upheld in a Belgian judgment, while even Swiss Courts that used to accept an absolute immunity have now accepted that property used for commercial purposes may be the object of execution. France also acknowledges the aforementioned distinction between property used for sovereign as and property used for private/ commercial purposes but further requires that a link between the property against which execution is sought and the original claim is proven. The link need not be proven if the property is public but not national.

Another limitation to the doctrine of immunity from enforcement is the private law character of the transaction[110]. French Law goes even further granting immunity only if the State's act is either an "acte de puissance publique" or that it have been carried out "dans l'intérêt d'un service public"[111]. In the case of the Greek haircut, it has been above been discussed that it remains to be examined if the Greek haircut will be considered a breach of contract or if it will be considered an act for the public interest, thus it will have to be examined if Greece would be able to successfully claim sovereign immunity to prevent enforcement of its assets found abroad.

It needs to be mentioned that if states could easily invoke the aforementioned doctrine to avoid their obligations out of awards, any action taken against them and in this case against Greece would be without any purpose. Therefore, a State that successfully relies on the doctrine of State immunity from enforcement may be in violation of its obligation under the Investment Treaties or European Law.

In the case of ICSID adjudication, as in the case of Argentina, it would be a treaty violation for a Contracting State to refuse to enforce an award, and non-compliance with Article 54 would then carry the consequences of State responsibility, including the revival of diplomatic protection under Art.27(1) of the ICSID Convention.

On account of the above, it comes as no surprise that since ICSID's creation, all countries have complied with their obligation to pay an arbitral award once its determination was finalized. This may, however, be challenged in the case of Argentina. In particular, as stated above the awards issued so far are remarkably high, awarding more than 100.000 million in each case, and should all pending cases be upheld, Argentina may be faced with having to pay more than $17 billion[112]. This debt is not proportionate taken into account the economic situation of Argentina and if Argentina is obliged to pay same, that very fact alone may initiate another financial crisis in Argentina and may pull same in worst levels of poverty and recession. It, therefore, comes as no surprise that the Argentine Government questioned the awards and criticised ICSID as being biased.

Lastly, it needs to be stated that even if immunity from enforcement is not an absolute immunity, Investors may be left without a remedy as finding commercial property is not always easy. Indeed, enforcement may only be "forced" in foreign states, where Greece may

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[109] August Reinisch European Court Practice Concerning State Immunity from Enforcement Measures The European Journal of International Law Vol. 17 no.4, 2006; Vol. 17 No. 4, p. 803–836

[110] David Gaukrodger, Foreign State Immunity and Foreign Government Controlled Investors OECD Working Papers on International Investment 2010/2, p. 18

[111] P. Mayer and V. Heuzé, Droit international privé 2007 (9th ed.) p. 325.

[112] Charity L. Goodman, ibid, p. 478

have limited assets that will usually be used for sovereign property that will hence be not subject to enforcement.

CHAPTER 7

Conclusion

This thesis dealt with the Greek Financial Crisis and addressed the remedies available to bondholders of GGBs following the haircut that took place on the 9th of March 2012. An attempt was made to identify the aforementioned remedies by contrasting the case of Greece with a similar and recent sovereign debt restructuring/default case, that of Argentina. The aforementioned comparison helped to explore the benefits and disadvantages of its available remedy. In addition, a brief presentation of procedural issues was attempted in order to provide a more complete view on the efficiency of the available remedies.

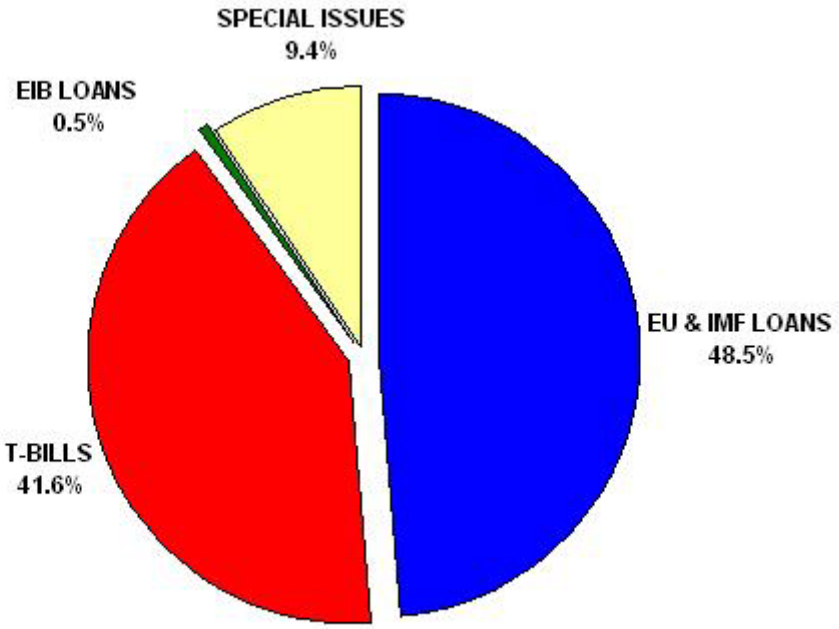
From the comparison and further research it has become evident that although there are remedies available under International Investment Treaties, European Law and separate insurance agreements like CDS, nonetheless the fact remains that these remedies do not provide full and sufficient protection to investors and a vacuum vis a vis effective protection of investors in cases of sovereign defaults continues to exist. Indeed, despite the many incidents of sovereign default in the last decades there continues not to be any legal framework establishing the Investors status in the negotiations for the sovereign debt restructuring as well as their rights and remedies once same is completed.

With the Greek economic crisis Investors have been called to accept a 53% haircut, while this might not be the last reduction. Although from the above it has become evident that Investors have recourse against defaulting states, nevertheless one may not overlook the fact that this process is slow, expensive and often futile as finding foreign public commercial property is not rather.

It therefore comes as no surprise Foreign Direct Investments and generally Investors' protectionism is on the rise, with screening of inward M&As becoming more frequent, typically, this is being done under the guise of "national interest" or similar concepts[113]. As such it is now more than ever crucial that the International Community faces this timeless problem and sets a legal framework regulating the procedure to be followed in case of sovereign default and establishing the investors negotiating power.

[113] Karl P. Sauvant, FDI Protectionism Is on the Rise, Policy Research Working Paper 5052 The World Bank Poverty Reduction and Economic Management Network International Trade Department, September 2009

Appendix 1



Source Greek Public Debt Management Agency
Data: 31.12.2011

Appendix 2

Figure 1: Barclays Capital estimated top 40 holders of Greek government bonds and Greek debt

Rank	Country	Name	Bonds and bills (€ bn)	Loans (€ bn)	Cumulative bonds holdings (€ bn)	Cumulative % of bonds	Cumulative debt (€ bn)	Cumulative % of debt	As of
1	Euro	Eurosystem SMP*	45.0	-	45	16%	45	13%	Q1 11
2	Euro	EU loans		38.0	45	16%	83	23%	Q1 11
3	Greece	Greek public sector funds	30.0	-	75	26%	113	31%	Q1 11
4	SWF	RoW official institutions (probably 3-5, Asia)*	25.0	-	100	35%	138	38%	Q4 09
5	IMF	IMF loans		15.0	100	35%	153	43%	Q1 11
6	Greece	National Bank of Greece	13.2	5.4	113	40%	172	48%	Q1 11
7	Euro	Euro area NCBs (BoG, BdF, BoP, BoI, etc)*	13.1	-	126	44%	185	51%	Q4 09
8	Greece	Eurobank EFG	9.0	-	135	47%	194	54%	Q4 10
9	Greece	Piraeus (net)	8.0	-	143	50%	202	56%	Q1 11
10	Germany	FMS (ex Depfa/Hypo Real Estate)	6.3	-	150	52%	208	58%	Q4 10
11	Greece	Bank of Greece legacy loans		6.0	150	52%	214	59%	Q1 11
12	France	BNP	5.0	-	155	54%	219	61%	Q4 10
13	Greece	ATE	4.6	-	159	56%	224	62%	Q4 10
14	Greece	AlphaBank	3.7	-	163	57%	227	63%	Q1 11
15	Bel/Lux/France	Dexia	3.5	-	166	58%	231	64%	Q4 10
16	Greece	Hellenic Postbank	3.1	-	169	59%	234	65%	Q4 10
17	Italy	Generali	3.0	-	172	61%	237	66%	Q4 10
18	Germany	Commerzbank	2.9	-	175	62%	240	67%	Q4 10
19	France	Societe Generale	2.9	-	178	63%	243	67%	Q4 10
20	Greece	Marfin	2.3	-	180	63%	245	68%	Q4 10
21	France	Groupama	2.0	-	182	64%	247	69%	Q4 10
22	France	CNP	2.0	-	184	65%	249	69%	Q4 10
23	Greece	Bank of Cyprus	1.8	-	186	65%	251	70%	Q1 11
24	Germany	Deutsche Bank/Deutsche Postbank	1.6	-	188	66%	252	70%	Q4 10
25	Germany	LBBW	1.4	-	189	66%	254	70%	Q1 10
26	Netherlands	ING	1.4	-	191	67%	255	71%	Q1 11
27	Germany	Allianz	1.3	-	192	67%	256	71%	Q4 10
28	France	BPCE	1.2	-	193	68%	258	72%	Q4 10
29	Belgium	Ageas	1.2	-	194	68%	259	72%	Q1 11
30	France	AXA	1.1	-	195	69%	260	72%	Q4 10
31	UK	RBS	1.1	-	197	69%	261	73%	Q4 10
32	Germany	DZ Bank	1.0	-	198	69%	262	73%	Q4 10
33	Italy	Unicredito	0.9	-	199	70%	263	73%	Q4 10
34	Italy	Intesa San Paolo	0.8	-	199	70%	264	73%	Q4 10
35	Austria	KA Finanz	0.8	-	200	70%	265	73%	Q4 10
36	UK	HSBC	0.8	-	201	71%	265	74%	Q4 10
37	Austria	Erste Bank	0.7	-	202	71%	266	74%	Q4 10
38	Germany	Munich Re	0.7	-	202	71%	267	74%	Q1 11
39	Netherlands	Rabobank (gross)*	0.6	-	203	71%	268	74%	Q4 10
40	France	Credit Agricole	0.6	-	204	71%	268	74%	Q4 10
41	Belgium	KBC	0.6	-	204	72%	269	75%	Q4 10
		Others	80.7	10.6	285	100%	360	100%	
		Total	285.0	75.0	285	100%	360	100%	

Note: this is not including some of the asset management companies, which may have some exposures above €500mm. "*" in the fourth column indicates that these are Barclays Capital best estimates, rather than publicly available data.
Source: Barclays Capital, Bank of Greece, EU, IMF, company reports, media reports

4 July 2011 2

Source: www.ftd.de/download/binary/.../file.../bin-pdf-european-rates.pdf

Appendix 3

Total number of Bilateral Investment Treaties concluded by Greece by 1 June 2011

Partner	Date of signature	Date of entry into force
Albania	1-Aug-91	4-Jan-95
Algeria	20-Feb-00	21-Sep-07
Argentina	26-Oct-99	---
Armenia	25-May-93	28-Apr-95
Azerbaijan	21-Jun-04	3-Sep-06
Bosnia and Herzegovina	12-Dec-00	15-Jun-07
Bulgaria	12-Mar-93	29-Apr-95
Chile	10-Jul-96	27-Oct-02
China	25-Jun-92	21-Dec-93
Congo, DR	26-Apr-91	---
Croatia	18-Oct-96	21-Oct-98
Cuba	18-Jun-96	18-Oct-97
Cyprus	30-Mar-92	26-Feb-93
Czech Republic	3-Jun-91	31-Dec-92
Egypt	16-Jul-93	6-Apr-95
Estonia	17-Apr-97	7-Jul-98
Georgia	9-Nov-94	3-Aug-96
Germany	27-Mar-61	15-Jul-63
Hungary	26-May-89	1-Feb-92
India	26-Apr-07	10-Apr-08
Iran	13-Mar-02	9-Jan-09
Jordan	21-Feb-05	8-Feb-07
Kazakhstan	26-Jun-02	---
Korea, Republic of	25-Jan-95	4-Nov-95
Latvia	20-Jul-95	9-Feb-98
Lebanon	24-Jul-97	17-Jul-99
Lithuania	19-Jul-96	10-Jul-97
Mexico	30-Nov-00	26-Sep-02
Moldova	23-Mar-98	27-Feb-00
Morocco	16-Feb-94	28-Jun-00
Poland	14-Oct-92	20-Feb-95
Romania	23-May-97	11-Jun-98
Russian Federation	30-Jun-93	23-Feb-97
Serbia	25-Jun-97	13-Mar-98
Slovakia	3-Jun-91	31-Dec-92
Slovenia	29-May-97	11-Feb-00
South Africa	19-Nov-98	5-Sep-01
Syrian Arab Republic	23-Feb-03	27-Feb-04
Tunisia	31-Oct-92	21-Apr-95
Turkey	20-Jan-00	24-Nov-01
Ukraine	1-Sep-94	4-Jan-97
Uzbekistan	1-Apr-97	8-May-98
Vietnam	13-Oct-08	---

Source: UNCTAD

Appendix 4

(Argentina Investor's Losses)

Table 11. Argentina's 2005 Exchange (January-February 2005) (continued)

	Global 19	Global 20	Global 27	Global 29	Global 30	Global 31	Global 31N	PRE 4	Pre 6	PRO2
Characteristics of Old Instruments										
Amount outstanding (US$ mn)	146.8	121.7	809.5	125.0	166.0	13.2	8,595.2	259.9	73.5	332.6
Maturity date	2/25/19	2/1/20	9/19/27	3/1/29	7/21/30	1/31/31	6/19/31	9/1/02	1/1/10	4/1/07
Remaining Life (years)	13.98	14.92	22.55	14.16	25.39	25.92	26.30	Matured	2.79	1.00
Coupon (percent)	12.125	12	9.75	8.875	10.25	12	12	1mL flat	1mL flat	1mL flat
Original Currency	USD	USD	USD	USD	USD	USD	USD	USD	USD	USD
PV of past due principal and interest (in US$) 1/	43.3	42.8	34.8	36.3	36.6	42.9	0.0	26.4	0.0	47.2
Compound rate (in percent per annum)	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25
PV of future cash flow on April 1 2005 (in US$) 1/	135.5	135.1	112.6	101.7	117.3	135.9	214.5	0.0	107.4	26.1
Discount rate (in percent)	8.14	8.20	8.67	8.15	8.85	8.88	8.91	N/A	7.51	7.41
Present value including PDI and PDP (in US$)	178.8	178.0	147.4	138.0	154.0	178.7	214.5	26.4	107.4	73.3
New Instruments and Cash obtained										
Option 1. PAR in US$ (35 year bond with step-up coupon, no face value reduction)										
Price on 3/4/05 (per unit of principal of new bond)	0.375	0.375	0.375	0.375	0.375	0.375	0.375	0.375	0.375	0.375
Units obtained 1/	104.2	105.0	102.8	103.0	104.6	105.0	106.4	17.0	111.1	67.1
Cash payment obtained (in US$) 1/	1.7	1.7	1.7	1.7	1.7	1.7	1.8	0.3	1.8	1.1
Total value obtained (in US$) 1/	40.8	41.1	40.2	40.3	40.9	41.1	41.7	6.6	43.5	26.3
Option 2. PAR in AR$ (35 year bond with step-up coupon, no face value reduction)										
Price on 3/4/05 (per unit of principal of new bond)	0.395	0.395	0.395	0.395	0.395	0.395	0.395	0.395	0.395	0.395
Units obtained 1/ 2/	304.1	306.3	299.8	300.4	305.0	306.3	310.5	49.5	324.1	195.8
Cash payment obtained (in AR$) 1/	2.4	2.4	2.4	2.4	2.4	2.4	2.4	0.4	2.6	1.5
Total value obtained (in AR$)	122.5	123.4	120.8	121.0	122.9	123.4	125.1	20.0	130.6	78.9
Total value obtained (in US$) 3/	41.8	42.1	41.2	41.3	41.9	42.1	42.7	6.8	44.6	26.9
Option 3. DISCOUNT in US$ (30 year bond with step-up coupon, face value reduction of 66.3 percent)										
Price on 3/4/05 (per unit of principal of new bond)	0.944	0.944	0.944	0.944	0.944	0.944	0.944	0.944	0.944	0.944
Units obtained 1/	35.1	35.4	34.6	34.7	35.2	35.4	35.9	5.7	37.4	22.6
Cash payment obtained (in US$) 1/	1.4	1.4	1.4	1.4	1.4	1.4	1.4	0.2	1.5	0.9
Total value obtained (in US$) 1/	34.6	34.8	34.1	34.1	34.7	34.8	35.3	5.6	36.8	22.2
Option 4. DISCOUNT in AR$ (30 year bond with step-up coupon, face value reduction of 66.3 percent)										
Price on 3/4/05 (per unit of principal of new bond)	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050
Units obtained 1/ 2/	102.5	103.2	101.0	101.2	102.8	103.2	104.6	16.7	109.2	66.0
Cash payment obtained (in AR$) 1/	2.9	2.9	2.8	2.8	2.9	2.9	2.9	0.5	3.1	1.9
Total value obtained (in AR$)	110.5	111.3	108.9	109.1	110.8	111.3	112.8	18.0	117.7	71.1
Total value obtained (in US$) 3/	37.7	38.0	37.2	37.2	37.8	38.0	38.5	6.1	40.2	24.3
Option 5. QUASI-PAR (in AR$, 42 year capitalizing bond, face value reduction of 30.1 percent)										
Value on 3/4/05 (per unit of principal of new bond)	0.551	0.551	0.551	0.551	0.551	0.551	0.551	0.551	0.551	0.551
Units obtained 1/ 2/	212.6	214.1	209.6	210.0	213.2	214.1	217.0	34.6	226.5	136.8
Cash payment obtained	-	-	-	-	-	-	-	-	-	-
Total value obtained (in AR$)	117.2	118.0	115.5	115.8	117.5	118.0	119.6	19.1	124.9	75.4
Total value obtained (in US$) 3/	40.0	40.3	39.4	39.5	40.1	40.3	40.8	6.5	42.6	25.7
Haircut based on Option 1 (in percent)	77.2	76.9	72.7	70.8	73.4	77.0	80.6	74.8	59.5	64.1
Haircut based on Option 2 (in percent)	76.6	76.3	72.0	70.1	72.8	76.4	80.1	74.2	58.5	63.3
Haircut based on Option 3 (in percent)	80.7	80.4	76.9	75.3	77.5	80.5	83.5	78.7	65.7	69.6
Haircut based on Option 4 (in percent)	78.9	78.7	74.8	73.0	75.4	78.7	82.1	76.8	62.6	66.9
Haircut based on Option 5 (in percent)	77.6	77.4	73.3	71.4	73.9	77.5	81.0	75.4	60.3	64.9
Weighted average 4/	78.1	77.9	73.8	72.0	74.5	78.0	81.4	75.9	61.2	65.6

1/ Per 100 units of principal at issue.
2/ Using exchange rate of 2.9175 AR$ per US$ prevailing on 12/31/03.
3/ Using exchange rate of 2.93 AR$ per US$.
4/ Using aggregate face value of the five options as weights (Option 1 and 2: US$15 bn; Option 3 and 4: $US11.9 bn; Option 5 about US$8.3 bn)

Table 11. Argentina's 2005 Exchange (January-February 2005) (continued)

	PRO4	PRO6	PRO8	PRO10	Hidro	Bonex 92	Radar 1	Radar 2	Radar 3	Radar 4
Characteristics of Old Instruments										
Amount outstanding (US$ mn)	452.3	527.6	14.7	51.5	18.2	150.0	349.5	351.7	361.9	232.0
Maturity date	12/28/10	4/15/07	1/1/16	4/15/07	12/2/08	9/15/02	4/24/03	5/28/03	7/24/06	8/8/06
Remaining Life (years)	2.84	1.13	5.75	1.13	1.84	Matured	Matured	Matured	1.38	1.42
Coupon (percent)	1mL flat	1mL flat	1mL flat	3m Lflat	1mL flat	6mL flat	3dlar+405	3dlar+405	3dlar+405	3dlar+405
Original Currency	USD	USD	USD	USD	USD	USD	USD	USD	USD	USD
PV of past due principal and interest (in US$) 1/	52.4	56.6	0.0	49.0	48.9	13.3	112.3	115.9	20.9	19.1
Compound rate (in percent per annum)	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25
PV of future cash flow on April 1 2005 (in US$) 1/	74.5	35.0	101.2	54.6	47.4	0.0	0.0	0.0	96.7	96.5
Discount rate (in percent)	7.51	7.41	7.67	7.41	7.45	N/A	N/A	N/A	7.43	7.43
Present value including PDI and PDP (in US$)	126.9	91.5	101.2	103.6	96.3	13.3	112.3	115.9	117.5	115.5
New Instruments and Cash obtained										
Option 1. PAR in US$ (35 year bond with step-up coupon, no face value reduction)										
Price on 3/4/05 (per unit of principal of new bond)	0.375	0.375	0.375	0.375	0.375	0.375	0.375	0.375	0.375	0.375
Units obtained 1/	124.3	84.4	111.1	100.5	91.0	12.6	103.0	101.4	102.7	102.9
Cash payment obtained (in US$) 1/	2.1	1.4	1.8	1.7	1.5	0.2	1.7	1.7	1.7	1.7
Total value obtained (in US$) 1/	48.7	33.1	43.5	39.4	35.6	4.9	40.3	39.7	40.2	40.3
Option 2. PAR in AR$ (35 year bond with step-up coupon, no face value reduction)										
Price on 3/4/05 (per unit of principal of new bond)	0.395	0.395	0.395	0.395	0.395	0.395	0.395	0.395	0.395	0.395
Units obtained 1/ 2/	362.7	246.2	324.1	293.2	265.4	36.8	300.4	296.0	299.7	300.2
Cash payment obtained (in AR$) 1/	2.9	1.9	2.6	2.3	2.1	0.3	2.4	2.3	2.4	2.4
Total value obtained (in AR$)	146.1	99.2	130.6	118.1	106.9	14.8	121.0	119.2	120.8	121.0
Total value obtained (in US$) 3/	49.9	33.9	44.6	40.3	36.5	5.1	41.3	40.7	41.2	41.3
Option 3. DISCOUNT in US$ (30 year bond with step-up coupon, face value reduction of 66.3 percent)										
Price on 3/4/05 (per unit of principal of new bond)	0.944	0.944	0.944	0.944	0.944	0.944	0.944	0.944	0.944	0.944
Units obtained 1/	41.9	28.4	37.4	33.9	30.7	4.3	34.7	34.2	34.6	34.7
Cash payment obtained (in US$) 1/	1.7	1.1	1.5	1.4	1.2	0.2	1.4	1.4	1.4	1.4
Total value obtained (in US$) 1/	41.2	28.0	36.8	33.3	30.2	4.2	34.1	33.6	34.1	34.1
Option 4. DISCOUNT in AR$ (30 year bond with step-up coupon, face value reduction of 66.3 percent)										
Price on 3/4/05 (per unit of principal of new bond)	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050
Units obtained 1/ 2/	122.2	83.0	109.2	98.8	89.4	12.4	101.2	99.7	101.0	101.2
Cash payment obtained (in AR$) 1/	3.4	2.3	3.1	2.8	2.5	0.3	2.8	2.8	2.8	2.8
Total value obtained (in AR$)	131.8	89.5	117.7	106.5	96.4	13.4	109.1	107.5	108.9	109.1
Total value obtained (in US$) 3/	45.0	30.5	40.2	36.4	32.9	4.6	37.2	36.7	37.2	37.2
Option 5. QUASI-PAR (in AR$, 42 year capitalizing bond, face value reduction of 30.1 percent)										
Value on 3/4/05 (per unit of principal of new bond)	0.551	0.551	0.551	0.551	0.551	0.551	0.551	0.551	0.551	0.551
Units obtained 1/ 2/	253.5	172.1	226.5	205.0	185.5	25.8	210.0	206.9	209.5	209.9
Cash payment obtained	-	-	-	-	-	-	-	-	-	-
Total value obtained (in AR$)	139.8	94.9	124.9	113.0	102.3	14.2	115.7	114.1	115.5	115.7
Total value obtained (in US$) 3/	47.7	32.4	42.6	38.6	34.9	4.8	39.5	38.9	39.4	39.5
Haircut based on Option 1 (in percent)	61.6	63.9	57.0	62.0	63.0	62.7	64.1	65.7	65.8	65.1
Haircut based on Option 2 (in percent)	60.7	63.0	56.0	61.1	62.1	61.8	63.2	64.9	64.9	64.3
Haircut based on Option 3 (in percent)	67.5	69.4	63.6	67.8	68.7	68.5	69.6	71.0	71.0	70.5
Haircut based on Option 4 (in percent)	64.6	66.6	60.3	64.9	65.8	65.6	66.8	68.3	68.4	67.8
Haircut based on Option 5 (in percent)	62.4	64.6	57.9	62.8	63.7	63.5	64.8	66.4	66.5	65.8
Weighted average 4/	63.2	65.4	58.8	63.6	64.6	64.3	65.6	67.2	67.2	66.6

1/ Per 100 units of principal at issue.
2/ Using exchange rate of 2.9175 AR$ per US$ prevailing on 12/31/03.
3/ Using exchange rate of 2.93 AR$ per US$.
4/ Using aggregate face value of the five options as weights (Option 1 and 2: US$15 bn; Option 3 and 4: $US11.9 bn; Option 5 about US$8.3 bn)

Table 11. Argentina's 2005 Exchange (January-February 2005) (continued)

	Celtic 2	Span 02	Letras T9	Letras T10	Letras T10	Letras T10	Letras T10	RML	Pagare III
Characteristics of Old Instruments									
Amount outstanding (US$ mn)	279.1	130.1	448.5	119.7	116.8	25.0	30.8	561.8	4.0
Maturity date	9/4/07	11/30/02	3/15/02	2/15/02	3/8/02	2/22/02	3/22/02	4/16/02	4/24/02
Remaining Life (years)	2.50	Matured	Matured	Matured	Matured	Matured	Matured	Matured	Matured
Coupon (percent)	adlar+405	rs. linked	zero	zero	zero	zero	zero	9	uesta+400
Original Currency	USD	USD	USD	USD	USD	USD	USD	USD	USD
PV of past due principal and interest (in US$) 1/	19.1	117.7	103.8	103.9	103.8	103.9	103.8	108.4	107.6
Compound rate (in percent per annum)	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25
PV of future cash flow on April 1 2005 (in US$) 1/	93.8	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Discount rate (in percent)	7.49	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Present value including PDI and PDP (in US$)	112.9	117.7	103.8	103.9	103.8	103.9	103.8	108.4	107.6
New Instruments and Cash obtained									
Option 1. PAR in US$ (35 year bond with step-up coupon, no face value reduction)									
Price on 3/4/05 (per unit of principal of new bond)	0.375	0.375	0.375	0.375	0.375	0.375	0.375	0.375	0.375
Units obtained 1/	103.0	101.2	100.0	100.0	100.0	100.0	100.0	101.9	103.1
Cash payment obtained (in US$) 1/	1.7	1.7	1.7	1.7	1.7	1.7	1.7	1.7	1.7
Total value obtained (in US$) 1/	40.3	39.6	39.2	39.2	39.2	39.2	39.2	39.9	40.4
Option 2. PAR in AR$ (35 year bond with step-up coupon, no face value reduction)									
Price on 3/4/05 (per unit of principal of new bond)	0.395	0.395	0.395	0.395	0.395	0.395	0.395	0.395	0.395
Units obtained 1/ 2/	300.4	295.2	291.8	291.8	291.8	291.8	291.8	297.2	300.8
Cash payment obtained (in AR$) 1/	2.4	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.4
Total value obtained (in AR$)	121.0	118.9	117.5	117.5	117.5	117.5	117.5	119.7	121.2
Total value obtained (in US$) 3/	41.3	40.6	40.1	40.1	40.1	40.1	40.1	40.9	41.4
Option 3. DISCOUNT in US$ (30 year bond with step-up coupon, face value reduction of 66.3 percent)									
Price on 3/4/05 (per unit of principal of new bond)	0.944	0.944	0.944	0.944	0.944	0.944	0.944	0.944	0.944
Units obtained 1/	34.7	34.1	33.7	33.7	33.7	33.7	33.7	34.3	34.7
Cash payment obtained (in US$) 1/	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.4
Total value obtained (in US$) 1/	34.1	33.6	33.2	33.2	33.2	33.2	33.2	33.8	34.2
Option 4. DISCOUNT in AR$ (30 year bond with step-up coupon, face value reduction of 66.3 percent)									
Price on 3/4/05 (per unit of principal of new bond)	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050
Units obtained 1/ 2/	101.2	99.5	98.3	98.3	98.3	98.3	98.3	100.2	101.4
Cash payment obtained (in AR$) 1/	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8	2.8
Total value obtained (in AR$)	109.1	107.3	106.0	106.0	106.0	106.0	106.0	108.0	109.3
Total value obtained (in US$) 3/	37.3	36.6	36.2	36.2	36.2	36.2	36.2	36.9	37.3
Option 5. QUASI-PAR (in AR$, 42 year capitalizing bond, face value reduction of 30.1 percent)									
Value on 3/4/05 (per unit of principal of new bond)	0.551	0.551	0.551	0.551	0.551	0.551	0.551	0.551	0.551
Units obtained 1/ 2/	210.0	206.4	203.9	203.9	203.9	203.9	203.9	207.8	210.2
Cash payment obtained	-	-	-	-	-	-	-	-	-
Total value obtained (in AR$)	115.8	113.8	112.4	112.4	112.4	112.4	112.4	114.5	115.9
Total value obtained (in US$) 3/	39.5	38.8	38.4	38.4	38.4	38.4	38.4	39.1	39.6
Haircut based on Option 1 (in percent)	64.3	66.3	62.3	62.3	62.3	62.3	62.3	63.2	62.5
Haircut based on Option 2 (in percent)	63.4	65.5	61.4	61.4	61.4	61.4	61.4	62.3	61.6
Haircut based on Option 3 (in percent)	69.7	71.5	68.1	68.1	68.1	68.1	68.1	68.8	68.2
Haircut based on Option 4 (in percent)	67.0	68.9	65.2	65.2	65.2	65.2	65.2	66.0	65.4
Haircut based on Option 5 (in percent)	65.0	67.0	63.0	63.1	63.0	63.1	63.0	63.9	63.3
Weighted average 4/	65.8	67.7	63.9	63.9	63.9	63.9	63.9	64.7	64.1

1/ Per 100 units of principal at issue.
2/ Using exchange rate of 2.9175 AR$ per US$ prevailing on 12/31/03.
3/ Using exchange rate of 2.93 AR$ per US$.
4/ Using aggregate face value of the five options as weights (Option 1 and 2: US$15 bn; Option 3 and 4: $US11.9 bn; Option 5 about US$8.3 bn)

Table 11. Argentina's 2005 Exchange (January-February 2005) (continued)

	Pagare IV	Pagare V	Pagare VI	Pagare A	Pagare B	Pagare C	'agare 200	Global F	FRB	Discount
Characteristics of Old Instruments										
Amount outstanding (US$ mn)	11.3	1.4	20.7	197.8	130.0	75.0	15.0	181.6	1,637.2	800.5
Maturity date	8/22/02	10/30/02	2/16/04	8/7/02	8/7/02	8/7/02	6/19/06	10/15/04	3/29/05	3/31/23
Remaining Life (years)	Matured	Matured	Matured	Matured	Matured	Matured	0.67	Matured	Matured	18.08
Coupon (percent)	uesta+400	esta+400	uesta+400	esta+580	adlar+300	adlar+75	adlar+150	0	nL+81.25	imL+81.25
Original Currency	USD	USD	USD	USD	USD	USD	USD	USD	USD	USD
PV of past due principal and interest (in US$) 1/	110.3	112.4	126.8	111.9	107.6	106.1	91.2	100.5	59.5	0.0
Compound rate (in percent per annum)	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	1.25	-
PV of future cash flow on April 1 2005 (in US$) 1/	0.0	0.0	0.0	0.0	0.0	0.0	53.6	0.0	0.0	99.6
Discount rate (in percent) 2/	N/A	N/A	N/A	N/A	N/A	N/A	7.39	N/A	N/A	8.39
Present value including PDI and PDP (in US$)	110.3	112.4	126.8	111.9	107.6	106.1	144.7	100.5	59.5	99.6
New Instruments and Cash obtained										
Option 1. PAR in US$ (35 year bond with step-up coupon, no face value reduction)										
Price on 3/4/05 (per unit of principal of new bond)	0.375	0.375	0.375	0.375	0.375	0.375	0.375	0.375	0.375	-
Units obtained 1/	103.1	101.7	100.9	101.1	101.3	101.4	103.7	74.3	56.5	-
Cash payment obtained (in US$) 1/	1.7	1.7	1.7	1.7	1.7	1.7	1.7	1.2	0.9	-
Total value obtained (in US$) 1/	40.4	39.8	39.5	39.6	39.7	39.7	40.6	29.1	22.1	-
Option 2. PAR in AR$ (35 year bond with step-up coupon, no face value reduction)										
Price on 3/4/05 (per unit of principal of new bond)	0.395	0.395	0.395	0.395	0.395	0.395	0.395	0.395	0.395	-
Units obtained 1/ 2/	300.8	296.6	294.3	295.0	295.5	295.9	302.6	216.8	164.8	-
Cash payment obtained (in AR$) 1/	2.4	2.3	2.3	2.3	2.3	2.3	2.4	1.7	1.3	-
Total value obtained (in AR$)	121.2	119.5	118.6	118.9	119.1	119.2	121.9	87.4	66.4	-
Total value obtained (in US$) 3/	41.4	40.8	40.5	40.6	40.6	40.7	41.6	29.8	22.7	-
Option 3. DISCOUNT in US$ (30 year bond with step-up coupon, face value reduction of 66.3 percent)										
Price on 3/4/05 (per unit of principal of new bond)	0.944	0.944	0.944	0.944	0.944	0.944	0.944	0.944	0.944	0.944
Units obtained 1/	34.7	34.3	34.0	34.1	34.1	34.2	35.0	25.0	19.0	15.8
Cash payment obtained (in US$) 1/	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.0	0.8	46.3
Total value obtained (in US$) 1/	34.2	33.7	33.4	33.5	33.6	33.6	34.4	24.6	18.7	61.3
Option 4. DISCOUNT in AR$ (30 year bond with step-up coupon, face value reduction of 66.3 percent)										
Price on 3/4/05 (per unit of principal of new bond)	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050
Units obtained 1/ 2/	101.4	100.0	99.2	99.4	99.6	99.7	102.0	73.1	55.5	46.1
Cash payment obtained (in AR$) 1/	2.8	2.8	2.8	2.8	2.8	2.8	2.9	2.1	1.6	135.2
Total value obtained (in AR$)	109.3	107.8	106.9	107.2	107.4	107.5	110.0	78.8	59.9	183.6
Total value obtained (in US$) 3/	37.3	36.8	36.5	36.6	36.6	36.7	37.5	26.9	20.4	62.7
Option 5. QUASI-PAR (in AR$, 42 year capitalizing bond, face value reduction of 30.1 percent)										
Value on 3/4/05 (per unit of principal of new bond)	0.551	0.551	0.551	0.551	0.551	0.551	0.551	0.551	0.551	-
Units obtained 1/ 2/	210.2	207.3	205.7	206.2	206.6	206.8	211.5	151.6	115.2	-
Cash payment obtained	-	-	-	-	-	-	-	-	-	-
Total value obtained (in AR$)	115.9	114.3	113.4	113.7	113.9	114.0	116.6	83.6	63.5	-
Total value obtained (in US$) 3/	39.6	39.0	38.7	38.8	38.9	38.9	39.8	28.5	21.7	-
Haircut based on Option 1 (in percent)	63.4	64.6	68.9	64.6	63.1	62.6	71.9	71.0	62.8	-
Haircut based on Option 2 (in percent)	62.5	63.7	68.1	63.7	62.2	61.6	71.2	70.3	61.9	-
Haircut based on Option 3 (in percent)	69.0	70.0	73.6	70.0	68.8	68.3	76.2	75.5	68.5	38.5
Haircut based on Option 4 (in percent)	66.2	67.3	71.2	67.3	65.9	65.4	74.1	73.3	65.7	37.1
Haircut based on Option 5 (in percent)	64.2	65.3	69.5	65.3	63.9	63.3	72.5	71.6	63.6	-
Weighted average 4/	64.9	66.1	70.2	66.1	64.7	64.1	73.1	72.3	64.4	37.8

1/ Per 100 units of principal at issue.
2/ For discount bond, principal and last three coupon payments were discounted using US long bond rate implicit in price of collateral released (4.67)
3/ Using exchange rate of 2.9175 AR$ per US$ prevailing on 12/31/03.
4/ Using exchange rate of 2.93 AR$ per US$.
5/ Using aggregate face value of the five options as weights (Option 1 and 2: US$15 bn; Option 3 and 4: $US11.9 bn; Option 5 about US$8.3 bn)

Table 11. Argentina's 2005 Exchange (January-February 2005) (concluded)

	RA $02	RA $07	RA $08	PRE 3	PRO1	PRO3	PRO5	PRO9
Characteristics of Old Instruments								
Amount outstanding (US$ mn)	20.3	5.8	248.6	9.9	39.2	1.0	96.9	30.3
Maturity date	7/10/02	2/12/07	9/19/08	9/1/02	4/1/07	12/28/10	4/15/07	4/15/07
Remaining Life (years)	Matured	1.94	3.54	Matured	1.00	2.84	1.13	1.13
Coupon (percent)	8.75	11.75	10-12	1m CD	1m CD	1m CD	1m CD	savings rt
Original Currency	ARS	ARS	ARS	ARS	ARS	ARS	ARS	ARS
PV of past due principal and interest (in US$) 1/	40.8	14.8	12.9	9.1	14.4	17.4	21.5	19.1
Compound rate (in percent per annum)	3.54	3.54	3.54	3.54	3.54	3.54	3.54	3.54
PV of future cash flow on April 1 2005 (in US$) 1/	0.0	33.3	31.4	0.0	6.4	16.3	11.3	17.7
Discount rate (in percent)	N/A	14.39	15.65	N/A	8.12	14.99	8.91	8.91
Present value including PDI and PDP (in US$)	40.8	48.1	44.3	9.1	20.7	33.6	32.8	36.7
New Instruments and Cash obtained								
Option 1. PAR in US$ (35 year bond with step-up coupon, no face value reduction)								
Price on 3/4/05 (per unit of principal of new bond)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Units obtained 1/	104.2	104.5	102.8	16.0	70.1	107.4	84.6	100.8
Cash payment obtained (in US$) 1/	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Total value obtained (in US$) 1/	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Option 2. PAR in AR$ (35 year bond with step-up coupon, no face value reduction)								
Price on 3/4/05 (per unit of principal of new bond)	0.395	0.395	0.395	0.395	0.395	0.395	0.395	0.395
Units obtained 1/ 2/	104.2	104.5	102.8	16.0	70.1	107.4	84.6	100.8
Cash payment obtained (in AR$) 1/	0.8	0.8	0.8	0.1	0.6	0.8	0.7	0.8
Total value obtained (in AR$)	42.0	42.1	41.4	6.5	28.3	43.3	34.1	40.6
Total value obtained (in US$) 3/	14.3	14.4	14.1	2.2	9.6	14.8	11.6	13.9
Option 3. DISCOUNT in US$ (30 year bond with step-up coupon, face value reduction of 66.3 percent)								
Price on 3/4/05 (per unit of principal of new bond)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Units obtained 1/	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Cash payment obtained (in US$) 1/	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Total value obtained (in US$) 1/	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Option 4. DISCOUNT in AR$ (30 year bond with step-up coupon, face value reduction of 66.3 percent)								
Price on 3/4/05 (per unit of principal of new bond)	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050
Units obtained 1/ 2/	35.1	35.2	34.7	5.4	23.6	36.2	28.5	34.0
Cash payment obtained (in AR$) 1/	1.0	1.0	1.0	0.2	0.7	1.0	0.8	1.0
Total value obtained (in AR$)	37.8	38.0	37.4	5.8	25.5	39.0	30.7	36.6
Total value obtained (in US$) 3/	12.9	13.0	12.8	2.0	8.7	13.3	10.5	12.5
Option 5. QUASI-PAR (in AR$, 42 year capitalizing bond, face value reduction of 30.1 percent)								
Value on 3/4/05 (per unit of principal of new bond)	0.551	0.551	0.551	0.551	0.551	0.551	0.551	0.551
Units obtained 1/ 2/	72.8	73.1	71.9	11.2	49.0	75.1	59.1	70.4
Cash payment obtained	-	-	-	-	-	-	-	-
Total value obtained (in AR$)	40.1	40.3	39.6	6.2	27.0	41.4	32.6	38.8
Total value obtained (in US$) 3/	13.7	13.7	13.5	2.1	9.2	14.1	11.1	13.3
Haircut based on Option 1 (in percent)	-	-	-	-	-	-	-	-
Haircut based on Option 2 (in percent)	64.9	70.1	68.1	75.9	53.5	56.1	64.6	62.3
Haircut based on Option 3 (in percent)	-	-	-	-	-	-	-	-
Haircut based on Option 4 (in percent)	68.3	73.1	71.2	78.2	58.1	60.4	68.1	66.0
Haircut based on Option 5 (in percent)	66.4	71.4	69.5	76.9	55.5	58.0	66.1	63.9
Weighted average 4/	66.4	71.4	69.5	76.9	55.5	58.0	66.1	63.9

1/ Per 100 units of principal at issue.
2/ Using exchange rate of 2.9175 AR$ per US$ prevailing on 12/31/03.
3/ Using exchange rate of 2.93 AR$ per US$.
4/ Using aggregate face value of the three options used as weights.

Table 11. Argentina's 2005 Exchange (January-February 2005) (concluded)

	RA $02	RA $07	RA $08	PRE 3	PRO1	PRO3	PRO5	PRO9
Characteristics of Old Instruments								
Amount outstanding (US$ mn)	20.3	5.8	248.6	9.9	39.2	1.0	96.9	30.3
Maturity date	7/10/02	2/12/07	9/19/08	9/1/02	4/1/07	12/28/10	4/15/07	4/15/07
Remaining Life (years)	Matured	1.94	3.54	Matured	1.00	2.84	1.13	1.13
Coupon (percent)	8.75	11.75	10-12	1m CD	1m CD	1m CD	1m CD	savings rt
Original Currency	ARS	ARS	ARS	ARS	ARS	ARS	ARS	ARS
PV of past due principal and interest (in US$) 1/	40.8	14.8	12.9	9.1	14.4	17.4	21.5	19.1
Compound rate (in percent per annum)	3.54	3.54	3.54	3.54	3.54	3.54	3.54	3.54
PV of future cash flow on April 1 2005 (in US$) 1/	0.0	33.3	31.4	0.0	6.4	16.3	11.3	17.7
Discount rate (in percent)	N/A	14.39	15.65	N/A	8.12	14.99	8.91	8.91
Present value including PDI and PDP (in US$)	40.8	48.1	44.3	9.1	20.7	33.6	32.8	36.7
New Instruments and Cash obtained								
Option 1. PAR in US$ (35 year bond with step-up coupon, no face value reduction)								
Price on 3/4/05 (per unit of principal of new bond)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Units obtained 1/	104.2	104.5	102.8	16.0	70.1	107.4	84.6	100.8
Cash payment obtained (in US$) 1/	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Total value obtained (in US$) 1/	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Option 2. PAR in AR$ (35 year bond with step-up coupon, no face value reduction)								
Price on 3/4/05 (per unit of principal of new bond)	0.395	0.395	0.395	0.395	0.395	0.395	0.395	0.395
Units obtained 1/ 2/	104.2	104.5	102.8	16.0	70.1	107.4	84.6	100.8
Cash payment obtained (in AR$) 1/	0.8	0.8	0.8	0.1	0.6	0.8	0.7	0.8
Total value obtained (in AR$)	42.0	42.1	41.4	6.5	28.3	43.3	34.1	40.6
Total value obtained (in US$) 3/	14.3	14.4	14.1	2.2	9.6	14.8	11.6	13.9
Option 3. DISCOUNT in US$ (30 year bond with step-up coupon, face value reduction of 66.3 percent)								
Price on 3/4/05 (per unit of principal of new bond)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Units obtained 1/	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Cash payment obtained (in US$) 1/	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Total value obtained (in US$) 1/	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Option 4. DISCOUNT in AR$ (30 year bond with step-up coupon, face value reduction of 66.3 percent)								
Price on 3/4/05 (per unit of principal of new bond)	1.050	1.050	1.050	1.050	1.050	1.050	1.050	1.050
Units obtained 1/ 2/	35.1	35.2	34.7	5.4	23.6	36.2	28.5	34.0
Cash payment obtained (in AR$) 1/	1.0	1.0	1.0	0.2	0.7	1.0	0.8	1.0
Total value obtained (in AR$)	37.8	38.0	37.4	5.8	25.5	39.0	30.7	36.6
Total value obtained (in US$) 3/	12.9	13.0	12.8	2.0	8.7	13.3	10.5	12.5
Option 5. QUASI-PAR (in AR$, 42 year capitalizing bond, face value reduction of 30.1 percent)								
Value on 3/4/05 (per unit of principal of new bond)	0.551	0.551	0.551	0.551	0.551	0.551	0.551	0.551
Units obtained 1/ 2/	72.8	73.1	71.9	11.2	49.0	75.1	59.1	70.4
Cash payment obtained	-	-	-	-	-	-	-	-
Total value obtained (in AR$)	40.1	40.3	39.6	6.2	27.0	41.4	32.6	38.8
Total value obtained (in US$) 3/	13.7	13.7	13.5	2.1	9.2	14.1	11.1	13.3
Haircut based on Option 1 (in percent)	-	-	-	-	-	-	-	-
Haircut based on Option 2 (in percent)	64.9	70.1	68.1	75.9	53.5	56.1	64.6	62.3
Haircut based on Option 3 (in percent)	-	-	-	-	-	-	-	-
Haircut based on Option 4 (in percent)	68.3	73.1	71.2	78.2	58.1	60.4	68.1	66.0
Haircut based on Option 5 (in percent)	66.4	71.4	69.5	76.9	55.5	58.0	66.1	63.9
Weighted average 4/	66.4	71.4	69.5	76.9	55.5	58.0	66.1	63.9

1/ Per 100 units of principal at issue.
2/ Using exchange rate of 2.9175 AR$ per US$ prevailing on 12/31/03.
3/ Using exchange rate of 2.93 AR$ per US$.
4/ Using aggregate face value of the three options used as weights.

Source: Federico Sturzenegger and Jeromin Zettelmeyer, Haircuts: Estimating Investor Losses in Sovereign Debt Restructurings,1998–2005 IMF Working Paper, WP/05/137

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