Investors vs. Greece

The Greek 'Haircut' and Investor Arbitration under BITs

By
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Introduction

According to the Financial Times (James Wilson & Gerrit Wiesmann 12.3.2012)[2] German investors were seeking lawsuits over the Greek debt swap, immediately after it was set in motion in March 2012. According to reports, a German law firm was preparing lawsuits against banks and the Greek state on behalf of holders of Greek bonds who have been forced to take part in Greece's multi billion debt swap. The Hamburg law firm claimed that there were some 200 expressions of interest in joining a class-action suit. This development follows the decision by Greece to trigger Collective Action Clauses (CAC) that were added to bonds issued under Greek law. The clauses force all bondholders to go along with the decision by the majority of the debt's owners – including banks, insurers and pension funds – to agree to the swap. The possibility of legal action over imposed 'haircuts' to sovereign debt is seen by many as an alternative strategy for seeking compensation, instead of relying on payments from Credit Default Swaps. The International Swaps and Derivatives Association (ISDA) after initially arguing that there had been no Greek default, after the activation of the CACs decided to trigger auctions on CDS. Despite this, there is heightened interest on legal avenues to seek compensation from those not covered by CDS or as an alternative to insurance products. A legal precedent on how to deal with sovereign workouts is offered by Argentina which defaulted on its sovereign debt in December 2001, prompting a class action claiming a violation of rights under a bilateral investment treaty after investors rejected a haircut offered in 2005 and again in 2010. This paper discusses options in the courts and international investment arbitration for investors who have suffered losses on the Greek restructuring of March 2012. The paper focuses on the precedents available under bilateral investment treaties (especially the Germany-Greece BIT of 1961), but also considers options under European Law (including the ECHR) and the Greek courts. The paper concludes by offering an assessment of the chances of success of claims under each of the above headings.

The core idea underpinning the framework of investor protection built into Bilateral Investment Treaties is the requirement for the payment of compensation for expropriation. For there to be a recovery for expropriation, however, in almost all jurisdictions, there is a requirement that there must be a taking of property. Defining what constitutes expropriation or taking has been a matter of significant controversy both in dispute resolution fora and in national courts (see Glinavos 2011 for a full analysis). What the experience of Argentina, and most recently Greece demonstrates, is that when a sovereign government is no longer willing or able to pay its debts, sovereign debt restructurings (known as workouts) occur taking the form of a formal change to debt contracts that is negotiated between creditors and debtors. Workouts often reduce the face value of the debt via 'swaps' where new bonds with lower interest rates and longer maturities are exchanged for the defaulted bonds. Such workouts are usually highly discounted and result in a loss for bondholders. Losses or discounts are commonly referred to as "haircuts" (Gallagher 9). Bond holders of Greek debt were

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offered a swap of Greek bonds to new bonds issued by Greece having a face value equal to 31.5% of the face amount of the exchanged bonds; in addition investors were offered EFSF notes with a maturity date of two years or less from the PSI settlement date and having a face value equal to 15% of the face amount of their exchanged bonds. The detachable GDP linked securities issued by Greece have a notional amount equal to the face amount of each holder's new bonds (Greek Ministry of Finance Press Release 24.2.12). As a result of the terms of the offer, the notional haircut is 53.5 percent (Reuters 7.3.12). It is held that a restructuring is deemed successful when 90% or more of bondholders participate in an offering that is no less than 50% of the net present value of the debt (Hornbeck, 2010). On 9 March 2012 (Ministry of Finance Press Release) 146 billion Euros worth of bonds had accepted the offer, while 9 billion refused, out of a total outstanding obligation of 177 billion.

Greece's troubles mirror to an extent the situation in Argentina a decade ago. Since Argentine fell victim to a debt crisis at the beginning of the Century its policy-makers attempted to negotiate a restructuring under the supervision of the IMF. After years of unsuccessful efforts, in 2004, Argentina announced that it would open a one-time bond exchange and passed domestic legislation mandating that it would never hold a future swap with a better offer. In January 2005, the country opened an exchange on over $100 billion in principal and interest on a diverse number of bond issuances whereby the bondholders were to receive a 67 percent haircut. In the end it restructured just over $62 billion with a 76 percent participation rate (24 percent holdouts). Holdouts and some observers of the restructuring were furious, going so far to call Argentina a “rogue creditor” (Porzecanski, 2005). Some holdouts, among them numerous vulture funds, took the litigation route in the United States, where 158 suits have been filed (Hornbeck, 2010). For the first time ever, a number of those holdouts filed claims under BITs to the International Center for the Settlement of Investment Disputes (ICSID). In September 2006, about 180,000 Argentine bondholders filed a claim under the Italy-Argentina BIT for approximately $4.3 billion. The creditors claimed that the Argentine restructuring was tantamount to expropriation and violated fair and equitable treatment standards under the treaty (Waibel, 2007). Argentina was still left with a significant debt load and was short of the 90 percent threshold for the restructuring to be seen as successful such that the rest of the holdouts could essentially be ignored. Argentina launched another take-it-or-leave-it exchange from May-June of 2010 for $18 billion of its debt offering a 75 percent haircut under the same rationale as in 2005 (Porzecanski, 2010). As was the case with the 2005 swap, the bonds were exchanged for bonds with CACs and that are linked to GDP, meaning that the bonds pay out more when the economy is growing fast, and less during slower times. 66% of the bondholders ($12.1 billion) tendered. $6.2 billion worth of bondholders will continue to litigate either through domestic courts or through the ICSID (IMF, 2010; Hornbeck, 2010).

The Argentine precedent demonstrates that there are always some ‘holdouts’ during a restructuring, disgruntled investors who refuse to negotiate and demand the full value of their investment, even in desparate situations for the countries involved. There are also so-called ‘vulture funds’, which purchase debt when it is of a very low value before or after a restructuring and then file suits to increase the value of their investment (Thomson and Runciman, 2006). The following analysis evaluates the chances of success of such claims, but does not condone the practice of pursuing claims against insolvent states via courts or arbitral tribunals. The paper begins by addressing the mechanism through which the provisions of BITs are used as the basis of a claim challenging a workout.

Suing under Investment Treaties

Introduction to the BIT regime

Bilateral Investment Treaties (BITs) are the most common vehicle for the facilitation and protection

of foreign direct investment. A BIT for the protection and promotion of foreign investments can de defined as a legally binding international agreement between two states where they each promise reciprocally to observe the standards laid down by the treaty in their dealings with investors from the other state (Muchlinski 1999:617). BITs aim to create a stable investment environment in the interests of development and to protect the foreign investor from arbitrary treatment by the host government that detrimentally affects the profitability of the investment. BITs may provide for specific standards both in the pre and post investment stage (with post investment treatment being more commonly regulated). The main terms of a BIT are in general as follows:

- They state the aims of the treaty, which usually are the reciprocal encouragement, and protection of investment flow between the two countries.
- The protected property is identified and the nature of the link of nationality to the home state that will grant protection to the foreign investor is explained.
- The standard of treatment to be accorded to the investor is spelt out
- The right of repatriation of profits is asserted.
- There are statements on the nature of compensation for loss through war or civil disturbance.
- The standard of compensation in the event of a takeover is identified
- There is a statement as to the settlement of disputes by way of international arbitration.

The effectiveness of a BIT in protecting the foreign investor will depend on its particular provisions. For an investment to be protected under the BIT it must be included in the definition of investment provided in each Treaty. The term investment is usually defined broadly but some treaties restrict their application to approved investment schemes. If the nationality of the company falls to be determined under normal principles of international law the investor who is obliged to enter the host country through the means of a joint venture may be denied protection unless the treaty provides for shareholder protection. Most BITs however define investments to include shares (Sornarajah 1994:246). The standard of treatment offered to the foreign investor will determine the type of remedy he will receive for loss through state interference. The International Minimum Standard (IMS) offers an objective standard against which all state activity is to be judged and provides the assurance of differential treatment to the investor. Its main implications are respect for the domestic law of the host state, minimum international standard of treatment, no expropriation unless the requirements of non-discrimination, public purpose and adequate compensation are fulfilled (Hull Formula- US State Dept, Statement on Foreign Investment and Nationalization 30/9/75 15 ILM [1976] p.186), pacta sum servanta, due process of law and local remedies law (where these are inadequate a direct appeal to international adjudication is usually provided for). The alternative standard that is the National Treament Standard (NTS), known as the Calvo Doctrine, which focuses on the territorial sovereignty of the state. Its main provisions are equality of nationals and aliens before the law, application of host country laws to investments, restriction of diplomatic protection and home country intervention and no obligation to compensate for war and civil conflicts unless provided by national law. Another standard commonly found in BITs is the Most Favoured Nation clause (MFN) that extends to all investors the type of preferential treatment offered to some under any other BIT.

The OECD characterizes BITs as an increasingly important vehicle for protecting and promoting investment flows by providing legal security to investors and their investments (OECD 2001). They presently represent the principal instrument for agreeing on specific rules for the legal protection of foreign investment (Cremades 2000).

Expropriation under BITs can occur only in accordance to international law standards, be non discriminatory and followed by payment of prompt, adequate and effective compensation. Modern

BIT and multilateral practice provides enhanced protection against expropriation through expanding the definition of investment in order to protect some contractual aspects of the investments. Recent BITs place emphasis on safeguarding the sanctity of contract by guarding against regulatory taking and other governmental action that thwarts the normal legitimate expectations of the investor (Waelde 1999). Further, investments are guaranteed unrestricted transfer of funds in freely convertible currencies. Any disputes between the foreign party and the host government can be referred to international arbitration, subjected to procedures already agreed in the context of investment agreements or submitted to the local courts or the administrative tribunals of the host country. The exhaustion of local remedies is normally not required for the submission of the dispute to arbitration.

BITs and workouts

Restructuring, by definition, reduces the value of a sovereign bond and could be seen as a violation of not only the capital transfer provisions of a BIT, but also of "fair and equitable treatment" (if for example domestic creditors are treated differently to foreign ones) and could also potentially constitute an "expropriation." By filing investor-state claims under a BIT, bondholders can attempt to circumvent official restructuring processes, as the Italian bondholders attempted to do, by suing the defaulting state in order to recoup the face value of their bonds. Even when debt-related claims during a restructuring are not permitted, prohibitions may not apply where the measures violate national treatment or most favoured nation provisions; even though a nation in crisis may be justified in giving domestic bondholders priority under a sovereign debt restructuring to protect the banking system or ensure fulfilment of wage and pension commitments (Kelsey 2011:9). Think for example the losses investors suffer on the swap of Greek bonds agreed in March 2012. Even those investors who agreed to the swap could potentially complain of discriminatory treatment considering that other lenders like the ECB, the IMF and EU member state central banks have not taken commensurate haircuts on their holdings of Greek debt.

If investors consenting to the swap may feel aggrieved when considering possible violations of their rights under treaties, those who have not consented are likely to have a wider range of grievances to bring to investment arbitration. As the focus of the analysis here is the case of Greece and the impending German action, we will focus primarily on an evaluation of the argument that an enforced haircut under CACs constitutes a compensatable expropriation. International law generally addresses the issue of expropriation by defining it as a compulsory transfer of property rights and refers to regulatory takings variably as indirect expropriation, disguised expropriation or creeping expropriation. While it is generally required that governments will need to offer compensation for actions amounting to expropriation, it is accepted that states are not liable for economic losses arising from bona fide regulation within the accepted scope of 'police powers' including the operation of competition law, consumer protection, securities regulation, environmental protection, land planning and other similar legislation (Wagner 1999: 518). In reviewing the decisions of the Iran-US Claims Tribunal for example, one of its members concluded that under international law, liability does not arise from actions that are non-discriminatory and are within the commonly accepted taxation and police powers of states (Aldrich 1994: 609). The key issue is therefore, whether a reduction in the face value of a sovereign bond is an exercise of legitimate state powers, or a form of expropriation that gives rise to a claim for compensation under international law.

The definition of expropriation has received considerable judicial attention in the US. US jurisprudence recognises that regulations that restrict the economic use of property may, in certain circumstances, qualify as compensatable 'takings'. US law defines compensatable expropriations on the basis of caselaw stemming from the Fifth Amendment of the US Constitution. The Fifth Amendment states that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation. While originally

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the courts interpreted this provision to require protection of real property or tangible assets, the definition has subsequently considerably widened (Glinavos 2011). A prime example of the widening definition of expropriation in US law is provided by the case of Lochner v New York (1905, 108 US 45). In Lochner, the Supreme Court used a combination of the Fourteenth and the Fifth Amendments to invalidate regulations regarding taxation, minimum wage requirements, and labour relations (Byrne 2000:100). In principle, there are two categories of takings that may attract compensation. The first is physical taking of property for which the owner must be compensated. In Pennsylvania Coal Co v Mahon in 1922, (260 US 393), for example, the Supreme Court held that this rule would also apply to a regulation whose effect was to strip land of any economic use. A second category deals with regulations that adversely impact on the economic use of property but fall short of stripping it of all economic use, so-called partial takings. The Supreme Court has avoided setting definitive rules for determining when compensation will be awarded in such circumstances (Baughen 2006: 208). In Penn Central Transportation v City of New York (438 US 104) the court offered a three part test in determining whether a state action could amount to expropriation: One should examine the character of government action (seizure of property or regulatory intervention); interference with reasonable investment-backed expectations; and the extent of the diminution in value (Glinavos 2011).

Actions that lead to high levels of interference resulting in significant losses will warrant compensation under the heading of expropriation. So long as it is not considered a mere breach of contract, but an exercise of sovereign authority (see discussion of Abaclat below) an enforced haircut as part of a sovereign debt restructuring is a significant regulatory intervention that interferes with investor expectations and can lead (as is the case in Greece at the moment) to a significant reduction in value. In principle therefore a sovereign debt restructuring or default could theoretically be interpreted as constituting a direct or indirect expropriation. Both defaults and restructuring obviously diminish the value of an asset, and under a "take-it-or-leave-it" swap arrangement a bondholder has the choice to either lose a bond altogether or to accept a new bond with a haircut. Tribunals often perform a "substantial deprivation" test to examine the level of diminished value in a restructuring, and would thus in this case be examining the size of the haircut in a bond exchange (Newcomb and Paradell, 2004).

The Abaclat Case

A case at hand is Argentina as we mentioned in the introduction. The case of Abaclat involved investor protection provisions under an *Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments*, signed in Buenos Aires on 22 May 1990. The matter in dispute was whether the Treaty covered bonds issued by Argentina, allegedly held by Italian investors, on the payment of which Argentina had defaulted. The Tribunal made a determination on jurisdiction and admissibility in August 2011. The Tribunal acknowledged while there is no formal legal framework establishing precise steps to be followed by a defaulting sovereign or the creditors leading to a credit event, an informal regime has developed consisting of some commonly adhered to principles. Firstly, the sovereign signals the need of debt restructure; secondly there is communication between the sovereign and the creditors; thirdly consensus is reached and the creditors consent on the terms of the restructure; fourthly, there is equitable burden sharing.

From 1991 through 2001, Argentina placed over US$ 186.7 billion in sovereign bonds across both domestic and international capital markets. The 83 bonds allegedly purchased by Claimants were governed by the laws of different jurisdictions, were issued in different currencies, and listed on various international exchanges, such as Buenos Aires, Frankfurt, Hong Kong, Luxembourg, Milan, Munich, and Vienna. These bonds generally paid a fixed coupon with the final maturity varying from three to thirty years. As the need for debt relief became clear, Argentina took in 2001 various measures in an attempt to restructure its economy and lighten its debt. Such measures included cutting both federal and provincial government spending, adopting a zero-deficit law, improving its tax administration system, and

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supporting competition with tax cuts for exporters, as well as global exchange offers in February, June and November 2001. These efforts apparently did not suffice to redress the situation. By December 2001, Argentina had allegedly come to a point where it was unable to avoid deferring interest and principal payments on all of its external bond debt owed to both foreign and Argentine creditors. On 23 December 2001, Argentina defaulted by publicly announcing the deferral of over US$100 billion of external bond debt owed to both non-Argentine and Argentine creditors.

On 14 January 2005, Argentina launched the Exchange Offer 2005, pursuant to which bondholders could exchange 152 different series of bonds, on which Argentina had suspended payment in 2001, for new debt that Argentina would issue. The Exchange Offer 2005 provided to the beneficial owners of the roughly US$ 81.8 billion in eligible outstanding debt a choice of options from which to choose the form of their new debt. The bondholders could choose par bonds with the same principal but a lower interest rate than the non-performing debt, discount bonds with reduced principal but a higher interest rate, or quasi-par bonds with a principal and interest rate falling between the two other bond options. Each bond offered was accompanied by securities with payment conditioned upon Argentina's gross domestic product, known as GDP-Linked Securities. On 9 February 2005, Law 26,017 was enacted, known as the Emergency Law. The Emergency Law provided, *inter alia*, that with regard to those bonds which were eligible for but were not exchanged in the Exchange Offer 2005 that the Executive Branch of the government would not reopen the exchange process; and that the national government is prohibited from entering into any juridical, extra-juridical or private transaction in relation to these bonds. On 25 February 2005, the period for submitting tenders pursuant to the Exchange Offer 2005 expired, 76.15% of all holdings having participated in the Exchange Offer 2005. The Claimants did not participate in the Exchange Offer 2005. A further exchange offer was made in 2010 attempting to settle a series of suits in courts and ICSID. While some more investors accepted those, there were enough holdouts to continue the action that resulted in the Abaclat decision.

The claimants submitted that throughout the 1990s, Argentina had proceeded to issue over 170 sovereign bonds, intentionally targeting retail investors, including in particular Italian retail investors like themselves. By virtue of Argentina's subsequent acts surrounding its default in late 2001 and directed at all claimants collectively, the claimants were deprived of the value of their investments. In particular the claimants alleged that Argentina first repudiated its obligations under the bonds and, subsequently, refused to negotiate with bondholders thereby pursuing a unilateral, punitive exchange offer targeting, *inter alia*, Italian retail investors; that Argentina enacted legislation repudiating all obligations to the claimants, which destroyed the value of their investments; that Argentina acted as a rogue debtor violating its international treaty obligations under the Argentina-Italy BIT. The claimants requested that the Arbitral Tribunal declare that the Argentine Republic has breached its obligations under the Argentina-Italy BIT, and is liable to Claimants awarding compensatory damages in an amount to be specified at a later stage.

Article 25 of the ICSID Convention provides:
―(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
(2) ―National of another Contracting State‖ means:
(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another

Contracting State for the purposes of this Convention

The Argentina-Italy BIT aimed to create favourable conditions for greater economic cooperation between the two States and, in particular, for the realization of investments by investors of one Contracting Party in the territory of the other Contracting Party. The Treaty is typical in its provisions, considering that the only way of establishing and maintaining an appropriate international flow of capital is to ensure a favourable climate for investments, in compliance with the laws of the receiving State; and recognizing that entering into an Agreement on the Promotion and Protection of Investments will stimulate entrepreneurial initiatives which will increase the prosperity of both Contracting Parties.

It was uncontested between the Parties, that there is a dispute which can be considered a (legal dispute in the sense of Article 25 ICSID Convention). What was contested between the Parties was whether this legal dispute arose out of rights and obligations contemplated in the BIT, or whether they were of a mere contractual nature arising out of the relevant bond documents relating to the Claimants' security entitlements. In other words, the Parties disagreed whether the claims submitted to this Tribunal fell within the scope of protection of the BIT. The crucial question therefore was, whether the claims did rise out of the BIT, i.e., were they so-called treaty claims or, on the contrary, pure contract claims or claims of another nature.

The parties admitted in principle that with respect to a BIT claim an arbitral tribunal has no jurisdiction where the claim at stake is a pure contract claim. This is because a BIT is not meant to correct or replace contractual remedies, and in particular it is not meant to serve as a substitute to judicial or arbitral proceedings arising from contract claims. Within the context of claims arising from a contractual relationship, the tribunal's jurisdiction in relation to BIT claims is in principle only given where, in addition to the alleged breach of contract, the Host State further breaches obligations it undertook under a relevant treaty. Pure contract claims must be brought before the competent organ, which derives its jurisdiction from the contract, and such organ – be it a court or an arbitral tribunal – can and must hear the claim in its entirety and decide thereon based on the contract only. As an exception to this principle, a BIT sometimes provides for a so-called Umbrella Clause, which requires a State to observe any obligation arising from particular commitments it has entered into with regard to investments. Under a possible interpretation of these clauses, a State's breach of contract with a foreign investor or breach of an obligation under another treaty or law becomes, by virtue of an Umbrella Clause contained in the relevant BIT, a breach of the BIT actionable through the mechanism provided in such treaty, i.e., through ICSID arbitration.

The Argentina-Italy BIT did not contain such Umbrella Clause. Nevertheless, the claimants contended that, based on the MFN clause of Article 3 of the BIT, they are entitled to invoke and rely on the Umbrella Clause contained in the subsequent Argentina-Chile BIT. This theory, however, only applies in case the Tribunal considers that the claims at stake are pure contract claims. A claim is to be considered a pure contract claim where the Host State, party to a specific contract, breaches obligations arising by the sole virtue of such contract. This is not the case where the equilibrium of the contract and the provisions contained therein are unilaterally altered by a sovereign act of the Host State. The Tribunal contended that this applies where the circumstances and/or the behaviour of the Host State appear to derive from its exercise of sovereign State power. Whilst the exercise of such power may have an impact on the contract and its equilibrium, its origin and nature are totally foreign to the contract. The Tribunal therefore had to address the following question, if they were treaty claims, would the alleged facts, if proven, possibly constitute a treaty violation? Secondly, if they were contract claims or claims of another nature, or in case of a treaty claim where the alleged facts would not constitute a violation of the treaty, can their case still be heard based on the MFN Clause of Article 3(1) BIT in connection with the Umbrella Clause contained in the Argentina-Chile BIT? Even if the claimants' claims were considered contractual claims, it was argued that these claims would fall within the jurisdiction of the Tribunal and the scope of protection offered under the Argentina-Italy BIT through the operation of the MFN clause of Article 3(1) allowing Claimants to invoke the Umbrella Clause contained in the Argentina-Chile BIT. A breach of the Umbrella

Clause contained in the Argentina-Chile BIT would simultaneously constitute a breach of the MFN clause of Article 3(1) Argentina-Italy BIT.

The Tribunal considered that, *prima facie*, these facts, if established, were susceptible of constituting a possible violation of at least some of the provisions of the BIT invoked by the claimants, particularly the arbitrary promulgation and implementation of regulations and laws can, under certain circumstances, amount to an unfair and inequitable treatment. It could even further constitute an act of expropriation where the new regulations and/or laws deprive an investor from the value of its investment or from the returns thereof. The allegations by the claimants with regard to different treatment afforded to domestic investors, such as Argentine pension funds, are capable of constituting a discriminatory treatment and breach of the obligation to refrain from discriminatory measures and to provide for national treatment. It was undisputed that the claimants, as owners of security entitlements, had a potential contract claim against Argentina for payment of the principal amount and interest of such security entitlement. This relationship is of a private and contractual nature, subject to the terms and conditions of the bonds, which vary depending on the bond issue. The terms and conditions of the relevant bonds provide for forum selection clauses, whereby the specific fora again vary from one issue of bond to another. It was also undisputed that Argentina, as debtor of the bonds, has failed to perform its obligations under these bonds. Argentina may thereby have breached contractual obligations towards claimants or other owners of security entitlements. What was relevant was that Argentina justified its failure based on the exceptional circumstances surrounding its public default and linked to its devastating financial situation at the end of 2001. The Emergency Law that Argentina enacted thereafter was a reaction to these circumstances and part of an attempt to redress the finances of Argentina. This Emergency Law had the effect of unilaterally modifying Argentina‘s payment obligations, whether arising from the concerned bonds or from other debts. Argentina did not contend that it had any contractual right of doing so, such as for example, a force majeure provision. Argentina has not invoked any contractual or legal provision excusing its non-performance of its contractual obligations towards the claimants. In fact, Argentina relied and justified its non-performance based on its situation of insolvency, which has nothing to do with any specific contract.

The Tribunal accepted that an insolvent debtor may in principle benefit from special regimes such as bankruptcy or other mechanisms of financial redress, and such mechanisms can very well affect the way a contract is performed by partially or fully liberating the debtor from its obligations thereunder. However, such a mechanism is subject to specific rules and conditions. First of all, it requires a legal basis contemplating the basic principle and then providing for its implementation through the designation of competent authorities, the formulation of a specific procedure taking into account both the debtor‘s and the creditors‘ interests, and the provision of distribution principles of the debtor‘s assets with regard to the entirety of the creditors‘ group and not just with regard to a specific contract or creditor. In the Abaclat case, the situation was unconventional as the debtor was a sovereign State. Argentina, which considered itself insolvent, decided to promulgate a law entitling it not to perform part of its obligations, which Argentina had undertaken prior to such law, and fixing as an exercise of legal sovereignty the modalities and terms of such liberation. Thus, what Argentina did, it did based on its sovereign power; it is neither based on nor does it derive from any contractual argument or mechanism. In other words, the present dispute does not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors in general, encompassing but not limited to the claimants in the case in question. To summarise, as the actions Argentina took in order to remedy its financial insolvency were based on a sovereign decision of Argentina outside of a contractual framework, such actions were the expression of State power and not of rights or obligations Argentina had as a debtor under a specific contract.

Consequently, the Tribunal held that the claims brought forward by the claimants in the Abaclat arbitration are not pure contractual claims but treaty claims based on acts of a sovereign, which the claimants alleged were in breach of Argentina‘s obligations under the BIT. The Tribunal found that the relevant bonds and the claimants‘ security entitlements therein were both to be considered made in the territory of Argentina.

In conclusion, the dispute in this case arose out of an investment pursuant to Article 1 BIT and (if needed) Article 25(1) ICSID Convention. As a result, the relevant bonds and the claimants' security entitlements therein were both to be considered investments pursuant to Article 1(1) lit.(c) BIT and the claimants' purchase of security entitlements in Argentinean bonds constitute a contribution which qualifies as an investment‖ under Article 25 ICSID Convention. The outcome of the Abaclat case therefore is that investors who suffer losses under a workout are protected by the provisions of BITs and can on the merits seek to bring a case seeking compensation for losses suffered.

BITs and the Greek Swap

The Abaclat decision offers hope to investors seeking to bring claims under BIT provisions against sovereigns for workouts. The fact that Abaclat did not rule on whether compensation was indeed payable, does not detract from its immense value in characterizing financial investments (in the form of purchases of sovereign bonds), as worthy of protection under BITs. Indeed, many BITs treat "any kind of asset" as a covered investment and therefore include sovereign bonds. More recent treaties explicitly list sovereign bonds as covered by the treaty. As Abaclat demonstrates, in terms of general jurisdiction and coverage, an arbitration claim against sovereign debt restructuring depends on several issues including whether the tribunal finds that it has jurisdiction (which requires an investment to have been made), consent by the sovereign party to arbitration or a claim based on the investment agreement itself. In terms of jurisdiction, the consent of the sovereign party will be governed by the investment agreement in the treaty. This is where the 'definitions' provisions of BITs come in. If an agreement clearly includes bonds and other debt instruments as covered investments, then the country has consented to jurisdiction for those claims. By extension, then, any limitation within the BIT to those claims is a limitation on consent (Cross2006).

Greece has signed according to UNCTAD 38 BITs with other countries within and outside the European Union. A study of the provisions of all these is beyond the scope of this paper. However, the Greece-Germany BIT of 1961 is an indicative case. We now move on to consider the provisions of the Germany-Greece BIT in attempting to assess whether this treaty could offer holdouts on the Greek restructuting an opportunity to obtain a result superior or alternative to payments on CDS contracts.

The Germany- Greece BIT of 1961

The Germany-Greece BIT was concluded between the Federal Republic of Germany and the Kingdom of Greece on 27 March 1961 with the aim of enhancing economic cooperation between the two countries and to create fertile conditions for capital investments. Article 1(2) offers investors Most Favored Nation treatment on capital investments, while Article 2 extends MFN status to professional and economic activity more generally. Article 3(2) offers full protection and security to investments and specifies that expropriations are only possible in the public interest on the payment of compensation. Such compensation must correspond to the value of the expropriated funds and must be paid without delay. Compensation payments and their legality is subject to judicial review in the normal courts of law. Losses due to war, insurrection or civil unrest are compensatable on the National Treatment standard, while fund transfers abroad benefit from MFN treatment (Art 3.3). Article 7 offers a clause that guarantees that protected investors will benefit from possible future agreements between Germany and Greece offering improved protection standards.

Article 8 contains definitions of protected investments. It contains property rights over chattels and real property, as well as land based rights such as mortgages, loans, leaseholds etc; equity and other rights over companies; promissory notes and receivables; intellectual property rights, design rights, technical know-how, business names and good will; rights derivative from the above. The article

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further specifies that changes in form of the above, in accordance with the law, does not alter their nature as protected investments. Receivables are defined as amounts accruing from investments during specified time periods in the form of participation rights in profits or interest. The Protocol to the Treaty specifies in paragraph 2(a) that the provisions of Article 3(2) -compensation for expropriation- apply to the transfer of investment capital to public ownership. However, state actions taken by creditors or investors in case of insolvency or administration are not considered expropriations (par 2.b). Only the removal or reduction in the exercise of property rights is considered expropriation.

Article 11 provides for dispute resolution processes, requiring that disagreements not resolved via mediation are referred to binding arbitration. The wording of the Article limits the rights to commence arbitration to the state signatories (as opposed to including private investors) with the process of appointing the tribunal specified in the Treaty. However, as both Greece and Germany signed on to ICSID in 1966, there is a strong argument in favour of the position that the relevant tribunal would now be the ICSID centre. It is far from clear however, whether the ICSID Convention helps overcome the inability of individual investors to commence arbitration written in the BIT. In April 2012 the German government in letters to investors refused to lend assistance in commencing arbitration against Greece on the basis of rights in the Treaty. Perhaps, signing onto ICSID could be considered as offering improved standards to investors, which under Article 7 (discussed above) helps open the arbitration provision to private as well as state actors.

Collective Action Clauses

It appears that CACs do not provide adequate protection for sovereign debtors in the context of BITs. On the surface, CACs would appear to prevent holdouts of sovereign bonds and vulture funds from filing claims under BITs. Yet even if the bondholders of a particular issuance voted against litigation through a minority clause or agreed to the terms of a restructuring under a majority clause, such actions under a CAC would not prevent an investor from filing an arbitral claim. According to Waibel (2007), CACs cover contractual rights of enforcement and are not designed to deal with treaty claims. Thus even if a CAC was activated, holdout bondholders could file a treaty claim arguing that the terms of a treaty have been violated (Waibel, 2007:715). The prima facie limited coverage of CACs—their questionable ability to include investment treaty arbitration—opens up a new window of opportunity for holdout litigation. The importance of this potential loophole for sovereign debt markets cannot be overemphasized if a BIT, like the Greece-Germany one, defines investment in terms broad enough to include purchasers of sovereign bonds. If ICSID tribunals hear treaty claims concerning sovereign bonds despite the legitimate exercise of CACs, then such clauses would become ineffective in binding non-participating creditors. If CACs were to leave treaty claims untouched, then they would bar only contractual causes of action originating in the bond contract. Bondholders might be able to obtain compensation even though the contractually prescribed majority of bondholders accepted the sovereign debt restructuring. Recourse to ICSID arbitration could thus create a legal gap in the international community's collective action policy (Waibel, 2007:736) with the result that investors suffering losses due to the Greek 'haircut' will spend a decade pursuing claims in Arbitral tribunals, pretty much like their Italian counterparts in the case of Argentina.

Furthermore, bondholders could "treaty shop" and file claims under treaties where it may be more certain that a bondholder will win jurisdiction (Wells 2010). Waibel (2011) has pointed out that a large number of sovereign bonds are traded on secondary markets and nationality can literally change in a matter of minutes, accentuating the ability of a bondholder to 'shop' for favourable treaties. Such forum shopping may not even be necessary in the presence of umbrella clauses, which are intended, as we mentioned above. Under an umbrella clause, a host state has the responsibility to respect its treaty obligations in addition to, or even despite the fact, that the same obligations may also be governed by domestic laws and contracts. Therefore, contractual approaches to workouts such as

CACs could be interpreted as being within the scope of an international investment agreement, via an umbrella clause. Even if a bond issuance with a CAC has had a bondholders' meeting whereby a supermajority has agreed to accept the restructuring and if there was no minimum enforcement vote of 25 percent of bondholders to litigate, under an umbrella clause holdouts may still be able to resort to investor-state arbitration.

In summary, there are three main problems with CACs in bond issues under BITs. Firstly, holdouts can acquire a supermajority within a bond issuance and neutralize the bond issue if a 25 percent minority wishes to litigate and arbitrate. Secondly, definitions of investment and umbrella clauses allow for investor-state arbitration over treaty obligations regardless of whether such obligations are also covered by local law under which CACs operate. Thirdly, many sovereign debt restructurings involve numerous bond issues and suffer from the agglomeration problem (collective action clauses do not apply across bond issuances, but only within single bond issuances). Take-it-or-leave-it bond exchanges such as those that have occurred in Argentina would satisfy the 75 percent rule, but it is not clear that such swaps could justly be deemed as 'negotiated', leaving the forced minority to explore other litigation and arbitration options.

Conclusion

On 9 March 2012 the Greek government exercised the powers it granted itself with Law 4050/2012 and activated collective action clauses on Greek bonds forcing holdouts to participate in the debt swap offer it launched in February 2012. On 14 March ISDA declared a credit event which allows the payment of credit default swap contracts on Greek debt. The analysis on this section indicates that considering the precedent of Argentina and the reasoning of the ICSID Tribunal in Abaclat in 2011, there is an opportunity for investors to pursue the Greek government for compensation under the terms of bilateral investment treaties Greece has signed. Especially the Greece-Germany BIT of 1961 offers fertile ground for arbitration under the International Centre for the Settlement of Investment Disputes. While there is no guarantee of success, there is enough legal justification for commencing action, and no doubt many holdouts will take that route.

The following two sections of this paper examine opportunities for litigation and arbitration under European and Greek Laws that may be used cumulatively with an action based on Treaty rights.

Suing under European Law

Investors suffering losses as a result of a workout are likely to perceive the reduction in the face value of their bonds as an expropriation. As a result they will consider any legal provision that applies to them aiming to protect property rights. The Charter of Fundamental Rights of the EU (2000/C 364/01), provides in Art. 17 on the Right to Property that:

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.

The article also specifically mentions that intellectual property shall be protected. This article is based on Article 1 of the Protocol to the ECHR :

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,

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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.

Defining expropriation in Europe to a great extent depends on what has been historically defined as property. We saw in the previous section the difficulty in determining whether sovereign bonds should be considered as giving rise to contractual rights protected in national law, or whether they give rise to property rights with protected status in international law. It is not always obvious which contractual expectations will be given the status of 'property rights' so that they can serve as the basis for a claim. For example, in the Oscar Chinn case, (UK v Belgium, 1934 PCIJ, ser A/B, no. 63) market access was held not to amount to property. The United Kingdom argued that the provision of subsidies to a shipping carrier (allowing them to charge nominal freight charges) amounted to a breach of the general principles of international law (respect for vested rights). The Permanent Court of International Justice (the precursor to the International Court of Justice) , however, rejected this position, reasoning that it is not possible to see in the claimant's original position, which was characterised by the retention of customers and the possibility of making a profit, anything in the nature of a genuine vested right. In contrast, vested contractual rights have been regarded as property which is capable of being expropriated. In SPP (Middle East) v Arab Republic of Egypt (ICSID Award, 32 ILM 933, 1993), a claim for expropriation succeeded in respect of losses sustained by the claimant under a contract to develop a site near the Pyramids for tourism that the Egyptian government cancelled when it introduced legislation preventing further development on the site (Baughen 2006:223-4)

The rights in article 1 are fundamental rights, common to all national constitutions of states party to the EU. This has been recognised on numerous occasions by the case-law of the European Court of Justice, initially in the Liselotte Hauer v Land Rheinland-Pfalz judgment (case 44/79, 1979, ECR 3727). The general principles to be applied in determining whether or not there has been a violation of Article 1 were set out in James v United Kingdom (1986, 8 EHRR 123). The first question is whether the deprivation was in the 'public interest'. In deciding this, national authorities enjoy wide discretion. The court argued that the judgement of national authorities will be respected unless it is 'manifestly without reasonable foundation'. Given the courts' reluctance to challenge the state's view as to what constitutes public interest, it is not surprising there have not been many successful challenges to a measure on this ground. Secondly, it is examined whether a reasonable relationship of proportionality exists between the means employed and the aim sought to be realised, meaning that a 'fair' balance must be struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. The balance would not be fair if the applicant had to bear 'an individual and excessive burden'. The taking of property without payment reasonably related to its value would normally constitute a disproportionate interference (Baughen 2006:214). It follows, therefore, that where the applicant has received no compensation, a breach of Article 1 will generally be established. However, this should not be interpreted as requiring the state to compensate for all actions affecting property entitlements. Only claimants arguing for 'deprivation of possessions' will be entitled to compensation, and the threshold for this heading is a high one. The measure in question must completely remove any economic value from the affected right. A mere reduction in value will not suffice, as is shown by a series of decisions by the European Court of Human Rights (Baughen 2006:215).

Precedents of investors suing the Greek state for violations of economic rights should not give many grounds for optimism to foreign investors in Greek bonds thinking of bringing claims under Human Rights related provisions, as the ones mentioned above. In Rosemarie Marra and Marrecon Enterprises, S.a./cross v. Vaso Papandreou, et al. case (216 F3d 1119, 2000) the claimant sued in the US courts, seeking $1.6 billion in damages from the Greek government for breach of contract and

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unlawful expropriation of property stemming from the revocation of a licence to build and operate a casino. The trigger for the action was the Greek government's decision to issue a resolution identifying legal defects in the licensing process, and accordingly revoking the Ministry of Tourism's earlier decision to grant a casino license to Marra and her partners. The Greek government won the case on the basis of a choice of law clause in the contract that gave jurisdiction to the Greek courts to hear the dispute, causing Marra to fall foul of the national statute of limitations.

Another instance of investors complaining about indirect expropriation on a contractual basis, this time brought before the ECtHR can be found in the case of Agrotexim and others v. Greece (330-A Eur. Ct. H.R. ser. A, 1995). The ECtHR noted at the outset that the applicant companies had not complained of a violation of the rights vested in them as shareholders of Fix Brewery. Their complaint had been based exclusively on the proposition that the alleged violation of the Brewery's right to the peaceful enjoyment of its possessions by the Greek government had adversely affected their own financial interests because of the resulting fall in the value of their shares. They had considered that the financial losses sustained by the company and the latter's rights had to be regarded as their own, and that they had therefore been victims, albeit indirectly, of the alleged violation. In its report the Court seemed to accept that a violation of a company's rights (protected by Article 1 of Protocol No. 1, ECHR) resulted in a fall in the value of its shares. Therefore it found that there was automatically an infringement of the shareholders' rights under that article. However, the Court found that such a set of circumstances did not give the shareholders locus standi. It was the Brewery, as the corporate entity whose rights had been violated, that could sue to recover any losses. The investors therefore again failed on account of a technicality, despite the fact that the court indicated its agreement with important arguments on the substance of the claimant’s case.

A third example where the European Court of Human Rights actually found for the applicants in their claim for compensation for a violation of Article 1, Protocol 1 of the ECHR is Stran Greek Refineries and Stratis Andreadis v. Greece (13427/87, 1994, ECHR 48). According to the applicants' submission, although no property was transferred to the state, the combined effect of legislative actions resulted in a de facto deprivation of their possessions. The loss to Stran arose by the cancellation of a debt set in a final and binding arbitral award. The Court considered this to be an infringement of the right to the peaceful enjoyment of possessions, because interference with the arbitral award constituted an interference with the applicants' property right.

This last case offers a good illustration of competing objectives weighing on the judges minds. The Court did not doubt that it was necessary for the democratic Greek state to terminate a contract concluded by the dictatorship of 1967-1974, which it considered to be prejudicial to its economic interests. The ECtHR recognised according to the case-law of international courts and of arbitral tribunals that any State has a sovereign power to amend or even terminate a contract concluded with private individuals, provided it pays compensation. This conclusion supposedly reflected recognition that the superior interests of the state take precedence over contractual obligations and took into account of the need to preserve a fair balance in a contractual relationship. However, the court noted, the unilateral termination of a contract does not extend to an arbitration clause. According to Subedi (2008:161) the tendency to treat contractual rights as equivalent to property rights in disputes related to takings, blurs the line between public and private law, between treaty obligations and private obligations. An example from the ICSID jurisprudence dealing with the similar issues as those discussed above in the Greek cases involved a US investor complaining that Turkey (PSEG Global Inc. and Konya v Republic of Turkey, 2007 ICSID,final award 19 January 2007) caused them loss in violation of the US-Turkey BIT by not proceeding with sanctioning the construction of a proposed power station. While the tribunal did not go as far as saying that compensation was payable, it found a violation of the principle of fair and equitable treatment.

Perhaps the best illustrations of efforts to stretch the notion of expropriation come from cases where businesses have challenged planning laws as equivalent to takings (Giannakourou and Balla 2006: 535). In Papamichalopoulos v. Greece (16 Eur. H.R. Rep. 440, para. 45, 1993), where the applicants' land had been taken over by the military, the Court found that, although there was never any formal expropriation, the loss of all ability to dispose of the land in issue entailed sufficiently serious consequences for the applicants property to be considered de facto expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions. In Pialopoulos v. Greece, (33 Eur. H.R. Rep. 977, 2001), despite the authorities having imposed a building freeze and having announced plans for the expropriation of the applicants' properties, the Court held that despite there being no reasonable balance struck between the demands of the general interest and the requirements of the protection of the individual's fundamental rights, the effect of these measures did not involve a deprivation of property or a control of the use of property.

Conclusion

Attempts to sue the Greek government demanding compensation for 'takings' under the Charter of Fundamental Rights of the ECHR are unlikely to be very fruitful for investors. As the caselaw presented above demonstrates, the courts are exceptionally deferential to the government's view of what constitutes legitimate public policy. Also, there are no prominent comparable cases of buyers of sovereign bonds complaining of expropriation under human rights provisions. In comparison to the options investors have under BITs, it is unlikely that pursuing a claim along the lines described in this section will be very appealing.

Suing in Greek Law

Options to sue in the Greek courts centre on the unconstitutionality of the haircut. There are two ways to challenge the laws implementing the restructuring. One is to challenge the process of law creation relating to the implementing laws for the PSI in the Conseil d'Etat, the other is to challenge the reduction in the value of the holdings on the basis of the property protection provisions of the constitution. Indeed, the Greek Constitution, as amended in 2008, offers a very good illustration of governments' attempts to balance the need for protection and respect of private property rights with the government's discretion to guide the national economy in the public interest. The Greek solution offers a pro market interpretation of the state-market relationship, that is remarkable in creating a constitutional duty to compensate takings under almost any circumstances. For example, while the constitution reserves the right to nationalise enterprises (but not to the extent that such nationalisation affects the right of foreign investors to repatriate profits, Art. 107), nationalisation is possible only for enterprises that are considered monopolies or are of vital importance to the development of sources of national wealth or are primarily intended to offer services to the community as a whole (Art 106.3). While initially, the constitution proclaims that the use of private rights of property cannot be exercised contrary to the public interest (Art 17.1) and states that private economic initiative shall not be permitted to develop at the expense of freedom and human dignity, or to the detriment of the national economy (Art 106.2), it proceeds to state that no state interference with private property is allowed, even in order to protect that public interest, without full compensation (Art 17.2). Indeed before the payment of such compensation begins (although it does not need to be paid in full in advance in the case of important works of an emergency nature), state interference on the private domain is not even allowed to start (Art 17.4). Also, every expropriation needs to be compensated within a year and a half, otherwise it is to be reversed, and the amounts paid to the private owners are not subject to tax and charges (Art 17.4). Compensation is also offered to shareholders of nationalised enterprises (Art 106.4), and minority shareholders are even offered a buy-out option in cases of part nationalisation, where the government attains a controlling state in the enterprise (Art 06.5) (Glinavos 2011).

The only instance where the right to compensation is not recognised is for subterranean works that do not affect the use of the over ground properties (Art 17.7). However, a very important question is what is considered in Greek law to be a 'taking'? Even the strongest constitutional protections from expropriation will not be particularly restrictive of government activity if very few government actions are actually given the label of expropriation. This reservation ought not to worry private owners of properties in Greece. It is important to state first of all that the Greek constitution seeks to protect property rights in a general sense, as those arising from contractual and real property transactions. This is consistent with the approach of the the ECHR (Protocol 1, Art 1) discussed above, which guarantees all property rights and interests, not limiting protection to real (land based) rights. Spyropoulos and Fortsakis (2009) argue that Greek courts prefer to base protection of wider economic rights on the ECHR, and not Art 17 of the Constitution, but that does not alter the practical effect of protection from expropriation being extended beyond land based rights. According to the aforementioned authors, definitions of property for these purposes include those of acquired rights (like profits). In this view, even the state's right to levy taxation (Art 78) is limited by the expropriation provisions of Art 17 insofar as excessive taxation will be deemed as equivalent to a taking, and therefore subject to the compensation provisions of the constitution.

As we saw ealier, Greece made its offer to bond holders of Greek law governed bonds on 24 February 2012 to accept new bonds with a face value of 31,5% of their former titles. On 8 March 2012 more than 90% of the bondbolders had agreed to take the offer. Immediately upon the passing of the law enabling the hair-cut on Greek sovereign bonds, a number of investors and Greek pension funds announced their intention to challenge the arrangement in the Greek courts. At the end of the offer period about the holders of 9bn worth of bonds opposed the offer. On 12 March 2012 Greece announced the swap of all bonds relying on CACs introduced into Greek law on 9 March 2012. This action prompted ISDA to declare a Credit Event in relation to Greece, which allows the payment of CDS contracts. A number of constitutional lawyers, including the Costas Hrysogonos of the University of Thessaloniki challenged the constitutionality of the measure noting the artificial distinction between an enforced haircut on private sector (but public purpoce) corporates like the state-supported pension funds and holdings of Greek bonds by the ECB and other EU member state central banks. Further, he claimed that the law forcing Greek pension funds to deposit their capital with the Bank of Greece amounted to expropriation (http://www.tanea.gr/latestnews/article/?aid=4702150).

The latter point could be a significant issue in forthcoming litigation. The Bank of Greece is charged with managing the capital of pension funds on the basis of Law 1611/ 1950, 2216/1994 and 2469/1997. Available funds constitute a common capital base which the Bank of Greece is required to invest in government bonds. The Bank of Greece did not consult with or seek the approval of the pension funds before investing in government bonds according to the pension funds. This situation renders the distinction between the pension funds and the state budget questionable, and it also raises the issue of violation of Art 17 of the Constitution. There is nothing to prevent the pension funds or other private investors of trying their lack in the Greek courts, alleging that the enforced reduction to their holdings under the activation of CACs constitutes an act of expropriation that mandates compensation.

Conclusion

Foreign investors are usually reluctant to pursue actions in national courts and with good reason. Precedents from developing countries suggest that the local judiciary is either lacking in competence, or subject to political pressure or both, making it a questionable vehicle for seeking compensation from the government. Greece is not a developing country, however its judicial system suffers from

many problems that are common in emerging economies. If one however looks beyond the practical difficulties and pitfalls of bringing actions in Greek courts, the legal situation appears promising. While it may be difficult to get Greek judges in the midst of the worst financial crisis the country has experienced to decide in favour of investors, there are good arguments that can be made challenging the constitutionality of the measures leading to the workout. For Greek holdouts, like some pension funds, pursuing actions in the national courts will probably be the preferred avenue.

Concluding Remarks

Greece has set a remarkable precedent in being the first developed country to default on its debt in living memory. While a number of European nations are continuing to live in circumstances of questionable solvency, Greece has been the focal point of the debt crisis that has been a consequence of the Great Recession that begun in 2008 with the collapse of Lehman Brothers in the US. The events in Greece since 2010 will occupy policy makers and market participants for the foreseeable future. They will also occupy courts and arbitral tribunals in multiple jurisdictions. The purpose of this paper has been to offer a first glimpse in what will become a major issue for discussion for legal scholars in years to come. In the same way that Argentina‘s default led to legal actions that are still to reach a conclusion, legal advisers will be grappling with the issues raised by Greece's workout well into the 2020s. This of course assumes that the European debt crisis stops here and does not lead to more workouts and defaults in other member states. This study is not an authoritative one, and draws heavily on the existing literature on the subject. The study is useful nevertheless, it is hoped, as it collates impressions as to the state of relevant law and can serve as a starting point for further research. The message for investors seeking to sue Greece for their losses is that they have a long and hard road ahead of them, but the very fact that a road exists is reason for optimism that a possibility of recouping some of their losses survives. This possibility is heightened for investors protected under BITs that Greece has signed and for those seeking to challenge the constitutionality of the workout in national courts. Whether investors should pursue this lengthy legal battle is another question. When there is money to be made, someone somewhere will always consider options, regardless of the damage such action may cause to the country concerned and its prospects for recovery. In a way, the possibility of legal actions on this topic is a consequence of decades of foreign direct investment liberalisation coming back to haunt us. Who would have thought in 1961 that a BIT signed to being investment funds into the country, would allow vulture funds to pick at Greece's fiscal corpse in 2012? If there is a wider message to draw from this discussion, it could be that policy makers need to think harder when balancing the need for investment with policy freedom in the long run.

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