The Greek Debt Restructuring and Property Rights
A Greek Tragedy for Investors?

Patrick Wautelet (University of Liège)

I. The Greek PSI – an overview
II. What may bondholders expect under Article 1 Protocol I ?
A. Sovereign bonds as 'possessions'
B. The Greek Bondholder Act as 'interference'
C. Was the interference 'legal'?
D. The Greek restructuring and legitimate public interest
E. The Greek restructuring : striking a fair balance?

On 24 February 2012, the Republic of Greece launched launched the so-called 'Private Sector Involvement' (PSI) action. The goal of this operation, which had been prepared during long negotiations between Greece, its private creditors, the International Monetary Fund (IMF), the EU and the ECB[1], was to restructure a large part of its debt burden[2]. Greece was required to reduce its total debt significantly in order to obtain the bailout which had been orchestrated by the so-called 'Troika', i.e. the IMF, the ECB and the members of the Eurozone[3].

The Greek operation was one of the largest sovereign debt restructuring in history[4], paralleled only by the exchange set up by Argentina in 2004[5]. Before the operation, the total Greek debt was estimated at € 350 billion. A substantial part of this debt was formed by bonds which had been issued by Greece. As other sovereign debtors have done, Greece chose to concentrate on this part of its debt, which amounted to approximately € 200 billion. During this operation, investors holding sovereign bonds issued by the Republic of Greece were invited to turn in their bonds[6]. In exchange they were granted new securities with a lower aggregate outstanding principal amount, lower rate and a longer maturity, thereby reducing the cost for Greece to service its debt. The exchange offer proved to be a success. On March 12, 2012, the Greek government announced that holders of € 177.25 billion bonds had consented to the exchange.

---

1 The creditor's committee was composed of representatives from a number of banks, insurers and asset managers (see *www.iif.com/press/press+219.php*). The steering committee of the Private Creditor-Investor Committee for Greece was chaired by Mr Charles Dallara (IIF). As noted, the exchange was carried out in a hybrid way : first prepared during discussions between the sovereign and a creditors' committee and then carried out by a unilateral exchange made by the sovereign. Contrast with the operations carried out by other sovereigns starting in the 1990's, which were mostly 'take-it-or-leave-it' debt exchange offers – see Hal S. Scott, *International Finance : Law and Regulation*, Sweet & Maxwell, 2008, pp. 701-723.

2 The operation aimed to reduce Greece's debt to GDP ratio to 120.5% by 2020 (Invitation Memorandum by the Hellenic Republic to the Holder of Securities, 24 February 2012, at p. 12) (hereinafter 'Invitation Memorandum').

3 This was not the first bailout granted to Greece. In May 2010, the Eurozone countries and the IMF had already agreed to a substantial bailout for Greece, which was conditional upon compliance with structural requirements. Looking back at history, Greece had already been subject to international supervision of its finances. See on the Greek International Financial Commission of Control which operated between 1899 and 1931, M. Waibel, *Sovereign Defaults before International Courts and Tribunals*, Cambridge University Press, 2012, pp. 44-45, with further references.

4 For an overview, see U.S. Das, M. G. Papaioannou and C. Trebesch, 'Sovereign Debt Restructurings 1950-2010 : Literature Survey, Data and Stylized Facts', IMF Working Paper 12/203 (2012).

5 The total value of the sovereign bonds was estimated at € 195.7 billion.

6 The operation also included 36 sovereign-guaranteed bonds issued by Greek government-owned companies, such as Railways and Athens Public Transport. The total value of these bonds amounted to approximately € 10 billion.

Even if the PSI proved to be a milestone in the sovereign debt crisis which has plagued the European Union, and in particular the Euro zone, for some years, the ensuing events showed that the exchange operation did not signal the end of the turmoils for the Greek public finances[7]. It is still open to question whether Greece will be able to avoid a default on the new bonds[8]. Nor did this operation bring a final point to the crisis on sovereign debt markets. Nevertheless, the PSI was significant. It left existing bondholders with new bonds worth substantially less than their previous holdings[9]. This depreciation represents a major loss for investors, at least those who have paid the full, nominal price for the bonds[10].

Creditors who suffered significant losses due to the restructuring could attempt to challenge what they could perceive as being an expropriation. This would not be a novelty. Holdout creditors have in the past been quite active in attempting to obtain payment on sovereign bonds notwithstanding a restructuring or a default by the sovereign debtor[11]. While it is unclear whether investors will go forward with litigation against Greece[12], this is far from excluded[13].

Among the arguments which investors could use against Greece, this contribution will focus

---

7 After the June 2012 elections, the new government asked its creditors an extension of the time period granted to restore a balanced budget. This led to a new round of negotiations between the Greek government and the 'Troika' on the reforms imposed to Greece.

8 The debt-to-GDP ratio of Greece remains very high. According to Eurostat, it clocked at 156.9 % for 2012. One of the reasons for this seems to be that the restructuring also affected Greek banks, which held a significant amount of Greek sovereign papers. These banks had therefore to be recapitalized. The amount needed for this recapitalisation was added to the Greek debt, thereby offsetting at least in part the effect of the restructuring.

9 The size of the 'haircut' has been the subject of a debate. In the media, the haircut was said to be around 70%. This figure has, however, been disputed. According to Zettelmeyer & Co, the actual loss suffered by Greek investors is “significantly lower than the 77 per cent ―market haircut, which was widely reported in the press”. Using a method outlined in their paper, these authors conclude that the haircut suffered range from 58% to 64-65% (J. Zettlemeyer, C. Trebesch and M. Gulati, 'The Greek Debt Exchange : An Autopsy', Sept. 2012, available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144932*), at p. 14.

10 In another chapter to this Greek story, a decision has to be taken on the credit default swaps purchased by those investors who sought to protect the value of their investment against the risk of default by the Greek government. As is well known, the ISDA announced in March 2012 that the implementation of the Greek Bondholder Law amounted to an event of default under the applicable ISDA agreement. As a consequence the CDS were triggered. See on the CDS-side of the story, A. Gelpern and M. Gulati, 'CDS Zombies', *Eur. Bus. Org. L. Rev.* (2012), pp. 347-390.

11 The phenomenon of 'holdout creditors ligitation' has been extensively documented. See already E. Robert, 'Rééchelonnement de la dette ou règlement judiciaire? (Analyse de la jurisprudence interne et internationale au regard des enjeux de la renégociation de la dette)', in *The External Debt*, D. Carreau and M.N. Shaw, Martinus Nijhoff, 1995, pp. 607 ff – with overview of the various arguments and tactics used by hold out creditors at pp. 607-626. Lately, holdouts have been described as 'vulture funds', and this has attracted additional literature – see *e.g.* J. Goren, 'State-to- State Debts: Sovereign Immunity and the 'Vulture' Hunt' 41 *George Washington Int'l. L. Rev.* (2010) 681 ff; Jill E. Fisch and Caroline M. Gentile, 'Vultures or Vanguards? The Role of Litigation in Sovereign Debt Restructuring', 53 *Emory L. J.* (2004), 1047 ff; J. Blackman and R. Mukhi, ‘The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal Fauna’ 73 *Law and Contemporary Problems* (2010) 47 ff. I have argued that there is not much to be gained by earmarking creditors as 'vulture funds' – see P. Wautelet, « Vulture funds, creditors and sovereign debtors : how to find a balance? », in *Insolvabilité des Etats et dettes souveraines*, M. Audit (ed.), LGDJ/Lextenso, 2011, 103-164.

12 See S. White and S. Sassard, 'Bold hedge funds mull risky Greek debt battle', *Reuters*, 7 March 2012 (*www.reuters.com/article/2012/03/07/uk-hedgefunds-greece-idUSLNE82602I20120307*).

13 One case has already been brought, before an arbitral tribunal A bank issued proceedings under the Greek-Cyprus BIT against Greece in 2013 : *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8.

on the alleged wrongful taking of property. Investors have indeed claimed that the whole operation amounted to deprivation of private property[14]. In order to verify whether investors could find any support for their claim in the protection of property rights,[15]. the analysis will be conducted on the basis of Article 1 of the 1st Protocol to the European Convention on Human Rights[16]. As any analysis of a possible violation of Article 1 is fact-sensitive, it is necessary to look first in details at the Greek PSI (I) before attempting to determine whether investors could validly challenge the Greek operation (II).

I. The Greek PSI – an overview

The exchange operation which Greece launched on February 24, 2012 was meant to refinance and reduce significantly its outstanding bond indebtedness. The Greek government offered bondholders the possibility to trade in the existing bonds for new bonds[17].

The existing bondholders were scheduled to receive a 'package' consisting of no less than three different elements[18]. At the heart of the exchange[19], bondholders were promised new bonds for an amount equivalent to 31.5 percent of the face amount of the old bonds which were exchanged[20].

Next, the bondholders trading in their existing bonds, were also promised new securities, which were designed to give bondholders the right to receive an additional amount if the Greek economy fared better[21]. These so-called 'GDP-linked securities' had a notional amount equal to the face value of each holder's new bonds. They were meant to constitute a financial

---

14 See Landon Thomas Jr., "Hedge Funds May Sue Greece If It Tries to Force Losses", *NYTimes*, 18 Jan. 2012 and "Vulture funds hunt Greek blocking stake", *Int'l. Fin. Rev.*, Dec. 2011, www.ifr.com/vulture-funds-hunt-greek-blocking-stake/1617526.article.

15 If this question is put before a domestic court, this court would first have to verify whether the claim is not barred by the sovereign immunity enjoyed by Greece. This would not present an insurmountable obstacle, as matter relating to expropriation are often excluded from the scope of protection enjoyed by sovereigns (see *e.g.* § 1605(a)(3) of the US Foreign Sovereign Immunities Act, which provides that a foreign State shall not be immune from the jurisdiction of US courts "in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state."). The issue of sovereign immunity obviously does not arise if proceedings are brought before the Eur CtHR against the sovereign debtor.

16 The same inquiry could be done using another framework of reference, such as the protection afforded under international law against expropriation. See on the Greek case M. A. Boudreau, "Restructuring Sovereign debt under Local Law : Are Retrofit Collective Action Clauses Expropriatory?", *Harvard Business Law Rev. Online*, 2012, vol. 2, pp. 164-186 and in general on the treatment of expropriation under international law in the context of sovereign restructruring, see M. Waibel, note 3, at pp. 278-289.

17 Some bonds were treated differently, apparently because of regulatory constraints. See on the treatment of Swiss-law bonds, Japanese-law bonds and Italian-law bonds, J. Zettlemeyer, C. Trebesch and M. Gulati, note 9, p. 6, note 5.

18 The European Financial Stability Facility (EFSF) played a key role, lending not less than € 30 billion to Greece through a 'Private Sector Involvement Liability Management Facility' ('PSI LM Facility') (document available at *www.efsf.europa.eu/about/operations/index.htm*).

19 Zettelmeyer & Co. offer facts and figures about the new securities : J. Zettlemeyer, C. Trebesch and M. Gulati, note 9, at pp. 41-43.

20 For each bond tendered having a face value of € 1.000, Greece issued a new bond having a face value of €315. The maturity of these new bonds was scheduled between 2023 and 2042, with annual coupons ranging between 2 and 4.3 percent. The new bonds were issued in no less than 20 different issues. The bonds, which were issued under English law, were governed by a 'co-financing agreement' concluded with the EFSF.

21 The securities triggered the right for bondholders to receive an additional amount if Greece's GDP exceeded in any year a certain rate. This rate was set in line with the IMF's growth projections for Greece.

inducement to bondholders.

Another additional incentive was promised to induce existing bondholders to trade in their bonds for the new package : the bondholders were promised Notes, which were to be issued by the EFSF[22]. These 'PSI Payment notes' had a very short maturity (one or two years). As they were guaranteed jointly by the Eurozone countries and issued by the EFSF, they were considered almost equivalent to cash for bondholders trading in their existing bonds[23].

A crucial element in the operation was the amendments which were made of the terms of the existing bonds. The amendments were necessary to allow Greece to offer the new package of securities to those bondholders trading in their old bonds[24]. The bondholders were asked to consent to these amendments. How the consent was sought and the amendments made differed according the governing law of the bonds.

The largest part of the bonds had been issued under Greek law[25]. These bonds did not include collective action clauses (CAC's) or similar provisions allowing a restructuring to be approved by a majority of bondholders[26]. Such clauses usually include a majority restructuring or amendment provision, allowing the sovereign debtor to modify some elements of the bonds by obtaining approval of a qualified majority[27]. Hence, any amendment of the existing Greek bonds would have required the unanimous consent of all bondholders. As has been noted[28], however, the fact that the bonds were governed by Greek law offered Greece the opportunity to adopt legislation making an exchange possible[29]. Greece could have adopted legislation which would directly modify the terms of the bonds.

The legislation adopted by Greece did not, however, intervene directly in the bonds, rewriting

---

22 The notes were to be issued by the EFSF, in accordance with the PSI LM Facility and handed to Greece which would deliver them to holders of existing bonds once they have tendered their bonds for the exchange.

23 The Notes represented an aggregate amount of around € 15 billion, which equaled 15% of the face amount of the exchanged bonds.

24 Without such amendments, the operation would have been a simple 'exit consent', where investors are offered new bonds in exchange for the existing ones. Usually, in such exit consent procedures, bondholders tendering in their bonds are asked to waive certain protections in the old bonds. This leaves the holdout bondholders with less protection. See in general, L. C. Buchheit & G. Mitu Gulati, 'Exit Consents in Sovereign Bond Exchanges', 48 *UCLA Law Rev.* (2000) 59 ff.

25 Almost 91 per cent of the sovereign bonds had been issued under Greek law.

26 Collective Action Clauses are inserted in bonds issues in order to prevent individual bondholders from undertaking action on their own in case of default or late payment. They include various provisions such as a common acceleration and enforcement clause (restricting the possibility for individual bondholders to accelerate the bonds) and various possibilities for creditors to decide on rescheduling and amendment of the bonds, provided a special majority is in favor of such amendment. See in general, Ph. Wood, *Principles of International Insolvency*, Sweet & Maxwell, 2007, pp.789-790.

27 See *e.g*. F. Elderson and M. Perassi, "Collective Action Clauses in Sovereign Foreign Bonds : Towards a More Harmonised Approach", *Euredia* (2003), at pp. 239-264. This allows a qualified majority of bondholders, typically 75%, to amend the some of the of the bond – for example, the payment terms, extension of maturity, interest-rate cut and possibly a 'haircut'. An individual creditor may hold out and not agree to the change proposed by a sovereign debtor. The amendment will nonetheless be binding on all bondholders, even those who have not accepted the amendment. Hence, the prospect of individual action by dissenting bondholders is made less attractive.

28 In a paper which attracted considerable attention : Lee C. Buchheit and G. Mitu Gulati, 'How to Restructure Greek Debt' (Duke Law Working Papers, Paper No. 47, 2010), available at http://scholarship.law.duke.edu/working_papers/47. Also published as "Restructuring a Nation's Debt", 29 *Intl. Fin. Law Rev.* 46 ff (2010-2011).

29 By contrast, all the new securities offered in the framework of the exchange were governed by English law.

their terms[30]. Instead, the law adopted on 23 February 2012[31] made it possible to seek the consent of the bondholders, authorizing Greece to amend the existing bonds in order to make it possible for Greece to offer new bonds with a different value for the old bonds traded in. In effect this amounted to writing in the terms of the bonds a super majority amendment clause, which was not present initially. In other words, if the required majority of bondholders consented[32], Greece could, instead of continuing to pay interests on the existing bonds, replace these bonds with the new package of securities[33].

The consent of existing bondholders was somewhat constrained. Bondholders could indeed not accept the exchange offer and simultaneously reject the amendments[34]. Bondholders accepting the exchange offer were therefore deemed to accept the amendment.

A limited number of bonds had been issued by Greece in the past under another law than its national law. These bonds, including bonds issued under English law, already included collective action clauses[35]. It was therefore not necessary to subject these bonds to the Bondholder Act. The system adopted for the amendment was much more in line with what other sovereign debtors had previously done : the invitation extended to bondholders to tender in their bonds provided that by doing so, bondholders agreed to the proposed amendments[36].

At the end of the operation, Greece announced that more than 85% of the holders of Greek bonds had tendered in their bonds and consented to the amendments[37]. Holders of approximately 5% of the outstanding amount of Greek bonds had given notice that they opposed the amendments. After extending the exchange operations with a few weeks[38], Greece made it known that it activated the amendments which had been proposed to the

30 This would certainly have raised additional concerns, not only under Art. 1 of the 1st Protocol to the ECHR.

31 Greek Bondholder Act, 4050/12, 23. February 2012 – an unofficial translation of the law is available at http://andreaskoutras.blogspot.be/2012/03/better-tarnslation-of-bondholders-act.html. A detailed summary of the operation of the Act is offered in the Invitation Memorandum, at p. 14-16.

32 Technically, the bondholders by tendering their old bonds, would give a proxy to a company designated by Greece, which could exercise their right to vote (i.e. the Bondholders Communication Group LLC and Hellenic Exchanges, SA – See Invitation Memorandum, at p. 14 and 18).

33 There were various thresholds built in the operation. First, Greece had to obtain additional financing from the EFSF (which was scheduled to deliver Greece the notes which were to be delivered to the creditors following the exchange). Second, at least 50 percent of the bondholders (or to be more precise, holders of at least 50 percent of the aggregate principal amount of eligible existing bonds) had to confirm their participation in the operation (which did not mean these bondholders irrevocably committed to tender their bonds in). Thirdly, a consent threshold was built in the operation. At least two-thirds of the holders which confirmed their participation had to consent to the proposed amendments. This threshold applied across the totality of all Greek law sovereign bonds outstanding, rather than bond-by-bond. Finally, the Greek government had the discretion to put the amendments into effect, by electing to put the amendments into effect. See the details in Invitation Memorandum at p. 14-15 and in details at pp. 21 ff.

34 According to the Invitation Memorandum, "by tendering Designated Securities for exchange, a holder of Designated Securities also consents to and votes in favour of, the Proposed Amendments to the relevant Designated Securities [...]" (Invitation Memorandum, at p. 13).

35 According to these clauses, the quorum required varied between two-thirds and 75 per cent, while at the same time, a lower quorum was provided if a second attempt proved necessary. The threshold for passing the amendment varied as well between two-thirds and 75 per cent of face value-weighted votes in the first meeting, with a lower threshold in a second meeting.

36 See for more details Invitation Memorandum, at p. 16-20.

37 As for bonds issued under other laws than Greek law (both sovereign and sovereign guaranteed), participation was lower. According to figures released by the Greek government, around 69% of the bondholders consented to the amendments. Among the 36 foreign law bond issues which were equipped with collective action clauses, only 17 were amended, leaving the other issues unamended.

38 This extension concerned foreign-law bonds. An initial extension was granted until March 23. Another extension brought the deadline to April 4.

existing bonds[39]. As a result, all existing bonds issued under Greek law were canceled[40]. In exchange the bondholders received the new securities. This applied not only to those bondholders who had approved the exchange but also to those who had rejected it or had neglected to react[41]. Even non-tendering holders of bonds, at least those governed by Greek law, were forced to participate in the exchange[42]. In effect, the Greek Bondholder Act neutralized the power of non-tendering bondholders, who could no longer block the execution of the exchange offer[43].

The holdout creditors have therefore been defeated. This may, however, have been the first battle in a long war. If one puts aside the holdout creditors holding foreign-law bonds, who represent the vast majority of non-cooperative investors[44] and the bonds issued under Greek law which have not been subject to the amendment process under the Greek Bondholder law[45], all bonds issued under Greek law have been subject to amendment thanks to the CAC retrofitted in their terms on the basis of the 2012 Act. It is now time to consider whether the cooperative and non-cooperative investors may challenge the Greek medicine they had to swallow and which left them with new bonds representing a significant loss.

II. What may bondholders expect under Article 1 Protocol I ?

Investors feeling cheated by the Greek restructuring could attempt to bypass the exchange in many ways. Some may take recourse to investment arbitration[46]. Investors who held bonds

---

39 Hellenic Republic Ministry of Finance, press release 9 March 2012 (*www.pdma.gr/attachments/article/80/9%20MARCH%202010%20-%20-%RESULTS.pdf*).

40 The Invitation Memorandum provides that when the bondholders receive the package of new securities, Greece "shall have discharged in full, and be deemed to have fully performed and satisfied, all of its obligations under the" old bonds (at p. 16).

41 See for more details Invitation Memorandum, at p. 14-15.

42 The Invitation Memorandum provided that "Holders of [old bonds] that do not participate in the Invitation and those that reject and vote against the Proposed Amendment to such [old bonds] will, if such Proposed Amendments are declared effective be bound by the relevant Proposed Amendments" (Invitation Memorandum, at p. 82).

43 In the past, some creditors have attempted to block restructuring. This happened to a restructuring initiated by Peru, which a creditor attempted to block - see *Elliott Associates LP v. Banco de la Nacion and the Republic of Peru*, 194 F.3d 363 (2d Cir 1999). Other creditors targeted the major exchange operation devised by Argentina in 2004 to restructure its debt. Some of the creditors who did not exchange their old, defaulted debt for new bonds, attempted to attach a number of the tendered 'old' bonds on which Argentina had defaulted. The creativity of creditors did not pay off : after issuing an *ex parte* attachment, the district court dissolved it. In appeal, the Second Circuit affirmed the ruling of the district court denying the attachment, noting that "If these attachments [and restraints] are still in effect, we throw into doubt, to say the least, the conclusion of the exchange offer." : *EM Ltd v. The Republic of Argentina*, 131 Fed. Appx. 745 (2d Cir. 2005).

44 According to Zettelmeyer & Co, holdout creditors held 3.1 % of the total debt. The holdouts were spread across 25 different bond issues, all but one of which were governed by foreign law. For more details, see J. Zettlemeyer, C. Trebesch and M. Gulati, note 9*,* at p. 9 and the figures included in tables at pp. 44-47.

45 This concerns a series a bonds issued by greek governmental agencies, with the guarantee of the Greek State. See table A4 in J. Zettlemeyer, C. Trebesch and M. Gulati, note 9*,* at p. 47.

46 This has been tried following the Argentinian restructuring. See *e.g.* M. Waibel, 'Opening Pandora's Box : Sovereign Bonds in International Arbitration', *Am. J. Intl L.*, 2007, 711-759; K. Halverson Cross, 'Arbitration as a Means of Resolving Sovereign Debt Disputes', *Am Rev Intl Arbitration* 2006, 335-382; W. Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' in *The Backlash against Investment Arbitration*, M. Waibel (ed.), Kluwer, 2010 and Y. Fortier, 'International Arbitration and the Argentine Cases: An Evaluation of 10 Years of Arbitration - Institutional Aspects' 6 *World Arb. & Mediation Rev.* 2012/3, 545-559. See the various procedural orders and the decision on jurisdiction and admissibility (August 4, 2011) by an ICSID arbitral tribunal in the case of *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly *Giovanna a Beccara et al. v. The Argentine*

issued under another law than Greek law and who have not tendered their bonds, may attempt to declare a default and seek to have the bonds accelerated, after which they could attempt to obtain payment. Most bondholders have, however, been subject to the amendments put forward by Greece, whether they consented or not. The question arises whether these investors could find support for a claim in the various legal provisions protecting the right to property. The analysis will be conducted on the basis of Article 1 of the 1st Protocol of the European Convention on Human Rights[47].

A. Sovereign bonds as 'possessions'

Before discussing whether the amendments imposed by Greece constituted a wrongful taking of property, it is worth noting that there is little doubt that the assets held by sovereign bondholders enjoy protection under Article 1 of the First Protocol. As is well known, this provision applies to "possessions", which covers all types of property rights. According to the European Court of Human Rights (the Court), the concept of 'possessions' has an autonomous meaning which is independent from the formal classification in domestic law[48]. In order to find out whether a claimant deserves protection, one should examine whether the circumstances of the case, considered as a whole, conferred on the claimant title to a substantive interest protected by Article 1 of Protocol No. 1[49].

Using this standard, it is difficult to challenge to right for bondholders to claim protection under Article 1. The Court has already recognized that debts and judgments debts could be covered by Article 1[50]. More recently, the application of Article 1 Protocol I to shares held by private investors in a bank which was nationalized, did not raise any difficulty[51]. Likewise, the Court held that domestic bonds issued by Russia in order to encourage farmers to sell their grain and other produce to the State, constituted 'possessions' which qualified for protection under Article 1 of Protocol No. 1. Although the bonds at first had no independent value, the Court relied on the fact that Russia had considered that the bonds were part of its internal debt[52]. There does not seem to be any valid reason why this conclusion should not apply to sovereign bonds. Incidental evidence that the investors had a proprietary interest eligible for protection under Article 1, may be found in the fact that Greece set up a complex procedure inviting the investors to trade in their bonds. This procedure rested on detailed legal documentation[53]. Further, Greece has adopted specific legislation in order to make the exchange possible. One may infer from this that the debts chargeable to the Greek Treasury were indeed a 'possession'.

Republic).

47 A similar analysis could be conducted using a national provision protecting the right of property, such as Art. 17 of the Greek Constitution which provides that "Property is protected by the State; rights deriving therefrom, however, may not be exercised contrary to public interest". For a recent discussion of the extent to which Belgian law protects the right of property, see A. Alen and W. Verrijdt, 'Recente evoluties inzake de bescherming van het eigendomsrecht in de rechtspraak van het Grondwettelijk Hof", in *Liber amicorum Martin Denys* , M. Boes, J. Ghysels, D. Lindemans en R. Palmans (eds.), Intersentia, 2012, pp. 1-26.

48 See *Beyeler v. Italy* (ECtHR-GC, 5 Jan. 2000), § 100.

49 See *Iatridis v. Greece* (ECtHR-GC, 25 March 1999), § 54 (ownership of a cinema site) and *Beyeler v. Italy* (ECtHR-GC, 5 Jan. 2000), § 100 (ownership of a painting).

50 *Stran Greek Refineries and Stratis Andreadis v. Greece* (ECtHR 9 Dec. 1994), at § 61-62.

51 *Dennis Grainger et al. v. United Kingdom* (ECtHR, 10 July 2012).

52 *Malysh et al. v. Russia* (ECtHR, 11 Feb. 2010), at §§ 65-71. The bonds were initially issued as administrative instrument aimed to encourage the farmers to sell their produce. They has no independent value and were not legal tender, although they had a nominal value. In later legislation, Russia recognized that the commodity bonds were part of its internal debt. It also adopted a program designed to settle this debt.

53 Which was made available on *www.greekbonds.gr*.

Some of the bondholders who may elect to bring proceedings against Greece will have bought their holdings on the secondary market at less than par value. They could even have benefited from a substantial discount, given the various downgrading which were applied by the rating agencies to Greek sovereign paper[54]. This does not seem to prevent the application of Article 1 of the First Protocol : even bought at less than full nominal value, a bond remains a debt owed by a debtor to the bondholder. At most this element may have an impact when assessing whether a fair balance was achieved in the restructuring process[55].

Neither is it relevant that the bondholder may be an investment fund established in a tax paradise – or that its activities remain shrouded in secrecy. This may be relevant when assessing the action of such investment funds from a moral perspective[56]. Denying a corporation the protection afforded by the Convention on this basis, is, however, not justified. Article 1 protects "[e]very natural or legal person", without distinction. Likewise, Greece would be ill advised to attempt to fend off a challenge by denying that the bondholders were "within [its] jurisdiction" as required by Article 1 of the Convention. What matters indeed is not so much where the investors are established, or whether the corporate vehicle used by an investor was merely a letterbox company established in a tax paradise. Rather, the protection afforded by the Convention should extend to all those who are directly affected by the actions of a Contracting State. Undeniably this is the case of the investors whose holdings lost part of their value following the exchange.

B. The Greek Bondholder Act as 'interference'

The first step in the analysis is to examine whether there was an interference with the right of the bondholders to the "peaceful enjoyment of their possessions". As is well known, the Court has distinguished three rules in Article 1 : the first one, set out in the first sentence of the first paragraph, is of a general nature and confers a general right to peacefully enjoy one's property[57]. The Court has added that Article 1 includes two other rules : i.e. the right not to be deprived of property, subject to certain conditions set out in the second sentence of the first paragraph, and the right of a State to control the use of property in accordance with the general interest.

The application of this general scheme may be difficult in the case of the Greek restructuring. Not all bondholders were indeed affected in the same way by the exchange operation. If one considers the bonds issued under Greek law, *prima facie* the operation treated all bondholders uniformly. Following the PSI, all existing bonds were indeed canceled outright. Bondholders

---

54 See the details in the timeline available at *www.reuters.com/article/2010/03/03/us-eurozone-greece-economy-timeline-idUSTRE62230T20100303* (Reuters).

55 In *Malysh*, the Court noted that the particular features of the Russian commodity bonds were relevant for the assessment of the level of compensation offered to bondholders - *Malysh et al. v. Russia* (ECtHR, 11 Feb. 2010), at § 81.

56 The draft bill which was introduced in the United States Congress in June 2009 to target sovereign debt creditors (Bill nr. HR 2932, introduced by Congresswoman Maxine Waters on 18 June 2009) required extensive disclosure from creditors seeking a judgment against a sovereign debtor. Creditors were indeed required to provide information on the identity of the persons who are behind the creditors (section 5(b)(3)(A)) and on the total amount paid by the creditor in order to acquire the interest in the sovereign debt (section 5(b)(3)(B)). For further comments on this attempt to legislate, see E. Broomfield, 'Subduing the Vultures : Assessing Government Caps on Recovery in Sovereign Debt Litigation', 2010 *Columbia Bus. L. Rev.* 473-528.

57 See the seminal judgment of the court in *Sporrong and Lönnroth v Sweden* (ECtHR 23 Sept. 1982), at § 61.

obtained new securities worth substantially less than the old bonds. The size of the loss suffered by the investors may, however, differ. Those investors who bought the bonds on the secondary market at less than par value, may have suffered a much smaller loss, if any at all, than investors who bought the bonds when they were issued. For the latter, it will be easier to demonstrate the existence of a loss. It may therefore be that the nature of the interference in the investors' property rights must be ascertained differently depending on the actual circumstances of each case. One may even more hesitate since the actual value of the bonds before the exchange operation was launched, was significantly lower than the nominal value.

The actual characterization of the Greek operation in regard to the three rules included in Article 1 of the 1st Protocol, is not an easy task. One could hesitate between the prohibition of deprivation of property, the control of individual property and the violation of the right to a peaceful enjoyment of one's property. For those bondholders whose securities were acquired at par value, the exchange operation could amount to a real taking of property, while Greece could be said to have merely controlled the use of property of those investors whose bonds were acquired at less than par value. Even though the Court has taken a rather strict view of what amounts to a formal or *de facto* expropriation, granting a wider scope than could be expected to the control by the State of the use of property[58], there is room to argue that the exchange operation amounts to a *de facto* deprivation of property, without a formal expropriation[59].

In theory it may be necessary to characterize the interference by reference to one of the three rules comprised in Article 1. In practice, the characterization may, however, not be strictly necessary. The Court has indeed taken a holistic approach to Article 1, stressing that beyond the distinction between the various rules, what mattered foremost was that the interference did not breach the “fair balance” between the demands of the general interest and the requirements of the protection of the individual's fundamental rights[60]. Beyond the differences separating the various categories of investors, the operation can at least be said to have adversely affected the investors' property rights. The application of Art. 1 of the 1st Protocol is therefore warranted. The differences may be more appropriately dealt with when assessing whether the Greek operation maintained a fair balance between the general interest and the investors' property rights.

However, one further element needs to be cleared before proceeding with the analysis. The whole exchange operation rested indeed on the consent of the bondholders. As in most restructuring, an offer was made, which they could accept or reject. They were therefore not directly deprived of their bonds by the State. Greece launched the operation, but it made sure to request the bondholders' authorization. Could this be taken into consideration to lessen or even dispel the existence of any interference? From a general perspective, it is not easy to answer this question. Consent to a violation of a human right is indeed a delicate question[61].

58 See *e.g. Hutten-Czapska v. Poland* (ECtHR-GC, 19 June 2006), § 161.

59 *Sporrong and Lönnroth v Sweden* (ECtHR 23 Sept. 1982), at § 63.

60 According to the Court, “the various rules incorporated in Article 1 are not distinct, in the sense of being unconnected, and the second and third rules are concerned only with particular instances of interference with the right to the peaceful enjoyment of property” (see *Broniowski v. Poland* (ECtHR, 22 June 2004), § 148; *Hutten-Czapska v. Poland* (ECtHR-GC, 19 June 2006), § 164). In *Malysh*, the Court even noted that “the alleged violation of the applicants' property rights cannot be classified in a precise category” (*Malysh et al. v. Russia* (ECtHR, 11 Feb. 2010), at § 73), before proceeding to apply a test based on the fair balance between the general interest and the applicants' rights.

61 See *e.g.* Ph. Frumer, *La renonciation aux droits et libertés*, Bruylant, 2001 and O. de Schutter and J. Ringelheim, 'La renonciation aux droits fondamentaux. La libre disposition de soi et le règne de l'échange',in: *La responsabilité, face cachée des droits de l'homme*, H. Dumont, F. Ost & S. Van Drooghenbroeck (eds.),

Looking at the Greek operation, there is, however, little doubt that whatever consent the bondholders may have given to the operation, the interference must be directly attributed to Greece.

Formally speaking, the PSI operation required investors to accept the terms and trade in their bonds[62]. Greece did not compel the investors to hand in their bonds, nor did it not directly expropriate the bondholders[63]. It has in fact been reported that a number of investors chose to reject Greece's offer – either by not tendering their securities or by submitting so-called 'Participating Instructions' but at the same time indicating that the proposed amendments were rejected.

The consent of a majority of bondholders does not, however, make the operation less of an interference. With respect to the non-cooperative bondholders, the consent of other bondholders is not decisive. One cannot consent to somebody else's being deprived of its property. Further, Greece could not take argument of the fact that it did not directly take away the non-cooperative bondholders' property, but only proceeded to the exchange after receiving approval from a majority of creditors. It is true that a sufficient portion of bondholders had consented with the operation, which in turn allowed Greece to activate the collective action clause which had been adopted by Parliament. It remains, however, that it was Greece which adopted the special legislation making it possible to retrofit the collective action clause in the existing bonds. It also fell upon Greece to decide whether or not to activate the collective action clause. The fact that the unwilling holdouts were forced to cooperate in the bond exchange because a supermajority of investors agreed to the change, cannot hide the fact that holdout creditors were directly affected and obtained new securities worth substantially less than the previous bonds. In other words, the consent of other bondholders, who tendered their bonds and agreed to the changes proposed, may be an additional 'layer' between Greece and the non-cooperative bondholders affected by the exchange. This layer may, however, not be used by Greece as shield in order to escape from what it did to the non cooperative bondholders. In practice the PSI together with the Greek Bondholder Law, had the effect that bondholders which did not tender their bonds, were also subject to the operation.

Looking at those investors who voluntarily turned in their bonds, one may even doubt whether the exchange was not arm-twisted. In order to convince investors, Greece indeed used not only the carrot[64], but also the stick. Greece made it indeed clear that holdouts would not

Bruylant, 2005, p. 441-482.

62 Presumably, some major investors would have given non binding indications before the PSI was formally launched, as to what their intentions were. This particularly applied to the Greek banks which held a substantial portion of the Greek bonds.

63 As other countries have done, notably in the scenario of a nationalization. See *Dennis Grainger et al. v. United Kingdom* (ECtHR, 10 July 2012). On the nationalization of Northern Rock, see R. M. Lastra, 'Northern Rock, UK bank insolvency and cross-border bank insolvency' 9 *J. Banking Reg*. 165-186 (2008) and J. Gray & O. Akseli (eds.), *Financial Regulation in Crisis? The Role of Law and the Failure of Northern Rock*, Edward Elgar, 2011, 128 p.

64 And an unusually sweet one, if one considers all the incentives which Greece provided. First among them rank the 'PSI Payment Notes' issued by the EFSF, which had such a short maturity that they could be considered near equivalent to a cash payment. This cash payment was very substantial when compared to the payments offered in other restructurings. Zettelmeyer et al. conclude on this basis that the Greek debt exchange "could be more accurately described as a fixed-price debt buy-back with an added 'bond sweetener' rather than as a bond exchange with a cash sweetener" (J. Zettlemeyer, C. Trebesch and M. Gulati, note 9, at p. 25). Further, the new securities issued were designed to offer a much more comfortable position to creditors who tendered their bonds. The new securities were indeed governed by English law (making it impossible for Greece to modify the terms of the bonds with new legislation) and included standard credit protections such as negative pledge, cross-default and *pari passu* clauses. Finally, the new bonds were issued

receive a sweeter deal[65]. The Greek government also declared that if the exchange was not completed, it would not be able to further service its debt[66]. During the operation, Greece went further and stated that its budget “does not contemplate the availability of funds to make payments to private sector creditors that decline to participate” in the exchange[67]. Even without these declarations, which come very close to threats, the general economic context served as a more than a gentle incentive inducing creditors to participate. Although the members of the Euro-zone had indicated that they were committed to honoring their sovereign obligations, the room for an additional bailout of Greece was indeed clearly very limited. The alternative would therefore been a default by Greece. Although the operation was deemed to be entirely voluntary[68], the consent of the cooperative creditors parties concerned was therefore far from entirely free[69]. In fact, the operation came very close to a forced renegotiation of a contract[70]. As interference must be analyzed in consequential rather than in formal terms, the course of events which led to the successful exchange operation qualifies as interference[71].

C. Was the interference 'legal'?

Any interference with the peaceful enjoyment of property must be lawful. According to the Court, a legal basis must be adequately accessible and sufficiently precise in order to be compliant with the rule of law, which is one of the fundamental principles of a democratic society[72].

As far as the Greek operation is concerned, the Greek government took care to stay within the limits of legality. Instead of directly rewriting the terms of the existing bonds, it adopted a special legislation authorizing it to obtain the bondholders' consent to amend the existing bonds. Does this legislation, together with the other provisions of Greek law in relation to

---

under a 'co-financing agreement' between Greece and the EFSF, which guaranteed that the bonds could not be amended without the consent of the latter (see the explanations of J. Zettlemeyer, C. Trebesch and M. Gulati, note 9, at p. 25-26).

65 On March 5, 2012, Finance Minister Venizelos was quoted as saying that “Whoever thinks that they will hold out and be paid in full, is mistaken” (S. Sassard and D. Kyriakidou, 'Top lenders back Greek bond swap plan', *www.reuters.com/article/2012/03/05/us-greece-bonds-idUSTRE82412N20120305*).

66 See the first 'risk factor' outline in the Invitation Memorandum at p. 81, which is captioned “The Republic faces High Refinancing Risk”.

67 Press release of 5 March 2012, quoted by J. Zettlemeyer, C. Trebesch and M. Gulati, note 9, at p. 28. One bondholder was quoted as saying that the whole operation was as voluntary as the 'Spanish inquisition' (see 'CAC threat sets up Greek bond swap', *Int'l Financing Rev.*, 25 Feb – 2 March 2012, available at *www.ifre.com/cac-threat-sets-up-greek-bond-swap/21002008.article*).

68 The Financial Assistance Facility Agreement between the European Financial Stability Facility and Greece referred to the operation as a “*voluntary liability management transaction by way of a voluntary bond echange*” (Recital 5 Preamble).

69 As Waibel notes, it is difficult to draw the line between a voluntary and a coercive sovereign bond exchange. According to Waible, “a bond exchange breaches the coercion threshold only when the incentive devices employed by the entity in distress deny any effective choice to creditors, i.e. when they are essentially forced to participate in the exchange” (M. Waibel, note 3, at p. 290).

70 Based on a comparison of debtor coerciveness in previous exchanges, Zettelmeyer et al. note, however, that the Greek operation was much less coercice than other sovereign restructurings - J. Zettlemeyer, C. Trebesch and M. Gulati, note 9, at p. 29-30.

71 The same issue arises in relation to the CDS. The swaps were triggered because in the eyes of the so-called 'Determinations Committee' of the International Swaps and Derivatives Association (ISDA), the use of CACs had the effect of involuntarily binding non-participating creditors to the restructuring. This is why the restructuring was deemed to be a 'triggering credit event'.

72 According to the Court, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the provisions of the Convention (see *Amuur v. France* (ECtHR, 25 June 1996) at § 50).

bonds issues, offer a sufficiently accessible, precise and foreseeable legal framework?

It is difficult to assess this requirement without the benefit of an official translation of the Greek Bondholder Law[73]. However, even with this reservation, it is clear that the law gives investors a fairly precise idea of how the restructuring would proceed. While the legislation does leave a margin of discretion to the Greek government, which could decide whether or not to trigger the collective action clause, investors could still picture out quite clearly what would happen to their bonds. This is even more so given that the vast majority of investors holding Greek sovereign paper, were highly sophisticated players, with extensive knowledge of the market and more than probably experience of previous sovereign restructuring. Those players should not have had any difficulty in chartering out they way the exchange would proceed. An additional factor pointing in this direction is that the exchange operation was negotiated at length between Greece and a creditors' committee which included representatives from both banks and investment funds. One can expect that these investors were fully informed of all details of the operation. The same applies for investors who bought Greek paper in the weeks or even months preceding the operation. Those investors have made calculation as to whether to purchase the debt at a time when the exchange operation had been imminent. Such investment decision is only made after careful study of all possible scenarios, including that of a coercive restructuring.

The concern is therefore not so much that investors could not anticipate on the results which would be reached based on the Greek Bondholder Act. The issue is rather that the law was adopted on 23 February 2012, i.e. only *one day* before the formal exchange offer was made by Greece. Investors did not therefore enjoy a great deal of time to contemplate the effects of the legislation before it was actually used to reduce, albeit with the consent of a majority, their rights. It would, however, be wrong to conclude on this basis that Greece acted without a sufficient legal basis. One should indeed take into account the highly specialized nature of investment funds and banks involved in the restructuring – players which by nature are used to take action in very limited time frame. Further, as already noted, the restructuring itself had been negotiated over a period of several months. It did not therefore come as a surprise. It is true that at the outset of the negotiations, it may not have been clear that Greece would retrofit collective action clause in the existing bonds governed by Greek law. However, during the course of the discussions, the attention had been drawn to this scenario in a widely quoted publication[74]. The omens had been very clear. It is submitted that investors ignored them at their own risks.

The same conclusion may be reached when looking at the fact that the Greek Bondholder Act in effect intervened with retrospect in bonds which had already been issued. Unlike collective action clauses which are included in bonds when they are issued, the amendment possibility introduced by the Act could not have been known by those investors who bought the bonds upon issuance. Those investors could therefore not have priced in the impact of the collective

---

73 The law upon which the interference is based should also be in accordance with the internal law of the Contracting State, including the relevant provisions of the Constitution. It is, however, for Greek courts to decide whether the Bondholders Law is indeed compliant with Greek law and in particular with Article 17 of the Greek Constitution, which requires a taking of property to be in the public interest and against payment of full compensation.

74 The paper published by Mrss Gulati and Buchheit (LEE C. BUCHHEIT and G. MITU GULATI, 'How to Restructure Greek Debt', Duke Law Working Papers, Paper No. 47, 2010), received considerable attention. It was mentioned in a piece published in the *New York Times* in March 2012 (*www.nytimes.com/2012/03/07/business/global/mitu-gulati-an-architect-of-greeces-debt-deal-wants-more.html?pagewanted=all&_r=0*).

action clauses and the fact that they could be faced with a decision by majority to restructure and modify the terms of the bonds. Any decision to restructure has, however, an impact on existing situations. By essence, when a State decides to repudiate or restructure its debt, it can only do so for existing bonds. Retroactivity is therefore not an appropriate benchmark when considering when the action taken by a State is based on a valid legal basis[75].

D. The Greek restructuring and legitimate public interest

A further question is whether the Greek restructuring operation pursued a legitimate aim. On this issue, the standard used by the Court seems rather lenient. The Court has indeed repeatedly indicated that States enjoy a margin of appreciation when deciding if a measure restricting individual property rights is in the public interest. This margin extends both to the existence of a problem of public concern warranting measures of deprivation of property and to the remedial action to be taken. The Court has even acknowledged that "when it comes to general measures of economic or social strategy", the States enjoy a "wide" margin of appreciation[76]. In this context, the role of the Court is to review whether the action of the State was "manifestly without reasonable foundation"[77]. The Court has been sensitive to the particular context in which a measure was adopted[78].

This contrasts with the approach which could be taken under general international law. If Greece were to try to justify the repudiation of part of its debt by reference to the doctrine of impossibility of performance or necessity[79], it would indeed face a much more difficult position. Although there are not many precedents, it appears that a State could only walk away from its obligations using the state of necessity if it builds a very convincing case. In the Serbian and in the Brazilian loan cases, the debtors claimed that the severe economic difficulties created by World War I had made it impossible for them to repay their debt obligations. The Permanent Court of International refused to accept that the mere increase in debt repayment obligations due to unforeseen conditions could excuse the non-performance by the debtors of their debt obligations[80]. The *force majeure* doctrine requires a stronger

75 It could, however, be taken into account when assessing whether a fair balance was struck, see *e.g. Pressos Compania Naviera s.a. et al. v. Belgium* (ECtHR, 20 Nov. 1995), § 43.

76 See *e.g. Grainger and others v. UK* (ECtHR, 10 July 2012), § 36; *James and Others v UK* (ECtHR, 21 February 1986) § 46; *The Former King of Greece v. Greece*, (ECtHR-GC, 23 Nov. 2000) § 87. In *Hutten-Czapska v. Poland* (ECtHR-GC, 19 June 2006), the Court noted that "Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has on many occasions declared that it will respect the legislature's judgment as to what is in the "public" or "general" interest unless that judgment is manifestly without reasonable foundation. These principles apply equally, if not *a fortiori*, to the measures adopted in the course of the fundamental reform of the country's political, legal and economic system in the transition from a totalitarian regime to a democratic State" (at § 166).

77 *Grainger and others v. UK* (ECtHR, 10 July 2012), § 36; *The Former King of Greece v. Greece*, (ECtHR-GC, 23 Nov. 2000) § 87.

78 In many instances, the Court has noted that it would take into account the context in which a measure is adopted. In many cases, the Court had to deal with measures adopted by Eastern European countries after their transition from a totalitarian regime to a democratic State. The Court has always stressed that this context was relevant when determining whether a measure was indeed in the "public interest" - *e.g. Hutten-Czapska v. Poland* (ECtHR-GC, 19 June 2006), § 166.

79 Greece has already attempted in the past to rely on the *force majeure* doctrine to avoid being compelled to pay amounts due under two arbitral awards deriving from loans – see the discussion of the '*Socobel*' case by M. WAIBEL, note 3, at p. 94-98.

80 Permanent Court of International Justice, *Case concerning the Payment in Gold of the Brazilian Federal Loans Issued in France*, Judgment No. 15, 1929 Series A, pp. 90-155, at p. 120; Permanent Court of International Justice, *Case concerning the Payment in Gold of the Serbian Federal Loans Issued in France*,

showing of “material impossibility” due to an “irresistible force”, which makes it very difficult for States to use in order to justify a default on their external debt[81]. Likewise the state of necessity or duress also requires the State to show that honoring its obligations would bring “a grave danger to the existence of the State itself, to its political or economic survival, the maintenance of conditions in which its essential services can function...”[82].

Looking at the PSI using the framework developed by the European Court of Human Rights, there is little doubt that the Greek Bondholder Law would pass the test of the legitimate aim[83]. Although Greece has not yet been asked to justify the measures it took, the reasons it would adduce for the PSI operation are apparent. At the time the debt was restructured, the situation of Greece and in particular its public finance, was dire. Greece had already received two bail-outs from the international community. It was virtually barred from acceding the financial markets, as it could not sustain the market interest rates. On the other hand, it was widely agreed that given the Greek economic situation, the debt burden had become unsustainable. Greece was also in the midst of a very severe recession, its GDP having contracted several years in a row. Austerity measures had also affected public services.

When taking all these elements into account, there was certainly a compelling need for action. The restructuring was indeed not simply meant to arm-wrestle a better deal from its creditors, as a private business could do when it is in a position of power[84]. Greece acted out of authentic 'governmental motives', i.e. reasons linked to its overall economic situation. Greece cannot, however, simply refer in general to its poor situation. It will need to build a case with concrete elements showing that its situation was no longer tenable and that urgent action was required.

Judgment No. 14, 1929 Series A, pp. 1-89, at p. 29-31. In the Serbian case, the Court held that “it cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian government and the French bondholders. The economic dislocations caused by the war did not release the debtor state...” (at p. 31).

81 A. Reinisch, *State responsibility for debts : international law aspects of external debt and debt restructuring*, Böhlau, Vienna, 1995, at p. 66. On change of circumstance as a defense for sovereign state, see also M. J. N. Meetarbhan, 'Vers un droit international de la dette extérieure?', in *The External Debt*, D. Carreau and M. N. Shaw, Martinus Nijhoff, 1995, pp. 484 ff, at p. 504-505.

82 As explained by R. Ago in his 'Addendum to the Eighth Report on State responsibility', reproduced in *Yearb. Intl. L. Commission*, 1980, vol. II, at p. 14, No. 2. Argentina has used the doctrine of necessity in several investment disputes. See A. Reinisch, 'Necessity in Investment Arbitration”, *Netherlands Y. Intl. L.*, 2010/41, pp. 137-158. The doctrine of necessity has also been used before domestic courts. In a case decided in 2007, the German Bundesverfassungsgericht held that “*Eine allgemeine Regel des Völkerrechts, die einen Staat gegenüber Privatpersonen berechtigt, die Erfüllung fälliger privatrechtlicher Zahlungsansprüche unter Berufung auf den wegen Zahlungsunfähigkeit erklärten Staatsnotstand zeitweise zu verweigern, ist gegenwärtig nicht feststellbar*” (at § 29). See on this case S. Schill and Y. Kim, 'Sovereign bonds in economic crisis : Is the necessity defense under international law applicable in investor-state relations? A critical analysis of the decision of the German constitutional Court in the Argentine Bondholder Cases', 3 *Yearb. Intl Investment Law & Policy* 2010-2011, pp. 485-512.

83 The Court has only in rare cases disputed the purposed alleged by a government. In the case of the Former King of Greece, the Court was willing to question one of the reasons put forward by Greece, i.e. the need to protect forests and archaeological sites. It also noted that the law which had deprived the former King of its property was adopted some twenty years after the transition in Greece from a monarchy to a republic. According to the Court, this “might inspire some doubt as to the reasons for the measures”.The Court concluded, however, that these doubts were not sufficient to deprive the overall objective of the law of its legitimacy in the public interest (*The Former King of Greece v. Greece*, (ECtHR-GC, 23 Nov. 2000) § 88).

84 In the literature, some defaults by sovereign debtors have indeed been characterized as 'opportunistic'. See for example on Ecuador's default in 2008, Lee C. Buchheit and G. Mitu, “The Coroner's Inquest”, *Intl. Financial L. Rev.*, 2009, vol. 27, at pp. 22-25.

As the notion of public interest is "necessarily extensive"[85], it would not be necessary for Greece to show that the basic human rights of its population were in danger of no longer being fulfilled[86] or that its existence as State was in danger because it could not longer guarantee the continued functioning of its essential services. Even though such a showing would certainly help, it does not seem necessary given the margin of appreciation which States enjoy[87]. In other contexts, the European Court of Human Rights has in fact accepted that a severe economic situation could lead a State to intervene adversely on individuals' property rights[88]. In *Malysh*, the Court recalled the dramatic situation of the Russian economy in the early 1990's : it observed that "the Russian State went through a tumultuous transition from a State-controlled to a market economy. Its economic well-being was further jeopardised by the financial crisis of 1998 and the sharp devaluation of the national currency". On this basis, the Court noted that "defining budgetary priorities in terms of favouring expenditures on pressing social issues to the detriment of claims with purely pecuniary nature was a legitimate aim in the public interest"[89]. Although the situation of Greece was not as dramatic as that of Russia in the early 1990's, it is difficult to imagine how the Court could call into question the pressing need for Greece to take some action. Hence, there is little doubt that the Greek Bondholder Law would pass the test of the legitimate aim. This is even more so given that Greece did a good job in persuading the majority of its creditors that a restructuring was necessary and that the terms it offered (with the support of the Eurozone countries) were reasonable given its economic and financial situation. While it is questionable whether this as such could be sufficient to demonstrate the existence of a public interest, it remains an additional element which the Court would probably weigh in its decision.

E. The Greek restructuring : striking a fair balance?

If Greece succeeds in clearing all preceding hurdles, it will have to show that there was a reasonable relation of proportionality between the means employed and the aim sought to be

85 *The Former King of Greece v. Greece*, (ECtHR-GC, 23 Nov. 2000) § 87; *Hutten-Czapska v. Poland* (ECtHR-GC, 19 June 2006), § 166.

86 A United Nations expert had warned that austerity measures could bring about violations of human rights (see *www.un.org/apps/news/story.asp?NewsID=38901&Cr=austerity&Cr1=#.Uda079d_6oo*).

87 The situation would be different if investors challenged the PSI under investment protection mechanisms. Investment tribunals have until now been quite reluctant to accept a defense of State based on human rights concerns. See *Suez Sociedad General de Aguas de Barcelona SA. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (UNCITRAL), Award of Nov. 21, 2001 (Argentina claimed that the Fair and Equitable Treatment must be interpreted taking into account the broader context, the extraordinary social and economic crisis which Argentina endured and the right to water). In *CMS Gas Transmission Company v Argentina Republic*, ICSID Case No. ARB/01/8, Award of May 12, 2005 (44 ILM 1205) (2005), Argentina argued that its commitment to human rights forced it to undertake the action which were challenged by the investors. Argentina specifically pointed to the severe social and economic crisis that it was going through, which it said affected human rights protection (see at para. 114 of the award). The tribunal refused to take this into consideration, holding that "there is no question of affecting fundamental human rights" (at para. 121). In general, A. Diehl, *The Core Standard of International Investment Protection. Fair and Equitable Treatment*, Wolters Kluwer, 2012, at pp. 507-508; U. Kriebaum, 'Privatizing Human Rights – the Interface between International Investment Protection and Human Rights', 3(5) *TDM* (2006) pp. 11 ff; J. Fry, 'International Human Right Law in Investment Arbitration : Evidence of International Law's Unity', 18 *Duke J. Comp. Intl. L.*, (2007) 77 ff. and the report of the High Commissioner of the UN on Human Rights, *Human Rights, Trade and Investment*, UN Economic and Social Council, UN Doc. E/CN.4/Sub.2/2003/9 (July 2003).

88 In *Grainger*, the Court noted that "given the exceptional circumstances prevailing in the financial sector, both domestically and internationally, at the relevant time, a wide margin of appreciation is appropriate" - *Grainger and others v. UK* (ECtHR, 10 July 2012), § 39.

89 *Malysh et al. v. Russia* (ECtHR, 11 Feb. 2010), at § 80.

realized by the restructuring. The Court has attempted to capture this requirement by putting forward the notion of a "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

When assessing whether such a fair balance has been respected, one should look at the whole operation and take into account all the relevant circumstances. Particular attention should be paid to the size of the loss suffered by the investors and conversely the existence of any compensation granted to these investors. The Court has stressed that compensation terms are indeed "material" to the assessment of whether measures respect the requisite fair balance[90].

At first sight, investors holding Greek bonds have been treated harshly. This is apparent when one takes into account the relative size of the 'haircut' when compared to other sovereign restructurings. This helps put the loss suffered in perspective. A historical comparison shows that the loss suffered by investors holding Greek bonds is significant : while a limited number of restructurings imposed a higher loss on private investors, these restructuring concerned highly indebted poor countries such as Yemen, Bolivia and Guyana. If one compares the Greek restructuring to those of other high- and middle-income countries, only a handful of cases were more demanding on investors[91].

This is, however, only a partial perspective on the restructuring. If one focuses on the terms of the Greek operation, without taking into reference any outside benchmark, it is easy to note that instead of an outright taking of property, the Greek exchange operation left the investors with some compensation for the existing bonds which were canceled. Certainly, these investors fared better than those who had invested in banks which have been nationalized following the 2008 crisis[92]. The fact that the compensation package was negotiated at length with representatives of the creditors, could be taken into account as it shows that Greece did not act arbitrarily in putting a value on what it offered in lieu of the existing bonds.

It is true that the package included securities which at best only promise a very distant hope of obtaining any payment. This is certainly the case for the GDP-linked securities offered to the investors. Bondholders will receive payment on the GDP-linked securities only if Greece's GDP growth rate in a given year exceeds the reference rate for that year. The link with GDP-growth makes it clear that payout under these securities is unlikely. It is enough to note that the austerity measures Greece is required to enact will most probably have a depressing effect on its GDP for the coming years[93].

However, the compensation package also included so-called PSI Payment notes which come close to a cash payment given their limited maturity and the fact that they are backed up by the Eurozone countries[94]. Further, the interest on the new bonds are payable in arrears on an

---

90 *E.g. Grainger and others v. UK* (ECtHR, 10 July 2012), § 37.

91 According to Zettelmeyer and Co, in this class of countries, only the restructuring imposed by Iraq (2006), Argentina (2005) and Serbia and Montenegro (2004) were harsher on private creditors, with haircut ranging from 71 to 91 per cent : J. Zettlemeyer, C. Trebesch and M. Gulati, note 9, p. 15.

92 *E.g.* the investors who had bought shares of Northern Rock (see *Grainger and others v. UK* (ECtHR, 10 July 2012)).

93 That effect may have been underestimated, as noted by O. Blanchard and D. Leigh, 'Growth Forecast Errors and Fiscal Multipliers", IMF Working Paper January 2013. In its *World Economic Outlook* (October 2012), the IMF stated that "The main finding, based on data for 28 economies, is that the multipliers used in generating growth forecasts have been systematically too low since the start of the Great Recession, by 0.4 to 1.2, depending on the forecast source and the specifics of the estimation approach" (at p. 41).

94 This is even more so for US holders of Greek bonds. For various reasons, these investors did not receive PSI

annual basis, starting in February 2013. Finally, investors have received new securities which are governed by English law, making it impossible for Greece to undertake a new 're-enginering' of the bond terms by statute[95].

In assessing whether Greece maintained a reasonable relationship between the means employed and the aim sought to be realized, one should also take into account the nature and value of the Greek bonds which were exchanged. Usually, the loss ('haircut') suffered by investors in the context of a restructuring is calculated taking into account the value of the new securities compared to the full nominal value of the olds bonds. As has been noted, this makes sense when the outstanding bonds are of a very short maturity[96]. However, when the restructuring affects bonds which have a longer maturity and did not give a right to immediate and full repayment, this definition "will typically exaggerate the losses"[97]. The value of the new bonds should indeed not be compared to immediate and full repayment in that case, but rather the "present value of the payment stream promised by the old bonds, evaluated at some discount rate"[98]. By doing so, the loss suffered by creditors is measured compared to a situation where no restructuring would have taken place, i.e. that the creditors would have been allowed to keep the existing bonds and seek to obtain payment of any interest due.

This seems in line with what was accepted by the Court in *Grainger*. In that case, the Court had to deal with the fall out of the nationalization of Northern Rock bank. After the nationalization of this bank, England set up a compensation scheme for investors. The regulations governing the assessment of the compensation included an obligation to take into account the actual nature of the bank's situation and in particular the fact that it could only have survived thanks for very extensive financing by public institutions. On this basis, the independent valuer came to the conclusion that no compensation would be awarded to the shareholders. Reviewing this scheme, the Court found that the assumptions which the valuer had to take into account, namely that Northern Rock only had survived thanks for governmental support, were justified[99].

Greece could therefore perfectly start from the assumption that prior to the restructuring its bonds had been downgraded to junk status. Working on this basis, Zettelmeyer and co have concluded that the average haircut suffered by investors range from 55 to 65 %[100]. This is a steep loss. However, the Court has already held that Article 1 does not guarantee a right to full compensation in all circumstances, since legitimate objectives of 'public interest' may call for less than reimbursement of the full market value[101]. Whether or not this loss is such that Greece's action must be deemed to be manifestly without reasonable foundation, should be assessed taking into account the differences among investors holding Greek bonds.

Payments notes, but instead cash. This cash came from the sale of the PSI payment notes which they would have otherwise received.

95 Some investors may also obtain compensation for the loss suffered thanks to the CDS they held. This should not, however, be taken into consideration when assessing whether Greece complied with the fair balance. Any payment received on the basis of the CDS originated indeed not so much from Greece but rather from the investors on the other sides of the CDS.

96 J. Zettlemeyer, C. Trebesch and M. Gulati, note 9, p. 11.

97 Idem.

98 Idem. This builds on previous works by F. Sturzenegger and J. Zettelmeyer, *Debt Defaults and Lessons from a Decade of Crises*, Cambridge,MIT Press, 2007.

99 *Grainger and others v. UK* (ECtHR, 10 July 2012), § 40.

100 J. Zettlemeyer, C. Trebesch and M. Gulati, note 9, p. 14.

101 *Lithgow et al. v. UK* (ECtHR, 8 July 1986), § 121; *Holy Monasteries v. Greece* (ECtHR, 9 Dec. 1994), at § 71).

Indeed, the exchange operation did not affect all investors in the same way. *Prima facie*, the Greek restructuring was a global operation, conducted without regard to the specific features of the investors. The same deal was offered to all investors, without any distinction related to the maturity of the bonds or the yield. The characteristics of the bonds were not considered[102]. Likewise, the Greek Bondholder Law was not discriminatory : investors were not treated differently depending on their nationality or place of residence. However, this general treatment may have obfuscated two important and, it is submitted, relevant differences among investors.

First of all, the bonds issues which were subject to the restructuring were not identical. If one leaves asides differences in currency denomination and governing law, which did not affect directly the value of the bonds, some bonds issues had very short residual maturities. Other bond issues had very long residual maturities – ranging from a few months to 45 years. The coupon rates also differed significantly. As has been noted, the 'one size fits all' approach adopted by Greece implied large differences in the size of the haircut imposed to investors[103]. Zettelemyer et al have found out that the "haircut tends to decline with maturity, with large haircuts at the short end (in excess of 75 per cent for bonds maturing within a year …) and smaller haircuts at the long end (less than 50 per cent for old bonds coming due in 2025 and beyond)"[104].

The uniform treatment imposed on all investors may be questioned. While it is easy to understand that Greece favored a simple exchange, without much variation, as it was under very intense pressure to proceed with the restructuring, it remains that all investors have not been afforded a similar treatment[105].

The size of the haircut is, however, only one element to be taken into account. In order to assess whether the fair balance has been achieved without breaching the equality principle, it is also important to look at the individual situation of bondholders. The question arises in this respect whether one could take into account the fact that some investors bought their bonds at a steep discount on the secondary market[106]. Undeniably this raises some difficult questions. In order to take into account this element, one would indeed need to obtain all relevant information. Presumably, only the investors themselves would be able to deliver this type of information[107]. Further, if one takes into account the consideration paid by the investors when

102 Save for the fact that foreign law bonds were subject to a distinct procedure. This does not, however, mean that the investors holding foreign law bonds received less or more than those holding Greek law bonds. The consideration promised by Greece was identical. Further, the terms of the various bonds issues were not identical.

103 J. ZETTLEMEYER, C. TREBESCH and M. GULATI, note 9, p. 16.

104 J. ZETTLEMEYER, C. TREBESCH and M. GULATI, note 9, p. 16. According to these authors, "At the extremely long end – a CPI-linked bond maturing in 2057 – the haircut is near zero, or possibly even negative".

105 As noted by Zettelmeyer et al., "We are not aware of any previous restructuring with such variation in present value haircuts across instruments" (J. ZETTLEMEYER, C. TREBESCH and M. GULATI, note 9, p. 18).

106 The English Debt Relief (Developing Countries) Act of 2010 leaves some room to take into account the actual market value of the claim held by an investor, instead of the nominal value. This is apparent in section 5 subsection 4, which provides that if the investor holds a judgment or award against the State, he may obtain payment of a relevant portion of his claim, but not if the effect of applying this relevant portion "would be to increase the amount of the judgment or award".

107 The draft bill which was introduced in the United States Congress in June 2009 to target sovereign debt creditors (Bill nr. HR 2932, introduced by Congresswoman Maxine Waters on 18 June 2009) required extensive disclosure from creditors seeking a judgment against a sovereign debtor. Creditors were indeed expected to file an affidavit under oath including a "statement of the total amount paid by all persons, directly or indirectly holding an interest in the claim against the foreign state, to acquire the interest, including the date the interest was acquired and the identity of any person from whom the interest was acquired" (see

acquiring the bonds, this should fall short of extending the analysis to the 'objectives' or the reputation of an investor. It may well be that an investor is a highly specialized investment fund targeting bonds issued by low income countries. This does not seem relevant, however, to appreciate whether a sovereign restructuring stroke a fair balance, as it would lead the court to factor in subjective elements not easily handled.

The case law of the European Court leaves some room to take into account the speculative nature of an investment. In the case of the Russian loans, the Court noted that the French investor who bought the bonds "*s'était livré à une opération financière, donc nécessairement aléatoire, à ses profits et risques*"[108]. In other contexts, international tribunals have also taken into account the fact that investors had speculated when buying sovereign bonds, purchasing bonds at less than par value in the hope of obtaining full repayment[109]. Even though this could lead to treating different categories of bondholders differently, affording less protection to some categories, the size of the consideration paid by investors when acquiring the bonds seems to be a relevant element when assessing whether a fair balance was struck[110]. As long as the difference is premised on objective and verified facts relating to the price paid for the bonds, it does not seem to run afoul of the prohibition of discrimination[111].

Taking into account the actual consideration paid for the bonds will certainly have an impact when looking at investors who bought Greek bonds after April 2010. At that stage, there had been a major upward revision of both the deficit and debt level of the Greek government, earlier figures having been found to be significantly flawed. As a result, the debt status of the was downgraded to junk[112]. Investors buying Greek debt at that time knew or should have known that they were undertaking significant risks and maybe even a gamble. This risk did not only concern the right to obtain payment of the interests generated by the bonds (the stream of payment), but also the repayment of the principal. It would therefore be flawed to take into account an expectation to be repaid in full in order to assess whether a fair balance has been respected.

Section 5(b) entitled "Disclosures Required in Actions Involving Collection of Sovereign Debt"). The Bill also required that the creditor provides information on the identity of the persons who are behind the creditors (section 5(b)(3)(A)) and on the total amount paid by the creditor in order to acquire the interest in the sovereign debt (section 5(b)(3)(B)).

108 *De Dreux-Breze v. France* (ECtHR, 15 May 2001), p. 9.

109 See the various cases discussed by M. Waibel, note 3, at p. 303-308.

110 The draft bill which was introduced in the United States Congress in June 2009 to target sovereign debt creditors made it "unlawful" to attempt to collect through litigation and seizure of assets payment of defaulted debt in amounts which exceeded the amount paid to acquire the debt. According to the Bill, "sovereign debt profiteering" was prohibited, a prohibition which is made hard by fines. Sovereign debt "profiteering" was defined in the bill as the action of seeking the payment of a sovereign debt for a total which exceeds the amount paid by the creditor to acquire interest in the defaulted sovereign debt. According to Section 3-4, "The term ''sovereign debt profiteering'' means any act by a vulture creditor seeking, directly or indirectly, the payment of part or all of defaulted sovereign debt of a qualified poor country, in an amount that exceeds the total amount paid by the vulture creditor to acquire the interest of the vulture creditor in the defaulted sovereign debt (excluding any amount paid for attorneys' fees or other fees and costs associated with collection), plus 6 percent simple interest per year on the total amount, calculated from the date the defaulted sovereign debt was so acquired, but the term does not include the purchase or sale of such a debt, or the acceptance of a payment in satisfaction of the debt obligation, without threat of, or recourse to, litigation."

111 From a wider perspective, this could, however, be challenged as it leads to rewarding less those who take more risks. This perspective is not relevant when assessing whether Article 1 has been breached in an individual case.

112 See R. Wachman and N. Fletcher, 'Standard & Poor's downgrade Greek credit rating to junk status', *The Guardian*, 27 April 2010 (*www.guardian.co.uk/business/2010/apr/27/greece-credit-rating-downgraded*).

One additional factor could weaken Greece's position. As its name makes it clear, the PSI only affected private investors. Public investors holding Greek bonds were not touched. This is in particular the case for the ECB, which had purchased a large quantity of Greek paper during the crisis that cursed much of the Eurozone. In fact, the ECB was the largest holder of Greek bonds, holding more than 20% of the total bonds outstanding[113]. The protection granted to the ECB was not the result of any carve out in the Greek Bondholder Law. Rather, it resulted from the simple fact that on February 17, 2012, the ECB announced a swap of its Greek bonds for new bonds exempted from the collective action clauses[114]. This preferential treatment meant in effect that the ECB was senior to private-sector bondholders[115].

European taxpayers may be happy that the ECB did not (yet?) suffer any loss on its holdings. There may also be valid, systemic reasons why the paper held by the ECB was not part of the restructuring. It remains however, that one may question whether this preferential treatment may be reconciled with the principle of equality. A court is likely to look with heightened scrutiny at the restructuring knowing that the private sector was not afforded the same treatment as the European Central Bank.

By way of conclusion

When viewing all these elements, there does not seem to be any room for a single answer on the Greek restructuring case. Whether or not Greece fell short of the standard of protection afforded by Article 1 of the First Protocol, depends much on the particulars of the case and specifically on the nature of the bonds and the circumstances in which they were acquired by investors. Those investors who came in at a late stage on the Greek debt market will find it much more difficult to allege that the restructuring amounted to an unlawful repudiation. On the other hand, investors who bought the bonds when they were issued and held bonds with short maturity, will be able to make a more credible case that Article of the First Protocol was not respected.

* * *

113The majority of those bonds were purchased during 2010 through the ECB's Secondary Market Programme (SMP).

114See Invitation Memorandum at p. 15, where it is indicated that Greece held mode than € 50 billion (nominal amount) of its debt, the largest part of which was acquired from the ECB and other central banks prior to 22 February 2012. Greece announced that these bonds would be cancelled and therefore not count towards the various thresholds.

115See 'What the ECB did in Greece & More', *Wall Street Journal*, 27 Feb 2012 (http://blogs.wsj.com/marketbeat/2012/02/27/what-the-ecb-did-in-greece-more/).