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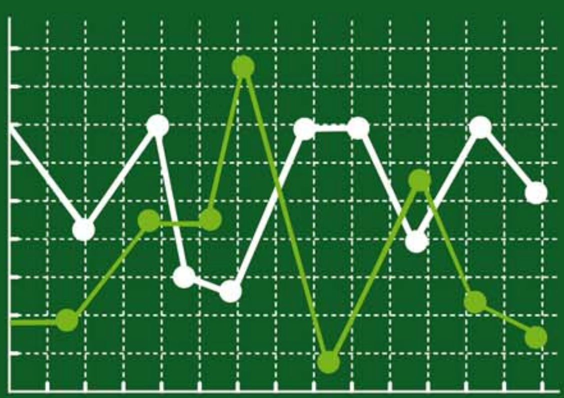

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The Cyprus Crisis and the Legal Protection of Foreign Investors

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Abstract - The legal protection of foreign investments deposited in EU financial institutions has attracted considerable attention both in the legal as well as in the business community following European Parliament's approval on last April of the Bank Recovery and Resolution Directive which includes the so called bail in clause. As the introduction of this clause reflects the intentions of EU's institutions to put an end to the use of taxpayers' funds to resolve financial crises, on the other hand it already had a remarkable impact on banks' creditors' property rights, especially in the case of foreign investors. In this view, this dissertation will survey the possible legal protection, mostly but not exclusively included in ad hoc Bilateral Investment Treaties ("BIT"), provided to foreign investors to recover the losses suffered following bail-ins' of credit institutions. In this regard, particular attention will be given to the analysis of the relevant crisis of the Cypriot's banking sector and the following laws enabling its restructuring by means of creditors' assets write off, the subsequent institutionalization of this template at the EU level and the connections of this new legal framework with international law rules and principles which safeguard property rights of expropriated foreign investors.

JEL: F33, F34, G28, K33, P14.

Keywords: International Monetary Arrangements and Institutions, International Lending and Debt Problems, Government Policy and Regulation, International Law, Property Rights

1 INTRODUCTION

Since the burst of the financial crisis in 2008 policymakers all around the world have been focused to develop stricter regulations to ensure global financial stability and to prevent the incoming of a new big turmoil in the financial markets. Therefore, one of the top priorities surrounding the adoption of such new reforms in the worlds' most important markets (USA with the Frank-Dodd Act; United kingdom with the Banking Act of 2009; EU with the so called Banking Union), regardless of their effective success, has been to limit the involvement of governments in the bailout of distressed financial institutions by means of injection of public funds and relief of troubled assets from their balance sheets[1].

Hence, one of the main consequences of such understanding have been to accept the idea that investors' cash deposited in the financial institutions might be used as a tool to resolve financial crises[2]. This had the direct effect to undermine seriously the sacred principle of not violation of bank deposits which entrusted all the macroeconomic policies in the western democratic countries since the last century's Great Depression.

In this view, taking into account what listed in the previous paragraphs, the purpose of this dissertation will be to provide to the reader a comprehensive outline of what, in the field of international investments, such new laws providing for the write off of creditors' deposits in financial institutions have, apart from the obvious consequences

[1] http://ec.europa.eu/news/employment/131220_it.htm "President Barroso hailed this as "the beginning of the end of bank bail-outs". Banks, not taxpayers, will carry the cost for their own mistakes", he said at a press conference on Thursday, following the first day of the summit". http://www.cnsnews.com/news/article/obama-we-got-back-every-dime-bailout-cbo-bailout-will-lose-24-billion " President Barack Obama said on Thursday that "We got back every dime we used to rescue the financial system, but we also passed a historic law to end taxpayer-funded Wall Street bailouts for good". http://www.thisismoney.co.uk/money/news/article-1680543/Brown-wants-to-end-massive-bailouts.html

[2] Lessons for Monetary Policy from the Euro-Area Crisis, C.A.E Goodhart, *Journal of Macroeconomics* *Volume 39, Part B*, March 2014, Pages 378–382, "[…] the example of Cyprus, whereby local uninsured depositors took a major hit in order to recapitalise the local Cypriot banks, has been perceived as a possible template for future measures to recapitalise banks which might otherwise be failing […]".

on the macroeconomic side, already caused. And also what the current international law framework may offer to expropriated creditors to compensate their losses after restructuring of financial institutions by means of bail in procedures.

That said, the analysis of this topic will begin, at the first chapter, with the explanation of the crisis which hit the Cyprus banking sector in the early months of the 2013. Basically, the banking sector found itself considerably exposed after implementation of the Greek bailouts which provided for the involvement of the private sector holders of Greek bonds on the haircut of the face value of these latter. This measure procured several negative consequences in the balance sheet of Cypriots' banks which were among the biggest holders of Greek public debt throughout the Eurozone. It will be therefore the scope of this chapter to review the emergency legislation that Cyprus politics institutions enacted to handle down the situation and restore confidence in the national banking sector. Afterwards, the basic principles of the Cyprus emergency legislation shall be used to examine what of that legislation has been transferred afterwards into the EU Directive (Bank Resolution and Restructuring Directive "BRRD")[3] which sets out the common rules for cross-border resolution and restructuring of Eurozone credit institutions.

On the other hand, the second chapter will provide the fundamental information to assess the international investment law framework. The survey will concern especially the concepts of investment and financial investment, as well as the relative interpretation that the legal and the economic doctrine provided for the definition of the said concepts; moreover, relevant case law regarding these issues will be analyzed. In brief, this chapter will provide the basis for the indispensable understanding of the following chapter.

Indeed, the third chapter will constitute the core part of the present dissertation where, on the basis of the knowledge and information shared in the previous ones, it will be examined the legal protection in favour of foreign investors provided by the main clauses of BIT undersigned between States.

[3] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, please see http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.173.01.0190.01.ENG.

The final and concluding chapter will aim at summarizing all the issues treated in the present paper and will provide a rational prediction on the possible outcomes of a judicial review on this case.

2 THE CYPRUS CASE AND THE EU BANK RESTRUCTURING REFORM

2.1 CYPRUS LAWS ENABLING EXPROPRIATION OF BANK DEPOSITORS

2.1.1 The crisis of the Cyprus banking sector

Cyprus' was, before the introduction of the Euro, a small economy[4] with any consistent relevance in the international financial system[5]. Its financial sector was regulated with strict rules and the other business sectors were composed of small sized companies.
However, national political institutions pushed for the entry of the country in the EU and the subsequent request to adopt the Euro as its own currency had the purpose of boosting the modernization of the economic framework and to make Cyprus an interesting place where to make businesses and profits[6]. Basically, this intention was realized through two measures. The first one was to support investments, especially from abroad, by decreasing tax imposition on corporate profits[7]. The second, to favor the development of the banking sector by providing high interest rates on deposits accounted in its banks[8].

[4] http://www.multpl.com/cyprus-gdp/table/by-year, Cyprus GDP as of 31 December 2003 was equal to 13.32 billion USD.

[5] IMF Country Report No. 06/347 Cyprus: Assessment of Financial Sector Supervision and Regulation, including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision, Insurance Supervision, and Securities Regulation "[…] the single most important industry is tourism, but financial intermediation contributed 5.7 percent to real GDP in 2003[…]".

[6] The Financial Crisis and the Banking System in Cyprus, Marios Cleridesa and Constantinos Stephanoub, *Cyprus Economic Policy Review*, Vol. 3, No. 1, pp. 27-50 (2009). "[…] Cyprus had a strategy since the 1980s to become an international (offshore) business centre […]".

[7] Cyprus Income Tax Law of 2002, No.118(I)/2002, 15.7.2002, Section 25, Article 2.

[8]http://www.bloomberg.com/news/2013-03-18/cyprus-bank-deposits-returned-almost-twice-germany-s-since-2008.html.

In this context a decisive passage has been represented by Cyprus' adoption of the Euro in 2008[9]. Such adoption caused immediately a large injection of liquidity into the system as deposits in Euro were not anymore treated with the liquidity requirements provided for foreign currency deposits[10]. In fact, Cyprus' rules on supervision of credit institutions required liquidity ratios equal to 70% of the overall share of non-resident entities deposits. After 2008, as the deposits in Euro of non-residents were not anymore treated as foreign currency deposits, such liquidity ratios decreased at the percentage required for residents' deposits, that is 20%.

Notwithstanding the financial crisis of 2009, these conditions allowed credit growth to continue rising at a very high rate[11]. The lending capacities of Cypriots' banks directed significantly to finance the real estate sector while, on the other hand, large investments were made in the purchases of Greek government bonds for their attractive interest rates. The effects of such policy consisted in the worsening of the country's current account balance (for the said investments of foreign residents in Cypriots banks) and, at the same time, a consistent increase in the indebtedness of the private sector (due to the large amounts lent to finance the development of the economy, e.g. the real estate sector). Such disequilibrium became unsustainable on 2011 when the Greek sovereign debt crisis spread out and the financial assistance program imposed by the so-called "Troika"[12] set out the haircut of Greek bonds' face value held by the private sector. Cypriots' banks experienced immediately huge losses being among the largest underwriters of Greek public debt and their capitalizations dropped below capital requirements provided for under Basel II. In addition, concerns spread among investors, especially foreigners, on the strength of the banks, led to massive outflows of capital form the island outwards. Being necessary a recapitalization of two of the major credit

[9] http://europa.eu/rapid/press-release_IP-08-1_en.htm?locale=en "Cyprus adopts the Euro".

[10] The Financial Crisis and the Banking System in Cyprus, Marios Cleridesa and Constantinos Stephanoub, Cyprus *Economic Policy Review*, Vol. 3, No. 1, pp. 27-50 (2009).

[11] http://www.tradingeconomics.com/cyprus/domestic-credit-provided-by-banking-sector-percent-of-gdp-wb-data.html, "[…] domestic credit provided by banking sector (% of GDP) in Cyprus increased from a level of 191.61% on 2001 up to a level of 347.34% in 2012 […].

[12] Expression frequently used to indicate the group of international policy players, composed by the International Monetary Fund, the European Central Bank and the European Commission, which usually assisted Eurozone member States with economic difficulty to restore financial stability.

institutions of the country, Bank of Cyprus ("BOC") and Cyprus Popular Bank (also said Laiki Bank), the Cypriot government found itself unable to assist and recapitalize them as the dimensions of the banking sector were by that time completely out of control.

So, after a brief period on 2012 where emergency assistance was provided by both the Russian government and the ECB[13], the downgrading of Cyprus' bonds at junk level[14] obliged the national government to demand for official assistance of the EU.

2.1.1 *Framework of the bail out*

When the pressure on the Cyprus' financial system arose leading, as we have seen here above, to affect the rating of the country's government bonds, the Prime Minister, Nicos Anastasiades, asked to the representatives of the Troika a plan of financial assistance to recapitalize the financial sector. At the beginning of the consultations the proposals on the floor were the following. First of all, Cyprus' government representatives demanded for a full bailout which could have cost around 18 billion Euro. The second option which, in the same way as the first one will be completely rejected by the Troika, provided for the restructuring of the issued and still outstanding Cypriots bonds[15]. On the opposite, the other two remaining proposals both involved the haircut of excess deposits in the Cypriot banking with, in one case, the exclusion of the deposits below 100,000 Euro protected under the Cypriot deposit insurance scheme and, in the second one, the inclusion of them.

Thus, it has been made clear that Cyprus should have to find most of the resources to rescue its banking sector by its own. However, with a first attempt, Cyprus Parliament dismissed the draft law on resolution of credit institutions which foresaw the inclusion of small depositors in the banks' restructurings. In this context, the situation was rendered even harder by the declared closure of all the banks' branches to prevent a

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[13] "Beware of German gifts near elections. How Cyprus got here and why it is currently more out than in the Eurozone", Alexander Apostolides, *Capital Markets law Journal*, 2013 "[…] the only Laiki Bank received by June 2012 9.8 billion Euro. […]".

[14] http://www.bloomberg.com/news/2012-06-13/euro-crisis-deeper-with-moody-s-downgrading-spain-cyprus.html

[15] "Walking back from Cyprus", www.voxeu.org, Lee Buchheit and Mitu Gulati "[…] €4.4 billion of which are governed by Cypriot law and €3.8 billion by English law […]".

massive withdrawal of cash by depositors[16] and the Government struggled to put together another proposal to be then voted in the Parliament. Finally, on 25th March, 2013 a draft law that provided for the exemption of depositors below 100,000 Euro passed the Parliament's exam and was approved. In the end, heavy losses were inflicted to uninsured depositors and holders of subordinated debt obligations.

As said in the preceding paragraph, the Cyprus Parliament finally voted to involve private depositors in the recapitalization of its banking sector. That was one of the main points of the Memorandum of Understanding[17] signed afterwards with the European Commission, the European Stability Mechanism and the IMF whom purpose has been to put Cyprus in a pattern of financial recovery and debt sustainability over the long period[18]. In this view the financial assistance was granted in exchange of Cyprus' commitment to carry out macroeconomic policies and structural reforms adequate to ensure continuous primary's budget balance surplus over the whole period of the financial assistance[19].

Basically, the Central Bank of Cyprus (the "CBC") had to be the sole resolution authority to carry out the reform of the banking sector autonomously and independently. Such activity comprised three main tasks. The first one involved the carve-out of Greek branches incorporated by the biggest Cypriot banks. Greeks' deposits, loans and branches of Bank of Cyprus, Cyprus Popular Bank and Hellenic Bank were sold to Piraeus Bank of Greece which also took control of loans and deposits in their Greek subsidiaries[20].

[16] "When Cards and ATM's are the only choice: A fortnight in Cyprus with no banking system, nor trust", *Munich Personal RePEc Archive,* Leonidas Efthymiou and Sophia Michael "[…] Cyprus has made a negative mark in history, being the first country in the world to have its banking system shut down for the longest number of consecutive days (13 days: March 16th -28th[…])".

[17] Memorandum of Understanding on Specific Economic Policy Conditionality, http://www.mof.gov.cy/mof/mof.nsf/MoU_Final_approved_13913.pdf .

[18] "Assessment of the public debt sustainability of Cyprus", *European Commission Directorate General Economic and Financial Affairs,* "[…] an ambitious but achievable fiscal adjustment path over the medium-term is essential to contribute to the sustainability of Cyprus' public debt. For this reason, a key objective of the fiscal strategy and the agreed consolidation measures in the draft Memorandum of Understanding with Cyprus (MoU) […]".

[19] Eurogroup Statement on Cyprus, 25 March 2013, *« […] Cypriot authorities have reaffirmed their commitment to step up efforts in the areas of fiscal consolidation, structural reforms and privatisation […]».*

[20] Ibidem, (17), "[…] the programme's banking sector restructuring reduces the needs for public support […]".

The second consisted in resolving Cyprus Popular Bank. It was put into resolution and selected assets and liabilities were transferred to Bank of Cyprus together with the funds of the Emergency Liquidity Assistance previously granted by the ECB. The third task, that is the recapitalization of Bank of Cyprus, underwent through a mechanism of debt to equity conversion. The results of these operations allowed to decrease consistently the consistence of Cyprus' banking sector exposure in percentage of GDP even if the tools were at least questionable as the estimated contribution of uninsured depositors in Cyprus Popular Bank and Bank of Cyprus amounted at 8.3 billion Euro.

Apart from the measures oriented at restructuring the national banking sector, the Memorandum of Understanding underlines the financial resources, equal to an amount of approximately 10 billion Euro, which the Troika committed to provide to Cyprus to cover its financial needs over the period from 2013 until 2016[21].

Such amount is divided in three different parts. The first concerns the needs concerning the financial sector after its process of restructuring. In this sense, the European Commission committed to lend to Cyprus, by means of the European Stability Mechanism, 2.5 billion Euro which will flow to cover possible increase in the non-performing loans ratio and in the recapitalization of the Hellenic Bank in the case the Cyprus Central Bank didn't not find a private purchaser which overtakes the business.

The second tranche, equal to 4.1 billion Euro will serve the redemption of medium and long term maturity debt and the amortization of government loans while the remaining part is assumed to provide funds, for a total amount of 2,4 billion Euro, for the deficit financing needs of Cyprus' public expenditures over the plan's period.

Almost 90 percent of the overall financing will be provided by the European Stability Mechanism while the IMF will contribute to the financing for an amount up to 1 billion Euro. That said, the remaining part of the bailout program will be carried out by the Cyprus government with its own tools. While it has already been told about the banking sector restructuring, the remaining means of financing will be constituted by the sales of gold reserves held at the Central Bank of Cyprus, roll-overs of marketable debt held by domestic investors and a series of state-owned enterprises' privatizations[22].

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[21] Ibidem, (16).

22 Assessment of the actual or potential needs of Cyprus, European Commission Directorate General Economic and Financial Affairs, Pages 2-4.

2.1.2 *Cypriot's emergency legislation of March 2013*

Following final agreement with the relevant European institutions, the Cypriot government took the action to draft legislation in order to address the economic crisis. The legislative framework which came out from the consultation in the competent Parliament is composed of two laws and a number of decrees that the government enacted directly afterwards.

As anticipated earlier, the Cypriot Parliament backed the law proposal on the Resolution of Credit and Other Institutions ("RCOI") drafted by the Government in accordance with the agreements undertaken with the relevant international bodies. The analysis of the main points of the said law is necessary because it represents a useful template of comparison for the following examination of the European Directive on the Recovery and Resolution of credit institutions and investment firms. As a matter of fact, the European Commission transferred the main resolution measures of this law into the BRRD's text.

The RCOI law assigns the power to carry out all the activities indispensables to resolve credit institutions to the CBC. The principles it must follow are to guarantee the continuity of the most important banking services, to safeguard public confidence in the stability of the financial system and to prevent the creation or propagation of risks. At the same time, the preceding tasks are to be ensured without sustain affected financial institutions with public support therefore minimizing costs of resolution for taxpayers.

In very broad terms the resolution measures in the hands of the CBC are five. The first one consists in the possibility to increase the corporate capital of an institution under resolution. This can be done either through the issuance of new shares to existing shareholders or to other investors in the case, among others, existing shareholders are no longer fit and proper to maintain a capital position in the bank or if it is necessary an expedited capital increase to maintain financial stability. The second measure is the sale of operation where the CBC may proceed for the transfer of an institution under resolution's title deeds, some or all of the assets rights or liabilities to one or more credit institutions. The third and fourth measures confer to the CBC the power to transfer assets, rights and liabilities of the institution into a bridge bank or an asset management company. In the case of a bridge bank, it is basically the assignment of the good assets in a new specific company incorporated to carry out, in the view of the continuity of the business, the essential operations previously carried out by the failed institution. The bridge bank shall have a life period of three years where, if not sold at its end, shall be put into liquidation. The hypothesis of the assignment to an asset management company works more or less in the same way; the main difference being represented by the needs of the troubled institutions as, for instance, a very complex set of assets may require the establishment of a specific asset management company in order to maximize the value of the bank's portfolio while in other easier cases a bridge bank may be sufficient.

Finally the last measure, the so-called bail in, has been already the centre of previous discussions in the present paper. In the words of the ROIC it is "*the [CBC] power to write-down or convert debt or obligations of the institution under resolution into shares […] to reduce, including the reduction to zero, the principal amount of or outstanding amount due in respect of debts and obligations of an institution under resolution […] to cancel titles issued by an institution under resolution […] to require the conversion of debt instruments […] which contain a contractual term for the conversion […]to amend or alter the maturity of debt instruments issued by an institution under resolution, including payment suspension for a temporary period.*"

Notwithstanding the considerable amount of options to address the recovery of the banking system, Cypriot authorities addressed the banks' crisis to a large extent with the most invasive measures that is bailing in uninsured depositors and bondholders.

Indeed, the relevant decrees[23] issued by the Cypriot Government to regulate the resolution of the two biggest banks of the island, Bank of Cyprus and Cyprus Popular Bank (also "Laiki Bank"), even if with different modalities, both provided for the conversion of the banks' liabilities into equity of the same. As concerns the Bank of Cyprus' decree, this converted first of all debt securities, bonds convertible and subordinated debt held by investors into three different classes of shares.[24] The same conversion applied for deposits which exceeded the amount of Euro 100,000.00 covered under the Operation of Deposit Protection and Resolution of Credit and other

[23] We are referring to Decree No. 103/2013 by virtue of Article 5 (12) (a), 7 (1) and 12 of the ROIC issued to restore capital adequacy of BOC; and Decree No. 104/2013 by virtue of Article 5 (12) (a), 7 (1) and 9 issued to sale of certain operation of Cyprus Popular Bank.

[24] Decree No. 103/2013, Article 5, paragraph 2, lett. (b; c; d).

Institutions Scheme Regulations of 2013. The amount in excess of the said sum was split in three categories and subject to separate rules:

- 37.5% of the amount in excess was converted into Bank of Cyprus' shares with nominal value of 1 Euro for each Euro of amount in excess converted[25];

- Further 22.5% reduced to zero and replaced by shares with nominal value of 1 Euro for each Euro of amount in excess or converted into deposit at a conversion rate of 1 Euro for each Euro in excess;

- The remaining 40% of excess amount reduced to zero and temporarily replaced into a deposit at a conversion rate of 1 Euro for each Euro in principal amount converted.[26]

  On the same hand, the discipline regarding Cyprus Popular Bank has been, if possible, even harsher. The credit institution, being anymore viable, shall be wind down. The mechanism adopted foresaw for the constitution of a good bank and a bad bank where to transfer liabilities. As regards the good bank, the provisions of the relevant decree stated for the full transfer[27] into BOC of:
- The liabilities relating to the emergency liquidity assistance the CBC provided to Laiki Bank prior entering into resolution;

The liabilities of each person with maximum amount of 100,000 Euro which fall under the protection of the Operation of Deposit Protection and Resolution of Credit and other Institutions Scheme Regulations of 201328

Contrarily, the bad bank received the award of all the liabilities not included in the abovementioned parameters and hence relating to uninsured depositors. Although the foreseeable loss they will experience Cyprus authorities stated they will be compensated following liquidation of the bad bank's assets

[25] The amount afterwards increased up to 47.5% please look at http://www.centralbank.gov.cy/nqcontent.cfm?a_id=12896&lang=en.

[26] Decree No. 103/2013 Article 6, paragraph 1, (ii), lett. (a; b; c)

[27] Apart from assets, title deeds and rights listed in Annex I of the decree (e.g. Shares in subsidiaries of Cyprus Popular Bank Outside Cyprus; assets held in the bank's branches in the UK; assets sold to Piraeus Bank)

[28] Decree No. 104/2013 Article 5 sub-paragraph 2, lett. (a; b)

Besides the piece of legislation regulating BOC recapitalization and Laiki Bank resolution, Cyprus' government legislative moves comprised also the enforcement of restrictive measures on transactions. Such measures were designed to face the assumed temporary pressure on the country's financial system due to the risks of capital outflows. Although designed to be temporary these are still in place after more than eighteen months from the date of implementation of the rescue packages.

2.2 INSTITUZIONALIZATION OF THE CYPRUS CASE BY MEANS OF THE BRRD

Although many commentators, reviews and policy analysts expressed their doubts[29] about a resolution's model which overturned all the precedent rules traditionally applied to clear banking crisis, EU executives kept on relying on the template used in the Cyprus case to outline a common framework for the restructuring and the resolution of credit institutions operating inside the Eurozone[30]. The scope was essentially to provide the Eurozone with resolution tools which allow avoiding any kind of public intervention in the financial crisis, thus making the financial system fully independent from external resource's help (i.e. State's funding; assistance of the ECB).

In this regard, however, the European Commission's intention to proceed in this sense arrived much time before the turmoil in the Mediterranean island.

First of all, it begun when it assessed the issue immediately after the extraordinary measures taken to assess the initial phase of the financial crisis, where States aids' in favour of banks where allowed by means of specific derogations to the applicable rules

[29] Among others "Crisis Management Tools in the EU: What Do We Really Need?", Annemarie van der Zwet, De Nederlandsche Bank Occasional Papers, Vol.9/No.2 (2011) "[…] will it really help? As in the case of living wills, the problem with a bail-in mechanism is that does not change anything with regard to the size or interconnectedness of financial institutions […] establishing a bail-in mechanism therefore offers a partial, but probably not a sufficient solution for the 'too important to fail' problem." Also, Legal Aspects of Bank Bail-Ins, Simon Gleeson, Special Paper 2005 Lse Financial Markets Group Paper Series, January 2012 […]Bail-ins are not a panacea, and will not produce a zero-failure environment for banks. Recapitalisation only works for good businesses with bad balance sheets - businesses which are fundamentally bad will not be and should not be bailed in, but will be left to a resolution regime in the ordinary way […]"

[30] Trilogue agreement on the EU framework for bank recovery and resolution, 12 December 2013, please see http://europa.eu/rapid/press-release_MEMO-13-1140_en.htm?locale=en

of the TFEU[31]. Here, before the assessment with the competent Member States governments (e.g. ECOFIN meetings), the EU COM involved national authorities and financial players in a series of consultations informing them about the possible application of debt write down to resolve bank failures[32]. In the course of such process even the ECB[33], though generally agreeing with the views of the EU COM, warned this latter on the possible shortfall of a disorderly planning, as done in Cyprus, of the bail-in tool.

Notwithstanding the mentioned concerns which warned for the replication of a legislative text with the same loopholes of the Cypriot's emergency legislation, the European legislator had the merit to have partially solved some the outstanding issues arisen (e.g. liabilities within the applicable write-down's regime; hierarchy of the creditors and treatment of the same; relevant applicable procedures).

The BRRD appears to be a consistent legal document composed of more than a hundred articles more of them filled with really technical provisions.

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[31] Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis ('2008 Banking Communication') (OJ C 270, 25.10.2008, p. 8); Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition ('Recapitalisation Communication') (OJ C 10, 15.1.2009, p. 2); Communication from the Commission on the treatment of impaired assets in the Community financial sector ('Impaired Assets Communication') (OJ C 72, 26.3.2009, p. 1); Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules ('Restructuring Communication') (OJ C 195, 19.8.2009, p. 9); Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ('2010 Prolongation Communication') (OJ C 329, 7.12.2010, p. 7) and Communication from the Commission on the application, from 1 January 2012, of State aid rules to support measures in favour of financial institutions in the context of the financial crisis ('2011 Prolongation Communication') (OJ C 356, 6.12.2011, p. 7).

[32] Please refer to: http://ec.europa.eu/internal_market/bank/docs/crisis-management/discussion_paper_bail_in_en.pdf

[33] European Commission's Public Consultation On The Technical Details Of A Possible Eu Framework For Bank Recovery And Resolution, 6 January 2011, ESCB Contribution: "[…] It is essential, however, that the write-down tool has a clearly (ex ante) defined legal framework, including transparent trigger conditions, in order to avoid legal uncertainty and market distortion. In this respect the bail in should not allow for discrimination among equally ranked creditors, in the sense of treating them differently without building this differentiation on objectively justified grounds, as this would conflict with the general principle of equal treatment and create legal uncertainty about the extent of creditor rights […]".

As regards the bail in resolution tool, it is defined as "*the mechanism for affecting the exercise by a resolution authority of the write downs and conversion powers in relation to liabilities of an institution under resolution*"[34]. Such liabilities will comprise Core Equity Tier 1 financial instruments and, whether not sufficient to cover the losses, all the other liabilities from Additional Tier 1 instruments until senior eligible debt.[35]
That said, although the critical assessment of the efficacy in terms of financial stability of the BRRD were not a principal objective of the present paper[36,] it must be pointed out that the concerned policy still finds eminent commentators[37] seriously skeptics about bail-in's power to make the process of dealing with failing banks necessarily better.

3 <u>PRINCIPLES OF INTERNATIONAL FOREIGN INVESTMENTS</u>

3.1 <u>INTERNATIONAL INVESTMENTS</u>

3.1.1 *<u>The economic and the legal standpoint</u>*

Now that the discussion on the economic and legal background of the problem has been set, it shall be necessary to relate the aforementioned legal provisions with the international law tools in the hand of foreign investors seeking adequate compensation.
In this regard, with the purpose to achieve a complete assessment of the matter and to further provide a rational and equilibrate conclusion on the same it shall be necessary to start addressing the concept of international investment and, subsequently, questioning whether, pursuant to the accepted international law rules, an investment in a relevant financial instrument, regardless of its nature and accounted in a foreign bank, can be considered as such. In principle, from the historical perspective, the pattern trod by international investment law cannot be divided from past centuries imperialism of

[34] BRRD, Article 2, Paragraph 1, No. (57).

[35] BRRD, Article 48, Paragraph 1, lett. (a), (b), (c), (d), (e).

[36] Being the possible legal costs at the international level its main topic.

[37] Critical Evaluation of Bail-ins as Bank Recapitalisation Mechanisms, Charles Goodhart & Emilios Avgouelas, Centre for Economic Policy Rsearch, Discussion Paper 10065, July 2004; European banking: Bailout, bail-in and state aid control, Mathias Dewatripont, International Journal of Industrial Organization, 22 March 2014.

western countries' [38]. Indeed, the colonisation of vast part of the new discovered world allowed colonising countries' to explore useful opportunities for the improvement of their economies[39]. As a consequence, their relevant enterprises played a major role in exploiting territories rich of natural resources and slaves. In this context foreign investment was protected by the military control of the territory. Where the investment was not protected by military occupation, state's diplomatic officials assured the conclusion of useful agreements with the host state[40].

The issue of State responsibility as we currently know it arose afterwards by the time where most of the colonized countries, with underdeveloped economies, became independent. At the same time, with the power to determine their own policies in the hands of those states, risks surrounding business interests of foreign investors increased. This happened for different reasons which may comprise a (i) general hostility towards non-resident investors, (ii) change in the political orientation of the country, (iii) unilateral amendments made by the government to investment agreements, and (iv) changed circumstances which makes the respect of the agreement excessively onerous for the host state[41].

This framework, concerning the emergence in the international community of new independent countries with, from one side, their own apparent will to pursue independent policies together with, on the other, a simultaneous lack of development of their economies, represented the base for the economic debate which led the scene for the whole part of the second half of the twentieth-century. Here two main economic theories, with opposite views, reasoned on the states' convenience upon foreign investments dependence[42]. From one side, precisely the one which is related to free market ideologies, the basic assumption stated that foreign investments are always beneficial to the host state[43]. The positive effects would be determined by financial and technological justifications. First, the inflow of capital in the host state from advanced countries shall allow solving the scarcity of capitalization existing in the host state

[38] The International Law of Foreign Investment, M. Sornarajah, Cambridge University Press, page 36, 2010.

[39] Ibidem, page 39.

[40] Ibidem, page 40.

[41] Ibidem, page 70.

[42] Ibidem, page 47.

[43] Ibidem, page 48.

economy. At the same time, host state's workers may take advantage of highly-advanced working skills. The result of these two conditions materialize in an upgrade of entire sectors of the society such as facilities, health and educations infrastructures of which the whole host's state citizenship can benefit. Above all, this theory has been for a long time adopted by industrialized countries and the international institutions they controlled[44]. For this reason many critics[45] of this view ascribed to these latter the liability of taking advantage of this theory to keep on making profits at weak countries' expenses. Indeed, many reports in recent years, also issued by unexpected organizations like the UNCTAD[46], started to explicitly put in doubt the scientific economic benefits provided by foreign direct investments. A clear example of this argument may be taken by the effects occurred in most of the Latin America countries which implemented, under the umbrella of the so-called "Washington Consensus"[47], neo-liberalists policies with the purpose to boost trade and internationalization of the economy. Contrarily to the wishes of the Latin Americans politicians who encouraged the implementation of these policies, the consequences on many South-American countries were dramatic.

This example may provide the link to turn for the introduction of the other theory which, recently, is gaining more ground in the said Latin America's economies. This theory in summary refuses all the assumptions which are part of the free-market ideology and states that, instead of helping the growth of emerging economies, investments made by capital exporting countries would force the host state in a situation of everlasting financial dependency[48]. In the words of the academics[49] which sustain this vision, one of the main system with whom advanced economies would realize this state of facts would be by means of multinational corporations which, operating in the

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[44] Ibidem, page 48-50.

[45] Economists who contest the efficacy of this theory are, for instance, Nobel Prizes' Joseph Stiglitz (Making Globalisation Work, 2006), Amartya Sen (The Idea of Justice, 2009) and Dani Rodrik (One Economics, Many Recipes, 2009).

[46] UNCTAD, World Investment Report, 2003 where it is challenged the assumption included in BIT's preambles that these will "benefit the economic development of the host state".

[47] See reference 38, page 49.

[48] The origins of this theory must be found in the works of Paul Prebisch, Argentinian economist. Other references pertaining to the development of the dependency theory may be found in R. Peet (Global Capitalism: Theories of Social Development, 1991), B. Hettne (Development Theory and the Three Worlds, 1988).

[49] Ibidem.

host state through subsidiaries, would carry out business in the exclusive interest of their shareholders without having care about the real development of the host state. As said, currently the acceptance of this theory by some of Latin America's policymakers[50] has completely overhauled the perception of these latter concerning foreign investments. The refusal of this old economic approach served then to justify, in the eyes of international commentators[51], the surge in industrial nationalization which took place between the end of 90's and the mid-2000's and that mostly hit, with severe damages, multinationals corporations' investments in those states[52].

It is surely hard to determine with absolute certainty which of the two proposed positions is the best. However it seems that none of them is able, at the present time, to provide a definite picture of the problem and that both the economic and the legal academy must develop new forms of regulation in the field of international investments. In this regard, as prohibiting completely the free movements of capital in determined states may be as wrong as to fully allow their circulation, a responsible answer would be to pose certain limit to the actions of both investors and host states through provisions which, contrarily to the rules included in the BITs currently in force, may set minimum standards of behaviors or prohibit the activation of determined property's rights powers.

Along the lines of the economic literature, also in the legal field, even with greater uncertainties, the meaning of foreign investments underwent through different interpretations as well as sub-set[53]. For reasons of shortness it will be treated the meaning of investment limiting it at its evolution with the legal doctrine and the jurisprudence of the International Centre for Settlement of Investment Disputes ("ICSID" or the "Court"), being such the usual competent Centre for disputes arising out from violation of BITs' provisions.

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[50] See, for instance, http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/9218488/Argentinas-Cristina-Kirchner-opens-a-new-trade-war.html,

[51]

[52] Bolivia nationalised the domestic gas industry in 2006; the Chavez's regime in Venezuela took over the properties of the entire oil, cement and steel resources of the country between 2006 and 2008; President Cristina Fernandez de Kirchner renationalised several industrial companies beforehand controlled by foreign investors (e.g. YPF, FAdeA).

[53] Investment Treaty Arbitration: Judging under Uncertainty, Andres Rigo Sureda, Cambridge University Press, page 56, 2012.

Basically, at a first sight the term foreign direct investment meant literally the economic interest that a non-resident has in an enterprise located in a foreign country[54]. However, this is not the description which has been welcomed in the relevant international community. As a matter of fact the discussions around this term have been long and debated[55]. The first failure to draw a precise definition took place in the course of the negotiations among subscribing states which led to the adoption of the Convention on the Settlement of Investment Disputes between States and National of other States ("Washington Convention")[56]. Although preliminary drafts contained limited definition of investment, following concerns of the participating states pointed out the risks that an imprecise configuration of the term would have led unneeded discretionary power of the ICSID court[57]. The final document approved by the participating state then provided for a neutral definition of investment without any further additional description[58]. As this framework left great autonomy to the contracting states in the determination of the investments to be devolved at the jurisdiction of the ICSID, such freedom led to contradictories results[59]. In summary, the debate turns around two investment's meaning. The first one, also known as the *deferential approach*[60] assumes that as long as the underlying documents signed by the parties (irrespective of the consent being included in a BIT or, e.g., a contractual arbitration clause) of the disputes acknowledges for the inclusion of an economic activity or an asset into the definition of investment, the ICSID jurisdiction shall not be refused. The expression *deferential* is used due to the pre-eminence given in this criterion to the will of the state to bind itself into a given contract. The deference will be represented by the choice of arbitrators to leave the point of whether recognizing or not in a BIT, or another international agreement, certain investments as protected by ICSID's international investment law. This scheme left the

[54] The notion of "Investment" in International Investment Arbitration, in: Arbitrating Foreign Investment Disputes), Noah Rubins, (Horn, N./Kroll, S. eds.) (2004);

[55] ICSID Commnetary, Christoph Schreuer and al., Cambridge University Press, Article 25 - Jurisdiction pp. 71-347, 2009.

[56] The Meaning of 'Investment': ICSID's Travaux and the Domain of International Investment Law, J.D. Mortenson, Harvard International Law Journal, Vol. 51, No. 1, 2010; ICSID Commentary, Christoph Schreuer and al.

[57] Ibidem.

[58] Ibidem.

[59] Ibidem.

[60] Ibidem.

room for the development of a broad range of decisions which made the concept of investment remarkably wide[61].

On the opposite, the other approach, focused on limiting the spectrum of the type and nature of investments under the jurisdiction of the ICSID, attempted to set some requirements to define an investment. The basis for the development of such *restrictive approach*[62], are posited by the five features' test elaborated by Christoph Schreuer[63]. In his intention, a dispute arising out from an investment may be led to the jurisdiction of the ICSID whether the investment proved to be (i) of a certain duration, (ii) with a certain regularity of profits and returns (iii) incorporated of some risk, (iv) surrounded by the substantial undertaking of the investor and (v) with some significance for the host state's development of the economy. Without having regard to the real position of Schreuer whether considering the mentioned list of features mandatory or only indicative, a considerable number of ICSID tribunals came to accept unconditionally this type of features and moved to consider them just like legal substantial requirements[64].

The decision which can help to better understand this point is the *Salini* case[65]. In such dispute, the arbitrators formulated an empirical assessment to retain the case: in few words, the exam prescribed that an investment must relate to either a (i) contributions, (ii) a certain duration of performance of the contract, (iii) participation in the risks of the transaction and finally (iv) contribution to the economic development of the host State of the investment. It is easy to argue the intrinsic similarity between the proposed formulas in the terms of objectivity of the elements needed to consider the dispute as falling inside the perimeter of Article 25 of the Washington Convention. In addition to the criteria used to infer an investment as comprised in the perimeter of Article 25,

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[61] For a review of this case law please see for instance Fedax v Venezuela, ICSID Case No. ARB/96/3, Generation Ukr. v Ukraine, ICSID Case No. ARB/00/9, SGS v Philippines, ICSID Case No. ARB/02/6, Lanco Int'l Inc. v Argentine Republic, ICSID Case No. ARB/96/7.

[62] ICSID Commentary, Christoph Schreuer, Cambridge University Press, Article 25 - Jurisdiction pp. 71-347, 2001.

[63] Ibidem pages 121-131.

[64] For a review of this case law please see for instance Helnan Int'l Hotels v Arab Republic of Egypt, ICSID Case No. ARB/05/19, Saipem S.p.a. v People republic of Bangladesh, ICSID Case No. ARB/05/7, Jan De Nul N.V. v Arab Republic of Egypt, ICSID Case No. ARB/04/13.

[65] Salini Costruttori S.p.a. v Kingdom of Morocco, ICSID Case No. ARB/00/4.

following cases were resolved using what has then been defined as the "*double barreled approach*"[66] that is a multi-layer test composed of the said *Salini* test in conjunction with the survey of the specific BIT's clause with reference to the definition of investment.

3.1.2 *The case law regarding financial and portfolio investment*

That said, it is already possible at this stage to affirm how unstable and uncertain were the application of International Investment Law's principles with the ICSID. In this regard one of the fields more affected by this uncertainty is the financial sector[67] (which obviously is for the present discussion pretty peculiar). In fact the reliance on the terms of the double barreled approach created the conditions for the establishment of grey zones that do not seem covered by the protection of BIT's. Financial investments are included in such set for their characteristics which are far from the requirements of the *Salini* case: at a glance, duration and help to economic development of the host state do not appear to be inner qualifications of any financial investment, even more if dependent on the unpredictability of financial markets.

However, also in this case the precedent positions taken by the ICSID tribunals are not unique and provide the starting point for arguing whether a hypothetical investor expropriated in Cyprus may file a claim and pass the jurisdiction test with the ICSID. In this regard the case CSOB v Slovak Republic[68] provides excellent findings. The disputes arose from an agreement where CSOB, a Czech based commercial bank, agreed with the relevant Slovak Ministry of Finance to assign to this latter a portfolio of non-performing loans. Following failure of the state-owned controlled company to duly perform the repayment schedule set out in the agreement, CSOB appealed to the ICSID to activate the arbitration clause included in the said agreement. The arbitrators positively concluded over the jurisdiction of the ICSID Centre only after having progressed on a dialectical interpretation of the consent of the parties to retain the agreement as involving an investment, and, afterwards, whether such may be retained in

[66] For the complete formulation of such approach please see the dispute Malaysian Historical Salvors v. Malaysia, Award, 17 May 2007, para. 55.

[67] Michael Waibel, Opening Pandora's Box: Sovereign Bonds in International Arbitration, American Journal of International Law, Vol. 101, pp. 711-759, 2007.

[68] Cekoslovenska Obchodni Banka (CSOB) v Slovak republic, ICSID Case No. ARB/97/4.

the words of Article 25. Indeed the arbitrators reasoned that although the specific agreement signed by the parties may infer to retain that the relationship among them could be considered as an investment due to the reference to BIT provisions, that element shall not be considered sufficient in order to demonstrate the relevance of the investment according to Article 25. Therefore, although the opposition of the Slovak Republic which argued that a loan could not be interpreted as an investment lacking transfer of "*physical resources in the territory of the Republic*" as well as being not "*useful for the economic development of the country*", the Centre rejected these statements by saying that the contributions made by CSOB were, considered in their entirety, worthy of protection as they included feature elements of risks in exchange of a future economic return and at the same time helped the economic development of the host state.

The question on the admissibility of the ICSID jurisdiction towards financial contributions was replied in other two decisions, which, for their similarities, have to be treated together. It is made here reference to the so called Abaclat[69] and Fedax[70] cases.

The latter one stands out for two particular elements of the Award on the Jurisdiction which brought innovations in the field of financial investments arbitrations. As the disputes arose from the purchase of Venezuelans' promissory notes by a group of Dutch investors, the analysis "*ratione materiae*" and "*ratione personae*" of the Centre focused on two main issues: the question whether the dispute involved an investment and the further query whether the holders of the promissory notes can be considered "*investors*". With regard to the first point the interpretative process followed by the Centre recalled the same applied for disputes already treated in the precedent pages. Notwithstanding the objections raised by the Republic of Venezuela[71], arguing that promissory notes were not a direct investment as it did not involve the physical transfer of money in a relevant Venezuelan company nor it was executed passing by the exchange trade platform of Caracas or Maracaibo, the Centre developed an innovative award in relation to the previous concepts of direct investment as well as to the

[69] Abaclat and others v Argentine Republic, ICSID Case No. ARB/07/5.

[70] Please see reference (61).

[71] Ibidem (61), paragraph 24.

territorial linkages between the investment, the claimant and the respondent[72]. After having established that promissory notes can be included in the meaning of both Article 25 of the Washington Convention and also in the Agreement between the Republic of Venezuela and the Kingdom of Netherlands, it précised the misinterpretation surrounding the meaning of direct investment. In few words the word "*direct*" in paragraph 1 of Article of the Washington Convention would not refer to the word "investment" but, on the contrary, to the word "*dispute*". Such revision of the mechanism of paragraph 1 of Article 25 allowed the Centre to develop an argument that viewed the investments to be protected regardless of their direct or indirect nature. On the side of the territoriality issue, the jurisdiction was admitted as not every investment is required to provide for a physical transfer of funds in the host state, being the effective availability for the economic development of the host state the only requirement to be satisfied. This allowed retaining Dutch investors which did not materially had any presence in the host state territory to validly stand with the Centre and to be awarded for compensation.

On the second case, Abaclat v Republic of Argentina[73], a dispute which involved the security entitlements attached to a Argentina's sovereign bonds, the issues at stake were similar, i.e. the inclusion of the concerned investment in the applicable range "*rationae materiae*" of the Centre and the territoriality link between investor and investment with the host state. However, in this case the arbitrators reasoned in some aspects differently from the conclusion awarded in the Fedax case and that made Abaclat one of the disputes where the notion of investment reached the widest meaning.

In fact, the Centre abandoned the *Salini* test in the assessment of the jurisdiction sustaining that the application of its criteria would have hindered the spirit of the Washington Convention and limited the consent of the parties as included in each BITs. Furthermore, it affirmed, moving from the sole interpretation of the BIT's article on the definition of investment, that the inclusion of financial instruments in the list of investment did not need any other test. On the side of the territorial linkage the prerequisite of the economic development of the host state were respected in the words

[72] Ibidem (61), paragraph from 29 to 42.

[73] For a case law review of such dispute please see Abaclat and Others v Argentine Republic – The Definition of Investment, ICSID Review, No. 2 (2012), pp. 247-254.

of the Award, by the availability of funds transferred to Argentina. No need for the presence of a material economic activity in the territory of the host state was confirmed.[74]In this respect, the dissenting opinion by one of the arbitrators, Professor Abi Saab[75], defends the criteria of the "*double barreled test*" as not applied in Abaclat and contests the territoriality linkages given in both the Fedax and the Abaclat cases. The premise of the first issue is that investment made by means of financial markets' intermediation would have been left outside the meaning of Article 25 because being out of the scope of the Washington Convention as preliminarily outlined in the *Travaux Preparatoires*[76]. Article 25 should therefore serves as a legal boundary to limit the range of matters outside the hard-core of matters and BITs could not be against this formulation. As a consequence, only an empirical test on the respect by the concerned investment of certain requirements may, in the words of Prof. Saab, guarantee the compliance with Article 25.

As regards the second issue, which seems to be grounded on more solid basis, the argument moves, firstly, from the fact that the financial instruments were been sold outside Argentine. Secondly, that the respective contracts providing for a foreign governing law had linked the *situs loci* of the investment incontrovertibly outside Argentina therefore contravening, in this sense, to the wording of the concerned BIT between Argentine and Italy which required for an investment made "*in the territory*" of the host state and useful "*for its economic development*".

This brief dissertation whether admitting financial investment within the jurisdiction of the Centre shows that, even if with some inconsistencies and lack of clarities, the investor with purely financial investments may with good arguments file an appeal with the ICSID and pass the preliminary jurisdiction test. However, this procedural aspect is not sufficient to allow a definitive statement on the compensability of foreign investors involved in the Cypriot's bail-in. Besides the procedural aspect lie substantive arguments. It will be then the scope of the following chapter to provide evidences

[74] Ibidem (69), paragraph from 343 to 387.

[75] Abaclat and Others v. Argentina, Dissenting Opinion, Georges Abi-Saab, paragraph from 38 to 61 ("Investment under the ICSID Convention in General") and from 73 to 119 ("Territorial Link").

[76] In reality, the only category expressly excluded in the preliminary works of the Washington Convention was that of mere commercial transactions involving the international sale of goods.

whether Cyprus's institutions acted in compliance with the applicable international investment law or if the country shall be held liable and compensate expropriated investors.

4 PROTECTION OFFERED BY BIT

4.1 INVESTORS' PROTECTION CLAUSES UNDER BITS

The analysis carried out in the precedent chapter allow, for the purposes of the present dissertation, to move forward with regard to the possible application of BIT's provision to the specific case of the Cypriots' banks bail-in. In order to determine whether the claim of a certain expropriated foreign investor may hypothetically lay on strong grounds with the competent ICSID court it shall be necessary to tie the said BIT's provisions with the facts occurred as well as with the common principles applied in similar previous cases.

The starting point of the analysis is to survey whether the write-down of investors' assets in the Cypriots' banks can be assumed as an expropriatory act. In general terms the act of expropriation may be seen as the power of a State to imperatively transfer property's rights. This can be done either with a direct expropriation[77] , which descends from an explicit provision included in the law and that is aimed at withholding the owner's property by means of title's transfer, or through indirect expropriation[78], which, though not constituting a change in the ownership of the title, represents a clear interference in the disposal of rights to such an extent to make them almost useless to the benefit of their owner. The consequence of any expropriatory act may be different according as it has been a lawful expropriation[79] or an unlawful expropriation[80]. With the first term it is made reference to an appropriation which has been needed in order to safeguard national interest or that it has been required by exceptional economic

[77] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT EXPROPRIATION UNCTAD, Series on Issues in International Investment Agreements II, pages 6-7, 2012.

[78] Ibidem (77), page 8.

[79] Suzy H. Nikiema, Compensation for expropriation, International Institute for Sustainable Development, , March 2013, pages 2-3.

[80] Ibidem (79)

circumstances[81]. In this sense, whether the act comply with all the requirements provided by the relevant BIT's and the criteria elaborated by arbitral tribunals, the only relief available to the concerned investor will be the request to receive a fair and equitable compensation for the suffered losses which, usually, shall be granted taking into account the fair market value of the asset at the moment of the expropriation. In the other case, whereas the taking of the property were carried out with an unlawful act or without respecting the criteria of lawful expropriation, the claim's investor may comprised, together with the payment of damages, also the request to receive back the full disposal of the property's rights.

ICSID courts have normally acknowledged the distinction between direct and indirect expropriation in their awards, therefore widening at its most the spectrum of facts which may open the ground for a request of, at least, a fair compensation. In this view useful ICSID decisions to better understand the range of indemnifiable expropriations may be summed up by the case that viewed the United Mexican States opposed to Metalclad Corporation[82].

Metalclad v Mexico decision moved from the assumption that the host state is compelled to provide the best legal condition to foreign investor to carry out the envisaged development of the project in its territory. This follows a common principle outlined in every undersigned BIT that affirms the commitment of the concerned state to treat the foreign investor with the same parameters kept for national investors[83]. In this specific case the Republic of Mexico failed to comply with such obligation as, though during preliminary agreements with Metalclad where it guaranteed about the feasibility of the investment and on its commitment to issue all the necessary permits and authorisations to developed the envisaged project, the refusal of local authorities where the construction site had already begun to work to release the final permit

[81] In Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States80 the NAFTA Tribunal noted: "Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue…".

[82] *Metalclad Corporation v. The United Mexican States*, ICSID Case No.ARB(AF)/97/1

[83] Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* . Oxford : Oxford University Press , 2008 , Pp. xxxii, 315; Jonathan Bonnitcha, Substantive Protection under Investment Treaties A Legal and Economic Analysis.

constituted an irreparable damage to the corporation's economic interests. The Court found the Federal Government of Mexico responsible for its local's branch wrong doing and elaborated the principle that any regulatory taking which has the effect to incidentally interfere with the use of property leading to the owner's deprivation, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property shall be regarded as an unlawful expropriation and thus subject to full restoration.

To determine the extent of the contingent expropriations carried out in the verge of the Cyprus's rescue plan, regardless of their direct or indirect nature, it will be taken as a useful template the treaty undersigned by Cyprus and Luxembourg[84] as many financial and holding companies which may be hit by the plan's measures find their registered office in the Grand Duchy of Luxembourg.

The structure of this BIT is the standard one and incorporates the common provisions covering investors' rights. It therefore provides for inclusion in the definition of investment of every "*kind of assets and any direct or indirect contribution in cash, in kind or in services, invested or reinvested in any sector of economic activity [as well as] bonds, claims to money and to any performance having an economic value*"[85]. Investments are deemed to be protected in any circumstances apart from "*measures required to maintain public order*"[86] and shall be "*equal to those enjoyed by investors of a third State*"[87].

If reasons of *public purpose, security or national interest require undertaking measures of expropriation or nationalisation*[88], these shall be taken in compliance with *due process of law and shall provide for the payment of a fair and effective compensation*[89]. Such shall be equal *to the value of the investment on the day before the measures were taken*[90]*. In any case, the treatment received by investors may not be less favourable to those granted to national investors or other third parties' investors.*

[84] Investment promotion and protection treaties, Belgium-Luxembourg/Cyprus, 1991.

[85] Ibidem (84), Article 1, paragraph 2.

[86] Ibidem (84), Article 3, paragraph 2.

[87] Ibidem (85), paragraph 3.

[88] Ibidem (84), Article 4, paragraph 2.

[89] Ibidem (88), paragraph 2, let. c).

[90] Ibidem (88), paragraph 3.

That said, the expropriated investor may claim that the provisions introduced with the abovementioned decrees regulating the resolution of Bank of Cyprus and Laiki Bank represented a sovereign act which reduced the value of their investment. Especially, the loss suffered by those investors who saw their cash deposited or money invested in Laiki's Bank bonds transferred to the bad bank's arm incorporated during the resolution of the institution may move expropriation's claims for lack of fair compensation and discriminatory treatment (as depositors with cash accounted below Euro 100,000, liabilities owed to public financial institution like the CBC and investors of the UK and Greeks Laiki's branches were not hit by the write-down measures)[91].

4.2 CYPRUS' COUNTER-ARGUMENTS

The Cypriot's exceptions to the investors' allegations shall be predictably based on two ranges of defences.

The first type of defense assumes the existence of a state of necessity. This counter-argument takes its legal justification in many BITs which set the lists of non precluded measures (NPM clause) upon which states are entitled to derogate from the duty to pay effective compensation. However, the relevant BIT between Cyprus and Luxembourg does not contain a NPM clause. It only states that "*investors […] whose investments suffer losses owing to war or other armed conflict, revolution, a state of national emergency […] shall be accorded […] treatment, as regards restitution, indemnification, compensation […] no less favourable than that [accorded] to the investors of the most favoured nation*"[92]. In this view, as it would prove difficult to show that Cyprus has granted a better treatment to national investors than to foreigners being the measures applicable to all depositors regardless of their nationality, the remark can be moved in relation to the treatment accorded to the investors of the most favoured nation. Indeed, the accounts and other financial instruments credited in the UK

[91] http://www.standard.co.uk/business/business-news/cyprus-crisis-bank-of-england-rescues-uk-savers-in-laiki-bank-8556918.html, Cyprus crisis: Bank of England rescues UK savers in Laiki Bank, 2 April 2013; http://www.centralbank.gov.cy/nqcontent.cfm?a_id=12677&lang=en, Sale of the branches of the three Cypriot banks in Greece, 2 April 2013, "*[…] the branches of Laiki Bank and Bank of Cyprus in Greece would be sold to Piraeus Bank in Greece. It should be noted that the agreement also involved Hellenic Bank and, therefore, the operations of Hellenic's branches in Greece were also sold to Piraeus Bank in Greece […]*".

[92] Ibidem (88), paragraph 4

branch of Laiki Bank, which apparently should have been connected to the applicability of the emergency's legislation provisions, did not fell into the bail-in clause perimeter as they have been transferred to the balance sheet of Bank of Cyprus' UK subsidiary[93]. Consequently, being such an autonomous legal entity incorporated under the laws of the United Kingdom, it fell under the supervision of prudential regulation of UK laws. Furthermore, all the liabilities afferent to the emergency liability assistance granted by the CBC were fully transferred to Bank of Cyprus' accounts. These actions can be therefore seen as discriminatory treatments by all the other foreign investors with accounts opened in Laiki's Bank branches and that were hit by the bail-in measures. Moreover, unlike the previous case of the Greek haircut where bondholders were granted with the change to exchange their old bonds with new issued ones, in the present case the write-down of banks' accounts was carried out without any kind of settlement attempts' with depositors and bondholders[94].

Therefore, the Cypriot's defenses may need other arguments to challenge the claim of expropriated investors. Here, the exceptions can be grounded on the side of international customary law as deemed automatically applicable to all disputes governed by international law.

This argument lies on the rules provided by Article 25 of the Articles on the Responsibility of States for Internationally Wrongful Acts[95]. Paragraph 1 of this provisions states that whether a rule of international law, e.g. a BIT clause, has been violated, the concerned State may invoke the compliance of the alleged wrongful act with the concerned international obligation if it provides evidences that the act was the "*only way for the State to safeguard national interest against a grave and imminent peril and […] did not seriously impair an essential interest of the State or States towards which the obligation exists*". Moreover, the necessity clause can never be invoked in situations where the concerned obligation does not allow for the "state of

[93] Ibidem (91).

[94] Jeromin Zettelmeyer, Christoph Trebesch, Mitu Gulati, The Greek Debt Restructuring: An Autopsy, Peterson Institute for International Economics Working Paper No. 2013-13-8, page 8-12.

[95] http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

necessity exemption” or if the same State has contributed to create that state of necessity[96].

It is therefore a situation of impossibility to perform the international obligation[97] or a fundamental change of circumstance[98] that made necessary such state’s wrongful act. However, international courts have not been unanimous[99] whether recognising state’s defenses on the basis of the two aforementioned principles. In the field of international investment arbitrations, a case that can abet to better understand the attempts of states to be discharged from any duty of compensation is the Republic of Argentina. This country indeed performed several economic crisis in the last decades which led to the implementation of severe measures (i.e. expropriations; nationalisations) at the expenses of international investors and, once arraigned with arbitral tribunals, filed exceptions grounded on the state of necessity’ doctrine.

Two disputes that may be used as landmarks in the overall case laws that regarded Republic of Argentina’s state of necessity claim are the so-called CMS v Argentina and

[96] Marie Christine Hoelck Tjoernelund, State of necessity as an exemption from state responsibility for investments, University of Heidelberg, Max Planck Institute for Comparative Public Law and International Law and the University of Chile, March 2008. Pages 433- 442. Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, 25 September 1997, [1997] ICJ Rep. 7, paras. 51–52. In this award there can be found the clearest summary of state’s of necessity doctrine and its legal reason in the accepted rules of international customary law. “*the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It considers moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The following basic conditions set forth in Article 33 of the Draft Article on the International Responsibility of States by the International Law Commission are relevant in the present case: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law*”.

[97] Christian Eckart , Promises of States under International Law, Hart Publishing, pages 244-245.

[98] Wolfgang Peter, Arbitration and Renegotiation of International Investment Agreements, Wolters Kluwer. June 1995, pages 171-172.

[99] Michael Waibel, Two worlds of necessity in ICSID arbitration: CMS and LG&E,, *eiden Journal of International Law, Vol. 20, pp. 637-648, 2007,* where it is reported the conflicting positions with the ICSID court regarding acknowledgment of the state of necessity defence in relation to facts arose out from the financial crisis occurred in Argentina during 1999-2001.

LG&E v Argentina award. The disputes both took place following enactment of the Argentine Emergency Law[100] which, among other measures, prohibited the right for any licensees of public utilities to freely set the tariffs required for the executions of gas services. That resulted in a remarkable economic damage for those companies, among which the American CMS Gas Transmission Company ("CMS")[101], operating in that field.

After CMS's filing of a dispute with the ICSID to reclaim payment of compensation for the losses suffered, Argentina replied producing evidences that the legislation was enacted to avoid an economic meltdown and as such the measures issued to protect the national economic interest cannot constitute a violation of an international obligation. The arbitrators in the motivations of the award acknowledged that it cannot be anymore denied the existence of state of necessity as a legal exception on states' responsibility for international wrongful acts. At the same time though, the same arbitrators observed as such exception is extraordinary and can arise solely when no other act is available to handle the events. Furthermore, the award précised that in relation to economic crisis the development of such crisis can never disregard the implicit participation of the concerned state in the development of the crisis itself.

For all the above listed reasons then, the tribunal rejected Argentina's defenses and awarded CMS with compensation for the damages amounting at 132,2 million Dollars plus interest.

The other dispute, LG&E [102]v. Argentina, settled closely after the pronouncement of the CMS case, held a different approach. Although the factual backgrounds were the

[100] The 2002 Emergency Law repealed the Argentine Convertibility Law No. 23,928 of 27 March 1991. To this effect the peso-dollar convertibility was no longer in force.

[101] S Ripinsky with K Williams, Damages in International Investment Law (BIICL, 2008), http://www.biicl.org/files/3913_2005_cms_v_argentina.pdf CMS, a US corporation, acquired in 1995 – the course of privatisation of the gas sector in Argentina – a 30% share of TGN, an Argentinean gas transportation company. As part of its energy privatisation incentives, Argentina granted TGN the right to calculate tariffs in US dollars and then convert them to pesos at the prevailing exchange rate, and to adjust tariffs every six months to reflect changes in inflation. These rights were enshrined in the Argentinean law and in the License granted to TNG for the period of 35 years (until 2027).

[102] S Ripinsky with K Williams, Damages in International Investment Law (BIICL, 2008), http://www.biicl.org/files/3908_2007_lg&e_v_argentina.pdf, LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc (collectively referred to as "LG&E") were three US companies which held equity interest in three

same[103], the premises of the Court's reasoning left the room for a different interpretation of the state of necessity liability's exemption. The tribunal indeed moved from the assumption that were not relevant if the concerned state were in the conditions to choose the implementation of one among different available legislative measures. It stated that, in the real circumstances of that time, the enactment of an extraordinary economic rescue package was the only means to effectively address the financial crisis and the unilateral amendments of gas tariffs was to be retained within the meaning of it.

Such interpretation incorporates two flaws that, should this position be confirmed in future awards, could seriously grant to states a limitless power to address issues of national security.

The first is that, though the LG&E decision came eighteen months after the publication of the CMS award, the arbitrators failed to provide convincing arguments in order to show the need for a different conclusion relating to similar factual background. The second concerns the evidence in the award of the absence of the state's contribution to the development of the situation of necessity. Causation in economic matters does not lend itself to a strict deterministic evaluation. Some contribution by the country concerned, normally non-insignificant, will almost always be found, except in the most extreme instances, amounting to force majeure or as a consequence of the unlawful use of force against such State.

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local Argentinean gas companies Distribuidora de Gas del Centro (45.9%), Distribuidora de Gas Cuyana (14.4%) and Gas Natural BAN S.A. (19.6%). These three Argentinean companies were created in the early 1990s as a consequence of the privatization of Argentina's national natural-gas transport and distribution monopoly.

In order to attract foreign investors to participate in the capital of the newly-created companies, Argentina introduced – at the time of privatization – a legislative framework that included several advantageous features such as: the calculation of tariffs for gas distribution in U.S. dollars before conversion into pesos, semi-annual adjustments of tariffs according to the changes in the U.S. Producer Price Index ("PPI"), the commitment that tariffs were to provide an income sufficient to cover all costs and a reasonable rate of return, and that there would be no price freeze applicable to the tariff system without compensation. These obligations were set out in the Argentine legislation as well as in the Licenses granted to each of the gas distribution companies until 2027.

[103] Ibidem (99), page 639 "*Under these licences and the legal framework in the gas sector, tariffs were to be calculated in dollars. Conversion to pesos was to be effected according to the US Producer Price Index (US PPI) on billing. The Argentine Convertibility Law established a currency board with dollar–peso parity. Before the outbreak of the crisis the Argentine government had negotiated two voluntary temporary tariff freezes with the gas distribution companies. Shortly after the crisis hit, Argentina suspended gas tariff adjustments altogether*".

Anyway, it is worthy to point out that if we accept the idea that the invocation of an economic circumstances is sufficient to exclude the wrongfulness of certain state acts, the burden of proof upon claimant investors may become rather insurmountable. It is obviously agreed indeed that Cyprus would present any kind of evidence to counter investors' claims. However, looking at the meaning of the BIT's provisions, it can be expected that at least a compensation for lawful expropriation could be awarded.

4.3 THE ISSUE CONCERNING COMPENSATION

In international investment law the possible remedies available to investors are full reparation or a fair and equitable compensation.

The legal basis of state's responsibility can be found in the violations of a primary rule of international law. These can be included either in principles of international customary law or in a treaty. A wrongful act is deemed to be any action that constitutes a breach of international obligation directly attributable to the state and that breaches an international obligation of the same[104].

Whether affirmed responsible, a state must put in place actions aimed at essentially ceasing the wrongful act and restore the existing situation prior the commitment of the said act. It must also provide for the payment of compensation in all the cases where the full restoration is not applicable. Prior to the introduction of Bilateral Investment Treaties in international practices, one of the doctrine which tried to elaborate shared standard to qualify the right for lawful expropriations is what has been elaborated under the name of the Hull Formula[105].

Basically, it provided for the recognition of "*prompt, adequate and effective compensation*" and was applied in many international law disputes until the mid of twentieth century. With the term "prompt" it was meant to indicate the payment without unreasonable delay, "adequate" in the sense of equal to the market value at the day before the taking of the property and "effective" to be credited in a free transferable currency. As elaborated by former Secretary of State, Cordell Hull, the remedy sought

[104] David D. Caron, The American Journal Of International Law, [Vol. 96:857, 2002], The ILC Articles on State Responsiblity: The Paradoxical Relationship between Form and Authority.

[105] Shain Corey, But is it just? the inability for current adjudicatory standards to provide "just compensation" for creeping expropriation, , Fordham Law Review, [vol. 81, 2002].

to afford to industrialized countries' companies guarantee for the recovery of losses experienced in cases of expropriation of their investments throughout the world.

On the other side, the Calvo doctrine[106], created on the mid-'70 took the part of hosts' countries. It had the scope to limit the power of western countries to challenge sovereign acts. In this view it proposed that foreign investors shall get access exclusively to those rights granted to the host's state nationals. The consequence of this reasoning has been the deny of the minimum standard of treatment principle as, whether a state national was not entitled to compensation, the same was to be applied to foreign investors.

It must be remarked that both the Hull Formula and the Calvo doctrine did not raise at the level of common principles of international customary law as, the International Law Commission (ILC)'s 1996 Draft Rules on State Responsibility ("ILC Articles") did not contain any of them, though the Hull Formula is commonly accepted in many BITs.

This constitutes the main distinction in the matter of international investment law's remedies. The provisions of international customary law, as recently summed up in the ILC Articles regulating hypothesis of unlawful expropriation, opposed to the clauses included in BIT's which provide for compensation following lawful expropriation.

The milestone in the international investment dispute for unlawful expropriation is represented by the case of the *Chorzow Factory*[107]. Indeed, such is the award where (i) it was put the base for the separation between concepts of lawful and unlawful expropriation and (ii) for the recognition of the "full restoration" principle.

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[106] Ibidem, (106).

[107] Susan Marks Expropriation: Compensation and Asset Valuation, The Cambridge Law Journal, July 1989, pp 170 - 173 "*Compensation in the case of an unlawful expropriation, by contrast, is governed by the (secondary) international rules concerning state responsibility. These are to be found in customary international law, the locus classicus being the decision of the Permanent Court of International Justice in the Chorzow Factory case (1928) P.C.I.J Ser.A No. 13, 5. What is required is that the expropriated party b placed in the position he would have been in had the expropriation not occurred, by restitutio in integrum or, if restitution in kind is not possible, then its monetary equivalent. And the Chorzow Factory case indicates criteria for determining the "monetary equivalent" of restitution in the case of an ongoing business. Essentially, one takes the value of the undertaking as at the date of expropriation, including physical assets (land, buildings, equipment), contractual rights and other intangibles (goodwill and "future prospects"), or, its "going concern value," to use modern terminology. This is what the expropriated party would be entitled to even if the expropriation were lawful*".

The case arose out from the fact in which Poland expropriated after the end of the Second World War the property of a factory from a German investor. The claim filed with the Permanent Court of International Justice requested for the Poland's responsibility and the restitution of the expropriated property.

Being impossible the restitution of the property, the tribunal developed its reasoning by declaring that any wrongful act entails an obligation for "*full restoration*". With this term it is not meant to point the indemnification of the value of the undertaking but, on the opposite, to provide that the reparation must fully remove any effect of the said wrongful act.

The principle affirmed in the Chorzow Factory case came out again recently in the occasion of the decision upon the dispute ADC v Hungary[108].

The innovation produced in this award relates to the payable compensation for unlawful expropriations under BITs. The tribunal in fact stated that the BIT's between Hungary and Cyprus provided rules only for cases of lawful expropriation. As a consequence

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[108] http://www.biicl.org/files/3911_2006_adc_v_hungary.pdf, S Ripinsky with K Williams, Damages in International Investment Law (BIICL, 2008). "*In 1995, the Claimants, ADC Affiliate and ADC & ADMC Management, both Cypriot companies ultimately owned by Canadian investors, entered into a contract with a Hungarian state agency, ATAA, whereby they had to renovate, construct and operate two terminals of Budapest-Ferihegy International Airport in Hungary. In late 1998 the Claimants successfully finished construction and renovation of the terminals and operated them until the end of 2001. However, in December 2001 a Decree issued by the Minister of Transport of Hungary resulted in the takeover of all the activities related to the operation of the Airport from the Claimants.*

In 2003, ADC Affiliate and ADC & ADMC Management initiated arbitration proceedings against Hungary under the Cyprus-Hungary BIT (1989) claiming that their investments had been expropriated and requesting an award of damages in the amount ranging from US$ 68 million to US$ 99.7 million.

The Tribunal found that an unlawful expropriation had indeed occurred. In its

evaluation of damages, the Tribunal declined to apply the BIT standard of "just compensation" equal to "market value of the expropriated investments at the moment of the expropriation", as in the Tribunal's view, that BIT standard applied in cases of lawful expropriation. Instead, the Tribunal applied relevant rules of customary international law as elucidated in the PCIJ Chorzów Factory case ("payment of a sum corresponding to the value which a restitution in kind would bear"). As a relevant date for the assessment of damages, the Tribunal chose the date of the Award because the value of the investments increased considerably since the date of expropriation. To estimate the market value of the investments, the Tribunal applied the DCF analysis, although without a detailed explanation. The Tribunal awarded approximately US$ 76.2 million to the Claimants, plus post-Award interest at 6% p.a. compounded monthly until payment".

those rules were not applicable whether the facts were retained constituting an unlawful expropriation. For this reason arbitrators resorted to the principle of "full restoration" as outlined in the Chorzow Factory case dictum. The justification for this position must be found in the fact that BIT's provisions, imposing to the state the payment of compensation equal to the market value of the property at the day before the expropriation, did not guarantee the full acknowledgment of the investor's rights. These can exclusively be assured by putting the damaged party of the dispute in the same position that it would have had at the time of the award should the wrongful act were not happened.

The innovative approach used in the ADC v Hungary award however did not find univocal application[109]. The issue at stake was in fact that shifting the date of evaluation at the time of the award would not automatically caused a better protection of the investor's rights. As a matter of fact, in many disputes, arbitral tribunals declaring unlawful expropriations preferred to grant restoration on the basis of the fair market value at the date of expropriation because, being the value of the concerned asset decreased from the time of the expropriation, the liquidation of damages at the time of the award would have constituted a supplemental damage to the victim of the wrongful act.

This last issue opens the space for the final discussion regarding the criterion to use in order to determine the hypothetical damages.

In this regard, it must be made a distinction between compensable assets. As a matter of fact, the bail-in measures hit both deposits as well as other financial instruments such as bonds and other debentures. Therefore the parameters to be used in the assessment of the indemnities may not be the same.

The first reason is determined by the nature of the assets. While the deposits are not traded and respond to a scope of liquidity's immobilization, bonds' value depends on a meeting spot between demand and offer on financial markets.

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[109] Borzu Sabahi, Compensation and restitution in Investor-State Arbitration: Principles and Practice, 2011, Oxford University Press. Critics awards of the ADC v Hungary compensation principle are the decisions on the *Funnekotter v Zimbabwe* case where the tribunal, although citing the principle stated in ADC, rejected its application being doubt whether it replaced traditional views on lawful and unlawful expropriations. Other decisions which did not applied the ADC are e.g. *Rumeli v Kazakhstan*, *Siag & Vecchi v Egypt* and *Philips Petroleum v Iran*.

It is for this reason that, the fair market value seems to not be applicable to the expropriation of a deposit. The fair market value analysis moves from the assumption that the investor shall be entitled to receive compensation in amount equal to the value that the market reserved to the relevant asset the day before the date of expropriation. In the case of Cypriots' banks deposits, it is evident that the current value shall be the same as in the expropriation's day. Being the measures addressed to convert banks' liabilities into assets of the institution, it should be suggested that the most appropriate evaluation method may be its determination through assessment of the book value from the most updated balance sheet or any other official financial account of the bank. Such assessment criterion would help to find a shared value upon the amount to be compensated and it could be revised taking into account the depreciation occurred due to the inflation rate.

On the opposite side, fair market value could be the most suitable assessment value criterion for bonds as for such instruments the appropriate standard of compensation in default is the "generally recognized market value" or "fair market value"— which will typically diverge from the bond's face value.

5 CONCLUSIONS

The analysis carried out in the present paper had the scope to provide an overall view of the implications that the new legislation governing the resolution of credit institutions may have on the economic relationships among states at an international level. Indeed the effects coming out from the Cypriot's experience may not constitute an isolated incident.

First of all, it must be clarified the economic implications and the premises that have allowed the insurgence of the financial crisis in Cyprus. It is widely acknowledged in fact that the adoption of the Euro in the Cypriot economy caused a quick growth relying especially on foreign capitals inflows. This is a common element of all the Eurozone economies which experienced a financial crisis during the Eurozone sovereign debt crisis[110].

At that point, when the European Institutions were called to draw solutions in order to stop the speculation on government bonds, all the proposals claiming for more fiscal union and a strengthening of the ECB's role as a lender of last resort were put apart[111]. The doctrine that came out as a winner from those consultations was that of committing Eurozone Member States to enforce fiscal discipline and, whether provided with international bail-out funds, guarantee repayments carrying out austerity reforms. The Directive on the Bank Resolutions and Restructurings is a predictable consequence of the application of such doctrine. In this sense, as Eurozone Member State are not anymore in the condition to use fiscal as well as monetary backstops in order to stabilize financial markets and ensure trusts towards investors' expectations, and taking also into account that at the international level competent institutions are not willing to use "*public funds*" to resolve financial crisis, it is pretty obvious that in the event of a banking crisis the last option available to resolve the problem is to magically transform all banks' liabilities in assets of the institution

This way of dealing with banking crisis is harmful both from an economic as well from a legal point of view. On the economic side, lacking the protection of deposits with amounts higher than 100,000 Euro, the treasuries of multinational corporations which use bank deposits to account all their transactions, very often by means of centralized deposits, would cause a domino effect that, starting from the resolution of the bank institution, could crush into the real economy. It must be remembered indeed that the

[110] http://www.voxeu.org/article/gips-external-debt-problem, "The PIGS' external debt problem", Ricardo Cabral, 8 May 2010. Here, without discussing the merits of the conclusions drawn by Prof. Cabral (Assistant Professor at the University of Madeira and CEEAplA researcher), it is analysed the issue of PIGS' external indebtedness which is affirmed to be "*[…] the key to understanding the current crisis. Portugal, Ireland, and Spain have similar external debt dynamics to that of Greece. Despite netting out debt-like assets held by residents abroad, the PIGS' average net external debt-to-GDP ratio, is approximately 30 percentage points higher than the average gross external debt-to-GNP ratio observed in the emerging market external debt […]*"

[111] A Fiscal Union for the Euro: Some Lessons from History* Michael D. Bordoy , Lars Jonungz and Agnieszka Markiewicz, CESifo Economic Studies, 2013; The Euro needs a Fiscal Union: Some Lessons from History Michael D. Bordo, October 12, 2010; Shrink the eurozone, or create a fiscal union, Wolfgang Munchau, March 14, 2010, Financial Times.

position held by credit institutions in the international financial network cannot be compared to that of any other business institution. As in fact the insolvency of a common business corporation, even a multinational corporation, cannot pose serious threats to the stability of the financial system, on the opposite the insolvency of a bank institution can disrupt the foundation of an entire economy. [112]It is for this reason that, historically, government and international institutions were always been opposed to allow disorderly bank resolutions.

Shifting to the legal side of the issue, the enactment of such legislation poses doubts on the possible violation of property rights'[113] and of the provisions establishing public institutions' duty[114] to protect and incentivize savings. In this regards, the EU officials[115] seem to not care about the principles included in the Treaty of Lisbon, whose the European Charter of Fundamental Rights is an integral part, and, with their own

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[112] According to the economists relatable to the *monetary circuit theory*, the contemporary economic system would be shaped around the money creation carried out by banks. These would lend the money on the basis of a multiplier of the funds made available on their accounts by depositors. The money would then be use by companies to pay wages to employees which in turn would buy goods and services provided by the same companies which, with the revenues obtained from the selling of goods and services, would repay the loan received from the banks. The remaining part of the employees' wages which has not been used for purchases would be accounted as savings in the banks' accounts making possible the regeneration of the monetary circuit. From this basic description it is easy to understand how the monetary base, constituted mainly by deposits and upon which banks rely in order to grant loans to firms and households, were fundamental for the correct functioning of the whole banking system.

[113] The European Charter for Fundamental Rights sets out rules for the definition and the protection of rights found in the case law of the Court of Justice of the EU, the rights and freedoms enshrined in the European Convention on Human Rights and other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments. With regard to property rights it establishes at Article 17, the right of property is affirmed as "*[…] 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 […]*".

[114] It is made reference to the provisions included in Eurozone Member States' Constitution, for example Article 47 of the Italian Constitution, which set out State's commitment to encourage and protect savings "*in all its form*".

[115] https://euobserver.com/news/119591. "*[…] more fuel was added to the fire after Eurogroup chief, Jeroen Dijsselbloem told reporters that the Cypriot bail-in model could serve as a "template" for future bank restructuring in an interview with Reuters and the Financial Times on Monday. Dijsselbloem commented that: "If there is a risk in a bank, our first question should be 'OK, what are you in the bank going to do about that? What can you do to recapitalise yourself?" "If the bank can't do it, then we'll talk to the shareholders and the bondholders, we'll ask them to contribute in recapitalising the bank, and if necessary the uninsured deposit holders," he added […].*

words, affirmed that the whole measures taken to resolve the crisis in the island represented a template for the assessment of future banking crisis throughout the EU. The subsequent inclusion of Cypriot's emergency legislation main principles in the BRRD confirmed such intention.

However, the disputes that already spread out and that accused Cyprus of unfair treatment of international investors leave the room for some concerns whereas in the future a banking crisis should arise in a bigger and more relevant European country. [116]

It is worthy indeed to report that what has been outlined in the precedent chapters already found preliminary applications as a Greek based private equity fund, Marfin Investment Group, moved accusations towards Cyprus and for that reason filed a claim with the ICSID to obtain restitution of a sum equal to 700 million Euro which were deposited in the failed Cypriots' banks in the form of shares, bonds or deposits (Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus (ICSID Case No. ARB/13/27).

As already said then, the legal foundations of the claims for what pertains the rescue package implemented in Cyprus may be grounded on violations of the protection of investments clause included in BITs. The allegations of foreign investors may be grounded on Cyprus' authorities failure to provide fair and equitable treatment or violation of the most favoured nation clause. As described in the final chapter of this paper, the normative framework and the jurisprudence of the arbitral tribunals, above all the ICSID Court, leave the room to argue that should multiple claims be moved forward to challenge banking expropriations, these could pass the jurisdiction test of the Court and hold certain possibilities to be awarded with a compensation. The provisions adopted in the BRRD appear effectively to be conflicting with common principles of international public law as included in most of the bilateral investment treaties currently in force among states.

[116] This case proves interesting as it demonstrates, first of all, the irrepressible run of the investors with international arbitration courts rather than litigate with the national competent courts. Equally, the matter is surely interesting as it can be used a test tracker of the arguments and discussion developed in the present paper. However, being it still at very preliminary point, it is not possible to draw at this time comments or other kind conclusions on it.

In conclusion, the question that must be posed toward the new cross-border legislation regarding banking resolution is how it can be assured a stable climate for foreign investment if the same international legislative framework a priori sets out resolution mechanisms that do not guarantee the full explication of that principle and that poses the basis for potential disruptive litigations among investors and host states. This is surely an issue that policy makers will have to address in the incoming years in order to ensure the correct development of transparent international economic relationships.