

P.R.I.M.E. Finance
Panel of Recognized International Market Experts in Finance
Developments in Sovereign Finance: The Poštová Case



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The Poštová Case and Sovereign Debt

Definition and Interpretation of an “Investment”

Nature of the Secondary Debt Markets



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The Poštová Case turned on the Treatment of Greek Gov't Bonds ("GGBs") as Investments Under the Slovakia-Greece BIT

330. The question that the Tribunal must address is, therefore, whether the wide list of investments provided for under Article 1(1) of the Slovakia-Greece BIT includes sovereign debt in general and, if so, the GGBs in particular.

Poštová Banka, A.S. and Istrokapital SE v. the Hellenic Republic,
ICSID Case No. ARB/13/8, Award dated 9 April 2015 ("Poštová Award") ¶ 330.



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The Interpretation of an “Investment”

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Vienna Convention on the Law of Treaties Art. 31 (1).



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The Slovakia-Greece BIT's Listed Categories of Investments

ARTICLE 1

Definitions

1. "Investment" means every kind of asset and in particular, though not exclusively, includes :
 - a) movable and immovable property and any other property rights such as mortgages, liens or pledges,
 - b) shares in and stock and debentures of a company and any other form of participation in a company,
 - c) loans, claims to money or to any performance under contract having a financial value,
 - d) intellectual property rights, goodwill technical processes and know-how,
 - e) business concessions conferred by law or under contract, including concessions to search for cultivate, extract or exploit natural resources.



Greece Argued Interests in GGBs are not Investments

- Owning GGBs versus Interests in GGBs
 - *Primary Dealer versus Purchaser on Secondary Market*
- Territorial Nexus
- *Salini* Test Requirements under ICSID Art. 25
 - *contribution in money or other assets*
 - *significant duration*
 - *element of risk*
 - *contribution to the economic development of the host State or an operation made in order to develop an economic activity in the host State.*



Poštová's Arguments for an Ordinary Reading of Art. 1

92. The BIT definitions contain none of the limitations advocated by Greece. In Article 1 of the Slovakia-Greece BIT, Greece and Czechoslovakia defined the term “investment” specifically “[f]or the purposes of this Agreement.”¹⁸² The parties defined the term carefully, providing both a broad general definition, “every kind of asset,” and a list of examples of what “in particular, though not exclusively,” would constitute an investment for the purpose of the treaty.¹⁸³ Similarly, in Article 1 of the Cyprus-Greece BIT, Greece and Cyprus defined the term

kind of asset, including without limitation” specifically enumerated types of investments.¹⁸⁴ In so doing, the parties to each BIT clearly intended to give a special meaning to the term “investment” and to ensure that, at a minimum, any kind of asset that they enumerated would fall within that meaning. As already discussed, the Greek Bonds fall squarely within Article 1.1(c)



Poštová's Arguments for an Ordinary Reading of Art. 1

12 Furthermore, as this slide demonstrates, only
13 Poštová, not Clearstream or any Participant, committed
14 its own funds to buy the GGB after the initial
15 distribution, had the right to transfer the GGB, had
16 the right to post it as collateral with the ECB. Only
17 Poštová and other secondary market purchasers could
18 bring a claim against Greece in the event that Greece
19 failed to pay on the bond. Only Poštová Bank and
20 other secondary market purchasers had exposure to risk
21 of Greek default or expropriation. And as I showed a
22 moment ago, only they had the right to vote on the
1 Exchange Offer.

Transcript Day 2 490:12–491:1 (Rivkin)



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The Tribunal's Interpretation of the Slovakia-Greece BIT

314. In other words, an interpretation of the text and context of Article 1(1) leads the Tribunal to consider that the State parties to the treaty wanted an ample definition of what could constitute an investment, but within certain categories that are also broad, but not unlimited. Otherwise, the examples could be expanded to include any asset whatsoever, and would become useless or meaningless.

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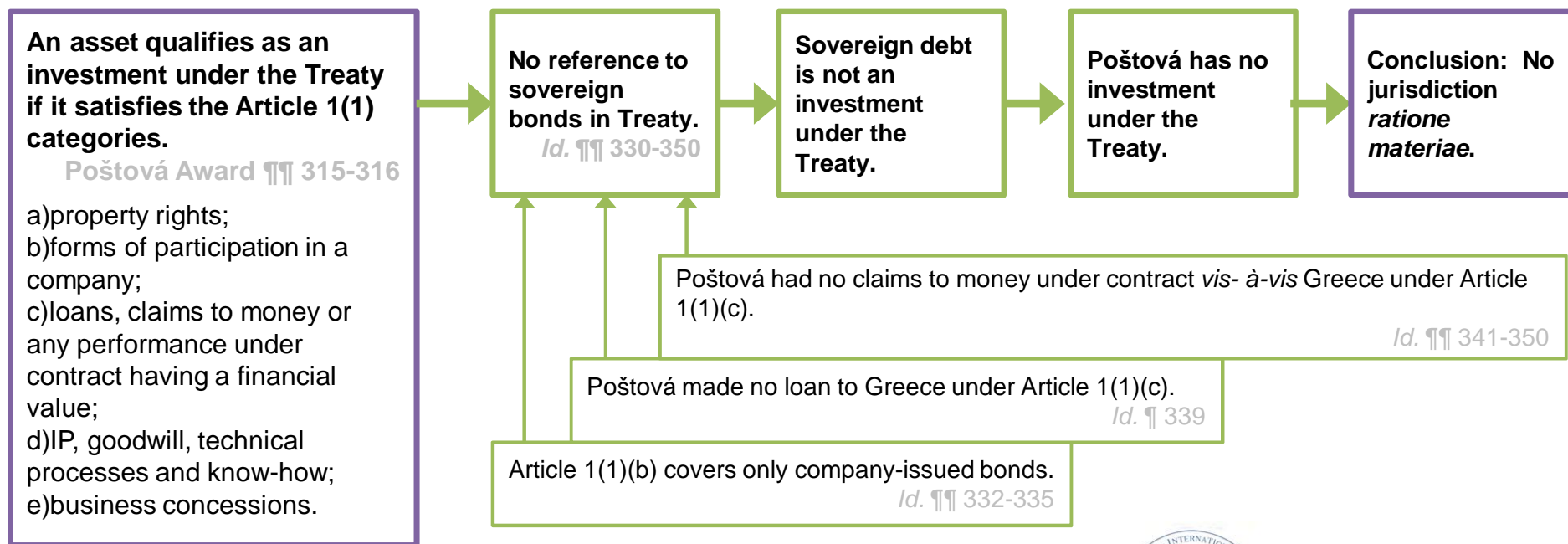
324. In sum, sovereign debt is an instrument of government monetary and economic policy and its impact at the local and international levels makes it an important tool for the handling of social and economic policies of a State. It cannot, thus, be equated to private indebtedness or corporate debt.

Poštová Award ¶ ¶ 314, 324.



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The Tribunal's Reasoning



The Tribunal's Reasoning: Based on the BIT?

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
VCLT Art. 31 (1).

1. "Investment" means every kind of asset and in particular, though not exclusively, includes :
 - a) movable and immovable property and any other property rights such as mortgages, liens or pledges,
 - b) shares in and stock and debentures of a company and any other form of participation in a company,
 - c) loans, claims to money or to any performance under contract having a financial value,

332. Neither Article 1(1) of the Slovakia-Greece BIT nor other provisions of the treaty refer, in any way, to sovereign debt, public titles, public securities, public obligations or the like. The Slovakia-Greece BIT does not contain language that may suggest that the State parties considered, in the wide category of investments of the list of Article 1(1) of the BIT, public debt or public obligations, much less sovereign debt, as an investment under the treaty.

goodwill technical
law or under con-
search for culti-
resources.



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Poštová's Argument for Annulment Based on Inconsistency of the Tribunal's Reasoning

Point A: Poštová had certain **contractual and property rights** vis-à-vis the **Participants**.

Poštová Award ¶ 348.

Point A: Poštová had certain **property rights** vis-à-vis **Greece**.

Id. ¶¶ 345, 348.

Article 1 of the Slovakia-Greece BIT explicitly includes contractual and property rights.

Point B: Poštová had no “investment” under Article 1 of the Slovakia-Greece BIT

Id. ¶ 350.

No express or implicit reason provided.



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Nature of the Secondary Debt Markets

Participants

Primary Dealers

Secondary Market
Purchasers



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Participants

- Natural or Legal Persons approved by Greek Government
- Pay consideration to Greece; Hold titles to GGBs
- Deliver interests in GGBs to Primary Dealers



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Primary Dealers

- Appointed by Minister of Finance and Governor of Bank of Greece
- Exclusive Right to Participate in syndications and auctions
- Successfully bid for 2% of total Bonds and Treasury Bills
- Create Market in response to demand for Greek Debt



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Secondary Market Purchasers

- Create Demand for the Debt
- Purchase and Hold Most of Debt acquired by Primary Dealers



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Poštová's Expert: Prof. René Stulz (Ohio State University)

Primary Dealers:

- Intermediaries
- Distribution mechanism for GGBs

Secondary Market Purchasers:

- Ultimate investors in Greek Sovereign Debt

Primary Market would not exist
without Secondary Market.



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Greece's Expert: Prof. Glenn Hubbard (Columbia Business School)

- Poštová's purchase of GGBs too remote from issuance process
- GGBs "fundamentally different" from an economic perspective

- Regulatory Arbitrage
- Carry Trade



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Experts Agree: Interest in GGB is an Investment

Q: First, putting the treaties to the side, just thinking about the ordinary meaning of the word “investment,” I’m sure you would agree with me that Postova’s purchase of Greek Government Bonds is what in ordinary course one would call an investment?

A: I’m not a lawyer, so I can’t help you with anything the Tribunal will have to decide, but yes, that would be a financial investment in the ordinary course of the term.

Transcript Day 2 277:12–20 (Cross Examination of Prof. Glenn Hubbard).



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Undisputed Economics of Secondary Market

Q: . . . Your report addresses both the issuance process for the Greek Bonds and the economics of the primary and secondary markets for this bonds, so you're saying that the distinction makes no difference for those issues?

A: It makes no difference for what I do. It's a legal distinction, and I'm offering an economic analysis, so it can't possibly make a difference for me.

Transcript Day 2 283:10–18 (Cross Examination of Prof. Glenn Hubbard).



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