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Developments in Sovereign Finance: The Poštová Case

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The Pošťová Case and Sovereign Debt

Definition and Interpretation of an “Investment”

Nature of the Secondary Debt Markets
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.

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).
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.*
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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

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

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.
The Tribunal’s Reasoning

An asset qualifies as an investment under the Treaty if it satisfies the Article 1(1) categories. Poštová Award ¶¶ 315-316

a) property rights;
b) forms of participation in a company;
c) loans, claims to money or any performance under contract having a financial value;
d) IP, goodwill, technical processes and know-how;

e) business concessions.

No reference to sovereign bonds in Treaty. Id. ¶¶ 330-350

Sovereign debt is not an investment under the Treaty.

Poštová has no investment under the Treaty.

Conclusion: No jurisdiction ratiocinio materiae.

Poštová made no loan to Greece under Article 1(1)(c). Id. ¶ 339

Poštová had no claims to money under contract vis-à-vis Greece under Article 1(1)(c). Id. ¶¶ 341-350

Article 1(1)(b) covers only company-issued bonds. Id. ¶¶ 332-335

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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.
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.
Nature of the Secondary Debt Markets

Participants

Primary Dealers

Secondary Market Purchasers
Participants

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

- Create Demand for the Debt
- Purchase and Hold Most of Debt acquired by Primary Dealers
Primary Dealers:
- Intermediaries
- Distribution mechanism for GGBs

Secondary Market Purchasers:
- Ultimate investors in Greek Sovereign Debt

Primary Market would not exist without Secondary Market.
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
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.
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.