

POŠTOVÁ BANKA, A.S. AND ISTROKAPITAL SE
v.
THE HELLENIC REPUBLIC

ICSID Case No. ARB/13/8

Award

9 April 2015

- **Claimants**

- Poštová banka - a Slovak bank
 - had acquired a total of €504 million in GGBs
- Istrokapital - a Cypriot company
 - held shares in Poštová banka

- **Respondent – Greece**

- **ICSID Arbitral Tribunal**

- 1965 International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) [applicable procedural law]
- Applicable (substantive) law: Slovakia-Greece & Cyprus–Greece bilateral investment treaties (BITs)

- **Factual background of the case**
 - **Greece's jurisdictional objections**
 - **Ratione materiae**
 - **Ratione personae**
 - **Tribunal's findings:**
 - **Istrokapital** (Cyprus-Greece BIT): "such claimant has no standing to pursue claims directly over the assets of the local company" [para. 245]
 - **Poštová banka**: whether GGBs can be qualified as "investments" under Slovakia–Greece BIT and under the ICSID Convention
 - **Dismissal and costs**
 - "the jurisdictional issue was not clear-cut and involved a complex factual and legal background" (para. 377); each party is ordered to bear its own legal costs and an equal share of the arbitration costs
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- **Request for Annulment**
 - 5 September 2015: constitution of the ICSID *ad hoc* Committee (decision expected by June 2016)

Factual background

- **2007-2010:** Greek government issued GGBs to primary dealers
- **2010** – Postova Banka acquired on secondary market interests in GGBs
- **2011** – downgrading of GGBs by rating agencies
- **2012**
 - Greek Bondholders Act (inclusion of Collective Action Clauses in GGBs)
 - restructuring of Greek's sovereign debt
 - proposal accepted by more 90% bondholders
- **2013** – Postova Banka and Istrokapital filed a request for arbitration to ICSID

Poštová banka's "INVESTMENT" (?)

1- according to the Slovakia-Greece BIT (1992)

2- according to the ICSID Convention

Article 1 ("Definitions") of the Slovakia-Greece BIT

"1. "Investment" means **every kind of asset** and **in particular, though not exclusively includes:**

a) movable and immovable property [...]

b) shares in and stock [...] 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 [...].

2. "Returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and other fees.

[...]

Article 2 ("Promotion and Protection of Investment")

1 . Each Contracting Party promotes in its territory investments by investors of the other Contracting Party [...]

3. Returns from the investments [...] enjoy the same protection as the initial investments.

Vienna Convention on the law of treaties

Article 31. GENERAL RULE OF INTERPRETATION

1. **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.**

2. The **context** for the purpose of the interpretation of a treaty shall comprise, in addition to the text, **including its preamble and annexes:**

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Poštová banka's "INVESTMENT" (?)

309. The preamble of the Slovakia-Greece BIT indicates that the State parties entered into the BIT

- *“DESIRING to intensify their economic cooperation to the mutual benefit of both countries on a long term basis;*
- *“HAVING as their **objective to create favorable conditions** for investments by investors of either Party in the territory of the other Party;*
- *“RECOGNIZING that the **promotion and protection of investment, on the basis of the present Agreement**, will stimulate the initiative in this field.”*

310. The objective of the Slovakia-Greece BIT, as pleaded by Claimants, is for the State parties to the treaty to create favorable conditions for investments by investors. But this does not mean that, in case of doubt, the treaty must be interpreted in favor of the investor [...] the promotion and protection of the investments made by the investor of one State party in the territory of the other State party is “*on the basis*” of the Slovakia-Greece BIT, i.e., subject to the terms of the BIT.

Poštová banka's "INVESTMENT" (?)

287. [...T]he Tribunal is not persuaded that a broad definition necessarily means that any and all categories, of any nature whatsoever, may qualify as an "investment" [...]

294. The list of examples provided by the Slovakia-Greece BIT must, [...] be considered in the context of the treaty and be given some meaning together. Otherwise, if the interpretation stops by simply indicating that any asset is an investment, the examples will be unnecessary, redundant or useless[...] States include categories of investments as examples for some purpose. Otherwise, it would be sufficient to define investment as any kind of assets of any nature without including examples of what may constitute an investment.

295. [...T]he examples altogether must be considered and given meaning to arrive at the proper interpretation of the treaty.

Poštová banka's "INVESTMENT" (?)

293. Interpretation of a treaty in good faith, considering not only the text but also the context, requires that the interpreter provide some meaning to the examples and to the content of such examples as part of the context of the treaty. The interpretation in good faith, be it considered alone or in conjunction with the object and purpose of the treaty, embodies the principle of effectiveness (*ut res magis valeat quem pererat*). Preference should be given to an interpretation that provides meaning to all the terms of the treaty as opposed to one that does not. As indicated by the Appellate Body of the WTO:

- *“We have also recognized, on several occasions, the principle of effectiveness in the interpretation of treaties ...which requires that a treaty interpreter: ‘...must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility’. In light of the interpretative principle of effectiveness, it is the duty of any treaty interpreter to ‘read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously’. An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole.”*

[World Trade Organization, Report of the Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, AB-1999-8, WT/DS98/AB/R, December 14, 1999, ¶¶ 80-81. (Emphasis and footnotes omitted), referenced in Isabelle Van Damme, TREATY INTERPRETATION BY THE WTO APPELLATE BODY (2009), at p. 286 (partially included as RL-82).]

Report of the Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* → GATT 1994: Art. XIX (Emergency Action on Imports of Particular Products)

WTO - Agreement on Trade-Related Investment Measures (TRIMS)

Article 1: Coverage

"This Agreement applies to investment measures related to trade in goods only (referred to in this Agreement as "TRIMs")"

Comments to the text (from the WTO official website)

"In examining whether the measures in question were "investment measures", the Panel in Indonesia — Autos reviewed the legislative provisions relating to these measures. The Panel found that the measures at issue fell within any reasonable interpretation of those terms:

- '[...]we believe that there is nothing in the text of the TRIMs Agreement to suggest that a measure is not an investment measure simply on the grounds that a Member does not characterize the measure as such, or on the grounds that the measure is not explicitly adopted as an investment regulation' [Panel Report, Indonesia — Autos, paras. 14.80–14.81]"

[https://www.wto.org/english/res_e/booksp_e/analytic_index_e/trims_01_e.htm#fntext2]

Poštová banka's "INVESTMENT" (?)

298. In the decision on jurisdiction and admissibility in ***Abaclat v. Argentina***, cited by the [...] the tribunal devotes several pages of reasoning to whether or not [...] bonds, considering the wording in the examples provided under Article 1 of the Argentina-Italy BIT, qualified as an investment.

300. The tribunal in *Abaclat v. Argentina* [...] paid due regard to the list of examples contained in Article 1(1) of the Argentina-Italy BIT and was persuaded by the fact that the list, interpreted in context with the preamble and the chapeau of Article 1, (i) covered "an extremely wide range of investments [...]"

301. The conclusion of the *Abaclat* tribunal was that the terms "obligations" and "public securities" were wide enough to encompass the bonds that were the subject of the dispute in that arbitration.

Argentina-Italy BIT (1993)

Article 1 Definitions

"1. **Investment** shall mean [...] any conferment or asset invested or reinvested by an individual or corporation of one Contracting Party in the territory of the other Contracting Party [...].

In particular, investment includes, without limitation:

(a) movable and immovable property [...];

(b) shares, quotas and other holdings, including minority or indirect holdings, in companies incorporated in the territory of one of the Contracting Parties;

(c) **bonds, private or public financial instruments or any other right to performances or services having economic value, including capitalized revenues;**

[....]

(g) **any right of economic nature conferred under any law or agreement**, as well as any license and concession granted in compliance with the applicable provisions governing the performance of the related economic activities, including prospecting, cultivating, extracting and exploiting of natural resources.

Slovakia-Greece BIT (1992)

Article 1 ("Definitions")

"1. "**Investment**" means **every kind of asset and in particular, though not exclusively includes:**

a) movable and immovable property [...]

b) shares in and stock [...] 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 [...].

2. "Returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and other fees.

[...]

Poštová banka's "INVESTMENT" (?)

304. The language in the Slovakia-Greece BIT [...] is significantly different from the one that led the *Abaclat* and *Ambiente Ufficio* tribunals to conclude that government bonds were investments under the Argentina-Italy BIT.

306. [...T] the list of examples of Article 1(1) of the Slovakia-Greece BIT [...] are substantially different from the ones invoked by the *Abaclat* and *Ambiente Ufficio* tribunals under the Argentina-Italy BIT. Article 1(c) of the Argentina-Italy BIT [...] includes [...] "*obligations, private or public titles or any other right to performances or services having economic value, including capitalized revenues.*" (....) In contrast, Article 1.1(c) of the Slovakia-Greece BIT refers to "*loans, claims to money or to any performance under contract having a financial value.*" There is no reference in the Slovakia-Greece BIT to a general concept such as "obligations," much less to "public titles."

307. [...T]he Slovakia-Greece BIT does not contain the wide language that the *Abaclat* tribunal considered as language that would comprise bonds, i.e., "*any right of economic nature conferred under law or contract.*" "Any right of an economic nature" is a wider concept than claims to money under contract.

Poštová banka's "INVESTMENT" (?)

336. In Article 1(1)(c) of the Slovakia-Greece BIT, the State parties to the treaty included "loans" as an example of an investment and Claimants consider that such term includes the GGBs. The wide interpretation of the text of Article 1(1)(c) proposed by Claimants considers that the GGBs, which are securities, bonds, clearly fit into the category of investments described in the words "*loans, claims to money or to any performance under contract having a financial value.*" The Tribunal disagrees.

337. Loans and bonds are distinct financial products. The creditor in a loan is generally a bank or group of banks[...]. Bonds are generally held by a large group of creditors, generally anonymous. Moreover, unlike creditors in a loan, the creditors of bonds may change several times [...] as bonds are traded. The tradability of loans [...] is generally limited [...]

338. The Tribunal agrees with Respondent that loans involve contractual privity between the lender and the debtor, while bonds do not involve contractual privity. [...]

Abaclat and Others v. Argentine Republic

Decision on Jurisdiction and Admissibility

4 August 2011

355. [...Article 2 lett] (c) specifically addresses financial instruments [(c) bonds, private or public financial instruments or any other right to performances or services having economic value, including capitalized revenues]. [...T]he term —obligation may be understood as referring to an economic value incorporated into a credit title representing a loan. This kind of obligations would in the English language more commonly be called —bond, rather than —obligation. Similarly, the term —title in Spanish and Italian would be more accurately translated into the English term of —security, which means nothing more than a fungible, negotiable instrument representing financial value.

Poštová banka's "INVESTMENT" (?)

341. In connection with "*claims to money*" [...] the Tribunal again disagrees with the interpretation of Claimants for several reasons.

342. First, a Tribunal should not lightly expand the language of a treaty so as to conclude that a general reference to "*claims to money*" includes bonds or other securities issued by a State, where there is no indication that the State parties intended to do so.

343. Second, the **text of Article 1(1)(c) of the Slovakia-Greece BIT considers as an investment "*claims to money or to any performance under contract having a financial value*"** [...]. Therefore [...] the claim to money must arise under a contractual relationship.

344. [...] Greece had a contractual relationship with the Participants and the Primary Dealers for the issuance and distribution of the GGBs. It is undisputed that Poštová banka was not a Participant or a Primary Dealer, and that it therefore had no contractual relationship with Respondent in connection with such issuance and distribution. [...]

ICSID Convention

Chapter II - Jurisdiction of the Centre

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally

[...]

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, **notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre.** [...]

Poštová banka's "INVESTMENT" (?)

353. In a number of well-known cases, tribunals have attempted to deal with this omission of a definition by articulating what they have called “objective criteria” for the definition of the term “investment” that are said to flow from the object and purpose of the ICSID Convention.
[...]

355. Other tribunals have taken the position that it is not so much the term “investment” in the ICSID Convention as the term “investment” *per se* that should be considered as having an objective meaning in itself [...]. For example, the tribunal in *Romak S.A. v. Uzbekistan*, conducting its proceedings on the basis of the UNCITRAL Arbitration Rules, observed as follows:

- “The term ‘investment’ has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT.
- [...] The Arbitral Tribunal therefore considers that the term ‘investments’ under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk [...]. if an asset does not correspond to the inherent definition of “investment,” the fact that it falls within one of the categories listed in Article 1 does not transform it into an ‘investment.’” [footnote 501: *Romak S.A. v. The Republic of Uzbekistan* (PCA Case No. AA280), Award of November 26, 2009, ¶ 180 and ¶ 207. (Emphasis in the original). See also *KT Asia v. Kazakhstan*]

Poštová banka's "INVESTMENT" (?)

356. [...] According to such test, an investment requires a contribution of money or assets, duration and risk, which elements form part of the objective definition of the term "investment."

357. [...] Insofar as BIT arbitration under the ICSID Convention is concerned, it has also been held in a number of well-known cases [...] that the definition of investment in a BIT providing for arbitration under the auspices of ICSID supplies the definition missing from the Washington Convention. Such definitions have been described as following a "subjective" approach adopted by such States in the instruments (whether BITs or national legislation) which embody their consent to ICSID jurisdiction. [...]

360. The Tribunal, by majority, believes that an analysis applying the "objective" test, as pleaded by the Parties, would lead to the same conclusion with respect to Poštová banka GGBs as the Tribunal reached in its analysis of the "subjective" test under the BIT. [...]

Poštová banka's "INVESTMENT" (?)

361. If an “objective” test is applied, in the absence of a contribution to an economic venture, there could be no investment. An investment, in the economic sense, is linked with a process of creation of value, which distinguishes it clearly from a sale, which is a process of exchange of values or a subscription to sovereign bonds which is also a process of exchange of values i.e. a process of providing money for a given amount of money in return [...]

363. The Claimants have not argued that the money Poštová banka paid for the GGB interests, even if considered as ultimately benefitting Greece, was used in economically productive activities. Rather, it appears that the funds were used for Greece's budgetary needs, and particularly for repaying its debts [...]

365. [...]n cases where the financial instruments were not linked with an economic venture, ICSID tribunals have not considered them as investments on their own [...]

366. As far as the element of duration is concerned, the Tribunal has been convinced by the evidence in the proceedings that such element is present in the GGBs acquired by Poštová banka.

Poštová banka's "INVESTMENT" (?)

368. The investment risk, for purposes of the application of an “objective” test, was defined by the *Romak* tribunal as follows:

- *“All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial [...].”*
- *An ‘investment risk’ entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is ‘risk’ of this sort, the investor simply cannot predict the outcome of the transaction.”*

369. In other words, under an “objective” approach, an investment risk would be an operational risk and not a commercial risk [...]

371. [....]f “objective” criteria were to be applied, while it could be accepted that there was an intended duration of the possession by Poštová banka of the GGB interests, the element of contribution to an economic venture and the existence of the specific operational risk that characterizes an investment under the objective approach are not present here. [...]

Argentinean case-law on sovereign debt restructuring

- **Abaclat and Others v. Argentine Republic**
 - the **largest claim (featuring some 60,000 claimants) brought in 2008 by Italian holders of Argentine bonds** has entered its final phase (the hearing on the merits was held in Washington, DC between June 16, 2014 and June 24, 2014)
 - 4 August 2011: Decision on Jurisdiction and Admissibility → the tribunal has jurisdiction to hear the case
- **Giovanni Alemanni and others v Argentina**
 - **First brought in 2007: the claim involved 183 Italian claimants**
 - 17 Nov 2014: Decision on Jurisdiction and Admissibility → the tribunal has jurisdiction to hear the case
 - The case has been stayed for nonpayment of the required advances
- **Ambiente Ufficio S.p.A. and others v. Argentina**
 - **First brought in 2008: the claim involved 119 claimants; but following settlement of some claims that number now stands at 90**
 - Karl-Heinz Boeckstiegel is also a member of the tribunal in the parallel Alemanni case
 - 8 February 2013: Decision on Jurisdiction and Admissibility → the tribunal has jurisdiction to hear the case
 - 28 May 2015: the case has been discontinued for lack of payment of the advances required by ICSID
- multi-party arbitrations ('mass claims') initiated by Italian nationals in the aftermath of Argentina's sovereign default
- Applicable law: Italy-Argentina BIT

Argentina-Italy BIT (1993)

Article 1 Definitions

"1. **Investment** shall mean [...] any conferment or asset invested or reinvested by an individual or corporation of one Contracting Party in the territory of the other Contracting Party [...].

In particular, investment includes, without limitation:

(a) movable and immovable property [...];

(b) shares, quotas and other holdings, including minority or indirect holdings, in companies incorporated in the territory of one of the Contracting Parties;

(c) bonds, private or public financial instruments or any other right to performances or services having economic value, including capitalized revenues;

[....]

(g) any right of economic nature conferred under any law or agreement, as well as any license and concession granted in compliance with the applicable provisions governing the performance of the related economic activities, including prospecting, cultivating, extracting and exploiting of natural resources.

Abaclat and Others v. Argentine Republic

Decision on Jurisdiction and Admissibility

4 August 2011 (1)

347. [...], Article 25 ICSID Convention does not provide for any specific definition of the concept of investment, and this silence was intended by the drafters of the Convention in order to leave certain room to further develop this notion. Thus, a number of arbitral tribunals have attempted to further define the concept of investment under Article 25 ICSID Convention. This has been regularly done by reference to some or all of the so-called *Salini* factors, developed in the *Salini* decision [...]. According to these *Salini* factors, for a transaction or activity to qualify as —investment in the sense of Article 25 ICSID Convention, it would require (i) a contribution, (ii) of a certain duration, (iii) of a nature to generate profits or revenues, (iv) showing a particular risk, and (v) of a nature to contribute to the economic development of the Host State. [...]

364. If Claimants' contributions were to fail the *Salini* test, those contributions – according to the followers of this test – would not qualify as investment under Article 25 ICSID Convention, , which would in turn mean that Claimants' contributions would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention's aim, which is to encourage private investment [...] **Considering that these criteria were never included in the ICSID Convention, while being controversial and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the *Salini* criteria. The *Salini* criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.**

Abaclat (2)

366. [...T]here is no doubt that Claimants made a contribution: They purchased security entitlements in the bonds and thus, paid a certain amount of money in exchange of the security entitlements. The value generated by this contribution is the right attached to the security entitlements to claim reimbursement from Argentina of the principal amount and the interests accrued. [...T]his right is protected under Article 1(1) lit. (c) of the BIT.

367. Consequently, the Tribunal finds that Claimants' purchase of security entitlements in Argentinean bonds constitutes a contribution which qualifies as —investment under Article 25 ICSID Convention.

ABACLAT case

1- Italy-Argentina BIT

- Bonds (and interests in bonds) as *investment*

2- ICSID Convention

- Bonds (and interests in bonds) as *investment*
- *Salini* criteria: " (i) a contribution, (ii) of a certain duration, (iii) of a nature to generate profits or revenues, (iv) showing a particular risk, and (v) of a nature to contribute to the economic development of the Host State"
- "The *Salini* criteria ... should ...not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create"

Different wording

POSTOVA BANKA case

1- Slovakia-Greece BIT

- No investment (not a *loan* nor a *money claim*)
- *Subjective* approach

2- ICSID Convention

- Objective criteria (no reference to *Salini* test):
 - "[A]n investment requires a **contribution of money or assets, duration and risk**"
- No investment (no contribution and no risk)

Ambiente Ufficio S.p.A. and others v. Argentina

Decision on Jurisdiction and Admissibility

8 February 2013

460. [...T]he Tribunal would [...] resist to endorse an overly narrow reading of the term “investment” in Art. 25(1) of the Convention. In particular, the Tribunal would like to caution against a restrictive reading of the jurisdictional provisions of the ICSID Convention which does not find its base in the Convention itself, but rather draws on concerns regarding the ability, and appropriateness, of arbitral tribunals to tackle difficulties relating to the substantive side of a case. This is a question to be dealt with on the level of the merits, but should not lead tribunals to decline to hear cases in “anticipatory obedience” to real or imagined constituencies.[...]

461. At the same time, the Tribunal would concede that a restrictive reading is required if the consent given by a State indicates that certain types of investment should be excluded from the protection of the ICSID arbitration mechanism. [...]