

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**  
WASHINGTON, D.C.

In the arbitration proceeding between

**POŠTOVÁ BANKA, A.S. AND ISTROKAPITAL SE**

(Claimants)

and

**THE HELLENIC REPUBLIC**

(Respondent)

**ICSID Case No. ARB/13/8**

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**AWARD**

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*Members of the Tribunal*  
Mr. Eduardo Zuleta, President  
Professor Brigitte Stern, Arbitrator  
Mr. John M. Townsend, Arbitrator

*Secretary of the Tribunal*  
Martina Polasek

*Date of dispatch to the Parties: April 9, 2015*

REPRESENTATION OF THE PARTIES

Representing Poštová banka, a.s. and  
ISTROKAPITAL SE:

Mr. David W. Rivkin  
Ms. Samantha Rowe  
Debevoise & Plimpton LLP  
919 Third Avenue  
New York, New York 10022  
United States of America  
and  
Mr. Marek Vojáček  
Mr. Dušan Sedláček  
Mr. Petr Bříza  
Havel, Holásek & Partners s.r.o.  
Tyn 1049/3  
110 00 Prague 1  
Czech Republic

Representing the Hellenic Republic:

Ms. Styliani Charitaki  
Member of the Legal Council of the State  
Ministry of Finance  
Kar. Servias 1 0  
101 84 Athens  
Greece  
and  
Ms. Emmanuela Panopoulou  
Member of the Legal Council of the State  
General Accounting Office  
Amerikis 6  
106 71 Athens  
Greece  
and  
Dr. Claudia Annacker  
Cleary Gottlieb Steen & Hamilton LLP  
12, rue de Tilsitt  
75008 Paris  
France  
and  
Mr. Christopher Moore  
Cleary Gottlieb Steen & Hamilton LLP  
City Place House, 55 Basinghall Street  
London EC2V 5EH  
England  
and  
Legal Council of the State  
68 Akadimias str and Harilaou Trikoupi,  
106 78 Athens  
Greece

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## LIST OF DEFINED TERMS

AFS	Available-for-Sale
Arbitral Tribunal or Tribunal	The arbitral tribunal composed of Mr. Eduardo Zuleta, Professor Brigitte Stern and Mr. John M. Townsend
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Assignment Agreements	Two assignment agreements entered into by and between Poštová banka and J&T Finance on December 23, 2011
BIT	Bilateral Investment Treaty
Bondholder Act	Law 4050/2012, approved by the Greek Parliament on February 23, 2012
Claimants	Collectively, Poštová banka and Istrokapital
Clearstream	Clearstream Banking
C-Mem.	Claimant's Memorial on the Merits and Counter-Memorial on Jurisdiction
Cyprus – Greece BIT	Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus on the Mutual Promotion and Protection of Investments dated March 30, 1992
Deposit Agreements	Two deposit agreements entered into by and between Poštová banka and J&T Finance on December 23, 2011
European Union	EU
GGBs	Greek Government Bonds
Hearing	Hearing on jurisdiction held in Washington, D.C. on September 8 and 9, 2014.
HFT	Held-for-Trading
HTM	Held-to-Maturity
ICSID Convention or Washington Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965

ICSID or the Centre	International Centre for Settlement of Investment Disputes
IMF	International Monetary Fund
Istrokapital	Istrokapital SE
J&T Finance	J&T Finance, a.s.
Mem.	Respondent's Memorial on Jurisdiction
MFN	Most-Favored-Nation
NBS	National Bank of Slovakia
Parties	Collectively, Claimants and Respondent
Poštová banka	Poštová banka, a.s.
Rep.	Respondent's Reply on Jurisdiction
Request	Claimants' Request for Arbitration dated May 2, 2014
Respondent or Greece	The Hellenic Republic
Settlement Agreement	Agreement on a deposit into Other Equity Accounts and on Settlement of Obligations entered into by and between Istrokapital, J&T Finance and Poštová banka, dated March 8, 2012
Slovakia-Greece BIT	Agreement between the Government of the Hellenic Republic and the Government of the Czech and Slovak Federal Republic for the Promotion and Reciprocal Protection of Investments dated June 3, 1991
System	System for Monitoring Transactions in a Book-entry Securities
Tr. [page:line]	Transcript of the Hearing on jurisdiction
VCLT	Vienna Convention on the Law of Treaties
SE	<i>Societas europeas</i>
SE Regulation	Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company (SE)

## I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Agreement between the Government of the Hellenic Republic and the Government of the Czech and Slovak Federal Republic for the Promotion and Reciprocal Protection of Investments dated June 3, 1991 (the “Slovakia-Greece BIT”), the Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus on the Mutual Promotion and Protection of Investments dated March 30, 1992 (the “Cyprus-Greece BIT”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “ICSID Convention” or “Washington Convention”).
2. The Claimants are Poštová banka, a.s. (“Poštová banka”), a Slovak bank, and Istrokapital SE (“Istrokapital”), a European Public Limited Liability Company, organized under the laws of Cyprus (collectively “Claimants”). Istrokapital holds shares in Poštová banka.<sup>1</sup>
3. Claimants are represented by Mr. David W. Rivkin and Ms. Samantha Rowe of the law firm of Debevoise & Plimpton LLP, New York, NY, USA and Mr. Marek Vojáček, Mr. Dušan Sedláček, Mr. Petr Bříza of the law firm of Havel, Holásek & Partners s.r.o., Prague, Czech Republic.
4. Respondent is the Hellenic Republic (the “Respondent” or “Greece”).
5. Respondent is represented by Ms. Styliani Charitaki and Ms. Emmanuela Panopoulou, Members of the Legal Council of the State, Athens, Greece, and Dr. Claudia Annacker and Mr. Christopher Moore of the law firm of Cleary Gottlieb Steen & Hamilton LLP, Paris, France and London, U.K.
6. Claimants and the Respondent are hereinafter collectively referred to as the “Parties.”

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<sup>1</sup> In their Memorial on the Merits and Counter-Memorial on Jurisdiction, Claimants explained that in late 2011, Istrokapital and J&T Finance began discussing the possibility of Istrokapital selling its majority stake in Poštová banka to J&T Finance. These discussions culminated in the transfer of interest in Poštová banka from Istrokapital to J&T Finance effective from July 1, 2013. C-Mem., ¶ 77; Tarda Witness Statement, ¶ 3.

## II. PROCEDURAL HISTORY

7. On May 3, 2013, ICSID received a Request for Arbitration dated May 2, 2013 from Claimants (the “Request”). Following an enquiry by the ICSID Secretariat, Claimants supplemented the Request with a letter dated May 17, 2013.
8. On May 20, 2013, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
9. On June 6, 2013, Respondent notified the Centre that it accepted Claimants’ proposal in the Request concerning the number of arbitrators and method of constituting the Tribunal. The Parties thus agreed to constitute the arbitral tribunal in accordance with Article 37(2)(a) of the ICSID Convention. Under their agreement, the Tribunal would consist of three members: one arbitrator to be appointed by each party and the third arbitrator, the President of the Tribunal, to be appointed by agreement of the Parties. Failing such agreement, the President would be appointed by the Secretary-General of ICSID.
10. On June 20, 2013, Claimants appointed as arbitrator Mr. John M. Townsend, a national of the United States, who accepted his appointment on June 26, 2013.
11. On July 29, 2013, Respondent appointed Professor Brigitte Stern, a national of France, as arbitrator. She accepted her appointment on July 31, 2013.
12. On September 6, 2013, the Parties informed the Secretary-General of ICSID that they were unable to reach an agreement on the appointment of the President of the Tribunal. In accordance with their agreement, the Parties requested that the Secretary-General appoint the presiding arbitrator in consultation with the Parties.

13. On September 9, 2013, the Secretary-General invited the Parties to submit their views on the qualifications, experience and profile of potential candidates. By the same letter, the Secretary-General proposed the following list-ranking procedure for appointing the President:
  - i. The Secretary-General will send a list of seven to ten candidates and requests that the Parties rank these candidates in order of preference [e.g. first choice, second choice, third choice, etc.] with the first choice being the most-preferred candidate. Each rank can only be used once. The Parties may veto the appointment of one candidate on the list.
  - ii. Each party will complete its ranking within seven business days and return it to ICSID by email without copying the opposing party.
  - iii. ICSID will appoint the candidate with the least number of points to act as the President of the Tribunal. If any candidates are tied with the lowest number of points, ICSID will select the President from one of those candidates.
14. By letters of September 11, 13 and 16, 2013, the Parties agreed to the list-ranking procedure proposed by the Secretary-General and submitted their views on the qualifications, experience and profile of potential candidates.
15. On September 26, 2013, the Secretary-General proposed ten candidates to the Parties. The Parties submitted their rankings on October 7, 2013.
16. On October 7, 2013, the Secretary-General informed the Parties that ICSID would proceed with the appointment of Mr. Eduardo Zuleta, the candidate with the least number of points, to act as President of the Tribunal. Mr. Zuleta accepted his appointment on October 21, 2013.
17. On October 21, 2013, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”) notified the Parties that all three arbitrators had accepted their appointments and that the



Tribunal was therefore deemed to have been constituted on that date. Ms. Martina Polasek, Team Leader/Legal Counsel, ICSID, was designated to serve as Secretary of the Tribunal.

18. On December 17, 2013, the Tribunal held a first session with the Parties by telephone conference. The Parties' agreements and the Tribunal's determinations on the procedural matters discussed at the first session were recorded in Procedural Order No. 1 of December 20, 2013.
19. Among other things, it was agreed that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, that the place of proceeding would be Washington, D.C. and that any ruling issued in the proceeding would be published. The Parties further agreed that production of documents would be governed by Article 3 of the *International Bar Association Rules on the Taking of Evidence in International Arbitration (2010)*, except where inconsistent with Procedural Order No. 1 or any later order of the Tribunal, in which case, the orders of this Tribunal would prevail. Following the Parties' agreement to bifurcate jurisdiction from the merits, a procedural schedule on jurisdiction was established.
20. After the issuance of Procedural Order No. 1, the Parties filed proposals for a proceeding on the merits following a potential Decision on Jurisdiction. On January 9, 2014, considering the Parties' proposals, the Tribunal issued Procedural Order No. 2 adopting a procedural calendar for a possible proceeding on the merits.
21. On January 17, 2014, in accordance with Procedural Order No. 1, Respondent filed a request for the Tribunal to decide on its request for production of documents. Respondent's Redfern Schedule contained Claimants' objections to production and Respondent's response to the objections. On January 21, 2014, following a request granted by the Tribunal, Claimants filed further comments on the Respondent's requests for production.

22. On January 22, 2014, the Tribunal issued Procedural Order No. 3 ordering Claimants to produce certain documents requested in Respondent's Redfern Schedule. On January 23, 2014, Claimants confirmed that they would produce certain documents but that they would not be able to produce the remaining documents within the set time frame given the broad scope of the documents ordered for production.
23. On March 5, 2014, the Parties submitted a joint proposal for an amended procedural calendar, which was adopted by the Tribunal in Procedural Order No. 4 of March 6, 2014.
24. On April 30, 2014, Claimants requested the Tribunal's assistance in resolving an urgent document production dispute between the Parties. They also requested that Respondent be ordered to destroy or return a confidential document that had been produced inadvertently.
25. On May 1, 2014, Respondent filed its Memorial on Jurisdiction. On the same day, Respondent notified the Tribunal that it would refrain from submitting or relying on the disputed or related documents identified by the Claimants in their letter of April 30, 2014, pending resolution of the matter by the Tribunal.
26. The Parties exchanged further correspondence concerning the documents at issue. On May 23, 2014, the Centre informed the Parties that the Tribunal had received sufficient information on the matter and did not require any further submissions.
27. On May 27, 2014, the Tribunal issued Procedural Order No. 5, deferring the decision on the relevant documents until after the filing of Claimants' Memorial on the Merits and Counter-Memorial on Jurisdiction. It ordered that Respondent return the main document to Claimants no later than May 30, 2014, without prejudice to the possibility of Respondent requesting the disclosure of the document and related documents in another document production phase, due to start on July 1, 2014.
28. On June 17, 2014, Claimants filed their Memorial on the Merits and Counter-Memorial on Jurisdiction, together with the witness statements of Messrs. Marek Tarda and Ladislav Timiul'ak and an expert opinion by Professor René M. Stulz.

29. On July 1, 2014, Respondent renewed its request for the Tribunal to order the production of the previously disputed documents. On July 8, 2014, Claimants objected to Respondent's second request, arguing that the documents were confidential and protected by attorney-client privilege. The Parties exchanged further communications on these matters by letters of July 11 and 17, 2014.
30. On July 20, 2014, the Tribunal issued Procedural Order No. 6 concerning Respondent's second request for production of documents. It granted some of the requests for production and denied others, as detailed in a Redfern Schedule attached to the Order.
31. On July 21, 2014, Respondent requested clarifications from the Tribunal with respect to Procedural Order No. 6, which the Tribunal provided in a decision of July 23, 2014 entitled "Clarification to Procedural Order No. 6."
32. On August 15, 2014, Respondent filed its Reply on Jurisdiction, together with expert reports of Professor R. Glen Hubbard and Professor Ray Ball.
33. On August 20, 2014, Claimants requested leave to submit a reply expert report of Professor René M. Stultz, a reply witness statement of Mr. Marek Tarda as well as a number of new exhibits. Claimants argued that Respondent had delayed the submission of its expert evidence until its Reply on Jurisdiction in order to deny Claimants an opportunity to respond.
34. On August 21, 2014, the Tribunal held a pre-hearing organizational meeting with the Parties and, on August 22, 2014, issued Procedural Order No. 7 concerning the outstanding procedural, administrative and logistical matters in preparation for the Hearing on jurisdiction. By the same order, the Tribunal decided on Claimants' request of August 20, 2014, rejecting Claimants' request to file a supplemental witness statement and expert report.
35. A Hearing on jurisdiction took place in Washington, D.C. on September 8 and 9, 2014. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the Hearing were:

For the Claimants:

Mr. David Rivkin  
Ms. Samantha Rowe  
Mr. Clay Kaminsky  
Ms. Nwamaka Ejebe  
Ms. JoAnna Tsoumpas  
Ms. Jennifer Lim  
Mr. Dušan Sedláček  
Mr. Jan Nosko

Debevoise & Plimpton LLP  
Debevoise & Plimpton LLP  
Debevoise & Plimpton LLP  
Debevoise & Plimpton LLP  
Debevoise & Plimpton LLP  
Debevoise & Plimpton LLP  
Havel, Holásek & Partners s.r.o.  
Poštová banka

For the Respondent:

Dr. Claudia Annacker  
Mr. Christopher Moore  
Ms. Styliani Charitaki  
  
Ms. Emmanuela Panopoulou  
  
Mr. David Sabel  
Dr. Enikő Horváth  
Ms. Laurie Achtouk-Spivak  
Mr. Konrad Rodgers  
Mr. Paul Barker  
Ms. Mayar Dahabieh  
Mr. Jacob Turner

Cleary Gottlieb Steen & Hamilton LLP  
Cleary Gottlieb Steen & Hamilton LLP  
Legal Council of the State, Hellenic  
Republic  
Legal Council of the State, Hellenic  
Republic  
Cleary Gottlieb Steen & Hamilton LLP  
Cleary Gottlieb Steen & Hamilton LLP  
Cleary Gottlieb Steen & Hamilton LLP  
Cleary Gottlieb Steen & Hamilton LLP  
Cleary Gottlieb Steen & Hamilton LLP  
Cleary Gottlieb Steen & Hamilton LLP  
Cleary Gottlieb Steen & Hamilton LLP

36. The following persons were examined:

On behalf of the Claimants:

Mr. Marek Tarda  
Professor René M. Stulz

Poštová banka  
Ohio State University

On behalf of the Respondent:

Professor R. Glenn Hubbard  
Professor Raymond Ball

Dean, Columbia Business School  
Sidney Davidson Distinguished Service  
Professor of Accounting, Chicago Booth  
School of Business

37. By letters of October 24 and 26, 2014, the Parties disputed the translations of exhibits R-149 and R-150 and the redactions to Procedural Orders Nos. 5 and 6 and Clarification to Procedural Order No. 6, which were requested by one of the Parties before the publication of those orders.
38. On October 31 and November 6, 2014, Claimants and the Respondent filed their respective Statements on Costs.
39. On November 4 and 10, 2014, the Parties filed additional submissions on the translation and redaction issues. On November 12, 2014, the Tribunal decided to allow the Claimants to submit their own translations of exhibits R-149 and R-150. Additionally, the Tribunal ordered the publication on the ICSID website of redacted versions of Procedural Orders No. 5 and 6 and Clarification to Procedural Order No. 6.
40. On November 18, 2014, in accordance with the Tribunal's directions of November 12, 2014, Claimants submitted exhibits C-210 and C-211, as their translations of exhibits R-149 and R-150.
41. On December 1, 2014, the Tribunal informed the Parties that it continued to engage in deliberations.
42. On April 9, 2015, the Tribunal informed the Parties that the proceeding was closed and that the Award would be rendered on that date.
43. The Tribunal has conducted its deliberations in person and by various modes of communication among its Members and in issuing this Award has taken into account all written submissions and oral arguments of the Parties. The fact that a particular reasoning, document or legal authority is not referred to in the following sections does not mean that it has not been considered by the Tribunal.

### III. FACTUAL BACKGROUND

44. The following section recalls the factual background of this dispute. As a preliminary matter, the Tribunal notes that in this arbitration Claimants asserted that their rights derive from the ownership by Poštová banka of Greek Government Bonds (“GGBs”),<sup>2</sup> whereas Respondent referred to such purchases by Poštová banka as “interests in GGBs.”<sup>3</sup> In light of the Tribunal’s decision, this distinction is not determinative. The Tribunal will thus refer to GGBs and interests in GGBs (or GGB interests) indistinctly in this decision.

#### *The Greek Financial Crisis*

45. The Hellenic Republic has been a Member State of the European Union (“EU”) and the Euro Area since 2001.
46. Due to the global financial crisis of 2008, Greece experienced a significant economic downturn.<sup>4</sup> In 2009, rating agencies downgraded Greek debt, given, among other factors, the country’s public debt burden.<sup>5</sup> Among the obligations of the Greek Government that were downgraded were five series of Greek Government Bonds, held at various times by Poštová banka, as described below.
47. On January 15, 2010, Greece submitted to the European Commission a three-year stability program to reduce its fiscal deficit within the EU limit, which was adopted by the European Commission on February 3, 2010 and was supported by the Heads of State and Government of the EU. This program was followed by the adoption of austerity measures by Greece on March 3, 2010.<sup>6</sup>
48. On April 11, 2010, the Euro Area Member States agreed on financial support for the Hellenic Republic and the International Monetary Fund (“IMF”) contributed additional

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<sup>2</sup> C-Mem., ¶ 3.

<sup>3</sup> Rep., ¶ 188.

<sup>4</sup> Mem., ¶¶ 23-27.

<sup>5</sup> Mem., ¶ 26; R-4; R-5; Rep. ¶ 27.

<sup>6</sup> Mem., ¶¶ 28-29.

funds in order to secure the financial stability of the Euro Area. The activation of this mechanism was formally requested on April 23, 2010.

49. On April 27, 2010, Standard & Poor's lowered Greece's long-term credit rating from BBB+ to BB+.<sup>7</sup> European Union and Greek leaders affirmed that restructuring was not on the table.<sup>8</sup>
50. Later, on May 2, 2010, an adjustment program was launched to increase financial support to Greece, conditioned upon the implementation of fiscal, financial and structural measures, set out in a Memorandum of Economic and Fiscal Policies of May 3, 2010, agreed with the IMF, the Eurogroup, the European Commission and the European Central Bank.<sup>9</sup>

#### ***Poštová Banka's Interests in GGBs***

51. While these events were unfolding, Poštová banka purchased in early 2010 a number of GGBs issued by the Hellenic Republic between 2007 and 2010. The bonds purchased by Poštová banka belonged to five series of GGBs, all of which were governed by Greek law:
  - **ISIN GR0114020457**, issued on March 2, 2007 pursuant to Ministerial Decision 2/13482/0023A of February 27, 2007, with an interest rate of 4.1% and maturing on 20 August 2012.<sup>10</sup>
  - **ISIN GR0114021463**, issued on March 26, 2008 pursuant to Ministerial Decision 2/20947/0023A of March 18, 2008, with an interest rate of 4% and maturing on 20 August 2013.<sup>11</sup>

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<sup>7</sup> C-Mem., ¶ 48; C-95.

<sup>8</sup> C-93; C-96.

<sup>9</sup> Mem., ¶¶ 31-34.

<sup>10</sup> R-98 Ministerial Decision.

<sup>11</sup> R-99 Ministerial Decision.

- **ISIN GR0110021236**, issued on February 17, 2009 pursuant to Ministerial Decision 2/11184/0023A of February 13, 2009, with an interest rate of 4.3% and maturing on 20 March 2012.<sup>12</sup>
  - **ISIN GR0114023485**, issued on February 2, 2010 pursuant to Ministerial Decision 2/6276/0023A of January 29, 2010, with an interest rate of 6.1% and maturing on 20 August 2015.<sup>13</sup>
  - **ISIN GR0124032666**, issued on March 11, 2010 pursuant to Ministerial Decision 2/14140/0023A of March 9, 2010, with an interest rate of 6.25% and maturing on 19 June 2020.<sup>14</sup>
52. These GGBs were issued by the Hellenic Republic by syndication or auction to 22 “primary dealers”; that is, financial institutions appointed on a yearly basis by joint decision of the Minister of Economy and Finance and the Governor of the Bank of Greece in order to provide specialized services in the government securities market.<sup>15</sup> GGBs were dematerialized securities.<sup>16</sup>
53. Law 2198 of 1994 created the System for Monitoring Transactions in a Book-entry Securities (“System”), administered by the Bank of Greece in order to monitor the loans on behalf of the Government of Greece.<sup>17</sup> In accordance with Article 6 of Law 2198 of 1994, aside from the Greek Government and the Bank of Greece, “(...) *legal or natural persons (Participants) defined either by category or by name are eligible for membership in the System, subject to approval by the a Bank of Greece Governor’s Act (sic).*”<sup>18</sup> Participants in the System are the only ones who can hold titles to GGBs, yet securities acquired by Participants may be transferred to third parties (defined in the Law as “investors”).<sup>19</sup> A Participant is required to have two types of accounts, one for

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<sup>12</sup> R-97 Ministerial Decision; R-111 Offering Circular.

<sup>13</sup> R-100 Ministerial Decision; R-112 Offering Circular.

<sup>14</sup> R-101 Ministerial Decision; R-110 Offering Circular.

<sup>15</sup> R-103, Article 1.

<sup>16</sup> See R-108, Articles 5 and 6.

<sup>17</sup> R-108, Article 5.

<sup>18</sup> R-108, Article 6.1.

<sup>19</sup> R-108, Article 6.2.



its customer portfolio and the other for its own account. Payments made to Greece on account of GGBs were only made by Participants as the system was envisioned as one of “delivery versus payment.”<sup>20</sup>

54. The GGBs were issued by the Greek Government through the Bank of Greece System to the Participants in the System. Participants deliver the bonds to the Primary Dealers, which ultimately provide the funds for the acquisition by Participants, and in turn, sell the GGBs on the secondary market. The distribution of bonds occurred electronically through universal depositories, such as Clearstream.<sup>21</sup>
55. The initial distribution process is completed once the Primary Dealers distributed the interests in the GGBs into the secondary market, which usually happened within one or two days of their issuance.<sup>22</sup>
56. Poštová banka used capital from consumer deposits to acquire €504,000,000 aggregate face principal amount of GGBs interests through a series of transactions between January 8, 2010 and April 23, 2010.<sup>23</sup>
57. The series of GGBs in which Poštová banka acquired interests were governed by Greek law and matured at various dates between March 20, 2012 and June 19, 2020. None of them contained Collective Action Clauses.<sup>24</sup>
58. Poštová banka’s purchases of GGBs took place from January 2010 through April 2010 on the following dates.<sup>25</sup>

<b>ISIN</b>	<b>Purchase Date</b>
GR0114020457	20 January 2010-23 April 2010
GR0114021463	8 January 2010-20 January 2010
GR0110021236	10 February 2010
GR0114023485	19 March 2010-22 March 2010
GR0124032666	19 March 2010-23 March 2010

<sup>20</sup> R-109, Section 1, p. 8.

<sup>21</sup> Hubbard Report, ¶ 44 and Cross Examination of Professor Stulz at Hearing, Tr., 369:6-371:4. *See also*: R-103; R-108 and R-109.

<sup>22</sup> Hearing, Tr., 13:14-18; Hubbard Report, ¶ 52.

<sup>23</sup> Mem., ¶ 69; C-Mem., ¶ 38; Tarda Witness Statement, ¶ 8.

<sup>24</sup> C-Mem., ¶ 42.

<sup>25</sup> C-Mem., ¶ 40; Hubbard Report, Appendix 21.

59. Poštová banka's interests in the GGBs were held in book-entry form in an account with Clearstream Banking, a corporation organized under the laws of Luxembourg ("Clearstream"). This account did not entitle Poštová banka to rights in any specific instrument, but only to rights in a pool of fungible interests.<sup>26</sup>

*Developments After Poštová Banka's Purchases of GGBs*

60. During 2010 and 2011, Greece paid the interest due on its bonds. Poštová banka received payment of the principal for GGBs that matured in 2011.<sup>27</sup>
61. In July 2011, GGBs were further downgraded by the bond rating agencies.<sup>28</sup> At that time, the IMF had concluded that a significant funding gap had to be closed at least in part through "Private Sector Involvement" ("PSI").<sup>29</sup> PSI is a polite circumlocution for requiring private holders of government debt to accept some reduction in the principal or the interest, or both, due on that debt.
62. As Greece's situation continued to deteriorate, a second adjustment program was adopted by the European Union and EU institutions on July 21, 2011.<sup>30</sup> This program would have combined a second bail-out with "voluntary contribution of the private sector" in order to fully cover the financing gap.<sup>31</sup> However, this program was never implemented.<sup>32</sup>
63. The Greek and the Euro Area authorities conducted consultations with the private sector regarding the PSI during the following months.
64. On October 26, 2011, the Euro Area Heads of State officially stated:

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<sup>26</sup> Mem., ¶ 66; R-116, Clearstream General Terms and Conditions, Article 11.

<sup>27</sup> Tarda Witness Statement, ¶ 13.

<sup>28</sup> Hearing, Tr., 420:4-7.

<sup>29</sup> Rep., ¶ 40; R-316.

<sup>30</sup> See R-27, Statement by the Heads of State or Government of the Euro Area and EU Institutions of July 21, 2011.

<sup>31</sup> R-27.

<sup>32</sup> C-49, pp. 6-8.

*“The Private Sector Involvement (PSI) has a vital role in establishing the sustainability of the Greek debt. Therefore we welcome the current discussion between Greece and its private investors to find a solution for a deeper PSI. Together with an ambitious reform programme for the Greek economy, the PSI should secure the decline of the Greek debt to GDP ratio with an objective of reaching 120% by 2020. To this end we invite Greece, private investors and all parties concerned to develop a voluntary bond exchange with a nominal discount of 50% on national Greek debt held by private investors. The Euro zone Member States would contribute to the PSI package up to 30 bn euro. On that basis, the official sector stands ready to provide additional programme financing of up to 100 bn euro until 2014, including required recapitalisation of Greek banks. The new programme should be agreed by the end of 2011 and the exchange of bonds should be implemented at the beginning of 2012. We call on the IMF to continue to contribute to the financing of the new Greek programme.”*<sup>33</sup>

65. On November 2011, a Steering Committee was created by the Private Creditor-Investor Committee to conduct negotiations on a voluntary PSI for Greece with the Greek and Euro Area authorities. Poštová banka was not a Member of the Private Creditor-Investor Committee or its Steering Committee.<sup>34</sup>
66. On February 21, 2012, the Eurogroup announced an increase in the financial package for Greece, in which it acknowledged the common understanding reached with the private sector on the general terms of the PSI, whereby a nominal “haircut” of 53.3% of the face value of the Greek debt was provided for.<sup>35</sup> Financial support was conditioned upon the implementation of the debt exchange in a Memorandum of Understanding between the European Commission and Greece entered into on March 1, 2012.<sup>36</sup>

### ***The Greek Bondholder Act***

67. The Greek Bondholder Act – Law 4050/2012 – was approved by the Greek Parliament on February 23, 2012. The Greek Bondholder Act provided that *“[t]he Ministerial Council upon recommendation of the Minister of Finance shall decide on the commencement of the modification process of the eligible titles by the Bondholders”*

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<sup>33</sup> R-28, Euro Summit Statement, October 26, 2011, p. 4; Mem., ¶ 38; C-Mem., ¶ 58.

<sup>34</sup> C-Mem., ¶ 59; R-30.

<sup>35</sup> Mem., ¶ 41; R-34, Eurogroup statement of February 21, 2012.

<sup>36</sup> Mem., ¶ 42; R-35, p. 6.

and would likewise determine which would be the eligible titles, the principal or nominal amount of the interest rate, the duration and applicable law of the new titles.<sup>37</sup> The Public Debt Management Agency – PDMA – was authorized to issue one or more invitations on behalf of the Greek Government, whereby Bondholders would be invited to decide whether or not they accepted the modification proposed by Greece.<sup>38</sup> This Act also provided that the exchange would become binding on all eligible GGBs governed by Greek law if two conditions were met: (i) participation of at least one half of the aggregate outstanding principal amount of all eligible titles, and (ii) vote in favor of the exchange of at least two thirds of the aggregate principal amount of participating GGBs.<sup>39</sup> This Act effected a significant change in the Greek law governing the GGBs, by permitting the terms of the bonds to be changed if the requisite number of holders of the bonds consented to the change.

68. Titles eligible for the type of exchange authorized by the Greek Bondholder Act were defined in a decision of the Greek Ministerial Council of February 24, 2012. The five series of GGBs at issue in this arbitration were included in that decision.<sup>40</sup>

### ***The Restructuring and Consent Solicitation***

69. On February 24, 2012, Greece initiated a sovereign debt restructuring which would be implemented through an exchange of outstanding GGBs for new titles.<sup>41</sup> These new titles were to consist of a combination of (i) new GGBs issued by the Hellenic Republic in a face amount of 31.5% of the nominal amount of the exchanged GGBs; (ii) European Financial Stability Facility Notes with a maturity date of 2 years or less in nominal amount equal to 15% of the face amount of the exchanged GGBs; and (iii) detachable GDP-linked securities in a notional amount equal to the face amount of the new GGBs; and (iv) 6-month European Financial Stability Facility Notes (“EFSF

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<sup>37</sup> R-41, Bondholder Act, Article 1.2.

<sup>38</sup> R-41, Bondholder Act, Article 1.2.

<sup>39</sup> Mem., ¶ 45; R-41, Bondholder Act, Article 1.4.

<sup>40</sup> R-40, Act. No. 5 of the Ministerial Council of February 24, 2012.

<sup>41</sup> Mem., ¶ 43; C-Mem., ¶ 62; R-37, Invitation Memorandum.

Notes”) in respect of the interest accrued on each tendered GGB.<sup>42</sup> This restructuring was subject to the approval of the exchange of securities by the holders of the specified majority of eligible GGBs in the Bondholder Act.

70. The Consent Solicitation by which the approval of the exchange by the holders of GGBs was launched on February 24, 2012 and was due to expire at 9:00 p.m. C.E.T on March 8, 2012.<sup>43</sup>
71. The Consent Solicitation was launched through an Invitation Memorandum, addressed to “Bondholders or holders of Designated Securities,” which included “each beneficial owner of the Designated Securities holding Designated Securities, directly or indirectly, in an account in the name of a Direct Participant acting on such beneficial owner’s behalf.”<sup>44</sup> Only Participants were authorized to submit Participation Instructions in accordance with the Invitation Memorandum.<sup>45</sup>
72. During early March, Greek officials made public declarations to explain that the PSI offer, launched through the Consent Solicitation, was the only available offer to bondholders.<sup>46</sup> In a press release published on March 6, 2012, Greece’s Public Debt Management Agency stated:

*“The Republic’s representative noted that Greece’s economic programme does not contemplate the availability of funds to make payments to private sector creditors that decline to participate in PSI. Finally, the Republic’s representative noted that if PSI is not successfully completed, the official sector will not finance Greece’s economic programme and Greece will need to restructure its debt (including guaranteed bonds governed by Greek law) on different terms that will not include co-financing, the delivery of EFSF notes, GDP linked securities or the submission to English law.”<sup>47</sup>*

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<sup>42</sup> R-38, Press Release of February 24, 2012, Ministry of Finance of the Hellenic Republic. It is the same document as C-7.

<sup>43</sup> R-37, Invitation Memorandum.

<sup>44</sup> R-37, Invitation Memorandum, p. 2.

<sup>45</sup> R-37, Invitation Memorandum, p. 2.

<sup>46</sup> C-Mem., ¶ 64; C-137; C-147.

<sup>47</sup> C-149, Press Release dated March 6, 2012.

73. On March 7, 2012, Poštová banka’s Board of Directors voted not to accept the exchange proposed in the Consent Solicitation.<sup>48</sup> Poštová banka therefore instructed Clearstream to vote against the exchange.<sup>49</sup>
74. On March 9, 2012, the results of the Consent Solicitation were announced: Approximately 91.5% of the eligible GGBs had participated and approximately 94.23% of the participating GGBs had voted in favor of the exchange.<sup>50</sup>
75. Thus, on March 12, 2012, new securities were delivered.<sup>51</sup> At the same time, Poštová banka received the new securities in its account with Clearstream, and the GGBs it had previously held in that account were removed from its account pursuant to the Bondholder Act.
76. On April 2, 2012, Poštová banka sold on the secondary market the EFSF notes that it had received in the exchange. Poštová banka retains the new bonds and GDP-linked securities received in the exchange.

***Poštová Banka’s Accounting for the GGBs***

77. International accounting standards required Poštová banka to classify bonds or other investments securities for accounting purposes as “held for trading” (“HFT”), “held to maturity” (“HTM”) and “available for sale” (“AFS”). Bonds classified as HFT are acquired principally for resale in the near term; they are carried in a bank’s books at market prices and reflected in the bank’s profit and loss statement. HTM bonds reflect the intent of the owner to hold them until maturity; they are carried at amortized costs so that market fluctuations do not affect their value. Except in limited circumstances, if bonds classified as HMT are sold or reclassified, all other assets in the HMT portfolio would have to be reclassified as AFS and remain in the AFS portfolio for the next two

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<sup>48</sup> C-156, Poštová banka Board of Directors Meeting Minutes.

<sup>49</sup> C-206; C-207; C-208 and C-209.

<sup>50</sup> Mem., ¶ 46; R-42, Act 10 of the Ministerial Council of March 9, 2012, Article 1(h) (i); C-Mem. ¶ 66; C-8.

<sup>51</sup> Mem., ¶ 46; R-45.

years.<sup>52</sup> Bonds classified as AFS are carried at their market price and can be sold prior to their maturity.<sup>53</sup>

78. Initially, most of these interests in GGBs were classified in Poštová banka's AFS portfolio.<sup>54</sup> The vast majority of these interests were reclassified on April 1, 2010 from AFS to HTM.<sup>55</sup>
79. Under the international accounting rules applicable to debt and equity investments, GGBs could have also been classified in the HFT portfolio, where they are held for short-term trading. Poštová banka never classified any of its GGBs as HFT.<sup>56</sup>
80. On April 19, 2010, the Hellenic Republic made its last bond issuance prior to the Bondholder Act.<sup>57</sup>
81. During 2011, Poštová banka sold the entirety of its GGB interests in its AFS portfolio, comprising three of the five series of GGB interests it had bought (ISIN GR0124032666, ISIN GR0114023485 and ISIN GR0114020457). Later on, Poštová banka purchased GGB interests of the same series and in the same principal amounts, though for different prices.<sup>58</sup>

### ***The Agreements Concerning Poštová Banka's Interests in GGBs***

82. In October 2011, the National Bank of Slovakia ("NBS"), in its capacity as regulator of Slovak banks, requested a meeting with Poštová banka to discuss the "*development of the financial situation of Poštová Banka in 2011 as regards the Bank's exposure to Greek government bonds.*" One of the alternatives presented by Poštová banka was to

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<sup>52</sup> C-107, ¶ 9 and ¶ 32; Tarda Witness Statement, ¶ 10.

<sup>53</sup> Tarda Witness Statement, ¶ 9.

<sup>54</sup> C-Mem., ¶ 44.

<sup>55</sup> Mem., ¶¶ 69-70.

<sup>56</sup> C-Mem., ¶ 46; Tarda Witness Statement, ¶ 11.

<sup>57</sup> See Hearing, Tr., 28:22-29:3.

<sup>58</sup> Mem., ¶¶ 73-75.

transfer the risk from part of the GGBs portfolio to a shareholder of Poštová banka or to another person.<sup>59</sup>

83. On December 22, 2011, Istrokapital (Poštová banka's majority shareholder) and J&T Finance, a.s., ("J&T Finance"), a company incorporated under the laws of the Czech Republic, signed a Framework Share Purchase Agreement ("FSPA") specifying the terms for the acquisition by J&T Finance of Istrokapital's shares in Poštová banka. J&T Finance and Istrokapital agreed that, notwithstanding the sale of shares, the risk associated with the GGBs would be ultimately borne by Istrokapital.<sup>60</sup> Under the FSPA, Istrokapital remained responsible for ensuring Poštová banka's capital adequacy in case it were affected by a situation with the GGBs and Istrokapital assumed also the obligation to compensate J&T Finance if the return on the value of the GGBs did not reach the acquisition cost.<sup>61</sup>
84. On December 23, 2011, Poštová banka and J&T Finance entered into two assignment agreements, whereby Poštová banka assigned "Part of the Receivable" to J&T Finance (the "Assignment Agreements"). The "Receivable" was an amount of the principal and interest of GGBs that Poštová banka then held, to be determined according to Greece's level of payment of the interests in GGBs to Poštová banka, either on the effective due date of the GGBs or on any earlier date on which they were paid.<sup>62</sup>

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<sup>59</sup> R-146, p. 2.

<sup>60</sup> C-Mem., ¶ 78.

<sup>61</sup> C-Mem., ¶ 79; R-80, FSPA, Articles 6.3 and 6.4.

<sup>62</sup> The subject of the Assignment Agreements is the obligation of the Assignor to assign to the Assignee "Part of Receivable" and the obligation of the Assignee to pay the Assignor recompense for assigning Part of the Receivable. "Part of the Receivable" is defined in the corresponding agreement on the basis of payment received by Poštova banka on the due date of the receivable. Three events were envisioned by the parties: (a) If on the Due Date, the Hellenic Republic does not pay the Receivable even partially, then Part of the Receivable means the right to be paid part of the Principal in the amount of 50% together with the right to be paid part of the Interest in the amount of 50%; (b) If on the Due Date, the Hellenic Republic pays the Receivable partially, but the payment is lower than or equal to 50% of the value of the Receivable, then Part of the Receivable means the right to be paid the unpaid part of the Principal in the amount of 50% together with the right to be paid part of the Interest in the amount of 50%; (c) If, on the Due Date, the Hellenic Republic pays the Receivable partially and the payment is higher than 50% of the value of the Receivable, then Part of the Receivable means the right to be paid the entire unpaid part of the Principal and the unpaid Interest. *See* R-149 and R-150, Articles I and II.



85. In turn, J&T Finance would compensate Poštová banka for assigning such receivables in the amount of their nominal value. In addition, J&T Finance would deposit funds in Poštová banka under related deposit agreements dated December 23, 2011 (the “Deposit Agreements”). These funds were not to be used by J&T Finance during the term of the commitment (i.e, from the date of deposit until August 27, 2012), and would be paid to J&T Finance upon the expiry of the term.<sup>63</sup> On the day of expiry of the term of commitment, Poštová banka would pay the Deposit and interest thereon in the amount of 7.5% to J&T Finance.
86. On December 23, 2011, J&T Finance and Istrokapital entered into two assignment agreements pursuant to which J&T Finance would assign to Istrokapital Part of the Receivable previously assigned by Poštová banka to J&T Finance. Once they were assigned to J&T Finance, Istrokapital would in turn pay compensation in the amount of the nominal value of the Part of the Receivable that was assigned to it. Istrokapital’s obligation to recompense is set off by J&T’s obligation to credit Istrokapital, pursuant to the credit agreement previously entered into between these two parties. These agreements would become effective on the effective date of the Assignment Agreements.<sup>64</sup>
87. The Assignment Agreements were later amended by an agreement of the Parties in mid February 2012 in order to replace the definition of “Part of the Receivable.”<sup>65</sup> The amended assignment agreements increased the amounts of the “Part of the Receivable” to be paid pursuant to the Assignment Agreements. Poštová banka and J&T Finance entered into further deposit agreements on account of the amendments to the Assignment Agreements.
88. On March 8, 2012, Istrokapital, J&T Finance and Poštová banka entered into an “Agreement on a Deposit into Other Equity Accounts and on Settlement of Obligations” (the “Settlement Agreement”).<sup>66</sup> The Settlement Agreement provides that

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<sup>63</sup> See R-153, Article II, 1, b and Article III, 1, b; R-154, Article II, 1, b and Article III.

<sup>64</sup> See R-155, Article X.2 and R-156 Article X.2.

<sup>65</sup> See R-151, Article I, II and R-152, Article I, II.

<sup>66</sup> See R-171.

it cancels and extinguishes all obligations of Poštová banka and J&T Finance under the Assignment Agreements as of the entry into effect of the Settlement Agreement.<sup>67</sup> The four Deposit Agreements entered into between Poštová banka and J&T Finance were terminated early and Poštová banka would not reimburse J&T Finance the deposits and accessions. Also, J&T Finance assigned the right to receive repayment of the deposits made with Poštová banka to Istrokapital and Istrokapital would make an equity deposit corresponding to the repayment of the deposit to Poštová banka and set off this contribution against receivables assigned by J&T Finance.

89. The Settlement Agreement required three conditions to enter into effect: (i) the delivery of a notification by Clearstream stating that new issues of Greek bonds had been credited to Poštová banka's account; (ii) a decision by Poštová banka's Board of Directors, and (iii) prior consent of Poštová banka's Supervisory Board.<sup>68</sup>
90. On the same date, J&T Finance and Istrokapital also entered into a Settlement Agreement pursuant to which J&T Finance assigned the receivables it had against Poštová banka to Istrokapital, which in turn agreed to pay compensation to J&T Finance for the amounts deposited in Poštová banka.

#### **IV. OBJECTIONS TO JURISDICTION**

91. Respondent submitted the following jurisdictional objections:
  - i. The Tribunal lacks jurisdiction *ratione materiae* because (a) Poštová banka's interests in GGBs are not protected investments under the Slovakia-Greece BIT and the ICSID Convention; and (b) Istrokapital never made an investment protected under the Cyprus-Greece BIT or the ICSID Convention.<sup>69</sup>

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<sup>67</sup> R-171, Article I.

<sup>68</sup> R-171, Article V.2.

<sup>69</sup> Mem., ¶¶ 103-173; Rep., ¶¶ 152-281.

- ii. The Tribunal lacks jurisdiction *ratione temporis* and/or the claims should be dismissed on grounds of abuse of process.<sup>70</sup>
- iii. The Tribunal lacks jurisdiction *ratione personae* over Istrokapital because (a) Istrokapital is not a “National of Another Contracting State” under Article 25(1) of the ICSID Convention; and (b) Istrokapital is not a protected investor under the Cyprus-Greece BIT.<sup>71</sup>
- iv. The Tribunal lacks jurisdiction over Claimants’ umbrella clause claims and/or Claimants have failed to establish *prima facie* those claims.<sup>72</sup>

92. In their Memorial on Merits and Counter-Memorial on Jurisdiction, Claimants submitted both their responses to Respondent’s jurisdictional objections and their arguments on the merits. Since this decision will solely address the Tribunal’s jurisdiction, Claimants’ arguments on the merits will not be summarized below.

93. The Parties extensively discussed the jurisdictional objections in their written submissions and during the Hearing. Following is a summary of the position of the Parties with respect to each such jurisdictional objection.

## V. POSITION OF THE PARTIES

### 1. The Tribunal Lacks Jurisdiction *Ratione Materiae*

#### a. Respondent’s Position

##### *Poštová Banka Does Not Have a Protected Investment*

94. Poštová banka’s GGB interests are not protected investments under the Slovakia-Greece BIT and the ICSID Convention.

95. According to Respondent, Poštová banka’s interests in GGBs are not protected investments under Article 1(1) of the Slovakia-Greece BIT and do not qualify as

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<sup>70</sup> Mem., ¶¶ 174-194; Rep., ¶¶ 282-322.

<sup>71</sup> Mem., ¶¶ 195-231; Rep., ¶¶ 323-357.

<sup>72</sup> Mem., ¶¶ 232-239; Rep., ¶¶ 358-397.

investments under Article 25 of the ICSID Convention. Claimants conflate GGBs with interests in GGBs<sup>73</sup>: Poštová banka never held GGBs and it was never a Participant in the System; instead it acquired a stake in a pool of freely negotiable, fungible interests by Clearstream in secondary market transactions.<sup>74</sup> As a holder of GGB interests, Poštová banka was in contractual privity with Clearstream and not with the Hellenic Republic.<sup>75</sup>

96. Respondent holds that in order for the Tribunal to have jurisdiction *ratione materiae*, Claimants must establish the existence of an investment both under the Slovakia-Greece BIT and the ICSID Convention for, as stated in *Phoenix v. Czech Republic*, “ICSID’s tribunal’s jurisdiction *ratione materiae* ‘rests on the intersection of the two definitions.’”<sup>76</sup>
97. Greece considers that the term ‘investment’ in Article 25 (1) of the ICSID Convention has an objective meaning that cannot be expanded or derogated by agreement between the Parties.<sup>77</sup> A long line of ICSID cases, subject to minor variations, has established four cumulative criteria to determine whether an investment was made for the purposes of Article 25 (1) of the Convention<sup>78</sup>: “(i) a contribution in money or other assets, (ii) a significant duration, (iii) an element of risk, and (iv) a contribution to the economic development of the host State or an operation made in order to develop an economic

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<sup>73</sup> In its Reply on Jurisdiction, Greece points to the differences between GGBs and GGB interests: GGBs are issued by the Hellenic Republic and purchased by Participants in the System, where they are held. Participants are the only holders of GGBs and they are in contractual privity with the Hellenic Republic. The price of GGBs is determined solely at the time of the bond issuance. GGB interests, in turn, are created by Participants and purchased by Primary Dealers who sell them in the secondary market. Holders of GGB interests do not participate in the BoG system and they are in contractual privity with the International Clearing System accounts where interests are deposited. The price of GGB interests and its inherent risks may change fundamentally as they are traded. *See Rep.*, ¶ 188.

<sup>74</sup> *Mem.*, ¶¶ 103-104; *Rep.*, ¶¶ 187-190.

<sup>75</sup> *Rep.*, ¶ 188.

<sup>76</sup> *Mem.*, ¶ 110. Citing to *Phoenix Action, LTD. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of April 15, 2009 (“*Phoenix v. Czech Republic*”).

<sup>77</sup> *Mem.*, ¶ 111; *Rep.*, ¶ 173.

<sup>78</sup> *Rep.*, ¶ 178.

activity in the host State.”<sup>79</sup> The last requirement has been considered implicit in the other three elements by certain tribunals.<sup>80</sup>

98. Greece considers that contrary to Claimants’ assertions, debt instruments do not automatically meet these criteria.<sup>81</sup> This assessment shall be made on a case-by-case basis.<sup>82</sup> Further, Respondent states that in none of the cases cited by Claimants for the proposition that investment should be understood in a broad manner, the tribunals dispensed with the analysis of whether the alleged investment met certain criteria pertaining to the objective definition of investment.<sup>83</sup> Particularly, Respondent highlights that in *Fedax v. Venezuela*,<sup>84</sup> the tribunal stressed that the promissory notes at issue were not volatile capital and that the decisions in *Abaclat v. Argentina*<sup>85</sup> and *Ambiente Ufficio v. Argentina*<sup>86</sup> were accompanied by strong dissenting opinions.<sup>87</sup>
99. As to the definition of investment under Article 1(1) of the Slovakia-Greece BIT, Respondent argues that it has an inherent meaning that entails a contribution to the host State of a significant duration that involves an element of risk.<sup>88</sup> These objective requirements derive from the ordinary meaning of the term investment, the context of Article 1(1) of the Slovakia-Greece BIT, which includes Article 10 of the BIT providing for ICSID arbitration, the treaty’s object and purpose and the objective definition of the term under international law.<sup>89</sup> Citing to *Romak v. Uzbekistan*<sup>90</sup> and

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<sup>79</sup> Mem., ¶ 112.

<sup>80</sup> Mem., ¶ 112 and ¶ 120.

<sup>81</sup> Rep., ¶ 179.

<sup>82</sup> Rep., ¶ 181.

<sup>83</sup> Rep., ¶ 183.

<sup>84</sup> *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction of July 11, 1997 (“*Fedax v. Venezuela*”).

<sup>85</sup> *Abaclat & Ors. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of August 4, 2011 (“*Abaclat v. Argentina*”).

<sup>86</sup> *Ambiente Ufficio S.p.A & Ors. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility of February 8, 2013 (“*Ambiente Ufficio v. Argentina*”).

<sup>87</sup> Rep., ¶¶ 182-184.

<sup>88</sup> Mem., ¶ 113.

<sup>89</sup> Mem., ¶¶ 113-114.

<sup>90</sup> *Romak S.A. (Switzerland) v. Republic of Uzbekistan*, UNCITRAL (PCA Case No. AA280), Award of November 26, 2009 (“*Romak v. Uzbekistan*”).

*Alps Finance v. Slovak Republic*,<sup>91</sup> Respondent asserts that assets listed under Article 1 (1) of the Slovakia-Greece BIT cannot be deemed as investments if they do not satisfy the objective requirements mentioned above.<sup>92</sup> Further, Respondent distinguishes a bond from a loan in so far as loans imply contractual privity and are usually tied to a specific operation or to an underlying investment in the host State.<sup>93</sup>

100. Respondent asserts that Claimants attempt to invoke Article 31(4) of the VCLT to replace the ordinary meaning of the term “investment” is unavailing. Claimants bear the burden of proving that the State parties to the BIT ascribed a special meaning to the term investment that deviates from the ordinary meaning of the term in its context, as indicated by Article 31(1) of the VCLT, and they have failed to demonstrate it.<sup>94</sup> Respondent, in turn, has derived the requirements of the term “investment” from its ordinary meaning, interpreted in context and in light of the treaty’s object and purpose, which cannot be limited to the protection of foreign investments for it also includes the stimulus of foreign investment and the accompanying flow of capital in order to develop the Contracting States’ economies.<sup>95</sup> Under this interpretation, the equation of the term investment with “every kind of asset” is not consistent with the object and purpose of the Slovakia-Greece BIT.<sup>96</sup> Further, Claimants’ proposition that falling into one of the categories of assets of Article 1(1) of the Slovakia-Greece BIT suffices for an investment, would lead to unreasonable results and to the inclusion of one-off transactions as investments.<sup>97</sup>
101. Responding to arguments advanced by Claimants, Greece conveys that contrary to the Italy-Argentina BIT that was applied in the *Abaclat v. Argentina* and *Ambiente Ufficio v. Argentina* cases, neither the Slovakia-Greece BIT nor the Cyprus-Greece BIT

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<sup>91</sup> *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Award of March 5, 2011 (“*Alps Finance v. Slovak Republic*”).

<sup>92</sup> Mem., ¶¶ 115-117.

<sup>93</sup> Hearing, Tr., 561:17-562:1.

<sup>94</sup> Rep., ¶¶ 158-159.

<sup>95</sup> Rep., ¶¶ 160-167.

<sup>96</sup> Rep., ¶¶ 165-169.

<sup>97</sup> Rep., ¶ 162.

expressly include sovereign debt instruments in the definition of investment.<sup>98</sup> The Slovakia-Greece BIT and other Greek BITs that do expressly include bonds, only refer to corporate bonds, whose nature is distinct from that of sovereign bonds.<sup>99</sup> Thus, the fact that the Slovakia-Greece BIT and the Cyprus-Greece BIT include corporate bonds and not sovereign bonds indicates that the Parties did not intend to extend investment treaty protection to the latter kind of assets.<sup>100</sup>

102. Hence, Respondent posits that Poštová banka's purchases of GGB interests do not meet the necessary requirements to qualify as an investment under Article 25(1) of the ICSID Convention and Article 1(1) of the Slovakia-Greece BIT.
103. First, Respondent argues that Poštová banka's purchases of GGB interests did not result in a contribution to the Hellenic Republic's economy. Greece argues that contribution of an investment to the host State's economy is necessary for an investment to benefit from protection under the ICSID Convention and an investment treaty, as this is the *quid pro quo* of the investor's right to resort to international arbitration.<sup>101</sup> This proposition is supported in the preambles of the Slovakia-Greece BIT and the ICSID Convention, which evidence that the State parties aimed to encourage and protect international investment made for the purpose of contributing to the economy of the host State, in academic writings, as well as in the decisions in *Caratube v. Kazakhstan*,<sup>102</sup> *Phoenix v. Czech Republic* and *Nations Energy v. Panama*.<sup>103</sup>
104. Second, Respondent argues that Poštová banka's purchases of GGB interests were secondary market transactions which did not involve flow of funds to the Hellenic Republic. The only flow of funds to Greece occurred when the bonds were issued and

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<sup>98</sup> Hearing, Tr., 440:13-21.

<sup>99</sup> Hearing, Tr., 440:22-442:4.

<sup>100</sup> Hearing, Tr., 442:13-20.

<sup>101</sup> Mem., ¶ 120.

<sup>102</sup> *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award of June 5, 2012 ("*Caratube v. Kazakhstan*").

<sup>103</sup> *Nations Energy Inc., Electric Machinery Enterprises Inc., and Jaime Jurado v. Republic of Panama*, ICSID Case No. ARB/06/19, Award of November 24, 2010 ("*Nations Energy v. Panama*"); Mem., ¶¶ 120-124.

were paid by the Primary Dealers. Therefore, any payment made by Poštová banka did not involve a contribution to or a relevant economic activity within the Hellenic Republic.<sup>104</sup>

105. Third, Respondent argues that Poštová banka's purchases of GGBs were speculative commercial transactions that did not involve any investment risk or any term commitment of resources. According to Respondent, "Poštová Banka's GGB interests were freely negotiable, high risk, short-term financial instruments, which did not involve any investment risk or any term commitment of financial resources on the part of Poštová Banka."<sup>105</sup>
106. In fact, Respondent says, interests in GGBs do not imply a different risk from that of ordinary commercial transactions;<sup>106</sup> they did not involve any risk sharing of operational risk.<sup>107</sup> Greece points to *Romak v. Uzbekistan*, where the tribunal established that an investment risk was distinct from the pure commercial risk of non-performance of a contract, to establish that investment risk entails uncertainty as to returns and expenditures, even if all parties fulfill their contractual obligations.<sup>108</sup> The fact that default risk has a special quality due to the sovereign character of the issuer does not make this an investment risk.<sup>109</sup> Respondent also argues that sovereign bonds do not involve an element of risk sharing required for assets to be protected as an investment under Article 25(1) of the ICSID Convention.<sup>110</sup>
107. In addition, Greece holds that Poštová banka made no term commitment of financial resources. Certain duration of the investment is required for its protection under the Slovakia-Greece BIT.<sup>111</sup> Poštová banka acquired interests in GGBs that could be sold

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<sup>104</sup> Mem., ¶¶ 125-126.

<sup>105</sup> Rep., ¶ 220.

<sup>106</sup> Mem., ¶ 128.

<sup>107</sup> Rep., ¶¶ 222-223.

<sup>108</sup> Mem., ¶¶ 129-130.

<sup>109</sup> Rep., ¶ 221.

<sup>110</sup> Mem., ¶ 132.

<sup>111</sup> Mem., ¶ 134.



at any moment in the secondary market<sup>112</sup> so that by their very nature they do not meet the duration requirement.<sup>113</sup>

108. Respondent argues that the intended duration of the commitment should be considered.<sup>114</sup> Poštová banka acquired these interests with the intention of reselling them in the near future, but then reclassified them from its AFS to its HTM portfolio in order to achieve higher cash flows as a result of the 2010 bail-out by the EU and the IMF and to protect Poštová banka's balance sheet.<sup>115</sup> This sole reclassification, which was based on speculation and on a change of intent by the bank,<sup>116</sup> does not suffice to convert interests in GGBs into investments of a certain duration.<sup>117</sup> Respondent cites the decision in *KT Asia v. Kazakhstan*<sup>118</sup> where the tribunal found that acquisition of shares with the intention to sell them in the short term did not meet the duration requirement because it did not involve a long-term contribution of resources.<sup>119</sup>
109. Poštová banka's intention to exploit the price volatility of the GGB interests due to Greece's financial situation is further evidenced by its decision to sell and then repurchase GGB interests in the exact same series during 2011.<sup>120</sup> These transactions underscore the speculative nature of the operation and the lack of economic activity in the host country.<sup>121</sup>
110. Finally, Respondent claims that the territorial *nexus* required for investments to be protected under the Slovakia-Greece BIT and the ICSID Convention is absent in Poštova banka's GGB interests. The preamble and several provisions of the Slovakia-Greece BIT are premised on the making of investments in the territory of the host

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<sup>112</sup> Mem., ¶ 136.

<sup>113</sup> Mem., ¶ 140.

<sup>114</sup> Rep., ¶¶ 225-227.

<sup>115</sup> Rep., ¶ 233.

<sup>116</sup> Rep., ¶ 229.

<sup>117</sup> Mem., ¶¶ 137-138; Hearing, Tr., 421:18-19.

<sup>118</sup> *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award of October 17, 2013 ("*KT Asia v. Kazakhstan*").

<sup>119</sup> Mem., ¶ 139.

<sup>120</sup> Mem., ¶¶ 141-143; Rep., ¶¶ 236-239.

<sup>121</sup> Mem., ¶ 144.

State.<sup>122</sup> Therefore, this BIT does not cover investments made outside the territory of the Hellenic Republic. Similarly, the Hellenic Republic's consent to ICSID arbitration is limited to investments made in its territory. Notwithstanding an express limitation in Article 10 of the BIT, this provision is limited to the same subject matter as the rest of the treaty.<sup>123</sup>

111. In this same sense, the object and purpose of the ICSID Convention signals that for investments to be within the scope of Article 25(1), they must be made in the territory of the respondent State.<sup>124</sup>
112. Secondary market purchases of interests in sovereign bonds lack territorial connection with the host State. This transaction did not involve inflow of funds into Greece and were not linked to any business undertaking in the Hellenic Republic.<sup>125</sup> Poštova banka's interests were held in accounts in Clearstream, maintained in Luxembourg and governed by Luxembourg law.<sup>126</sup>
113. Moreover, Claimants have not established that the purchase of GGB interests in the secondary market involved a flow of funds into the Hellenic Republic, because "*the sums paid to the Hellenic Republic by the underwriters cannot possibly be characterized as 'advance payments' of the purchase price paid by Poštová Banka in the course of the GGB interests' ordinary trading, long after completion of the bond issuance and distribution process.*"<sup>127</sup> These purchases could not have benefited Greece since, at the time they were made, Respondent had no primary market for GGBs.<sup>128</sup> Holders of GGBs are not parties to any 'loans' in the terms of Article 1(1)(c) of the Slovakia-Greece BIT for "[i]f the subscription of GGBs themselves could be compared with a 'loan,' the subscription agreements in relation to the bond issuances would have

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<sup>122</sup> Mem., ¶¶ 146-147.

<sup>123</sup> Mem., ¶ 148.

<sup>124</sup> Mem., ¶¶ 149-150.

<sup>125</sup> Mem., ¶¶ 152-153.

<sup>126</sup> Mem., ¶ 154.

<sup>127</sup> Rep., ¶ 246.

<sup>128</sup> Rep., ¶ 247.

*been concluded by the Primary Dealers, not Poštová Banka.*”<sup>129</sup> The *situs* of interests in immobilized securities is the place where the clearer is established, thus Poštová banka only had a right to payment against Clearstream, and these claims were situated in Luxembourg and not in Greece.<sup>130</sup>

114. In its Reply on Jurisdiction, Greece responded to assertions by Claimants concerning the nature of their investment. In the first place, Greece stated that the Invitation Memorandum cannot change the fact that only Participants in the System are considered the legal owners of the GGBs; only Participants were allowed to submit Participation Instructions.<sup>131</sup>
115. In addition, Respondent contests the application of the “unity of investment” theory to establish jurisdiction over transactions conducted in the secondary market for the purchase of GGB interests. Poštová banka’s purchases were not ancillary to or an implementation of an overall investment made by Claimants in Greece.<sup>132</sup> Instead, Claimants “*seek to piggy back on the alleged original contributions made by unrelated third parties in the original bond issuance process.*”<sup>133</sup> Poštová banka’s purchases did not form an integral part of the original bond issuances, because the bank purchased interests in the secondary market long after the distribution process was complete.
116. Greece distinguishes the situation of claimants in *Abaclat v. Argentina* and *Ambiente Ufficio v. Argentina*, where the tribunals found that the purchase of security entitlements constitutes a protected investment because these purchases resulted indirectly in economic benefit or flow of funds to the State.<sup>134</sup> The Hellenic Republic did not receive any of the purchase price paid by Poštová banka for its GGB interests, either directly or as an “advance payment.” Based on Professor Hubbard’s report, Respondent assert that from an economic perspective, the interests acquired by Poštová

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<sup>129</sup> Rep., ¶ 249.

<sup>130</sup> Rep., ¶¶ 250-252.

<sup>131</sup> Rep., ¶ 187.

<sup>132</sup> Rep., ¶¶ 192-201.

<sup>133</sup> Rep., ¶ 201; *See* Rep., ¶¶ 192-201.

<sup>134</sup> Rep., ¶ 205.

banka, long after the end of the distribution period, were fundamentally different from the instruments involved in the distribution process.<sup>135</sup>

117. Respondent then suggests that, in any case, Claimants' purchases of GGB interests are too remote from the GGBs issuance process to be considered to give rise to a dispute arising directly out of an investment. Claimants' purchases of the interests in GGBs were structured in a way that had no effect on the price for the issuer.<sup>136</sup> At the time of purchase by Claimants, Greece no longer had access to the primary market; transfers in the secondary market had no effect on the primary market since the pricing of GGBs was dependent on potential bail-outs to Greece.<sup>137</sup> This remote and disconnected secondary market did not provide any benefit to the Hellenic Republic.<sup>138</sup> Based on *Enron v. Argentina*<sup>139</sup> and *PSEG v. Turkey*,<sup>140</sup> Respondent argues that even if interests in GGBs and GGBs were not to be considered separate financial instruments, claims based on Poštová banka's trades in the secondary market are beyond the cut-off point at which claims are permissible, because they are too distant from the underlying investment.<sup>141</sup>
118. In its Reply on Jurisdiction and during the Hearing, Respondent asserted that Poštová banka's behavior involved a form of regulatory arbitrage, "(...) namely, the purchase of high yield GGB interests (and yet with a disproportionate risk-weighting) with a view to selling them when their yields converged with other financial instruments (i.e., when the price of the GGB interests increased)."<sup>142</sup>

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<sup>135</sup> Rep., ¶¶ 207-208.

<sup>136</sup> Rep., ¶ 215.

<sup>137</sup> Rep., ¶ 214, ¶¶ 216-219.

<sup>138</sup> Hearing, Tr., 452:19-22.

<sup>139</sup> *Enron Creditors Recovery Corporation (formerly Enron Corporation) & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of May 22, 2007 ("*Enron v. Argentina*").

<sup>140</sup> *PSEG Global Inc. & Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of January 19, 2007 ("*PSEG v. Turkey*").

<sup>141</sup> Hearing, Tr., 453:21-454:10.

<sup>142</sup> Rep., ¶ 82; See Rep., ¶¶ 79-86; Hubbard Report, ¶ 27 and ¶ 42.

### *Istrokapital Does Not Have a Protected Investment*

119. Respondent also argues that Istrokapital never made a protected investment under the Cyprus-Greece BIT or the ICSID Convention.
120. Respondent argues that as a shareholder of Poštová banka, Istrokapital does not have any legal right to the company's assets and thus may not base the Tribunal's jurisdiction on the GGB interests that belong to Poštová banka.<sup>143</sup> In this regard, Respondent notes that a company is a legal entity different from its shareholders and that the property of the former is distinct from that of the latter.<sup>144</sup>
121. Citing to *GAMI v. Mexico*,<sup>145</sup> *BG Group v. Argentina*,<sup>146</sup> *El Paso v. Argentina*<sup>147</sup> and *ST-AD v. Bulgaria*,<sup>148</sup> Respondent argues that a shareholder has no enforceable right in arbitration over the assets of the company in which it holds shares, but only over its shares in the company.<sup>149</sup>
122. Consequently, in order to enforce its claim, Istrokapital would have to prove that its shareholding in Poštová banka is protected under the Cyprus-Greece BIT and that the measures allegedly taken against the Greek Bonds in contravention of the Cyprus-Greece BIT impaired the value of Istrokapital's shares.<sup>150</sup> According to Respondent, Istrokapital cannot claim that its shareholding in a Slovak company, such as Poštová banka, qualifies as a protected investment under the Cyprus-Greece BIT, as it has no property right or activity whatsoever in Greek territory.<sup>151</sup>

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<sup>143</sup> Mem., ¶ 159.

<sup>144</sup> Mem., ¶ 160.

<sup>145</sup> *GAMI Investments, Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award of November 15, 2004 (“*GAMI v. Mexico*”).

<sup>146</sup> *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award of December 24, 2007 (“*BG Group v. Argentina*”).

<sup>147</sup> *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award of October 31, 2011 (“*El Paso v. Argentina*”).

<sup>148</sup> *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL (PCA Case No. 2011-06), Award on Jurisdiction of July 18, 2013 (“*ST-AD v. Bulgaria*”).

<sup>149</sup> Mem., ¶¶ 161-164.

<sup>150</sup> Mem., ¶ 165.

<sup>151</sup> Mem., ¶ 166.

123. In its Reply on Jurisdiction, Respondent notes that the cases invoked by Claimants actually support Respondent’s contention that a tribunal may only exercise jurisdiction on the basis of claimants’ shareholding in a local company – even if such shareholding is indirect – but not on account of the local company’s assets.<sup>152</sup>
124. Moreover, in explaining the differences between the circumstances addressed in the *Siemens v. Argentina*<sup>153</sup> and *Azurix v. Argentina*<sup>154</sup> cases cited by Claimants, Respondent indicates that, in order to claim protection of an investment under the relevant treaty, the claimant must show an active involvement in the act of investing.<sup>155</sup> Since, by Claimants’ own admission, Istrokapital had no part in the acquisition and management of Poštová banka’s GGB interests, it cannot claim to have indirectly invested in the bonds.<sup>156</sup>
125. Finally, Respondent stresses that, contrary to Claimants’ contention, there is a fundamental difference between an indirect shareholding in a company and the assets of such company. In this regard, Respondent explains that, while the shareholding confers rights to participation in certain decisions affecting the company, it is the company itself that owns and manages its assets.<sup>157</sup> Therefore, investment treaty protection is generally conferred to the claimant’s participation in a domestic company for derivative or reflective losses in the value of its shares, but not for losses to the domestic company and its assets in themselves.<sup>158</sup>
126. In regard to the Tribunal’s jurisdiction over Istrokapital, Respondent further refers to its arguments that Poštová banka’s GGB interests are not protected under the Cyprus-Greece BIT or the ICSID Convention.<sup>159</sup> On this subject, Respondent stresses that (i)

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<sup>152</sup> Rep., ¶¶ 254-260.

<sup>153</sup> *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of August 3, 2004 (“*Siemens v. Argentina*”).

<sup>154</sup> *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of December 8, 2003 (“*Azurix v. Argentina*”).

<sup>155</sup> Rep., ¶¶ 270-276.

<sup>156</sup> Rep., ¶¶ 273-277.

<sup>157</sup> Rep., ¶ 261.

<sup>158</sup> Rep., ¶ 261.

<sup>159</sup> Mem., ¶ 167; Rep., ¶ 278.

the GGB interests do not display the elements of contribution to the host State, risk sharing and duration that belong to the “inherent” meaning of the term “investment” in the context of investment treaty arbitration,<sup>160</sup> and (ii) that the GGB interests cannot be considered an investment made “in the territory” of Greece as required by the Cyprus-Greece BIT.<sup>161</sup>

## **b. Claimants’ Position**

### ***Poštová Banka Has a Protected Investment***

127. Claimants assert that the Tribunal has jurisdiction *ratione materiae* under the broad definitions of investment in the Slovakia-Greece BIT and in the Cyprus-Greece BIT because GGBs are assets comprising a loan to the Greek Government, a claim to money, and the right to performance under a contract having financial value under Article 1.1(c) of the Slovakia-Greece BIT and are assets, comprising monetary claims and contractual claims with economic value under Article 1.1(c) of the Cyprus-Greece BIT.<sup>162</sup> According to Claimants, this language “*clearly encompasses a sovereign bond, and the rights to that bond that were taken away by Greece’s forced surrender of our client’s bonds. Certainly a bond is a monetary claim. It’s a monetary claim to coupon payments and to payment of the principal on maturity.*”<sup>163</sup> Claimants submit that, contrary to Respondent’s suggestion, there is no relevant difference between a bond and a loan.<sup>164</sup>
128. Claimants consider that Greece’s interpretation of the term “investment” is inconsistent with the language and the object and purpose of the BITs. Article 31 of the Vienna Convention on the Law of the Treaties governs the Tribunal’s interpretation of the BITs<sup>165</sup> and Greece overlooks that Article 31(4) VCLT provides that a special meaning shall be given to a term if it is established that the parties so intended. Thus, instead of

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<sup>160</sup> Mem., ¶¶ 168-170; Rep., ¶¶ 280-281.

<sup>161</sup> Mem., ¶¶ 171-173.

<sup>162</sup> C-Mem., ¶ 88.

<sup>163</sup> Hearing, Tr., 481:3-8.

<sup>164</sup> Hearing, Tr., 562:7-563:1.

<sup>165</sup> C-Mem., ¶ 90; Hearing, Tr., 69:21-70:1.

resorting to a restrictive dictionary definition,<sup>166</sup> Respondent should have consulted the definition of ‘investment’ in each treaty.<sup>167</sup>

129. In fact, “[d]efinitional sections in treaties obviously may provide express elaborations of particular meanings that Parties intended to give certain terms.”<sup>168</sup> Where a treaty defines a given term, this definition overrides any other meaning that could be given to such term.<sup>169</sup>
130. The definitions of “investment” in the treaties do not contain the limitations advanced by Greece. In both cases, the State parties defined the term carefully, providing a broad general definition as every kind of asset and a list of examples of what would constitute an investment for the purpose of the treaty. The cap of the definition includes language that shows that investment means every kind of asset without limitations, and there was no need to define sovereign bonds specifically because they are included in monetary and contractual claims.<sup>170</sup> Claimants rebut the notion proposed by Greece of some concept of “investment” under international law that is different from treaty definitions. If such a concept were to exist, “it would no doubt account for the fact that most contemporary treaties refer in broad terms to every kind of asset, including those to which Greece is a party.”<sup>171</sup>
131. These general definitions are consistent with the object and purpose of the treaties, as elucidated in their preambles,<sup>172</sup> specifically in the reference to the creation of favorable conditions for investments of investors.<sup>173</sup> In any case, a treaty’s object and purpose cannot be used to read out an express definition in its text.<sup>174</sup> Claimants argue that “[i]n so doing, the parties to each BIT clearly intended to give a special meaning

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<sup>166</sup> C-Mem., ¶ 95.

<sup>167</sup> C-Mem., ¶ 91.

<sup>168</sup> Hearing, Tr., 62:14-16.

<sup>169</sup> Hearing, Tr., 70:16-18.

<sup>170</sup> Hearing, Tr., 484:18-485:13.

<sup>171</sup> Hearing, Tr., 75:17-20.

<sup>172</sup> C-Mem., ¶ 93.

<sup>173</sup> Hearing, Tr., 72:11-73:4.

<sup>174</sup> Hearing, Tr., 72:11-19.



to the term ‘investment’ and to ensure that, at a minimum, any kind of asset that they enumerated would fall within that meaning.’<sup>175</sup>

132. GGBs fall squarely in some of these categories and Respondent fails to ascribe ordinary meaning to those categories that would exclude them from the BITs’ scope.<sup>176</sup> Greece cannot get around the fact that it explicitly agreed to include financial instruments in both BITs.<sup>177</sup>
133. In addition, Claimants argue that Greece’s attempt to import definitions from *Romak v. Uzbekistan* and *Alps Finance v. Slovakia* is inapposite.<sup>178</sup>
134. In any case, Claimants assert that the GGB interests purchased on the secondary market constitute protected “investments.” The distinction drawn by Respondent between GGBs and interests in GGBs and the fact that Poštova banka was not a registered Participant in the System make no difference for jurisdictional purposes.<sup>179</sup> This distinction also ignores recent decisions by tribunals in *Abaclat v. Argentina* and *Ambiente Ufficio v. Argentina*.
135. Purchases by investors like Poštová banka imply a contribution to the Hellenic Republic because the flow of funds to Greece depends entirely on the sale of GGBs on the secondary market. Claimants state that the issuance of GGBs was necessarily premised on the existence of a robust secondary market and that Greece knew and understood this and therefore required the Primary Dealers to make a market in its bonds.<sup>180</sup> Claimants base this proposition on several sections of the documents underlying issuance of the bonds.<sup>181</sup>
136. During the Hearing, Claimants responded to the distinction raised by Respondent between the issuance of the bonds and their purchase in the secondary market in order

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<sup>175</sup> C-Mem., ¶ 92.

<sup>176</sup> C-Mem., ¶ 92.

<sup>177</sup> Hearing, Tr., 61:15-18.

<sup>178</sup> C-Mem., ¶ 96.

<sup>179</sup> C-Mem., ¶¶ 98-99.

<sup>180</sup> C-Mem., ¶ 101.

<sup>181</sup> C-Mem., ¶ 102.

to question the existence of an economic contribution. Claimants stated that foreign portfolio investment provides access to funds that the State did not have and that the increased liquidity generated by secondary market GGBs facilitated Greece's debt financing.<sup>182</sup> Furthermore, Greece treated the relevant investors in GGBs as if they were the first purchaser in the secondary market.<sup>183</sup> In fact, as further evidence of a unified market between the primary and secondary markets, Claimants stated that holders in the secondary market were the ones that voted the Consent Solicitation.<sup>184</sup>

137. In addition, Claimants hold that the tribunals in *Abaclat v. Argentina and Ambiente Ufficio v. Argentina* found that there is no distinction between government bonds and security entitlements held in a book-and-entry form in a universal depository such as Clearstream, since they are part and parcel of the same investment operation.<sup>185</sup> These tribunals also rejected attempts to separate the primary and secondary markets and found that investors in the secondary market had provided a contribution to the State.<sup>186</sup> Referring to the “unity of an investment operation” as explained by the *CSOB v. Slovakia* tribunal, Claimants conclude that: “[t]he bonds and the interests in the bonds are part of one single act of investment in which Poštová Bank and Greece participated.”<sup>187</sup>
138. Moreover, Claimants submit that Greece's conduct during the time of the restructuring, whereby it treated Poštová banka as a bondholder and included holders of Designated Securities in the Invitation Memorandum to participate in the exchange, cannot be squared with its current litigation position. These facts were significant for the *Abaclat v. Argentina* tribunal, which concluded that a sovereign that included secondary market

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<sup>182</sup> Hearing, Tr., 92:11-93:2.

<sup>183</sup> Hearing, Tr., 93:3-14.

<sup>184</sup> Hearing, Tr., 96:17-97:8.

<sup>185</sup> C-Mem., ¶¶ 103-104.

<sup>186</sup> Hearing, Tr., 98:11-99:10.

<sup>187</sup> C-Mem., ¶ 106; *Československa Obchodní Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction of May 24, 1999 (“*CSOB v. Slovakia*”).

purchasers in the exchange offer admitted their importance in the bond issuance and distribution process.<sup>188</sup>

139. For these reasons, Claimants assert that secondary market purchases of GGBs constitute protected investments.
140. As to the territorial nexus, Claimants first signal that neither the Slovakia-Greece BIT nor the Cyprus-Greece BIT require the funds to be linked to a specific project in Greece and that tribunals, such as the tribunal in *Ambiente Ufficio v. Argentina*, have refused to insert such a requirement into treaties.<sup>189</sup> For territoriality purposes, it is sufficient that funds were put at the disposal of Greece to foster its economic development.<sup>190</sup>
141. In this regard, Claimants explain that the GGBs are located in the Bank of Greece<sup>191</sup> and that their issuance and their sale in the secondary market constitute a single investment in Greece.<sup>192</sup> Territorial nexus should be assessed differently in events of financial investments, for, as established in *Fedax v. Venezuela* and in *CSOB v. Slovakia*, in such events the funds are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere.<sup>193</sup> Hence, in this case, the relevant question is whether Poštová banka ultimately made funds available to Greece to support its economic development. It is clear that Claimants' investment involved a flow of funds into Greece and thus the territorial *nexus* is satisfied.<sup>194</sup>
142. Since the bond issuance process incorporated both the primary and secondary markets as a means to provide Greece with funds for government spending, and since the GGBs would not have been successfully sold on the primary market without the secondary market, the territorial *nexus* is satisfied.<sup>195</sup> This conclusion was also reached by the

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<sup>188</sup> C-Mem., ¶¶ 107-109.

<sup>189</sup> C-Mem., ¶ 112.

<sup>190</sup> C-Mem., ¶ 112.

<sup>191</sup> Hearing, Tr., 111:7-17.

<sup>192</sup> C-Mem., ¶ 113.

<sup>193</sup> C-Mem., ¶¶ 114-115.

<sup>194</sup> Hearing, Tr., 110:22-111:6.

<sup>195</sup> C-Mem., ¶ 116.

*Abaclat v. Argentina* and *Ambiente Ufficio v. Argentina* tribunals.<sup>196</sup> The existence of a minor time interval between the flow of funds from the bond issuance to the sale of bonds in the secondary market and the fact that Clearstream accounts were located in Luxembourg and governed by Luxembourg law do not bear consequences on this territoriality *nexus*.<sup>197</sup>

143. In addition, since GGBs are “investments” within the meaning of the BITs, they qualify as investments under Article 25 (1) of the ICSID Convention. According to Claimants, the ICSID Convention does not pose a bar due to a more restrictive definition of investment than in each BIT. Greece’s consent to ICSID jurisdiction in each BIT creates a strong presumption that the parties considered the bonds an investment under both treaties to be an investment under the Convention.<sup>198</sup> Furthermore, since the drafters of the Convention chose not to define “investment,” “*the clear trend is for tribunals to hold that assets that fall within the definition of ‘investment’ under an applicable bilateral investment treaty also constitute an ‘investment’ under the ICSID Convention absent compelling reasons to disregard the Parties’ mutually agreed definition.*”<sup>199</sup>
144. Nonetheless, Claimants submit that even under the “double-barreled test,” GGBs qualify as a protected investment within the context of a broad “objective” definition of the term investment under Article 25 of the ICSID Convention.<sup>200</sup> The purchase of sovereign debt is not a marginal economic activity that can be compared to transactions that have been determined to fall outside of the ICSID Convention.<sup>201</sup> In this sense and referring to the decisions in *Fedax v. Venezuela*, *Abaclat v. Argentina* and *Ambiente Ufficio v. Argentina*, Claimants state that every ICSID tribunal that has considered the

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<sup>196</sup> C-Mem., ¶ 116.

<sup>197</sup> C-Mem., ¶¶ 117-118.

<sup>198</sup> C-Mem., ¶ 120.

<sup>199</sup> C-Mem., ¶ 122.

<sup>200</sup> C-Mem., ¶ 124.

<sup>201</sup> C-Mem., ¶ 124.

issue has held that government debt instruments purchased in the secondary market constitute an “investment” under the ICSID Convention.<sup>202</sup>

145. Claimants rebut Greece’s reference to the set of cumulative criteria to determine whether an investment was made under Article 25 of the ICSID Convention – the “so-called ‘*Salini* criteria.’” Neither the BITs nor the ICSID Convention contain these criteria, and Greece derives their authority from cases that post-date these treaties and therefore cannot reflect the intention of the States that are parties to those treaties.<sup>203</sup> Claimants refer to writings by scholars and decisions of prior tribunals that have criticized this position and viewed it as contrary to the ICSID Convention. Particularly, Claimants signal to the decisions in *Biwater Gauff v. Tanzania*,<sup>204</sup> where the tribunal deemed that this approach might exclude transactions that have been internationally recognized as protected investments, and to the decision in *Abaclat v. Argentina* where the tribunal considered that imposing limitations that the parties did not create would be contrary to the Convention’s aim of encouraging investments.<sup>205</sup>
146. In any event, GGBs satisfy the criteria of the *Salini* approach. First, Poštová banka made a contribution of approximately €500 million to purchase bonds and Greece made regular payments for these bonds.<sup>206</sup> Second, Claimants bore a risk beyond an ordinary commercial risk, evidenced by the existence of a dispute and by the possibility of the host State’s intervention in relation to the sovereign bonds.<sup>207</sup> The need for “operational risk sharing” to establish the existence of an investment is not inserted in the language of the BITs.<sup>208</sup> Third, Poštová banka made a contribution to the Greek economy because through the issuance of bonds the host country raised funds for government spending.<sup>209</sup> Claimants further explained that no distinction could be

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<sup>202</sup> C-Mem., ¶ 125.

<sup>203</sup> Hearing, Tr., 83:10-84:5.

<sup>204</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of July 24, 2008 (“*Biwater Gauff v. Tanzania*”).

<sup>205</sup> C-Mem., ¶ 127.

<sup>206</sup> C-Mem., ¶ 129.

<sup>207</sup> C-Mem., ¶ 130.

<sup>208</sup> Hearing, Tr., 102:15-20.

<sup>209</sup> C-Mem., ¶ 131.

drawn between the economic contribution generated by a general funding sovereign bond and a bond issued for a specific project.<sup>210</sup>

147. Lastly, GGBs are of sufficient duration. This element is determined by the relevant duration period in the term specified in the contract, as established in *Deutsche Bank v. Sri Lanka*,<sup>211</sup> and not by how long Claimants held the bonds.<sup>212</sup> Claimants dispute Respondent's assertions that Poštová banka bought the bonds with the intent of reselling them, by stating that a party's intent is irrelevant in regards to the duration requirement. In any case, Poštová banka did not speculate in GGBs, for by holding them in its HTM portfolio, its long-term commitment to the bonds is evidenced. Moreover, the 2011 tradings do not undermine the status of GGBs as investments, since resale of bonds does not negate the benefit Greece received from the credit, regardless of who the investor was at a given point in time.<sup>213</sup> Claimants' investments remained despite the 2011 tradings and they would remain until maturity.<sup>214</sup> These transactions were motivated by an effort to address the bank's losses due to the declining value of GGBs.<sup>215</sup>
148. During the Hearing, Claimants rebutted Respondent's arguments that their acquisition of GGBs was a short-term strategy and a bet on the volatility of bonds.<sup>216</sup> Poštová banka bought the bonds in order to obtain the interest rates from the time of purchase to the time of maturity.<sup>217</sup> GGBs were not placed in the HFT portfolio, used for short-term trading. Placing the bonds in the AFS portfolio is consistent with the strategy of holding them until maturity, but simply gives the bank more flexibility.<sup>218</sup> Once Poštová banka purchased all of the bonds it intended to purchase, it allocated 80% of

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<sup>210</sup> Hearing, Tr., 505:16-506:16.

<sup>211</sup> *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award of October 31, 2012 ("*Deutsche Bank v. Sri Lanka*"); Hearing, Tr., 109:3-8.

<sup>212</sup> C-Mem., ¶ 132.

<sup>213</sup> C-Mem., ¶¶ 134-135.

<sup>214</sup> Hearing, Tr., 101:2-5.

<sup>215</sup> C-Mem., ¶ 136.

<sup>216</sup> Hearing, Tr., 51:20-52:2.

<sup>217</sup> Hearing, Tr., 52:2-4.

<sup>218</sup> Hearing, Tr., 53:8-21.

them in the HTM portfolio and left 18% of the bonds in the AFS portfolio.<sup>219</sup> Bonds in the HTM portfolio were not sold between the first months of 2010 and their forcible exchange.<sup>220</sup> The 2011 tradings are not evidence of speculative intent, but means to deal with the bank's capital adequacy.<sup>221</sup>

### ***Istrokapital Has a Protected Investment***

149. Claimants argue that Istrokapital's indirect investment in the Greek Bonds is no barrier to its claim.
150. Istrokapital claims that, as a shareholder in Poštová banka, it made an indirect investment in the assets of Poštová banka<sup>222</sup> – the GGBs – and that such investment is protected under Article 1(1)(c) of the Cyprus-Greece BIT.<sup>223</sup> More precisely, Claimants hold that “*Istrokapital indirectly invested in the Greek Bonds through its Slovak subsidiary Poštová Bank.*”<sup>224</sup> According to Claimants, such investment schemes have been recognized by arbitral tribunals which have “*consistently assumed jurisdiction over claims regarding shareholders' indirect investments through intermediary companies in third-party States.*”<sup>225</sup>
151. Claimants argue that shareholders may assert treaty claims independently of the corporations in which they hold shares, even if there are intermediary companies separating the shareholder claimants from their investment in the respondent State.<sup>226</sup> Moreover, Claimants state that such intermediary companies may be incorporated in a State different from the Contracting States parties to the BIT in question.<sup>227</sup>
152. Finally, Claimants refute Respondent's contention that there is a difference between an indirect investment in shares and an indirect investment in assets and argue that what

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<sup>219</sup> Hearing, Tr., 105:4-18.

<sup>220</sup> Hearing, Tr., 106:17-107:1.

<sup>221</sup> Hearing, Tr., 107:21-108:18.

<sup>222</sup> Hearing, Tr., 120:11-12.

<sup>223</sup> Request, ¶ 20; C-Mem., ¶ 88 and ¶ 137.

<sup>224</sup> C-Mem., ¶ 141.

<sup>225</sup> C-Mem., ¶ 141.

<sup>226</sup> C-Mem., ¶ 139.

<sup>227</sup> C-Mem., ¶ 140.

matters is that the BIT's definition encompasses indirect economic interests as the Cyprus-Greece BIT does.<sup>228</sup> According to Claimants, the tribunals in *BG Group v. Argentina* and *El Paso v. Argentina*, among others, recognized that the claimant's shareholding in the local company entitled it to bring claims before the tribunal based on the host State's treatment of such company's contracts and assets.<sup>229</sup> Thus, there is no reason why Istrokapital should be denied protection under the Cyprus-Greece BIT of its "indirect investment in the Greek Bonds."<sup>230</sup>

## **2. The Tribunal Lacks Jurisdiction *Ratione Temporis* and/or the Claims Should Be Dismissed on the Grounds of Abuse of Process**

### **a. Respondent's Position**

153. Respondent claims that the Tribunal lacks jurisdiction *ratione temporis* over claims based on the GGB interests held in Poštová banka's HTM portfolio because Claimants did not possess a protected investment at the time when the measures that allegedly violated the relevant BITs were taken.<sup>231</sup> According to Respondent, Poštová banka had transferred all risk associated with these interests and only assumed the losses claimed in the present arbitration *ex post facto*.<sup>232</sup> Such *post hoc* assumption of losses also constitutes an abuse of process as it was made with the view of claiming them in this arbitration.<sup>233</sup>
154. Respondent argues that in order to establish jurisdiction *ratione temporis*, a claimant must show that it held a protected investment under the ICSID Convention and the relevant BIT at the time when the alleged treaty violation occurred.<sup>234</sup> In this vein, Respondent maintains that risk is an inherent element of a protected investment under both the ICSID Convention and the two relevant BITs and, citing to *KT Asia v.*

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<sup>228</sup> C-Mem., ¶ 143.

<sup>229</sup> C-Mem., ¶ 144.

<sup>230</sup> See C-Mem., ¶ 138.

<sup>231</sup> Rep., ¶ 286.

<sup>232</sup> Rep., ¶ 286.

<sup>233</sup> Mem., ¶ 176.

<sup>234</sup> Mem., ¶ 181; Rep., ¶¶ 294-298.



*Kazakhstan*, contends that such element is missing when a claimant is somehow shielded from any risk.<sup>235</sup>

155. According to Respondent, Poštová banka entered into a series of agreements with J&T Finance in response to the pressure from its regulator (the NBS) to limit its exposure to GGBs in order to protect capital adequacy.<sup>236</sup> Respondent argues that this purpose was achieved through the Assignment Agreements, which fully shielded Poštová banka from any risk associated with the GGB interests in its HTM portfolio, including that of debt exchange.<sup>237</sup> Thus, as of December 23, 2011, Poštová banka's investment in the GGB interests held in its HTM portfolio lost the element of risk inherent to the definition of a protected investment.<sup>238</sup>
156. Under the Assignment Agreements, Poštová banka was protected from any losses on the GGBs so that it would not have been entitled to claim any damages in arbitration.<sup>239</sup> Respondent asserts that Poštová banka only assumed the losses purportedly derived from the Bondholder Act, the Consent Solicitation and the implementation of the debt exchange after they had occurred.<sup>240</sup> Indeed, Respondent claims that although backdated to March 8, 2012, the Settlement Agreement that intended to cancel the Assignment Agreements only became effective on March 13, 2012, i.e., after the aforementioned measures had come into effect.<sup>241</sup> In this regard, Respondent explains that a notification from Clearstream informing that the new securities had been credited to Poštová banka's account was set in the Settlement Agreement as a condition for the cancellation of the Assignment Agreements and such notification was made on March 13, 2012.<sup>242</sup>
157. According to Respondent, the fact that the Settlement Agreement was conveniently backdated to exactly the day before the results of the Consent Solicitation were

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<sup>235</sup> Mem., ¶ 178.

<sup>236</sup> Mem., ¶ 80; Rep., ¶ 282; Hearing, Tr., 31:1-9.

<sup>237</sup> Mem., ¶¶ 179-180; Rep., ¶ 283.

<sup>238</sup> Hearing, Tr., 37:4-10.

<sup>239</sup> Hearing, Tr., 433:1-434:7.

<sup>240</sup> Mem., ¶ 175 and ¶ 179; Rep., ¶ 288.

<sup>241</sup> Mem., ¶ 179; Rep., ¶ 289.

<sup>242</sup> Mem., ¶ 96 and ¶ 98.

announced and four days before the debt exchange was implemented,<sup>243</sup> is evidenced by the fact that Claimants were still exchanging drafts of the Settlement Agreement in late March 2012 and accordingly did not disclose the existence of that agreement in the annual reports filed in the first semester of 2012.<sup>244</sup> Respondent also suggests that the minutes provided by Claimants as evidence that a settlement agreement was discussed and approved on March 8, 2012 are not only unreliable but actually refer to another agreement.<sup>245</sup>

158. In this regard, Respondent also claims that Claimants' theory that an original settlement agreement was effectively signed on March 8, 2012 and later amended is untenable as Claimants have failed to produce the signed "original" agreement and to provide a witness statement from the purported signatory (Mr. Hoffmann).<sup>246</sup> Since Claimants have failed to deliver a consistent explanation of why the Settlement Agreement was backdated to March 8, 2012, it must be inferred that Poštová banka assumed the losses related to its HTM portfolio *ex post facto* with the sole purpose of claiming compensation for the face value of the securities in this arbitration.<sup>247</sup>
159. In response to Claimants' contention that the Assignment Agreements never entered into effect because the condition precedent of a "haircut" never occurred, Respondent notes that such assertion is inconsistent with the information provided by Poštová banka in its annual reports, the representations it made to its auditor and to its regulator and with internal documents that suggest that Poštová banka would receive payment from J&T Finance even in the event of a compulsory debt exchange.<sup>248</sup> Moreover, Respondent points out that the text of the Assignment Agreements itself contemplated a debt exchange.<sup>249</sup> Also, Respondent argues that the correct interpretation of the

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<sup>243</sup> Rep., ¶ 308; Hearing, Tr., 10:22-11:3.

<sup>244</sup> Rep., ¶ 288.

<sup>245</sup> Hearing, Tr., 438:4-22.

<sup>246</sup> Rep., ¶ 288.

<sup>247</sup> Hearing, Tr., 44:8-18.

<sup>248</sup> Rep., ¶ 290; Hearing, Tr., 39:7-40:14. The internal document specifically referred to by Respondent is C-155, Poštová Bank Finance Department Analysis of March 7, 2012, at PBI-00001494.

<sup>249</sup> Rep., ¶ 292.

Assignment Agreements is that they were effective on signature, but J&T Finance was not obliged to make payments until the Due Date or the Early Due Date.<sup>250</sup>

160. Finally, and in response to Claimants' argument that Article 10(3) of the Slovakia-Greece BIT explicitly acknowledges that a claimant may shield itself from risk without losing protection under the BIT, Respondent argues that such provision refers to insurance contracts which are different from the transactions under discussion. According to Respondent, the J&T Finance Assignment Agreements are best paralleled to a forward sale of receivables that effectively transfers the entire risk and not to an insurance contract where payment of a premium is required.<sup>251</sup>
161. In sum, Respondent claims that since Poštová banka was shielded from the risk associated with its HTM portfolio at the time when the disputed measures were taken and only assumed the losses *ex post facto*, the Tribunal lacks jurisdiction *ratione temporis* over claims based on such interests.<sup>252</sup>
162. Furthermore, Respondent argues that, in any event, Poštová banka's decision to assume the losses *ex post facto* constitutes an abuse of process, because it was made in view of the upcoming dispute and with the intention of claiming such losses in international arbitration.<sup>253</sup> According to Respondent, the foregoing is particularly evidenced in correspondence from Poštová banka and Istrokapital to international law firms "regarding proposal for legal representation in dispute with Greece" dated February 23, 2012.<sup>254</sup> It is also evidenced by a memorandum sent by the General Manager of J&T Finance to Mario Hoffman and Poštová banka's CEO, among others, which, in exploring Poštová banka's alternatives regarding the Consent Solicitation, suggested that the best option was "not to 'swap'" because it opened the door for international arbitration against Greece.<sup>255</sup>

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<sup>250</sup> Hearing, Tr., 430:5-22.

<sup>251</sup> Rep., ¶ 304.

<sup>252</sup> Mem., ¶ 176 and ¶ 182; Rep., ¶ 284.

<sup>253</sup> Mem., ¶ 176 and ¶ 183.

<sup>254</sup> Mem., ¶ 184.

<sup>255</sup> Mem., ¶¶ 186-187.

163. In its Reply, Respondent contests the alleged contradictions adverted by Claimants in regard to its understanding of the transactions involving the Assignment Agreements and the backdated Settlement Agreement. First, Respondent explains that these transactions were motivated by the positions adopted by the NBS and Poštová banka's auditor KMPG regarding the bank's dealing with its exposure to Greek debt.<sup>256</sup> Second, Respondent asserts that J&T Finance is not part of the Istrokapital group and the question of whether it could have brought a claim against Greece itself is irrelevant for the purposes of this arbitration.<sup>257</sup> Lastly, Respondent argues that Claimants can hardly complain that Respondent disregarded the agreements between J&T Finance and Istrokapital, when Claimants themselves concealed those agreements from Poštová banka's auditor and regulator.<sup>258</sup> Besides, Respondent claims that, in any event, evidence in the record supports the conclusion that J&T Finance was the one bearing the risk of losses pursuant to the Assignment Agreements.<sup>259</sup>
164. As for the GGB interests held in Poštová banka's AFS portfolio, Respondent claims that these were purchased in late 2011 with a view to initiating investment treaty arbitration at a time when the present dispute was highly probable and, as a result, claims based on such GGBs should also be dismissed on grounds of abuse of process.<sup>260</sup>
165. In this regard, Respondent recalls that in the course of 2011, Poštová banka sold the GGB interests in its AFS portfolio and then repurchased the same amount and same series in December 2011.<sup>261</sup> According to Respondent, by this time the present dispute was "clearly foreseeable" as the upcoming debt exchange had already been announced in the October 26, 2011 Euro Summit.<sup>262</sup> Additionally, consultations between Greece,

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<sup>256</sup> Rep., ¶ 308.

<sup>257</sup> Rep., ¶ 309.

<sup>258</sup> Rep., ¶¶ 311-312.

<sup>259</sup> Rep., ¶¶ 312-313.

<sup>260</sup> Mem., ¶¶ 189-193; Rep., ¶ 316.

<sup>261</sup> Mem., ¶ 189.

<sup>262</sup> Mem., ¶ 191; Rep., ¶ 316.

Euro Area authorities and private creditors on the debt exchange had been amply publicized since July 2011.<sup>263</sup>

166. Moreover, Respondent explains that while Poštová banka's selling of the GGB interests in its AFS portfolio could achieve the stated purpose of improving the bank's capital adequacy and also result in some tax benefits, the same rationale cannot be applied to the repurchase of the same interests as no such benefits would derive therefrom.<sup>264</sup> Hence, Respondent concludes that the repurchase of the GGB interests in late 2011 can only be explained as an attempt to buy claims against Greece in view of an imminent dispute.<sup>265</sup>
167. Finally, Respondent asserts that the transactions carried out by Poštová banka in connection with the GGB interests held in its HTM portfolio and those held in its AFS portfolio are not inconsistent.<sup>266</sup> On the contrary, they are easily explained as Claimants' attempt to "double down on its bet" by buying further interests at a great discount with a view of bringing a claim against Greece for the full face value of such instruments.<sup>267</sup>
168. Accordingly, Respondent requests that all claims based on the GGB interests held in Poštová banka's AFS portfolio be dismissed on grounds of abuse of process, as these were bought at a time when the present dispute was clearly foreseeable and with the sole intention of claiming compensation for their face value in this arbitration.<sup>268</sup>

#### **b. Claimants' Position**

169. According to Claimants, Respondent's *ratione temporis* and abuse of process objections fail on both legal and factual grounds. As regards the legal justification, Claimants argue that Respondent's risk theory is an "improper distortion" of the *Salini* test, irrelevant for the purposes of a *ratione temporis* objection. As to the factual

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<sup>263</sup> Mem., ¶ 191.

<sup>264</sup> Rep., ¶¶ 317-319.

<sup>265</sup> Rep., ¶ 319; Hearing, Tr., 32:20-33:1 and 33:12-18.

<sup>266</sup> Rep., ¶ 320.

<sup>267</sup> Rep., ¶ 320.

<sup>268</sup> Rep., ¶ 321; Hearing, Tr., 33:12-18.

grounds, Claimants assert that Respondent has failed to fully and correctly explain the context and effects of the Assignment Agreements and related transactions.<sup>269</sup>

170. First, Claimants argue that Respondent’s “unprecedented” theory that Poštová banka did not hold a protected investment at the time when the treaty breaches occurred because it was allegedly shielded from risk is not a question of jurisdiction *ratione temporis*.<sup>270</sup> According to Claimants, the *ratione temporis* doctrine “is entirely about timing of investments and nationality at the time the investment was made and the time that the treaty claim arose.”<sup>271</sup> Since Respondent has not made any allegations that touch upon these questions, the *ratione temporis* doctrine is simply inapplicable.<sup>272</sup>
171. Second, Claimants assert that Respondent’s reliance on the *Salini* test is misplaced because the proper standard for determining whether a given investment is protected is found in the language of the BIT. According to Claimants, the bonds in question are comprised within the definition of investment of the Slovakia-Greece BIT and such status did not change upon Claimants’ entrance into the Assignment Agreements.<sup>273</sup>
172. Third, Claimants argue that even if the *Salini* test were applied, Respondent’s contentions are unsupported by case-law. On the one hand, tribunals that have applied the *Salini* test have found that the fact that a claimant has mitigated the risk of its investment does not necessarily mean that such investment is no longer protected.<sup>274</sup> In this regard, the decision in *KT Asia v. Kazakhstan* relied upon by Respondent is inapposite as it does not address a case where an investor made an investment and then mitigated against part of its risk.<sup>275</sup> Moreover, Claimants indicate that the two relevant BITs allow investors to mitigate against the risk of their investment through insurance

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<sup>269</sup> C-Mem., ¶ 151.

<sup>270</sup> Hearing Tr., 124:15-22; C-Mem., ¶¶ 152-153.

<sup>271</sup> Hearing, Tr., 124:3-6.

<sup>272</sup> Hearing, Tr., 124:7-15; C-Mem., ¶ 152.

<sup>273</sup> C-Mem., ¶ 154.

<sup>274</sup> C-Mem., ¶ 155.

<sup>275</sup> C-Mem., ¶ 155.

or otherwise<sup>276</sup> and accordingly prohibit raising a defense to the effect that an investor has received compensation for damages under an insurance contract.<sup>277</sup>

173. On the other hand, even the tribunals that apply the *Salini* test convey that the elements of an investment must be globally assessed and that the fact that one of them is not present does not necessarily imply a lack of jurisdiction.<sup>278</sup> Thus, Respondent’s theory that a temporary disappearance of one *Salini* factor renders an otherwise protected investment no longer protected, is also unsupported.<sup>279</sup>
174. In addition to the legal flaws in Respondent’s allegations, Claimants argue that Respondent’s *ratione temporis* argument according to which Poštová banka was shielded from risk through the Assignment Agreements is not supported by the facts on the record.
175. First, Claimants explain that under the J&T Finance agreements, Istrokapital – and not J&T Finance – would absorb the losses eventually suffered by Poštová banka in connection with the GGBs.<sup>280</sup> Claimants insist that these transactions must be examined in conjunction with the share purchase agreement between Istrokapital and J&T Finance whereby Istrokapital endeavored to reimburse J&T Finance for any losses resulting from the bond restructuring.<sup>281</sup> Accordingly, if a “haircut” was imposed on the GGBs and, as a result, the Assignment Agreements came into effect, J&T Finance would – pursuant to another set of assignment agreements between Istrokapital and J&T Finance – assign to Istrokapital the claims previously assigned by Poštová banka under the Assignment Agreements.<sup>282</sup> In any event, Claimants point out that regardless of who bore the losses, the risk factor remained inherent to the investment.<sup>283</sup>

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<sup>276</sup> C-Mem., ¶ 155.

<sup>277</sup> Hearing, Tr., 125:12-126:1.

<sup>278</sup> C-Mem., ¶ 156.

<sup>279</sup> C-Mem., ¶ 157.

<sup>280</sup> C-Mem., ¶ 159.

<sup>281</sup> Hearing, Tr., 130:16-131:22.

<sup>282</sup> C-Mem., ¶ 160.

<sup>283</sup> Hearing, Tr., 142:14-19.

176. Claimants complain that Respondent has conveniently overlooked the agreements between J&T Finance and Istrokapital, hiding behind the fact that these were allegedly concealed from KPMG and the NBS. In response to this allegation, Claimants explain that those authorities have no jurisdiction over Istrokapital and thus Claimants were only obliged to disclose what was reflected in the agreements between J&T Finance and Poštová banka.<sup>284</sup>
177. Second, Claimants argue that, in any event, the Assignment Agreements were cancelled on March 8, 2012 by means of the Settlement Agreement. According to Claimants, the cancellation of the Assignment Agreements was a result of the need for an alternative structure to protect J&T Finance from losses associated with the GGBs in view of the fact that a “seizure of the Greek Bonds” rather than a “haircut” was going to take place.<sup>285</sup>
178. Third, even if the Settlement Agreement only entered into force on March 13, 2012, as Respondent claims, Poštová banka had not assigned the “bonds” at the time of the alleged treaty breaches because the condition precedent for the assignment envisaged in the Assignment Agreements, namely a “haircut,” had not taken place at that time.<sup>286</sup>
179. As regards the abuse of process allegations, Claimants note that Respondent has failed to comply with the high burden of proof that falls on the party raising such a claim.<sup>287</sup> According to Claimants, none of the facts and evidence presented by Respondent support the abuse of process claims.<sup>288</sup> First, Claimants argue that Respondent’s theory in regard to the cancellation of the Assignment Agreements as a means for Poštová banka to assume the losses *ex post facto* and thereby gain standing in this arbitration is illogical.<sup>289</sup> In this regard, Claimants point out that under Respondent’s theory, there would be no reason for Poštová banka to struggle with the cancellation of the Assignment Agreements in order to get jurisdiction, because the Czech J&T Finance,

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<sup>284</sup> Hearing, Tr., 135:18-136:10.

<sup>285</sup> C-Mem., ¶ 161.

<sup>286</sup> C-Mem., ¶ 162.

<sup>287</sup> C-Mem., ¶ 165.

<sup>288</sup> C-Mem., ¶ 166.

<sup>289</sup> C-Mem., ¶ 167.



as alleged “true” holder of the Bonds, could have brought the claim itself under an identical BIT.<sup>290</sup>

180. Second, Claimants assert that the standard of review of an abuse of process claim is whether a claimant took actions to manufacture jurisdiction where there was none.<sup>291</sup> According to Claimants, Respondent’s theory is flawed as it fails to explain why Poštová banka decided to enter into the Assignment Agreements, which supposedly endangered the claim, precisely at the time where a possible lawsuit was foreseeable, but then hurriedly cancelled those agreements to obtain the same jurisdiction it would have had three months before, when the Assignment Agreements had not been signed, and then waited six months to exercise jurisdiction by initiating this arbitration.<sup>292</sup>
181. As regards the allegedly backdated Settlement Agreement, Claimants argue that Respondent did not meet the burden of proof of an abuse of process claim as it failed to demonstrate that Claimants acted in bad faith.<sup>293</sup> Claimants explain that an original settlement agreement was effectively signed on March 8, 2012, but since it had to be drafted quickly in light of the pace of the events, the parties then negotiated a more detailed Settlement Agreement replacing the original version. Given that the Settlement Agreement provided the exact same protections as the original one, the parties found it appropriate to date the former as of the same date as the latter.<sup>294</sup> Claimants stress that this explanation is consistent with Mr. Tarda’s testimony.<sup>295</sup> Moreover, Claimants contradict Respondent’s contention that the Settlement Agreement did not exist until late March 2012 by pointing out that it was discussed and approved in extraordinary meetings of Poštová banka held on March 7 and 8, 2012, as evidenced in the corresponding minutes.<sup>296</sup>

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<sup>290</sup> C-Mem., ¶ 168.

<sup>291</sup> C-Mem., ¶ 169.

<sup>292</sup> C-Mem., ¶ 170.

<sup>293</sup> C-Mem., ¶¶ 171-172.

<sup>294</sup> Hearing, Tr., 127:21-129:13.

<sup>295</sup> Hearing, Tr., 128:14-129:1.

<sup>296</sup> Hearing, Tr., 140:5-12.

182. Finally, Claimants assert that the evidence invoked by Respondent as proof of Poštová banka's intention of manufacturing jurisdiction is clearly insufficient.<sup>297</sup> According to Claimants, bad faith cannot be derived from the fact that Claimants sought legal advice in a situation (passing of the Bondholder Act) where legal representation was obviously needed.<sup>298</sup> As regards the memorandum discussing alternatives to respond to the Consent Solicitation, Claimants point out that the document simply offers different scenarios, including that of international arbitration, but says nothing about an effort to manufacture jurisdiction.<sup>299</sup>
183. On the contrary, Claimants argue that Respondent conveniently ignored the presentations made by officials of Poštová banka in connection with the decision to accept or reject the Exchange Offer. According to Claimants, these documents show that Poštová banka's main concern in this regard was whether the new securities would be transferable to third parties in case liquidity was needed, but do not support Respondent's contention that Poštová banka reassumed the losses in order to gain standing to later claim those losses in international arbitration.<sup>300</sup>
184. Further, Claimants claim that the structure of the transactions envisaged in the Settlement Agreement show that Claimants' underlying intention was to ensure that Poštová banka stayed capitalized if the bonds were "forcibly taken" and that J&T Finance would persist in its investment in Poštová banka without assuming the losses derived from the bonds.<sup>301</sup>
185. Also, Claimants explain that the Assignment Agreements were cancelled in view of the fact that the debt restructuring would consist of a swap instead of a "haircut" as envisaged by the Assignment Agreements.<sup>302</sup> Contrary to Respondent's contentions, the Assignment Agreements could not possibly apply to a bond swap because they

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<sup>297</sup> C-Mem., ¶ 174.

<sup>298</sup> C-Mem., ¶ 174.

<sup>299</sup> C-Mem., ¶ 175.

<sup>300</sup> C-Mem., ¶ 176.

<sup>301</sup> C-Mem., ¶ 177.

<sup>302</sup> C-Mem., ¶ 178.

were premised on transactions to be carried out with the existing bonds. If these ceased to exist as the result of a bond exchange, the structure would no longer work.<sup>303</sup>

186. As regards the abuse of process claim in connection with the GGBs held in Poštová banka's AFS portfolio, Claimants point to the contradictions in Respondent's theory that such bonds were sold and repurchased in late 2011 in an effort to create jurisdiction in view of an upcoming dispute.<sup>304</sup>
187. First, Claimants point out that if Poštová banka's intention was to acquire claims, it would make no sense that it would sell the bonds it already held.<sup>305</sup> According to Claimants, Poštová banka was entitled to invoke the Tribunal's jurisdiction both before and after those trades were made and it simply bought back the same bonds at a loss in order to ensure the bank's capital adequacy.<sup>306</sup> Moreover, Claimants argue that the repurchase of the bonds only evidences the bank's intention to hold the bonds to maturity.<sup>307</sup> Claimants add that there is no difference in the investment before and after the sale and repurchase transactions, but even if treated as separate investments, there is no basis to decline jurisdiction.<sup>308</sup>
188. Second, Claimants assert that it is contradictory to argue that Poštová banka was at the same time trying to shield itself from risk in relation to the GGBs held in its HTM portfolio, while trying to purchase new bonds and gain risk to access international arbitration in respect to the AFS portfolio.<sup>309</sup>
189. Accordingly, Claimants conclude that contrary to Respondent's "imagined theories," which are not supported by the record, the only consistent and logical explanation is

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<sup>303</sup> Hearing, Tr., 135:1-17.

<sup>304</sup> C-Mem., ¶ 179.

<sup>305</sup> C-Mem., ¶ 179.

<sup>306</sup> Hearing, Tr., 145:22-146:9; C-Mem., ¶ 180 and ¶ 181.

<sup>307</sup> Hearing, Tr., 55:19-56:1.

<sup>308</sup> Hearing, Tr., 527:17-528:5.

<sup>309</sup> C-Mem., ¶ 181.

that Claimants' actions "*had nothing to do with future treaty claims against Greece and everything to do with ensuring the capital adequacy of the bank.*"<sup>310</sup>

### 3. The Tribunal Lacks Jurisdiction *Ratione Personae* Over Istrokapital

#### a. Respondent's Position

190. Respondent claims that Istrokapital is neither a "national of another Contracting State" for the purposes of Article 25(1) of the ICSID Convention, nor a legal person organized under Cypriot law with its seat in Cyprus as required by Article 1(3)(b) of the Cyprus-Greece BIT.<sup>311</sup> Hence, the Tribunal lacks jurisdiction *ratione personae* over Istrokapital.
191. Respondent argues that in order to qualify as an investor under Article 25(1) of the ICSID Convention, a claimant must meet a twofold requirement: it must be a national of a Contracting State of the ICSID Convention and it must not have the nationality of the respondent State.<sup>312</sup> According to Respondent, as a supranational company established under EU law, Istrokapital is incapable of fulfilling this twofold condition.<sup>313</sup>
192. First, Respondent argues that as a *societas europeas* ("SE"), Istrokapital is formed and existing under the law of the EU and not under Cypriot law.<sup>314</sup> In view of the fact that the EU is not a Contracting State of the ICSID Convention, Istrokapital does not qualify as an investor under Article 25(1) of the Convention.<sup>315</sup>
193. According to Respondent, Recital 6 and Article 1(1) of SE Regulation confirm that a SE derives its existence and legal personality from EU law. Respondent claims that Claimants have mischaracterized SE Regulation, in particular its Articles 3 and 10, as

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<sup>310</sup> Hearing, Tr., 147:14-19.

<sup>311</sup> Mem., ¶ 195; Rep., ¶ 323.

<sup>312</sup> Mem., ¶ 196.

<sup>313</sup> Rep., ¶ 323.

<sup>314</sup> Mem., ¶¶ 198-200.

<sup>315</sup> Mem., ¶ 200; Rep., ¶ 333.

none of these provisions obliges Greece to treat Istrokapital as a Cypriot investor for the purposes of Article 25 of the ICSID Convention.<sup>316</sup>

194. Second, Respondent contends that if, due to its SE nature, Istrokapital were considered to have been incorporated in Cyprus, as Claimants claim, it had to be equally considered as incorporated in any of the other EU Member States, including Greece, and would therefore bear Greek nationality as well.<sup>317</sup> Since Article 25 of the ICSID Convention implicitly precludes juridical persons who have the “nationality” of the respondent State from resorting to ICSID arbitration,<sup>318</sup> Istrokapital is outside the Centre’s jurisdiction.<sup>319</sup>
195. In this regard, Respondent claims that Claimants’ analogy between an SE and an EU citizen fails to disprove Respondent’s contention that Istrokapital does not comply with the diversity of nationality requirement. According to Respondent, the status of an SE is neither accessory nor complementary as is the EU citizenship and the proposed analogy is therefore inapposite.<sup>320</sup>
196. Further, Respondent asserts that Istrokapital is not a protected investor under the Cyprus-Greece BIT as it does not comply with the two cumulative conditions required by Article 1(3)(b) of that BIT, namely those of (i) being constituted under Cypriot law and (ii) having its seat (“έδρα”) within Cypriot territory.<sup>321</sup> In other words, Istrokapital lacks a genuine connection with Cyprus, which is required by the relevant BIT in the form of incorporation and seat.<sup>322</sup>
197. First, Respondent insists that Istrokapital is constituted under EU law and not under Cypriot law.<sup>323</sup> Second, Respondent claims that since the SE nature allows Istrokapital

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<sup>316</sup> Rep., ¶¶ 334-335.

<sup>317</sup> Mem., ¶ 201; Rep., ¶ 340.

<sup>318</sup> Mem., ¶¶ 204-205.

<sup>319</sup> Mem., ¶ 206.

<sup>320</sup> Rep., ¶¶ 324-343.

<sup>321</sup> Mem., ¶¶ 207-208; Rep., ¶ 345.

<sup>322</sup> Mem., ¶ 210; Rep., ¶ 323.

<sup>323</sup> Mem., ¶ 209.

to transfer its seat from one EU Member State to another without dissolution or reincorporation, Istrokapital lacks a genuine connection with Cyprus.<sup>324</sup>

198. Respondent asserts that Claimants' translation of the term "έδρα" as "registered office" without requiring an "effective center of business administration" is incorrect. First, the equation of "έδρα" with "registered office" would render the two cumulative conditions of Article 1(3)(b) of the Cyprus-Greece BIT ineffectual because the maintenance of a registered office is practically a requirement of incorporation.<sup>325</sup> Second, Respondent claims that the legal authorities invoked by Claimants as evidence that "έδρα" means "registered office" actually support Respondent's contention that the term's correct translation is "seat."<sup>326</sup>
199. Moreover, Respondent claims that Istrokapital cannot be deemed to have its seat within Cypriot territory as required by Article 1(3)(b) of the Cyprus-Greece BIT, because the company is not effectively managed from Cyprus.<sup>327</sup>
200. According to Respondent, the foregoing is evidenced by the fact that all of Istrokapital's current employees and directors are Slovak nationals who reside in the Slovak Republic;<sup>328</sup> the costs associated with Istrokapital's registered office from 2010 to 2013 are primarily related to travel, supposed corporate events and telephone and post expenses and the office itself does not seem to be used by the company;<sup>329</sup> and most of the company's operating expenses between 2010 and 2012 were incurred for activities outside of Cyprus.<sup>330</sup> According to Respondent, Claimants' contention to the contrary is incorrect or at least misleading.<sup>331</sup>
201. Respondent contends that it is unlikely that a conglomerate the size of Istrokapital could be effectively managed by only two non-resident employees and directors who

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<sup>324</sup> Mem., ¶¶ 211-212.

<sup>325</sup> Rep., ¶ 349.

<sup>326</sup> Rep., ¶¶ 350-352.

<sup>327</sup> Mem., ¶¶ 221-223.

<sup>328</sup> Mem., ¶¶ 224-226.

<sup>329</sup> Mem., ¶ 227.

<sup>330</sup> Mem., ¶ 228.

<sup>331</sup> Rep., ¶¶ 355-356.

only meet four times a year for short periods of time outside of Istrokapital's office.<sup>332</sup> Instead, the more plausible inference from these facts is that Istrokapital is effectively managed in the Slovak Republic where its ultimate beneficial owner (the Slovak Mr. Hoffmann) resides.<sup>333</sup>

202. In sum, Respondent claims that Istrokapital lacks the genuine connection requirement derived from the conjunctive conditions of incorporation and seat established under the Cyprus-Greece BIT and therefore cannot be considered a protected investor under the said treaty.<sup>334</sup>
203. Finally, Respondent argues that Istrokapital may not resort to investment treaty arbitration by means of an intra-EU BIT in order to resolve a dispute that involves key issues of EU law and touches upon the involvement of the EU and its Member States in the Greek financial crisis.<sup>335</sup>
204. According to Respondent, by allowing that cases involving matters of EU law – such as the present dispute – may be resolved by an investor-State arbitration tribunal, Article 9 of the Cyprus-Greece BIT disproves the CJEU's role as final and sole authoritative interpreter of EU law and is therefore incompatible with EU law.<sup>336</sup> Respondent claims that under both Article 30(3) of the VCLT and EU law, EU law prevails over conflicting provisions of intra-EU BITs that were entered into before the States parties to the relevant BIT acceded to the European Union.<sup>337</sup> Accordingly, Respondent concludes that Istrokapital may not rely on the Cyprus-Greece BIT in order to have the present dispute resolved by this Tribunal.<sup>338</sup> In its Reply, Respondent stresses that Claimants failed to address the incompatibility of the present arbitration with EU law.<sup>339</sup>

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<sup>332</sup> Mem., ¶ 229; Rep., ¶ 354.

<sup>333</sup> Mem., ¶¶ 229-230.

<sup>334</sup> Mem., ¶ 231.

<sup>335</sup> Mem., ¶¶ 219-220; Rep., ¶¶ 338-339.

<sup>336</sup> Mem., ¶¶ 218-219; Rep., ¶¶ 338-339.

<sup>337</sup> Mem., ¶¶ 214-217; Rep., ¶ 337.

<sup>338</sup> Mem., ¶ 220; Rep., ¶ 339.

<sup>339</sup> Rep., ¶ 336.

## **b. Claimants' Position**

205. Contrary to Respondent's contentions, Claimants assert that Istrokapital is indeed a protected investor under both Article 25 of the ICSID Convention and Article 1(3)(b) of the Cyprus-Greece BIT.<sup>340</sup>
206. Claimants argue that the nationality of a juridical person under Article 25(1) of the ICSID Convention is determined by its place of incorporation or registered office.<sup>341</sup> Istrokapital's constitutive documents evidence that Istrokapital was incorporated in Cyprus under Cypriot law, with its registered office in Cyprus, and Respondent's arguments to the effect that Istrokapital may not be deemed a "*national of another Contracting State*" under Article 25 of the ICSID Convention mischaracterize and disregard applicable EU law.<sup>342</sup>
207. Claimants assert that pursuant to the European Company Regulation, SEs must be treated as public limited-liability companies of the Member State in which they have their registered office.<sup>343</sup> Similarly, other provisions of the same Regulation evidence that SEs are subject in many key aspects to the national law of the country in which they have their registered office.<sup>344</sup>
208. Moreover, Claimants sustain that, per the European Company Regulation, SEs are domiciled in one single State and the fact that they can transfer their registered office within the EU does not mean that they have multiple nationalities or no nationality because such transfer is subject to registration in a Member State at a time.<sup>345</sup> Claimants also compare an SE with a natural person holding the nationality of an EU Member State who automatically becomes an EU citizen, but is not therefore rendered a national of every or no Member State.<sup>346</sup>

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<sup>340</sup> C-Mem., ¶ 182.

<sup>341</sup> C-Mem., ¶ 184.

<sup>342</sup> C-Mem., ¶¶ 184-186.

<sup>343</sup> C-Mem., ¶ 185.

<sup>344</sup> Hearing, Tr., 150:14-21.

<sup>345</sup> C-Mem., ¶¶ 187-188.

<sup>346</sup> C-Mem., ¶ 188.



209. Claimants further argue that Istrokapital is a protected investor under the Cyprus-Greece BIT. First, Claimants claim that the Cyprus-Greece BIT does not require that Istrokapital have its “effective center of administration” in Cyprus.<sup>347</sup> Following the principles of treaty interpretation found in the VCLT, Claimants argue that (i) the ordinary meaning of the word “*έδρα*” in the context of corporate nationality has the same interchangeable meaning whether translated as “seat” or as “registered office,”<sup>348</sup> (ii) there is no reason for interpreting this term restrictively because the BIT does not direct the interpreter to do so;<sup>349</sup> and (iii) the use of “*έδρα*” in other of Greece’s BITs confirms that the term is not intended to impose additional requirements on investors other than having a “registered office” in the home State.<sup>350</sup>
210. In any event, Claimants assert that Istrokapital meets the standard for its “effective center of administration” to be located in Cyprus, as (i) all of its board meetings and shareholders’ meetings are held in Cyprus;<sup>351</sup> (ii) contrary to Respondent’s contention its two managing directors reside, work and pay income taxes in Cyprus;<sup>352</sup> the company is registered in Cyprus for tax purposes and pays value-added tax there;<sup>353</sup> (iii) most of Istrokapital’s operating expenses (audit services; taxes and local fees; rent and utilities for its office; employees’ salaries, among others) relate to its operations in Cyprus;<sup>354</sup> and (iv) Istrokapital has its head office in the same place as its registered office in compliance with applicable EU law.<sup>355</sup> Accordingly, even under the expansive interpretation of Article 1(3)(b) of the Cyprus-Greece BIT proposed by Respondent, Istrokapital is a Cypriot investor.<sup>356</sup>

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<sup>347</sup> C-Mem., ¶ 183 and ¶ 195.

<sup>348</sup> C-Mem., ¶ 197; Hearing, Tr., 151:13-18.

<sup>349</sup> C-Mem., ¶ 198.

<sup>350</sup> C-Mem., ¶ 200.

<sup>351</sup> C-Mem., ¶ 206.

<sup>352</sup> C-Mem., ¶¶ 206-207.

<sup>353</sup> C-Mem., ¶ 208.

<sup>354</sup> C-Mem., ¶ 209.

<sup>355</sup> C-Mem., ¶ 210.

<sup>356</sup> C-Mem., ¶ 201 and ¶ 211; Hearing, Tr., 151:18-152:10.

211. Claimants refute the theory that intra-EU BITs have become invalid or have otherwise terminated as a result of the States' accession to the EU.<sup>357</sup> Claimants point out that, as recognized by various arbitral tribunals, intra-EU BITs remain valid because they have not been terminated pursuant to their own terms or the VCLT.<sup>358</sup> Specifically, neither of the States parties to the Cyprus-Greece and the Slovakia-Greece BITs have provided notice of termination of either treaty pursuant to the respective BIT's terms.<sup>359</sup>
212. Moreover, Article 59 of the VCLT, which is often invoked as basis of the proposition that intra-EU BITs are no longer valid, does not apply to the Slovakia-Greece and Cyprus-Greece BITs because (i) EU treaties and the two relevant BITs do not relate to the same subject matter;<sup>360</sup> (ii) neither of the States parties to the Slovakia-Greece and Cyprus-Greece BITs have indicated that they intended for their BITs to be superseded by Slovakia's or Cyprus' accessions to the EU;<sup>361</sup> and (iii) EU treaties and the two relevant BITs are not in such conflict that they cannot apply simultaneously.<sup>362</sup> In any event, Article 59 of the VCLT is inapplicable because neither Greece nor Slovakia or Cyprus have initiated the notification procedure required by the VCLT in order to invoke termination of the respective BITs.<sup>363</sup> In conclusion, Claimants assert that both the Slovakia-Greece and the Cyprus-Greece BITs remain in full force and effect and Claimants are entitled to rely on them in order to submit their investment disputes against Greece to international arbitration.<sup>364</sup>

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<sup>357</sup> C-Mem., ¶¶ 212-213.

<sup>358</sup> C-Mem., ¶ 212.

<sup>359</sup> C-Mem., ¶¶ 215-217.

<sup>360</sup> C-Mem., ¶ 218.

<sup>361</sup> C-Mem., ¶¶ 219-220.

<sup>362</sup> C-Mem., ¶ 221.

<sup>363</sup> C-Mem., ¶ 222.

<sup>364</sup> C-Mem., ¶ 221 and ¶ 223.

#### 4. The Tribunal Lacks Jurisdiction Over Claimants' Umbrella Clause Claims and/or Claimants Have Failed to Establish *Prima Facie* Such Claims

##### a. Respondent's Position

213. Relying on the 2013 Resolution of the Institute of International Law, Respondent argues that umbrella clauses cannot be imported, as Claimants claim.<sup>365</sup> In this regard, Respondent first argues that the MFN clauses in the Slovakia-Greece and Cyprus-Greece BITs do not apply to umbrella clauses because the said treaties do not contain an umbrella clause themselves.<sup>366</sup> Moreover, the extension of the protection of the Slovakia-Greece and Cyprus-Greece BITs to obligations incurred by Greece under its domestic law would violate the *ejusdem generis* rule.<sup>367</sup>
214. Second, Respondent claims that the umbrella clauses, in general, and the ones that Claimants seek to invoke, in particular, require contractual privity.<sup>368</sup> Respondent argues that since neither Poštová banka nor Istrokapital has entered into any contractual relationship with Greece, they may not invoke any umbrella clauses.<sup>369</sup>
215. More specifically, Respondent argues that the umbrella clauses invoked by Claimants only apply to “*obligations entered into by the host State under investment contracts and may only be invoked by the party to whom the contractual obligation is owed under applicable domestic law.*”<sup>370</sup> Respondent argues that the only contracts entered into by Poštová banka in connection with the GGBs are ordinary commercial agreements to which Greece is not a party.<sup>371</sup> Thus, Claimants have failed to demonstrate that Greece has entered into an obligation with regard to their purported investment for purposes of the invoked umbrella clauses.<sup>372</sup>

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<sup>365</sup> Rep., ¶ 359; Hearing, Tr., 461:2-7.

<sup>366</sup> Rep., ¶¶ 358-360.

<sup>367</sup> Rep., ¶ 361.

<sup>368</sup> Mem., ¶ 234; Rep., ¶ 365.

<sup>369</sup> Mem., ¶ 239.

<sup>370</sup> Rep., ¶ 368.

<sup>371</sup> Rep., ¶ 369.

<sup>372</sup> Rep., ¶ 369.

216. Third, Respondent argues that even accepting Claimants' proposed standard, Claimants have failed to establish that (i) there is an "obligor-obligee relationship" between Claimants and Greece that (ii) gives rise to obligations "specific in relation to an investment."<sup>373</sup> Regarding the first requirement, Respondent claims that the parties' obligations arising from the GGBs must be examined under Greek law.<sup>374</sup> In this regard, Respondent first notes that since Claimants do not qualify as bondholders under the terms of the GGBs, they cannot invoke any rights under the GGBs' terms or under the offering circulars.<sup>375</sup> Second, Respondent argues that under Law 2198/1994, Poštová banka only has a claim to payment against Greece if the latter fails to pay "due interest and principal" to the Bank of Greece, which never occurred in the instant case.<sup>376</sup> Otherwise, Poštová banka only has a claim to payment against Clearstream.<sup>377</sup> Therefore, Respondent concludes that Law 2198/1994 does not create an obligor-obligee relationship between Greece and Poštová banka.<sup>378</sup> Finally, Respondent asserts that Claimants have failed to demonstrate that the GGBs terms and conditions conferred on them a right to payment that could not be lawfully amended under the applicable Greek law.<sup>379</sup>
217. Fourth, Respondent asserts that, by voting the Consent Solicitation, Poštová banka (i) waived any rights it may have had under Greek law in connection with GGBs and (ii) agreed to submit to the jurisdiction of Greek courts any dispute arising under the Consent Solicitation and the Exchange Offer.<sup>380</sup> Accordingly, Claimants may not raise umbrella clause claims asserting that Greece violated its obligations under the aforementioned documents.<sup>381</sup>

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<sup>373</sup> Rep., ¶ 370.

<sup>374</sup> Rep., ¶¶ 374-377.

<sup>375</sup> Rep., ¶¶ 378-379.

<sup>376</sup> Hearing, Tr., 458:17-459:9.

<sup>377</sup> Rep., ¶¶ 381-382.

<sup>378</sup> Rep., ¶ 380.

<sup>379</sup> Rep., ¶¶ 383-385.

<sup>380</sup> Rep., ¶ 387 and ¶ 397.

<sup>381</sup> Rep., ¶ 397.

## **b. Claimants' Position**

218. Claimants argue that by virtue of the MFN clauses contained in the Slovakia-Greece and Cyprus-Greece BITs, they are entitled to import the umbrella clauses found in other treaties entered into by Greece and, specifically, those found in the Jordan-Greece and Croatia-Greece BITs.<sup>382</sup>
219. According to Claimants, the authorities cited by Respondent to argue that investors cannot rely on the clauses to import umbrella clauses actually undermine this position.<sup>383</sup>
220. Claimants argue that Respondent's position that umbrella clause claims require contractual privity ignores the absence of any such limitation in the relevant BITs<sup>384</sup> and has little support in decisions of other investor-State tribunals.<sup>385</sup> Moreover, the idea that umbrella clause claims cannot be based on general commitments made by States is also undermined in previous decisions of other tribunals.<sup>386</sup>
221. Claimants submit that the umbrella clause refers to the existence of an obligor-obligee relationship between the host State and claimant in relation to an investment.<sup>387</sup> Accordingly, Claimants argue that the question for determining whether the umbrella clause applies is whether the host State has assumed international obligations with respect to the claimant and its investment.<sup>388</sup>
222. According to Claimants, such an obligor-obligee relationship clearly exists between Respondent and Claimants "*with respect to payments of interest and principal*" deriving from the terms of the GGBs.<sup>389</sup> Also, in Law 2198/1994, Greece recognizes

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<sup>382</sup> C-Mem., ¶ 224.

<sup>383</sup> Hearing, Tr., 148:4-7.

<sup>384</sup> Hearing, Tr., 67:5-8.

<sup>385</sup> Hearing, Tr., 148:8-19.

<sup>386</sup> Hearing, Tr., 149:5-17.

<sup>387</sup> C-Mem., ¶¶ 226-228.

<sup>388</sup> C-Mem., ¶ 229.

<sup>389</sup> C-Mem., ¶ 230.

that payment obligations are specifically owed to investors.<sup>390</sup> Therefore, Claimants insist that the Tribunal has jurisdiction over its umbrella clause claims.<sup>391</sup>

223. Moreover, Claimants assert that the fact that the Invitation Memorandum was also directed to holders who had bought bonds in the secondary market without regard to when and how their purchases were made, and, as a result, that holders in the secondary market voted and fully participated in the process, shows that there was an obligation on the part of Greece and a sufficient relationship between Greece and the secondary purchasers to create an umbrella-clause claim.<sup>392</sup>

224. Finally, Claimants argue that the validity and meaning of the waiver contained in the Invitation Memorandum is a question to be discussed in the merits phase, if necessary.<sup>393</sup>

## VI. ANALYSIS OF THE TRIBUNAL

225. Respondent has submitted objections to the jurisdiction *ratione materiae*, *ratione personae* and *ratione temporis* of the Tribunal – together with an allegation of abuse of process – and an objection to jurisdiction related to the umbrella clause.

226. The objections to jurisdiction *ratione materiae* are twofold: First, Respondent claims that Istrokapital never made an investment under the Cyprus-Greece BIT and that Istrokapital may not base jurisdiction on assets of Poštová banka. Second, Respondent considers that Poštová banka's GGB interests are not protected investments under the Slovakia-Greece and Cyprus-Greece BITs.

227. For purposes of its analysis, the Tribunal will initially address objections to jurisdiction *ratione materiae* as follows:

First, as to claimant Istrokapital:

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<sup>390</sup> C-Mem., ¶ 231.

<sup>391</sup> C-Mem., ¶ 232.

<sup>392</sup> Hearing, Tr., 95:16-97:13.

<sup>393</sup> Hearing, Tr., 150:5-9.

- a. By determining whether Istrokapital may establish jurisdiction on the basis that its investment under the Cyprus-Greece BIT are the GGBs held by Poštová banka.
- b. If so, by analyzing the term “investment” as described in Article 1 of the Cyprus -Greece BIT and determining whether the GGBs and any rights of Istrokapital thereunder fall within the scope of such definition.
- c. If so, the Tribunal may have to determine whether the term “investment” under Article 25 of the ICSID Convention has an inherent meaning or a meaning under international law that has to be analyzed together with the definition of “investment” under Article 1 of the Cyprus–Greece BIT, as claimed by Respondent, or whether the term “investment” for purposes of Article 25 of the ICSID Convention must be given the meaning of Article 1 of the Cyprus–Greece BIT, as claimed by Claimants.

Second, as to claimant Poštová banka:

- d. By analyzing the term “investment” as described in Article 1 of the Slovakia-Greece BIT and establishing whether the GGBs and the rights of Poštová banka thereunder fall within the scope of such definition.
- e. If so, the Tribunal may have to determine whether the term “investment” under Article 25 of the ICSID Convention has an inherent meaning or a meaning under international law that has to be analyzed together with the definition of “investment” under Article 1 of the Slovakia–Greece BIT, as claimed by Respondent, or whether the term “investment” for purposes of Article 25 of the ICSID Convention must be given the meaning of Article 1 of the Slovakia–Greece BIT, as claimed by Claimants.

## 1. Analysis of the Objections to the Tribunal’s Jurisdiction *Ratione Materiae*

### a. Whether Istrokapital Has an Investment Protected Under the Cyprus-Greece BIT

228. Istrokapital claims that, as a shareholder in Poštová banka, it made an indirect investment in the GGBs through Poštová banka and that such investment is protected under article 1.1. (c) the Cyprus-Greece BIT as assets comprising monetary claims and contractual claims with an economic value<sup>394</sup>. In this regard, Istrokapital has clearly stated that its claim rests solely on the GGB interests held by Poštová banka – that is, on the bank’s assets – and not on its shareholding in the company.<sup>395</sup> Respondent challenges this position by asserting that Istrokapital has no legal right to the assets of Poštová banka, including the GGB interests. Hence, those interests are not protected under the Cyprus-Greece BIT and Istrokapital may not pursue a claim on such basis.<sup>396</sup>
229. The Tribunal agrees with the Respondent: there is nothing in the record that supports Claimants’ contention that a shareholder in the position of Istrokapital has standing to assert claims for an alleged impairment of the assets of a company (in the place of Poštová banka) in which it holds shares. Claimants have failed to establish that the Cyprus-Greece BIT enables Istrokapital to submit claims for any alleged rights or claims that Poštová banka might have against Greece. Moreover, prior case law, discussed by the Parties, supports the opposite proposition, that is, that shareholders do not have claims arising from or rights in the assets of the companies in which they hold shares.
230. First, as the *HICEE B.V. v. Slovak Republic*<sup>397</sup> tribunal rightly points out, the “default position” in international law is that a company is legally distinct from its shareholders.<sup>398</sup> The foregoing implies that as an independent legal entity, a company is

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<sup>394</sup> C-Mem., ¶ 88

<sup>395</sup> Request, ¶ 20; C-Mem., ¶¶ 137-138.

<sup>396</sup> Rep., ¶ 264.

<sup>397</sup> *HICEE B.V. v. Slovak Republic*, UNCITRAL, PCA Case No. 2009-11, Partial Award of May 23, 2011 (“*HICEE B.V. v. Slovak Republic*”).

<sup>398</sup> RL-28, ¶ 147, cited by Respondent in Mem., footnote 234 to ¶ 160.



granted rights over its *own* assets, which it alone is capable of protecting.<sup>399</sup> Claimants have not even attempted to establish whether there is a deviation of the “default position” in the applicable domestic law. In other words, Claimants have failed to prove that, under the applicable law, Istrokapital has any legal or contractual right to the GGB interests held by Poštová banka that would allow it to bring a treaty claim against Greece on the basis of an alleged impairment of such security entitlements.

231. Claimants’ contention does not find any support in previous decisions of investment arbitration tribunals either. On the contrary, tribunals – such as the one in *ST-AD GmbH v. Republic of Bulgaria* – have consistently held that “*an investor has no enforceable right in arbitration over the assets and contracts belonging to the company in which it owns shares.*”<sup>400</sup>
232. Referring to the decisions in *El Paso v. Argentina*, *BG v. Argentina*, and *ST-AD v. Bulgaria*, among others, Claimants argue that investment arbitration tribunals have recognized that “*the claimant’s interest in a local company in the host State entitled it to assert claims based in the host State’s treatment of that local company’s contracts and assets.*”<sup>401</sup> The foregoing is true, but – in accordance with the same decisions referred to by Claimants – only to the extent that those claims are related to the effects that the measures taken against the company’s assets have on the value of the claimant’s shares in such company.
233. In *El Paso v. Argentina*, the question before the tribunal was whether the rights protected by the US-Argentina BIT were limited to those pertaining to the shares held by the claimant in various Argentinian companies, or whether they included other items such as legal and contractual rights belonging to said companies.<sup>402</sup> In other words, the tribunal had to examine whether certain assets of the companies in which the claimant had a shareholding qualified as protected investments under the treaty.

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<sup>399</sup> *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), I.C.J., Preliminary Objections, Judgment of May 24, 2007, I.C.J. Reports 2007, p. 582 at p. 605 ¶ 61, cited by Respondent in Mem., footnote 234 to ¶ 160.

<sup>400</sup> *ST-AD v. Bulgaria*, ¶ 278.

<sup>401</sup> C-Mem., ¶ 144.

<sup>402</sup> *El Paso v. Argentina*, ¶ 144 and ¶ 148.

234. The answer provided by the *El Paso v. Argentina* tribunal was straightforward: while the shares held by the claimant in the Argentinian companies were a protected investment under the US-Argentina BIT, the licenses and other contracts granted to the Argentinian companies were not protected investments.<sup>403</sup>
235. In its analysis, the *El Paso v. Argentina* tribunal first verified whether the Argentinian companies qualified as protected investors under the relevant treaty and concluded that they did not.<sup>404</sup> Consequently, the tribunal reasoned that if the domestic companies were not protected investors, their assets could not be considered protected investments.<sup>405</sup> In the words of the tribunal:
- “[...] *El Paso* owns no contractual rights to be protected, as it has signed no contract with Argentina. [...] It is thus the conclusion of the Tribunal that none of the contracts the interference with which is complained of by the Claimant are protected investments under the ICSID Convention and the BIT.”<sup>406</sup>
236. In summarizing its conclusion regarding the definition of the protected investment for the purpose of the tribunal’s jurisdiction, the *El Paso v. Argentina* tribunal stated that “what is protected are ‘the shares, all the shares, but only the shares.’”<sup>407</sup>
237. The tribunal in *BG v. Argentina* reached the same conclusion. In that case, the claimant contended that its investment in Argentina consisted, *inter alia*, of certain “rights over the economic value”<sup>408</sup> of a license for the distribution of natural gas held by one of the domestic companies in which BG Group Plc (“BG”) owned an interest. Specifically, BG claimed that Argentina had breached the investment treaty, causing damage to BG’s “claims to money” and “claims to performance” under the said license.<sup>409</sup>
238. In examining BG’s claim, the tribunal noted that BG was not a party to the license and that it had not proved that it could directly assert any claims thereunder.<sup>410</sup>

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<sup>403</sup> *El Paso v. Argentina*, ¶ 177 and ¶ 214.

<sup>404</sup> *El Paso v. Argentina*, ¶¶ 178-187.

<sup>405</sup> *El Paso v. Argentina*, ¶ 188.

<sup>406</sup> *El Paso v. Argentina*, ¶ 189.

<sup>407</sup> *El Paso v. Argentina*, ¶ 214.

<sup>408</sup> *BG Group v. Argentina*, ¶ 112.

<sup>409</sup> *BG Group v. Argentina*, ¶ 208.

<sup>410</sup> *BG Group v. Argentina*, ¶ 210.

Furthermore, the tribunal noted that the UK-Argentina BIT did not provide a mechanism that would allow BG to bring claims before the tribunal derived from the license on behalf of the domestic company.<sup>411</sup> Finally, the tribunal concluded that “*BG does not have standing to seize this Tribunal with ‘claims to money’ and ‘claims to performance’, or to assert other rights, which it is not entitled to exercise directly.*”<sup>412</sup>

239. Ultimately, the tribunal upheld jurisdiction over BG’s claims, but only in so far as they related to its shareholding in the Argentine companies. While the tribunal found that BG’s indirect participation in the domestic companies was an investment for the purposes of Article 1(a)(ii) of the UK-Argentina BIT,<sup>413</sup> it made very clear that such protection did not extend to the license held by one of the companies in which BG owned an interest.

240. In *Urbaser v. Argentina* – another decision invoked by Claimants – the tribunal accepted jurisdiction over the claims raised by the claimants under the relevant treaty “*for damage suffered by them arising from their investment in the form of shares in AGBA,*”<sup>414</sup> an Argentine company that operated a concession for the provision of public services in Buenos Aires. In its decision, the tribunal emphatically noted that, pursuant to claimants’ own case, their investment was bound to claimants’ shares in the domestic company and their claims were limited to the protection of rights arising from said shares.<sup>415</sup> In the words of the tribunal:

*“Claimants repeatedly have stated that their claim is not based on [...] a hypothetical legal title that would allow a shareholder to raise in its own name a claim that is based on a relationship to which the company alone is party, and not the shareholders.”*<sup>416</sup>

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<sup>411</sup> *BG Group v. Argentina*, ¶ 214.

<sup>412</sup> *BG Group v. Argentina*, ¶ 214.

<sup>413</sup> *BG Group v. Argentina*, ¶ 138; ¶ 203; ¶ 216.

<sup>414</sup> *Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction of December 19, 2012 (“*Urbaser v. Argentina*,”) ¶ 254.

<sup>415</sup> *Urbaser v. Argentina*, ¶ 204.

<sup>416</sup> *Urbaser v. Argentina*, ¶ 237.

241. Another decision endorsing a similar approach to the issue at hand was delivered by the tribunal in *CMS v. Argentina*.<sup>417</sup> This case concerned the treatment received by a foreign investor holding a minority shareholding in an Argentine company, which, in turn had been granted a license for the transportation of natural gas by the Argentinean Government. The *CMS v. Argentina* tribunal accepted jurisdiction on the basis of the claimant’s shareholding in the domestic company and not on the account of any rights pertaining to such domestic company or relating to such company’s assets.<sup>418</sup>
242. The *ST-AD v. Bulgaria* tribunal clearly established that its jurisdiction was limited to the claimant’s shareholding in the domestic company – which was in fact a protected investment under the treaty – as opposed to the assets belonging to the local company in which claimant owned shares.<sup>419</sup>
243. While the *ST-AD* tribunal conclusively held that “*an investor whose investment consists of shares cannot claim, for example, that the assets of the company are its property and ask for compensation for interference with these assets,*”<sup>420</sup> it also clarified that “*such an investor can, however, claim for any loss of value of its shares resulting from an interference with the assets or contracts of the company in which it owns the shares.*”<sup>421</sup>
244. The same approach was confirmed by the *Paushok v. Mongolia* tribunal, which recognized that a shareholder is entitled to bring claims concerning alleged treaty breaches resulting from actions taken against the assets of the company in which it holds shares, but only to the extent that the shareholder’s claims relate to the effect that such actions have on the value of its shares. In the words of the *Paushok v. Mongolia* tribunal:

*“In the present instance, Claimants’ investment are the shares of GEM, a company incorporated under Mongolian law as required by that country in*

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<sup>417</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction of July 17, 2003 (“*CMS v. Argentina*”).

<sup>418</sup> *CMS v. Argentina*, ¶¶ 66-68.

<sup>419</sup> *ST-AD v. Bulgaria*, ¶ 276; ¶ 278; ¶ 284.

<sup>420</sup> *ST-AD v. Bulgaria*, ¶ 282.

<sup>421</sup> *ST-AD v. Bulgaria*, ¶ 282.

*order to engage into the mining business and, through ownership of those shares, Claimants are entitled to make claims concerning alleged Treaty breaches resulting from actions affecting the assets of GEM, including its rights to mine gold deposits or its contractual rights and thereby affecting the value of their shares. It is therefore important to note that Claimants must prove that their claims arise out of the Treaty itself and not merely be an attempt to exercise contractual rights belonging to GEM. To argue that Claimants could not make such Treaty claims would render it practically meaningless in many instances; a large number of countries require foreign investors to incorporate a local company in order to engage into activities in sectors which are considered of strategic importance (mining, oil and gas, communications etc.). In such situations, a BIT would be rendered practically without effect if it were right to argue that any action taken by a State against such local companies or their assets would be not be subject to Treaty claims by a foreign investor because its investment is merely constituted of shares in that local company.”<sup>422</sup> (Emphasis added).*

245. As clearly and consistently established by the above referenced decisions – all of which were invoked or discussed by Claimants in their Counter-Memorial on Jurisdiction – a shareholder of a company incorporated in the host State may assert claims based on measures taken against such company’s assets that impair the value of the claimant’s shares. However, such claimant has no standing to pursue claims directly over the assets of the local company, as it has no legal right to such assets.
246. In the present case, Istrokapital has not relied on its shareholding in Poštová banka as the basis of its claim: indeed, as stated in Claimants’ Counter-Memorial on Jurisdiction, “[t]o be clear, Istrokapital’s protected investment is its indirect investment in the Greek Bonds, not its shareholding in Poštová Bank.”<sup>423</sup> Istrokapital thus has expressly sought to base the Tribunal’s jurisdiction on its alleged “indirect investment” in the GGBs held by Poštová banka. However, Istrokapital has failed to establish that it has any right to the assets of Poštová banka that qualifies for protection under the Cyprus-Greece BIT. Therefore, this Tribunal has no jurisdiction over Istrokapital’s claims in the present arbitration.

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<sup>422</sup> *Sergei Paushok & Ors. v. Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability of April 28, 2011 (“Paushok v. Mongolia”), ¶ 202.*

<sup>423</sup> C-Mem., ¶ 138.

247. Considering that the Tribunal does not have jurisdiction over Istrokapital’s claims in this arbitration for the reasons expressed above, there is no need to undertake a detailed analysis of whether the GGBs qualify or not as an investment under the Cyprus-Greece BIT, or to analyze the interplay between the Cyprus-Greece BIT and the ICSID Convention, or the objections *ratione personae* or other objections to jurisdiction related exclusively to Istrokapital.<sup>424</sup>

**b. Whether Poštová Banka’s GGB Interests Are Protected Investments Under the Slovakia-Greece BIT**

248. The Parties do not dispute that under Article 25 of the ICSID Convention, in order for the Tribunal to have jurisdiction *ratione materiae* over the dispute submitted to this Tribunal, it is necessary that the dispute relate to an investment. The Parties, however, disagree as to how the term “investment” should be construed under Article 25 of the ICSID Convention and Article 1(1) of the Slovakia–Greece BIT, and as to whether, in the light of the aforesaid provisions, the rights that Poštová banka claims to have under the GGBs are to be considered an investment.

249. The Parties do not contest that the VCLT contains the relevant provisions for the interpretation of the Slovakia-Greece BIT and the ICSID Convention. The Parties are in dispute, however, concerning the interplay between the aforementioned treaties and the VCLT and the results of the application of the VCLT to the aforementioned BIT and ICSID Convention.

250. In order to determine whether the rights of Poštová banka under the relevant GGBs qualify as an investment under the Slovakia-Greece BIT, the Tribunal will first refer to

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<sup>424</sup> However, even if the Tribunal had found that Istrokapital had standing to claim for the alleged injury to Poštová banka’s interest in the GGBs, Istrokapital’s claims would still fail under the Cyprus-Greece BIT for substantially the same reasons contained in the following section of this Award. For the Tribunal, it is clear that there are some differences between the chapeau of the Cyprus-Greece BIT and the chapeau of the Slovakia-Greece BIT, and that the list of examples of what may constitute an investment differ in some cases between both treaties. But it is also clear that, first, the list of examples of the Cyprus-Greece BIT expressly refers to bonds, but only in respect of bonds issued by companies; second, there is no reference to financial instruments (not even, as in the case of the Slovakia-Greece BIT, a reference to loans); third, there is no language that suggests that the State parties intended to include public debt or public obligations, and last but not least, a general reference to “monetary claims” cannot be expanded to include instruments such as the GGBs, for the reasons explained in the analysis contained in the following paragraphs of this Award.

the relevant facts relating to the issuance of the GGBs and the acquisition thereof by Poštová banka (1). The Tribunal will then undertake the analysis of the relevant provisions of the Slovakia-Greece BIT (2). Finally, the Tribunal will consider how the ICSID Convention applies to such facts (3).

*1. The Issuance of the GGBs and the Acquisition by Poštová Banka*

251. In this section, the Tribunal will refer to the process of issuance of the GGBs by Greece, the actors that intervened in the process, the acquisition of the GGBs by Poštová banka and the relevant provisions of the norms, contracts and documents that apply to such issuance and acquisition.

*1.1. The Issuance of the GGBs*

252. It is undisputed that the GGBs on which Poštová banka bases its claims were issued by Greece between 2007 and 2010 and that they comprise five different series, as follows:

- **ISIN GR0114020457**, issued on March 2, 2007 pursuant to Ministerial Decision 2/13482/0023A of February 27, 2007, with an interest rate of 4.1% and maturing on 20 August 2012.<sup>425</sup>
- **ISIN GR0114021463**, issued on March 26, 2008 pursuant to Ministerial Decision 2/20947/0023A of March 18, 2008, with an interest rate of 4% and maturing on 20 August 2013.<sup>426</sup>
- **ISIN GR0110021236**, issued on February 17, 2009 pursuant to Ministerial Decision 2/11184/0023A of February 13, 2009, with an interest rate of 4.3% and maturing on 20 March 2012.<sup>427</sup>
- **ISIN GR0114023485**, issued on February 2, 2010 pursuant to Ministerial Decision 2/6276/0023A of January 29, 2010, with an interest rate of 6.1% and maturing on 20 August 2015.<sup>428</sup>

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<sup>425</sup> R-98, Ministerial Decision.

<sup>426</sup> R-99, Ministerial Decision.

<sup>427</sup> R-97, Ministerial Decision; R-111, Offering Circular.

- **ISIN GR0124032666**, issued on March 11, 2010 pursuant to Ministerial Decision 2/14140/0023A of March 9, 2010, with an interest rate of 6.25% and maturing on 19 June 2020.<sup>429</sup>
253. It is also undisputed that the GGBs were subject to Greek law and to the jurisdiction of Greek courts.<sup>430</sup>
254. Chapter B, Articles 5-12, of Greek Law 2198 of 1994, governs the issuance of dematerialized titles, such as the GGBs, by the Greek Government.<sup>431</sup>
255. Law 2198 of 1994 created the System for Monitoring Transactions in Book-entry Securities (the “System”), administered by the Bank of Greece.<sup>432</sup> In accordance with Article 6 of Law 2198 of 1994, aside from the Greek Government and the Bank of Greece, “(...) *legal or natural persons (Participants) defined either by category or by name are eligible for membership in the System, subject to approval by a Bank of Greece Governor’s Act.*”<sup>433</sup>
256. Participants in the System are the only ones who can hold titles to GGBs, yet securities acquired by Participants may be transferred to third parties.<sup>434</sup> Such transfer “*is valid between the parties and does not bring about legal consequences in favor or against the Greek Government or the Bank of Greece.*”<sup>435</sup>
257. The Participants keep an account in the System and must keep a separate account for third parties who acquire the securities.<sup>436</sup>
258. Pursuant to Article 8.2 of Law 2198 of 1994, the third party who acquires a security “has a claim on his Security only against the Participant keeping his investor account.

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<sup>428</sup> R-100, Ministerial Decision; R-112, Offering Circular.

<sup>429</sup> R-101, Ministerial Decision; R-110, Offering Circular.

<sup>430</sup> R-110; R-111; R-112; R-113; R-114; R-115.

<sup>431</sup> R-108.

<sup>432</sup> R-108, Article 5.

<sup>433</sup> R-108, Article 6.1.

<sup>434</sup> R-108, Article 6.2.

<sup>435</sup> R-108, Article 6.2.

<sup>436</sup> R-108, Articles 6.5, 6.6 and 6.7.



If the Greek Government has not fulfilled its obligations under paragraph 6 of the present Article, the investor has claim arising from the Security only against the Greek Government.”<sup>437</sup> Paragraph 6 of Article 8, in turn, provides that “payment of due interest and principal on Securities by the Greek Government to the Bank of Greece discharges the Greek Government’s obligations.”<sup>438</sup>

259. In addition to the Participants, the Greek regulations provide for the participation of the “Primary Dealers,” in the syndications and auctions of Greek government securities in the primary market as well as in trading such securities in the secondary market.<sup>439</sup> Primary Dealers are financial institutions appointed on a yearly basis by joint decision of the Minister of Economy and Finance and the Governor of the Bank of Greece in order to provide specialized services in the government securities market.<sup>440</sup>
260. The Primary Dealers assume obligations in the following areas: (A) the primary market, (B) the secondary market, (C) the yield curve and (D) further contribution to the Greek Government bond market.<sup>441</sup>
261. In connection with the primary market, Primary Dealers “*are required during the whole calendar year for which they have been granted the Primary Dealer status to participate actively in the auctions with competitive and non-competitive bids for an amount not less than 2% per year (duration weighted) of the total amount of successful bids at Government bond and Treasury-bill auctions. In addition, Primary Dealers participate in syndications of Greek Government securities....*”<sup>442</sup>
262. In the secondary market, Primary Dealers have the right to carry out transactions in GGBs on every approved regulated market, but are required during the whole calendar year for which they have been granted the Primary Dealer status to achieve a minimum turnover of not less than 2% of the total annual turnover (duration weighted) on the

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<sup>437</sup> R-108, Article 8.2.

<sup>438</sup> R-108, Article 8.6.

<sup>439</sup> R-103, Article 1.1.

<sup>440</sup> R-103, Article 1.1 and Article 1.2.

<sup>441</sup> R-103, Article 4.1, *Primary Dealers Obligations*.

<sup>442</sup> R-103, Article 4.

approved regulated markets.<sup>443</sup> The transactions can be settled in the Bank of Greece Securities Settlement System or in any other Clearing and Settlement System approved by the Bank of Greece.<sup>444</sup>

263. In addition to the above, Primary Dealers are required, *inter alia*, as a further contribution to the Greek Government bond market, to facilitate a broad distribution of Greek Government securities domestically as well as internationally; to provide the Greek Government with advice, information on and assessment of market conditions, and other information pertaining to their status as Primary Dealers; and to submit certain reports on the activity on the primary and the secondary market.<sup>445</sup>
264. The GGBs in question were issued by syndication or auction to 22 Primary Dealers.<sup>446</sup>
265. The operation of the issuance of the GGBs may be summarized as follows: the Greek Government issued the GGBs through the Bank of Greece System to the Participants in the System and the Participants paid the consideration due to Greece. Participants in turn delivered the GGBs to the Primary Dealers, who provided the funds for the acquisition. Primary Dealers, in turn, sold the GGBs in the secondary market.<sup>447</sup>

### 1.2. *Purchase of the GGBs by Poštová Banka*

266. The Parties do not dispute that Poštová banka was neither a Participant nor a Primary Dealer and therefore, Poštová banka did not intervene in the process of issuance of the GGBs and the initial distribution thereof to the secondary market. Even though Poštová

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<sup>443</sup> R-103, Article 4.

<sup>444</sup> R-103, Article 4.

<sup>445</sup> R-103, Article 4.1.D.

<sup>446</sup> See R-103; R-104; R-105; R-106; R-107.

<sup>447</sup> See Hubbard Report, ¶ 44: “*The issuance and distribution of GGBs on the primary and secondary market can be briefly summarized. Upon issuance of a GGB to a Participant, that Participant transfers funds via the Bank of Greece to the Hellenic Republic. All payments made by the Hellenic Republic, such as payments of coupons for GGBs are made exclusively to Participants via the Bank of Greece system, and all payments received by Greece for GGBs are likewise made only by Participants at the time of issuance. The primary dealers act as underwriters and intermediaries between Participants and the secondary market. Once the primary dealers have sold their GGBs into the secondary market the GGB distribution process is complete.*” Professor Hubbard cites to R-108, Article 6 and R-109. This understanding is confirmed by Professor Stulz in his Cross Examination. See Hearing, Tr., 369:6-371:4.

banka claims that the “[p]articipants, who are registered in the BoG System, purchased the Greek Bonds and then immediately sold them to investors, like Poštová Bank, on the secondary market,”<sup>448</sup> there is no evidence that Poštová banka acquired GGBs in the initial distribution made by Participants and Primary Dealers. On the contrary, the evidence in the record indicates that Poštová banka acquired the vast majority of its interests in the GGBs well after the initial distribution process had been completed, as follows:

<b>ISIN</b>	<b>Date of Issuance</b>	<b>Purchase Dates</b> <sup>449</sup>
GR0114020457	2 March 2007 <sup>450</sup>	20 January 2010 - 23 April 2010
GR0114021463	26 March 2008 <sup>451</sup>	8 January 2010 - 20 January 2010
GR0110021236	17 February 2009 <sup>452</sup>	10 February 2010
GR0114023485	2 February 2010 <sup>453</sup>	19 March 2010 - 22 March 2010
GR0124032666	11 March 2010 <sup>454</sup>	19 March 2010 - 23 March 2010

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<sup>448</sup> C-Mem., ¶ 100.

<sup>449</sup> C-Mem., ¶ 40.

<sup>450</sup> R-98, Ministerial Decision.

<sup>451</sup> R-99, Ministerial Decision.

<sup>452</sup> R-97, Ministerial Decision; R-111, Offering Circular.

<sup>453</sup> R-100, Ministerial Decision; R-112, Offering Circular.

<sup>454</sup> R-101, Ministerial Decision; R-110, Offering Circular.

267. It is also undisputed that Poštová banka acquired its interests in the GGBs on the secondary market and that these interests were held in Poštová banka's account with Clearstream, a universal depository.<sup>455</sup>
268. Under its general terms and conditions, applicable to the purchases made by Poštová banka, Clearstream opens an account for the deposit of securities of each of its customers.<sup>456</sup> The securities received by Clearstream are treated as fungible<sup>457</sup> and “[n]o Customer shall have any right to specific securities but, each Customer will instead be entitled, subject to these General Terms and Conditions, to require CBL [Clearstream Banking, Luxembourg] to deliver to the Customer or a third party an amount of securities of an issue equivalent to the amount credited to any securities account in the Customer's name, without regard to the certificate numbers of any securities certificates.”<sup>458</sup>
269. Clearstream's general terms and conditions provide further for the obligation of Clearstream to “promptly transmit to the appropriate agent of the issuer any order received from a Customer constituting the exercise of a right, option or warrant held for the account of such Customer.”<sup>459</sup>
270. The Parties debate whether, as a result of the aforesaid purchases, Poštová banka held GGBs, or “interests” in GGBs, or rights in a pool of fungible assets, and on whether GGBs and “interests” on GGBs are different securities subject to different treatment.
271. Poštová banka initially classified in its accounting books and records the interests that it acquired in the GGBs as HTM and as AFS, and later on reclassified some GGBs from AFS to HTM.<sup>460</sup> The Parties debate as to the whether such initial classification and further reclassification reflects an intent of having a long-term investment.

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<sup>455</sup> Mem., ¶ 56; C-Mem., ¶ 38. See also R-92; R-93; R-94; R-95 and R-96.

<sup>456</sup> R-116 Article 4.

<sup>457</sup> R-116 Article 7.

<sup>458</sup> R-116, Article 11.

<sup>459</sup> R-116, Article 21.

<sup>460</sup> See ¶ 78 above.

272. It is uncontested that at the time of the purchases of the GGBs by Poštová banka, the Slovak regulator, NBS, had designated Eurozone bonds, including GGBs, as “zero risk,” so Poštová banka did not need to hold capital against them. However, in the market the GGBs had already been downgraded to BB+ by rating agencies.<sup>461</sup>

*1.3. The Sales and Assignments by Poštová Banka of Its Interests in the GGBs*

273. During 2011, Poštová banka sold all of its interests in the GGBs in its AFS portfolio. The sale comprised three of the five series of GGB interests it had bought (ISIN GR0124032666, ISIN GR0114023485 and ISIN GR0114020457), accounting for about 18% of the value of Poštová banka’s GGBs holdings.<sup>462</sup> Immediately after the sale, Poštová banka purchased GGB interests of the same series and in the same principal amounts, but for a different price.<sup>463</sup> Poštová banka states that it made these trades to ensure that the bank met its statutory capital adequacy and capital exposure limits,<sup>464</sup> as well as a way to book its losses related to GGBs in its profit and loss account.<sup>465</sup>

274. Also, in 2011, through the Assignment Agreements, which involved J&T Finance and Istrokapital, Poštová banka assigned part of its interests in the GGBs to J&T Finance. The Assignment Agreements terminated or lost effect at a date that is the subject matter of debate between the Parties.

275. Claimants assert, and Respondent does not dispute, that from the different dates of acquisition of the interests in the GGBs by Poštová banka up to the date in which the exchange became effective, Poštová banka received payments of capital and interest corresponding to the interests it held in the GGBs.<sup>466</sup>

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<sup>461</sup> See C-95.

<sup>462</sup> See Tarda Witness Statement, ¶ 17, C-Mem., ¶ 46.

<sup>463</sup> Mem., ¶¶ 73-75.

<sup>464</sup> Tarda Witness Statement, ¶¶ 15-18.

<sup>465</sup> C-Mem., ¶ 47.

<sup>466</sup> C-Mem., ¶ 52; Tarda Witness Statement, ¶ 13.

2. *Article 1 of the Slovakia-Greece BIT*

276. The Tribunal will first determine whether, in light of the facts summarized above and the evidence in the record, the interests held by Poštová banka in the GGBs qualify as an investment under Article 1(1) of the Slovakia-Greece BIT.
277. If there is no protected investment under the Slovakia-Greece BIT, the dispute subject matter of this arbitration will not be a dispute related to an investment, as required in Article 10(1) of the Slovakia-Greece BIT which contains the consent of the parties to arbitration, and therefore such dispute will not fall under the jurisdiction of ICSID and the competence of this Tribunal under the aforementioned Article 25.
278. Article 1 (“*Definitions*”) of the Slovakia-Greece BIT provides:

*For the purposes of this Agreement:*

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, business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.*
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.*
3. *“Investor” shall comprise with regard to either Contracting Party:*
  - a) *natural persons having the nationality of that Contracting Party in accordance with its law*
  - b) *legal persons constituted in accordance with the law of that Contracting Party.*
4. *“Territory” means in respect of either Contracting Party, the territory under its sovereignty as well as the territorial sea and submarine areas, over which*

*that Contracting Party exercises, in conformity with international law, sovereign rights or jurisdiction.”*

279. As summarized under paragraphs 127 to 132 above, Claimants claim that their interests in GGBs are included in what they consider a broad definition of “investment” contained in the chapeau of Article 1 of the Slovakia-Greece BIT, and under section (c) of the same article, because Claimants’ interests in the GGBs are either “loans” or “claims to money” or both. In reading the Slovakia-Greece BIT, Claimants consider that there is no inherent meaning of investment under international law and that the Tribunal, pursuant to Article 31(4) of the VCLT must simply apply the special meaning ascribed to the term “investment” by the State parties to the Slovakia-Greece BIT.
280. Respondent, in turn, considers that the term “investment” contained in the aforesaid chapeau of Article 1 has an inherent meaning under international law and that a correct interpretation of Article 31(4) of the VCLT leads to the conclusion that there is no special definition of the term “investment” under the treaty.
281. Articles 31(1) and 31(2) of the VCLT require interpretation of a treaty:

*“(1)...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 purposes of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement related to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.”<sup>467</sup>*

282. The heading of Article 31 of the VCLT calls that article a “general rule of interpretation” meaning that the elements contained in Article 31(1) form a single rule of interpretation and may not be taken separately or in isolation. As indicated by the tribunal in *Aguas del Tunari v. Bolivia*:

*“Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and*

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<sup>467</sup> VCLT, Articles 31(1) and 31(2).

*(3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation. In approaching this task, it is critical to observe two things about the general rule (...). First, the Vienna Convention does not privilege anyone of these three aspects of the interpretation method. The meaning of a word or phrase is not solely a matter of dictionary and linguistics. (...)*<sup>468</sup>

283. In other words, “*the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown in to the crucible, and their interaction would give the legally relevant interpretation.*”<sup>469</sup>
284. In the view of this Tribunal, an interpretation in good faith is not simply interpretation *bona fides*, as opposed to the absence of *mala fides*, or a principle providing for the rejection of an interpretation that is abusive or that may result in the abuse of rights. It also means that the interpretation requires elements of reasonableness that go beyond the mere verbal or purely literal analysis.
285. The chapeau of Article 1 of the Slovakia-Greece BIT provides that for the purposes of the treaty “[i]nvestment means every kind of asset and in particular, though not exclusively includes: (...).” In turn section (c) of Article 1 refers to “*loans, claims to money or to any performance under contract having a financial value.*”
286. The Tribunal agrees with Claimants that the concept of “investment” as contained in Article 1 of the Slovakia-Greece BIT is a broad one. The BIT contains a broad asset-based concept of investment – as opposed to a closed or limitative concept – and considers that an investment includes “*every kind of asset*” comprising the examples of investments listed in Article 1.
287. However, the Tribunal is not persuaded that a broad definition necessarily means that any and all categories, of any nature whatsoever, may qualify as an “investment,” nor that the only manner in which a category may be excluded as an investment, under a

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<sup>468</sup> *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction of October 21, 2005 (“*Aguas del Tunari v. Bolivia*”), ¶ 91.

<sup>469</sup> RL-80, Report of the International Law Commission on the work of its eighteenth session, [1966] Yearbook of the ILC, vol. II, part II, p. 219, ¶ 8.



broad-asset based concept, is by express exclusion in the given treaty. The rule of interpretation of Article 31 of the VCLT must be applied to each treaty in particular, and not seeking to create general categories or classifications of treaties, depending on whether the definition is broad or closed.

288. It is true that when a treaty includes examples of categories that may constitute an investment, such as the ones contained in Article 1 of the Slovakia-Greece BIT, the structure of the treaty, as regards protected investments, is not that of a closed list or an exhaustive description of what may constitute an investment. But this does not mean that investor-State tribunals are authorized to expand the scope of the investments that the State parties intended to protect merely because the list of protected investments in the treaty is not a closed list. The rule of interpretation of Article 31 of the VCLT requires that the terms of the treaty be interpreted in good faith, and not only referring to the text but to the context, as well as considering the object and purpose of the treaty.
289. Several treaties, including the Slovakia-Greece BIT, contain similar – and even identical – concepts of “investment” in the chapeau of the article that refers to protected investments. In fact, the same chapeau contained in Article 1 of the Slovakia-Greece BIT, with a broad asset-based concept, is repeated not only in a significant number of Greek BITs but also in a number of other treaties referred to in decisions repeatedly cited by the Parties to this arbitration.
290. As to Greek treaties, the same or similar chapeau is used, *inter alia*, in the BITs with Albania (1991),<sup>470</sup> Romania (1991),<sup>471</sup> Cyprus (1992), and Romania (1997).<sup>472</sup>
291. With respect to decisions invoked by the Parties in this arbitration:

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<sup>470</sup> RL-120, Agreement between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investment of August 1, 1991.

<sup>471</sup> CL-128, Agreement between the Government of the Hellenic Republic and the Government of Romania for the Promotion and Reciprocal Protection of Investments of September 16, 1991.

<sup>472</sup> RL-119, Agreement between the Government of the Hellenic Republic and the Government of the Republic of Romania on the Promotion and Reciprocal Protection of Investments of May 23, 1997.

- In *Fedax v. Venezuela*, the definition in the Netherlands-Venezuela BIT provides “[t]he term *Investments* shall comprise every kind of asset and more particularly though not exclusively.”<sup>473</sup>
- The UK-Egypt BIT in *Joy Mining v. Egypt* provides that “‘investment’ means every kind of asset and in particular, though not exclusively, includes:”<sup>474</sup>
- In *Malaysian Historical Salvors v. Malaysia*, the UK-Malaysia BIT provides that “‘investment’ means every kind of asset and in particular, though not exclusively, includes:”<sup>475</sup>
- The Switzerland-Uzbekistan BIT applied in *Romak v. Uzbekistan* defines investment by indicating that “[t]he term ‘investments’ shall include every kind of assets and particularly:”<sup>476</sup>

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<sup>473</sup> See *Fedax v. Venezuela*, ¶ 31. Article 1 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela of 22 October 1991 (the “*Netherlands-Venezuela BIT*”) reads as follows: “For the purposes of this Agreement (a) the term ‘investments’ shall comprise every kind of asset and more particularly though not exclusively: i. movable and immovable property, as well as any other rights in rem in respect of every kind of asset; ii. rights derived from shares, bonds, and other kinds of interests in companies and joint-ventures; iii. title to money, to other assets or to any performance having an economic value; iv. rights in the field of intellectual property, technical processes, goodwill and know-how; v. rights granted under public law, including rights to prospect, explore, extract, and win natural resources.” (Treaty available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2094>)

<sup>474</sup> See *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction of August 6, 2004 (“*Joy Mining v. Egypt*”). Article 1 of the United Kingdom-Arab Republic of Egypt Agreement for the Promotion and Protection of Investments which entered into force on February 24, 1976 (the “*UK-Egypt BIT*”) provides: “For the purposes of this Agreement: (a) “investment” means every kind of asset and in particular, though not exclusively, includes: (i) movable and immovable property and any other property rights such as mortgages, liens or pledges; (ii) shares, stock and debentures of companies or interests in the property of such companies; (iii) claims to money or to any performance under contract having a financial value; (iv) intellectual property rights and goodwill; (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.” (Treaty available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1122>)

<sup>475</sup> See *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment of April 16, 2009 (“*MHS Annulment*”), ¶ 59. Article 1 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments (“*UK-Malaysia BIT*”) reads as follows: “For the purposes of this Agreement: (1) (a) “investment” means every kind of asset and in particular, though not exclusively, includes: (i) movable and immovable property and any other property rights such as mortgages, liens or pledges; (ii) shares, stock and debentures of companies or interests in the property of such companies; (iii) claims to money or to any performance under contract having a financial value; (iv) intellectual property rights and goodwill; (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.” (Treaty available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1972>)

- In *Alps Finance v. The Slovak Republic*, the Slovakia-Switzerland BIT provides that “[t]he term “investments” shall include every kind of assets and particularly:”<sup>477</sup>
- The award in *Deutsche Bank v. Sri Lanka* refers to the Germany-Sri Lanka BIT which defines investment by indicating that “the term ‘investments’ comprises every kind of asset, in particular.”<sup>478</sup>
- The Netherlands-Kazakhstan BIT in *KT Asia v. Kazakhstan* defines investment by indicating that “the term ‘investments’ means every kind of asset and more particularly, though not exclusively:”<sup>479</sup>

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<sup>476</sup> See *Romak v. Uzbekistan*, ¶ 174. Article 1 of the Bilateral Investment Treaty entered into between the Swiss Confederation and the Republic of Uzbekistan on the “Promotion and the Reciprocal Protection of Investments” dated 16 April 1993 (the “Switzerland-Uzbekistan BIT”) states: “For the purpose of this Agreement: (...) (2) The term ‘investments’ shall include every kind of assets and particularly: (a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges; (b) shares, parts or any other kinds of participation in companies; (c) claims to money or to any performance having an economic value; (d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), technical processes, know-how and goodwill; (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.” (Treaty available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2328>)

<sup>477</sup> See *Alps Finance v. Slovak Republic*, ¶ 230. Article 1(2) of the Agreement between the Czech and Slovak Federal Republic and the Swiss Confederation on the promotion and reciprocal protection of investments of 5 October 1990 (the “Slovakia-Switzerland BIT”), reads as follows: “The term “investments” shall include every kind of assets and particularly: (a) movable and immovable property as well as any other rights in rem such as servitudes, mortgages, liens, pledges; (b) shares, parts or any other kinds of participation in companies; (c) claims and rights to any performance having an economic value; (d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill; (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.” (Treaty available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2264>)

<sup>478</sup> See *Deutsche Bank v. Sri Lanka*, ¶ 130. Article 1 of the Treaty between the Federal Republic of Germany and the Democratic Socialist Republic of Sri Lanka concerning the Promotion and Reciprocal Protection of Investments of 7 June 2000 (the “Germany-Sri Lanka BIT”) provides as follows: “For the purposes of this Treaty 1. the term “investments” comprises every kind of asset, in particular: (a) movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges; (b) shares in and stock and debentures of companies and other kinds of similar interest in companies; (c) claims to money which has been used to create an economic value or claims to any performance having an economic value and associated with an investment; (d) intellectual property rights, in particular copyrights, patents, utility-model patents, registered designs, trademarks, trade-names, trade and business secrets, technical processes, know-how, and good will; (e) business concessions under public law or under contract, including concessions to search for, extract and exploit natural resources; (...)” (Treaty available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1418>)

292. However, the list of categories that follows the introductory phase and that illustrates what may constitute an investment varies – in some cases substantially – from one treaty to another. In the above cited cases of Greek treaties, while some include, for example, the term “loans,” others refer to “long term loans,” others to loans “connected to an investment” and others – which is the case of the Cyprus-Greece BIT – exclude the term “loan” altogether. As for the treaties that served as bases for the decisions mentioned in 291 above, the examples vary significantly from one treaty to the other.
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 (ut res magis valeat quem pererat) 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.”<sup>480</sup>*

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<sup>479</sup> See *KT Asia v. Kazakhstan*, ¶ 162. Article 1 of the Agreement on encouragement and reciprocal protection of investments between the Republic of Kazakhstan and the Kingdom of the Netherlands of 1 August 2007 (the “*Netherlands-Kazakhstan BIT*”) provides as follows: “*For the purposes of this Agreement: (a) the term “investments” means every kind of asset and more particularly, though not exclusively: (i) movable and immovable property as well as any other rights in rem in respect of every kind of asset; (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures; (iii) claims to money, to other assets or to any performance having an economic value; (iv) rights in the field of intellectual property, technical processes, goodwill and know-how; (v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.*” (Treaty available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1784>)

<sup>480</sup> 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).

294. The list of examples provided by the Slovakia-Greece BIT must, thus, 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. Treaties are carefully drafted and negotiated, and the differences in the examples used in the treaties that contain a broad-based definition of assets are not fortuitous. 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. This does not mean that the list of examples becomes a closed or exhaustive list. Based on the understanding that the concept of asset is a broad one and the examples are such and not limitative lists, the examples altogether must be considered and given meaning to arrive at the proper interpretation of the treaty.
296. The reasoning of the tribunal in the decision of *Fedax v. Venezuela*, repeatedly invoked in this arbitration, assigned substantial weight to the wording of the list of examples contained in Article 1(1) of the BIT between Venezuela and the Netherlands. In the words of that tribunal:

*“It follows that, as contemplated by the Convention, the definition of ‘investment’ is controlled by consent of the Contracting Parties, and the particular definition set forth in Article 1 (a) of the Agreement is the one that governs the jurisdiction of ICSID:*

*‘[T]he term Investments’ shall comprise every kind of asset and more particularly though not exclusively:*

*(ii) rights derived from shares, bonds, and other kinds of interests in companies and joint ventures;*

*(iii) titles to money, to other assets or to any performance having an economic value ...’*

*This definition evidences that the Contracting Parties to the Agreement intended a very broad meaning for the term ‘investment.’ The Tribunal notes in particular that titles to money in this definition are not in any way restricted to*

*forms of direct foreign investment or portfolio investment, as argued by the Republic of Venezuela. Some such restrictions may perhaps apply to other types of investment listed in such definition, such as rights derived from shares or other similar types of investment, but they do not apply to the credit transactions of different categories that are embodied in the meaning of ‘titles to money’ as referred to in subparagraph (iii) of the definition set out above. It should be noted, moreover, that titles to money are not necessarily excluded from the concept of direct foreign investment.”*<sup>481</sup>

297. The *Fedax v. Venezuela* tribunal was not only persuaded by the broad context of the chapeau of the relevant provision, but by the inclusion in the list of assets that may constitute an investment of the term “titles to money.”
298. In the decision on jurisdiction and admissibility in *Abaclat v. Argentina*, cited by the Parties in this arbitration and invoked by Claimants to support the allegation that there is no inherent meaning for the term “investment,” the tribunal devotes several pages of reasoning to whether or not the term “obligaciones” (in the Spanish version) and “obbligazioni” (in the Italian version) should be translated as “obligations” or as “bonds” and as to whether or not bonds, considering the wording in the examples provided under Article 1 of the Argentina-Italy BIT, qualified as an investment.
299. In its analysis of Article 1(1) of the Argentina-Italy BIT, and specifically in its review of the examples contained in the aforesaid Article, the *Abaclat* tribunal reasoned as follows:

*“According to the Tribunal’s own English translation of Article 1(1) BIT, the term ‘investment includes, without limitation’:*

*- lit. (a): ‘movable and immovable goods, as well as any other right in rem, including – to the extent usable as investment – security rights on property of third parties;’*

*- lit. (b): ‘shares, company participations and any other form of participation, even if representing a minority or indirectly held, in companies established in the territory of a Contracting State;’*

*- lit. (c): ‘obligations, private or public titles or any other right to performances or services having economic value, including capitalized revenues;’*

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<sup>481</sup> *Fedax v. Venezuela*, ¶¶ 31-32. (Emphasis added).

- lit. (d): ‘credits which are directly linked to an investment, which is constituted and documented in accordance with the provisions in force in the State where the investment is made;’

- lit. (e): ‘copyrights, intellectual or industrial property rights – such as invention patents, licenses, registered trademarks, secrets, industrial models and designs – as well as technical processes, transfer of technology, registered trade names and goodwill;’

- lit. (f): ‘any right of economic nature conferred under law or contract, as well as any license and concession granted in compliance with the applicable provisions applicable to the concerned economic activities, including the prospection, cultivation, extraction and exploitation of natural resources’.”

(...)

“Firstly, this list covers an extremely wide range of investments, using a broad wording and referring to formulas such as ‘independent of the legal form adopted,’ or ‘any other’ kind of similar investment. It even contains a residual clause in lit. (f), encompassing ‘any right of economic nature conferred under law or contract.’ In other words, the definition provided for in Article 1(1) is not drafted in a restrictive way. Based on its wording, as well as on the broader aim of the BIT as described in the Preamble, Article 1(1) cannot be seen to have intended to adopt a restrictive approach with regard to what kind of activity or dealing was meant to qualify as an investment.

“Secondly, lit.(c) specifically addresses financial instruments. It is true that the term ‘obligations’ is a broad term and can refer to any kind of contractual obligation, i.e., debt, and it is also true that the term ‘title’ is also very broad. However, put in the context of the further terms listed in lit. (c) such as ‘economic value’ or ‘capitalized revenue,’ as well as considering that lit. (f) already deals with the more general concept of ‘any right of economic nature,’ lit. (c) is to be read as referring to the financial meaning of these terms. Thus, the 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.

“Thus, the Tribunal finds that the bonds, as defined above in § 11, constitute ‘obligations’ and/or at least ‘public securities’ in the sense of Article 1(1) lit. (c) of the BIT.

“With regard to the security entitlements that Claimants hold in these bonds, they also represent ‘securities’ in the sense of Article 1(1) lit. (c), since they constitute an instrument representing a financial value held by the holder of the security entitlement in the bond issued by Argentina.”<sup>482</sup>

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<sup>482</sup> *Abaclat v. Argentina*, ¶ 352 and ¶¶ 354-357.

300. The tribunal in *Abaclat v. Argentina*, thus, 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, using a broad wording and referring to formulas such as ‘independent of the legal form adopted.’ or ‘any other’ kind of similar investment,*”<sup>483</sup> (ii) contained “*a residual clause in lit. (f), encompassing ‘any right of economic nature conferred under law or contract’*”;<sup>484</sup> (iii) specifically addressed financial instruments because “*the term ‘obligation’ may be understood as referring to an economic value incorporated into a credit title representing a loan (...).*”<sup>485</sup>
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.
302. The *Ambiente Ufficio* tribunal also considered in detail the list of examples in Article 1(1) of the Argentina-Italy BIT as a key element to its conclusion that bonds are covered either because the word “*obligaciones*” or “*obbligazioni*” should be translated as bonds, or because what the tribunal calls a “catch-all clause” covers rights derived from law or contract.<sup>486</sup>
303. In sum, the decisions that have specifically analysed issues related to financial products similar to those at issue in this case have consistently considered the text of the list of categories that may constitute an investment as a definitive element to determine whether the activity or operation at stake may be considered an investment.
304. The language in the Slovakia-Greece BIT, as will be analysed below, 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.

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<sup>483</sup> *Abaclat v. Argentina*, ¶ 354.

<sup>484</sup> *Abaclat v. Argentina*, ¶ 354.

<sup>485</sup> *Abaclat v. Argentina*, ¶ 355.

<sup>486</sup> *Ambiente Ufficio v. Argentina*, ¶¶ 488-495.



305. First, as opposed to the wide language quoted by the *Abaclat* tribunal from the Argentina-Italy BIT, that includes general formulas such as “*independent of the legal form adopted*,” the language used in the chapeau of Article 1(1) of the Slovakia-Greece BIT simply provides that “[i]nvestment means any type of asset and in particular, though not exclusively, includes:...”
306. Second, the list of examples of Article 1(1) of the Slovakia-Greece BIT, and particularly the sections invoked by Claimants in support of their interpretation of the relevant 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, invoked by the *Abaclat* and *Ambiente Ufficio* tribunals as the basis for their conclusion, includes amongst the illustrative list of what may constitute an investment “*obligations, private or public titles or any other right to performances or services having economic value, including capitalized revenues.*” (Emphasis added) 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. Third, the 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.
308. A wide term like “obligations” – particularly in the context in which it must be understood in civil law systems – and a reference to “private or public titles” may well lead, as it seems to have led the *Abaclat* and *Ambiente Ufficio* tribunals, to the conclusion that a Government bond is generally an obligation and specifically a public title. However, the same conclusion may not be reached when a treaty, interpreted in accordance with the rules of interpretation of the VCLT, includes less encompassing language.

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, or that protecting investments is the sole purpose of the treaty. The State parties, in addition to expressing their desire to intensify their mutual cooperation (first section of the Preamble), agree that it is necessary to create favorable conditions to investors (second section of the Preamble) and then recognize that the promotion and protection of investment *“on the basis of the present Agreement, will stimulate the initiative in this field”* (third section of the Preamble). The conclusion seems obvious: 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.

311. The terms of the BIT are contained in its 13 articles, which start with the chapeau of Article 1(1) which, as already mentioned, provides that *“[i]nvestment means every kind of asset and in particular, but not exclusively, includes:”* The chapeau is followed by a list of what, *“in particular, but not exclusively,”* the parties to the treaty deem included as an *“investment.”*

312. If the chapeau of Article 1(1) is interpreted in isolation, in a mere literal manner or solely in conjunction with Article 1(1)(c), it would mean that: (i) any asset of any nature whatsoever would qualify as an investment under the Slovakia-Greece BIT; but (ii) that the list contained in Article 1(1) of the BIT would be useless or meaningless. An interpretation of the chapeau, considering its text and context within Article 1(1) of

the BIT, and the object and purpose of the treaty, as required by the VCLT, leads to a different result.

313. Article 1(1) of the Slovakia-Greece BIT initially provides for a broad concept by indicating that investment “*means any kind of asset.*” But then uses the words “*and in particular*” (which means, specifically or especially distinguished from others; a term used to show that a statement applies to one person or thing more than any other),<sup>487</sup> followed by the words “*but not exclusively, includes,*” and a list of what is included. Article 1(1) of the BIT provides, thus, for a broad concept of investment, that it then qualifies to indicate that the term applies especially to a specific group or category (the list contained in sections (a) to (d)), which group or category is not closed, or limited or restrictive.
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.
315. The categories selected by the State parties must be considered in determining if an asset, that may constitute an investment, is included in the categories of investments selected by the States. In such consideration, the Tribunal must balance the broadness of the categories with the limits that result from their inclusion in the treaty.
316. Based on the above, an interpretation of Article 1 (1) of the Slovakia-Greece BIT requires a determination of whether Poštová banka’s interests in the GGBs fit within the specific, but wide, category or group of investments listed in sections (a) to (f), and specifically a determination as to whether, in the words of Claimants, the GGBs “*fall*

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<sup>487</sup> See, e.g.: “particular.” Merriam Webster Dictionary (online version) <http://www.merriam-webster.com/dictionary/particular?show=0&t=1423065666> (retrieved January 30, 2015); “in particular.” Oxford Dictionary (online version) <http://www.oxforddictionaries.com/es/definicion/ingles/in-particular?q=in+particular> (retrieved January 30, 2015).

*squarely within Article 1.1 (c) of the Slovakia-Greece BIT (“loans, claims to money or to any performance under contract having a financial value”) (...).”*<sup>488</sup>

317. The Tribunal has no doubt and the Parties do not seem to dispute that, on the one hand, the GGBs constitute sovereign debt, and on the other, that they are securities.<sup>489</sup>
318. Sovereign debt, as indebtedness of a sovereign State, has special features and characteristics. First, it is clearly a method of financing government operations, from investments in infrastructure to ordinary government expenditures.
319. Second, it is a key instrument of monetary and economic policy (e.g., indebtedness may be incurred to avoid either the issuance of fresh money – that may create hyperinflation – or an increase in taxes; or, as in the case at hand, for political reasons, regulators may decide to rate sovereign debt at zero risk despite the rating of the debt in the market).
320. Third, sovereign debt is subject to a high degree of political influence and risk. A sovereign State engages in much more complex decisions, both in negotiating and structuring the debt and in payment thereof, and repayment is subject not only to the normal credit risk of any credit operation, but also to political decisions that are extremely sensitive for the inhabitants of the given State, such as a tax increase or a reduction in public expenditure or investment to repay the sovereign debt. Moreover, given the above considerations, it has been hotly debated whether sovereign indebtedness is an act of the sovereign or a commercial operation.<sup>490</sup>
321. Fourth, while ordinary credits generally embody the interest of the main parties to the credit agreement – debtor and creditor – and the influence of third parties is limited, sovereign debt is highly influenced to different degrees by both internal and external factors.

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<sup>488</sup> C-Mem., ¶ 92.

<sup>489</sup> Mem., ¶ 60; Hearing, Tr., 95:5-9.

<sup>490</sup> See, e.g.: *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), *Borri v. Argentina*, Cass., sez. un., 27 May 2005, n. 11225, 88 RIVISTA DI DIRITTO INTERNAZIONALE 856 (2005) cited in: Michael Waibel, *Opening Pandora's Box: Sovereign Bonds In International Arbitration*, American Journal of International Law (2007), Vol. 101, p. 711, at fn 113.

322. Fifth, the only security for the creditors of sovereign debt is normally the full faith and credit of the given State. Moreover, as a general rule there is no strict seniority in sovereign debt issues and therefore, existing creditors may see their debt “diluted” by subsequent new bond issuances.
323. Last, but not least, creditors have much more limited legal resources if a sovereign debtor fails to make a contracted payment considering issues of immunity that only apply to sovereigns.
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.
325. As regards government bonds, the facts presented and documented by the Parties in this case confirm that they are securities and as such are subject to specific and strict regulations.
326. An issuance of bonds in the European context requires that an offer of securities to the public within the territory of an EU Member State must be preceded by the publication of a prospectus and that the publication of the prospectus is made subject to the approval of the competent authority of the home Member State, in this case the Respondent.<sup>491</sup> Approval of the prospectus is subject to specific requirements under the law of the issuing State and must consider the applicable laws of the State or States where the bonds will be traded. Moreover, the bonds may need to include or exclude certain provisions or disclaimers so as to prevent the application of strict legislation of States where the bonds will be traded.<sup>492</sup>

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<sup>491</sup> R-110; R-111; R-112; R-113; R-114.

<sup>492</sup> The Offering Circular for the GGBs (*see e.g.*, R-110) provides: “*The distribution of this Offering Circular and the offer or sale of Bonds may be restricted by law in certain jurisdictions. The Republic and the Managers do not represent that this document may be lawfully distributed or that the Bonds may be lawfully offered, in compliance with any applicable registration or other requirements in any such jurisdiction, or pursuant to an exemption available thereunder, or assume any responsibility for facilitating any such distribution or offering. In particular, no action has been taken by the Republic or the Managers which would permit a public offering of the Bonds or distribution of this document in any jurisdiction where action*”

327. The evidence submitted by the Parties, including the expert reports, describes in detail the operation of bonds in the primary and secondary markets and the fact that bonds are easily tradable on the secondary market, with clearing houses acting as intermediaries or as administrators, but under contract with the bondholders.<sup>493</sup> As a result, creditors change many times during the life of the bond, and there is no requirement to notify or inform the issuing State about the changes of holders in the secondary market.
328. Bonds issued by a Sovereign are subject to ratings by rating agencies and to a continuous monitoring of the State's credit rating (which in turn varies depending on a number of factors, including changes in the government, the adoption of economic measures, including tax measures, and variation in the international prices of commodities produced by the given State).
329. The requirements, characteristics and tradability of the GGBs are amply documented in the record. The Tribunal has no doubt that GGBs are sovereign debt, in the form of securities, in general, and bonds, in particular, that are subject to strict requirements in their issuance. These securities are heavily regulated not only by the issuing State, but in the markets where they are traded, including measures adopted by the banking regulators and rules on to how they should be accounted for and rated for purposes of the balance sheet of the bondholders subject to special regulations, such as the case of Poštová banka.

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*for that purpose is required. Accordingly, the Bonds may not be offered or sold, directly or indirectly, and neither this Offering Circular nor any advertisement or other offering material may be distributed or published, in any jurisdiction except under circumstances that will result in compliance with any applicable laws and regulations. Persons into whose possession this Offering Circular or any Bonds come must inform themselves about, and observe, any such restrictions.*

*The Bonds have not been and will not be registered under the United States Securities Act of 1933, as amended (the "Securities Act"), or under any state securities law. Unless so registered, the Bonds may not be offered or sold within the United States except in a transaction that is exempt from or not subject to any registration requirement. As a result, the Bonds are only being offered (a) to qualified institutional buyers as defined in Rule 144A under the Securities Act ("Rule 144A") in compliance with Rule 144A and (b) pursuant to offers and sales in compliance with Regulation S under the Securities Act ("Regulation S"). Prospective purchasers of the Bonds are hereby notified that the sellers of the Bonds may be relying on the exemption from the provisions of the Securities Act provided by Rule 144A. See 'Subscription and Sale'." R-110, p. 2.*

<sup>493</sup> Mem., ¶ 56; Stulz Report, ¶¶ 22-25; Hubbard Report, ¶¶ 43-45.

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.
331. It is clear to the Tribunal that the list of investments contained in Article 1(1) of the Slovakia-Greece BIT does not include the language of the Italy-Argentina BIT from which the *Abaclat* tribunal derived its conclusions on admissibility and jurisdiction, and specifically, does not contain any reference to “obligations” or to “securities,” much less to *public* titles or obligations.
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.
333. The only reference to bonds in the Slovakia-Greece BIT is in Article 1(1)(b) which refers to “*shares in and stock and debentures of a company and any other form of participation in a company*” (emphasis added). The text leaves no doubt that the bonds referred to under Article 1(1)(b) are only bonds issued by a company – debentures of a company – not sovereign debt in general, or bonds issued by either State party to the treaty, in particular. Respondent argues, and the Tribunal agrees, that sovereign bonds are different from forms of participation in corporations, and therefore their exclusion from the definition of investment in a given treaty indicates that the contracting parties did not intend to cover these types of assets.<sup>494</sup>

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<sup>494</sup> See Hearing, Tr., 441:9-442:4: “*There is a fundamental difference between shares, corporate bonds and other forms of participation in a company on the one hand and sovereign bonds on the other hand. Shares and corporate bonds are associated with a commercial undertaking in the host State. Now, a Shareholder owns part of the company, and a corporate bond is a claim to a portion of the company's profit. Now, sovereign bonds, by contrast, are not associated with the commercial undertaking in the host State. They typically serve general budgetary purposes. Well, there are important differences between corporate bonds on the one hand and sovereign bonds even at the time of the issuance of the sovereign bonds, and this is particularly so with respect to sovereign bonds that are not linked with specific economic activity in the host State such as the Greek Government Bonds at issue in this arbitration.*”

334. It is indeed telling that the State parties have specifically referred under section (b) to “any form of participation in a company,” which includes bonds, but is clearly limited to bonds issued by companies, and have not included bonds in general under section (c) or in any other provision of the treaty. The provisions of treaties are, as both Parties recognize,<sup>495</sup> carefully and extensively negotiated. The express inclusion of debentures issued by companies and the omission of any other reference to bonds or to public obligations in the treaty must be given some meaning for purposes of the interpretation of the text and context of the treaty.
335. It is therefore clear that in the context of the Slovakia-Greece BIT, and particularly in Article 1(1)(b) the State parties considered some types of bonds as investments, but the reference to bonds is limited to bonds issued by a company.
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, normally identified in the pertinent agreement. 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 in a matter of days or even hours, as bonds are traded. The tradability of loans or syndicated loans is generally limited, and precisely because loans are generally not tradable, they are not subject to the restrictions or regulations that apply to securities.
338. The Tribunal agrees with Respondent that loans involve contractual privity between the lender and the debtor, while bonds do not involve contractual privity. The lender has a direct relationship with the debtor – in the case of public debt, the State – as party to

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<sup>495</sup> C-Mem., ¶ 92; Hearing, Tr., 440:13-443:8.



the same contract – the loan agreement – while in the issuance of bonds the contractual relationship of the State is with the intermediaries – in the case at hand with the Participants and the Primary Dealers. The holders of the bonds – the ultimate creditors, holders of the bonds – have a contractual relationship with the intermediary or the clearing house where the bonds are acquired or both.

339. The facts of this case and particularly the various operations undertaken by Poštová banka with the GGBs confirm the above. Poštová banka acquired the GGBs under a contract with Clearstream, sold the GGBs back through Clearstream under the same contract. Thereafter, Poštová banka assigned rights to the GGBs to third parties under the Assignment Agreements and then terminated such agreements pursuant to a Settlement Agreement. It treated the GGBs as bonds in its financial statements for the purposes that have been amply debated in this arbitration. If Poštová banka had granted a loan to Greece, as opposed to having acquired bonds in the secondary market, it would have had a direct contractual relationship with Greece, and the fast tradability of the bonds – without involving Greece – which allowed Poštová banka to sell, repurchase, assign and reverse the assignment, in some cases in matter of hours, without even informing the State debtor in any step of the operation, would not have been possible.
340. Again, the specific use of the term “debentures” only for debt issued by companies in Article 1(1)(b) of the Slovakia-Greece BIT and the specific use of the term “loans” in another section of the Slovakia-Greece BIT, Article 1(1)(c) , together with the lack of reference to any sort of public indebtedness, leads the Tribunal to consider that the Parties to the treaty did not intend to treat government securities, such as the GGBs, as investments for purposes of the BIT.
341. In connection with “*claims to money*,” the other category of investments in Article 1(1)(c) of the BIT which Claimants deem to include GGBs, 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*” (emphasis added). Therefore the investment consists of a claim to money, or a claim to performance, under a contract having a financial value. In other words, the claim to money must arise under a contractual relationship.
344. The contractual relationships in the issuance by Greece in the primary market and the purchase by Poštová banka in the secondary market have been widely discussed. 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. Poštová banka acquired its interests in the GGBs through a transaction with Clearstream, governed by the laws of Luxembourg, which governed, inter alia, the opening of the corresponding account for the purchase and sale of the GGBs.
345. Under Greek Law 2198 of 1994 and the documents governing the issuance and trade of the GGBs, the rights of Poštová banka – like the rights of other bondholders – were rights against the Participants. There is nothing in the record that even suggests that there was a contractual relationship between Respondent and Poštová banka. Poštová banka had certain rights against the Greek Government under the terms of the GGBs, as discussed below, but such rights would only become exercisable against Respondent in one specific circumstance: the Greek Government’s failure to pay due interest and principal on securities to the Bank of Greece.<sup>496</sup>
346. Even if, as suggested by Claimants, the issuance of the GGBs and the sales in the secondary market constitute one single economic operation, the Tribunal is not

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<sup>496</sup> R-108, Article 8.2.

convinced that even the fact of considering such unified operation would result in Poštová banka having a claim to money under contract against Respondent.

347. The record indicates that Poštová banka never entered into a contract with Respondent and its contractual relationship under the GGBs was exclusively with the Participants through Clearstream. In other words, the “*claim to money*” would not result from a contract between Poštová banka and Respondent.
348. Poštová banka holds a right in a title – *a right in rem* – against the Participants, and would have rights against Greece, not arising from a contract with Respondent, but from the title and the consequences provided therein in case the Greek Government fails to pay principal and interest to the Bank of Greece pursuant to the terms of Law 2198 of 1994.
349. Since Poštová banka does not have a claim to money under contract having a financial value, it does not have an investment for purposes of Article 1(1) of the BIT.
350. The Tribunal accordingly concludes that neither of the Claimants is an investor with an investment as defined in Article 1(1) (c) of the Slovakia-Greece BIT and in Article 1(1) (c) of the Cyprus-Greece BIT. Based on the above analysis, the Tribunal concludes that it lacks jurisdiction *ratione materiae* to entertain this dispute. In light of this conclusion, the Tribunal does not deem it necessary to examine the remaining objections to jurisdiction advanced by Respondent, concerning absence of jurisdiction *ratione personae* and *ratione temporis*, nor the allegations concerning abuse of process and the umbrella clause.

## **2. Analysis of the Tribunal’s Jurisdiction Under the Washington Convention**

### **a. The Tribunal Need Not Determine Whether It Would Have Jurisdiction Under the Washington Convention in the Circumstances of the Case**

351. The Tribunal’s conclusion concerning the definition of “investment” under the Slovakia-Greece BIT in Section VI.1 above makes it unnecessary for the Tribunal to resolve the dispute between the Parties concerning whether Poštová banka’s GGBs

would be considered investments as that term is used in the Washington (ICSID) Convention. Because the Parties have devoted significant attention to that issue, however, the Tribunal feels it appropriate to refer to such disagreement.<sup>497</sup>

352. According to Article 25(1) of the Washington Convention:

*“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.”*

It is well known that the drafters of the Washington Convention intentionally chose not to include a definition of investment within that convention.<sup>498</sup>

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. Those tribunals have concluded that such criteria cannot be set aside by a consent that may have been given in another legal instrument, such as a BIT. An example of such an approach is the one taken by the *ad hoc* Committee in the Patrick Mitchell v. Congo annulment proceeding, which expressed its understanding of the limits of the notion of investment in the following terms:

*“[T]he parties to an agreement and the States which conclude an investment treaty cannot open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an investment. It is thus repeated that, before ICSID arbitral tribunals,*

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<sup>497</sup> The Tribunal here takes a similar approach as in *Plama Consortium Limited v. Bulgaria* where the tribunal explained that:

*“The Parties have extensively documented their allegations; numerous exhibits, witness statements and expert reports have been submitted by both Parties. The factual and legal arguments have been discussed in detail during the Final Hearing, in which a number of witnesses and experts were also examined by the Parties and the arbitrators. The Tribunal has therefore decided that, in acknowledgement of the Parties’ efforts, it will consider their further allegations on the merits.”* *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award of August 27, 2008, ¶ 147.

<sup>498</sup> See *MHS Annulment*, ¶¶ 65-71.

*the Washington Convention has supremacy over an agreement between the parties or a BIT.*<sup>499</sup>

354. The same position was articulated in *Phoenix*:

*“At the outset, it should be noted that BITs, which are bilateral arrangements between two States parties, cannot contradict the definition of the ICSID Convention. In other words, they can confirm the ICSID notion or restrict it, but they cannot expand it in order to have access to ICSID. A definition included in a BIT being based on a test agreed between two States cannot set aside the definition of the ICSID Convention, which is a multilateral agreement. As long as it fits within the ICSID notion, the BIT definition is acceptable, it is not if it falls outside of such definition. For example, if a BIT would provide that ICSID arbitration is available for sales contracts which do not imply any investment, such a provision could not be enforced by an ICSID tribunal.”*<sup>500</sup>

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, whether it is mentioned in the ICSID Convention or in a BIT. 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 [...]. By their nature, asset types enumerated in the BIT’s non-exhaustive list may exhibit these hallmarks. But 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.’ In the general formulation of the tribunal in *Azinian*, ‘labeling ... is no substitute for analysis.’”*<sup>501</sup>

356. In sum, the aforementioned tribunals seem to have developed an understanding to the effect that some core elements characterize an investment, whether these are

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<sup>499</sup> *Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award of November 1, 2006, ¶ 31.

<sup>500</sup> *Phoenix v. Czech Republic*, ¶ 96. (Footnotes omitted). *See also* ¶ 82.

<sup>501</sup> *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*.

considered as a general framework or as jurisdictional requirements. 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. On the other hand, insofar as BIT arbitration under the ICSID Convention is concerned, it has also been held in a number of well-known cases that, because the ICSID Convention provides no definition of the term “investment,” the limits of this concept are susceptible to agreement between the State parties to a BIT, and 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. As stated by the tribunal in the *CSOB* case, under this approach, the consent of the State parties as to what constitutes an investment is of primary importance:

*“[I]nvestment as a concept should be interpreted broadly because the drafters of the Convention did not impose any restrictions on its meaning. Support for a liberal interpretation of the question whether a particular transaction constitutes an investment is also found in the first paragraph of the Preamble to the Convention, which declares that ‘the Contracting States [are] considering the need for international cooperation for economic development, and the role of private international investment therein.’*

[...]

*It follows that an important element in determining whether a dispute qualifies as an investment under the Convention in any given case is the specific consent given by the Parties. The Parties’ acceptance of the Centre’s jurisdiction with respect to the rights and obligations arising out of their agreement therefore creates a strong presumption that they considered their transaction to be an investment within the meaning of the ICSID Convention.”<sup>502</sup>*

358. Others have been more blunt. In *Malaysian Historical Salvors v. Malaysia*, the *ad hoc* Committee observed that:

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<sup>502</sup> *CSOB v. Slovakia*, ¶¶ 64–66.

*“It is those bilateral and multilateral treaties which today are the engine of ICSID’s effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term “investment” as found in Article 25(1) of the Convention, risks crippling the institution.”*<sup>503</sup>

359. Given the Tribunal’s conclusion that the definition of investment in the BIT at issue in this case does not extend to Poštová banka’s GGBs, this is a controversy that this Tribunal does not need to resolve. The Tribunal has considered both approaches, but does not need to choose between the “objective” approach, which would give the term “investment” an inherent meaning, and a “subjective” approach based on the will of State parties, as expressed in the BIT.

**b. If an Objective Approach were applied, a Majority of the Tribunal Would Find That Claimants Do Not Have an Investment Under the Washington Convention**<sup>504</sup>

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. The members of the Tribunal who conclude that, if the Tribunal were to analyse the GGB interests in light of the “objective” test – contribution, duration, risk – the Claimants would not have an investment under the ICSID Convention, would place particular emphasis on the following circumstances.

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,<sup>505</sup> which distinguishes it clearly from a sale,<sup>506</sup> which is a process of exchange of values or a subscription to sovereign bonds which is

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<sup>503</sup> *MHS Annulment*, ¶ 73.

<sup>504</sup> Arbitrator Townsend does not agree with the reasoning or the conclusions stated in this section and therefore does not join in this portion (Section VI.2.b) of the Award.

<sup>505</sup> To be entirely accurate, it should be said “a process of purported creation of value,” in order to take into account failed investments which must still be considered investments.

<sup>506</sup> In a sale there is also a contribution of goods or services by the seller and a contribution of money by the buyer, but this is different from the contribution to an economic venture required in order to find an investment.

also a process of exchange of values *i.e.* a process of providing money for a given amount of money in return. If the idea that the contribution, as an element of investment, has to be involved in an economic operation creating value is accepted, would this be the situation considering the concrete facts of the case?

362. A State is not primarily an economic actor engaged in economic ventures in the sense just developed. The State enters into numerous sales contracts to run its different administrations, it pays its civil servants, it ensures the functioning of its embassies, refinances part of its foreign debt (which could imply that the sums raised are not used in the territory of Greece, and possibly do not even pass through Greece's territory, but are sent to the different financial places where Greece had debts, possibly through compensation schemes) and so on.

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, as acknowledged both in the written submissions and at the Hearing:

*“Greece’s ability to raise these funds from investors was critical to its funding of its government budget, particularly as it was discovered years after the fact that Greek officials had underreported the country’s budget deficit when applying for entry into the Eurozone in 2001.”*<sup>507</sup>

*“Greece heavily relied on the capital raised by its bond offerings to fund its government budget.”*<sup>508</sup>

*Greece took the funds raised through its issuance and it used it to fund more debt and it used it to fund its other budgetary obligations.*<sup>509</sup>

364. For the purposes of ascertaining jurisdiction, prior decisions have distinguished between sovereign bonds that are used for general funding purposes and those used for

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<sup>507</sup> C-Mem., ¶ 4. (Emphasis added).

<sup>508</sup> C-Mem., ¶ 30. (Emphasis added).

<sup>509</sup> Hearing, Tr., 116:6-8. (Emphasis added).



public works or services. Michael Waibel referred to two mixed commission cases in the following terms:

*“(…) Two mixed-commission cases dealing with sovereign bonds do suggest, however, a distinction between physical and intangible assets; jurisdiction was found only for those sovereign bonds used for public works or services rendered to the government, as opposed to those issued for general budgetary purposes of the issuing country. In *Companie Générale des Eaux de Caracas*, the commission accepted jurisdiction over Venezuelan bearer bonds, issued to the Belgian claimant CGE, to finance public works. The direct link between bonds issued as payment for property transferred and services rendered to the government overcame the presumption of no jurisdiction. In *Boccardo*, the commission accepted jurisdiction where the claimant had received bonds in exchange for merchandise furnished.”*<sup>510</sup>

365. The same approach has been adopted by ICSID tribunals, in *Fedax v. Venezuela*, where promissory notes were considered as investments because they were issued by the Republic of Venezuela in connection with a contract for the provision of services, in *CSOB v. Slovakia*, where a loan was considered as an investment, only because it was part of an overall economic operation of restructuring of CSOB and development of the bank. And in cases where the financial instruments were not linked with an economic venture, ICSID tribunals have not considered them as investments on their own, like for example in *Joy Mining v. Egypt*, where a bank guarantee which was not linked with a contract that could qualify as an investment was not considered as an investment, or in *Alps Finance v. Slovak Republic*, where the tribunal decided that, because the underlying contract having given rise to some receivables was not an investment, the receivables themselves could not be considered as investments.
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.
367. Under an “objective” test, the element of risk is essential and cannot be analysed in isolation. Indeed any economic transaction – it could even be said any human activity –

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<sup>510</sup> RL-27: Michael Waibel, *Opening Pandora's Box: Sovereign Bonds In International Arbitration*, American Journal of International Law (2007), Vol. 101, p. 711, pp.743-744.

entails some element of risk. Risk is inherent in life and cannot *per se* qualify what is an 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, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.”*

*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.”*<sup>511</sup>

369. In other words, under an “objective” approach, an investment risk would be an operational risk and not a commercial risk or a sovereign risk. A commercial risk covers, *inter alia*, the risk that one of the parties might default on its obligation, which risk exists in any economic relationship. A sovereign risk includes the risk of interference of the Government in a contract or any other relationship, which risk is not specific to public bonds.
370. Under the objective approach, commercial and sovereign risks are distinct from operational risk. The distinction here would be between a risk inherent in the investment operation in its surrounding – meaning that the profits are not ascertained but depend on the success or failure of the economic venture concerned – and all the other commercial and sovereign risks. This distinction has been underscored by Emmanuel Gaillard:

*“Trois éléments sont donc requis: l’apport, la durée et le fait que l’investisseur supporte, au moins en partie, les aléas de l’entreprise [...] Dans une telle*

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<sup>511</sup> *Romak v. Uzbekistan*, ¶¶ 229-230.

*conception, un simple prêt dont la rémunération ne dépend en rien du succès de l'entreprise ne peut être qualifié d'investissement.*<sup>512</sup>

371. In sum, if “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. In other words, under the objective approach of the definition of what constitutes an investment, *i.e.* a contribution to an economic venture of a certain duration implying an operational risk, the acquisition by Poštová banka of the interests in GGBs would not constitute an investment, and as a consequence, if that criteria were applied, the Tribunal could not assert jurisdiction.

## VII. COSTS

372. Both Parties request an award of costs in respect of their legal fees and expenses and the costs of arbitration incurred in connection with this proceeding.

373. Claimants’ legal fees and expenses amount to US\$5,517,010.09 as of September 30, 2014.<sup>513</sup> Claimants have advanced US\$300,000 on account of the fees and expenses of the Members of the Tribunal and the ICSID administrative fees and expenses, as well as a lodging fee of US\$25,000.

374. Respondent’s legal fees and expenses amount to €4,650,232.73 as of September 30, 2014.<sup>514</sup> Respondent has advanced US\$300,000 to ICSID to cover costs of the arbitration.

375. The fees and expenses of the Tribunal and ICSID’s administrative fees and expenses (the costs of arbitration), including expenses relating to the Hearing, amount to

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<sup>512</sup> Emmanuel Gaillard, *La jurisprudence du CIRDI (ICSID Case Law)*, Pedone Paris 2004, p. 479.

<sup>513</sup> Claimants’ Submission on Costs of October 31, 2014.

<sup>514</sup> Respondent’s Submission on Costs of November 6, 2014.

approximately US\$600,600.00.<sup>515</sup> These costs are paid out of the advances made by the Parties.<sup>516</sup>

376. Rule 47(1) of the ICSID Arbitration Rules provides that the Tribunal's Award "*shall contain [...] (j) any decision of the Tribunal regarding the cost of the proceeding.*" Article 61 of the ICSID Convention gives the Tribunal discretion to allocate costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

377. Although the Tribunal has concluded that it lacks jurisdiction *ratione materiae* and ruled in favor of Respondent, the jurisdictional issue was not clear-cut and involved a complex factual and legal background. Each side presented valid arguments in support of its respective case and acted fairly and professionally.

378. In light of these circumstances, the Tribunal decides that both sides shall bear the costs of arbitration equally, and that each side shall bear its own legal and other costs.

## **VIII. DECISION**

379. For the reasons set forth above, the Tribunal unanimously decides as follows:

- i. The Tribunal has no jurisdiction over the dispute;
- ii. The Parties shall bear the costs of the arbitration in equal shares;
- iii. Each Party shall bear its own legal fees and expenses;
- iv. All other claims are dismissed.

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<sup>515</sup> The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as all invoices are received and the account is final.

<sup>516</sup> Any remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

*(signed)*

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Professor Brigitte Stern  
Arbitrator  
Date: April 9, 2015

*(signed)*

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John M. Townsend  
Arbitrator  
Date: April 9, 2015

*(signed)*

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Eduardo Zuleta  
President  
Date: April 9, 2015