INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

POŠTOVÁ BANKA, A.S. AND ISTROKAPITAL SE

v.

THE HELLENIC REPUBLIC

ICSID Case No. ARB/13/8

ANNULMENT PROCEEDING

DECISION ON POŠTOVÁ BANKA'S APPLICATION FOR PARTIAL ANNULMENT OF THE AWARD

Members of the *ad hoc* Committee
Professor Azzedine Kettani, President
Sir David A.O. Edward
Professor Hi-Taek Shin

Secretary of the *ad hoc* Committee
Martina Polasek

Date of Dispatch to the Parties: September 29, 2016

REPRESENTATION OF THE PARTIES

Representing the Applicant

Mr. David W. Rivkin
Ms. Samantha Rowe
Ms. Z. J. Jennifer Lim
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
United States of America

Mr. Filip Lukáč
Mr. Jan Nosko
Poštová banka, a.s.
Dvořákovo nábrežie 4
811 02 Bratislava
Slovakia

Representing the Respondent

Ms. Styliani Charitaki
Member of the Legal Council of the State
Ministry of Finance
Kar. Servias 1 0
101 84 Athens
Greece

Ms. Emmanouela Panopoulou
Member of the Legal Council of the State
General Accounting Office
Amerikis 6
106 71 Athens
Greece

Dr. Claudia Annacker
Cleary Gottlieb Steen & Hamilton LLP
12, rue de Tilsitt
75008 Paris
France

Mr. Christopher Moore
Cleary Gottlieb Steen & Hamilton LLP
City Place House, 55 Basinghall Street
EC2V 5EH London
United Kingdom

TABLE OF CONTENTS

LIST OF DEFINED TERMS

Applicant, Poštová or Poštová banka	Poštová banka a.s.
Application	Applicant's application for partial annulment dated July 31, 2015
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Arbitral Tribunal or Tribunal	The arbitral tribunal composed of Mr. Eduardo Zuleta, Prof. Brigitte Stern and Mr. John M. Townsend
Assignment Agreements	Two assignment agreements entered into by and between Poštová banka and J&T Finance on December 23, 2011
Award	Award issued by the Arbitral Tribunal on April 9, 2015
BIT	Bilateral Investment Treaty
Greek Bondholder Act	Law 4050/2012 approved by the Greek Parliament on February 23, 2012
GGBs	Greek Government Bonds
Hearing	Hearing on partial annulment held on June 1, 2016 at the International Dispute Resolution Centre, London, United Kingdom
Claimants	Poštová banka a.s. and Istrokapital SE
Committee	*Ad hoc* Committee composed of Prof. Azzedine Kettani, as President, Sir David A.O. Edward and Prof. Hi-Taek Shin
Clearstream	Clearstream Banking
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
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
Istrokapital	ISTROKAPITAL SE
J&T Finance	J&T Finance, a.s.
Parties	Poštová banka a.s. and the Hellenic Republic as Parties to the Annulment proceedings
PSI	Private Sector Involvement
Respondent or Greece	The Hellenic Republic

SE	Societas europeas
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 Czech and Slovak Federal Republic and the Government of the Hellenic Republic for the Promotion and Reciprocal Protection of Investments, dated June 3, 1991
Tr. [page:line]	Transcript of the Hearing on Partial Annulment
VCLT	Vienna Convention on the Law of Treaties

I. THE PARTIES

1. The Applicant in this annulment proceeding is Poštová banka a.s. ("**Poštová banka**", "**Poštová**" or "**Applicant**"), a bank incorporated under the laws of the Slovak Republic, which was one of two Claimants in the arbitration proceeding. The Applicant has been represented in this annulment proceeding by David Rivkin, Samantha J. Rowe and Z.J. Jennifer Lim of Debevoise & Plimpton, and by Filip Lukáč and Jan Nosko of Poštová banka.

2. The Respondent is the Hellenic Republic ("**Hellenic Republic**", "**Greece**" or "**Respondent**"). The Respondent has been represented in this annulment proceeding by Claudia Annacker and Christopher Moore of Cleary Gottlieb Steen & Hamilton, and by Styliani Charitaki, Emmanouela Panopoulou and Maria Vlassi of the Legal Council of the State.

3. ISTROKAPITAL SE ("**Istrokapital**"), a European Public Limited Liability Company holding shares in Poštová banka and incorporated under the laws of Cyprus, was the other Claimant in the arbitration, and is not a party to the annulment proceeding.

II. PROCEDURAL HISTORY

4. On July 31, 2015, the Applicant filed with the Secretary-General of the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") an application requesting the partial annulment of the award rendered on April 9, 2015 ("**Award**") in the case between the Applicant and Istrokapital ("**Claimants**" in the original proceedings) and the Hellenic Republic. The application ("**Application**") was filed in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**" or "**Washington Convention**") and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**"). The Applicant sought partial annulment of the Award on the basis that the Award has failed to state the reasons on which it is based pursuant to Article 52(1)(e) of the ICSID Convention.

5. On August 5, 2015, the Secretary-General informed the Parties that the Application had been registered on that date and that the Chairman of the Administrative Council of ICSID would proceed to appoint an *ad hoc* Committee pursuant to Article 52(3) of the ICSID Convention.

6. By letter of September 2, 2015, in accordance with Rule 52(2) of the Arbitration Rules, the Secretary-General notified the Parties that an *ad hoc* Committee ("**Committee**") had been constituted – composed of Professor Azzedine Kettani (Moroccan) as President, and Sir David Edward KCMG QC (British) and Professor Hi-Taek Shin (Korean) as Members – and that the

annulment proceeding was deemed to have begun on that date. The Parties were also informed that Ms. Martina Polasek, Team Leader/Legal Counsel, ICSID, would serve as Secretary of the *ad hoc* Committee, assisted by Ms. Celeste Mowatt, Legal Associate, ICSID.

7. The first session of the Committee was held by teleconference on October 29, 2015. In addition to the Committee, its Secretary and Ms. Mowatt, participating in the conference were:

On behalf of the Applicant

Mr. Filip Lukáč	Poštová banka, a.s.
Mr. David W. Rivkin	Debevoise & Plimpton LLP
Ms. Samantha J. Rowe	Debevoise & Plimpton LLP
Ms. Z.J. Jennifer Lim	Debevoise & Plimpton LLP

On behalf of the Respondent

Ms. Styliani Charitaki	Member of the Legal Council of the State
Ms. Emmanouela Panopoulou	Member of the Legal Council of the State
Ms. Maria Vlassi	Member of the Legal Council of the State
Dr. Claudia Annacker	Cleary Gottlieb Steen & Hamilton LLP
Mr. Christopher Moore	Cleary Gottlieb Steen & Hamilton LLP
Ms. Laurie Achtouk-Spivak	Cleary Gottlieb Steen & Hamilton LLP
Dr. Enikő Horváth	Cleary Gottlieb Steen & Hamilton LLP

8. On November 4, 2015, the Committee issued Procedural No. 1, signed by the President of the Committee. Among other things, the Parties agreed that the applicable arbitration rules would be the ICSID Arbitration Rules in force as of April 10, 2006, that London would be the place of the proceeding and that English would be the procedural language.

9. On November 20, 2015, the Applicant filed its Memorial on Annulment ("**Memorial**"), accompanied by 12 factual exhibits (C-0212 to C-0214 and nine exhibits from the arbitration proceeding) and 20 legal authorities (CL-0137 to C-0156).

10. On February 5, 2016, the Respondent filed its Counter-Memorial on Annulment ("**Counter-Memorial**"), accompanied by 20 factual exhibits (R-0487 to R-0501 and five exhibits from the arbitration proceeding) and 23 legal authorities (RL-0138 to RL-0150 and 10 legal authorities from the arbitration proceeding).

11. On March 18, 2016, the Applicant filed a Reply on Annulment ("**Reply**"), accompanied by 10 legal authorities (CL-157 to CL-162 and four authorities from the arbitration proceeding).

12. On April 28, 2016, the Respondent filed its Rejoinder on Annulment ("**Rejoinder**"), accompanied by nine legal authorities (RL-0151 to RL-0159).

13. The hearing on annulment was held at the International Dispute Resolution Centre in London on June 1, 2016 ("**Hearing**"). In addition to the Committee and its Acting Secretary, Ms. Mowatt, present at the Hearing were:

Attending on behalf of the Applicant

Mr. Filip Lukáč	Poštová banka, a.s.
Mr. Jan Nosko	Poštová banka, a.s.
Mr. David W. Rivkin	Debevoise & Plimpton LLP
Ms. Samantha J. Rowe	Debevoise & Plimpton LLP
Ms. Z.J. Jennifer Lim	Debevoise & Plimpton LLP
Ms. Yin Yee Ng	Debevoise & Plimpton LLP

Attending on behalf of the Respondent

Ms. Styliani Charitaki	Legal Council of the State
Ms. Emmanouela Panopoulou	Legal Council of the State
Ms. Maria Vlassi	Legal Council of the State
Dr. Claudia Annacker	Cleary Gottlieb Steen & Hamilton LLP
Mr. Christopher Moore	Cleary Gottlieb Steen & Hamilton LLP
Ms. Ariella Rosenberg	Cleary Gottlieb Steen & Hamilton LLP
Ms. Sarah Schröder	Cleary Gottlieb Steen & Hamilton LLP
Mr. Antonios Vassiloconstandakis	Cleary Gottlieb Steen & Hamilton LLP
Mr. Marcus Cohen-Thomas	Cleary Gottlieb Steen & Hamilton LLP

14. There were two rounds of oral arguments. At the end of the Hearing, it was agreed that the Parties would file statements on costs by June 30, 2016. The Parties filed their statements on costs as scheduled.

15. In accordance with Arbitration Rules 38(1) and 53, the proceedings were declared closed on August 23, 2016.

16. The Committee has deliberated by various means of communication and, in rendering this decision, have taken into consideration the Parties' written and oral arguments and submissions on Poštová's application for partial annulment of the Award.

III. THE AWARD

17. Below, the Committee provides a brief summary of the Award rendered on April 9, 2015 by a tribunal composed of Mr. Eduardo Zuleta, (President, appointed by the Secretary-General), Mr. John M. Townsend (appointed by the Claimants) and Prof. Brigitte Stern (appointed by the Respondent) (the "**Tribunal**"), including the relevant facts that gave rise to the dispute.[1] The claims were submitted to ICSID 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 of Investments dated March 30, 1992 (the "**Cyprus-Greece BIT**") and the ICSID Convention.

A. Summary of Facts

18. Sections I and II of the Award introduce the parties to the arbitration proceeding and describe the procedural history of the arbitration. Section III of the Award outlines the factual background of the dispute, which is briefly summarized below.

The Greek Financial Crisis and Poštová Banka's Interests in Greek Government Bonds

19. Greece experienced a significant economic downturn due to the global financial crisis of 2008. In 2009, Greek public debt was downgraded by rating agencies. In January 2010, Greece submitted to the European Commission a three-year stability program to reduce its fiscal deficit, which was followed by the adoption of austerity measures.

20. Through a series of transactions completed between January and April 2010, Poštová used capital from consumer deposits to acquire € 504,000,000.00 aggregate face principal amount of Greek Government Bonds (hereinafter referred to as "**GGBs**" or "interests in **GGBs**").[2] The GGBs acquired by Poštová belonged to five series of GGBs, governed by Greek law, which had been issued by the Hellenic Republic between 2007 and 2010 and matured at various dates between 2012 and 2020.[3] These five series of GGBs were among the obligations of the Greek

[1] This factual summary is based on the facts described in the Award and is not intended to be an exhaustive and detailed narrative of all such facts. Rather, its purpose is simply to provide the general context of this Decision.
[2] In para. 44 of the Award, at the outset of the factual summary, the Tribunal notes that "*in this arbitration Claimants asserted that their rights derive from the ownership by Poštová banka of Greek Government Bonds ('GGBs'), whereas Respondent referred to such purchases by Poštová banka as 'interests in GGBs.' 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.*" (Footnotes omitted).
[3] The five series of bonds acquired by the Applicant are described at para. 51 of the Award.

Government that were downgraded by rating agencies. Poštová's GGBs were held in a book-entry form in an account with Clearstream Banking ("**Clearstream**").

21. The process for the issuance of the GGBs was as follows: the Greek Government issued the GGBs through the Bank of Greece administered system to Participants, which, under Greek law, are legal or natural persons approved by the Bank of Greece. The Participants paid the consideration due to Greece for the GGBs and held title to the GGBs. The Participants in turn delivered interests in the GGBs to the Primary Dealers, financial institutions appointed on a yearly basis by competent Greek authorities, who provided the funds for the acquisition. Primary Dealers, in turn, sold the GGBs on the secondary market.

22. None of the GGBs acquired by Poštová contained a collective action clause, allowing a supermajority of bondholders to agree to a debt restructuring that would be legally binding on all holders of the bond, including those who voted against the restructuring.

Developments after Poštová Banka's purchases of GGBs

23. During 2010 and 2011, Greece paid the interest due on its bonds. From July 2011, as Greece's situation continued to deteriorate, the International Monetary Fund together with Greek and Euro authorities determined that "Private Sector Involvement" ("**PSI**") was necessary to close a significant funding gap, meaning that private holders of government debt would be required to accept some reduction in the amount due on that debt.

24. In the following months, Greek authorities engaged in consultations concerning PSI and formed a Steering Committee to conduct negotiations. Poštová was not involved in this process, whereby a nominal "haircut" of 53% of the face value of the Greek debt was agreed.

25. A Greek Bondholder Act was approved by the Greek Parliament on February 23, 2012 in order to implement the PSI. The sovereign debt restructuring was to be implemented through an exchange of outstanding GGBs for new titles. The restructuring of the new titles, which is outlined in paragraph 69 of the Award, was subject to the approval by the holders of the specified majority of eligible GGBs in the Bondholder Act.

26. 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 Direct Participant acting on such beneficial owner's behalf*". Only Participants were authorized to submit participation instructions in accordance with the Invitation Memorandum.

27. Poštová voted not to accept the exchange proposed in the Consent Solicitation, however, a vast majority of the participating GGB holders (94.23%) voted in favour of it. Thus, new securities were delivered on March 12, 2012. Poštová received the new securities in its account with Clearstream and the GGBs previously held in that account were removed. On April 2, 2012, Poštová sold the European Financial Stability Facility notes that it received in the exchange.

Poštová Banka's accounting for the GGBs

28. International accounting standards required Poštová to classify bonds or other investments securities for accounting purposes as "held for trading" ("**HFT**"), "held to maturity" ("**HTM**") and "available for sale" ("**AFS**"). Initially, most of Poštová's interests in GGBs were classified in its AFS portfolio. The vast majority of these interests were reclassified on April 1, 2010 from AFS to HTM. Poštová never classified any of its GGBs as HFT.

29. During 2011, Poštová sold the entirety of its GGB interests in its AFS portfolio, comprising three of the five series of GGB interests it had bought. Later on, Poštová purchased GGB interests of the same series and in the same principal amounts, though for different prices.

30. On December 23, 2011, Poštová and J&T Finance, a.s. ("**J&T Finance**") entered into two assignment agreements, whereby Poštová 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 then held, to be determined according to Greece's level of payment of the interests in GGBs to Poštová, either on the effective due date of the GGBs or on any earlier date on which they were paid.

31. On December 23, 2011, J&T Finance and Istrokapital also entered into two assignment agreements pursuant to which J&T Finance would assign to Istrokapital part of the Receivable previously assigned by Poštová to J&T Finance.

32. On March 8, 2012, Istrokapital, J&T Finance and Poštová entered into an "Agreement on a Deposit into Other Equity Accounts and on Settlement of Obligations" (the "**Settlement Agreement**"). The Settlement Agreement provided that it would cancel and extinguish all obligations of Poštová and J&T Finance under the Assignment Agreements as of the entry into effect of the Settlement Agreement.

33. 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's account; (ii) a decision by Poštová's Board of Directors, and (iii) prior consent of Poštová's Supervisory Board.

B. The Parties' Arguments on Jurisdiction

34. As the Parties agreed to bifurcate the jurisdictional objections from the merits of the dispute, the Award dealt with the following jurisdictional objections raised by the Respondent, as stated in Section IV of the Award:

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.*
ii. *The Tribunal lacks jurisdiction* ratione temporis *and/or the claims should be dismissed on grounds of abuse of process.*
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.*
iv. *The Tribunal lacks jurisdiction over Claimants' umbrella clause claims and/or Claimants have failed to establish* prima facie *those claims.*[4]

35. Section V of the Award summarizes the Parties' arguments on these jurisdictional objections. An overview of the arguments concerning item (i) is set out below. As Istrokapital has not requested annulment in this case and the Applicant has not requested annulment with respect to items (ii) or (iv), there is no need to discuss these items.

(i) The Respondent's Position

36. The Respondent argued that neither Claimant had a protected investment under either of the applicable BITs, or under Article 25 of the ICSID Convention.

37. As noted in footnote 2, Greece emphasized the difference between GGBs and GGB interests. GGBs, on the one hand, are issued by Greece and purchased by Participants in the system. Participants are the only holders of GGBs and are in contractual privity with Greece; the price of GGBs is determined at the time of the bond issuance. GGB interests, on the other hand, are created by Participants and purchased by Primary Dealers who sell them on the secondary market. Holders of GGB interests do not participate in the System and are in contractual privity with the International Clearing System accounts where interests are deposited.

[4] Award, para. 91.

38. Greece argued that a line of ICSID cases established four cumulative criteria to be applied in order to determine whether there is an investment within the meaning of Article 25(1) of the Convention (the *Salini* test), which it argued also applied to the definition of investment under Article 1(1) of the Slovakia-Greece BIT: "*(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 activity in the host State*."[5] The Respondent argued that debt instruments do not automatically meet these criteria.

39. The Respondent claimed that the territorial *nexus* required for investments to be protected under the BIT and the ICSID Convention was absent because secondary market purchases of interests in sovereign bonds lacked territorial connection with the host State, noting that Poštová's GGB interests were held in accounts in Clearstream, maintained in Luxembourg and governed by Luxembourg Law.

40. The Respondent emphasized that the nature of the investments did not change, neither by the fact that Poštová banka received an "Invitation Memorandum" in order to participate into the Consent Solicitation above mentioned, nor by the application of the "unity of investment" theory advanced by the Claimants to establish jurisdiction over transactions conducted in the secondary market.

41. Greece also argued that the purchase of GGB interests resulted only indirectly in economic benefit to the State, asserting that, from an economic perspective, the interests acquired by Poštová banka long after the end of the distribution period were fundamentally different from the instruments involved in the distribution process.

42. Greece additionally argued that the Claimants' purchases were too remote from the GGB issuance process to be considered to give rise to a dispute "*arising directly out of an investment*."

(ii) The Claimants' Position

43. The Claimants asserted that the Tribunal had jurisdiction *ratione materiae* because GGBs are assets comprising a "loan" to the Greek Government, a "claim to money" and the "right to performance under a contract" pursuant to Article 1(1) of the Slovakia-Greece BIT and are assets, comprising monetary claims and contractual claims with economic value pursuant to Article 1(1) the Cyprus-Greece BIT. The Claimants also stressed that there is no relevant difference between a bond and a loan.

[5] Award, para. 97, quoting para. 112 of the Respondent's Memorial on Jurisdiction dated May 1, 2014.

44. The Claimants stated that the definitions of "investment" in the BITs did not contain the limitations advanced by Greece as the BITs provided, on the contrary, a broad general definition. The Claimants asserted that, as defined in the BITs, investment meant every kind of asset and that there was no need to define sovereign bonds specifically because they were included in monetary and contractual claims.

45. Further, the Claimants argued that purchases by investors like Poštová implied a contribution to the State because the flow of funds to Greece depended entirely on the sale of GGBs on the secondary market.

46. The Claimants also responded to the distinction raised by the Respondent between the issuance of the bonds to the Participants and their purchase in the secondary market in order to question the existence of an economic contribution. As further evidence of a unified market between the primary and the secondary markets, the Claimants stated that bond holders in the secondary market were the ones that voted the Consent Solicitation. In addition, the Claimants argued that tribunals have previously 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 of the same investment operation. [6]

47. The Claimants, moreover, considered that Greece treated Poštová as a bondholder and included holders of Designated Securities in the Invitation Memorandum to participate in the exchange. They added that these facts had been significant for a previous tribunal, which concluded that a sovereign that included secondary market purchasers in the exchange offer admitted their importance in the bond issuance and distribution process.[7]

48. Regarding the territorial *nexus*, the Claimants asserted that neither of the applicable BITs required the funds to be linked to a specific project in Greece and that it was sufficient that funds were put at the disposal of Greece to foster its economic development.

49. The Claimants argued Greece's consent to ICSID jurisdiction in each of the applicable BITs created a strong presumption that the Parties considered the bonds as an investment under both BITs to be an investment under the Convention.

[6] Award, para. 137, citing *Abaclat & others. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, August 4, 2011 ("*Abaclat v. Argentina*") and *Ambiente Ufficio S.p.A & Others. v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, February 8, 2013 ("*Ambiente Ufficio v. Argentina*").
[7] Award, para. 138, citing *Abaclat v. Argentina*.

50. The Claimants added that the purchase of sovereign debt was not a marginal economic activity that can be compared to transactions that have been determined to fall outside of the ICSID Convention.

51. The Claimants rebutted Greece's reference to the *Salini* test to determine whether an investment was made under Article 25 of the ICSID. They argued that the BITs and the Convention did not contain these criteria and noted that tribunals have previously ruled that this approach might exclude transactions that have been internationally recognized as protected investments.

52. The Claimants stated that, in any event, their GGBs satisfied the four criteria of the *Salini* test. With regard to the duration of the investment, the Claimants asserted that the party's intent was irrelevant and that placing the bonds in the AFS portfolio was consistent with the strategy of holding them until maturity, but simply gave the bank more flexibility.

C. Analysis of the Tribunal

53. Section VI of the Award sets out the Tribunal's analysis on the jurisdictional objections. The Tribunal unanimously dismissed Poštová's and Istrokapital's claims for lack of jurisdiction *ratione materiae*. The Tribunal held that (i) Istrokapital's indirect relationship to the GGBs through its shareholding in Poštová did not qualify as a protected "investment" under the Cyprus-Greece BIT and that (ii) it did not have jurisdiction over Poštová's claims because government bonds did not qualify as protected "investments" under the Slovakia-Greece BIT. The Tribunal also discussed the Parties' arguments concerning its jurisdiction under Article 25 of the ICISD Convention. Greece's other jurisdictional objections were not analyzed in the Award. The following provides a brief summary of the Tribunal's analysis of whether or not Poštová's GGB interests were protected investments under the Slovakia-Greece BIT and the ICSID Convention.

(i) Whether Poštová banka's GGB interests are protected investments under the Slovakia-Greece BIT

54. The Tribunal recalled that the Parties disagreed 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 concerning the interplay between the aforementioned treaties and the Vienna Convention on the Law of Treaties ("**VCLT**").

55. The Claimants claimed that their interests in GGBs were included in what they consider a broad definition and special meaning of "investment" contained in the *chapeau* of Article 1(1) and under its section (c), because the interests would be either "loans" or "claims to money" or both.

The Respondent, in turn, argued that "investment" has an inherent meaning that requires that certain objective criteria must be satisfied in order for an asset listed under Article 1(1) to qualify as an investment.

56. The Tribunal quoted Articles 31(1) and 31(2) of the VCLT, outlining a general rule of interpretation of a treaty and provided an analysis of Article 1(1) of the Slovakia-Greece BIT with regards to this rule.

57. According to the Tribunal, Article 31 of the VCLT requires that the terms of the treaty be interpreted in good faith, not only referring to the text but to the context, as well considering the object and purpose of the treaty.

58. In that respect, the Tribunal agreed with the Claimants that the concept of "investment" as contained in Article 1(1) of the Slovakia-Greece BIT is a broad one, however, the Tribunal was not persuaded that a broad definition necessarily meant 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 broad-asset based concept, is by express exclusion in the given treaty.

59. For the Tribunal, the fact that the list of protected investments in the treaty is not a closed list did not mean that investor-State tribunals are authorized to expand the scope of the investments that the State parties intended to protect.

60. The Tribunal noted that several treaties, including the Slovakia-Greece BIT, contain a similar, or identical, general definition of investment. However, the list of examples that follows the introductory phrase, which illustrates what may constitute an investment, varies from one treaty to another.

61. The Tribunal stated that an interpretation in good faith should embody the principle of effectiveness,[8] meaning that, according to the Tribunal, preference should be given to an interpretation that provides meaning to all the terms of the treaty as opposed to one that does not. 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 as in previous cases.[9]

[8] Award, para. 293 ("*Ut res magis valeat quem pereratˮ*).
[9] Award, paras. 294-303, citing *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, July 11, 1997; *Abaclat v. Argentina*; and *Ambiente Ufficio v. Argentina*.

62. The Tribunal noted that the decisions that have specifically analyzed 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.

63. Comparing these previous decisions with the present arbitration, the Tribunal stated that, first, the Slovakia-Greece BIT differed from the wide language included in the general definition of investment in the Argentina-Italy BIT which was relied on in *Abaclat*. Second, the list of examples of Article 1(1) of the Slovakia-Greece BIT, and particularly the sections invoked by the Claimants in support of their interpretation of the relevant BIT, were also substantially different from the Argentina-Italy BIT. The Argentina-Italy BIT listed "*obligations, private or public titles or any other right to performances or services having economic value, including capitalized revenues*"[10], whereas the Slovakia-Greece BIT in contrast referred to "*loans, claims to money or to any performance under contract having a financial value*". Third, the Slovakia-Greece BIT did not contain the wide language that the *Abaclat* tribunal considered would include bonds, i.e. "*any right of economic nature conferred under law or contract*".[11]

64. As pleaded by the Claimants, the objective of the Slovakia-Greece BIT is for the State parties to the treaty to create favorable conditions for investments by investors, but this does not mean for the Tribunal 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.

65. Article 1(1) of the Slovakia-Greece BIT initially provided for a broad concept by indicating that investment "*means any kind of asset*" in the *chapeau*, but then used the words "*and in particular*", a term used to show that a statement applies to one person or thing more than any other.

66. Therefore, the interpretation of the text and context of Article 1(1) led the Tribunal to consider that the State parties to the treaty preferred an ample definition of what could constitute an investment, within certain categories that are also broad, but not unlimited.

67. Based on the above, the Tribunal had to determine 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) of Article 1(1).

[10] Award, para. 306 (emphasis in original).
[11] Award, para. 307.

68. 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.

69. The Tribunal had no doubt that the GGBs constituted sovereign debt, in the form of securities, in general, and bonds, in particular, that are subject to strict requirements in their issuance. The question that the Tribunal had to address was, therefore, whether the wide list of investments provided for under Article 1(1) of the Slovakia-Greece BIT included sovereign debt in general and, if so, the GGBs in particular.

70. For the Tribunal, the Slovakia-Greece BIT did not contain any language that suggests 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 obligation, nor sovereign debt, as an investment under the treaty. The only reference to bonds in Article 1(1)(b) left no doubt to the Tribunal that the bonds referred to were only bonds issued by a company, not sovereign debt in general, or bonds issued by either State party to the treaty in particular. The Tribunal agreed with the Respondent that sovereign bonds were different from forms of participation in corporations and therefore their exclusion from the definition of investment in a given treaty indicated that the contracting parties did not intend to cover these types of assets.

71. The Tribunal disagreed with the wide interpretation of the text of Article 1(1)(c) proposed by the Claimants, that the GGBs 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*" and further detailed how loans and bonds are distinct financial products.

72. The Tribunal first agreed with the Respondent that loans involved contractual privity between the lender and the debtor while bonds do not involve contractual privity. The Tribunal then considered that the various operations undertaken by Poštová banka with the GGBs confirmed lack of privity and that if Poštová had granted a loan to Greece, as opposed to having acquired bonds in the secondary market, it would then have had a direct contractual relationship with Greece.

73. As for claims to money, the Tribunal again disagreed with the interpretation of the Claimants for several reasons. First, there was no indication that the State parties intended to expand the language of the treaty so as to include bonds under the general reference of "claims to money". Second, claim to money must arise under a contractual relationship and, as the Tribunal

discussed, it was undisputed that Poštová banka was not a Participant or a Primary Dealer, and that it therefore had no contractual relationship with the Respondent in connection with the issuance and distribution of the bonds.

74. Consequently, and under Greek Law 2198 of 1994, the rights of Poštová banka – like the rights of other bondholders – were rights against the Participants. Poštová banka had certain rights against the Greek Government, but such rights would only become exercisable against the Respondent in one specific circumstance, which is the failure of the Greek Government to pay due interest and principal on securities to the Bank of Greece.

75. In addition, even if the issuance of the GGBs and the sales in the secondary market constituted one single economic operation, as suggested by the Claimants, the Tribunal was not convinced that it would result in Poštová banka having a claim to money against the Respondent. The Tribunal deducted that Poštová banka did not have an investment for purposes of Article 1(1) of the BIT.

76. The Tribunal concluded that neither of the Claimants had an investment as defined in Article 1(1) of the Slovakia-Greece BIT and in Article 1(1) of the Cyprus-Greece BIT and that the Tribunal therefore lacked jurisdiction *ratione materiae* to entertain the dispute.[12]

(ii) Analysis of the Tribunal's jurisdiction under the ICSID Convention

77. The Tribunal's conclusion concerning the definition of "investment" under the Slovakia-Greece BIT above made it unnecessary for it to resolve the dispute between the Parties as to whether Poštová banka's GGBs would be considered investments as that term was used in the ICSID Convention. However, the Tribunal felt appropriate to refer to such disagreement.

78. The Tribunal stated that it was well known that the drafters of the ICSID Convention intentionally chose not to include a definition of investment. The Tribunal noted that a number of cases attempted to deal with this omission by articulating a set of "objective criteria", which cannot be set aside by consent that may have been given in another legal instrument, such as a BIT. According to such test, an investment requires a contribution of money or assets, duration and risk (more or less the *Salini* test argued by the Respondent).

79. On the other hand, the Tribunal recognized that other ICSID tribunals have held that, because the ICSID Convention provided no definition of the term "investment", the limits of this concept

[12] Based on this conclusion, the Tribunal did not deem it necessary to examine the Respondent's remaining objections concerning the absence of jurisdiction *ratione personae* and *ratione temporis*, nor the allegations concerning abuse of process and the umbrella clause.

were susceptible to agreement between the State parties to a BIT. This approach has been described as a "subjective" approach.

80. In the present case, the Tribunal, after considering both approaches did not feel the need to choose between the "objective" approach, which would give the term "investment" an inherent meaning, and a "subjective" approach.

81. In any event, the Tribunal, by majority, believed that an analysis applying the "objective" test as pleaded by the Parties would have led to the same conclusion with respect to Poštová's GGB interests as the Tribunal reached in its analysis under the BIT. Mr. Townsend did not join in this conclusion.

82. In setting out the majority's position in that regard, the Award considered three criteria of the objective test: contribution, duration and risk. The majority was of the view that the element of contribution to an economic venture and the existence of the specific operational risk were not present. Therefore, "*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.*"[13]

83. Section VII of the Award contained the Tribunal's decision on the allocation of the Parties' legal fees and expenses, and the costs of arbitration. The Tribunal decided that both sides would bear the costs of the arbitration equally, and that each side would bear its own legal and other costs.

84. Section VIII of the Award contained the *dispositif* :

> *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.*

[13] Award, para. 371.

IV. THE PARTIES' POSITIONS

85. The Parties' positions in respect of the Application for Partial Annulment are summarized below, taking into consideration the written and oral submissions.[14]

A. The Applicant's Position

86. The Applicant requests the partial annulment of the Award on the basis that the Award "*failed to state the reasons on which it is based*", relying on Articles 48(3) and 52(1)(e) of the ICSID Convention.

87. The Applicant argues that the Award should be partially annulled because the Tribunal failed to state reasons for its conclusion that Poštová banka had no qualifying "investments" under the Slovakia-Greece BIT:

> *… the Tribunal found that Poštová's bond holdings gave rise to certain contractual and property rights against both the Greek Government and certain financial institutions located in Greece. The Tribunal* also *found that the Treaty included contractual and property rights in its definition of 'investments.' However, the Tribunal ignored the obvious conclusion that results from these two findings: that it has jurisdiction over claims concerning Poštová's contractual and property rights. Instead, in denying jurisdiction, the Tribunal never explained why Poštová's contractual and property rights, which it had specifically found to exist, did not fall within the Treaty's admittedly wide definition of 'investments,' with its broadly-worded chapeau (referencing 'every kind of asset') and its list of five nonexclusive categories of assets that constitute 'investments.'*
>
> *The Tribunal thus failed to ensure that the Parties, or anyone else, can understand its reasoning, and left its decision on the key jurisdictional issue—that the Greek sovereign bonds do not constitute an 'investment' under Article 1 of the Treaty—essentially lacking in any expressed rationale. Moreover, the Tribunal's findings that Poštová (i) held contractual and property rights that fall within the Treaty's express definition of 'investments' but (ii) nonetheless did not have an investment under the Treaty, are 'genuinely contradictory;' indeed, they are mutually exclusive. For both of these reasons, the Award 'failed to state the reasons on which it is based' under Article 52(1)(e) of the ICSID Convention.* [15]

88. Three main arguments were advanced by the Applicant: (i) that the Tribunal failed to provide reasons that enable the reader to follow how the Tribunal proceeded from Point A to Point B; (ii) that the reasoning provided by the Tribunal was so contradictory so as to amount to no reasons at all; and (iii) that the Tribunal's errors were outcome-determinative.

[14] This summary is not intended as an exhaustive and detailed narrative of all arguments of the Parties. Rather, its purpose is to simply provide the general context of this Decision.
[15] Memorial, paras. 4-5 (emphasis in original).

89. The Applicant argues that because the Tribunal has failed to state reasons for its decision that it lacked a qualifying investment under the Slovakia-Greece BIT, "*the dismissal of Postova's claims for lack of jurisdiction must be annulled*."[16]

(i) *The Tribunal failed to provide reasons that enable the reader to follow how the Tribunal proceeded from Point A to Point B*

90. According to the Applicant, the standard to be applied under Article 52(1)(e) of the Convention is the "*often quoted*" test applied by the *ad hoc* Committee in *MINE v. Guinea*: "*the requirement to state reasons is satisfied as long as the award enables one to follow how the Tribunal proceeded from point A to point B and eventually to its conclusion, even if it made an error of fact or of law*" (the "*MINE* test").[17]

91. Poštová argued that partial annulment of the Award is justified because the *MINE* test is not satisfied by the reasoning included in the Award: the Tribunal recognized that Poštová banka had certain contractual and non-contractual rights against other Participants and non-contractual rights against Greece that fall explicitly within the list of "investments" of the Treaty (Point A), yet denied jurisdiction *ratione materiae* over Poštová's claims on the basis that it did not have an "investment" under the Treaty (Point B), without any expressed rationale or explanation as to how it proceeded from Point A to Point B.[18]

92. The Applicant states that the Award explicitly recognized that Poštová has the following contractual and property rights in connection with its GGBs, and that these "*key factual findings* should *have served as the basis for its interpretation of Article 1(1) of the Treaty*":[19]

- *Under Greek Law 2198 of 1994 and the documents governing the issuance and trade of the GGBs, Poštová enjoyed rights against the Participants*.[20]
- *These rights arose out of: (a) Poštová's "*contractual relationship under the GGBs . . . exclusively with the Participants through Clearstream;*" and (b) Poštová's ownership of the GGBs, which gave it a "*right in a title – a right in rem – against the Participants*."*[21]

[16] Memorial, para. 77.
[17] Hearing, Tr. 20:12-18, citing *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment, December 14, 1989, (CL-0150) ("*MINE v. Guinea*").
[18] Reply, para. 1.
[19] Memorial, para. 32 (emphasis in original).
[20] Memorial, para. 32, citing para. 345 of the Award.
[21] Memorial, para. 32, quoting paras. 347-348 of the Award.

- *The Participants included Greek entities*.[22]
- *Even though Poštová had no contractual relationship with Greece, it "*had certain rights against the Greek Government*," which did not arise "*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.*"*[23]

93. The Applicant notes that the Award states that the Tribunal's task was to determine "*whether Poštová banka's interests in the GGBs fit within the specific, but wide, category or group of interests listed in sections (a) to [(e)] of the Treaty*."[24] The Applicant asserts that the Tribunal did not assess, much less explain, why Poštová's rights against Greece and against the Participants, listed above, did not fit within the definition contained in Article 1(1) of the BIT, which defines the term "investment" explicitly to include both property and contractual rights.[25] Article 1(1) states:

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

94. The Applicant considers that the Tribunal's finding that sovereign bonds were not within the scope of Article 1(1) did not address the question whether the rights that Poštová banka does hold against the Greek Government and Greek Participants, listed above, might fit within the categories included in Article 1(1). In particular, the Applicant argues that the Tribunal did not address why the rights *in rem* against Greece and against the Participants did not fall under subparagraph (a) (i.e. "…*other property rights*…") and why the contractual rights against the

[22] Memorial, para. 32, citing Tr. Day 2, (C-0213), 537:18-21 (Dr. Annacker) *("[The Participants] are both international and Greek financial institutions, and the number changes slightly every year. It's about 20 Participants, both domestic and international.*").
[23] Memorial, para. 32, quoting paras. 345, 348 of the Award and citing Law 2198 of 1994 (R-0108), Art. 8.2.
[24] Memorial, para. 37, quoting para. 316 of the Award.
[25] Memorial, para. 67.

Participants did not fall under subparagraph (c) (i.e. "*loans, claims to money or to any performance under contract having a financial value*").[26]

95. The Applicant argues that the reasons that are included in the Award to support the Tribunal's decision that the GGBs as sovereign debt do not constitute an "investment" under the Treaty "*do not remedy the lacuna in its reasoning*" with regard to the rights acknowledged against Greece and the Participants.[27] While the finding that Poštová had no contractual relationship with Greece might have explained why Poštová's rights against Greece did not fall within Article 1(1)(c) of the Treaty, it did not explain, according to the Applicant, why Poštová's property rights against Greece did not fall within Article 1(1)(a) of the Treaty, or why the contractual and property rights against the Greek Participants did not fall under Article 1(1)(a) and Article 1(1)(c).[28]

96. The Applicant argues that the lack of reasoning in between these two points constituted an annullable error under Article 52(1)(e) of the Convention because it is impossible for any informed reader to understand how the Tribunal reached its conclusion that the Applicant's property and contractual rights were not "investments".[29]

97. Poštová argues that the Respondent's submissions on annulment (i) apply the wrong legal test under Article 52(1)(e); (ii) conflate the question whether sovereign bonds fall within the Treaty's definition of "investment" with the question of whether Poštová's contractual and property rights arising from its sovereign bond interests satisfy the definition; and (iii) mischaracterize the Tribunal's factual findings in the Award with regard to the Applicant's property and contractual rights.[30] These arguments are summarized briefly below.

98. With respect to the legal test for annulment for failure to state reasons, the Applicant states that the relevant question is not whether or not there is a total absence of reasoning but rather whether the reader can follow the reasoning of the Tribunal on points of fact and law (and whether the reasons that the Tribunal does provide are contradictory or frivolous).[31]

[26] Reply, para. 13.
[27] Memorial, para. 68.
[28] Reply, para. 13.
[29] Reply, para. 14.
[30] Reply, para. 7.
[31] See E.g. Memorial, para. 54, citing *MINE* v. *Guinea*, paras. 5.08-5.09.

99. The Applicant also argues that the question whether sovereign bonds satisfy the Treaty's definition of "investment" should not be conflated with the question whether Poštová's contractual and property rights arising from its ownership of sovereign bonds satisfy that test.

100. The Applicant rejected the existence of implicit reasons in the Award that might explain how the Tribunal proceeded from Point A to Point B, as asserted by the Respondent. The Applicant distinguished *Soufraki v. UAE* and *Wena v. Egyp*t, which were relied upon by Greece to support its argument concerning the existence of implicit reasons in the Award, noting that the *Soufraki* Committee did not rely on implicit reasons in its decision because it found that adequate reasoning had been included in the Award, and that in *Wena* the implicit reasons found by the Committee could be identified in the documentary evidence relied on in the proceeding.[32]

101. The Applicant stresses that its Application is based on the "*text of the Award itself*"[33] and the Tribunal's "*failure to follow its own interpretive construct*";[34] the Applicant states that the Committee does "*not need to look beyond the Award*",[35] noting that the Respondent's position in the annulment proceeding focused on arguments which were advanced by the Parties during the arbitration, rather than the text of the Award.

102. In that vein, the Applicant also argues that the Respondent's submissions on annulment mischaracterize the Tribunal's factual findings in the Award regarding Poštová banka's contractual and property rights. In particular, the Applicant notes that the text of the Award states that the Applicant has rights against Participants, and does not indicate that Clearstream was the only Participant against whom Poštová had contractual and property rights, emphasizing the Tribunal's statement in the Award that Poštová had a "*contractual relationship under the GGBs . . . with the Participants through Clearstream*".[36] Further, the Award states that Poštová had property rights against the Greek Government, not merely "*statutory rights*" as claimed by the Respondent.[37]

(ii) <u>The Tribunal's reasons are contradictory</u>

103. The Applicant also argues that the two propositions made by the Tribunal are contradictory: on the one hand, the Tribunal decided that Poštová banka had no investment and therefore no property or contractual rights arising out of its GGB holdings and, on the other hand, the Award

[32] Reply, para. 15 (emphasis omitted).
[33] Reply, para. 21 (emphasis omitted).
[34] Reply, para. 22.
[35] Hearing, Tr. 17:19-20.
[36] Reply, para. 24, quoting para. 347 of the Award.
[37] Reply, para. 27.

states that Poštová banka had property and contractual rights arising out of its GGB holdings.[38] The Applicant asserts that these contradictory propositions are a "*in direct conflict with each other and cannot be reconciled*"[39] and therefore constitute a failure to state reasons which justifies the partial annulment of the Award under Article 52(1)(e) of the ICSID Convention.

104. According to the Applicant, Greece's allegation that the Tribunal expressly held that the rights associated with the Applicant's GGB interest did not qualify as protected investments mischaracterized the conclusions set out in the Award.[40]

(iii) The Tribunal's errors were outcome-determinative

105. The Applicant notes that annulment committees have held that an Award's failure to state reasons must be on a point "*necessary to the tribunal's decision*"[41] in order for the failure to constitute an annullable error. The Applicant argues that partial annulment of the Award is justified because the Tribunal failed to state reasons on an outcome-determinative issue.[42]

106. The Applicant argued that, contrary to Greece's assertion, the only basis for the Tribunal's conclusion that it lacked jurisdiction over Poštová's claims was its analysis under the Treaty, as the Tribunal "*explicitly refused to decide*" whether it had jurisdiction under Article 25 of the ICSID Convention.[43]

107. The Applicant states that, "*[h]ad the Tribunal considered the implications of its own factual findings*" concerning the rights held against Greece and the Participants and considered whether those rights fell within the categories of investment included in the Treaty, "*the Tribunal may well have reached an entirely different conclusion in favor of jurisdiction.*"[44] The Applicant states that the Tribunal's failure to undertake an analysis concerning the property and contractual rights arising from the GGBs *"led to the dismissal of Poštová's entire claim*."[45]

108. Consequently, the Applicant considered that the dismissal of Poštová banka's claims for lack of jurisdiction *ratione materiae* must be annulled and that Poštová banka must be reimbursed of all costs associated with the annulment proceedings.

[38] Memorial, para. 72.
[39] Memorial, para. 73.
[40] Reply, para. 31.
[41] Memorial, para. 74, citing *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, ("*Vivendi I*") (CL-0141), para. 65.
[42] Memorial, para. 76.
[43] Reply, para. 4 (emphasis omitted).
[44] Memorial, para. 76.
[45] Memorial, para. 76.

B. The Respondent's Position

109. The Respondent argued that the Applicant has failed to satisfy its heavy burden of establishing a legitimate basis for annulment under the ICSID Convention. The Respondent emphasized that the standard for annulment for failure to state reasons is subject to a high threshold.

(i) The Applicant has not met the high burden of showing that the Award failed to state the reasons on which it is based

110. The Respondent asserted that an award is not to be annulled for a failure to state reasons as long as the tribunal fulfilled the "minimum requirement" that enables the reader to follow the factual and legal reasoning of the tribunal.[46] The Respondent considered that this standard is fulfilled by the Award at issue.

111. The Respondent also argued that a failure to articulate certain reasons in support of an award is not a ground for annulment under Article 52(1)(e) of the ICSID Convention where those reasons are implicit.[47]

112. The Respondent specified further in its Rejoinder its position that the relevant question for the *ad hoc* Committee in considering the request for partial annulment is whether the Tribunal failed to state any reasons on a question material for the conclusion that the Tribunal lacked jurisdiction *ratione materiae*.[48]

113. The Respondent stated that it is well established, that Article 52(1)(e) of the ICSID Convention concerns only the absence of reasons, not their correctness, adequacy or sufficiency.[49] The Respondent further explained that the Applicant's position that the standard should be "sufficient

---

[46] Counter-Memorial, para. 61, quoting *MINE v. Guinea*, para. 5.09.

[47] Counter-Memorial, para. 63, quoting *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, June 5, 2007, ("*Soufraki v. UAE*") (CL-0146), para. 24 ("*if the* ad hoc *Committee can 'explain' the Award by clarifying reasons that seemed absent because they were only implicit, it should do so.*") See also Footnote 93 of the Counter-Memorial, which further references *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, August 10, 2010, ("*Vivendi II*") (RL-0144), para. 248 ("*It is also understood that in the matter of adequate reasoning, upon a hearing, an ICSID* ad hoc *Committee may, if it deems it necessary, further explain, clarify, or supplement the reasoning given by the Tribunal rather than annul the decision.*") and *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB 01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, September 25, 2007, (CL-0140), para. 127 ("*In the Committee's view, although the motivation of the Award could certainly have been clearer, a careful reader can follow the implicit reasoning of the Tribunal […].*"). Rejoinder, para. 42, quoting *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, February 5, 2002, ("*Wena v. Egypt*") (CL-0154), para. 81 ("[*t]he Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.*")

[48] Rejoinder, para. 12.

[49] See Counter-Memorial, para. 60, quoting para. 52 of the Memorial, and para. 13 of the Rejoinder, para. 13, which cites *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2012, ("*AES v. Hungary*") (CL-0137), para. 17.

reasons" has been rejected, quoting, among others, Prof. Schreuer in his commentary on the ICSID Convention.[50]

114. The Respondent argued that the Tribunal did not make the factual findings which the Applicant alleges concerning rights held by Poštová banka against the Participants and Greece for the following reasons:

(1) With regard to the Applicant's alleged property rights against Greece, the Respondent argued that the Award states that those rights would only arise "*in one specific circumstance: the Greek Government's failure to pay due interest and principal on securities to the Bank of Greece*".[51] The Award states that the Applicant "*would have rights against Greece….in case the Greek Government fails to pay … pursuant to the terms of Law 2198 of 1994*" however the Applicant never argued that such a default had occurred.[52]

(2) With regard to the alleged property and contractual rights against Participants located in Greece, the Respondent argued that the Applicant never claimed before the Tribunal to have rights against Greek Participants, nor could it, because it never suggested that it held an investor account with a Participant located in Greece or instructed such a Participant to vote against the debt exchange.[53] Poštová banka held its account with Clearstream, a Luxembourg company.[54]

115. The Respondent further argued that, in any event, the Applicant never argued before the Tribunal that its rights against a Participant (i.e. Clearstream in Luxembourg according to the Respondent) are investments made in the Hellenic Republic protected under Article 1(1) of the Slovakia-Greece BIT, as Poštová's only theory in the arbitration was that GGB interests are loans to the Greek Government or give rise to a claim to money against the Hellenic Republic (i.e. that the investment fit within Article 1(1)(c)).[55]

[50] Rejoinder, para. 16, quoting C.H. Schreuer, The ICSID Convention: A Commentary (2009), Article 52 (CL-0155), p. 1003 ("*Once an* ad hoc *committee starts looking into whether the tribunal's explanation is sufficient to constitute a statement of reasons, it has already embarked upon a quality control of the award. The formal test of the presence of a statement of reasons blends into a substantive test of adequacy and correctness and the distinction between annulment and appeal becomes blurred*").
[51] Counter-Memorial, para. 93, quoting para. 345 of the Award.
[52] Rejoinder, para. 23, quoting para. 348 of the Award.
[53] Counter-Memorial, para. 95.
[54] Counter-Memorial, paras. 95, 100.
[55] Counter-Memorial, para. 15.

116. Relying on previous annulment decisions,[56] the Respondent argued that the Applicant may not have the *ad hoc* Committee second-guess the Tribunal's interpretation of Article 1(1) of the Slovakia-Greece BIT under the guise of an annulment review. Annulment proceedings do not provide the losing party with an opportunity to reposition or reargue its case.[57]

117. The Respondent argued that the Tribunal's conclusion that the Applicant's GGB interests were not investments under Article 1(1) of the BIT also encompassed rights arising from ownership of GGB interests: if sovereign debt is not protected, rights arising out of sovereign debt are also not protected.[58]

118. Quoting paragraph 332 of the Award, the Respondent concluded that the Applicant cannot avoid the Tribunal's conclusion that sovereign bonds or interests therein, and any right arising from them, are not protected under the Slovakia-Greece BIT, nor can the Applicant avoid its own failure to invoke Article 1(1)(a) of the Treaty before the Tribunal.[59]

(ii) The Tribunal's reasons are not contradictory

119. The Respondent also stressed that it is well-established that contradictory reasons are not sufficient for annulment under Article 52(1)(e) of the ICSID Convention. The Respondent quotes paragraph 60 of the Applicant's Memorial, which states that an award can only be annulled for containing contradictory reasons if these reasons "*are so contradictory that they effectively amount to no reasons at all*"[60] and that "*reasons must be* 'genuinely contradictory,' *such that they are incapable of standing together on any reasonable reading of the Award.*"[61] According to the Respondent, this standard is not met in the present case.

120. The Respondent states that the Tribunal's holding that the Applicant lacked an investment protected under the BIT did not imply that the Applicant had "*no property or contractual rights arising out of its GGB holdings*".[62] The exclusion of the application of the BIT rested on the

[56] Rejoinder, para. 29, citing *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment, February 1, 2016, (RL-0155), paras. 284-285; and *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, December 23, 2010, (RL-0143), para. 112.
[57] Counter-Memorial, paras. 53, 67.
[58] Rejoinder, paras. 34-35.
[59] Rejoinder, paras. 39-41.
[60] Counter-Memorial, para. 64, quoting para. 60 of the Memorial, which cites *AES v. Hungary*, para. 53.
[61] Counter-Memorial, para. 64, quoting para. 60 of the Memorial, which cites *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, September 16, 2011, (*Continental Casualty v. Argentina*) (CL-0142), para. 103 and *Vivendi I*, para. 53.
[62] Counter-Memorial, para. 98, quoting para. 73 of the Memorial.

findings that rights associated with Poštová banka's GGB interests are not investments for purpose of the BIT.[63]

121. The Respondent contended that the Applicant had not shown that the Tribunal's reasoning is contradictory.

122. The Respondent argues that the Applicant's argument in this regard is based on a *non-sequitur*, that the Applicant cannot conclude that every right qualifies as a protected investment and that the Tribunal's finding that the Applicant lacked a protected investment was not based on, and did not imply, a finding that the Applicant had no rights arising out of its GGB interests, but simply meant that any such rights are not protected.[64]

(iii) The error alleged by the Applicant is not outcome-determinative

123. The Respondent stated that the Applicant bears the burden to show that the alleged failure to state reasons concerns an outcome-determinative point for the Tribunal's decision that it lacked jurisdiction *ratione materiae* and that the Applicant did not show this outcome- determinative point in its submissions.[65]

124. The Respondent stated that the Applicant had not established any alleged failure to state reasons concerning a point that is outcome-determinative, pursuant to Article 52(1)(e) of the ICSID Convention. There is no indication that the Tribunal would have come to a different conclusion, had it included in the Award an express analysis of the Applicant's rights under each of the five categories of assets listed in Article 1(1) of the Treaty or had it concluded that the Applicant's GGB interests are protected under Article 1(1) of the Treaty.[66]

125. The Respondent noted that, even if the Tribunal had found that there was jurisdiction *ratione materiae* under the Treaty, the Tribunal would still have decided by majority that it lacked jurisdiction under Article 25 of the ICSID Convention.[67]

V. THE COMMITTEE'S ANALYSIS

A. General Observations

126. The Committee is bound to apply the provisions of Article 52 of the ICSID Convention and the ICSID Arbitration Rules. The Committee considers that the application of these provisions may

[63] Counter-Memorial, para. 99.
[64] Rejoinder, para. 48.
[65] Counter-Memorial, paras. 102-103.
[66] Rejoinder, paras. 54-55.
[67] Rejoinder, paras. 55-57.

be guided, if justified under the circumstances, by paragraphs 41 to 43 of the Report of the Executive Directors on the Washington Convention. The Committee notes that decisions of ICSID tribunals are not binding on the Parties or the Committee. Previous decisions by *ad hoc* committees may have an illustrative value on how different cases, under similar factual circumstances and considerations, were resolved.

127. The Parties in this annulment proceeding agree that annulment is an extraordinary remedy with a high threshold, as has been repeatedly emphasized by *ad hoc* committees in applying Article 52 of the ICSID Convention.[68]

128. It is evident from the drafting history of that provision, and its subsequent and consistent application, that the function and purpose of an annulment proceeding is distinct from an appeal.[69] As stated by the *Soufraki* Committee, "*the annulment review, although obviously important, is a limited exercise, and does not provide for an appeal of the initial award*."[70]

129. The Committee in *Mitchell v. DRC* stated that *"[n]o one has the slightest doubt – all the* ad hoc *Committees have so stated, and all authors specializing in the ICSID arbitration system agree – that an annulment proceeding is different from an appeal procedure and that it does not entail the carrying out of a substantive review of an award […] Nor is there any doubt that the grounds for annulment set out in Article 52 must be examined in a neutral and reasonable manner, that is, neither narrowly nor extensively. An* ad hoc *Committee should not decide to annul an award unless it is convinced that there has been a substantial violation of a rule protected by Article 52."*[71]

130. In the same vein, the *ad hoc* Committee in *Klöckner I* stated that annulment cannot "*be used by one party to complete or develop an argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its arguments*."[72]

---

[68] Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ("Background Paper on Annulment") (CL-0164), pages 35-38 (The background paper identifies a number annulment decisions which have accepted as a general principle that "*annulment is an exceptional and narrowly circumscribed remedy and the role of an* ad hoc *Committee is limited*.")

[69] See Background Paper on Annulment, pages 38 to 47. (The background paper identified a line of annulment decisions which confirm that "ad hoc *Committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an* ad hoc *Committee cannot substitute the Tribunal's determination on the merits for its own*.")

[70] *Soufraki v. UAE*, para. 20.

[71] *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, November 1 2006, ("*Mitchell v. DRC*") (RL-0005), para. 19.

[72] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on the Application for Annulment Submitted by Klöckner, May 3, 1985, ("*Klöckner I"*) (CL-0148), para. 83.

131. Mindful of these general principles, the Committee now turns to an analysis of the legal standard for an annulment under Article 52(1)(e) of the ICSID Convention.

B. The Legal Standard – Failure to State Reasons

132. In this proceeding, the Applicant's request for partial annulment is based on one ground – that the Award issued by the Tribunal failed to state the reasons on which it was based pursuant to Article 52(1)(e) of the ICSID Convention.

133. The Committee notes that the corollary of that provision is the requirement, contained in Article 48(3) of the ICSID Convention, that an Award "*shall state the reasons upon which it is based*."[73] The Applicant has described this requirement as a "*fundamental obligation*".[74]

134. The *ad hoc* Committee in *Tulip v. Turkey* commented on the purpose of a statement of reasons in an arbitral award:

> *The purpose of a statement of reasons is to explain to the reader of the award, especially to the parties, how and why the tribunal reached its decision. Since the parties are the award's primary addressees, it is not necessary for a tribunal to restate all their arguments and evidence. The parties will be familiar with the main issues before the tribunal, with the evidence that was before it and with the main legal arguments presented to it. Moreover, Article 48(3) does not require discussion of arguments without impact on the award.*[75]

135. Both Parties accept that the relevant test for failure to state reasons under Article 52(1)(e) is the formula set out in the *MINE v. Guinea* decision:

> 5.*08. The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an ad hoc Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.*
>
> *5.09. In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.*[76]

---

[73] This requirement is restated in ICSID Arbitration Rule 47(1)(i).
[74] Hearing, Tr. 9:1-3.
[75] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, December 30, 2015, ("*Tulip v. Turkey*"), para. 98, referencing *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, November 2, 2012, paras. 273-275.
[76] *MINE v. Guinea*, paras. 5.08-5.09.

136. The Parties further agree that, applying this standard, a committee's role is not to consider the quality or persuasiveness of a tribunal's reasons, but is limited to a consideration of whether the reasons are sufficient to allow a reader to understand how the tribunal's conclusion was reached. In other words, the standard relates to the existence of reasons and not the validity of the reasons. The exception, recognized in *MINE* and by subsequent committees, are reasons which are contradictory or frivolous, such that the reasoning provided is so flawed that it amounts to no reasons at all.

137. With regard to contradictory reasons, the Parties have both accepted the standard articulated by the committee in *Continental Casualty*:

> *[F]or genuinely contradictory reasons to cancel each other out, they must be such as to be incapable of standing together on any reasonable reading of the decision. An example might be where the basis for a tribunal's decision on one question is the existence of fact A, when the basis for its decision on another question is the* non-existence *of fact A. In cases where it is merely arguable whether there is a contradiction of inconsistency in the tribunal's reasoning, it is not for an annulment committee to resolve that argument.*[77]

However, the Parties do not agree whether the Award in this case includes reasoning that is contradictory.

138. The *MINE* Committee's position concerning the standard under Article 52(1)(e) of the ICSID Convention was endorsed by the Committee in *Wena v. Egypt*, which stated:

> *The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the* ad hoc *Committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not. As stated by the* ad hoc *Committee in* MINE, *this ground for annulment refers to a 'minimum requirement' only. This requirement is based on the Tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision. If such sequence of reasons has been given by the Tribunal, there is no room left for a request for annulment under Article 52(1)(e).*[78]

139. Both Parties have also accepted the test articulated by the *Vivendi I* Committee:

> *[I]t is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state* any *reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an* ad hoc *committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the Tribunal, their correctness is beside the point in terms of Article 52(1)(e).*[79]

---

[77] *Continental Casualty v. Argentina*, para. 103.
[78] *Wena v. Egypt*, para. 79.
[79] *Vivendi I*, para. 64.

140. Finally, both Parties have also accepted the standard articulated in the Decision on Annulment in *El Paso v. Argentina*, which states that an award should only be annulled if "*a well-informed reader can[not] understand the facts and the law by which the Tribunal reached its conclusions*."[80]

141. Some committees have held that implicit reasons may be read into the award provided they can be reasonably inferred by a reader. The Committee in *Soufraki v. UAE* stated that "*if the* ad hoc *Committee can 'explain' the Award by clarifying reasons that seemed absent because they were only implicit, it should do so*."[81] As stated by the Committee in *Vivendi II*, it is "*understood that in the matter of adequate reasoning, upon a hearing, an ICSID* ad hoc *Committee may, if it deems it necessary, further explain, clarify, or supplement the reasoning given by the Tribunal rather than annul the decision.*"[82]

142. This approach is consistent with the standards that have been endorsed by the Parties in this proceeding with regard to Article 52(1)(e); if the reasoning of a tribunal on a particular point can be inferred without difficulty and without substantial speculation by the reader, then the reader is in a position to understand how the Tribunal reached its conclusion and the so-called *MINE* Test is satisfied and, furthermore, the function of a statement of reasons is served. However the Committee is mindful of the caveat expressed by the Committee in *Rumeli* that if alleged implicit reasons "*do not necessarily follow or flow from the award's reasoning, an* ad hoc *committee should not construct reasons in order to justify the decision of the tribunal*."[83]

143. Finally, the Committee notes that, even where an absence of reasons is found, in order for a failure to state reasons to justify an annulment, the error must relate to an issue that was outcome-determinative.[84] This has been accepted by the Parties and confirmed by a number of *ad hoc* committees.

---

[80] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, September 22, 2014, ("*El Paso v. Argentina"*) (CL-0143), para. 220.
[81] *Soufraki v. UAE*, para. 24.
[82] *Vivendi II*, para. 248.
[83] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, March 25, 2010, ("*Rumeli v. Kazakhstan*") (CL-0152), para. 83.
[84] See E.g. *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment (July 10, 2014) (CL-0138), para. 202; *Vivendi I*, para. 65; *El Paso v. Argentina*, para. 169; *Rumeli v. Kazakhstan*, para. 81; *Wena v. Egypt*, para. 58.

C. The Committee's Findings

(i) The alleged absence of reasons

144. The question presented by the Applicant in this annulment proceeding is whether the Award includes sufficient reasons to enable the reader to understand how the Tribunal got from Point A (the Tribunal's finding that the Applicant possessed property and contractual rights associated with Poštová's GGB interests) to Point B (the conclusion that the Tribunal lacked jurisdiction because there was no 'investment' under the Slovakia-Greece BIT).

145. In respect of "Point A", the Applicant considers that there are three "Point As" contained in the Award: (i) the Tribunal's acknowledgement in the Award of the Applicant's contractual rights against the Participants;[85] (ii) the Tribunal's acknowledgement of the Applicant's property rights against the Participants;[86] and (iii) the Tribunal's acknowledgement of the Applicant's property rights against the Greek government.[87] As discussed above, the Respondent does not agree with the Applicant's characterization of the Tribunal's findings.

146. The Applicant has argued that, although the Award explicitly recognizes certain rights arising from the GGBs, there is an absence of reasoning to explain why these rights did not constitute an investment under the Treaty. Furthermore, the Applicant argues that the findings included in the Award are contradictory.

147. In considering the Parties' arguments, the Committee has carefully reviewed the Tribunal's analysis in the Award, which leads to the conclusion that there was no 'investment' within the meaning of Article 1(1) of the Treaty. The Tribunal's reasoning in respect of its decision that Poštová did not have an investment within the meaning of the Treaty is described in detail in paragraphs 248 to 350 of the Award, and is summarized in Section II of this Award.

148. At the outset of its analysis concerning Article 1(1) of the Slovakia-Greece BIT, the Tribunal described its approach to Treaty interpretation in accordance with Articles 31(1) and 31(2) of the VCLT. The Tribunal notes that the elements contained in Article 31(1) (i.e. the ordinary meaning to be given to the terms of the treaty, in their context, in light of the treaty's object and purpose) "*form a single rule of interpretation and may not be taken separately or in isolation*".[88]

[85] Memorial, para. 32, quoting para. 347 of the Award.
[86] Memorial, para. 32, quoting para. 348 of the Award.
[87] Memorial, para. 32, quoting Award paras. 345 and 348 and citing Law 2198 of 1994, (R-0108), Art. 8.2.
[88] Award, para. 282.

The Tribunal further states its view that "*an interpretation in good faith… requires elements of reasonableness that go beyond the mere verbal or purely literal analysis*."[89]

149. The Tribunal then applied this interpretive approach to Article 1(1) of the Slovakia-Greece BIT. Although the Tribunal confirmed its agreement with the Claimants that the concept of "investment" articulated in the *chapeau* of Article 1(1) is broad, it expressed its view that it is not persuaded that the definition is unlimited.

150. The Tribunal stated that *"[i]f 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.*"[90]

151. The Tribunal concluded that an interpretation of Article 1(1) of the BIT, considering its wording, and the object and purpose of the treaty, as required by the VCLT, lead it to the result that the definition was not unlimited:

> *…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.*
>
> *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.*[91]

152. As has been emphasized by the Applicant in the annulment proceeding, the question which the Tribunal addressed in the Award to reach the determination that the Applicant did not have a qualifying investment under the BIT was the following, set out in paragraph 316 of the Award:

> *[A]n 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 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*") (…).

153. The Committee does not find any difficulty in following the reasoning set out by the Tribunal in answering this question. The Tribunal recognized that the definition of investment contained in

[89] Award, para. 284.
[90] Award, para. 312.
[91] Award, paras. 314-315.

Article 1(1) of the Slovakia-Greece BIT is broad. But the Tribunal found that the definition is not limitless and does not include sovereign debt. In reaching this conclusion, the Tribunal provided a detailed description of the characteristics of sovereign debt and securities, which, in its view, place Poštová's GGB interests outside the definition of investment.

154. The Tribunal emphasized that neither Article 1(1) nor any other provisions of the Treaty refer to "*to sovereign debt, public titles, public securities, public obligations or the like"* stating that the *"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.*"[92]

155. Greece has stated that Poštová did not argue during the arbitration proceeding that the ancillary rights associated with its GGB interests were investments, separate from the GGB rights. The Applicant argues that its application for partial annulment is based on the text of the Award, and that the Tribunal made explicit findings as to the rights associated with the GGBs in its analysis based on the arguments presented by the Parties.

156. The Committee understands from the text of the Award, and from the arguments presented during the annulment proceeding, that no argument was advanced during the arbitration proceeding that rights associated with the GGBs independently constituted an investment under the Treaty. From the Award, the Committee understands that the Claimant's argument in the arbitration was that Poštová's investment fell "*squarely within*" Article 1(1)(c) (i.e. "*loans, claims to money or to any performance under contract having a financial value*"). It is therefore not surprising that the Tribunal did not address, as a separate question, whether the ancillary rights associated with the sovereign debt constituted an investment under the Treaty.

(ii) <u>The alleged contradictory reasons</u>

157. The Committee now turns to the Applicant's supplemental argument that certain reasons included in the Award are contradictory. As discussed above, contradictory reasons can justify an annulment of an Award only if the reasons are so fundamentally contradictory, that they amount to no reasons at all.

158. The Committee does not consider that the analysis included in the Award is contradictory. As described above, the Award explains the view of the Tribunal that sovereign bonds, as compared to participation in a company, were not within the intended scope of the Treaty. There is no

[92] Award, para. 332.

inconsistency between the Tribunal's finding that, as a matter of interpretation, sovereign bonds were not intended to fall within the broad definition of investment included in the Treaty and the finding that, in this case, certain specific rights related to sovereign bonds fell outside the intended scope of that definition. The Committee therefore does not consider that there are contradictory reasons in the Award which would justify partial annulment.

(iii) Whether the alleged errors were outcome-determinative

159. The Parties have made a number of arguments concerning the legal significance of the section of the Award that addresses the Tribunal's jurisdiction under Article 25 of the ICSID Convention (paragraphs 351 to 371 of the Award). As the Committee has not found an absence in reasoning which could potentially justify an annulment, it is not necessary for the Committee to consider the Parties' arguments in respect of this element.

160. Having considered the Parties' arguments in respect of the Application for partial annulment, the Committee decides that the high threshold required for annulment under Article 52(1)(e) of the ICSID Convention is not satisfied and the Applicant's request for partial annulment is therefore not granted.

VI. COSTS

161. In their respective pleadings, each of the Parties has sought to recover their costs and expenses in this annulment proceeding. As noted above, the Parties submitted their claims for costs on June 30, 2016. The Parties' positions are briefly summarized below.

A. The Applicant's Position

162. According to its June 30, 2016 cost submission, the Applicant's legal fees total USD 499,055.50 and its costs total USD 361,822.71. The Applicant's costs include its advance payments to ICSID in the amount of USD 300,000.00 and USD 25,000.00 lodging fee. The advances to ICSID for the annulment proceeding were covered solely by the Applicant in accordance with Regulation 14(3)(e) of the Administrative and Financial Regulations.

163. The Applicant argued that it is entitled to a partial annulment of the Award and, in those circumstances, requested that the Committee direct the Respondent to bear the costs of the proceeding in full, in line with the *ad hoc* Committees in *Sempra v. Argentina*[93] and *MHS v.*

[93] *Sempra Energy International v. Argentine Republic*, (ICSID Case No. ARB/02/16), Decision on Annulment, June 29, 2010, (CL-0162), paras. 227-228.

Malaysia.[94] The Applicant also argues that Greece falls "*far short of its own standard for a costs award that the annulment application must be 'clearly meritless'*" in order for a respondent to recover its expenses.[95]

164. The Applicant has also taken the position that Greece has unnecessarily increased the costs of the annulment proceeding by raising irrelevant arguments and attempting to re-litigate its case on the facts and relied on *EURAM v. The Slovak Republic*[96] and *LETCO v. Liberia*[97] for their claim that such behavior merits an adverse finding of costs.[98]

B. The Respondent's Position

165. In its submission of June 30, 2016, the Respondent claimed that it incurred legal fees and expenses to the amount of € 928,174.06 in this annulment proceeding. The Respondent requests that the Committee order the Applicant to pay the Respondent's legal fees and expenses.

166. The Respondent noted that several *ad hoc* committees have held that in circumstances where an application was "*clearly without merit*" the losing applicant should bear all costs and expenses.[99] The Respondent argues that it should recover its costs incurred in the annulment proceeding because the application for partial annulment "*fundamentally lacks merit*."[100] In particular, the Respondent argues that the Applicant has sought to "*re-litigate its case*"[101] by raising arguments that were not presented to the Tribunal in the arbitration proceeding, and that the Applicant has mischaracterized the Tribunal's findings.

C. The Committee's Analysis

167. The Committee notes that Article 61(2) of the ICSID Convention, which is contained in its Chapter VI titled "Cost of Proceedings," states that:

> *[T]he Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those*

---

[94] *Malaysian Historical Salvors SDN BHD v. Government of Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, April 16, 2009, (CL-0161), paras. 82-83.
[95] Reply, para. 43.
[96] *European American Investment Bank AG v. The Slovak Republic*, UNCITRAL, Award on Costs, August 20, 2014, (CL-0158), para. 43 (stating that procedural misconduct is a "*material consideration, particularly where it has led to costs being unnecessarily incurred*.").
[97] *Liberian Eastern Timber Corporation (LETCO) v. The Government of the Republic of Liberia*, ICSID Case No. ARB/83/2, Award, March 31, 1986, (CL-0160), para. 675 (awarding costs against Liberia based "*largely on Liberia's procedural bad faith*").
[98] Reply, para. 44.
[99] Rejoinder, para. 58, with reference to *AES v. Hungary*, para. 181.
[100] Rejoinder, para. 58.
[101] Rejoinder, para. 58.

expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the Award.

168. In addition, Rule 47(1)(j) of the Arbitration Rules states that the award shall contain "*any decision of the Tribunal regarding the cost of the proceeding*." In accordance with Article 52(4) of the ICSID Convention, Article 61(2) "*shall apply* mutatis mutandis *to proceedings before the Committee*." Rule 53 of the Arbitration Rules specifies that the Arbitration Rules shall apply to any procedure relating to the annulment of an award and to the decision of the Committee.

169. In accordance with Regulation 14(3)(e), the Applicant has made two advance payments to ICSID to cover the costs of this annulment proceeding, including the costs and expenses of the Centre and fees and expenses of the Members of the *ad hoc* Committee ("Costs of the Proceeding"). The fees and expenses of the Committee and ICSID's administrative fees and expenses have been paid out of the advances made by the Applicant and amount to USD 205,159.99, divided as follows (in USD):[102]

Committee's fees and expenses	125,284.62
Professor Azzedine Kettani	50,455.97
Sir David Edward	29,962.28
Professor Hi-Taek Shin	44,866.37
ICSID's administrative fee	64,000.00
Other disbursements (estimated)[103]	15,875.37
Total	205,159.99

170. The Committee has rejected the Application for Partial Annulment. A number of *ad hoc* committees have in such circumstances allocated the Costs of the Proceeding to the Applicant.[104] For example, in *M.C.I. Power v. Ecuador* the Committee stated that a consequence of Regulation 14(3)(e) "*which imposes on the party who applies for annulment the financial burden of advancing the costs, should normally be that the Applicant, when annulment is refused, remains*

[102] 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.
[103] The amount includes estimated charges (courier, printing and copying) in respect of the dispatch of this Decision on Annulment,
[104] See E.g. *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Decision on the Application for Annulment of the Democratic Republic of the Congo, March 29, 2016, (RL-0154) para. 240; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, February 26, 2016 (RL-0156), para. 349; *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, January 15, 2016, (CL-0157), para. 281; *Tulip v. Turkey*, para. 230; *Kilıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, July 14, 2015, (Rl-0153), para. 208.

responsible for these costs."[105] The Committee therefore decides that the Applicant shall bear the Costs of the Proceeding.

171. The Committee does not share the Respondent's view, however, that the Application for annulment was "*clearly without merit*". In this annulment proceeding, the Applicant has raised good questions, which were narrowly and effectively pleaded.

172. The Committee's view is that both of the Parties have acted in an efficient, professional and courteous manner throughout the pendency of the annulment proceeding. In these circumstances, the Committee decides that each party shall bear its own costs for legal representation and expenses incurred in this annulment proceeding.

VII. DECISION

173. For the foregoing reasons, the *ad hoc* Committee decides that:

(1) Poštová banka's Application for Partial Annulment of the Award dated April 9, 2015 is dismissed;

(2) Poštová banka shall bear the full costs and expenses incurred by ICSID in these annulment proceedings, including the fees and expenses of the Members of the Committee; and

(3) Each Party shall bear its own costs for legal representation and expenses in the annulment proceeding.

[105] *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of* Ecuador, ICSID Case No. ARB/03/6, Decision on Annulment, October 19, 2009, ("*M.C.I. Power v. Ecuador"*) (RL-0140), para. 89.

(*signed*)

Sir David Edward
Member
Date: September 12, 2016

(*signed*)

Prof Hi-Taek Shin
Member
Date: September 2, 2016

(*signed*)

Prof. Azzedine Kettani
President
Date: September 16, 2016