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Are Bondholders Investors?
Sovereign Debt and Investment Arbitration After Poštová

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ABSTRACT

As a result of the 2010 sovereign debt crisis and the subsequent restructuring operations, bondholders have pursued different dispute resolution strategies. Litigation before US courts has proved to be a viable option, as demonstrated by Argentine cases. State court litigation, however, is not the only available forum: in some cases, bondholders have commenced arbitration proceedings against the issuing State.

Arbitral case-law so far seemed to be consistent in concluding that the holders of sovereign bonds issued by the host State qualify as investors and thus have standing to bring investment treaty-based claims. The recent Poštová award, however, casts doubts as to whether holders of sovereign bonds qualify as investors for the purposes of international investment law.

This article illustrates the main problems revolving around the qualification of sovereign bond as investments for the purposes of international investment law. The article summarises the relevant legal framework and the solutions adopted by arbitral case-law so far. Subsequently, the contents of the Poštová decision are addressed in detail and the consequences of this decision are scrutinised.
1. Introduction

As a result of the 2010 sovereign debt crisis and the subsequent restructuring operations, bondholders have pursued different dispute resolution strategies. Litigation before US courts has proved to be a viable option, as demonstrated by Argentine cases.\(^1\) State court litigation, however, is not the only available forum: in some cases, such as *Abaclat v. Argentina*,\(^2\) *Ambiente Ufficio v. Argentina*\(^3\) and *Giovanni Alemanni v. Argentina*,\(^4\) bondholders have commenced arbitration proceedings against the issuing State, arguing that the ‘haircut’ amounts to a violation of international obligations arising out of the applicable investment treaty.

Although the aforementioned cases did not reach the merits stage and, therefore, the tribunals will not determine whether and to what extent a violation of international obligations exists,\(^5\) arbitral case-law so far seemed to be consistent in concluding that the holders of sovereign bonds issued by the host State qualify as investors and thus have standing to bring investment treaty-based claims. The recent *Poštová* award, however, casts doubts as to whether holders of sovereign bonds qualify as investors for the purposes of international investment law.\(^6\)

This article illustrates the main problems revolving around the qualification of sovereign bonds as investments for the purposes of international investment law. To this end, it will be first of all necessary to summarise the relevant legal framework and the solutions adopted by arbitral case-

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\(^2\) *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly Giovanna Beccara and Others v. The Argentine Republic), Decision on Jurisdiction and Admissibility of 4 August 2011.


\(^4\) *Giovanni Alemanni and Others v. The Argentine Republic*, ICSID Case No. ARB/07/8. As the Decision on Jurisdiction and Admissibility in this case relies to a large extent on the findings of the *Abaclat* and *Ambiente* tribunals, it need not be analysed in detail in this article.


\(^6\) For a comment on the state of uncertainty triggered by the award see Francesco Montanaro, ‘Poštova Banka SA and Istrokapital SE v Hellenic Republic – Sovereign Bonds and the Puzzling Definition of “Investment” in International Investment Law’ (2015) 30(3) ICSID Rev 549.
law so far: the notion of ‘investment’ under the ICSID Convention and the definition of said term in bilateral investment treaties (BITs) will be scrutinised. Subsequently, the contents of the Poštová decision will be addressed in detail and the consequences of this decision will be addressed. Before addressing the core of the issue, however, a preliminary clarification concerning the relations between the problem at hand and the political and geo-economic context of sovereign insolvency is in order.

2. A Preliminary Clarification on the Political and Geo-economic Context of Sovereign Insolvency

The problem of sovereign debt dispute resolution is strictly linked with broader political and geo-economic concerns. The restructuring of the Greek sovereign debt was a key component of the attempt to salvage a distressed national system and avoid further negative consequences for the Eurozone and, more generally, for the global economy. The debate on the relations between sovereign debt litigation and economic recovery is particularly articulate and controversial: on the one hand, it has been argued that the possibility for holdouts to successfully bring an action against the issuing State may undermine rescue attempts and, ultimately, endanger the sovereignty of States facing a situation of crisis.

On


9 Jonathan I Blackman and Rahul Mukhi, ‘The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal Fauna’ (2010) 73 Law & Contemp Probs 47. On the influence of Unanimous Action Clauses (UACs) and Collective Action Clauses (CACs) on the behaviour of bondholders see
the other hand, it has been argued that sovereign debt litigation mitigates the risk of opportunistic defaults and ensures the efficiency of international capital markets. The scope of this article is much narrower: rather than assessing the political and geo-economic effects of sovereign debt litigation, it simply discusses the availability of investment arbitration as a dispute resolution venue for bondholders, in light of the contents of the ICSID Convention and the relevant Bilateral Investment Treaties (BITs).

The analysis carried out in the article can, of course, be relied upon to formulate more general prescriptive considerations in the context of the above debate. By way of example, those who stress the risks of sovereign debt litigation may rely on the analysis carried out in Sections 3-7 to argue that the notion of ‘investment’ currently enshrined in international investment law is overbroad and should be re-modulated. These considerations, however, cannot entirely overlap with the interpretation of the relevant legal provisions. The opposite view would require selecting the politically desired outcome (e.g. the exclusion of sovereign bonds from the purview of the notion of ‘investment’) and reconstructing backwards a line of interpretative reasoning leading to the preferred conclusion. Such approach is only acceptable if one were to construe the relevant legal sources (in this case, the ICSID Convention, the Argentina-Italy BIT and the Slovakia-Greece BIT) as being indeterminate in meaning and equally open to all interpretations. Although a fully articulate answer to these questions would require a detour into analytical jurisprudence, clearly beyond the scope of this article, suffice it to say that, according to the view adopted here, not all interpretations of legal texts are in principle equally tenable. To be sure, this observation should not be read as an espousal of narratives theorizing a


11 It should incidentally be noted that such considerations would not be merely speculative, but rather resonate with an already ongoing treaty-making tendency, reducing the relevance of sovereign bonds in the field of investment protection. For instance, Annex 8-B of the draft text of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) specifies that negotiated debt restructuring cannot give rise to investor claims: see <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf>, accessed 24 June 2016. Along the same lines, Annex G of the US-Uruguay BIT and Annex 10-F of the US-Peru Trade Promotion Agreement exclude negotiated restructurings from the scope of investor-State dispute settlement.

12 From this point of view, it has been argued that law is so indeterminate that any interpretation entails discretionary value choices: Duncan Kennedy, A Critique of Adjudication (fin de siècle) (Harvard University Press 1997).
static and absolute meaning of legal texts, as legal rules are structurally the result of interpretation, rather than deriving automatically from the written word. Interpretations, however, should be the ground upon which conclusions are formulated, rather than becoming vehicles for the promotion of a pre-selected outcome. Furthermore, a non-goal-oriented analysis of legal problem seems to be one of the possible characterizing purposes (and privileges) of legal scholarship, while the imitation of judicial tropes and argumentative frameworks within scholarly discourse is, ultimately, illusory.

3. The Notion of ‘Investment’ under the ICSID Convention
(a) BITs and the ICSID Convention

The current reality of international investment law is dominated by a large network of BITs, which typically set forth a definition of ‘investment’; hence, nationals of both contracting States are entitled to protection under the BIT only inasmuch as their activities fall within the boundaries of such definition.

Although not all BITs are worded in the same terms, most of them provide that investors can initiate arbitration proceedings under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID). According to Article 25(1) of the ICSID Convention, the Centre has jurisdiction, \textit{ratione materiae}, over ‘any legal dispute arising directly out of an investment, between a Contracting State (…) and a national of another Contracting State’. It is therefore necessary to analyse the notion of ‘investment’ set forth in Article 25 of the ICSID Convention and to clarify its relationship with the definition of ‘investment’ included in each BIT providing for ICSID arbitration.


\footnote{Interestingly, the same argument is put forth by critical lawyers highlighting the indeterminacy of the law: Pierre Schlag, ‘Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)’ (2009) 97 Geo L J 803, 812-813. Additionally, with specific regard to investment arbitration, a further reflection is necessary as far as the potential modes of goal-oriented interpretation are concerned. Even if one were to start from the \textit{a priori} assumption that bondholders should not be allowed to undermine sovereign debt restructuring through investor-State dispute settlement, there are no compelling reasons to conclude that this result should be attained by excluding the jurisdiction of arbitral tribunals. Ioannis Glinavos, ‘Haircut Undone? The Greek Drama and Prospects for Investment Arbitration’ (2014) 5(3) JIDS 475 notes that the same goal could be pursued at the merits stage, by relying on the notion of ‘fair market value’ enshrined in the BIT provisions concerning expropriation when valuating compensation. In principle, this solution would seem more suitable, as it allows distinguishing among different bondholders, depending on the moment of purchase of the bonds on the secondary market and, potentially, on the ‘bad faith’ element. On the possible defences of the issuing State at the merits stage see Robert M. Ziff, ‘The Sovereign Debtor's Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law’ (2011) 10(3) Richmond Journal of Global Law and Business 345.}
(b) Article 25(1) of the ICSID Convention

The ICSID Convention does not set forth a definition of the term ‘investment’.\(^{15}\) It states that the jurisdiction of the Centre covers disputes arising directly out of an investment, but does not clarify what investment means. For this reason, it is debatable whether sovereign debt instruments qualify as investments for the purposes of Article 25.

Sovereign bonds clearly fall within the contemporary ordinary meaning of ‘investment’.\(^{16}\) However, such basic consideration is not enough ground to conclude that sovereign bonds fall within the scope of Article 25, as it could be argued that not everything that would be encompassed in the ordinary meaning of investment is also covered by Article 25 of the ICSID Convention. The problem has been analysed in detail in arbitral case-law.

(c) Fedax v. Venezuela

The first case where an arbitral tribunal addressed the problem of the qualification of sovereign debt instruments as investments under Article 25 of the ICSID Convention was Fedax v. Venezuela. The case revolved around six promissory notes, negotiable in the secondary market. The notes, issued by Venezuela in order to acknowledge its debt for the provision of services under a contract with a private company, were assigned to Fedax, which initiated ICSID arbitration proceedings after Venezuela failed to repay the debt.

Venezuela objected to the arbitral tribunal’s jurisdiction, alleging that the transaction did not involve any long term transfer of financial resources and that Fedax did not have any direct relationship with Venezuela, since it had acquired the instruments on the secondary market.

The Tribunal relied on the assumption that the notion of investment for the purposes of the ICSID Convention is not necessarily overlapping with its ordinary financial meaning. For this reason, in order to determine whether sovereign bonds qualify as an investment, it referred to the scholarly work of Schreuer, who described the concept of investment by listing a number of basic features (duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development).\(^{17}\)

\(^{15}\) For an analysis of the reasons leading to the failure of attempts at defining the term see Michael Waibel ‘Opening Pandora’s Box: Sovereign Bonds in International Arbitration’ (2007) 101 Am J Int’l L 711, 719.


On the basis of such analysis, the Fedax tribunal concluded that the promissory notes qualified as an investment, irrespective of whether the claimant had acquired the titles on the primary or secondary market. The circumstance that the identity of the investor can change several times was considered irrelevant, since the investment itself remains constant and the issuer enjoys ‘a continuous credit benefit until the time the notes become due’. Furthermore, the Tribunal noted that the existence itself of a dispute as to the payment of the principal and interests evinced the existence of risk.

(d) The Analysis of the Tribunal in Abaclat

The list of basic features indicated in Schreuer’s commentary had descriptive purposes: it was not intended as a list of requirements, which an undertaking must fulfil in order to qualify as an investment, but as a depiction of the typical model of investment falling within the scope of Article 25 of the ICSID Convention. However, arbitral case-law has adopted this ‘basic features’ methodology to elaborate a prescriptive list, i.e. a list of requirements in the absence of which the ICSID Convention should be regarded as inapplicable.

The case where these requirements were first set forth is Salini v. Morocco. According to the Salini tribunal, the notion of investment entails financial contributions made by the investors, a certain duration of performance, regularity of profits and returns, a participation in the risk of the transaction and a contribution to the economic development of the host State. The use of such criteria in order to determine whether an investment exists within the meaning of Article 25 is commonly referred to as ‘Salini test’.

The first ICSID claim concerning Argentina’s default was Abaclat. In this case, a large group of Italian bondholders initiated ICSID proceedings under the Argentina-Italy BIT, arguing that Argentina’s restructuring of its sovereign debt amounted to a violation of the State’s obligations arising out of the BIT.

The majority of the Abaclat tribunal refused to apply the Salini test in order to resolve the problem of the applicability ratione materiae of the ICSID Convention. The decision noted that, if the bondholders’ contributions were to fail the Salini test, they would be deprived of the procedural protection afforded by the ICSID Convention. In light of a subjective interpretation of Article 25, the tribunal found that such result would run counter to the ICSID Convention’s

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18 Fedax (n 17) para 40.
19 Fedax (n 17) para 40.
23 Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, para 91.
aim ‘to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote’. In other words, the tribunal argued that it would be contradictory to conclude that on the one hand Italy and Argentina agreed to protect a certain type of investment and to submit to ICSID arbitration, but on the other hand ICSID arbitration is not available, because of the Salini criteria. The tribunal further noted that the Salini criteria are ‘controversial’\(^\text{24}\) and they should not serve to create a limit to the jurisdiction of ICSID, since they were never included in the ICSID Convention.

(e) The Analysis of the Tribunal in Ambiente

Similarly to Abaclat, the Ambiente case concerns claims of Italian nationals, seeking compensation from Argentina for purported violations of the Argentina-Italy BIT in connection with the respondent State’s default on paying its sovereign debt in 2001.

The Ambiente tribunal reached the same conclusions as the Abaclat tribunal, holding that the case falls within the jurisdiction of ICSID. Nonetheless, the Ambiente decision on jurisdiction and admissibility shed further light on the notion of investment enshrined in Article 25 of the ICSID Convention.

The Abaclat tribunal had rejected \textit{a priori} the possibility that an investment protected under the Argentina-Italy BIT could fall outside of the jurisdiction of ICSID. By contrast, not only did the Ambiente tribunal conclude that the term ‘investment’ is to be given a broad meaning encompassing sovereign bonds and security entitlements,\(^\text{25}\) but it turned to consider the Salini test as well.\(^\text{26}\)

The Ambiente tribunal concluded that sovereign bonds and security entitlements pass the Salini test, for the following reasons:

- with regard to the criterion of a substantial contribution on the investors’ part, what counts is not the contribution of the single claimant, but the relevance of the bonds issued as a whole, which generate a significant financial flow;\(^\text{27}\)
- with regard to the minimum duration of the investment, the duration of the bonds must be considered, irrespective of their velocity of circulation on the secondary market;\(^\text{28}\)
- as far as the requirement of an operational risk is concerned, the risk of the host State’s sovereign intervention, which resulted in Argentina’s default and restructuring, is not a mere commercial risk.\(^\text{29}\)

\(^{24}\) Abaclat (n 2) para 364.
\(^{25}\) Ambiente (n 3) paras 470-471.
\(^{26}\) According to Ambiente (n 3) para 481, the Salini criteria are not jurisdictional requirements \textit{stricto sensu}, but useful ‘guidelines’.
\(^{27}\) Ambiente (n 3) para 483.
\(^{28}\) Ambiente (n 3) para 484.
\(^{29}\) Ambiente (n 3) para 485.
the interests supposed to be paid periodically satisfy the requirement of regularity of profits and returns;\textsuperscript{30}

- the circumstance that the funds generated through the bonds issuance process were ultimately made available to Argentina fulfils the requirement of a significant contribution to the development of the host State.\textsuperscript{31}

Hence, the Ambiente decision reinforced the Abaclat tribunal’s conclusion that holders of sovereign bonds fall within the scope of Article 25 of the ICSID Convention.

(f) The Dissenting Opinions in Abaclat and Ambiente

Both the Abaclat and the Ambiente decisions were not unanimous. One of the arbitrators of the Abaclat tribunal (Prof. Georges Abi-Saab) issued a dissenting opinion covering several aspects of the Decision on Jurisdiction and Admissibility, including the definition of the scope of application of Article 25 of the ICSID Convention. The dissenting opinion noted that the definition of investment emerging from financial markets is over-wide\textsuperscript{32} and that only investments fulfilling certain requirements fall within the jurisdiction of ICSID.\textsuperscript{33}

According to the Abaclat dissenting opinion, the model of foreign direct investment (FDI) serves as a touchstone to determine whether any other type of undertaking qualifies as an investment.\textsuperscript{34} In light of this, the opinion concluded that sovereign bonds do not qualify as investments, because the circulation of the bonds on the secondary market happens without any involvement of the sovereign debtor and does not create any direct flow of funds towards the State.\textsuperscript{35}

Similarly to what had happened in Abaclat, one of the arbitrators in the Ambiente tribunal (Dr Santiago Torres Bernárdez) expressed a dissenting opinion. According to the dissenting arbitrator, the issuance of sovereign bonds and the purchase of security entitlements deriving from said bonds on the secondary market cannot be described as two parts of one economic

\textsuperscript{30} Ambiente (n 3) para 486.

\textsuperscript{31} Ambiente (n 3) para 487.

\textsuperscript{32} Abaclat (n 2) Dissenting Opinion to Decision on Jurisdiction and Admissibility of Prof. Georges Abi-Saab (hereinafter ‘Abaclat dissent’), para 42.

\textsuperscript{33} Abaclat dissent (n 32) paras 51-52. The dissenting opinion refers not only to the Salini test, but also to the criteria set forth in Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5 and Romak S.A.(Switzerland) v The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280, Award of 15 April 2009.

\textsuperscript{34} Abaclat dissent (n 32) para 55.

\textsuperscript{35} Abaclat dissent (n 32) para 71 with reference to Waibel (n 15) 727.
Hence, the opinion concluded that purchasers of security entitlements on the secondary market cannot be equated to subscribers of sovereign bonds on the primary market.\textsuperscript{37} Furthermore, the dissenting opinion held that even subscribers on the primary market cannot qualify as investors for the purposes of the ICSID Convention, because the issuing State operates on the primary market as a commercial actor and not as a host State.\textsuperscript{38}

As for the ordinary meaning of ‘investment’, the opinion proposed a distinction between the current financial notion of investment, which clearly encompasses sovereign bonds, and the type of investments that the ICSID Convention sought to protect in 1965, when the ICSID Convention was concluded.\textsuperscript{39} In Dr Torres Bernárdez’s view, the 1965 notion of investment cannot encompass sovereign bonds, as ‘(i)n 1965 the time of the tradable Brady sovereign bonds of the 1990s and later markets was still far away’.\textsuperscript{40}

In conclusion, the problem of the applicability of Article 25 of the ICSID Convention to sovereign bonds has given rise to articulate and detailed dissenting opinions on the part of some arbitrators. However, both the \textit{Abaclat} and the \textit{Ambiente} majority decisions have held that sovereign bonds qualify as investments for the purposes of the ICSID Convention.

\textbf{4. The Definition of ‘Investment’ in BITs}

\textbf{(a) Fragmentation of the Notion of Investment}

In order to be protected under international investment law, sovereign bonds must fulfil the requirements of applicability \textit{ratione materiae} set forth in the relevant BIT.\textsuperscript{41} In this regard, it must be noted that the wording of BITs, although in many instances similar,\textsuperscript{42} is not always identical. Hence, the question as to whether bondholders qualify as investors for the purposes of BITs cannot be answered in general terms. \textit{Abaclat} and \textit{Ambiente} addressed the problem from the perspective of the Argentina-Italy BIT.

\begin{itemize}
  \item \textsuperscript{36} \textit{Ambiente} (n 3) Dissenting Opinion of Santiago Torres Bernárdez (hereinafter 'Ambiente dissent') paras 157-158.
  \item \textsuperscript{37} \textit{Ambiente} dissent (n 36) para 158.
  \item \textsuperscript{38} \textit{Ambiente} dissent (n 36) para 186. In other terms, Argentina was ‘making a commercial dealing of a financial product of its own outside the Republic in international markets as could be the selling of any other eventual kind of Argentine governmental goods, getting a price in return’ (para 187).
  \item \textsuperscript{39} \textit{Ambiente} dissent (n 36) para 250.
  \item \textsuperscript{40} \textit{Ambiente} dissent (n 36) para 267.
  \item \textsuperscript{41} Therefore, in order to be able to bring a treaty-based ICSID claim, the claimants must both fulfil the requirements of Article 25 of the ICSID Convention and fall within the scope of application of the investment treaty where the State has expressed its consent to ICSID arbitration (‘double-barrelled test’).
  \item \textsuperscript{42} The convergence of BITs towards homogeneous standards of investment protection is described in detail by Stephan W. Schill, ‘The multilateralization of international investment law’ (CUP 2009) 65-120.
\end{itemize}
(b) The Analysis of the Tribunals in *Abaclat* and *Ambiente*

BITs usually offer a general definition of investment, followed by a non-exclusive list of examples. Article 1(1) of the Argentina-Italy BIT defines ‘investment’, ‘in conformity with the legal system of the receiving State and irrespective of the legal form adopted and of any other legal system’, as ‘any conferment or asset invested or reinvested by an individual or corporation of one Contracting Party in the territory of the other Contracting Party, in compliance with the laws and regulations of the latter party’. Furthermore, the Article includes a list of six types of investment, two of which play a significant role in the *Abaclat* and *Ambiente* decisions:

- ‘lit. (c): obligations, private or public titles or any other right to performances or services having economic value, including capitalized revenues’;
- ‘lit. (f): any right of economic nature conferred under law or contract, as well as any license and concession granted in compliance with the applicable provisions applicable to the concerned economic activities, including the prospection, cultivation, extraction and exploitation of natural resources’.

The *Abaclat* tribunal noted that Article 1(1) is not drafted in a restrictive way and, as such, should be interpreted broadly.\(^43\) In light of this, the Decision concluded that sovereign bonds ‘constitute “obligations” and/or at least “public securities” in the sense of Article 1(1) lit. (c) of the BIT’.\(^44\) With regard to security entitlements circulating on the secondary market, the tribunal held that they are also encompassed in Article 1(1) lit. (c), since they ‘constitute an instrument representing a financial value held by the holder of the security entitlement in the bond issued by Argentina’.\(^45\)

The *Ambiente* tribunal reached the same conclusions, highlighting how the broad term ‘obligations’ in Article 1(1) lit. (c),\(^46\) albeit generic, does not exclude bonds or security entitlements, but rather includes them as well as all other types of obligations, as suggested by the expression ‘any other right to performances or services having economic value’.\(^47\)

The *Ambiente* tribunal further relied on Article 1(1) lit. (f): in light of such catch-all clause, the majority concluded that bonds and security entitlements must be brought into the purview of the BIT.

\(^{43}\) *Abaclat* (n 2) para 354.  
\(^{44}\) *Abaclat* (n 2) para 356.  
\(^{45}\) *Abaclat* (n 2) para 357.  
\(^{46}\) The translation of the term, which reads as ‘obligaciones’ in the Spanish version and ‘obbligazioni’ in the Italian version of the BIT, has been subject to controversy between the parties. Both the *Abaclat* and the *Ambiente* tribunal relied on the English term ‘obligations’, proposed by Argentina: see *Abaclat* (n 2), para 352 and *Ambiente* (n 3), para 491.  
\(^{47}\) *Ambiente* (n 3) para 491.
(c) The Dissenting Opinions in Abaclat and Ambiente

Interestingly enough, Prof. Abi-Saab did not disagree with the majority of the Abaclat tribunal as far as the interpretation of Article 1(1) lit. (c) is concerned: according to the dissenting opinion, the provision at hand ‘covers financial instruments’ and ‘its language is large enough to encompass the security entitlements in the Argentinean bonds’.\(^48\) The opinion then calls for a distinction between primary market subscribers and secondary market purchasers, arguing that in the latter scenario the purchasers have no legal nexus with Argentina and therefore do not fulfil the requirements set forth in the *chapeau* of Article 1;\(^49\) such argument, however, does not undermine the assumption that bonds and security entitlements are, in principle, covered by Article 1(1) lit. (c) of the BIT.

By contrast, the *Ambiente* dissenting opinion briefly states that sovereign bonds and security entitlements are not be covered by the non-exhaustive list of examples set forth in Article 1(1) of the BIT;\(^50\) however, Dr Torres Bernárdez mainly justifies the inapplicability of the BIT by arguing that, even if an asset falls within one of the types enumerated in the non-exhaustive list of examples, it cannot be considered as an investment if it has no link with the territory of the host State. Hence, the problem of the interpretation of Article 1(1) lit. (c) is to a certain extent put aside, the main focus of the dissent being the problem of the territorial connection between bondholders and Argentina.

It can thus be concluded that, although a dissent has arised within both the *Abaclat* and the *Ambiente* tribunals as to the applicability *ratione materiae* of the Argentina-Italy BIT, the applicability of Article 1(1) lit. (c) of the Argentina-Italy BIT to sovereign bonds is one of the least controversial aspects of the two cases. For this reason, the line of reasoning adopted by the *Poštová* tribunal is surprising in many respects, as it constitutes a significant departure from the Argentine precedents.

5. The *Poštová* Award

(a) Structure of the Award

On 3 May 2013 ICSID received a request for arbitration from Poštová banka, a Slovak bank, and Istrokapital SE, a European Public Limited Liability Company, organized under the laws of Cyprus and holding shares in Poštová. The claimants argued that Greece’s 2012 debt restructuring amounted to a violation of the obligations arising out of the Slovakia-Greece BIT and the Cyprus-Greece BIT.

\(^{48}\) *Abaclat* dissent (n 32) para 68.

\(^{49}\) *Abaclat* dissent (n 32) paras 73-119.

\(^{50}\) *Ambiente* dissent (n 36) para 282. Although para 282 notes *en passant* that sovereign bonds and security entitlements would not be covered by the non-exhaustive list of examples, thus marking a difference with the *Abaclat* dissent, the reasoning of the dissenting opinion focuses entirely on the territorial link requirement set forth in the *chapeau* of Article 1(1).
On 9 April 2015 the ICSID tribunal rendered an award declining jurisdiction over the dispute and thus casting significant doubts on the viability of investment arbitration as a forum for the resolution of disputes concerning sovereign debt restructurings.

The tribunal declined jurisdiction with respect to the claims brought by both Poštová and Istrokapital. However, the reasons why such conclusion was reached are different in respect of the two claimants: as far as Istrokapital is concerned, the tribunal based its decision on the simple fact that the company did not hold any Greek sovereign bonds, but rather held shares in Poštová, which in turn held Greek bonds. For this reason, the part of the award concerning Istrokapital is not relevant for the purpose of clarifying the status of bondholders under international investment law; hence, this article will only analyse the reasoning of the tribunal regarding the position of Poštová.

The tribunal recognised the relevance of the double-barrelled test, i.e. the necessity of fulfilling the requirements of applicability set forth both in the ICSID Convention and in the invoked BIT. The contents of the Slovakia-Greece BIT were analysed first, whilst Article 25 of the ICSID Convention was scrutinized subsequently.

(b) Analysis of the Contents of the Slovakia-Greece BIT

According to the tribunal, sovereign bonds do not qualify as investments under the Slovakia-Greece BIT. Article 1(1) of the BIT reads as follows:

“Investment” means every kind of asset and in particular, though not exclusively includes:

a) movable and immovable property and any other property rights such as mortgages, liens or pledges,

b) shares in and stock and debentures of a company and any other form of participation in a company,

c) loans, claims to money or to any performance under contract having a financial value,

d) intellectual property rights, goodwill, technical processes and know-how, business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources’.

The definition of ‘investment’ is described in the award as ‘a broad one’, but not unlimited. In order to determine its scope, the award advocates a good faith interpretation of Article 1(1). First of all, the tribunal notes that the lists of examples illustrating what may constitute an investment vary significantly from one BIT to the other: it is thus argued that such

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51 Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Award, para 286.
52 Poštová (n 51) para 314. On the boundaries of the notion of investment, see also para 288.
differences should be taken into account, in order to reach the proper interpretation of the treaty.53

Against such background, the tribunal differentiates the case at hand from Abaclat and Ambiente. Three main differences between the Argentina-Italy and the Slovakia-Greece BITs are highlighted:

- the *chapeau* of Article 1 of the Argentina-Italy BIT specifies that the existence of an investment should be assessed ‘irrespective of the legal form adopted’, whilst the *chapeau* of Article 1 of the Slovakia-Greece BIT does not include a similar provision;54
- Article 1(1)(c) of the Argentina-Italy BIT refers to ‘obligations, private or public titles or any other right to performances or services having economic value, including capitalized revenues’, whilst Article 1(1)(c) of the Slovakia-Greece BIT refers to ‘loans, claims to money or to any performance under contract having a financial value’;55
- Article 1(1)(f) of the Argentina-Italy BIT broadly encompasses ‘any right of economic nature conferred under law or contract’, whilst the Slovakia-Greece BIT does not include such language.56

In light of the above factors, the award argues that the Slovakia-Greece BIT includes ‘less encompassing language’ than the Argentina-Italy BIT,57 thus allowing for a differentiation between Poštová and the Argentine cases.

Moving on to the analysis of the contents of the Slovakia-Greece BIT, the award notes how Article 1(1)(b) only covers private indebtedness and corporate debt; it is argued that sovereign debt cannot be equated to private debt, because of its role in the governance of the monetary and economic policy of a State.58 As for Article 1(1)(c), covering ‘loans, claims to money or to any performance under contract having a financial value’, the tribunal reasons that loans and bonds are distinct financial products. In particular, it is contended that loans involve contractual privity between the lender and the debtor, while bonds circulate on the secondary market and the identity of the creditor ‘may change several times in a matter of days or even hours’.59

Along the same lines, the award maintains that bonds cannot qualify as ‘claims to money or to any performance under contract having a financial value’, because no contractual relationship exists between the issuing State and the purchasers of bonds on the secondary market.60 According to the tribunal, ‘Greece had a contractual relationship with the Participants and the

53 Poštová (n 51) paras 294-295.
54 Poštová (n 51) para 305.
55 Poštová (n 51) para 306.
56 Poštová (n 51) para 307.
57 Poštová (n 51) para 308.
58 Poštová (n 51) paras 318-324.
59 Poštová (n 51) paras 337-338.
60 Poštová (n 51) paras 343-344.
Primary Dealers”; by contrast, since Poštová has acquired the bonds on the secondary market, it has no contractual relationship with Greece.

(c) Analysis of Article 25 of the ICSID Convention

The conclusion concerning the definition of investment under the Slovakia-Greece BIT makes it unnecessary to consider the problem of the applicability *ratione materiae* of the ICSID Convention. Nonetheless, the award addresses the problem at hand in a detailed *obiter dictum*.\(^{61}\)

According to the award, the problem of the applicability of the ICSID Convention can in principle be approached in two different ways. On the one hand, it is possible to argue that the notion of investments is characterised by some ‘core elements’, in the absence of which the Convention cannot apply: the tribunal mentions the requirements of a contribution of money or assets, duration and risk,\(^{62}\) along the lines of the *Salini* test. On the other hand, it is also possible to conclude that the ICSID Convention does not provide any definition of ‘investment’ and, therefore, the State parties to a BIT are free to determine the scope of such concept by agreement.\(^{63}\)

Although the award does not choose between the ‘objective’ and the ‘subjective’ approach,\(^{64}\) it notes that, were the former applied, sovereign bonds would not qualify as investments. In particular, it is argued that sovereign bonds do not entail any contribution, if they are not linked with an economic venture.\(^{65}\) In other words, according to the tribunal, if the money paid for the bonds is not used in ‘economically productive activities’, but for the State’s ‘budgetary needs’, the bonds do not qualify as an investment.\(^{66}\)

Furthermore, the award concludes that no risk exists in the case at hand. In this regard, it is argued that an ‘investment risk’ only exists when the investor cannot be sure of a return on the investment, even if all relevant counterparties discharge their contractual obligations.\(^{67}\) In the tribunal’s view, the risk of interference of the Government (which was evident in the case of Greece’s retrofit introduction of collective action clauses) is a ‘sovereign risk’ and should be equated to a normal commercial risk, rather than to an investment or operational risk.\(^{68}\) The tribunal thus argues that, were the *Salini* test (in one of its variations) to be applied, sovereign bonds would not be covered by the ICSID Convention.

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\(^{61}\) Poštová (n 51) paras 352-371.
\(^{62}\) Poštová (n 51) para 356.
\(^{63}\) Poštová (n 51) para 357.
\(^{64}\) Poštová (n 51) para 359.
\(^{65}\) Poštová (n 51) para 365.
\(^{66}\) Poštová (n 51) para 363.
\(^{67}\) Poštová (n 51) paras 368-369, with reference to Romak (n 33) paras. 229-230.
\(^{68}\) Poštová (n 51) para 369.
6. Critical Assessment

(a) Definition of ‘Investment’ in the Slovakia-Greece BIT

The Poštová award generates doubts as to the possibility for holders of sovereign bonds to bring investment treaty claims against the issuing State. The main reasoning of the award must be distinguished from the obiter, as the two parts call for different considerations.

The tribunal’s analysis of Article 1(1) of the Slovakia-Greece BIT can partially be seen as a physiological consequence of the current state of fragmentation of international investment law: given the discrepancies in the wording of different BITs, it is not entirely surprising or unacceptable that arbitral tribunals operating under a disharmonic legal regime reach divergent conclusions. Nonetheless, the tribunal’s analysis of the term ‘loans’, included in Article 1(1)(c) of the Slovakia-Greece BIT, raises some concerns.

According to the Poštová award, the notion of ‘loan’ does not encompass sovereign bonds, because it involves contractual privity between the lender and the debtor. Although the decision does not elaborate on this point any further, it is doubtful whether the notion of ‘loan’ necessarily entails contractual privity. Since ‘loan’ is a generic term, it would be reasonable to construe it in broad terms, thus covering both sovereign bonds and other legal relationships, irrespective of the relevance of the identity of the lender. In fact, it could be argued that bonds constitute the currently prevailing form of loan, as both States and privates commonly finance their activities by issuing tradable bonds. Furthermore, the conclusion reached in the Poštová award is incompatible with the treatment that the term ‘loan’ has been given in arbitral case-law so far: according to the Fedax tribunal, ‘promissory notes are evidence of a loan’, irrespective of whether they are freely tradable or not. For these reasons, the differentiation between loans and bonds operated by the Poštová tribunal is unpersuasive.

Starting from the premise that loans require contractual privity, the arbitral tribunal differentiates between primary market subscribers, who are deemed to have a contractual relationship with the State, and secondary market purchasers, who on the contrary are considered not to have such relationship. For this reason, the arbitral tribunal argues that Poštová is not entitled to protection under the Slovakia-Greece BIT.

The distinction between primary and secondary market is not convincing, as it does not take into account the mechanism of bond issuance and the close link between subscription on the primary market and circulation on the secondary market. The State’s decision to issue tradable

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69 Christian Hofmann, ‘A Legal Analysis of the Euro Zone Crisis’ (2013) 18(3) Fordham J Corp Fin L 519, 560-561 highlights how the transposition of the Abaclat line of reasoning to the Greek scenario depends, inter alia, on the wording of the applicable Greek BIT.
70 Fedax (n 17) para 29.
71 Poštová (n 51) para 338.
72 Poštová (n 51) para 339.
bonds clearly evinces the intention to make the credit transferable:73 the ease of circulation is the mainspring of tradable bonds and, as such, its relevance cannot be disregarded when analysing the nature of the relationship between the issuing State and bondholders. The issuance of tradable bonds entails a unilateral promise in incertam personam: therefore, the existence of a contractual relationship cannot be ruled out merely because the identity of the bondholder may vary over time.74 On the contrary, it must be concluded that sovereign bonds constitute a particular type of loan, encompassed within the general definition of loan of Article 1(1)(c) of the Slovakia-Greece BIT and characterised by the irrelevance of the identity of the creditor.75 Furthermore, it should be noted that the tribunal’s approach, whereby a contractual relationship exists only in the presence of contractual privity, would lead to illogical consequences: applying such line of reasoning, holders of shares in a company would have no contractual relationship with the company, since shares circulate freely without any relevance of intuitus personae.

In conclusion, although the different outcome can be partially explained in light of the discrepancies in the applicable treaties, the Poštová award is openly at odds with the Abaclat and Ambiente decisions, inasmuch as it denies the existence of a close correlation between primary and secondary market operations. Given such disagreement among different arbitral tribunals, it is currently impossible to determine clearly whether purchasers of bonds on the secondary market are entitled to the same treaty-based protection that may be available (depending on the wording of the applicable BIT) to primary market subscribers.

73 The possibility to transfer securities acquired on the primary market to third parties is expressly enshrined in the Greek law governing the issuance of dematerialised titles: see Greek Law 2198 of 1994, Chapter B, Article 6.2.

74 Similar arguments have been put forth with regard to private bonds: see Matteo Gargantini, ‘Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities; the Advocate General’s Opinion in Kolassa v. Barclays’ (2014) 4 Riv Dir Int Priv Proc 1095, 1099-1103.

75 A subtler question is whether different techniques of retention of the bonds may have a consequence on the existence of a direct loan relationship between the claimants and the Hellenic Republic, and hence on the applicability of the BIT. Investors usually hold securities through intermediaries, but the methods of retention may vary from one jurisdiction to another, as well as on a case-by-case basis. In the European Union, the different techniques of retention of securities are described in European Commission, EU Clearing and Settlement. Legal Certainty Group - Questionnaire. Horizontal answers', MARKT/G2/MNCT D(2005). In particular, in some cases the intermediaries do not have any legal entitlements on the securities they hold on behalf of the investors; conversely, in other cases, the intermediary is the formal owner of the bonds, whilst the position of the investor is regulated by the law of trust. It could be argued that, in the latter scenario, the purchasers of the bonds on the secondary market do not have standing to bring a treaty-based action, because they do not formally qualify as owners. In any case, this distinction does not alter the boundaries of arbitral jurisdiction ratione materiae, as its consequences are limited to the applicability of the relevant investment agreement ratione personae.
(b) The Meaning of ‘Investment’ Under Article 25 of the ICSID Convention

In the obiter, the Poštová tribunal argues that, even if the claimants’ undertakings were encompassed in the definition of investment set forth in the Slovakia-Greece BIT, the dispute may still not fall within Article 25 of the ICSID Convention.

As stated above, Article 25(1) of the ICSID Convention refers to disputes ‘arising directly out of an investment’, but does not define the notion of investment. For this reason, the meaning of ‘investment’ under the ICSID Convention is a largely unsettled question. In order to put this problem in perspective, it is necessary to consider the way consent to ICSID arbitration operates.

The ICSID Convention implements a framework for the resolution of investment disputes by means of arbitration. However, no State is under any obligation to submit any particular dispute to arbitration, for the mere fact of being a party to the ICSID Convention; to the contrary, the Convention requires that States express an independent consent to arbitration, including a reference to ICSID arbitration in a separate legal instrument. In practice, consent to ICSID arbitration is often expressed in a BIT concluded by the State hosting the investment and the home State of the investor.

In light of this legal framework, it could be argued that States are free to determine the scope of application of the ICSID Convention: since Article 25 does not specify any criterion of applicability ratione materiae, it is up to the parties of an investment treaty expressing consent to ICSID arbitration to determine the type of disputes falling within the jurisdiction of the Centre. This ‘subjective’ approach to the problem at hand clearly resonates with the reasoning of the Abaclat tribunal, according to which it would not be correct to conclude that disputes concerning sovereign debt are not covered by the jurisdiction of ICSID, since they fall within the scope of application of a BIT providing for ICSID arbitration.

Conversely, the proponents of a prescriptive application of the Salini criteria argue that the notion of ‘investment’ under Article 25 of the ICSID Convention constitutes an objective jurisdictional constraint; from this point of view, the State parties to an investment treaty would

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76 ICSID Convention, Preamble: ‘no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration’.
77 Schreuer, Malintoppi, Reinisch and Sinclair (n 20) 205-206.
79 Abaclat (n 2) para 364.
not be able to refer to ICSID arbitration any kind of dispute. In other words, according to the ‘objective’ approach, the circumstance that the contracting States to an investment treaty have consented to ICSID arbitration is not enough ground to conclude that Article 25 applies: if a dispute does not arise out of an ‘investment’, ICSID does not have jurisdiction, irrespective of the wording of the treaty where consent to ICSID arbitration has been expressed.

The Poštová tribunal does not expressly state that Article 25 of the ICSID Convention should be interpreted in light of an objective approach: hence, the ‘subjective’ reasoning of the Abaclat tribunal, whereby the ICSID Convention applies inasmuch as the contracting States to the BIT provided for ICSID arbitration, is not directly undermined. However, the award argues that, were one to adopt an objective approach, sovereign bonds would not qualify as investments, as the Salini criteria would not be fulfilled. From this point of view, the award is openly at odds with Ambiente, as far as the criteria of contribution and risk are concerned.

The application of the Salini criteria by the Poštová tribunal is particularly controversial. However, before moving on to the analysis of the requirements of contribution and risk, it is important to analyse the dialectics between the objective and the subjective approach to the interpretation of Article 25 of the ICSID Convention. On the one hand, the Poštová award refuses to take a clear position in this regard, thus leaving the question as to the relevance of Article 25 unanswered. On the other hand, however, a closer scrutiny of the ICSID Convention would have allowed for a mitigation of the contrast between the objective and the subjective approaches, thus shedding a new light on the applicability of the ICSID Convention to disputes relating to sovereign debt restructurings.

(c) A Missed Opportunity: The Poštová Award Between Subjective and Objective Interpretations of Article 25

Investments tribunals interpret the ICSID Convention in light of the criteria enshrined in the Vienna Convention on the Law of Treaties (VCLT). Although these rules of interpretation play a fundamental role in clarifying the meaning of international agreements, they should not be applied uncritically, but rather used in an adaptive fashion. The VCLT is based on the primacy of State consent: since international treaties enshrine the agreement of two or more States on certain rules, treaty interpretation should aim at clarifying what the States meant when they concluded the agreement. Such rationale, albeit generally correct, fails to take into account the circumstance that, in some cases, States may intentionally decide to leave the agreement incomplete. In the case of the ICSID Convention, the lack of definition of ‘investment’ should be seen as an example of strategic silence on the part of the contracting States.

80 Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award of 1 November 2006, para 31; Phoenix (n 33) para 82; Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction of 6 August 2004, para 49.

81 Ambiente (n 2) paras 483 and 485.
It is not uncommon for the parties to any kind of agreement to leave the contents thereof partially undefined. Such incompleteness is not necessarily due to the need to avoid excessive transactional costs: in some cases, the parties decide to leave certain aspects of the agreement undefined for strategic reasons. According to scholarly analyses of contract-making between privates, parties may intentionally leave a gap in their contract, when they cannot foresee how their own purposes may change over time.\(^82\) Similarly, the parties to the ICSID Convention reached an agreement on the procedural framework for the resolution of investment disputes, at a time when no widespread consensus existed as to the substantive contents and the scope of application of international investment law. For this reason, the ICSID Convention has been accurately characterized as a ‘power-conferring treaty’, since it partially grants control over the meaning of its terms to entities other than the contracting States.\(^83\) On the basis of this premise, the conflict between the ‘objective’ and the ‘subjective’ approach to the interpretation of Article 25 can, to a large extent, be composed.

During the negotiations of the ICSID Convention, the parties failed to agree on the notion of ‘investment’. Together with the ICSID Convention, the International Bank for Reconstruction and Development published a ‘Report of the Executive Directors’, which clarifies many aspects of the process of negotiation of the Convention.\(^84\) According to this document, the lack of a definition of the term ‘investment’ is not problematic, ‘given the essential requirement of consent by the parties’. In other words, since States are not bound by ICSID arbitration for the fact itself of being parties to the ICSID Convention, but rather must express their consent to arbitration in a separate instrument, the scope of application of the Convention can be clarified at this later stage, when consent to arbitration is actually expressed.\(^85\) Hence, the genesis of the ICSID Convention clearly suggests that the contracting parties have a significant margin of autonomy, when determining the scope of application of the Convention itself.

The existence of such a discretional power is confirmed by two provisions of the Convention. Firstly, pursuant to Article 25(4), each contracting State can notify ICSID of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. Thus, the Convention confers upon the contracting States a power to manipulate the scope of Article 25 unilaterally.\(^86\) Furthermore, under Article 64, contracting States can resolve disputes


\(^{85}\) Report of the Executive Directors (n 84) para 27.

\(^{86}\) States which have made a notification remain free to subsequently disregard it and consent to arbitration, irrespective of whether the dispute falls within one of the classes which the notification refers
between them as to the interpretation or application of the Convention by way of negotiation. Therefore, the Convention itself contemplates the possibility that its contents will be given diverging interpretations within different groupings of States.

The above analysis demonstrates the untenability of the assumption whereby the rules of interpretation should aim at clarifying the contents of notion of ‘investment’, which the contracting States had in mind when the Convention was concluded. To the contrary, the genesis and the contents of the ICSID Convention evince that the notion of ‘investment’ is intrinsically fluid; for this reason BITs, as well as other instruments where States express their consent to ICSID arbitration, play an important role in clarifying the boundaries of Article 25.

The subjective approach adopted by the Abaclat tribunal comports with the fluid character of the notion of ‘investment’ enshrined in Article 25. However, a purely subjective approach is unsatisfactory, as it does not value the contents of the provision at hand. Had the contracting States wished to eliminate all jurisdictional constraints, they could have disposed of every specification, simply extending the jurisdiction of the Centre to any dispute between a contracting State and a national of another contracting State. To the contrary, Article 25(1) states that the disputes must arise directly out of an investment: therefore, even in the absence of any agreed definition of ‘investment’, the provision at hand must be construed as constituting a minimum constraint to the jurisdiction of the Centre. However, the contents of such provision should be ascertained by taking into account the strategic silence of the contracting States.

The contracting parties to the ICSID Convention intentionally left a gap, implementing a mechanism for the resolution of investment disputes in the absence of a consensus on the notion of ‘investment’. Hence, they entrusted future interpreters of the Convention with the task of filling the gap, by relying on an evolving meaning of investment. The question ‘what


88 Ambiente dissent (n 36) para 250.

89 A confirmation that the ICSID Convention should be interpreted in an evolutionary way, taking into due account the current reality of international investment, can be found in the way consent to ICSID arbitration operates. The simplest type of consent, which the drafters of the Convention had in mind, is the insertion of an arbitration clause in an investment contract, concluded directly by the investor and the host State: Lucy Reed, Jan Paulsson and Nigel Blackaby, ‘Guide to ICSID Arbitration’ (Kluwer 2010) 22-
constitutes an investment?’ should be answered not by looking at the intention of the contracting State (which were purposely silent on this point), but by taking into consideration what an investment is currently considered to be. Consequently, the best view is that the Salini criteria are not strictly prescriptive, but rather serve as indicators of the currently prevailing distinctive characters of an investment. As such, they should not be relied upon rigidly, but rather used in an adaptive and circumstance-specific fashion.  

The above arguments demonstrate that flexibility can play an important role in mitigating the conflict between the objective and the subjective interpretations of Article 25. The interpretative autonomy afforded by this approach, however, is not unlimited, as a teleological interpretation of the Washington Convention necessarily entails a time constraint. Since the Convention aims at fostering growth by stimulating cross-border investment, it must be construed as implementing a dispute resolution infrastructure which can, at least potentially, attain such goals by encouraging investors to undertake wealth-producing activities in a foreign host State. Such effect of encouragement could not be achieved, were the notion of ‘investment’ relevant for the purposes of Article 25 open to interpretative changes and adaptations, depending on circumstances arising after the investment has been performed. If this was the case, potential investors would have no certainty as to the availability of ICSID arbitration and, therefore, no additional reason-for-action when deciding whether and where to perform an investment. In other words, general economic circumstances existing at the time the investment was performed can be taken into account, in order to determine the distinctive characters of the notion of ‘investment’ under Article 25. Conversely, factors emerging after the investment has been performed should not be considered, so as to preserve the certainty of the investment protection framework.

This general observation has an important consequence for the case of sovereign debt restructurings. In principle, one could reason that the strategic silence of Article 25 can be relied upon, in order to empower arbitral tribunals to adjust the scope of the notion of ‘investment’ in

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23. However, in practice, consent to ICSID arbitration is currently often expressed in a standing offer, formulated by the host State either in its domestic laws or in an investment treaty with the home State of the investor: Jan Paulsson, 'Arbitration Without Privity' (1995) 10(2) ICSID Rev 232. Such evolution has triggered a rapid extension of arbitral jurisdiction in recent times, as demonstrated by the ICSID caseload: ICSID, 'The ICSID Caseload - Statistics (Issue 2015-1)' <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1.pdf> accessed 24 June 2016. The legitimacy of expressions of consent included in investment treaties is currently undisputed in international investment law, although the drafters of the ICSID Convention had not specifically focused on this possibility; therefore, the evolution of international investment law clearly suggests the viability of an evolutionary approach to the interpretation of the Convention.


91 The Convention’s Preamble contains numerous indications in this sense.
light of the broader geo-economic context of this kind of disputes. It could thus be argued that, because of the particularly critical situation of the issuing State and the global ramifications of the crisis, arbitral tribunals should conclude that bondholders cease constituting investments, because of a change in the surrounding economic conditions. This line of reasoning, however, cannot be followed, as it would jeopardise the overall purpose of the Convention: were tribunals free to determine post factum\textsuperscript{92} that sovereign bonds do not qualify as investments, the ICSID regime could not constitute a reliable incentive for international undertakings.

In conclusion, the ‘agnostic’ point of view of the Poštová tribunal is unconvincing. The award depicts a clear conflict between the objective and the subjective approach, refusing to express any preference. On the contrary, the best view is that the contrast could to a large extent be mediated, taking into account that on the one hand States have a significant margin of autonomy in determining the scope of application of Article 25, but on the other hand a minimum objective meaning of ‘investment’ can be ascertained by looking at the contemporary prevailing practices, as existing at the moment when the investment is performed. In this regard the Poštová decision is a missed opportunity, as it unnecessarily perpetuates the current state of uncertainty as to the applicability \textit{ratione materiae} of the ICSID Convention.

\textbf{(d) Application of the Salini Criteria}

Further doubts arise, when considering the application of the Salini criteria by the Poštová tribunal. The definition of risk proposed by the tribunal is tailored exclusively on the model of FDI, thus bringing portfolio investments entirely out of the purview of the ICSID Convention. According to the Poštová award, the risk of the host State’s sovereign intervention (‘sovereign risk’) would be different from an operational risk. Such assumption relies on the logical premise that foreign direct investment constitutes the ‘ideal type’\textsuperscript{93} of investment covered by the ICSID Convention and that therefore the risk criterion must be modelled after the kind of risk which FDI typically incurs.

The tribunal’s approach is unduly restrictive: since the contracting parties to the ICSID Convention failed to agree on any definition of ‘investment’, and considering that the drafting of the Convention was partially triggered by the World Bank’s efforts to resolve disputes relating to portfolio investments,\textsuperscript{94} there are no \textit{a priori} reasons to use FDI as a touchstone to

\textsuperscript{92}Given the inextricable connection between primary and secondary markets operations, described above in Section 6(a), the relevant chronological reference would necessarily be the moment of the purchase of the instruments on the primary market.

\textsuperscript{93}The Weberian notion of ‘ideal type’ is expressly invoked by Prof. Abi-Saab in the Abaclat dissent (n 32) para 55.

\textsuperscript{94}Nolan, Sourgens and Carlson (n 16) 495-496 note that the establishment of ICSID was preceded by the City of Tokyo Bonds case, a dispute between the City of Tokyo and French bondholders, submitted for conciliation to the president of the International Bank for Reconstruction and Development. On the City of Tokyo Bonds case see Michael Waibel, Sovereign Defaults before International Courts and Tribunals
determine the scope of application of Article 25. On the contrary, the notion of ‘operational risk’ should be understood in neutral terms, as a risk connected with the way an investment operates; this substance-neutral approach effectively accommodates the evolutionary character of the notion of investment, determined by the strategic silence of the ICSID Convention, within the Salini test.

Since FDI and portfolio investments operate in different ways, they are connected with a different type of operational risk. In the case of portfolio investment, the operational risk is the risk of a sovereign restructuring of the debt: differently from the commercial risk of non-performance, the risk of a restructuring of the debt is connected with the exertion of sovereign powers on the part of issuing State and with the characteristic way in which portfolio investments operate. For these reasons, the reasoning of the Poštová award concerning the requirement of risk does not seem to be convincing.

As for the requirement of contribution, the Poštová award distinguishes between sovereign bonds that are used for general funding purposes and those used for public works or services: according to the tribunal, the former do not fulfill the requirement of contribution, whilst the latter do. This assumption is untenable, as it disregards the circumstance that the issuance of freely tradable bonds always aims at generating a financial flow in favour of the issuer, irrespective of its purpose of use: given the fungible nature of money, there are no reasons to differentiate among tradable bonds on the basis of their alleged aim. In fact, doing so may lead to paradoxical results: the issuing State would have a unilateral power to determine the scope of application of the ICSID Convention, by simply specifying the reason why the bonds have been issued. To the contrary, the best view is that the requirement of contribution is satisfied, inasmuch as the issuer benefits from the financial flow arising out of the bonds. Once again, the approach of the Poštová award seems to be unnecessarily restrictive and exclusively focused on the model of FDI.

7. Conclusions

The Poštová award casts significant doubts as to the viability of investment arbitration as a forum for the resolution of disputes relating to sovereign debt restructurings.
The decision of the arbitral tribunal to decline jurisdiction mainly hinges on the wording of the Slovakia-Greece BIT, which is different from the Argentina-Italy BIT. In light of this, the difference in outcome with Abaclat and Ambiente can be partially explained as a consequence of the fragmentation currently existing within international investment law. Nonetheless, some parts of the Poštová award are expressly at odds with the Argentine precedents: first of all, the decision relies on the differentiation between primary market subscribers and secondary market purchasers, which both the Abaclat and the Ambiente tribunals rejected (albeit with dissenting opinions). Furthermore, the outcome of Poštová is irreconcilable with the Argentine cases, as far as the applicability of Article 25 of the ICSID Convention is concerned.

The Poštová tribunal refuses to take a position as to the correct interpretation of Article 25, merely presenting a conflict between the subjective approach, whereby the scope of application of the ICSID Convention is determined by the States expressing consent to ICSID arbitration, and the objective approach, according to which the term ‘investment’ has an independent and ascertainable meaning. By perpetuating the dichotomy between ‘objectivists’ and ‘subjectivists’, the tribunal misses the opportunity to advance the understanding of the ICSID Convention: the obiter could have mediated between different positions by highlighting the strategic silence of the contracting States in the wording of Article 25, rather than simply presenting the opposite views as irreconcilable.

In addition the Poštová award argues that, were an objective approach to be followed in the interpretation of Article 25 of the ICSID Convention, holders of sovereign bonds would not fulfil the requirements of contribution and risk. Such findings are unpersuasive, as they use FDI as a touchstone to determine whether sovereign bonds fulfil the Salini criteria. To the contrary, there are good reasons to conclude that the requirements of contribution and risk are met. From the first point of view, since all tradable bonds aim at generating a financial flow in favour of the issuing State and given the fungible nature of money, there is no reason to distinguish on the basis of the alleged purpose of use of the funds. From the second point of view, the risk of a sovereign restructuring is linked to the peculiar way in which a portfolio investment operates and, as such, it cannot be equated to a normal commercial risk of non-performance.

The clash between the Poštová award and the Abaclat and Ambiente decisions evinces the state of dissent among different arbitral tribunals as to the qualification of holders of sovereign bonds as investors for the purposes of international investment law. Given the decentralised nature of investment arbitration, such conflict is unlikely to be settled in the near future. As a result, it is doubtful whether investment treaty arbitration will maintain its role in the protection of holders of sovereign bonds in the future: the current reality of arbitral case-law raises more questions than answers.