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The ICSID Recent Decision on Greek PSI: Can Sovereign Bonds Be Protected as Investments?

Epameinondas Stylopoulos (Stylopoulos & Associates) · Thursday, July 2nd, 2015

A ruling issued on the 9th April 2015 by the International Centre for Settlement of Investment Disputes (ICSID) rejected a case brought by a Slovak bank and its shareholders against the 2012 PSI bond ‘haircut’ in Greece via the activation of Collective Action Clauses (CACs) (the award is available [here](#)).

Poštová banka (a Slovakian bank) and one of its shareholders (Istrokapital SE) filed an international arbitration claim against Greece for the Private Sector Involvement Program (PSI), invoking the claim that Greece adopted measures in breach of international treaties, depriving the value of their investments in Greek bonds back in 2012.

Concerning the factual background of the case, it is important to highlight that due to the global financial crisis of 2008, Greece experienced a major economic downturn. Among the obligations of the Greek Government were five series of Greek Government Bonds, held at various times by Poštová banka. These bonds were subject to the 2012 haircut together with the implementation of the Greek Bondholder act¹⁾ that the Greek government was obliged to pass in order to adopt the sovereign debt restructuring. Accordingly, the claimants argue that under the Greece-Slovakia BIT they are entitled to compensation for their losses.

The main issue at stake was whether the shares held by Istrokapital in Postova bank on one side and the acquisition of bonds by Postova bank on the other side were considered protected investments under the Greece-Slovakia BIT. If the answer was affirmative, then the said Court would have jurisdiction to further address the compensation claim itself.

Firstly, in order to analyse the question whether Istrocapital’s shares in Postova bank can be protected and compensated as an investment, the court implemented the general doctrine of commercial law in all jurisdictions, namely that a company is an independent and separate legal entity, distinguished from its shareholders, having its own assets, rights and obligations. Therefore, the fact that Postova bank held Greek bonds and made an investment in Greece does not automatically render the shares held by Istrocapital eligible to be characterized as an investment. The only owner of the Greek bonds is Postova bank. Accordingly, Istrocapital’s claim was rejected a priori for reasons of jurisdiction.

Secondly, the tribunal clarified the matter of Postova bank’s bond acquisition in the light of the Greece-Slovakia BIT and the ICSID Convention. According to art. 1 of the Greece-Slovakia BIT

“investment means every kind of asset and in particular, though not exclusively includes:c) loans, claims to money or to any performance under contract having a financial value” and the list is non-exclusive.

One must then determine whether the bonds acquired by Postova bank can fall within the definition of the term “investment”. It is very important to underline that each BIT gives a different definition on the term “investment” and one cannot give broadly or arbitrarily another meaning to the word, in order to fall within the treaty’s protection.

In this case, **the tribunal analysed the difference between loans and bonds**: the latter are held generally by anonymous groups of creditors and are subject to several alterations of their value and are connected in this case with sovereign debt. **It concluded that while the article expressly protects debentures, it does not protect sovereign debt**, an obvious omission that was considered of high importance by the court and led to the conclusion that **Postova bank’s bonds cannot be protected under the Treaty as investments**. Neither can Istrocapital’s shares, as analysed above. After this admission, the tribunal noted that the implementation of the ICSID Convention rules in this case was essentially unnecessary and the remarks expressed did not add anything crucial to the ruling.

Summing up, this decision substantially strengthens the PSI agreement in the international legal system, especially after the Decision no 1116-1117/2014 (21.03.2014) of the Greek Council of State that confirmed the legitimacy of the PSI in the internal and European legal system. In the near future, a decision on the PSI will be issued from the perspective of the European Convention of Human Rights, an issue that will reawaken the conflict between private sector investors, the public sector and each country’s citizens on the legitimacy of the measures implemented in the context of the European financial crisis.

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References

- ?1 L. 4050/12 (PSI Law): Inserted retroactive collective action clauses on Greek bonds, forcing holdouts to participate in the debt swap offer. In other words, the particular Law forced (despite the voluntary nature of the involvement) the private sector to “sacrifice” the value of their bonds in order to facilitate the public debt restructuring.

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