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INTERNATIONAL INVESTMENT ARBITRATION – – AN OUTLOOK FROM CROATIA

Summary

Since Croatia's establishment as a sovereign country in the early 1990s, foreign investments have been identified as a strategic priority of its economic policy. Croatia seeks to provide a stable legal environment for foreign investors through its domestic rules, EU law or bilateral investment treaties. Providing legal protection in international investment disputes is a challenging task, and requires careful balancing between protecting private investor interests and the public interest in the State of investment. Entrusting this task to ad hoc arbitration tribunals, which adjudicate based on a specific body of investment law, and its open concepts, has been under increasing criticism, leading to a conclusion that the characteristics that distinguish arbitration from court proceedings are, at the same time, its greatest shortcomings. On the trail of this reflection, and following the Achmea case, there is increasing advocacy for establishing a special EU court for international investment disputes. This paper focuses, however, on the investment dispute resolution before ICSID involving Croatia either as the respondent or the home state in the last half decade.

Keywords: Croatia, EU law, foreign investments, ICSID, international investment disputes.

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MEĐUNARODNA INVESTICIONA ARBITRAŽA – – IZ PERSPEKTIVE REPUBLIKE HRVATSKE

Sažetak

Od uspostavljanja Hrvatske kao suverene zemlje početkom 90-ih, strane investicije su izdvojene kao strateški prioritet ekonomske politike zemlje. Hrvatska nastoji da obezbedi stabilno pravno okruženje za strane investitore, kako kroz svoja domaća pravila, tako i kroz pravo EU, te bilateralne investicione ugovore. Pružanje pravne zaštite u međunarodnim investicionim sporovima predstavlja jedan od izazovnijih zadataka, jer zahteva pažljivo balansiranje između zaštite interesa privatnog investitora i javnog interesa u državi ulaganja. Poveravanje ovog zadatka ad hoc arbitražnim sudovima predmet je sve većih kritika, što dovodi do zaključka da su karakteristike koje razlikuju arbitražu od sudskog postupka istovremeno i njeni najveći nedostaci. Na tragu tog razmišljanja i nakon slučaja Achmea, sve više se zagovara uspostavljanje posebnog suda EU za međunarodne investicione sporove. U ovom radu fokus je, međutim, na pitanju rešavanja investicionih sporova pred ICSID-om u kojima je Hrvatska uključena bilo kao tužena strana ili kao matična država u poslednjih pola decenije.

Ključne reči: Hrvatska, pravo EU, strane investicije, ICSID, međunarodni investicioni sporovi.

1. Introduction

1.1. General Policy and Treaty Landscape

1.1.1. Foreign Investment Policy

While direct investment in foreign markets had emerged globally after World War II (Sornarajah, 1999, p. 1), in transition countries, including Croatia, has become possible only after to the market economy was opened up in the early 1990s. Foreign investment drives the recipient country's competitiveness, economic growth, and higher productivity. In addition, for the recipients, it brings several social benefits, including new and modern technology transfers and expertise, and strengthening employment through workforce development and training. At the same time, indirect spillovers on other local businesses are indicative as well (Pečarić, Jakovac & Miličić, 2020, p. 135 ff).

Since Croatia's establishment as a sovereign country, foreign investment has been a focus of socio-economic and political discourse and has been identified as a strategic priority of the Croatian economic policy (Marošević & Romić, 2011, p. 156). According to the World Bank income classification, Croatia is an upper middle-income country (World Bank Group, 2024). Numerous advantages of the Croatian economy include its great geographical and strategic position, modern infrastructure, low inflation rate, and stable exchange rate. Membership in international associations, particularly accession to the World Trade Organization in 2000, and Croatia's full European Union membership in 2013, have accelerated foreign investment attraction.

According to the Croatian Ministry of Economy's data for 1993, when the foreign direct investment data first became available, until the first quarter of 2024, Croatia has attracted EUR 46.2 million in foreign investments. The majority of its European investors come from the Netherlands (15%), Austria (14%), Germany (11%), Luxembourg (10%), and other countries. The most attractive investment areas include financial services (23%), manufacturing (17%), real estate (16%), and trade (13%) (Croatian Ministry of Economy, 2024).

1.1.2. Legal Framework

Acknowledging that foreign direct investment is crucial for development, Croatia has provided a secure and stable legal environment for foreign investors. While there are no specific laws that relate to foreign investors, the same rules apply to foreign and domestic investors. Several provisions of the Croatian Constitution impact foreign investment policy. The Constitution firmly guarantees the right of ownership, which may be restricted or rescinded by law only if such restriction is in Croatia's high interest and is subject to indemnification equal to the market value of the pertinent property (Art. 48(1) and Art. 50, Constitution of Republic of Croatia). Foreigners are free to exercise the right of ownership. Pursuant to the Ownership and Other Property Rights Act, foreign natural or legal persons subject to reciprocity, which is no longer required for EU Member States, can, in principle, acquire real estate.

The Constitution provides for free enterprise and free market as the foundations of Croatia's economic system, entailing equal legal status for entrepreneurs in the market and the prohibition of monopoly. Furthermore, the Constitution guarantees that "all rights acquired through the investment of capital shall not be infringed by law or any other legal act," and that foreign investors may freely transfer and repatriate profits and invested capital. The Constitution specifies also the allowed limits and boundaries for free enterprise and property rights (Art. 50(2), Constitution of Republic of Croatia).

Other national legislation applies equally to foreign investors and Croatian companies as well. The Companies Act includes definitions of 'foreign company' and 'foreign sole proprietor',[1] which have equal rights as Croatian companies and sole proprietors when doing business in Croatia (Art. 612(1), Companies Act). In addition, foreign companies and sole proprietors can conduct business permanently if they establish their branch office in Croatia. Furthermore, the Companies Act defines a 'foreign investor' as any legal person with the registered seat of the company outside Croatia or any natural person who is a foreign citizen, a refugee, or a stateless person who is acquiring shares in companies or investing capital on a contractual basis. Under the condition of presumed reciprocity, any foreign investor who incorporates or participates in the incorporation of foreign companies in Croatia has the same rights and obligations as any domestic investor. No reciprocity applies if a foreign investor has their seat or permanent residence in a country that is member of the World Trade Organization (Arts. 619(1), 620, Companies Act). The relevant European Company law rules apply equally to all.

The Protection of Competition Act governs antitrust rules and competition policy. The Labour Act governs collective agreements, individual contracts, and labour relations. The recently adopted Investment Promotion Act fully aligns with EU legislation, particularly with Regulation No 651/2014, which declares specific categories of aid compatible with the internal market. The recent Croatian Private International Law Act has implemented contemporary global and European principles of cross-border civil justice. By adopting the Strategic Investment Projects Act, Croatia has set the rules for the election, evaluation, preparation, and implementation of strategic projects, granting concessions and issuing administrative acts. It is in full compliance with EU legislation. Double taxation is avoided among EU Member States through bilateral agreements with third countries (Ministry of Finance, 2024).

Arbitration proceedings are governed by the 2001 Arbitration Act. The Croatian legislator relied on the UNCITRAL Model Law on International Commercial Arbitration as a prototype (Uzelac & Nagy, 2011, pp. 165-278). To a certain extent, the legislator reverted also to the German Model Law, whilst keeping some elements of the previous Croatian (post-Yugoslavian) legal framework for arbitration (Dika, 2016).

Any prospective EU foreign investment policy reform will also shape the Croatian landscape. The current regime under Regulation 2019/452 establishing the framework for the screening of foreign direct investments (FDIs) is subject to

[1] A foreign company is "validly established under regulations outside the Croatia in which the seat of the company is registered." In contrast, a foreign sole proprietor is a "natural person who is considered as such in the country of the company's registered seat and where he/she carries out his/her business activity." (Art. 611, Companies Act.

revision, as the Proposal for a new Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation 2019/452 was launched in January 2024.

1.1.3. International Treaties and International Investment Arbitration Proceedings

Croatia is a party to major international treaties relevant to investments, and most importantly the 1965 Washington Convention for the Settlement of Investment Disputes between States and Nationals of Other States. The multiplicity of legal sources may lead to overlapping international agreements at different levels. Hence, a multilateral agreement can become a secondary source if there is a bilateral agreement in force regarding the specific subject matter and states (Sajko, 2009, pp. 61-62). Croatia has contracted many bilateral investment treaties (hereinafter: BITs) and treaties with investment provisions (hereinafter: TIPs) to strengthen foreign investment. It has concluded 59 bilateral investment agreements, though those with EU Member States have since been terminated (UNCTAD, 2024). In 2018, the EU Court of Justice in C-284/16 *Slowakische Republik v. Achmea* found that investor-state arbitration under the Netherlands - Slovakia BIT is incompatible with EU law. Following this decision that intra-EU BITs overlap and conflict with the EU single market (Borovikov, Evtimov & Crevon-Tarassova, 2016, pp. 186-95; Meijer Dusman, 2012, pp. 167 ff), they were terminated where they related to the EU and in Croatian bilateral relations as well.

The Croatian BITs normally have standardised content, and contain a most favoured nation clause (MFN). As a principle, foreign investors have equal rights and obligations as domestic investors and, when conducting business activities, are considered domestic legal entities (Petrović & Ceronja, 2012, p. 294). These BITs provide for standards of protection including non-expropriation, fair and equitable treatment, full protection and security, free transfer of capital, umbrella clause, and national treatment. The notion and interpretation of fair and equitable treatment (Babić, 2012, pp. 375-395), as well as the relationship of these standard BIT provisions to general customary international law has occupied Croatian doctrine as well (Muhvić, 2016, pp. 33-42). Most BITs provide for arbitration under "ICSID or UNCITRAL rules, or ICSID, UNCITRAL or ICC rules." As a rule, they also include a mandatory attempt at amicable dispute resolution. Legal theory has raised an issue that many BITs contain problematic provisions, particularly the ones prescribing for the prior and mandatory mediation procedure and subsequent elective jurisdiction of different bodies (Vuković & Kunštek, 2005, pp. 343-345).

As a party to several BITs, Croatia has been a party to a number of international investment arbitration proceedings over the last decade. To present an overview of

Croatia's international investment arbitration proceedings, the paper will focus on the more recent cases dating from 2018 to 2024. Before that date, Croatia had been involved in investment disputes settled before ICSID, both as the respondent and the home state. Croatia acted as the respondent State in cases V*an Riet v. Croatia*, *Adria Beteiligungs v. Croatia*, and *Ulemek v. Croatia*, all of which were decided in Croatia's favour. Croatia acted as the home State in *Tvornica Šećera v. Serbia*, *HEP v. Slovenia* and *Pren Nreka v. Czech Republic*, with the two former cases decided in favour of the State, and the latter one decided in favour of the investor.[2] The available data will be analysed to establish the possibility and adequacy of contracting alternative more efficient methods for international investment dispute resolution in terms of efficiency,[3] recovering the damage claimed, and protecting fundamental rights. The conclusion will be examined in light of *the Achmea* judgment from March 2018. These considerations will inform the authors in their comments on the possible direction for developing international investment dispute resolution mechanisms compatible with EU law.

2. International Investment Arbitration Proceedings

2.1. Requirements for Initiating and Participating in the Proceedings

To a large extent, international treaties on the protection of foreign investments (hereinafter: BIT) were concluded back in the 1990s between the old EU Member States and Eastern European countries to protect European investors from the political risks of investing during the period of significant transition reforms in the communist countries. A decade later, some of these countries, including Croatia, became EU Member States. However, the availability of recourse mechanisms under EU law has challenged the importance of BITs that had long provided the basis for international investment arbitration and their coherence with EU law. Their long-term future is one of the issues that will be further discussed in this paper. Notably, the BITs have resulted in several international investment arbitration proceedings initiated by foreign investors.

In accordance with the provisions of Art. 43 para. 1 of the State Attorney's Office Act (hereinafter: SAOA), the Croatian State Attorney's Office (hereinafter: SAO) represents Croatia in property disputes and other proceedings for the protection of Croatia's property rights and interests before foreign courts, international and national bodies. This includes also international investment arbitration

[2] Detailed analysis is available in earlier scholarly work (Župan & Čuljak, 2019, pp. 68-94).

[3] Taking into account procedural economy and costs.

proceedings. They are initiated by foreign investors against Croatia for BIT violations or because the Contracting Parties, one of which is Croatia, have agreed on international arbitration instead of dispute settlement before state courts. If under the applicable law, the SAO cannot represent Croatia in the international arbitration proceedings, the Croatian State Attorney General may authorise a foreign attorney to represent Croatian interests, with the consent of the Croatian Government (Art. 43, para. 2, SAOA). To ensure transparency and cost-effectiveness (Report of the SAG 2023, p. 237), the SAOA and the State Attorney's Office Rules of Procedure (hereinafter: SAORP) prescribe the procedure for selecting an attorney to represent Croatia in investment arbitration (arg. *ex* Art. 153, SAORP), as well before foreign courts and bodies (arg. *ex* Art. 154, SAORP). The procedure starts when the notification of the intent to initiate arbitration or a request for arbitration for a BIT violation is received. The SAO publishes a public call on its official website to attorneys and law firms specialising in the relevant type of proceedings to express interest in representing Croatia.[4] The call contains the basic information on the subject matter of the dispute (arg. *ex* Art. 153, para. 1, SAORP). After attorneys and law firms submit their representation strategy, financial offers and their references, a Commission appointed for the selection of attorneys to represent Croatia before foreign courts and international bodies examines the received offers, conducts interviews, if necessary, and draws up an opinion on the choice of attorney, which they then submit to the Croatian State Attorney General. After the Croatian Government has accepted the opinion on the selected attorney, the State Attorney General concludes a representation contract (arg. *ex* Art. 153, para 3-5, SAORP). In urgent cases, the State Attorney General may authorise an expert to perform certain steps in the proceedings, provided he/she regularly reports to the Croatian Government (Art. 43, para. 5, SAOA). The procedure for selecting an attorney in international arbitration proceedings agreed on by Contracting Parties slightly differs. If the Croatian SAO cannot represent Croatian interests, or if it would not be cost-effective to represent Croatia, the Deputy Chief State Attorney requests a proposal or a list of attorneys or law firms that could represent Croatia in the proceedings from the diplomatic mission in the State in question, and sends them a written invitation to express an interest in representation (arg. *ex* Art. 154, para. 2-3, SAORP).

[4] A call was published on 24 June 2024 on the official website of the SAO for expressing interest in representing Croatia in international investment arbitration proceedings before ICSID in the case MOL Hungarian Oil and Gas Public Limited Company c/a Republic of Croatia (ICSID Case No. ARB/24/19; DORH, 2024). State of the case on August 8, 2024 - Following appointment by the Claimant, Oscar M. Garibaldi (Argentinian/US); accepted his appointment as arbitrator.

2.2. Amicable Dispute Resolution Procedure

The international investment arbitration procedure is usually preceded by amicable dispute resolution initiated upon a request from the foreign investor to the Croatian inter-departmental Commission for foreign investors' requests related to disputes arising from Croatia's investment promotion and protection international treaties (hereinafter: the Commission) (Report of the SAG, 2023, p. 237).

In 2018, German investors submitted a request for an amicable settlement of the investment dispute as they has been prevented from exercising their property rights due to the duration of court proceedings, claiming damages in the amount of EUR 168,337,520.00. In 2019, five requests for an amicable dispute settlement were submitted with unknown claim amount. Foreign investors referred to the investment protection agreements Croatia concluded with Bosnia and Herzegovina, Israel, Austria, Germany, and UK. In 2020, three requests for an amicable dispute settlement were submitted with unknown claim amount. These were typically multi-million claim requests. Foreign investors referred to the investment protection agreements Croatia concluded with the United States of America (hereinafter: USA) and Hungary. No requests were submitted in 2021 and 2022, while in 2023, one request was submitted for an amicable dispute resolution with unknown claim amount. The foreign investor referred to the investment protection agreement concluded by Croatia with the Kingdom of the Netherlands. According to the available data on the outcomes of the amicable dispute resolution procedures, in 2021, the State Attorney's Office proposed a settlement with Colgate/McCallum Ltd., based in Novi Sad, Gavin Michael Susman, a resident of Novi Sad, and Proficiom d.d., which was accepted.[5] This ended the dispute resulting from the decisions of the Croatian Privatisation Fund, which had violated the provisions on fair and equitable treatment and expropriated American investors, depriving them of effective judicial protection within the Croatian judicial system (Report of the SAG, 2021, p. 206). According to the SAO, these procedures had a legal dimension, in addition to the political one, which was reflected in the possibility to determine the relevant facts based on assessing the merits of the request and the outcome of arbitration proceedings. They can also be understood as an indication of the need to change the procedures of competent authorities and persons and amend certain legislation (Report of the SAG, 2023, p. 238). In addition, the amicable dispute resolution procedures have a deterring effect in terms of avoiding exceptionally high costs of the international investment arbitration proceedings, which can often reach several million euros (Report of the SAG, 2023, p. 238).

[5] For information on requests for amicable dispute resolution before the initiation of arbitration for foreign investment protection available in the SAO reports from 2018 until 2023, see: DORH, 2024; ICSID, 2024.

2.3. The Outline of the Proceedings

2.3.1. ICSID Proceedings

Since 2018, the proceedings against Croatia presented herein have been conducted before ICSID. The first case was brought by the Dutch company B3 Croatien Courier Cooperativ, also the owner of the Croatian company CityEx, for breaching the BIT concluded with the Kingdom of the Netherlands, resulting in damages amounting to EUR 53,000,000.00. In April 2019, the Tribunal ruled that, despite the violations of their rights, the applicants did not suffer any damage, rejecting their claim for damages. Croatia was ordered to bear the costs of the arbitration proceedings amounting to USD 554,616.31 and EUR 365,607.49. These costs were paid in part in 2019.

The second case was brought by the Dutch company Amlyn holding B.V., claiming damages in the amount of EUR 85,000,000.00, which it had allegedly suffered as a result of a breach of a provision of the Energy Charter Treaty (hereinafter: ECT) (Arts. 10, 13, ECT) consisting of arbitrary changes in the legal framework and favouring other investors. The evidence was obtained in 2018, and all legal actions were taken to prepare for the hearing before the Tribunal, scheduled for May 2019.

On 22 October 2022, the Tribunal delivered its award rejecting the claim for damages amounting to EUR 71.1 million, including 8.34% interest per annum charged from 3 April 2015 until payment. Since the Tribunal found that Croatia had breached one of the four ECT obligations, it ordered payment of 25% of the costs of the proceedings amounting to EUR 1,100,088.78, and ICSID administrative costs amounting to USD 611,937, 42.

The third case was brought by the Dutch company Elitech B.V. and Golf Development Ltd. from Zagreb for damages amounting to EUR 123,000,000.00. The applicants claimed that they had invested significant funds in the development of a golf project in the Dubrovnik area for the purchase of land and the obtained documentation, but over more than ten years, the project was not implemented due to numerous actions by NGOs, populist groups and certain influential politicians, which had created a negative perception of the project and influenced the decision-making of administrative bodies and courts. The applicants claimed they were deprived of their right to the expected profit from the value of the golf project, which represented direct expropriation without any compensation made by Croatia. The hearing was held in October 2021. By order of 23 May 2023, the Tribunal found that Croatia had not violated the provisions of Article 3, paras. 1, 2 and 4 on fair and equitable treatment, and legitimate expectations, and Art. 6 of the Croatia - Netherlands BIT, and that there had been no discriminatory treatment by the competent authorities.

Four arbitration proceedings was instituted by banks for their alleged damages brought about by the adoption of the Act on Amendments to the Consumer Credit Act and the Act on Amendments to the Credit Institutions Act. The borrowers were entitled to have their previously concluded loan agreements with a Swiss Franc foreign exchange clause converted into EUR loans at the exchange rate prevailing at the time of the conclusion of the loan agreement, and the banks were obligated to do so, resulting in new calculations, including the cost of converting the loans, at the detriment of the banks.

Croatia reached agreements regarding the proceedings initiated before ICSID and domestic courts and not yet instituted proceedings with six banks (Unicredit Bank Austria A. G., Zagrebačka banka d.d., Raiffeisen Bank International AG and Raiffeisenbank Austria d.d., Erste Group Bank AG, Steiermärkische Bank und Sparkassen AG and ERSTE & STEIERMÄRKISCHE BANK d.d., OTP Bank Plc, Intesa Sanpaolo S.p.A., Zagreb d. commercial Bank and Sberbank Europe AG and Sberbank d. d. Zagreb). In the arbitration proceedings brought by Unicredit Bank Austria A. G., Zagrebačka Bank d., Raiffeisen Bank International AG and Raiffeisenbank Austria d. d., Erste Group Bank AG, Steiermärkische Bank und Sparkassen AG and ERSTE & STEIERMÄRKISCHE BANK d. d., OTP Bank Plc, the parties agreed to suspend the proceedings, after which the arbitration proceedings and any future disputes were terminated.

No agreement was reached with Addiko Bank AG, Addiko Bank d.d., and Societe General S.A. The applicants Addiko Bank AG and Addiko Bank d.d., Austrian investors, initiated arbitration proceedings against Croatia before ICSID for damages amounting to EUR 201,100,000.00. The claim was subsequently reduced to EUR 163,500,000.00. The hearing was held in March 2021. The French investor Societe General S.A. initiated arbitration proceedings before ICSID for damages amounting to EUR 37,000,000.00. The written phase of the proceedings was completed in 2023. In June 2024, the Tribunal held a hearing on jurisdiction and the merits.

In the eighth arbitration case in mid-2018, George Gavrilovic and Gavrilovic d.o.o. succeeded in their action for damages amounting to EUR 198,500,000.00, and the Tribunal established that Croatia had violated the Croatia - Austria BIT. Gavrilovic d.o.o. was awarded damages in the amount of HRK 9,699,463.73 and EUR 1,658,460.49, and the costs in the amount of EUR 2,593,642.36 and USD 285,288.28, including interest. In the remainder, the claim was rejected, whereby Croatia's success in the dispute was 98.5%, while the success of Gavrilovic d.o.o. was only 1.5% of the damages claimed.

Marko Mihaljevic, a German investor, registered the ninth arbitration proceedings against Croatia before ICSID on 31 December 2019 for damages amounting to 200 million euros. In his application, he claimed that his father, Srecko

Mihaljevic, had made an investment in Croatia by purchasing real estate in July 1993 from a company owned by Gortan Construction (Gortan) for approximately EUR 1 million and later gifted it to his son, the applicant Marko Mihaljevic. According to his claims, the authorities' actions had deprived the applicant of his property rights. Croatia submitted a preliminary objection in accordance with ICSID rule 41/5, which was rejected. On 19 May 2023, the Tribunal issued its award in which it fully accepted the objection of lack of competence raised by Croatia, and awarded the costs of the proceedings to Croatia in the amount of USD 1,974,516.27, with interest charged from the date of the award until payment. Namely, the SAO had objected to the application registration before ICSID, arguing that Marko Mihaljevic was a national of both Croatia and Germany. As a dual national with nationality of the State against which the arbitration proceedings were initiated, the applicant did not enjoy the right to protection under the Convention on the settlement of investment disputes between States and nationals of other States of 1965 (hereinafter: the ICSID Convention). However, this objection was ignored, and ICSID registered the application. The Tribunal ruled that the jurisdiction prerequisite had not been met as the applicant was a dual national of Croatia and Germany at the application registration date, which excluded the jurisdiction of ICSID under Article 25 (2)(a) of the ICSID Convention. One of the arbitrators in the proceedings issued a supportive opinion stating that the application had to be dismissed, not only for the reasons stated in the ruling but also due to the violation of the proceedings, which SAO had pointed out when registering the application and subsequently during the proceedings.

The eleventh request for arbitration before ICSID was registered on 2 March 2020. The applicants were Adria Group B. V. and Adria Group holding B. V., Netherlands, which claimed that by adopting the Act on extraordinary administration procedure in companies of systemic importance to Croatia in 2017, Croatia had violated the Croatia - Netherlands BIT, and request compensation amounting to several billion EUR. Croatia requested a separate ruling on jurisdiction before discussing the case's merits, to which the Tribunal agreed. Croatia challenged the jurisdiction of the Tribunal, pointing out that the arbitration proceedings had been initiated based on the Croatia - Netherlands BIT, which was subsequently terminated by the Agreement on Termination of Bilateral Investment Treaties between the Member States of the European Union. On 30 October 2023, the Tribunal rejected the Croatian objection to the lack of jurisdiction. However, Croatia still had the possibility to raise issues concerning the jurisdiction or admissibility of the action. By the Tribunal's procedural order, the applicants were to submit a claim in July 2024.

In 2020, the twelfth arbitration case was initiated with the registration of the request by the applicant Ahron Frankel before ICSID. The proceedings was based

on the Croatia - Israel BIT for damages amounting to EUR 100,000,000.00. The applicant claimed he had been deprived of the right to the expected profit from the value of his investment in the golf project, which represented direct expropriation without any compensation made by Croatia. Although significant funds had been invested in developing this project, it was not implemented for over ten years, as the administrative authorities and courts did not approve it due to the alleged activities of numerous NGOs, populist groups, and politicians. Croatia requested bifurcation and the Tribunal decided to stay the proceedings pending the decision in *Elitech B.V. and Golf Development Ltd. v Croatia*, given the interconnectedness of the case. The proceedings were continued after the decision was rendered in the *Elitech B.V. and Golf Development Ltd. v Croatia* case.

2.3.2. Proceedings Under UNCITRAL Rules

Under the UNCITRAL rules, a Canadian national, Haakon Korsgaard, initiated arbitration proceedings against Croatia for damages amounting to EUR 200,000,000.00 for an alleged violation of Art. 12, para. 4 of the Croatia - Canada BIT. The applicant argued that he was prevented from acquiring property rights on real estate in Croatia that had previously been public property with the right of use by public enterprises from the Republic of Serbia, according to the State of ownership on 8 October 1991. The applicant's investment in Croatia was disputed, and it was pointed out that property rights could not be acquired directly under the Succession Agreement, Annex G. Furthermore, the objection was raised that the arbitration clause did not cover succession issues. On 7 November 2022, the Tribunal dismissed the claim in its entirety and awarded the costs of the proceedings to Croatia, having taken the view that Annex G. could not be applied. Instead, an agreement had to be concluded under which issues concerning the property rights relations between Croatia and the Republic of Serbia needed to be resolved, including war damages.

In February 2020, Raiffeisenbank International AG and Raiffeisenbank Austria d. d. submitted a request for arbitration for a violation of the Austria - Croatia BIT in accordance with the UNCITRAL arbitration rules. In the request for arbitration, Frankfurt, Germany, was selected as the seat of the Tribunal, which the SAO accepted because it was able to bring an action before the competent German court to establish that the arbitration proceedings were inadmissible (on the grounds that the arbitration clause contained in the Austria – Croatia BIT was invalid).

The applicants pointed out that by having adopted the Act on extraordinary administration procedure in companies of systemic importance for Croatia in 2017, Croatia had violated the Austria – Croatia BIT and claimed damages in the amount of

EUR 26 million. On 11 February 2021, the Croatian request was accepted, and the arbitration proceedings was declared inadmissible on the grounds that the arbitration clause was invalid (*Achmea* case). On 30 November 2021, the German Federal Court of Appeal (Bundesgerichtshof, hereinafter: BGH) dismissed the banks' appeal. This decision is a precedent and a great success for Croatia in international arbitration proceedings.

In October 2022, MOL Hungarian oil and gas Plc. (MOL) initiated *ad hoc* arbitration proceedings against Croatia on its own behalf and on behalf of INA-oil industry d.d. (INA), claiming that Croatia had violated the provisions of a series of mutual agreements. This request was part of a dispute brought by MOL before ICSID in the ARB/13/32 case, where the Tribunal, in its ruling of 5 July 2022, declared that it did not have jurisdiction, having taken the view that the dispute was not an investment dispute. The applicant sought damages for violations of provisions of the GMA, FAGMA, SHA and FASHA suffered by INA and MOL amounting to approximately EUR 34,000,000.00 and EUR 89,000,000.00 for compensation of procedural costs and the corresponding interest. In June 2023, MOL submitted the claim, and in October of that same year, Croatia submitted its response.

3. Feature Analysis

3.1. Costs of Proceedings

From 2018 to 2023, the costs of conducting international arbitration and proceedings before foreign courts and bodies gradually had decreased, from the initial 70 to 80% of the total annual allocation for SAO operations to 52.7% in 2023. As the cost data are presented in summary form including both international arbitration proceedings and proceedings before foreign courts and other bodies, this does not allow for reliable conclusions on the reasons for the significant cost reduction regarding the proportion of costs that relate to international arbitration. One possible reason could be the number of proceedings, which has decreased by one-half since 2021. In addition, the success of amicable dispute settlement in that period, especially the settlements with the six banks in the proceedings initiated for the alleged damages caused by the adoption of the Act on amendments to Consumer Credit Act and the Act on Amendments to Credit Institutions Act have contributed significantly to the reduced number of arbitration proceedings. Furthermore, a certain contribution should be attributed to the fact that the SAO has been participating in international arbitration proceedings for some time now, and the knowledge and experience it has acquired over time has significantly influenced Croatia's success in the disputes.

Table 1. The costs of conducting international arbitration proceedings and proceedings before foreign courts and other bodies (available in 2018-2023 SAO reports)

Year	State Attorney's Office budget	Cost of arbitration/ procedures before foreign courts and other bodies	Percentage
2018	60,717,444.00	42,476,500.00	70 %
2019	103,176,931.00	82,759,000.00	80.21%
2020	Data not available		
2021	65,790,615.00	44,102,000.00	67 %
2022	50,462,718.00	28,294,085.00	56 %
2023	52,696,799.10	27,747,153.90	52.7 %

Despite the decreasing trend, the costs of conducting international arbitration are still considerable. Although this includes, according to the reports, administrative costs of the arbitration tribunal, arbitrator's fees, foreign attorneys' fees, experts' fees and expenses (according to ICSID rules, applicable law is a fact to be proved), the cost of translation of extensive documents, the costs of witnesses, and travel and accommodation during the hearings, the cost breakdown is not available. Therefore, it is impossible to assess which aspect of the proceedings has the highest share in these costs. The reports indicate the Tribunal's operating costs as problematic, but despite efforts to reduce them, the overall costs of arbitration proceedings have been on the rise in recent period, ignoring, as the critics point out, "precedential concerns, equality of arms, settlement efforts, and public interest" and potentially limiting *access to justice* (Behn, Langford & Létourneau-Tremblay, 2020, p. 205). Allocating the costs of the proceedings is also a significant issue. Critics point out that applying the loser-pays rule is more likely to benefit investors than it is to ensure the success of the states.[6] Concerning the cases analysed in this paper, in the observed period, there seems to be several cases where, despite the preliminary objection of the lack of competence, the application went on to be registered before the ICSID, only for the Tribunal to decide in the course of the proceedings that it did not have jurisdiction in the case. Such practice puts states in a position where they are forced to conduct international arbitration proceedings, which is extremely cost and resource intensive, but ultimately does not result in obtaining redress for the parties. Moreover, it could be argued that the initiated proceedings merely justify the work of the Tribunal appointed to preside over the case in the period leading to the decision on the lack of jurisdiction.

[6] Franck's most recent study indicates a certain inequality when the loser-pays rule is applied, namely that it is primarily for the benefit of winning investors rather than for the winning states. (Behn, Langford & Létourneau-Tremblay, 2020, p. 205).

3.2. Legal Certainty

It appears that in international investment arbitration proceedings ensuring legal certainty is more challenging than in court proceedings.

In principle, a more flexible and less formal approach is highlighted as an advantage of international investment arbitration proceedings. This concerns, in particular, the diversity in the composition of tribunals, election and appointment of arbitrators, the nature of investment law, and the manner of deciding on the merits. However, according to surveys, these characteristics could also be possible reasons for greater dispute resolution disparities and even decision-making disparities (for example, regarding decisions on jurisdiction) (IBA Report, 2018, p. 13). Since issues decided in international investment arbitration proceedings are of public interest, the identified weaknesses should be considered more carefully.

The analysis of the observed cases reveals discrepancies in decision-making regarding certain questions whilst resolving preliminary issues compared to deciding those same questions whilst resolving the merits. However, a more detailed analysis comparing decisions to explore possible impacts of the different arbitration panel composition or the circumstances of the selection of arbitrators by the parties to the proceedings is not possible. However, one can suggest a link between the nature of investment law, whose broad concepts allow it to be adapted to different situations, and the procedural framework, often much more flexible in comparison to judicial proceedings, and the discrepancies in decision-making in individual disputes (IBA Report, 2018, p. 13).

Parallel proceedings are among the factors undermining economy, efficiency, and legal certainty in international investment arbitration proceedings. This concerns primarily the simultaneous proceedings before courts and arbitration tribunals, but in many cases different tribunals as well (ICSID and UNCITRAL). A possible solution is to stay the pending proceedings until the conflict of jurisdiction issue is resolved. However, the practitioners consider this solution problematic, arguing that it is applicable only if it is necessary to ensure equality, the right to be heard, and prevent unreasonable delays, and if the outcome of the parallel proceedings is 'material' to the outcome of the arbitration (IBA Report, 2018, p. 21).

The occurrence of parallel proceedings is problematic in the context of the outcomes of such proceedings. The existence of two awards on damages in the same legal matter raises the issue of the recognition and enforcement of awards and the reimbursement of costs of proceedings. In such cases, the *res iudicata* objection is limited to successive but not simultaneous proceedings. At the same time, the *lis pendens* objection can be raised only in proceedings where there is an identity of the parties, the subject matter of the dispute and the submitted claim. Another

problem discussed alongside the issue of parallel proceedings is the possibility of their consolidation to achieve uniform outcomes. Consolidation as a mechanism to increase the likelihood of consistent awards has been included on ICSID's agenda to amend its arbitration rules (IBA Report, 2018, p. 21).

In the meantime, the suitability of *de facto* consolidation, achieved by bringing both the proceedings before the same arbitration panel, should also be explored. The applicability of this solution, however, would depend on the parties' willingness to bring the proceedings before an arbitration panel of the same composition. As such, it would be of limited effect. Additionally, it could raise an objection that arbitrators would be inclined to take decisions that, by their content and effect, would suit the parties' expectations concerning *de facto* consolidation.

3.3. Duration of Proceedings

The duration of proceedings, which significantly impacts the effectiveness of dispute resolution in international arbitration proceedings, is discussed increasingly in legal literature. According to the surveys, international arbitration proceedings lasted an average of 3.73 years until 2018, with a tendency of increased duration in recent years. Some theorists attribute this increase to the greater complexity of the cases and a larger set of actors involved in dispute resolution (Behn, Langford & Létourneau-Tremblay, 2020, p. 209). However, factors such as stages of proceedings, rules contributing to procedural flexibility, time limits, penalties, and the unavailability of arbitrators and lawyers representing the parties to the dispute also need to be considered. In this context, the duration of the period between the conclusion of the hearing before the arbitration panel and the delivery of the award appears to be particularly problematic. The legal literature points out that users and observers in investment arbitration are concerned that the costs associated with arbitration undermine the efficient resolution of investment disputes (IBA Report, 2018, p. 50). The available data on the observed international investment arbitration proceedings from 2018 until today, in which Croatia is a party, suggest that it took several years (approx. 5 to 7 years) until the award was made. Although not offering a large sample, the comparison with the duration and success of the amicable dispute settlement procedures can nevertheless inform certain conclusions. According to the available data for the period 2018 to 2023, ten amicable dispute resolution procedures were initiated. One settlement was concluded in 2021, but there is no information on the duration of the period from initiating and examining the request until proposing that the settlement be concluded to the Croatian Government. The comparison of the 5 year period (2016 to 2021) it took from the initiation of several international investment arbitration proceedings by the banks

and agreeing to the settlements to the duration of the two still ongoing international investment arbitration proceedings initiated by Addiko Bank AG and Addiko Bank d.d. and Societe General S.A. is also relevant in this context.

3.4. Selection of Arbitrators

As the data analysis suggests, the selection of arbitrators is an important element both in terms quality and outcome and in terms of the duration of the international investment arbitration proceedings. Theorists thus take that the reason behind the long-time parties may take in appointing arbitrators is that 'the selection of the party-appointed arbitrator may be the most critical decision in an international arbitral proceeding'. Indeed, it is often said to be the reason for parties to prefer arbitration over litigation (IBA Report, 2018, p. 39). Having the autonomy to appoint an arbitrator to the panel remains a central appeal of the investment treaty arbitration system to many of its users (IBA Report, 2018, p. 41). However, while the choice and appointment of arbitrators is clearly a determining feature of arbitration, awareness of possible problems connected to it is increasing. Some commentators have suggested that a party-appointed arbitrator may feel the need to pay specific regard to the facts or arguments presented by the party appointing him or her, even – controversially – going so far as to actively promote the appointing party's interests in tribunal deliberations (IBA Report, 2018, p. 40).

Greater transparency in the appointment of arbitrators could be a potential remedy to at least some of the above objections. This can be understood as a request for more attention to the requirement of increased transparency in institutional decision-making on the appointment and challenges to arbitrators, as well as consideration of arbitrator performance in making arbitral appointments (IBA Report, 2018, p. 53). However, it should be kept in mind that this goes directly against the idea of arbitration proceedings as proceedings where the parties are guaranteed confidentiality of proceedings and flexibility, including greater autonomy in deciding on the composition of the arbitration panel.

Among the solutions that would contribute to the objectivity of the proceedings, cost-effectiveness and thus efficiency, some authors suggest the appointment of a single arbitrator for less complex proceedings. So far, this has not been the case in international investment arbitration proceedings in which Croatia is a party to the proceedings. In order to consider this solution, the number of less complex proceedings in international investment arbitration proceedings should be estimated. Furthermore, this does not resolve the open issues related to complex proceedings. It only relieves a certain (smaller) number of proceedings of the objections concerning the manner and lengthy duration of the selection of the arbitration panel.

In addition, will the parties be motivated to entrust the dispute resolution to a single arbitrator, or will they consider that, given the other characteristics of the arbitration, it is more adequate to refer the matter to the court? Since the complexity of the proceedings is not always easy to assess, and it might even contribute to prolonging the procedure, it is necessary to allow for the possibility of subsequent appointment of an arbitration panel if the proceedings prove to be more complex than the initial assessment.

3.5. Duration of Specific Stages in the Proceedings

Often, criticism of the duration of specific stages in the proceedings concerns the resolution of unfounded applications. In many court systems, a meritless claim, which is either legally, factually or jurisdictionally deficient, can be dismissed long before trial. In international arbitration, however, the claimant is often permitted to request documents from the other side, submit witness statements, submit expert reports and conduct a full hearing on all issues. After these numerous steps, a tribunal may rule that the claim was meritless. Such a ruling could often come earlier in the proceedings, eliminating the need for extensive factual development and the time and expense necessary to provide expert testimonies and argue at hearings (IBA Report, 2018, p. 41).

In certain proceedings, the parties object to the Tribunal's jurisdiction by referring to the ICSID 41/5 rule. Croatia referred to the ICSID 41/5 rule in Marko Mihaljevic's case against Croatia. After its objection was rejected, Croatia disputed jurisdiction and succeeded in 2023, after having participated in a five-year long proceedings. However, there is growing criticism as to its efficiency.[7] Rule 41(5) objections that are overruled may cause the arbitration proceedings last longer and be more costly because they must be argued and ruled upon before the discussion on the merits. The 'manifestly without legal merit' standard requires the 'respondent to establish its objection clearly and obviously, with relative ease. The standard is thus set high'. 'Manifest' implies that it is not necessary to engage in elaborate analysis. Accordingly, objections involving complex legal issues are outside the scope of Rule 41(5). This high bar protects the due process of claimants. However, it impedes efforts to increase efficiency in international investment arbitration proceedings (IBA Report, 2018, p. 43).

As regards the possibility of concluding a settlement in the amicable dispute resolution procedure preceding the international investment arbitration proceedings or during the arbitration proceedings, according to surveys, until 2014, out

[7] In *Global Trading v Ukraine*, ten months passed from filing the objection until the award date (IBA Report, 2018, p. 43).

of the 400-plus ICSID cases filed, only nine cases (approximately two per cent) included conciliation. Moreover, while most BITs have a so-called cooling-off period built in to enable the parties to negotiate amicably at the outset of the dispute, no guidelines or international norms suggest how the parties could use this period productively (IBA Report, 2018, p. 45).

Furthermore, while arbitration rules allow for a settlement or consent awards, they do not assist the parties in re-evaluating and actively exploring additional dispute resolution mechanisms. If they propose negotiation or consultation, the parties may need guidance and education to overcome concerns about conveying a perception of weakness. Additionally, parties may not utilise cooling-off periods effectively. They may even waste them by 'turning the temperature up, not down, and concentrating on arbitration, not settlement' (IBA Report, 2018, p. 45).

From the states' perspective, governments often hesitate to use mediation in international investment cases, apparently due to transparency and personal liability concerns (IBA report 2018, p. 45). Furthermore, the host state may be weary of negotiating a settlement because any such settlement 'may be challenged by political opponents and the media as 'selling out to foreigners', weakness, or the product of corruption'. Some authors have even asserted that ADR mechanisms can potentially destroy state sovereignty because they do not constitute a resolution of the dispute pursuant to law (IBA Report, 2018, p. 45). A case in which Croatia was a party is an example of the opposite position of the State. As expected, the settlements concluded with the six banks were met with disapproval and criticism accompanied by doubts whether it was opportune to conclude such agreements with the banks in the light of the protection of the public interest.[8] Although bifurcation in cases of high factual and legal complexity has been highlighted as a solution promoting procedural economy and efficiency of conduct, recent analyses of international arbitration proceedings indicate a possible weakness of this position. Bifurcation is the separation of the procedure into the stage of examination of the question referred for a preliminary ruling relating to jurisdiction, admissibility of the application, the application of the applicable law or the authenticity of the documents, and the stage of discussion and decision on the substance. It is considered that this ensures timely resolution of the issues determined to proceed as the weak cases can be dismissed at the jurisdictional stage without the need to deal with the entire consideration of the merits (Behn, Langford & Létourneau-Tremblay, 2020, p. 212).

In the observed procedures to which Croatia is a party, a bifurcation request was raised in several cases (case *Raiffeisen Bank International AG and Raiffeisen Bank Austria d.d., v. Croatia* from 2018 in which a settlement was subsequently concluded between the parties, case *Erste Group Bank AG, Steiermaerkische Bank und*

[8] For the reports on the concluded settlement, see: INDEX.HR, 2023; NACIONAL.HR, 2023).

Sparkasse AG and Erste & Steiermaerkische v. Croatia in which the proceedings are still pending, and a case from 2020 by Prosecutor Ahron G. Frankel before ICSID, in which an application for bifurcation was filed in 2022, and the court ruled on the stay pending the conclusion of the proceedings in *Elitech B.V. and golf Development Ltd. v RH,* resuming the proceedings after its conclusion).

However, according to the research, in addition to the previously analysed impact of the duration of the selection of arbitrators and their potential subsequent recall (arbitrator challenges and arbitrator replacement), bifurcation can affect mostly the length of or delays in the proceedings.[9] When a tribunal bifurcates proceedings and 'at the end of the jurisdictional stage decides it does have jurisdiction, the result is usually a very long case', and bifurcation can be very time and cost intensive if the case ends up with pleadings in every stage (IBA Report, 2018, p. 52). Therefore, more recent interpretations suggest that the possibility of bifurcation should even be completely disregarded.

4. Conclusion

Providing legal protection in international investment disputes is among the more challenging tasks, as it requires careful balancing between protecting private investor interests and the public interest in the State of investment. Entrusting this task to *ad hoc* arbitration tribunals, which adjudicate based on a specific body of investment law, and its open concepts, has been under increasing criticism. The justification can be found in the nature of the Tribunal, composed based on the parties' decision. It is criticised that the impermanence and the disparities in the composition of the Tribunal and inconsistencies in the appointment of arbitrators allow for different interpretations of the broad concepts of investment law and, thus, for disparate awards. This brings into question the level of protection afforded in relation to an individual dispute and legal certainty. Certain characteristics of arbitration, including the way arbitrator is selected, i.e., the lack of transparency and scrutiny of the process, raise objections to the length and costs of proceedings and arbitrariness in decision-making. The example of the proceedings in which Croatia was a party suggests that despite certain advances brought by more extensive experience in participation in international investment arbitration proceedings, the costs associated with the proceedings, regardless of the success rate, are still too high. Their reduction in the observed period is partly due to Croatia's approach to the possibility of concluding settlements in several

[9] However, in 2011, Greenwood questioned whether bifurcation might cause the problem rather than be the solution. (Behn, Langford & Létourneau-Tremblay, 2020, p. 209).

proceedings. However, this practice is often subject to serious criticism, and states as parties to the proceedings do not resort sufficiently to it in international investment arbitration proceedings. The voiced criticism allows for a conclusion that the characteristics that distinguish arbitration from court proceedings are, at the same time, its greatest shortcomings. On the trail of this reflection, there is increasing advocacy for establishing a special court for international investment disputes, resulting in initial preparatory steps and the opening of negotiations for its establishment in 2018. Additional support in this regard is provided in the *Achmea* case, which called into question proceedings before *ad hoc* arbitration tribunals in the light of the application of EU law. However, setting up such a court requires a strong willingness on the side of the EU and Member States and significant organisational efforts and resources. Although it is impossible to concur with its success, considering the quality concerns regarding investment arbitration, it is a path worth exploring in the coming period.

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