BIT(s) and But(s) in Central and Eastern Europe: Croatian Perspective

Abstract: This paper analyses the position of international bilateral investment treaties, the so-called BITs, in Central and Eastern Europe. The author focuses on the BITs signed by the Republic of Croatia before the country became a European Union Member State. By using as an example the BIT signed between the Republic of Austria (RA) and the Republic of Croatia (RC) in 1997, the author explains the role of the International Centre for Settlement of Investment Disputes (ICSID) and the interaction between the BITs and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention). The author also explains the mechanism for investment dispute settlement before the ICSID Centre and the role that the safeguard clause from the RC-RA BIT Agreement plays here. The paper also demonstrates the position and the current state of BITs in the European Union by analysing the CJEU case law from Micula to the famous Achmea case. Finally, the author reflects on the reaction of the European Commission to ICSID rulings and discusses the possible effects of the Declaration signed by the Member States on 15th January 2019 on the fate of BITs and investment dispute settlement. With this recent Declaration, the representatives of the governments of the Member States of the European Union obliged themselves to „inform investment arbitration tribunals about the legal consequences of the Achmea judgment“, and to „set these awards aside or not to enforce them due to a lack of valid consent“. Not only should the undertakings controlled by the Member States’ governments „withdraw pending investment arbitration cases“, but also “Member States will make best efforts to deposit their instruments of ratification, approval or acceptance of that plurilateral treaty or of any bilateral treaty terminating bilateral investment treaties between Member States no later than 6 December 2019“.
LEGAL BACKGROUND

- BIT CROATIA - AUSTRIA 1997

- Regulation on the Ratification of the Agreement between the Republic of Croatia and the Republic of Austria for the Promotion and Protection of Investments, Official Gazette - International treaties 19/97


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LEGAL BACKGROUND

- BIT CROATIA - AUSTRIA 1997

- Article 9 para. 2:

  "If a dispute...cannot be settled within three months of a written notification of sufficiently detailed claims, the dispute shall upon the request of the Contracting Party or of the investor of the other Contracting Party be subject to the following procedures:

  (a) to conciliation or arbitration by the International Centre for Settlement of investment Disputes, established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on 18 March 1965. In the case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitration agreement between the Contracting Party and the investor, to submit any such dispute to this Centre. This consent implies the renunciation of the requirement that the internal administrative or juridical remedies should be exhausted..."
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

- Article 25 ICSID Convention:
  «(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.»

BIT CROATIA - AUSTRIA 1997

- Article 1
  „For the purpose of this Agreement
  (1) the term “investment” comprises all assets linked to business activities and in particular, though not exclusively:
  (a) movable and immovable property as well as any other rights in rem such as mortgages, liens, pledges, usufructs and similar rights;
  (b) shares and other types of participations in legal entities;
  (c) claims to money that has been given in order to create an economic value
  or claims to any performance having an economic value;
  (d) intellectual and industrial property rights, as defined in the multilateral agreements concluded under the auspices of the World Intellectual Property Organization, insofar as both Contracting Parties are parties to them, including, but not limited to, copyrights, trademarks, patents, industrial designs and technical processes, rights in plants varieties, know-how, trade secrets, trade names and goodwill;
  (e) business concessions under public law to search for or exploit natural resources.”
1. Erste Group Bank AG and others v. Republic of Croatia (ICSID Case No. ARB/17/48)

- Subject of Dispute: Banking services and debt instruments
- Economic Sector: Finance
- Instrument(s) Invoked: BIT Croatia - Austria 1997
- Applicable Rules: ICSID Convention - Arbitration Rules


- Subject of Dispute: Banking services and debt instruments
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3. Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia (ICSID Case No. ARB/17/34)

- Subject of Dispute: Banking services and debt instruments
- Economic Sector: Finance
- Instrument(s) Invoked: BIT Croatia - Austria 1997
- Applicable Rules: ICSID Convention - Arbitration Rules

4. UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia (ICSID Case No. ARB/16/31)

- Subject of Dispute: Banking services and debt instruments
- Economic Sector: Finance
- Instrument(s) Invoked: BIT Croatia - Austria 1997
- Applicable Rules: ICSID Convention - Arbitration Rules
Act on Amendments to the Consumer Credit Act, Official Gazette 102/15
Act on Amendments to the Credit Institutions Act, Official Gazette 102/15
These amendments enabled one-off conversion of loans denominated in Swiss francs (CHF loans) into loans denominated in Euro (EUR loans) and the one-off conversion of loans denominated in Croatian Kuna and indexed to CHF (“HRK/CHF loans”) into loans denominated in HRK and indexed to EUR (“HRK/EUR loans”).
CONVERSION ACTS: VIOLATION OR JUSTIFICATION OF EU LAW?

- Legal background:
- Stabilization and Association Agreement between the Republic of Croatia and the European Communities and their Member States (SAA) of 29 October 2001, Official Gazette of the Republic of Croatia – International Agreements (OG IA) Nos. 14/01, 15/01, 14/02, 1/05, 7/05, 9/05 and 11/06
- Obligation to align the Croatian existing legislation with the acquis communautaire stipulated in Arts. 69 and 74 SAA
  - Harmonization clause – Art. 69 SAA
  - Consumer protection – Art. 74 SAA
- The first Consumer Protection Act (CPA), OG No. 96/03 was enacted in June 2003 and represented partial approximation with the EU consumer protection acquis transposing Directives 98/6/EC, 85/577/EEC, 97/7/EC, 94/47/EC, 93/13/EEC, 84/450/EEC, 87/102/EEC, and partially the Directive 1999/44/EC Consumer Protection Act
- The new CPA was enacted in August 2007, OG Nos. 79/07, 125/07, 75/09, 79/09, 89/09, 133/09, 78/12, and 56/13 and implemented Directives 2002/65/EC, 98/27/EC, and 2005/29/EC

Judgment and order of the High Commercial Court of the Republic of Croatia of 13 June 2018, Pž-7129/13-4
- UCT: • VARIABLE INTEREST RATE ✓ • CURRENCY CLAUSE ✓

Judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2
- UCT: • VARIABLE INTEREST RATE ✓

Decision of the Constitutional Court of the Republic of Croatia of 13 December 2016, U-III-2521/2015
- UCT: • VARIABLE INTEREST RATE ✓ • CURRENCY CLAUSE?

Order of the Supreme Court of the Republic of Croatia in the case Franak – 3 October 2017, Revt 575/16-5
- UCT: • VARIABLE INTEREST RATE ✓ • CURRENCY CLAUSE?

Judgment of the High Commercial Court of the Republic of Croatia of 14 June 2018, 43 Pž-6632/2017-10
- UCT: • VARIABLE INTEREST RATE ✓ • CURRENCY CLAUSE ✓

Awaiting the ruling of the Supreme Court of the Republic of Croatia 2019

CONVERSION ACTS:
VIOLATION OR JUSTIFICATION OF EU LAW?

- Croatian case law on CHF & HRK/CHF LOANS:
- Judgment and order of the Supreme Court of the Republic of Croatia of 9 April 2015, Revt-249/14-2:

  “there is however a duty of Croatian courts to interpret national law in the spirit of the law of the European Union and of her overall acquis (what includes among others also a practice of the Court of Justice of the European Union), to what the Republic of Croatia obliged itself by signing the Stabilisation and Association Agreement that was in force from 2005”

BITs SAFEGUARD CLAUSE:
SUPREMACY OF EU LAW?

- Article 11(2) of the Agreement between the Republic of Croatia and the Republic of Austria for the Promotion and Protection of Investments:

  “the Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal acquis of the European Union (EU) in force at any given time.”
CJEU CASE LAW
VALIDITY OF INTRA-EU BITs?

- “The payment of the compensation awarded by the arbitral tribunal established under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) by award of 11 December 2013 in Case No ARB/05/20 Micula a.o. v Romania to the single economic unit comprising Viorel Micula, Ioan Micula, S.C. European Food SA, S.C. Starmill S.R.L., S.C. Multipack, European Drinks SA, Rieni Drinks SA, Scandic Distilleries SA, Transilvania General Import-Export S.R.L., and West Leasing S.R.L constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market.”
CJEU CASE LAW

VALIDITY OF INTRA-EU BITs?

- Judgment of 6 March 2018, C-284/16, Achmea, EU:C:2018:158, para. 13:
  - Para 13: “(…) since the accession of the Slovak Republic to the European Union on 1 May 2004, the BIT has constituted an agreement between Member States, so that in the event of conflict the provisions of EU law take precedence, in the matters governed by them, over the provisions of the BIT.”

- Para 33: Also according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other

- Para. 41: Given the nature and characteristics of EU law mentioned in paragraph 33 above, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.

EU LAW


- Article 351 (1-2) TFEU: The rights and obligations arising from agreements concluded before ... or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
MS DECLARATION:
FATE OF BITs AND ICSID CASES?

- Declaration signed by the Member States on 15th January 2019 on the fate of BITs and investment dispute settlement:
- With this recent Declaration, the representatives of the governments of the Member States of the European Union obliged themselves to "inform investment arbitration tribunals about the legal consequences of the Achmea judgment", and to "set these awards aside or not to enforce them due to a lack of valid consent". Not only should the undertakings controlled by the Member States’ governments "withdraw pending investment arbitration cases", but also "Member States will make best efforts to deposit their instruments of ratification, approval or acceptance of that plurilateral treaty or of any bilateral treaty terminating bilateral investment treaties between Member States no later than 6 December 2019".

Thank you for your attention!