CHAPTER 41

The State as a Party in Arbitral Proceedings on Settlement of Private Law Disputes – Miscellaneous

Krešimir Sajko*

I Introduction

The jurisdiction of institutions for settlement of private law disputes is bifurcated. Depending on the fulfilment of the prescribed legal requirements, jurisdiction is exercised either by state courts or by arbitration. However, some of these disputes could be solved by other methods of alternative dispute resolution, i.e., by conciliation (mediation) which is provided for by several national laws. At the level of the European Union, such a method is stimulated, inter alia, by Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.¹

In this paper are analysed some aspects of situations in which a state is a party to arbitral proceedings on settlement of private law disputes. The provisions on these matters are set out in national arbitration laws and in several international conventions.

First we will focus on situations where a state is a party to arbitral proceedings on settlement of investment disputes provided by international conventions whose scope is the protection of investments. That discussion will especially concentrate on some issues regarding bilateral treaties on investment protection (hereinafter: BIT) concluded by Croatia taking into account the consequences of Croatia’s accession to the EU on 1 July 2013. Thereafter our analysis will turn to issues dealing with the state’s capacity to be a party to arbitral proceedings on the resolution of private law disputes.

I dedicate this paper to my old friend and colleague Professor Budislav Vukas, one of the greatest scholars in the field of international law. In his scientific research and his activities not only as a law professor and former judge at the International Tribunal for the Law of the Sea in Hamburg, but also as a renowned international arbitrator, he displays a great ability to analyse,

* Professor Emeritus of the University of Zagreb; Former Member of the International Court of Arbitration, International Chamber of Commerce; Member of the European Academy of Sciences and Arts (Austria).

evaluate and judge the most complicated legal matters and provide very strongly argued solutions for them. Therefore I have with great pleasure prepared this paper as I would like it to express my appreciation both for his scientific contributions and for his long friendship.

II Croatia as a Party to Bilateral Investment Treaties – An Overview

1 General Remarks

The settlement of investment disputes between states and nationals of other states is regulated by several multilateral and by many bilateral treaties.

As to the former, the most important is the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (hereinafter: ICSID Convention) by which the International Centre for Settlement of Investment Disputes (hereinafter: ICSID) was established. There are currently (as of 20 May 2013) 158 signatory states to the ICSID Convention – 149 states have deposited their instruments of ratification, acceptance or approval of the Convention. In Croatia the ICSID Convention entered into force on 22 October 1998. For the time being there are two pending ICSID arbitration proceedings connected with Croatia. In one, a Croatian company is the claimant – HRVATSKA ELEKTROPRIVREDA d.d. v. REPUBLIC OF SLOVENIA, ICSID Case No. ARB/05/24; in the other case Croatia is the respondent – GAVRILOVIĆ & GAVRINOVIĆ d.o.o. v. REPUBLIC OF CROATIA, ICSID Case No. ARB/12/39.

The main purpose of the ICSID Convention is to promote increased flows of international investment by facilitating the settlement of investment disputes. Besides, several other multilateral treaties covering specific subject matters also provide dispute resolution by arbitration, such as the Energy Charter Treaty of 1994, the North American Free Trade Agreement of 1992 (hereinafter: NAFTA) and the Central American Free Trade Agreement of 2004.

In addition to the mentioned multilateral conventions, there are a great number of bilateral treaties on settlement of disputes between states and nationals of other states (BITS). The first BIT was concluded between Germany

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4 \text{ Croatia ratified the Treaty in 1997; the Treaty entered into force for Croatia on 16 April 1998. For data on other member states, see: &lt;www.encharter.org/index.php&gt;.)}
\end{align*} \]