

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**ERSTE GROUP BANK AG, STEIERMÄRKISCHE BANK UND SPARKASSEN AG, AND
ERSTE & STEIERMÄRKISCHE BANK D.D.**

Claimants

and

REPUBLIC OF CROATIA

Respondent

ICSID CASE NO. ARB/17/49

**ORDER OF THE TRIBUNAL TAKING NOTE OF THE
DISCONTINUANCE OF THE PROCEEDING**

Members of the Tribunal

Dr. Andrés Rigo Sureda, President of the Tribunal
Professor Andreas Bucher, Arbitrator
Mr. Lazar Tomov, Arbitrator

Secretary of the Tribunal

Ms. Jara Mínguez Almeida

Date of dispatch to the Parties: 15 July 2021

REPRESENTATION OF THE PARTIES

*Representing Erste Group Bank AG,
Steiermärkische Bank und Sparkassen AG,
and Erste & Steiermärkische Bank d.d.:*

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1. On 15 December 2017, the International Centre for Settlement of Investment Disputes (“**ICSID**”) received a request for arbitration (the “**Request**”) from Erste Group Bank AG (“**Erste**”), Steiermärkische Bank und Sparkassen AG (“**SBS**”) and Erste & Steiermärkische Bank d.d. (“**ESB Croatia**” and together the “**Claimants**”) for the institution of arbitration proceedings under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “**ICSID Convention**”), in respect of a dispute with Republic of Croatia (“**Croatia**” or the “**Respondent**”) (together the “**Parties**”).
2. The dispute relates to the Claimants’ alleged losses in their investments and shareholdings in Croatia following measures adopted by the Respondent concerning the Swiss franc loan agreements, which according to the Claimants were in breach of the Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments, which was done in Vienna on 19 February 1997 and entered into force on 1 November 1999 (the “**BIT**”).
3. On 29 December 2017, the Secretary-General registered the Request pursuant to Article 36(3) of the ICSID Convention and Rules 6(1)(a) and 7(a) of the ICSID Institution Rules and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
4. The Parties agreed to constitute the Arbitral Tribunal in accordance with Article 37(2)(a) of the ICSID Convention and that the Tribunal would consist of three arbitrators, one to be appointed by each Party, the third arbitrator and President of the Tribunal to be appointed by agreement of the Parties.
5. The Tribunal is composed of Dr. Andrés Rigo Sureda, a national of the Kingdom of Spain, President, appointed by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention; Mr. Lazar Tomov, a national of the Republic of Bulgaria, appointed by the Claimants; and Prof. Andreas Bucher, a national of Switzerland, appointed by the Respondent.
6. On 22 June 2018, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“**Arbitration Rules**”) notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Jara Mínguez Almeida, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
7. On 10 August 2018, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session by telephone conference (the “**First Session**”).
8. On 20 August 2018, following the First Session, the Tribunal issued Procedural Order No. 1, recording the Parties’ agreements on procedural matters and the decision of the

Tribunal on the disputed issues. Procedural Order No. 1 established, *inter alia*, that: the applicable Arbitration Rules would be those in effect from 10 April 2006; the procedural language would be English; and the place of the proceeding would be London, United Kingdom. In its Procedural Order No. 1, the Tribunal invited the Parties to jointly propose a procedural calendar.

9. On 21 December 2018, the European Commission (the “**EC**”) filed with ICSID Secretariat its Application for Leave to Intervene as Non-Disputing Party, dated 20 December 2018 (the “**Application**”).
10. In accordance with the Procedural Order No. 1, the Claimants submitted their Memorial on the Merits on 4 January 2019, together with Annexes 1 through 6; Indices of Exhibits, Witness Statements and Expert Reports; Exhibits C-0001 through C-0030, C-0032 through C-0065, C-0067 through C-0083, C-0085 through C-0086, C-0088 through C-0089, C-0091 through C-0094, C-0096 through C-0107, C-0109 through C-0112, C-0114 through C-0120, C-0122 through C-0224; Legal Authorities CL-0001 through CL-0144; Witness Statement of Mr. Dejan Donev (including Exhibits DD-0001 through DD-0005); Witness Statement of Ms. Danica Kozica (including Exhibits DK-0001 through DK-0011, DK-0013 through DK-0016); Witness Statement of Ms. Ana Laslo (including Exhibits AL-0001 through AL-0009, AL-0011 through AL-0016, AL-0018 through AL-0022); Supplemental Bundle to the Memorial containing Exhibits C-0225 through C-0232 and Legal Authorities CL-0145 through CL-0150; Expert Report of Mr. Phillip Swagel (including Appendices A through C and Exhibits PS-0001 through PS-0110); and Expert Report of Mr. Richard Caldwell (including Appendices A through F and Exhibits RC-0001 through RC-0050) (the “**Memorial**”).
11. On 8 January 2019, the Tribunal notified the Parties that it would invite the Parties’ simultaneous comments on the Application after receipt of the Respondent’s Counter-Memorial or the Respondent’s Memorial on Preliminary Objections and Request for Bifurcation.
12. By letter of the same date, ICSID conveyed the Tribunal’s message to the EC advising the EC that the Tribunal would consult with the Parties regarding the Application and would invite the Parties to comment on the Application later in the year in light of the procedural calendar in place in this proceeding.
13. On 24 April 2019, the Respondent filed its Memorial on Preliminary Objections and a Request for Bifurcation and Suspension of the Proceedings on the Merits together with Exhibits R-001 through R-006, Legal Authorities RL-001 through RL-076, and Expert Opinion of Professor Paul Craig, dated 24 April 2019, together with Legal Authorities PC-001 through PC-060 (the “**Memorial on Jurisdiction and Request for Bifurcation**”).
14. Further to an extension agreed by the Parties and approved by the Tribunal, the Claimants submitted their Response on the Respondent’s Request for Bifurcation on 18

June 2019, together with Exhibits C-0233 through C-0239 and Legal Authorities C-0151 through CL-0171 (the “**Response on Bifurcation**”), opposing the Respondent’s Request for Bifurcation.

15. By letter dated 21 June 2019, the Tribunal invited the Parties to submit a second round of comments on the Respondent’s Request for Bifurcation. The Parties informed the Tribunal of their agreement to extend the deadlines that had been set by emails of 28 June 2019, and on the same day, the Tribunal approved the agreed extensions.
16. In accordance with the Tribunal’s directions, and the modified timetable approved by the Tribunal on 28 June 2019, the Respondent filed a Reply on Request for Bifurcation on 12 July 2019, together with Legal Authority RL-077 (the “**Reply on Bifurcation**”).
17. On 26 July 2019, the Claimants submitted a Rejoinder on the Request for Bifurcation, together with Exhibits C-0240 through C-0245 and Legal Authorities CL-0172 through CL-0185 (the “**Rejoinder on Bifurcation**”).
18. On 30 July 2019, following the Respondent’s Submission on Preliminary Objections and Request for Bifurcation dated 25 April 2019, and subsequent exchange between the Parties regarding the Request for Bifurcation, the Tribunal invited the Parties to submit their comments on the Application by 14 August 2019.
19. On 14 August 2019, the Parties submitted their respective comments.
20. On 9 September 2019, the Tribunal issued its Decision on the Respondent’s Request for Bifurcation (the “**Decision on Bifurcation**”), joining all the jurisdictional objections to the merits of the proceeding. The Tribunal further directed the Parties “to consult with each other to determine the remainder of the procedural calendar, including consideration of a possible bifurcation of the merits in a liability phase and a quantum phase, and inform the Tribunal of their consultation’s outcome no later than three weeks from the date of this decision.”
21. On 9 September 2019, the Tribunal issued its Decision on the EC’s Application (the “**Decision on NDP Participation**”).
22. On 30 September 2019, the Claimants wrote to the Tribunal indicating that the Parties had reached only a partial agreement with regard to the remainder of the procedural calendar. Relevant to this decision, the Parties had agreed to first address the Respondent’s Application for Bifurcation of Damages from the Issue of Liability (the “**Application for Bifurcation of Damages**”) and the Claimants annexed to their letter the Parties’ agreed timetable. The Respondent confirmed its agreement with the Annex on 1 October 2019.
23. By letter of 1 October 2019, the Tribunal adopted the Parties’ agreed deadlines for the submissions on the Application for Bifurcation of Damages. The Tribunal decided that:
(i) the Respondent would file its Application for the Bifurcation of Damages from the

Issue of Liability by 8 October 2019; (ii) the Claimants would file their Comments on the Respondent's Application for the Bifurcation of Damages from the Issue of Liability by 16 October 2019; (iii) the Parties would continue their consultations with a view to agreeing the remaining procedural calendar under the different scenarios and revert to the Tribunal by 16 October 2019; and (iv) the EC's *amicus curiae* brief would be filed two weeks after the EC is notified. The Tribunal intended to notify the EC on 16 October 2019.

24. On 8 October 2019, the Respondent submitted its Application for Bifurcation of Damages together with Legal Authorities RL-084 through RL-087.
25. On 16 October 2019, the Claimants submitted their Comments on the Respondent's Application for the Bifurcation of Damages, together with Legal Authorities CL-0191 through CL-0194 ("**Comments on Application for Bifurcation of Damages**").
26. On the same day, the Tribunal invited the EC to file its written submission, by 31 October 2019, as directed in the Tribunal's Decision on NDP Participation.
27. On the same day, each Party submitted separately its proposals for the procedural calendar under the bifurcated and non-bifurcated scenarios as they had been unable to agree on this matter.
28. On 31 October 2019, the EC submitted its *amicus curiae* brief, together with Annexes EC-01 through EC-28.
29. On 4 November 2019, the Tribunal issued its Decision on the Respondent's Request for Bifurcation on Liability. The Tribunal rejected the Application for Bifurcation of Damages, and invited the Parties to continue (i) to consult with each other on the calendar for the remainder of the proceeding taking into account the availability of the Tribunal for a hearing, and (ii) to inform the Tribunal of the results of these further consultations no later than fifteen days from the date of the Decision.
30. By communications of 18 and 19 November 2019, the Parties submitted to the Tribunal proposed procedural calendars with two suggestions for alternative hearing dates as the Parties were not available on the dates suggested by the Tribunal in its Decision of 4 November 2019.
31. Further to exchanges between the Parties, on 9 December 2019, the Tribunal issued a procedural timetable, which, *inter alia*, set the hearing dates for 12-22 January 2021.
32. On 9 March 2020, the Parties submitted their comments on the EC's *amicus curiae* brief.
33. On the same date, the Respondent submitted its Counter-Memorial on the Merits and Memorial on Further Jurisdictional Objections, together with a Consolidated Index of Supporting Documentation; Exhibits R-0008 through R-0039; Legal Authorities RL-

0090 through RL-0174; Witness Statement of Mr. Boris Lalovac (including Exhibits BL-0001 through BL-0005); Witness Statement of Mr. Nikola Lazanin (including Exhibits NL-0001 through NL-0006); Witness Statement of Ms. Sandra Flajpan (including Exhibits SF-0001 through SF-0008); Witness Statement of Mr. Vjekoslav Fiočić (including Exhibits VF-0001 through VF-0004); Expert Report of London Economics by Patrice Muller (including Exhibits PM-0001 through PM-0212; Expert Report of NERA Economic Consulting by Dr. Chudozie Okongwu (including Exhibits CO-0001 through CO-0032; and Legal Opinion of Prof. Dr. Sc Silvija Petrić (including Exhibits SP-0001 through SP-0191) (the “**Counter-Memorial**”).

34. By communications of 1 April 2020, the Parties notified the Tribunal that they had agreed to postpone the hearing and to the consequential modification of the procedural timetable. The Parties had agreed to postpone the hearing at the time scheduled for January 2021 by approximately six months. The Parties further requested that the Tribunal inform the Parties of the Tribunal’s available dates from 14 June 2021 onwards for a hearing.
35. On 3 April 2020, the Tribunal notified the Parties that it was available to hold a hearing between 12 and 23 July 2021. The Parties were invited to submit by 30 April 2020 their joint proposal on the revised procedural timetable.
36. On 29 April 2020, the Parties submitted their joint proposal on the revised procedural timetable.
37. On 30 April 2020, the Tribunal confirmed the Parties’ revised procedural timetable, which, *inter alia*, set the hearing dates for nine days starting from 13 July 2021.
38. On 29 September 2020, the Parties submitted a draft revised procedural timetable. In their agreement, the Parties had agreed to postpone all remaining time limits by approximately two months and to modify the remaining procedural calendar accordingly. The Parties also agreed to postpone the hearing (scheduled for 13 to 23 July 2021), and asked the Tribunal to identify its available dates in October/November/December 2021.
39. On 6 October 2020, the Tribunal confirmed the Parties’ revised procedural timetable, which, *inter alia*, set the hearing dates for nine days to be determined by the Tribunal after consulting with the Parties.
40. By communications of 13 October 2020, the Parties requested that the Tribunal (i) reserve its decision regarding the alternative hearing dates, (ii) block the proposed hearing dates in the Members’ calendars, and (iii) grant a 30-day extension of the deadline for responding to the Tribunal’s proposal.
41. On 14 October 2020, the Tribunal informed the Parties that it granted the extension requested by the Parties. Accordingly, the Parties were invited to confirm by 13

November 2020 whether they were available to schedule the nine-day hearing during the last two weeks of September (i.e., between 20 September and 1 October 2021).

42. On 13 November 2020, the Parties submitted a draft revised procedural timetable. The Parties notified the Tribunal that they were engaged in settlement negotiations and had accordingly agreed on a further 3-month extension of all deadlines. The Parties requested that the Tribunal identify a set of dates during the first quarter of 2022 in which they would be available for a nine-day hearing.
43. On 23 November 2020, the Tribunal confirmed the Parties' revised procedural timetable, which, *inter alia*, vacated the hearing dates reserved between 20 September and 1 October 2021, and proposed to the Parties to hold the hearing in the second quarter of 2022 starting on 21 June 2022, the earliest date the members of the Tribunal were available after the first quarter. The Tribunal invited the Parties to confirm their availability for a nine-day hearing starting on 21 June 2022 by 7 December 2020.
44. On 7 December 2020, the Parties confirmed their availability for a nine-day hearing starting on 21 June 2022.
45. On 7 January 2021, the Parties requested that the Tribunal issue an order suspending the proceedings in this case through 30 June 2021 until further notice.
46. On 11 January 2021, the Tribunal approved the Parties' request for suspension until 30 June 2021.
47. On 30 June 2021, the Parties jointly informed the Tribunal as follows:

Dear Mr. President, dear Members of the Arbitral Tribunal,

The Parties wish to inform the Arbitral Tribunal that they have resolved their dispute.

Accordingly, the Parties jointly request that the Arbitral Tribunal issue an order taking note of the discontinuance of the proceedings.

The Parties kindly ask for the Arbitral Tribunal's advance notification of the date of the intended issuance of such an order.

The Parties further request that the Arbitral Tribunal arrange for the final calculation of the fees and expenses of the Arbitral Tribunal and ICSID, if applicable. For the avoidance of doubt, this final calculation of the fees and expenses of the Arbitral Tribunal and ICSID shall not include amounts that may have already been awarded to any of the Parties, which amounts the Parties shall bear as decided in such awards.

The Claimant(s) and the Respondent shall each bear their own legal costs and expenses arising from the claim. The Claimant

and the Respondent shall pay in equal shares the fees and expenses of the Arbitral Tribunal and of ICSID.

The Parties wish to emphasize that this submission does not in any way constitute an acknowledgment or admission of liability.

48. Rule 43(1) of the ICSID Arbitration Rules provides:

If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.

ORDER

1. THEREFORE, in accordance with the Parties' request, and pursuant to Rule 43(1) of the ICSID Arbitration Rules, the Tribunal hereby takes note of the discontinuance of the proceeding.

Dated as of 15 July 2021:

[Signed]

Professor Andreas Bucher
Arbitrator

[Signed]

Mr. Lazar Tomov
Arbitrator

[Signed]

Dr. Andrés Rigo Sureda
President of the Tribunal