

# IMPACT OF INVESTMENT ARBITRATIONS AGAINST THE SLOVAK REPUBLIC ON ARBITRATIONS IN THE EUROPEAN UNION

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**Abstract:** *Arbitration proceedings led by shareholders of public health insurance companies in the Slovak Republic caused significant changes affecting investment arbitration proceedings throughout the European Union. The aim of the article is to analyze the process which lead towards the current state of law, the impact which these arbitrations had on arbitration proceedings and what further development can be expected in this context.*

**Keywords:** *arbitration, Slovakia, health insurance companies, BITs, European Union law*

## I. INTRODUCTION

Due to changes in Slovak legislation in the area of public healthcare in the late 2000s, investors started claiming that their investment into this sector had been affected and initiated several investment arbitrations against the Slovak Republic. These arbitrations, however, did not only have an effect in Slovakia but caused a significant impact on all bilateral investment treaties concluded between Member States of the European Union. The goal of this article is to chronologically analyse the path of the disputes and the consequences which they had on the system of bilateral investment treaties within the European Union.

### I. 1. Chronological Order of Initial Facts

In the year 2004, the Slovak Republic decided to liberalize its public healthcare market and open this market to competition and foreign investments. Based on that, several foreign investors decided to establish a subsidiary in Slovakia and started providing public healthcare insurance services.<sup>2</sup> After the parliamentary elections in 2006, the Slovak government decided that it was necessary to change the public healthcare insurance system. On 25 October 2007, the Act No. 530/2007 Coll. was adopted (hereinafter “Relevant Act”) according to which the public healthcare insurance companies were prohibited to distribute profit. To be precise, a new section 15(6) was inserted into the Act No. 581/2004 Coll. on healthcare insurance companies, according to which: “*If, after fulfilling the obli-*

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<sup>2</sup> HRUŠOVSKÝ, M. Koniec investičnej arbitráže na základe tzv. intra-EÚ bilaterálnych investičných zmlúv. *Súkromné právo*. 2018, No. 4, p. 164.

*gation referred to in paragraph 1(b) [to create and use a technical reserve for the reimbursement of healthcare under this Act] within the public healthcare insurance the operating result is a profit, it can be used only for payments to the extent stipulated by a special regulation, at the latest by the end of the calendar year following the calendar year for which the profit was generated and only if it does not jeopardize the systematic and effective fulfilment of the obligation of the healthcare insurance company to ensure access to healthcare for the insured persons under this Act [para. a)] and does not contradict the duty of the healthcare insurance company to reimburse the provided healthcare properly and in time.”*

## I. 2. Conformity of the Adopted Legislation with the Slovak Constitution

Besides the arbitration proceeding which will be analysed below, the Relevant Act was reviewed by the Slovak Constitutional Court with respect to its conformity with the Slovak Constitution.<sup>3</sup> On 26 January 2011, the Slovak Constitutional Court has decided that section 15(6) of the Relevant Act was unconstitutional. Based on this decision, the mentioned provision became ineffective and the National Council of the Slovak Republic (the Slovak parliament) was obliged to bring the legislation into conformity with the Constitution. This happened with the Act No. 79/2011 Coll. from 24 March 2011 which repealed section 15(6) of the Relevant Act.

## II. INITIATION OF THE ARBITRATION PROCEEDINGS BY PUBLIC HEALTHCARE COMPANIES

The Dutch company *HICEE B.V.* (hereinafter “HICEE”) held an indirect interest in two Slovak healthcare insurance companies, *DÓVERA zdravotná poisťovňa, a.s.* and *APOLLO zdravotná poisťovňa, a.s.* HICEE was a shareholder in the Slovak company *DÓVERA Holding, a.s.* which was a shareholder of the two above-mentioned healthcare insurance companies. HICEE initiated an arbitration proceeding against the Slovak Republic due to the prohibition to distribute profits described according to the Relevant Act. The arbitration was based on the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of 29 April 1991 (hereinafter “BIT”). The arbitral tribunal gave no ruling on the merits of the case. It has come to the conclusion that it does not have jurisdiction in the matter due to the fact that the BIT only protects direct investments. The investment of HICEE in the two healthcare insurance companies was indirect (made through another Slovak company *DÓVERA Holding, a.s.* which was the direct shareholder). Besides HICEE, there was another investor who has decided to enter the Slovak healthcare insurance market. The Dutch company *Achmea B.V.* (hereinafter “Achmea”), formerly known as *Eureko B.V.*, operated in the Slovak Republic through its subsidiary *Union zdravotná poisťovňa, a.s.* After the ban on the distribution of profits was adopted, Achmea initiated an arbitration based on the same BIT. On 1 October 2008, Achmea sent a notice of arbitration whereby the

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<sup>3</sup> Act No. 460/1992 Coll. as amended.

jurisdiction of the arbitral tribunal was based on Article 8 of the BIT which provides as follows: “(2) *Each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement... (4) The arbitration tribunal shall determine its own procedure applying the arbitration rules of the United Nations Commission for International Trade Law (UNCITRAL).*” The place of arbitration was determined to be Frankfurt, Germany.<sup>4</sup> Before dealing with the substantive issues, the tribunal has decided to hold a preliminary jurisdictional phase due to the reason that the Respondent (the Slovak Republic) objected that the tribunal had jurisdiction based on the dispute’s internal European Union character which rendered the dispute subject to the exclusive jurisdiction of the European Union.<sup>5</sup> The tribunal dismissed the jurisdictional objection with its Award on Jurisdiction, Arbitrability and Suspension from 26 October 2010. Later, on 7 December 2012 the tribunal decided also on the merits and awarded Achmea damages in the amount of EUR 22.1 million plus interest and cost. Although most of the arbitration awards are fulfilled voluntarily,<sup>6</sup> this was not the case of the award that Achmea received against the Slovak Republic. Between the time when the prohibition of distribution of profits of public healthcare insurance companies was adopted (2006) and the time when the arbitral award was issued (2012), two parliamentary elections have already occurred in Slovakia (the elections from 2010 and 2012). However, at both of the mentioned moments (i.e. adoption of the ban and issuance of the award) the political party *SMER* had a dominant position in the government.<sup>7</sup> Although not providing for a generally good impression towards foreign investors, it has been decided that the award should be challenged in courts. Since the award was binding and enforceable, an enforcement proceeding has been initiated and funds of the Slovak Republic in Luxembourg have been garnished. The action for setting aside of the award was filed with the Frankfurt *Oberlandesgericht* (Higher Regional Court). However, before looking at the decisions of the German court, we shall firstly mention the decision on jurisdiction by the arbitral tribunal and its arguments.

### III. DECISION ON JURISDICTION BY THE ARBITRAL TRIBUNAL

It should be firstly mentioned that, when deciding on the jurisdiction, the arbitral tribunal emphasized that it had decided on the basis of particular facts and that it does not wish to decide on general principles. In other words, the tribunal wanted to emphasize that it does not want to create a precedence which other tribunal deliberating on analogous issues should follow. The arbitrators especially mentioned that (i) the BIT was con-

<sup>4</sup> *Eureko B.V. v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, para. 16.

<sup>5</sup> This jurisdictional objection and the relevant arguments will be discussed in detail in the further text.

<sup>6</sup> ESKIYÖRÜK, S. Harmonisation on the Performance of International Arbitral Awards. *Ankara Bar Review*. 2010, No. 2, pp. 61–62.

<sup>7</sup> Due to the length of investment arbitration proceedings and time that passes between the initiation of the arbitral proceedings and the issuance of the final award, in many cases the political leadership of the country changes and the “blame” for losing the investment arbitration can be assigned to the previous government. This was not the case in Slovakia.

cluded before Slovakia has become a EU Member State, (ii) it does not arise from a multilateral treaty and that (iii) the arbitration was initiated before the Lisbon Treaty<sup>8</sup> came into force.<sup>9</sup> Apparently, the tribunal wanted to avoid having the final award scrutinized due to the fear of creating general principles not suitable for other disputes. The Slovak Republic raised several arguments supporting its position that the tribunal lacks jurisdiction in the matter which shall be discussed in detail in below.

### III. 1. Termination of the BIT due to Accession to the EU

The wording of Art. 59 of the Vienna Convention on the Law of Treaties (hereinafter “VCLT”) provides: “*A treaty will be terminated if all the parties conclude that there is a later treaty on the same subject matter that should be governed by the later treaty, and the current treaty cannot be governed at the same time as the later treaty. A treaty will be suspended in operation if mentioned in the later treaty or all parties intend the treaty to be suspended.*” The Slovak Republic as Respondent argued that all the conditions of Art. 59 VCLT have been met, especially that both treaties (i.e. the BIT and the Association Agreement between Slovakia and the EU) cover the same subject matter. The tribunal rejected the argument of the Respondent. Firstly, in case a treaty is terminated, the provision of Art. 65 VCLT, dealing with the procedure to be followed in case of termination, has to be applied. According to the mentioned provision: “*A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim.*” This procedure has not been observed. Secondly, Art. 59 VCLT should only apply to the termination of the *entire treaty*. After analysing the particular rights provided by the BIT and their comparison with the rights provided by EU law, the tribunal came to the conclusion that “*EU law does not provide substantive rights for investors that extend as far as those provided by the BIT. There are rights that may be asserted under the BIT that are not secured by EU law.*”<sup>10</sup> The arguments of the tribunal are convincing. If a party wants to terminate an international treaty, the other parties need to be notified. This procedure also promotes the principle of legal certainty since all the parties know which treaties to follow. The Slovak Republic also argued that the BIT arbitration clause should not be applicable based on Art. 30(3) VCLT which regulates the inapplicability of the earlier treaty as follows: “*When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.*” This provision does not require to assess the intent of the parties and also does not regulate the incompatibility of the whole treaty but rather its individual provisions. The tribunal has come to a quick conclusion that Art. 8 of the BIT which regulates the jurisdiction in investor-state disputes is not

<sup>8</sup> Treaty on the Functioning of the European Union from 13 December 2007. It entered into force on 1 December 2009.

<sup>9</sup> *Eureko B.V. v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, para. 218.

<sup>10</sup> *Ibid.*, para. 262.

incompatible with EU law. The tribunal stated: “*There is... no rule of EU law that prohibits investor-State arbitration. Far from it: transnational arbitration is a commonplace throughout the EU, including arbitrations between legal persons and States; and the European Court of Justice has given several indications of how questions of EU law should be handled in the course of arbitrations, including important questions of public policy.*”<sup>11</sup>

### III. 2. No Jurisdiction due to Application of EU Law

As the third argument, the Respondent claimed that the tribunal has to apply EU law as the law in force of the contracting party according to Art. 8(6) of the BIT. It was further argued that the tribunal did not have jurisdiction due to the applicability of EU law which is directly effective and prevails over national law while at the same the Court of Justice of the European Union (hereinafter “CJEU”) has interpretative monopoly over EU law. The tribunal also dismissed this argument based on the reasoning that according to Art. 8(6) of the BIT, EU law might be applicable but that is a question of the merits.<sup>12</sup> Regarding the possibility of applying EU law, the CJEU does not have monopoly over the application and interpretation of EU law. Arbitral tribunals and national court apply and interpret EU law daily. It only has monopoly over the final interpretation of EU law.<sup>13</sup> The tribunal is therefore capable and entitled to apply EU law if it should be necessary when assessing the merits of the case. The Slovak Republic also asserted that the dispute is non-arbitrable according to German law. Based on the German Act on Civil Procedure,<sup>14</sup> disputes involving an economic interest are arbitrable unless any other German legal regulation provides that national courts have exclusive jurisdiction. The EU law is an integral part of the German law and according to the Respondent, it does not allow for the conferral of jurisdiction in the area covered by the BIT to an arbitral tribunal.<sup>15</sup> With respect to this argument, the arbitral tribunal repeated that the EU law does not deprive the tribunal of jurisdiction.<sup>16</sup>

### III. 3. Submission of Questions to the CJEU

Finally, the Respondent requested that the tribunal should submit the dispute to the CJEU for a preliminary ruling and stay its proceedings and that the European Commission should be invited to participate in the arbitration. The tribunal reiterated that EU law might be applicable, however, during the merits stage of the proceedings. With respect to the suspension of the proceedings until the CJEU and the European Commission have an opportunity to come to a decision, the tribunal concluded that at this stage of the proceeding, it would not be appropriate. However, it might become necessary during the later stage of the dispute.

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<sup>11</sup> *Ibid.*, para. 274.

<sup>12</sup> *Ibid.*, para. 279.

<sup>13</sup> *Ibid.*, para. 282.

<sup>14</sup> Section 1030 of the German Act on Civil Procedure.

<sup>15</sup> *Eureko B.V. v. Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, para. 145.

<sup>16</sup> *Ibid.*, para. 285.

### III. 4. Summarization

To sum it up, the tribunal dismissed all Respondent's arguments and decided that it has jurisdiction over the dispute and that the proceedings shall not be suspended until the European Commission and the CJEU come to a decision on the EU law aspects of the infringement proceedings.

## IV. DECISION OF THE FRANKFURT UPPER REGIONAL COURT

After the decision of the arbitral tribunal on jurisdiction, the Slovak Republic has filed a motion to the Higher Regional Court in Frankfurt am Main (hereinafter "Higher Court") to set aside the interim award on jurisdiction. The competence of the mentioned court to decide on the matter derives from the fact that the agreed place of arbitration was Frankfurt am Main. The Respondent essentially reiterated the same arguments supporting the lack of jurisdiction of the arbitral tribunal which were already presented before the tribunal itself.<sup>17</sup> The Higher Court assessed these arguments and came to the conclusion that the jurisdiction clause contained in the BIT is in accordance with the applicable (German) law as *lex arbitri*.<sup>18</sup> Secondly, the court also dismissed the argument that the jurisdiction clause is in contradiction to Art. 344 of the TFEU which provides for an exclusive jurisdiction of the CJEU. According to the Higher Court, the mentioned provision only applies to disputes among Member States of the EU, not disputes between investors and these states.<sup>19</sup> The Higher Court also repeated the conclusion of the arbitral tribunal that even if Art. 344 TFEU would not be concerned, the CJEU does not possess exclusive jurisdiction to decide on matters of EU law. The CJEU only has monopoly over the final interpretation of EU law, other courts and tribunals are entitled to apply it in their decision taking.<sup>20</sup> The Higher Court also did not accept the argument that Art. 8(2) BIT has been displaced through the accession of Slovak Republic to the EU pursuant to Art. 30(3) VCLT. Due to the fact that Art. 344 TFEU and Art. 8(2) BIT do not cover the same subject matter, Art. 30(3) VCLT is not applicable.<sup>21</sup> Furthermore, the Higher Court stated that the jurisdiction clause in the BIT is not in contradiction with Art. 18 TFEU which deals with the prohibition of discrimination. This provision can only have effect of extending the rights (to arbitrate disputes against the state) to other investors, not to limit the rights of investors already covered by the BIT.<sup>22</sup> Finally, the Higher Court also did not accept the proposition that an intra-EU BIT violates the principle of mutual trust between courts of the Member States.<sup>23</sup> To conclude, the Higher Court dismissed the claim of the Respondent to set aside the interim award on jurisdiction. Moreover, it also did not see any reason to submit a preliminary question to the CJEU.

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<sup>17</sup> Decision of the Higher Regional Court in Frankfurt am Main, pp. 5–7.

<sup>18</sup> *Ibid.*, pp. 14–15.

<sup>19</sup> *Ibid.*, pp. 16–17.

<sup>20</sup> *Ibid.*, p. 21.

<sup>21</sup> *Ibid.*, p. 23.

<sup>22</sup> *Ibid.*, pp. 23–24.

<sup>23</sup> *Ibid.*, pp. 24–25.



## V. APPEAL TO THE GERMAN SUPREME COURT AND DECISION OF THE CJEU

The Respondent appealed the decision of the Higher Court to the German Supreme Court (hereinafter “Supreme Court”) which referred questions to the CJEU for a preliminary ruling concerning the compatibility of the BIT jurisdiction clause with EU law. The Supreme Court asked the CJEU whether Art. 344, Art. 267 or Art. 18 TFEU “preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date”.<sup>24</sup> Essentially, the Supreme Court asked whether any of the mentioned provisions of the TFEU precludes the application of a jurisdiction agreement in a bilateral investment treaty between two Member States. The CJEU held that arbitral tribunals which decide a dispute based on a bilateral investment treaty between Member States have to apply and interpret EU law. However, these tribunals are not considered to be *courts* which are entitled to submit a preliminary question to the CJEU. The right of courts (dealing with a potential claim regarding the setting aside of an arbitral award) to refer questions to the CJEU for a preliminary ruling does not solve the problem since these courts only have limited powers to review the decision of the tribunal. The CJEU asserted that “*by concluding an intra-EU BIT, Member States have effectively consented to remove from the jurisdiction of their national courts certain disputes that could require the application and interpretation of EU law pursuant to Art. 19(1) TFEU.*”<sup>25</sup> The tribunal may be called upon to apply and interpret EU law but does not have the option to ask for a preliminary ruling, which “*call[s] into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties... and is not therefore compatible with the principle of sincere cooperation.*”<sup>26</sup> Based on the answers of the CJEU, the Supreme Court held that the dispute resolution clause contained in Art. 8 BIT is not compatible with EU law. On 1 May 2004, Slovakia became a Member State of the EU and the BIT became an agreement between Member States. The jurisdiction provisions of such agreements become unenforceable. Thus, the jurisdiction clause in the BIT could not be used as a basis of jurisdiction of the arbitral tribunal. Based on this, the arbitral award was set aside by the Supreme Court.

## VI. CONSEQUENCES OF THE CJEU DECISION

For a long time, international investment law has been the main mode of investment policy in Europe. Hundreds of intra-EU bilateral investment treaties have been concluded

<sup>24</sup> Case C- 284/16 *Slovak Republic v. Achmea BV*. ECLI:EU:C:2018:158, para. 23.

<sup>25</sup> WILSKE, S., FOX, T. J., STOUTEN, T. The View from Europe. What’s new in European Arbitration? *Dispute Resolution Journal*. 2017, No. 73, pp. 125 and 127.

<sup>26</sup> Case C- 284/16 *Slovak Republic v. Achmea BV*. ECLI:EU:C:2018:158, para. 58.

and there has been a tendency to resolve investment disputes through arbitration. EU law and investment arbitration have co-existed for many years.<sup>27</sup> The decision of the CJEU came to many as a surprise, especially due to the reason that the CJEU departed from the opinion of the Advocate General.<sup>28</sup> The decision has been criticized by many as a political one where reasoning has been adapted to conform with the intended result.<sup>29</sup> The question is, how will the ruling of the CJEU affect investment arbitration where the jurisdiction of the tribunal is based on an intra-EU BIT. It has to be stressed that there is no remedy against the CJEU decision, and that this decision constitutes a binding interpretation of EU law. Moreover, the decision has been handed down by the Grand Chamber consisting of 15 (out of totally 28) of the CJEU judges. Such composition is reserved for decisions with *exceptional importance*.<sup>30</sup>

## VI. 1. Difficulties for Arbitrations based on Intra-EU BITs

One option for investors from one Member States who have a claim against another Member State would be to make avail of the national courts in this latter Member State (since the jurisdiction provision in the BIT is ineffective). This dispute resolution mechanism, of course, is not considered as good as investment arbitration.<sup>31</sup> In case the investor, despite that, decides to opt for arbitration, the following aspects need to be considered. In case the Member State loses the arbitration (and probably also during the arbitral proceeding itself), it will try to set aside the award based on lack of jurisdiction of the tribunal or violation of public policy. Moreover, the Member State will probably also resist recognition and enforcement of the award based on the multiple reasons. Firstly, it can be claimed that there has not been a valid arbitration clause.<sup>32</sup> Secondly, it can be asserted that the subject matter of the dispute cannot be settled in arbitration.<sup>33</sup> Finally, the Member State can use the argument that the award is against public policy of the state of enforcement.<sup>34</sup> A possible option for the investor would be to try to enforce the award outside of the EU. In such case, the courts in the place of enforcement are not bound by EU law and the Achmea decision.

## VI. 2. Limitations of the CJEU Decision

Right after the CJEU decision in Achmea has been rendered, there have been tendencies of arbitrators and commentators to limit its application to the specific aspects of the

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<sup>27</sup> SKOURIS, V. Recourse to International Arbitration as a Means of Settlement of Disputes to which EU Law May Be Applicable. *IAI Series on International Arbitration*. 2018, No. 11, p. 191.

<sup>28</sup> Opinion of Advocate General Wathelet, case C-284/16, *Slovak Republic v. Achmea BV*, 19 September 2017.

<sup>29</sup> STIER, A. Enforcement of Arbitral Awards after Achmea. *Journal of Enforcement of Arbitration Awards*. 2018, No. 1, p. 69.

<sup>30</sup> Art. 16 of the Statute of the CJEU.

<sup>31</sup> The advantages of investment arbitrations are manifold, including (i) easier and quicker enforcement, (ii) informality of arbitral proceedings, (iii) swiftness of the proceedings and (iv) a tribunal which (generally) enjoys a higher degree of independence.

<sup>32</sup> Art. V(1)(a) of the New York Convention.

<sup>33</sup> Art. V(2)(a) of the New York Convention.

<sup>34</sup> Art. V(2)(b) of the New York Convention.



case.<sup>35</sup> Achmea was an arbitration decided according to the UNICTRAL Arbitration Rules whereby the place of arbitration has been in a Member State (Germany).

### VI.2.1. Effects on Arbitrations Based on the Energy Charter Treaty

The jurisdiction of the arbitral tribunal in Achmea was based on a provision of a bilateral investment treaty between two Member States. The Energy Charter Treaty (hereinafter “ECT”) was concluded in 1994 and it is a multinational treaty whereby the signatories are Member States, other (third) countries and also the EU itself. Art. 26 ECT provides for a dispute settlement mechanism according to which the investor is entitled to have his disputes decided by an arbitral tribunal. Since the EU itself signed and ratified the ECT, the EU and its institutions (particularly the CJEU) should not go against their own actions and claim that its provisions would cause a detriment to the application and interpretation of EU law. The EU became a party to the ECT without reservations which implies that the EU should not have any issues with its application (including its dispute resolution mechanism). *“From the point of view of international law it is difficult to accept that the principle of supremacy may ‘absolve’ the Member States from fulfilling their commitments towards foreign states or international organisations.”*<sup>36</sup> Moreover, the signatories of the ECT are also third countries. The approach which does not accept a possibility of settlement of disputes by arbitration in case of claims connected only with Member States would create two separate levels of protection depending on the facts whether third countries are concerned with the dispute. In Achmea, the CJEU stated: *“It is true that, according to settled case-law of the [CJEU], an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the [CJEU], is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected”*.<sup>37</sup> Thus, CJEU referred to the competence of the EU to conclude international treaties and establish international courts. Unfortunately, it did not refer specifically to the ECT.<sup>38</sup>

### VI.2.2. Effects on ICSID Arbitrations

The ECT and many bilateral investment treaties provide the investors with the option to choose an arbitration administered by the International Centre for the Settlement of Investment Disputes (hereinafter “ICSID”). The ICSID convention does not provide for a possibility to set aside the arbitral award by a national court. Instead, the award can be

<sup>35</sup> WILSKE, S., FOX, T. J., STOUTEN, T. The View from Europe. What’s new in European Arbitration? *Dispute Resolution Journal*. 2017, No. 73, pp. 125 and 128–129.

<sup>36</sup> SZPUNAR, M. The Impact of EU Law on International Commercial Arbitration. In: FERRARI, F. (ed.). *The Impact of EU Law on International Commercial Arbitration*. New York: JurisNet, LLC, 2017, p. 96.

<sup>37</sup> Case C-284/16 *Slovak Republic v. Achmea BV*. ECLI:EU:C:2018:158, para. 57.

<sup>38</sup> STIER, A. Enforcement of Arbitral Awards after Achmea. *Journal of Enforcement of Arbitration Awards*. 2018, No. 1, pp. 69 and 79.

set aside by another tribunal called the Annulment Committee.<sup>39</sup> The final awards have to be enforced by the signatory states of the ICSID convention in the same way as judgments of their state courts. In this regard, the arbitral award in the case of Micula should be mentioned.<sup>40</sup> In 2013, the arbitral tribunal ruled that investors' investments in Romania have been impaired by the state. The investors were awarded approx. 178 million EUR. The European Commission intervened as *amicus curiae* during the arbitration, asserting that an award compensating the investors would lead to the granting of state aid incompatible with EU rules. Romania filed for an annulment of the award before the ICSID Committee which was rejected. After a partial payment by Romania, the European Commission decided that such payment shall be considered as illegal state aid. It prohibited further payments and ordered Romania to recover the partial payment. The investors filed an application for annulment of the Commission's decision with the General Court. The General Court annulled the decision, asserting that EU law regarding state aid was not applicable since all the events took place before Romania's accession to the EU. With respect to the intra-EU aspect of the applicable bilateral investment treaty (between Sweden and Romania), the General Court distinguished this case from Achmea, stating that: "*the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it.*"<sup>41</sup> In the meantime, the investors have asked several national courts to enforce the award. The approach of the courts differs. The Swedish court declined enforcement (based on the Commission's decision), the Brussels Court of Appeal asked the CJEU for a preliminary ruling and the US court decided that: "*As a party to the ICSID Convention, the United States has a compelling interest in fulfilling its obligation under Article 54 to recognize and enforce ICSID awards regardless of the actions of another state. To do otherwise would undermine the ICSID Convention's expansive spirit on which many American investors rely when they seek to confirm awards in the national courts of the Convention's other member states.*"<sup>42</sup> Furthermore, it has to be mentioned that the decision of the General Court has been appealed by the Commission and the final decision will be handed down by the Court of Justice. To sum it up, it is far from clear to what extent the Achmea decision of the CJEU also applies to ICSID awards and what are the consequences of enforcing these awards in Member States and third countries. We need to wait how the CJEU (and other relevant court outside of the EU) deal with this issue to come to a definite conclusion. However, one conclusion can be mentioned already – the Achmea decision has caused a serious obstacle in the enforcement of investment arbitration awards.

## VII. CONCLUSION

During the whole process of dispute resolution connected with the claims of Achmea, the decisions pointed towards the conclusion that jurisdiction clauses in intra-EU bilateral

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<sup>39</sup> Art. 53 ICSID Convention.

<sup>40</sup> Ioan Micula and others v. Romania, ICSID case No. ARB/05/20.

<sup>41</sup> Case T-704/15 *Micula and Others v. Commission*, ECLI:EU:T:2019:423, para. 87.

<sup>42</sup> *Ioan Micula, et al. v. the Government of Romania*, No. 1:2015mc00107 – Document 66 (S.D.N.Y. 2015), Part C(1), p. 13.

investment treaties are valid and effective and can be used in order to establish jurisdiction of an arbitral tribunal. This was confirmed by the tribunal, the Higher Regional Court in Frankfurt and in the opinion of the Advocate General. However, the final interpretation was provided by the CJEU which decided that EU law “*must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*”<sup>43</sup> Based on this, the Member States have terminated or started terminating their intra-EU bilateral investment treaties.<sup>44</sup> This conclusion is unfortunate for investors (from a Member State who execute their investment in another Member State). It also creates considerable legal uncertainty connected with the questions to what extent the Achmea ruling also applies to multinational treaties, ICSID awards and enforcement proceedings outside of the EU. The CJEU ruling certainly did not contribute towards the lowering of risk for investors regarding the protection of their investment. There is a tendency of arbitral tribunals to distinguish the Achmea case and to limit its effects to the specific circumstances.<sup>45</sup> Nevertheless, this does not remove the legal uncertainty. National courts are clearly not a preferred forum for investors – otherwise they would not choose to recover their claims through arbitration. At the end it should be mentioned that one of the circumstances which led to the CJEU decision in Achmea was the unwillingness of the Slovak government to voluntarily pay the damages according to the arbitral award. This is again a negative sign towards the investors. It seems that investment arbitration within the EU has moved towards the wrong direction. It should also be emphasized that the Member States did not follow a consistent approach following the Achmea ruling – there is currently a heterogeneous approach which is not a positive signal to future investors. It might lead to a new structuring of investments or preference of investments towards non-EU members. It is up to the EU to try to remedy the situation and come up with a dispute resolution mechanism which will adequately protect the investors.

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<sup>43</sup> Case C- 284/16 *Slovak Republic v. Achmea BV*. ECLI:EU:C:2018:158, para. 60.

<sup>44</sup> ZHANG, Y. Mutual Termination of Sunset Clauses in Intra-EU BITS: The Search for Investor Protection, *The American Review of International Arbitration*. 2018, No. 29, pp. 173 and 174.

<sup>45</sup> Several tribunals have concluded that they have jurisdiction despite Achmea, e.g. in cases *Vattenfall v. Germany* and *Masdar Solar & Wind Cooperatief v. Spain*.