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## **INVESTOR STATE ARBITRATION AS PART OF EU'S JUDICIAL SYSTEM**

### **ABSTRACT**

*There is a long lasting debate between legal scholars if investor state arbitration is part of EU's judicial system. Some argue that Investor state arbitration is incompatible with the autonomy of EU law and with the role of the Court of Justice of the European Union, which is guarding the uniform interpretation and application of EU law. Some have contrary opinion. In recent decision in Case C-284/16 the Court of Justice of the European Union declared that the investor-state arbitration provision in the bilateral investment treaty between The Netherlands and Slovakia is incompatible with EU law. The Court of Justice of the European Union did not follow the Advocate General's Opinion, which reached the opposite conclusion. Taking into consideration two opposing opinions, the goal of the paper is to analyse recent case law and argue whether other investment arbitration tribunals set up under intra-EU bilateral investment treaties should be seen as courts common to the member states and are therefore fully part of the EU's judicial system. The author concludes that as the Court of Justice of the European Union focused only on the specific bilateral investment treaty between the Netherlands and Republic of Slovakia at issue, it is difficult to apply the same argumentation on disputes currently pending under the Energy Charter Treaty if only two member states of the EU are involved.*

**Keywords:** *Investor-state arbitration, bilateral investment treaty, arbitration, TFEU*

### **1. INTRODUCTION**

After the Lisbon Treaty we live on times of backlash of investor state arbitration in European Union (EU). The Treaty of Lisbon extended the EU's exclusive competences by including foreign direct investment in common commercial policy. It is important that in May 2017, the European Court of Justice published Opinion 2/15 where it held that matters related to foreign direct investment fall within the exclusive competence of the EU, apart from investment protection (to the extent it relates to non-direct investments) and investment arbitration, which fall within a competence shared between the EU and the member states.<sup>1</sup>

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<sup>1</sup> Opinion of the Court 2/15 [2017], ECLI:EU:C:2017:376, para. 305

The legality of investor–state dispute settlement, in EU trade agreements under EU law is a contentious issue among academics and legal experts. The main question concerns the autonomy of the EU legal order and investor state arbitration effect on the exclusive jurisdiction of the EU courts to hear claims for damages.

In recent decision in *Slovakia Republic v Achmea B.V.*<sup>2</sup> the Court of Justice of the European Union (European Court of Justice) found that the investor state arbitration provision in the bilateral investment treaty between The Netherlands and Slovakia is incompatible with EU law. The Court did not follow the Advocate General’s Opinion, which reached the opposite conclusion. In the same dispute the investment arbitral tribunal in the case *Achmea v. Slovakia*<sup>3</sup> took another view when decided on jurisdiction. The tribunal held that there was no incompatible provision for protecting an investment and fundamental investor rights under Intra-EU bilateral investment treaties and EU law. Present opposing arguments are based upon different political visions,<sup>4</sup> and that means that the debate on the issue won’t end soon.

Current development proves the topicality of the issue and raises additional questions concerning the future of investor – state arbitration clauses in bilateral investment treaties concluded by EU member states. The question of disputes - still open concerning bilateral investment treaties, is unclear after the decision of the European Court of Justice.

In the following chapters the author will analyse the role of investor-state arbitration in EU’s judicial system from perspective of international arbitral tribunals and the European Court of Justices. Taking into consideration two opposing opinions, the goal of the paper is to analyse recent case law and argue whether other investment arbitration tribunals set up under intra-EU bilateral investment treaties should be seen as courts common to the member states and are therefore fully part of the EU’s judicial system.

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<sup>2</sup> Case C-284/16 *Slovakia Republic v Achmea B.V.* [2018] ECLI:EU:C:2018:158, para. 60

<sup>3</sup> UNCITRAL, PCA Case No. 2008-13 *Achmea B.V. v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension [2010]

<sup>4</sup> Niemelä, P., *The Relationship of EU Law and Bilateral Investment Treaties of EU Member States: Treaty Conflict, Harmonious Coexistence and the Critique of Investment Arbitration*, Helsinki, 2017, Academic Dissertation, p. 6

<sup>1</sup><https://helda.helsinki.fi/bitstream/handle/10138/225135/TheRelat.pdf?sequence=1> Accessed 1 April 2018

## 2. THE COMPLEX ROLE OF INVESTOR-STATE ARBITRATION IN INTERNATIONAL INVESTMENT DISPUTES IN EU

Investor-state arbitration is known since the mid-twentieth century when first bilateral investment treaty was concluded. The system provides advantages for both parties: investor and host state. It is considered to be more independent and flexible than national courts, as both parties have the opportunity to choose arbitrators and the proceedings of the dispute settlement are mostly confidential. At the end of arbitration process there is a binding decision based on law. A variety of institutions or rules are available for arbitration between foreign investor and host state. The parties may choose to settle the dispute in ad-hoc arbitration, which is in the case when arbitration is not supported by a particular arbitration institution. In practice, majority of the cases are brought under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) which promotes economic development through the creation of a favorable investment climate.<sup>5</sup> The ICSID Convention created the International Centre for Settlement of Investment Disputes (ICSID). ICSID provides system of dispute settlement that is specialized in investor-state disputes.<sup>6</sup> Some bilateral investment treaties leave the investors with the choice between ICSID and other types of arbitration, as ICSID is not the only institution for foreign investment arbitration.

The treaties under which investor state arbitration have arisen have either been bilateral investment treaties or multilateral investment treaties, for example, North America Free Trade Agreement (NAFTA). Bilateral investment treaties are treaties between two states containing reciprocal undertakings. They provide a direct way for investors to protect their rights through arbitration against the state in which they have invested, if the standards of treatment contained in treaty have been breached. Bilateral investment treaties generally include standard provisions related to the protection provided by international legal principles.

In the EU there is a division of intra-EU bilateral investment treaties and extra-EU bilateral investment treaties. The latter are concluded between a member state and a third state. After the Lisbon Treaty there is a transitional regime for extra-EU BITs, which allows their continued existence on a number of conditions until the

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<sup>5</sup> ICSID Convention, Regulations and Rules. *Convention on the settlement of investment disputes between states and national of other states*, p. 11  
[<https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf>]  
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<sup>6</sup> Reed, L., Paulsson, J., Blackaby, N., *Guide to ICSID Arbitration*, Kluwer Law International, 2011, pp. 6-9

EU has concluded equivalent investment protection treaties with the respective third states.<sup>7</sup> The regulation<sup>8</sup> expressly states that extra-EU BITs ‘remain binding on the member states under public international law’, and it simultaneously requires that member states ‘take the necessary measures to eliminate incompatibilities, where they exist, with EU law, contained in bilateral investment agreements concluded between them and third countries’.

After the enlargement of the EU in 2004 and 2007, new member states joined the European Union. Intra-EU bilateral investment treaties are the ones concluded between the new member states and the old ones at that time, before they entered EU. In general intra-EU bilateral investment treaties are concluded between two EU member states. Intra-EU bilateral investment treaties have been described as anomaly within the EU internal market.<sup>9</sup> These investment agreements, which may favor foreign investors, may contain provisions that conflict with provisions of EU law. In result some EU member states are being sued by foreign investors in arbitration for the new policies they implement when trying to comply with EU Law. European Court of Justice has held that EU law prevails over member states’ mutual treaty obligations in case of conflict,<sup>10</sup> but the application of primacy of EU law outside the EU legal order is not evident.

Division of intra and extra bilateral investment treaties is the main reason for jurisdiction of investor state arbitration to become relevant when there is an investment dispute between two EU member states and bilateral investment treaty with arbitration clause is present. There are some areas where a possibility of conflict between EU law and bilateral investment treaty provisions may occur and in those situations it doesn’t matter if it is intra-EU bilateral investment treaty or extra-EU bilateral investment treaty. The situations may concern: Capital transfer restrictions, performance requirements, public policy exceptions, state aid prohibitions and liberalization, overlap with EU trade agreements with third countries.<sup>11</sup> As extra-EU bilateral investment treaties are covered by public international law, the principle of supremacy of EU law does not apply.

<sup>7</sup> See Case 41/76 *Suzanne Criel v. Procureur de la République*, ECLI:EU:C:1976:182, para. 32

<sup>8</sup> Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member states and Third Countries [2012] OJ L 351, pp. 40-46

<sup>9</sup> PCA Case No. 2008-13, *Eureko v Czech Republic*, Award on Jurisdiction, Arbitrability and Suspension [2010], para. 177

<sup>10</sup> See Case C-3/91 *Exportur SA v. LOR SA and Confiserie du Tech*, ECLI:EU:C:1992:420, para. 8

<sup>11</sup> Kleinheisterkamp, J., *Investment protection and EU law: The Intra- and Extra- EU dimension of the Energy Charter Treaty*, Journal of International Economic Law 15(1), 2012, pp. 85-109

The European Commission is on the opinion that since the Lisbon Treaty, bilateral investment treaties made between EU member states are incompatible with EU law. That would mean that Investor- state arbitration provisions included in those treaties should be governed by the legal framework of the EU and investor - state arbitration tribunals have no jurisdiction.

Mostly arbitral tribunals have refused to uphold this opinion. For instance, the arbitral tribunal in *Achmea v. Slovakia*<sup>12</sup> when deciding on jurisdiction analysed the argument that Article 351 of TFEU requires the member states to take action against incompatibilities between EU law and an earlier treaty. The tribunal held that intra-EU bilateral investment treaties provided wider investment protection than EU law and that there was no incompatible provision for protecting an investment under Intra-EU bilateral investment treaties and EU law. The tribunal also noticed that there was no intention on the part of the member states to derogate from the application of Intra-EU bilateral investment treaties.

It is also discussed in scholar articles, that protection of bilateral investment treaties are broader and more effective than remedies available under EU law and national laws of the member states.<sup>13</sup> At the same time it is considered that any comparison of the particular remedies will reveal that the comparison is difficult by nature.<sup>14</sup>

In the arbitration case the question of supremacy of EU law was discussed. Principle of supremacy enables EU law to prevail over treaties concluded between EU member states. The tribunal decided that international law had to be applied as a matter of law, while EU law may be applied as facts, in assessing whether there was a breach of the afforded substantive protection. The principle of supremacy concerns only EU and EU member states in EU law matters, but tribunals gain jurisdiction based on bilateral investment treaty or ICSID Conventions, which are part of public international law. That means that arbitral tribunal is of the opinion that also intra-EU bilateral treaties are part of public international law.

The analyse went together with concerns of the exclusive jurisdiction of the European Court of Justice on interpreting EU law and providing preliminary rulings. There is no option for arbitral tribunals to seek preliminary rulings if there is a need to make interpretation on EU law. Arbitral tribunal in this case was on the opinion

<sup>12</sup> UNCITRAL, PCA Case No. 2008-13 *Achmea B.V. v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension [2010]

<sup>13</sup> Sattorova, M., *Investor Rights under EU Law and International Investment Law*, 17 Journal of World Investment & Trade, 2016, pp. 895-918

<sup>14</sup> Paparinskis, M., *Investors' Remedies under EU Law and International Investment Law*, 17 Journal of World Investment & Trade, 2016, pp. 919-941

that the European Court of Justice had no jurisdiction over investor-state disputes, and there was no prohibition of investor-State arbitration under EU law. Similarly, the arbitral tribunal in *Micula v. Romania*<sup>15</sup> case refused to allow the prevailing application of EU law over the bilateral investment treaty, since the investment was made prior to Romania's accession to the EU, thus being subject only to the intra-EU bilateral investment treaty. In general Commission's submission that European Court of Justice has exclusive jurisdiction whenever an issue of EU law arises in a dispute has been rejected by several tribunals - *Eureko v. Czech Republic*,<sup>16</sup> *Binder v. Czech Republic*,<sup>17</sup> *Eastern Sugar BV v. Czech Republic*.<sup>18</sup> Arbitral tribunals have explained that investment treaty tribunal is vested with jurisdiction by virtue of bilateral investment treaty and ICSID Convention. It is argued that international law is controlling tribunals and providing them with jurisdiction. The fact that investors may have more rights under bilateral investment treaty than EU law does not mean that there is an incompatibility. In *Eureko v. Czech Republic* tribunals stressed that nothing in EU law precludes investor-state arbitration.

Argumentation above leads to a chance for possibility that a tribunal renders an award allegedly incompatible with EU law. One may argue that in this case national court of member state might set aside award, given that EU law forms part of public policy or refuse recognition or enforcement. This argument would not be valid if the award is rendered under ICSID Convention, because ICSID Convention specifically rules out any invocation of "ordre public" or "public policy" in a challenge to ICSID awards.<sup>19</sup>

### 3. RECENT VIEW OF THE EUROPEAN COURT OF JUSTICE ON THE COMPATIBILITY OF INVESTOR STATE ARBITRATION WITH EU LAW

From the perspective of EU many serious question arise when discussing compatibility issue of investor state arbitration with EU law. First of all it concerns the principle of non-discrimination in EU single market. If it is concluded that inves-

<sup>15</sup> ICSID Case No. ARB/05/20 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, Decision on Jurisdiction and Admissibility, 2008

<sup>16</sup> PCA Case No. 2008-13 *Eureko v Czech Republic*, Award on Jurisdiction, Arbitrability and Suspension, 2010, para. 177

<sup>17</sup> UNCITRAL case *Binder v Czech*, Award on Jurisdiction, 2007

<sup>18</sup> SCC Case No.088/2004 *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, Partial Award, 2007

<sup>19</sup> Ku, J. G., *Enforcement of ICSID Awards in the People's Republic of China*, 6 *Contemp.asia Arb. J.* 31, 2013

[[https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1305&context=faculty\\_scholarship](https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1305&context=faculty_scholarship)] Accessed 1 April, 2018

tor state arbitration is part of EU judicial system, then it results that investors from certain member states enjoy a greater degree of protection than that afforded by the EU Law. In the light of intra-EU bilateral investment treaties, it is important to note that arbitral tribunals are not bound to the same restrictions on judicial review as courts of the European Union and national courts in the member states.

The European Commission has been strict on the opinion that intra EU bilateral treaties are contrary to EU Law.<sup>20</sup> There were also several infringement proceedings launched against Austria, the Netherlands, Romania, Slovakia and Sweden in respect of their intra-EU bilateral investment treaties.<sup>21</sup>

Recently the question of investment arbitration in intra-EU disputes were discussed in European Court of Justice in the case *Slovakia Republic v Achmea*. The process divided arbitration community in two fronts as the Opinion of Advocate General defended investor state dispute settlement as part of EU judicial system in contrary to the decision of The Court.

The case concerned reference for preliminary ruling by a German Federal Court of Justice about the validity of an award rendered by an Investor-State dispute settlement mechanism established by an intra-EU bilateral investment treaty. The award was issued against the Slovak government as the result of the partial reversal of the privatization of the Slovak health care system.

In an advisory Opinion to the European Court of Justice, Advocate General Wathelet suggests that an investor state dispute settlement mechanism between two member states is not contrary to EU law. That means that there is no conflict of jurisdiction between the EU courts and investor state arbitration. Advocate general also argues that, in disputes arising from bilateral investment treaties between two member states, arbitral tribunals may refer questions on the interpretation of EU law to the European Court of Justice by way of the preliminary reference procedure.<sup>22</sup> That would mean that arbitral tribunals are under an obligation to apply EU law in the same way as any other court in EU member states.

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<sup>20</sup> Commission newsletter, *Get the facts: Intra-EU bilateral investment treaties*, 2015, [[http://ec.europa.eu/newsroom/fisma/item-detail.cfm?item\\_id=24581&utm\\_source=fisma\\_newsroom&utm\\_medium=Website&utm\\_campaign=fisma&utm\\_content=Get%20the%20facts%20Intra-EU%20bilateral%20investment%20treaties%20&lang=en](http://ec.europa.eu/newsroom/fisma/item-detail.cfm?item_id=24581&utm_source=fisma_newsroom&utm_medium=Website&utm_campaign=fisma&utm_content=Get%20the%20facts%20Intra-EU%20bilateral%20investment%20treaties%20&lang=en)] Accessed 1 April, 2018

<sup>21</sup> SCC Case No.088/2004 *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, Partial Award, 2007

<sup>22</sup> Case C-284/16 *Slovakia Republic v Achmea B.V* [2018], Opinion of Advocate General Wathelet delivered on 19 September 2017, ECLI:EU:C:2017:699, para. 131

The Advocate General discusses that accession treaties of the member states did not provide for the termination of intra-EU bilateral investment treaties, thus providing for uncertainty.<sup>23</sup>

In the Opinion Advocate General argues the most common issues raised against investor state dispute settlement mechanisms in EU judicial system. Firstly, Advocate General claims that there was no discrimination on grounds of nationality, even though the concerned bilateral investment treaty benefitted only investors from the Netherlands and Slovakia and not from other member states. Advocate General explains that Slovakia has concluded other bilateral investment treaties with other EU member states providing basically the same treatment. Advocate General supports argumentation with the prior case law and uses analogy with the Case C376/03,<sup>24</sup> where decision concerned Double Taxation Treaties. In this case the European Court of Justice held that member states were permitted under EU law to engage in bilateral treaties granting rights to each other's nationals in matters of taxation. In general the European Court of Justice in this case found that these treaties was not discriminatory notwithstanding the fact that a national from a third member state cannot take advantage of them. In overall Advocate General concludes that Investor state dispute settlement mechanism in not contrary to Article 18 of the Treaty of Functioning of European Union (TFEU). Interesting is the fact, that in his Opinion Advocate General noted how the EU membership was divided over the question whether intra-EU BITs are compatible with EU law. There were five EU member states: Austria, Finland, France, Germany and the Netherlands which argued for compatibility, while eleven member states argued the opposite.<sup>25</sup> It may be explained that division reflects the member states' different experiences of investment arbitration.

Secondly Advocate General states that there is no contradiction between Investor states dispute settlement clause in bilateral investment treaty and Article 344 of TFEU. In general Article 344 of TFEU provides that EU member states undertake not to submit a disputes concerning interpretation of EU law to any other dispute settlement mechanisms outside EU legal system.<sup>26</sup> Firstly Advocate General argues that Article 344 TFEU does not apply to disputes between member state and foreign investor. Consistent analysis was performed by the arbitral tribunal at the

<sup>23</sup> *Ibid.* para. 41

<sup>24</sup> *Ibid.* para. 73-75

<sup>25</sup> *Ibid.* para. 34-35. Member states that argued the opposite: Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy, Latvia, Poland, Romania, the Slovak Republic and Spain

<sup>26</sup> Art. 344 TFEU (Lisbon)



jurisdiction challenge stage in the arbitration proceedings in *Achmea v. Slovakia* and other investment arbitration tribunals that have dealt with this issue.<sup>27</sup>

Further Advocate General argues that dispute does not concern the interpretation of EU law, but interpretation of bilateral investment treaty and thus the arbitral tribunal's jurisdiction in present case was expressly confined to the alleged breaches of the bilateral investment treaty. Advocate general concludes that by their scope bilateral investment treaties are wider than EU law.

While approach taken by Advocate general may work for arbitral tribunals established under UNCITRAL arbitration rules as in this case and having their seat within the EU, it is problematic to see how arbitral tribunals, seated outside the EU, could be required to be able to request preliminary rulings from the European Court of Justice. This is even less possible for ICSID arbitral tribunals, which operate under the ICSID Convention. ICSID Convention contains significant differences as regards enforcement and the possibility of national courts to review the compatibility of arbitral awards with EU law. In the recent decision European Court of Justice took into consideration these arguments and issued a decision contrary to the Opinion of Advocate General.

European Court of Justice in decision of March 6, 2018 in the case *Slovakia vs. Achmea BV*<sup>28</sup> ruled that arbitration clauses in bilateral investment treaties concluded between EU member states – intra-EU bilateral investment treaties, were incompatible with, and had an adverse effect on EU law.

In the decision the European Court of Justice agrees with the argumentation of the European Commission that, by concluding the bilateral investment treaty with arbitration clause, Slovakia and the Netherlands had established a mechanism for settling disputes which was not capable of ensuring that those disputes will be decided by a court within the judicial system of the EU, which is able to ensure the full effectiveness of EU law. The European Court of Justice stated that Articles 267 and 344 of TFEU must be interpreted as preventing a provision in an international agreement concluded between member states, such as arbitration clause in the bilateral investment treaty between the Netherland and Slovakia. Arbitration clause in the treaty meant that an investor from one of those member states may, in the event of a dispute concerning investments occur 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. The

<sup>27</sup> UNCITRAL, PCA Case No. 2008-13 *Achmea B.V. v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension [2010]

<sup>28</sup> Case C-284/16 *Slovakia Republic v Achmea B.V* [2018] ECLI:EU:C:2018:158

European Court of Justice stressed that arbitration clause of the intra EU bilateral investment treaty in question “has an adverse effect on the autonomy of EU law” and was not compatible with the principle of sincere cooperation.

The ruling of the European Court of justice is significant as it is binding on all member states. However, the full impact of the decision is not yet clear, as the European Court of Justice focused only on the specific bilateral investment treaty between the Netherlands and Slovakia at issue and did not hand down a ruling of general application. If the further practice shows that the ruling has more general nature then the investor state dispute settlement clauses in the nearly 200 intra EU bilateral investment treaties currently in force, are incompatible with EU law.

What is also not so clear from the decision is whether this also applies to bilateral investment treaties concluded between individual EU member countries and third States. The fact that the decision doesn’t cover extra-EU bilateral investment treaties gives some hope for investor state dispute settlement mechanism to survive in other aspects apart from intra-EU bilateral investment treaties. The European Court of Justice is also not clarifying if the ruling also applies to the disputes currently pending under the Energy Charter Treaty if only two member states of the EU are involved. From the perspective of investors, also the question of “legitimate expectations” arises after decision.

The European Court of Justice didn’t provide for alternative in its’ ruling, but in recent years initiative comes from European Commission. In order to address criticisms towards investor state dispute settlement, the EU’s approach has been in attempt to use an Investment Court System in trade and investment agreements it concludes on behalf of its Member states. For example, the provision was included in The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. Investment Court System involves a permanent and institutionalized court, whose members are appointed in advance by the parties to the treaty instead of being appointed on a case-by-case basis by the investor and the state involved in the dispute. That is different from the appointment mechanisms used in investor state arbitration. An appellate body is also provided for by CETA.

#### **4. CONCLUDING REMARKS**

The European Court of Justice has decided that investor state arbitration is not part of EU’s judicial system. The ruling is significant, however the full impact of the decision is not yet clear, as it only covers specific bilateral investment treaty at issue and doesn’t hand down a ruling of general application. At the same time it

is clear that the ruling will have an adverse impact on the enforcement of future investment arbitration awards.

Investor state arbitration is an important dispute resolution mechanism, but after decision of European Court of Justices there are various questions, when the dispute concerns an intra-EU investment issue, which make the mechanism less attractive. At the same time European Court of Justice failed to provide safe and fair alternative for investment protection. The question how investment arbitration shall be shaped within the EU and in the context of the applicable EU law is still open.

The public international law implications of the Europeans Courts of Justice judgment will have to be considered and determined by the national court, as well as arbitral tribunals called upon to decide disputes under intra-EU bilateral investment treaties. Respondent EU member states will rely on the judgment of European Court of Justice in on-going and future arbitrations of intra-EU bilateral investment treaty disputes to challenge the jurisdiction of tribunals and to resist the enforcement, or to challenge the validity, of awards. Change in performance of EU member states will make investment disputes in arbitration unpredictable and long developed investment protection mechanisms undesirable. That also could lead to situations when investors are forced to restructure their investment in order get protection guaranteed in bilateral investment treaty.

The judgment of the European Court of Justice will also put pressure on EU member states to terminate intra-EU bilateral investment treaties and in general will support the European Commission in the pending infringement proceedings against certain member states refusing to terminate their intra-EU bilateral investment treaties.

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