

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Gavrilović and Gavrilović d.o.o.

v

Republic of Croatia

(ICSID Case No. ARB/12/39)

DECISION ON THE RESPONDENT'S REQUEST OF 4 APRIL

Members of the Tribunal

Dr Michael C. Pyles AO PBM, President of the Tribunal

Dr Stanimir A. Alexandrov, Arbitrator

Mr Christopher Thomas QC, Arbitrator

Secretary of the Tribunal

Ms Jara Minguez Almeida

Assistant to the President of the Tribunal

Mr Andrew Di Pasquale

Date: 30 April 2018

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I. INTRODUCTION

1. This arbitration arises out of the alleged investments of Mr Georg Gavrilović, a national of Austria, and Gavrilović d.o.o., a company organised under the laws of Croatia (together, the “**Claimants**”), in the Republic of Croatia (the “**Respondent**” or “**Croatia**”) (collectively, with the Claimants, the “**Parties**”).
2. On 21 December 2012, the Claimants commenced this arbitration under the auspices of the International Centre for Settlement of Investment Disputes (“**ICSID**”) on the basis of the Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments, which entered into force on 1 November 1999 (the “**BIT**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
3. The Respondent's Counter-Memorial on the Merits and Memorial on Preliminary Objections was filed on 31 October 2014.
4. The substantive hearing of the issues for determination in this arbitration was held in March 2016. A hearing following the submission of post-hearing briefs was held in September 2016.
5. The parties were informed in March 2018 that the Tribunal expected that the award may be issued in a few months.
6. This Decision sets out the Tribunal's analysis of, and decision in respect of, the Respondent's request to fix a schedule for pleadings on its “supplementary preliminary objections” raised by letter of 4 April 2018 (the “**Request of 4 April 2018**”).
7. For the reasons in Section IV below, the Tribunal has decided to dismiss the Respondent's Request of 4 April 2018, and, therefore, it will not fix a schedule for pleadings concerning the same.

II. RELEVANT PROCEDURAL BACKGROUND

8. On 4 April 2018, the Respondent submitted a letter to the Tribunal to draw attention to the ruling of the Grand Chamber of the Court of Justice of the European Union (“CJEU”) in Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea B.V.* (“*Achmea*”), and raise supplementary preliminary objections to the jurisdiction of the Tribunal and the admissibility of the Claimants’ claims. Accordingly, the Respondent requested that the Tribunal fix a schedule for the Respondent’s supplementary preliminary objections.
9. At the invitation of the Tribunal, on 11 April 2018, the Claimants submitted a letter to the Tribunal in response, asking that the Respondent’s request be dismissed and providing short submissions in support.
10. On 14 April 2018, the Respondent submitted a further letter in support of what it characterised as its request to fix a schedule for pleadings on its supplementary preliminary objections.
11. At the invitation of the Tribunal, on 20 April 2018, the Claimants submitted comments on the Respondent’s letter of 14 April 2018.

III. THE PARTIES’ SUBMISSIONS

A. THE RESPONDENT’S REQUEST OF 4 APRIL 2018

12. The Respondent submits that the ruling of the CJEU in *Achmea* is “a new circumstance of a fundamental nature that will decisively affect the outcome of this arbitration” that calls for further submissions by the Parties.
13. The Respondent states that in *Achmea* the CJEU ruled “that the Treaty on the Functioning of the European Union precludes provisions in an international agreement concluded between EU Member States under which an investor from one of those Member States may bring arbitral proceedings against the other Member State.”

14. The Respondent argues that the judgment of the CJEU was unknown to the Tribunal and the Respondent before 6 March 2018, and the Parties could not have addressed it in their earlier case presentations.
15. Accordingly, the Respondent requests the Tribunal to fix a schedule for pleadings limited to the Respondent's supplementary preliminary objections to the jurisdiction of the Tribunal and the admissibility of the Claimants' claims, including pursuant to Article 11(2) of the BIT.

B. THE CLAIMANTS' RESPONSE OF 11 APRIL 2018

16. The Claimants submit that the Respondent's request of 4 April 2018 should be dismissed, as it was raised too late in the proceedings and was based on a "gross misinterpretation of the reach and effect" of the *Achmea* decision.
17. The Claimants argue that, first and foremost, the ICSID Arbitration Rules require that jurisdictional objections must be raised as early as possible, but no later than the expiration of the time limit for the filing of the Counter-Memorial. According to the Claimants, because the Respondent failed to raise any European Union law related objections to the Tribunal's jurisdiction in compliance with this provision, it should now be barred from doing so.
18. The Claimants contend that the jurisdictional objections related to the EU law compatibility of certain elements of investor-State arbitration were not previously "unknown" to the Respondent, and have been raised in numerous cases over the past 10 years. Rather, the Claimants posit that the Respondent "simply decided not to plead EU law related preliminary objections in this case."
19. Further, the Claimants contrast the situation in *Achmea* with that in the present case, where the relevant State measures and the filing of the Request for Arbitration predate Croatia's accession to the EU on 1 July 2013. According to the Claimants, it is well established that

the CJEU has no jurisdiction to interpret EU law in matters where the facts arose prior to a country's accession, such that EU law, including the ruling in *Achmea*, have no application here.

20. Finally, the Claimants contend that the Respondent's consent to this arbitration was perfected when the Claimants filed the Request for Arbitration on 16 November 2012. From that date, in accordance with Article 25(1) of the ICSID Convention, "no party may withdraw its consent unilaterally", including through any alleged change in internal law that would invalidate such consent, or an alleged incapacity to have entered into such consent. Thus, the Claimants submit that, regardless of any alleged effects of *Achmea* on the Austria-Croatia BIT, it can have no bearing on the Tribunal's jurisdiction in this case.
21. In sum, the Claimants contend that the Respondent's Request "is nothing more than a[n] attempt to further prolong the resolution of the dispute before this Tribunal", and, at this stage, no further submissions should be allowed.

C. THE RESPONDENT'S COMMENTS IN REPLY OF 14 APRIL 2018

22. The Respondent contends that its objections based on the *Achmea* judgment are timely. ICSID Arbitration Rule 41(1) permits objections to be raised later than the Counter-Memorial if "the facts on which the objection is based are unknown to the party at that time." The Respondent says that it bases its objections on the *Achmea* judgment of the CJEU of 6 March 2018. According to the Respondent, it is undisputed that this is the date when the supreme court of the European Union in matters of EU law determined that intra-EU investor-State arbitration clauses, such as Article 9 of the Austria-Croatia BIT, are precluded by EU law. It follows, according to the Respondent, that this is the earliest possible point in time when the Respondent could advance its objections based on this new and authoritative ruling that addresses the situation at hand (namely, investment arbitration between EU nationals and an EU Member State). The Respondent raised its objections shortly thereafter on 4 April 2018. Any discussions pre-dating the *Achmea* judgment could

not take into account the repercussions of the ruling of the Grand Chamber of 6 March 2018 “and any related observations”.

23. The Respondent also points to Article 41(2) and contends that “objections to the jurisdiction of the Tribunal cannot be ignored if raised during the pendency of the proceedings, as here.” Further, the Tribunal has a duty to verify its jurisdiction *ex officio* and it is empowered to deal with jurisdictional questions of its own motion “at any stage of the proceeding” under Arbitration Rule 41(2).
24. Further, the Respondent says that the Claimants also make submissions on the substance of the Respondent's supplementary preliminary objections, and advance the following short observations in response. First, the Claimants' suggestion that EU law and the *Achmea* ruling have no application *ratione temporis* is mistaken. It is sufficient to dispose of the Claimants' objection to note that the Claimants also impugn State measures post-dating the accession of the Republic of Croatia to the EU, including land registrations that took place in 2017. It is also settled case law that rulings of the CJEU under the preliminary reference procedure, as in *Achmea*, must be applied *ab initio* from the time the respective provisions (here, what are currently known as Articles 267 and 344 of the Treaty on the Functioning of the European Union (“TFEU”)) entered into force.
25. Secondly, Article 11(2) of the Austria-Croatia BIT illustrates that there was never an offer of consent to arbitrate investor-State disputes if this is “incompatible with the legal acquis of the European Union (EU) in force at any given time.” Accordingly, the Claimants' argument that consent was allegedly irrevocably perfected with the filing of the Request for Arbitration on 16 November 2012 is “ill-considered.”
26. In sum, the Respondent submits that Article 9 of the BIT is inapplicable and this arbitration must come to an end forthwith.

D. THE CLAIMANTS' SECOND ROUND OF COMMENTS OF 20 APRIL 2018

27. First, in response to the Respondent's (new) argument that the *Achmea* judgment is a "fact", the Claimants contend that the judgment is a legal ruling, not a "fact" as envisaged by Rule 41(1). Moreover, even if it is assumed, for the sake of argument, that the *Achmea* judgment constitutes a "fact" pursuant to Rule 41(1), it is not the fact upon which the Respondent's objection will truly be based: the relevant fact is simply that the Claimants rely on a BIT in place between two EU Member States, a fact which has been known to the Respondent since its accession to the EU on 1 July 2013.
28. Secondly, the Claimants note the Respondent's argument that Article 41(2) of the ICSID Convention and Arbitration Rule 41(2) give rise to a "duty" of the Tribunal to hear any preliminary objection, so long as it is brought during the pendency of the proceedings. In response, the Claimants posit that this proposition would render Rule 41(1) meaningless, and point out that the Respondent cites no authority for its proposition. Although Rule 41(2) states that the Tribunal "may, on its own initiative" consider its jurisdiction at any stage of the proceedings, the Claimants stress that numerous tribunals have declined to exercise this discretion when a party raises a belated preliminary objection, based on the language of Rule 41(1).
29. Thirdly, the Claimants argue that the inconvenience and disadvantage to the Claimants in permitting the briefing of the Respondent's supplementary objections is "manifest". The Claimants point to the fact that they brought their claims over five years ago, and have spent considerable effort and expense responding to the numerous preliminary objections already submitted by the Respondent. Further, to add delay and expense to these proceedings 18 months after the last hearing in this case, as the Tribunal prepares to render its Award, to address an additional objection the Respondent "chose not to bring in a timely manner", would be a severe disadvantage and inconvenience to the Claimants. This is said to be particularly true as the Second Claimant, Mr Gavilrović, continues to fight criminal charges brought by the Respondent.

30. Finally, the Claimants address the Respondent's contention that it is "undisputed ... that the [CJEU] determined that intra-EU investor-State arbitration clauses such as Article 9 of the Croatia-Austria BIT are precluded by EU law", submitting that the Claimants certainly do dispute Respondent's characterisation of the *Achmea* decision, and in particular its application in the present case.

IV. THE TRIBUNAL'S ANALYSIS

31. As noted above, the Claimants commenced this arbitration under the auspices of ICSID on the basis of the BIT between the Republic of Austria and the Republic of Croatia and the ICSID Convention.

32. Article 9 of the BIT provides for the settlement of investment disputes between a Contracting Party and an investor of the other Contracting Party. If a dispute cannot be settled within three months of a written notification of sufficiently detailed claims, the dispute shall be subject to conciliation or arbitration by ICSID, or arbitration in accordance with the UNCITRAL Rules (Article 9(2)).

33. Notably, Article 11(2) of the BIT, concerning the application of the Agreement, provides:

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.

34. On 4 April 2018, the Respondent raised supplementary preliminary objections to the jurisdiction of the Tribunal and the admissibility of the Claimants' claims, including pursuant to Article 11(2) of the BIT.

35. The Parties cite the following provisions as relevant to the Tribunal's decision on the Respondent's Request of 4 April 2018.

36. Article 41(2) of the ICSID Convention provides:

Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

37. ICSID Arbitration Rule 41(1) establishes that:

Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder unless the facts on which the objection is based are unknown to the party at that time [emphasis added].

38. Finally, ICSID Arbitration Rule 41(2) provides:

The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence [emphasis added].

39. Having carefully considered the submissions of the Parties, for the reasons that follow, the Tribunal considers that the Respondent has not raised the supplementary preliminary objections “as early as possible”, as required by ICSID Arbitration Rule 41(1). It follows that the Tribunal dismisses the Respondent’s request to brief the proposed supplemental jurisdictional objections.

40. First, the question of the jurisdiction of an arbitral tribunal that is not part of the judicial system of the EU to determine a dispute between an investor of the EU and an EU Member State, and its invocation as a defence in investor-State arbitration, is a notorious one which has been hotly disputed in many cases involving EU Member States. By way of example, the Claimants appositely refer to *EDF v Hungary*, in which the European Commission’s

intervention specifically addressed Articles 267 and 344 of the TFEU, being the articles at issue in *Achmea*, and in which counsel for the Respondent represented the claimant.¹

41. Secondly, and more particularly, many of the facts concerning *Achmea* are not new. The decision of the arbitral tribunal was issued in December 2012. The respondent Member State, Slovakia, sought to set aside the award in the Frankfurt am Main Higher Regional Court. When the court dismissed the action, Slovakia appealed on a point of law against the dismissal to the Federal Court of Justice of Germany. In March 2016, the Federal Court of Justice referred to the CJEU questions concerning whether Articles 267 and 344 of the TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the EU 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. The fact that the matter was submitted to the CJEU was public knowledge, and the judgment was expected in the first half of this year. While no one could know how the Court would rule, these facts should have been known to the Respondent.
42. There is a dispute between the Parties as to whether the decision of the CJEU in *Achmea* is a fact or ruling of law. To some extent it may be regarded as both. Clearly, the handing down of the decision is a fact. But the decision itself is legal rather than factual in nature: it clarifies the law in the EU. On balance, the Tribunal considers that the “fact” of the ruling in *Achmea* does not suffice as a basis for the objection(s) that the Respondent seeks to raise at this stage of the proceeding.
43. Thirdly, even if the Respondent decided not to rely on the so-called intra-EU BIT objection in the absence of a ruling by the CJEU, the Respondent could have stated at a minimum that it reserved the right to raise the objection if the CJEU ruled in favour of Slovakia.

¹ *E.D.F. International S.A. v Republic of Hungary*, PCA Case No 2009-13, Written Observations of the European Commission dated 14 May 2013, pp 14-15, available at: ec.europa.eu/dgs/legal_service/submissions/arbitrage/pca_2009_13_obs_en_red.pdf.

Alternately, the Respondent could have requested that the Tribunal suspend the proceeding until the judgment was rendered, arguing that the application of the dispute settlement provision of the BIT was contingent upon the ruling of the CJEU. In this regard, the Tribunal notes that the Respondent has not been reluctant to make other reservations of rights in the course of this arbitration. However, the Respondent did not raise the matter of compatibility of the BIT with EU law as an issue, let alone an objection. Nor was there a reservation of rights.

44. Fourthly, the terms of Article 11(2) of the BIT reinforce the Tribunal's view. The explicit requirement – that the Contracting Parties are not bound by the BIT insofar as it is incompatible with the legal *acquis* of the EU in force at any given time – is not contained in many other intra-EU BITs. Together with the (then) impending decision of the CJEU, and the view that intra-EU BITs were embraced by the European Commission for a number of years, the Respondent could have raised the issue in some form at an earlier stage of the proceedings. The Respondent could not have been ignorant of the existence of Article 11(2).
45. Fifthly, as foreshadowed, the Tribunal is mindful of the stage of the proceedings. The Request for Arbitration was filed on 26 November 2012, and was registered on 21 December 2012. The Respondent's Counter-Memorial on the Merits and Memorial on Preliminary Objections was filed on 31 October 2014. The last hearing in this case was held in September 2016. The parties were informed in March 2018 that the Tribunal expected that the award may be issued in a few months.
46. Finally, Article 41(2) of the ICSID Convention does not give rise to a mandatory obligation on the part of the Tribunal to hear any preliminary objection to jurisdiction, provided that it is raised during the pendency of the proceedings. Rather, the Tribunal agrees with the conclusion in *Siag & Vecchi v Egypt*:

It is [Arbitration Rule 41] which grants the right to a party to object to the jurisdiction of the Centre, and it is the right granted by

Rule 41 which the Claimants assert has been waived as a result of a failure to invoke that right "as early as possible." The alternative, which is a logical extension of Egypt's argument, is that a party could never waive an objection to jurisdiction no matter how dilatory had been that party's conduct, because the right to object to jurisdiction at any time was protected by Article 25 of the ICSID Convention. The Tribunal does not accept that proposition.²

47. Further, ICSID Arbitration Rule 41(2) states that the Tribunal "may, on its own initiative" consider its jurisdiction at any stage of the proceedings. Tribunals have declined to exercise this discretion when a party raises a belated preliminary objection, based on the language of Rule 41(1).³ As the tribunal in *Vestey v Venezuela* stated, "the Tribunal's discretionary power to review its jurisdiction *ex officio* does not absolve the parties from compliance with ICSID Arbitration Rule 41(1).⁴ For the foregoing reasons, the Tribunal likewise declines to exercise the discretion provided for in Arbitration Rule 41(2).
48. In conclusion, therefore, the Tribunal considers the Respondent's Request of 4 April 2018 untimely and thus inadmissible. Accordingly, the Tribunal dismisses the Respondent's request to fix a schedule for pleadings concerning the proposed supplementary preliminary objections.

² *Waguih Elie George Siag & Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009 ("*Siag & Vecchi*") (CL-0060), ¶ 288.

³ See, eg, *Siag & Vecchi* (CL-0060), ¶ 288 (dismissing untimely objection) and *Vestey Group Ltd v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award dated 15 April 2016 ("*Vestey*"), ¶ 150 (same). But see also *AIG Capital Partners Inc. and CJSC Tema Real Estate Company v Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award dated 7 October 2003, ¶¶ 9.1-9.2 (allowing objection to jurisdiction raised shortly after submission of the counter-memorial, but before the hearings).

⁴ *Vestey*, ¶ 149.

V. DECISION

49. For the foregoing reasons, the Tribunal finds and decides as follows:

- (1) The Respondent's Request of 4 April 2018 is rejected.

For and on behalf of the Tribunal,

[signed]

Dr Michael Pryles AO PBM
President of the Tribunal
Date: 30 April 2018