36 Summary of Decision No. 14/2013 (VI. 17) AB of the Constitutional Court of Hungary

On The Constitutionality of Article 17(3) of the Act No. CXCVI of 2011 on National Assets and of Article 4 of the Act No. LXXI of 1994 on Arbitration

I

1. On 11 June 2013, the Constitutional Court of Hungary rejected the petition submitted by the Commissioner for Fundamental Rights aimed at establishing:

i) the unconstitutionality of Article 17(3) of Act No. CXCVI of 2011 on National Assets (hereinafter: National Assets Act) and of the following passage of Article 4 of Act No. LXXI of 1994 on Arbitration (hereinafter: Arbitration Act): '…furthermore, in cases where the subject of the legal dispute is a national asset being on the territory within the borders of Hungary and falling within the scope of the Act No. CXCVI of 2011 on National Wealth, and any right and claim related to it…'

and also at establishing

ii) that the above-mentioned legal rules are contrary to international treaties to which Hungary is a party.

2. Refering to its competence defined by Article 46(3) of Act No. CLI of 2011 on the Constitutional Court, on the grounds of the Paragraph (1) of Article B) and also of Paragraph (2) of Article Q) of the Fundamental Law, the Court simultaneously *established as a constitutional requirement*

i) that the last clause of Article 17(3) of the National Assets Act ('Furthermore, for settlement of such legal disputes, the contracting party entitled to dispose of the national asset cannot stipulate arbitration proceedings.') should be interpreted and applied jointly with the first clause of Article 17(1) of the National Assets Act ('The National Assets Act shall be without prejudice to rights and obligations acquired legally and in good faith before the entry into force of this Act.'). This requirement refers to investment agreements and

undertaking matter covered by the National Assets Act and in force on 1 January 2012 which have been signed by the Hungarian State and a legal person of the other Contracting State, and

ii) that the following passage of Article 4 of the Arbitration Act:

> […] furthermore in cases where the subject of the legal dispute is a national asset being on the territory within the borders of Hungary and falling within the scope of the Act No. CXCVI of 2011 on National Assets, and any right and claim related to it […],

and also Articles 55(1) lit. b) and 55(2) lit. a) of the same Act should be interpreted and applied jointly with the first clause of Article 17(1) of the National Assets Act ('The National Assets Act shall be without prejudice to rights and obligations acquired legally and in good faith before the entry into force of this Act'). This requirement refers to investment agreements and undertaking matter covered by the National Assets Act and in force on 1st January 2012 which have been signed by the Hungarian State and a legal person of the other Contracting State.

3. The Constitutional Court *established as a constitutional requirement*, that the articles of bilateral agreements for protection of investments providing for settlement of legal disputes between the sovereign states by constituting of arbitral tribunal do not fall within the scope of the Arbitration Act, respectively of Article 17(3) of the National Assets Act.

II

1. In December 2011 the Hungarian Parliament acting within its competence defined by Article 38(1)-(2) of the Fundamental Law adopted the National Assets Act. This Act is classified as a cardinal Act, the adoption or amendment of which requires the votes of two-thirds of the Members of Parliament present [Fundamental Law, Article T), paragraph (4)]. Most of the provisions of the Act, including the one challenged by the Commissioner for Fundamental Rights, are effective as of 1 January 2012.

In its Article 38(1), the Fundamental Law defines the property of state and of local governments as national assets. The National Assets Act regulates the requirements for preserving and protecting national assets, as well as for the responsible management thereof, and determines the scope of the exclusive property and of the exclusive economic activities of the state, as well as the limitations and conditions of the alienation of national assets of outstanding importance for the national economy.

Paragraph (2) of the same Article itemizes the objects of national assets, e.g.: the exclusive and other property and also the financial assets of the state and of the local governments, and any shares owned by them, the airspace above the territory defined by Hungary's borders, the Kyoto units, natural and cultural heritage values, etc.

Appendix No.1 of the National Assets Act lists assets being the exclusive property of the Hungarian state: *i)* rivers, brooks, backwaters, river tributaries, and all their beds, water installations, and also natural lakes (Balaton Lake, Velence Lake, Fertő Lake, Hévíz Lake), and *ii)* the national trunk railway lines.

Appendix No. 2 lists as national assets of particular importance for Hungarian economy numerous forestries, the *HungaroControl Magyar Légiforgalmi Szolgálat Zrt*. (Hungarian Aircontrol Service Private Company Limited by Shares), the *Szerencsejáték Zrt*. (Gambling Services Private Company Limited by Shares), the *Bábolna Nemzeti Ménesbirtok* (National Stud-farm), the *Kincsem Nemzeti Lóverseny és Lovasstratégiai Kft.* (National Horse-races and Equestrian Strategy Ltd.), the *Diákhitel Központ Zrt*. (Student-credit Private Company Limited by Shares), and some other private companies limited by shares under the control of Ministry of Defence. National assets belonging to this group are also the statues at Kossuth Square, including the Equestrian Statue of Francis II Rákóczi, the Kossuth memorial, the memorial for the 1956 Hungarian Revolution, the statue of the poet Attila József sitting on the bank of the river as described in his poem '*By the Danube*'.

The Appendix includes furthermore a list of protected monuments and buildings, starting with those in Budapest: the Sándor Palace, which is at present the Hungarian President's official residence, the Royal Palace in Buda, the ruins of the tower and the walls of the Maria Magdalene Church, the Gül Baba Tomb, a Turkish Bath, the ruins of the Roman Civil Town of Aquincum, the Citadel of Gellért Hill, the Heroes Square with its monuments, the Vajdahunyad Castle. In the county Baranya, national assets are the Siklos and the Szigetvár fortress, the Jakováli Hasszán mosque, and the Cella Septichora in the county seat Pécs; in the county Borsod, the Fazzola ancient smelting furnace, the Boldogkőváralja fortress, the Diósgyőr fortress, the Sárospatak fortress, the Fűzér fortress ruins, the Ónod fortress ruins, the Regéc fortress ruins, the Bükkszentlélek cloister ruins, the Mártony cloister ruins, the synagogue in Mád, the L'Huillier-Coburg manor-house in Edelény; then in the county Heves, the fortress and the minaret of Eger; and in the county Zala, the Festetics Palace in Keszthely etc.

According to Article 2 of the National Assets Act, its scope does not extend to

a. financial possessions of agencies and persons who are part of the administration of state finances;
b. claims and payment obligations;
c. social insurance; and
d. state records defined by law as national data assets

Due to these concrete legal rules of the National Assets Act and its appendices, the administrative authorities and the actors of the economic life have at their disposal accurate information for the natural, cultural and property components of the national assets; consequently the National Assets Act is in conformity with Paragraph (1) of Article B) of the Fundamental Law.

2. As mentioned above, the adoption of the National Assets Act has been prescribed by Article 38 of the Fundamental Law with the view to regulating the means of preserving and protecting national assets, as well as for the responsible management thereof. The aim of the management and protection of national assets shall be to serve the public interest, to satisfy common needs and preserve natural resources, and to take into account the needs of future generations. For achievement of this aim the regulation concerning the national assets provides for some limiting conditions on exercising the proprietor's rights. Such a restriction is prescribed by Article 17(3) of the National Assets Act:

> If a civil law contract concerns the national assets on the territory of Hungary delimited by its borders, the contracting party entitled to dispose of the national asset should stipulate the exclusive application of the Hungarian language and Hungarian law and – in case of legal dispute concerning the national asset – the exclusive jurisdiction of Hungarian courts, not including the arbitration courts. Furthermore, for settlement of such legal disputes the contracting party entitled to dispose of the national asset cannot stipulate arbitration proceedings.

This legal rule is effective as of 1 January 2012.

For securing legal coherence with this rule, on 5 June 2012, the Hungarian Parliament amended Article 4 of the Arbitration Act as follows: 'No arbitration court – either *ad hoc* or permanent, with place (seat) either in Hungary, or outside Hungary – may proceed in the procedures regulated by Chapters XV–XXIII of the Code of Civil Procedure (CCP), furthermore in cases where the subject of the legal dispute is a national asset being on the territory within the borders of Hungary and falling within the scope of the Act No. CXCVI of 2011 on National Assets, and any right and claim related to it, respectively, as well as in cases where an act excludes the settlement of a legal dispute in the framework of arbitration.' This legal rule is effective as of 13 June 2012. It shall apply in the proceedings commenced after the entry into force of this Act.

Summarizing the above: the challenged rule of the National Assets Act excludes the stipulation of arbitration in the contracts concerning national assets, and the challenged rule of the Arbitration Act precludes the arbitration procedure in legal disputes where the subject is a national asset.

3. In his petition, the Commissioner for Fundamental Rights asserted that both legal provisions are contrary to the European Convention on International Commercial Arbitration (signed in Geneva, 21 April 1961, the 'Geneva Convention', entry into force: 7 January 1964), to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (signed in New York, 10 June 1958, the 'New York Convention', entry into force: 7 June 1959) and to the *Convention on the Settlement of Investment Disputes* between States and Nationals of Other States (signed in Washington, 18 March 1965, the 'Washington Convention', entry into force: 14 October 1966). According to his reasoning, since the challenged provisions generally preclude arbitration in matters concerning items of national property located in Hungarian territory they are in conflict with these conventions, considering that Hungary is a party to all of them. Consequently the constitutionality of these provisions is also contested, as far as Paragraph (2) of Article Q) of the Fundamental Law states that in order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.

III

1. First and foremost the Constitutional Court points out that Article 17(3) of the National Assets Act and Article 4 of the Arbitration Act have no impact on the validity of arbitral clauses provided for (or to be provided for) in international investment, undertaking and other treaties of similar nature which do not fall within the scope of the National Assets Act, therefore by no means concern the national assets. That is, the issue of conflict of these legal provisions with international treaties such as the New York Convention, the Geneva Convention, the Washington Convention or the bilateral agreements to which Hungary is a party does not arise.

2. Furthermore, the Constitutional Court notes that the consideration of the economic benefits, detriments and other relevancies of the challenged provisions does not fall within its competences.

3. Accordingly, the assertion of conflict Article 17(3) of the National Assets Act and Article 4 of the Arbitration Act with international treaties has been examined by the Constitutional Court from the following aspects:

i. the international investment, undertaking etc. agreements in force shall concern the national assets;
ii. they shall include an arbitral clause;

iii. directly or indirectly they shall fall within the scope of either a bilateral investment protection agreement between states, either the New York Convention, either the Washington Convention, either the Geneva Convention.

4. The grounds of the Arbitration Act and the arguments of the Commissioner for Fundamental Rights both indicate that the challenged passage of Article 4 of the Arbitration Act

> ([…] furthermore in cases where the subject of the legal dispute is a national asset being on the territory within the borders of Hungary and falling within the scope of the Act No. CXCVI of 2011 on National Assets, and any right and claim related to it […])

has been formulated with regard to Article 17(3) of the National Assets Act. As a consequence, due to the close correlation between these two legal rules, and also taking into consideration their textual similarity and identical purpose, the Constitutional Court examines *simultaneously* the conformity of the challenged rules with the Fundamental Law.

5. The issue of conflict of Article 17(3) of the National Assets Act and Article 4 of the Arbitration Act with international treaties has been examined by the Constitutional Court based on the following aspects:

a. Is there any conflict with bilateral investment protection agreements?
b. Is there any conflict with the Washington Convention?
c. Is there any conflict with the Geneva Convention?
d. Is there any conflict with the New York Convention?

IV

Is there any conflict with bilateral investment protection agreements? No.

The bilateral investment treaties (BIT) arranging such relationships are literally almost identical, the contracting parties usually look for a model BIT in the database of the United Nations Conference on Trade and Development (UNCTAD), which is the most comprehensive BIT database. The purposes of the constitutional review may be served adequately by a typical example of BIT as is the one between Hungary and Azerbaijan promulgated by Act No. CVIII of 2007.

The issue of breach of bilateral agreements may arise:

i. in the context of a legal dispute between the state and an investing national of another state;
ii. in cases unrelated to the above-mentioned legal dispute

i) Is there any conflict with bilateral agreements in the context of a legal dispute between the state and an investing national of another state? No.

Article 8 of the bilateral investment protection treaty regulates the settlement of investment disputes between a contracting party and an investor of the other contracting party as follows:

> '1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment on the territory of that other Contracting Party shall be subject to negotiations between the parties in dispute.
> 2. If any dispute between an investor of one Contracting Party and the other Contracting Party cannot be thus settled within a period of six months following the date on which such negotiations were requested in written notification, the investor shall be entitled to submit the dispute either to:
> *a)* the competent court of the Contracting Party in the territory of which the investment has been made; or
> *b)* the International Centre for Settlement of Investment Disputes (ICSID) having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965, in the event both Contracting Parties shall have become a party to this Convention; or
> *c) ad hoc* arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The parties to the dispute may agree in writing to modify these Rules.'

It is unambiguous that if the dispute is arranged by negotiations (paragraph 1), the challenged provisions *in concreto* do not conflict with Article 8 of the BIT, and they do not conflict with it in the case the negotiations are not effective, but the contracting parties agree to submit the dispute to the competent Hungarian court [Para 2. a)].

If none of these solutions are accepted by the contracting parties and ICSID arbitration is demanded, the conflict with it may be precluded with regard to considerations concerning the Washington Convention set forth below.

In case the setting up of an UNCITRAL *ad hoc* arbitral tribunal is requested, it should be noted that the Arbitration Rules of the United Nations Commission on International

Trade Law, enshrined by UN General Assembly Resolution 31/98, themselves have effect on contracts with arbitration provision which entered into force prior to the UNCITRAL Arbitration Rules.

To avoid the conflict between the Article 17(3) of the National Assets Act, respectively Article 4 of Arbitration Act, and the ICSID respectively the UNCITRAL Rules, the Constitutional Court deems necessary the establishment of a constitutional requirement according to which the effect of the provision of Article 17(1) in any case, without exception, concerns the international agreements of private law nature with contracting parties a state and an investor/national of another state which are in force on 1st January 2012. It provides that 'the National Assets Act shall be without prejudice to rights and obligations acquired legally and in good faith before the entry into force of this Act. Should the duration of contracts concluded prior to the entry into force of this Act be extended after the entry into force of this Act, this extension shall be deemed conclusion of a new legal contract, except for the cases defined by Article 6(8), Article 11(10) and Article 12(3).'

The Constitutional Court notes that prior to the expiry of the duration of such agreement the Government should act in accordance Article 17(3) of the National Assets Act and Article 4 of Arbitration Act to renegotiate the agreements if it considers necessary or expedient the continuation of the legal relationship established by it.

ii) Is there any conflict with bilateral agreements in cases unrelated to the above-mentioned legal dispute? No.

According to Article 9 of the bilateral investment protection agreement regulating the settlement of disputes between the two contracting states:

> '1. Disputes between the Contracting Parties concerning the interpretation or application of this Agreement shall, if possible, be settled through consultation or negotiation.
> 2. If the dispute cannot be thus settled within six months, it shall upon the request of either Contracting Party, be submitted to an Arbitral Tribunal of three members, in accordance with the provisions of this Article.'

It is unambiguous that if the dispute is arranged by negotiations (Article 9(1) of the bilateral investment protection agreement), the challenged provisions *in concreto* do not conflict with Article 9 of the BIT. During the negotiations the representative of the Hungarian Government should emphasize that according to the established constitutional requirement neither Article 4 of the Arbitration Act, nor the Article 17(3) of the National Assets Act should be correlated with articles of bilateral agreements for protection of investments

providing for settlement of legal disputes between the sovereign states by constituting of arbitral tribunal.

If the state does not act as a sovereign but as an economic actor the situation is different. Some provisions of the National Assets Act concern foreign states too, primarily those according to which agreements for utilization of national assets may be concluded only by physical persons and transparent organizations and the foreign states and the organs of the foreign states are qualified as transparent organizations.

Since in these cases the state acts through its organs, if the organ of the foreign state is in the position of the investor, the same principles are valid for him, as those set forth by the Constitutional Court herein above concerning the settlement of investment disputes between the Hungarian state and an investor national of another state. (In the case it yet acts as a sovereign state, the constitutional requirement established in Section I/3 refers to it.) Consequently the foreign state may be involved either *i)* as the state whose national the investor is, or to which he linked, or *ii)* as the acting economic actor itself. Therefore the constitutional requirement declaring that concerning the international investment protection and economic-natured agreements, Article 17(3) of the National Assets Act and Article 4 of the Arbitration Act should be interpreted with regard to Article 17(1) of the National Assets Act has been established irrespectively to the above-mentioned legal positions of the state.

It is the task of the Government to act in accordance with Article 17(3) of the National Assets Act and with Article 4 of the Arbitration Act to renegotiate the agreements if it considers necessary or expedient the continuation of the legal relationship or to terminate them if it does not meet the intent of the other contracting party.

V

Is there any conflict with the Washington Convention? No.

Articles 25 and 26 of the Washington Convention contain the following provisions:

> 'Article 25
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> 1. The jurisdiction of the Centre shall extend *to any legal dispute arising directly out of an investment*, between a Contracting State (*or any constituent subdivision or agency of a Contracting State designated to the Centre by that State)* and a national of another Contracting State, *which the parties to the dispute consent in writing to submit to the Centre.* When the parties have given their consent, no party may withdraw its consent unilaterally.
> 2. 'National of another Contracting State' means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

3. Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.
4. Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.'

The effect of the jurisdiction of the ICSID (mentioned above as the Centre) may actually be influenced by the government of a state by taking the opportunity provided for by Article 25(1). In other words, the denial of the contracting state to sign the prescribed written consent is one of the obstructions offered by the Convention to the parties to it. Since the list of the 'constituent subdivisions or agencies of a Contracting State designated to the Centre by' may be subsequently amended, the Hungarian Government should make the necessary steps to update the list with regard to domestic authorities entitled to dispose of national assets if they are on the list. According to Article 25(4) there is no time-limit

for such a notification. Another opportunity for Hungary to avoid the conflict of the Article 17(3) of the National Assets Act and Article 4 of the Arbitration Act with the Washington Convention is the necessity of the consent of the state provided for in Article 25(3) of the Convention which the state is not bound to give.

Consequently, the conflict of the challenged provisions with the Washington Convention may be prevented without recourse to the constitutional requirement established above.

VI

Is there any conflict with the Geneva Convention? No.

Articles I, II and X of the Geneva Convention contain the following provisions:

> Article I – Scope of the Convention
> 1. This Convention shall apply:
> (a) to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States;
> (b) to arbitral procedures and awards based on agreements referred to in paragraph 1(a) above.
> 2. For the purpose of this Convention,
> (a) the term: 'arbitration agreement' shall mean either an arbitral clause in a contract or an arbitration agreement, the contract or arbitration agreement being signed by the parties, or contained in an exchange of letters, telegrams, or in a communication by teleprinter and, in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws;
> (b) the term 'arbitration' shall mean not only settlement by arbitrators appointed for each case (*ad hoc* arbitration) but also by permanent arbitral institutions;
> (c) the term 'seat' shall mean the place of the situation of the establishment that has made the arbitration agreement.

> Article II – Right of Legal Persons of Public Law to Resort to Arbitration
> 1. In cases referred to in Article I, paragraph 1, of this Convention, legal persons considered by the law which is applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements.
> 2. On signing, ratifying or acceding to this Convention any State shall be entitled to declare that it limits the above faculty to such conditions as may be stated in its declaration.
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> Article X – Final Clauses
> 7. The provisions of the present Convention shall not affect the validity of multi-lateral or bilateral agreements concerning arbitration entered into by Contracting States.
> 9. Any Contracting Party may denounce this Convention by so notifying the Secretary-General of the United Nations. Denunciation shall take effect twelve months after the date of receipt by the Secretary-General of the notification of denunciation.

The issue of conflict of the challenged provisions arises with regard to the term 'arbitration agreement' defined both as an arbitral clause in contract, and also as an arbitration agreement itself. The answer of this question should be detailed in the relation of *i)* investment (private international law) agreements in force and *ii)* agreements which are not signed yet.

In the case of the investment agreements in force the constitutional requirement based on Article 17(1) of the National Assets Act precludes any interpretation dispute, i.e. in their relationship there is no conflict with the Geneva Convention.

A different issue to be examined: is it possible to deduce from the Geneva Convention and in particular from its Article II(1) an obligation for the state to make possible for the 'legal persons of public law' to enter into arbitration agreements *pro futuro,* i.e. does it protect not only the agreements already in force or it also establishes for them so to say a general *facultas de contrahenda*?

The opportunity for the state to make a declaration under the Article II(2) (by it the state may declare the limits of such activities, prescribed by some particular provision of its domestic law) at first sight supports such an interpretation based on *a contrario* reasoning. However, it should be stressed that both the English and the French version (which are authentic texts of the Convention) Article I(1) of the Geneva Convention are formulated in past tense (contrary to Hungarian version using present tense):

> 'La présente Convention s'applique (a) aux conventions d'arbitrage conclues […].'

'This Convention shall apply: (a) to arbitration agreements concluded […].'

This should be taken into consideration since Article II refers to Article I. At the same time the English and the French version of Article II(1) is formulated in present tense (with a Hungarian version conform with them).

The Constitutional Court examined the interpretation of the Geneva Convention based on the practice of its application. Some of the parties to this Convention are members of the European Union, but the majority of the EU members are not parties to it. Hungary has entered into bilateral investment agreement with most of the party countries.

Belgium and Latvia made declarations in accordance with Article II(2). The Belgian Government declared that in Belgium only the State has, in the cases referred to in Article I(1), the faculty to conclude arbitration agreements. Latvia declared that Article II(1) should not be applied for state authorities and local government authorities. The Constitutional Court notes that France without making such a declaration, in practice limits the opportunities of its local government to enter into arbitration agreements (see articles 2059-2061 of Code Civil). Hungary has not made a declaration. The principle of reciprocity may be validated in relation to the states, which made declarations, or which restrict *ex lege* their legal persons of public law in entering into arbitration agreements. With regard to the provision of Article X(7), the Constitutional Court refers to its ascertainment in Section 6a)-*ii)* concerning the bilateral agreements between states.

Accordingly, only the *pro futuro* precluding of the arbitral clause might – in certain interpretation – conflict with the Geneva Convention and only in the case when the activity under the National Assets Act is of commercial nature in the sense of the Geneva Convention. The National Assets Act covers at least one activity of commercial nature: the offer for sale of the Kyoto units under the Kyoto Protocol to the Framework Convention on Climate Change, since the Kyoto units ar classified as national wealth by Article 1(2f) of the National Assets Act. Nevertheless, the Constitutional Court takes the standpoint that the option of the denunciation under Article X(9) is open and it is up to the Government to choose – if necessary – the way to preclude conflict with the Geneva Convention which may be: *i)* the denunciation of the Geneva Convention; *ii)* the denunciation of the Geneva Convention and re-accession to the same with a concurrent declaration precluding the conflict with domestic provisions.

VII

Is there any conflict with the New York Convention? No.

Articles I and II of the New York Convention contain the following provisions relevant to the issue:

> Article I
> 1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
>
> Article II
> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
> The Constitutional Court ascertains that in regard of the 'differences between persons, whether physical or legal' the Article I of the New York Convention shall apply to the arbitral awards already made and the Article II of the same Convention refers to the agreements in force which provide basis for the awards.

Since the provisions of the Article 17(3) of the National Assets Act and of Article 4 of the Arbitration Act a priori do not relate to the previously made arbitral awards and since the constitutional requirement established in regard to Article 17(1) provides sufficient guarantees for the international agreements of private law nature in force, a conflict with the New York Convention cannot arise.

VIII

1. The Constitutional Court came to the conclusion that protection of established rights needs an establishment of a constitutional requirement concerning the interpretation of Article 17(1) of the National Assets Act. Consequently, the conformity of domestic law with international law provided for by Article Q) of the Fundamental Law does not require the establishment of unconstitutionality of Article 17(3) of the National Assets Act and Article 4 of the Arbitration Act and their annulment. Therefore the Constitutional Court rejected the petition submitted by the Commissioner for Fundamental Rights.

The Constitutional Court is entitled to establish a constitutional requirement by Article 46(3) of the Act No. CLI of 2011 on the Constitutional Court and by proceeding in line with it the Court also took into consideration its continuous practice to show forbearance towards the legal rules in force.

2. The extension of the constitutional requirement to Article 55(1) lit. b) and (2) lit. a) of the Arbitration Act is necessary due to the close correlation of these provisions with Article 4 of the same Act.

3. The Constitutional Court observes that in the course of the duration of the above-mentioned agreements of private law nature and also of the bilateral interstate agreements the Hungarian party may initiate the modification of such an agreement in order to enforce the provisions of the Article 17(3) of the National Assets Act and Article 4 of the Arbitration Act but such a modification may be reached only with the consent of the other contracting party.

A dissident opinion signed by two judges was attached to the decision.[1]

This document is only a summary and it does not bind the Court.
The full text in Hungarian can be read on the site of the Constitutional Court: www.mkab.hu.

1 The reporting judge of the Decision was Judge Péter Kovács.