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Intra-EU Investment Treaty Disputes in US Courts: Achmea, Micula and Beyond

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The Arbitration Review of the Americas 2022 covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; and has eleven overviews, including two on arbitrability (one focused on Brazil in the context of allegations of corruption, the other on the relationship with competence-competence across the region). There's also a lucid guide to the interpretation of "concurrent delay" around the region, using five scenarios.

Other nuggets include:

• helpful statistics from Brazil's CAM-CCBC, showing just how often public entities form one side of an arbitration;
• an exegesis on the questions that US courts must still grapple with when it comes to enforcing intra-EU investor-state awards;
• a similarly helpful summary of recent Canadian court decisions;
• another on Mexican court decisions that showed a rather mixed year; and
• the discovery that the AmCham in Peru as of July 2021 now engages in ICC-style scrutiny of awards.

Intra-EU Investment Treaty Disputes in US Courts: Achmea, Micula and Beyond

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Alston & Bird

Summary

IN SUMMARY

In ***Micula***, a US federal district court enforced an award pursuant to the ICSID Convention over objections from Romania and the European Commission based on ***Achmea***. ***Micula*** should encourage parties pursuing claims under intra-EU treaties of their prospects for enforcement in the United States. However, the district court's reasoning did not foreclose the relevance of EU law in proceedings to enforce intra-EU awards before US courts. Since ***Micula***, claimants have continued bringing intra-EU treaty claims and seeking enforcement of the resulting awards in the United States. The European Commission remains hostile to intra-EU investor-state arbitration and raises ***Achmea*** to oppose such arbitration and enforcement of the resulting awards. Future decisions may further clarify the attitude of US courts towards intra-EU investor-state awards.

DISCUSSION POINTS

- The ***Micula*** ICSID arbitration
- ***Achmea*** decision issued while the Miculas's petition was pending in Washington, DC
- The district court in ***Micula*** rejected a jurisdictional challenge based on ***Achmea***
- Questions raised by the district court's decision in ***Micula***
- Future questions

REFERENCED IN THIS ARTICLE

- *Micula v Government of Romania*
- *Slowakische Republik (Slovak Republic) v Achmea BV*
- *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania [I]*
- Convention on the Settlement of Investment Disputes between States and Nationals of Other States
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- Foreign Sovereign Immunities Act
- Settlement of Investment Disputes, 22 USC section 1650a
- Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union

Now nearing its second anniversary, a Washington, DC federal district court's decision in ***Ioan Micula et al v Government of Romania*** remains a key reference point for investors seeking to enforce intra-EU arbitration awards in US courts. ***Micula*** marked the US judiciary's first decision considering the enforceability of an investor-state arbitration award made pursuant to a bilateral investment treaty (an intra-EU BIT) between two EU member states after the Court of Justice of the European Union (CJEU) ruled, in ***Slovak Republic v Achmea***,[1] that investor-state arbitration among EU member states was contrary to the constitutional order of the European Union.

The decision in ***Micula***, affirmed by the DC Circuit in May of 2020, shows that so far as US courts are concerned, awards based on intra-EU BITs are potentially enforceable. At the same time, the court's decision in ***Micula*** does not foreclose the relevance of the CJEU's decision in future proceedings to enforce intra-EU investor-state awards before US courts and leaves significant questions unanswered.

Micula's ambiguities are significant because, notwithstanding ***Achmea*** and the European Commission's long-standing position that the resolution of investment disputes within the European Union should occur only within the framework of the EU's own legal system, European investors continue to bring treaty claims against EU member states. Around 66 such intra-EU claims are currently pending before the International Centre for Settlement of Investment Disputes (ICSID) alone.[2] Some of those cases were filed quite recently, even though a majority of EU member states agreed in 2020 to terminate more than 130 intra-EU investment treaties with retroactive effect.[3]

In addition, ***Micula*** is significant because enforcement actions in respect of over US$560 million worth of intra-EU investor-state awards are pending before US federal district courts.-[4] This article considers the potential implications of the ***Micula*** decision for the treatment of intra-EU awards in US federal courts as the European Commission seeks to expand the scope of the ***Achmea*** ruling and maintains its hostility to intra-EU investor-state arbitration.

THE MICULA ICSID ARBITRATION

The ***Micula*** arbitration arose as a consequence of Romania's preparations for its entry into the European Union in 2007. Romania had earlier extended certain economic incentives to encourage foreign investment in its new post-Soviet economy. The claimants, two brothers of Swedish nationality but Romanian heritage, had relied on these incentives when investing in the food and beverage industry of an impoverished region of Romania.[5]

Although the incentives had been meant to last for at least a decade, they were withdrawn as part of Romania's efforts to bring itself into compliance with the ***acquis communautaire*** in preparation for its EU accession.[6] The European Commission had advised Romania that, from the standpoint of European law, the incentives at issue constituted unlawful 'state aid' that distorted incentives and created uneven treatment within an integrated single European economy.[7]

Alleging breaches of their legitimate, investment-backed expectations as protected under the Swedish-Romanian BIT's fair and equitable treatment clause, the Miculas commenced arbitration before ICSID in August of 2005.[8] After an ICSID tribunal found their claims admissible, the European Commission warned that any award reinstating the privileges abolished by Romania, or compensating the investors for the loss of those privileges, would itself constitute state aid contrary to the supremacy of EU law.[9]

The arbitral tribunal refused, however, to subordinate Romania's international law obligations under the BIT to the Commission's view of European law. It instead refused to 'assume that by virtue of entering into the [EU] Accession Treaty or by virtue of Romania's accession to the EU, either Romania, or Sweden, or the EU sought to amend, modify or otherwise detract from the application of the BIT'.[10] The tribunal ultimately awarded the Micula claimants compensation of approximately €178 million in December 2013 plus interest.[11]

Shortly thereafter, the European Commission issued an order purporting to enjoin Romania from complying with the award. The ***Micula*** claimants promptly challenged that order before

the European Union's General Court.[12] Romania, meanwhile, sought review of the award before an ad hoc annulment committee within the framework of the ICSID Convention.[13] The annulment committee refused Romania's request to stay enforcement of the award until the conclusion of the annulment procedure, however, because Romania refused to promise that it would comply with the award if it was upheld by the Committee.[14]

While annulment proceedings continued, the ***Micula*** claimants sought to enforce their award before various national courts. Article 54 of the ICSID Convention obliges each contracting state to the ICSID Convention to enforce an ICSID award 'as if it were a final judgment of a court in that state'.[15] A petition for enforcement of the award was filed with the United States federal district court in Washington DC on 11 April 2014.

ACHMEA DECISION ISSUED WHILE THE MICULAS'S PETITION WAS PENDING IN WASHINGTON, DC

The CJEU, the European Union's highest judicial body, issued its decision in ***Achmea*** while the ***Micula*** claimants' enforcement action was pending before the federal district court in Washington, DC.

The background to the CJEU's decision in ***Achmea*** was as follows: a Dutch investor had brought a claim against Slovakia pursuant to the Netherlands-Slovakia BIT of 1992, challenging measures taken by the government that had adversely impacted its investments in the health insurance sector.[16] The resulting arbitration was conducted pursuant to the UNCITRAL Arbitration Rules with the arbitration seated in Germany.

Achmea prevailed in the arbitration. However, Slovakia immediately applied to annul the resulting award on the theory that investor-state arbitration under the treaty was contrary to EU law. Rather than decide the question itself, the German Federal Court of Justice referred the question to the CJEU.[17]

In its judgment, the CJEU found that the dispute at issue could require the tribunal to apply EU law and that its resolution within an investor-state arbitration would be final and not fully reviewable before the courts of a European member state or the European courts, or both.[18] This, the CJEU reasoned, threatened 'consistency and uniformity in the interpretation of EU law'.[19]

Accordingly, the CJEU explained, EU law 'must be interpreted as precluding a provision in an international agreement concluded between member states . . . under which an investor from one of those member states may, in the event of a dispute concerning investments in the other member state, brings proceedings against the latter . . . before an arbitral tribunal'.[20]

THE MICULA DISTRICT COURT REJECTED A JURISDICTIONAL CHALLENGE BASED ON ACHMEA

Under the ICSID Convention and US law, there are no grounds for challenging an ICSID award in the US courts. Pursuant to 22 USC section 1650a, a federal court is obliged to treat an ICSID award as having the status of a final court from another US state.[21] It may not 'examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award'.[22] A district court's role when presented with an ICSID award comprises nothing more than an 'examin[ation of] the award's authenticity and enforce[ment of] the obligations imposed'.[23] Consistent with the ICSID Convention's self-contained annulment mechanism, review of ICSID awards is thus much more narrowly circumscribed than that of awards governed by the New York Convention.[24]

Romania, however, used ***Achmea*** as the basis for an attack on the district court's subject-matter jurisdiction in respect of a dispute involving a sovereign (Romania) under the US Foreign Sovereign Immunities Act (FSIA).[25] Under US law, the FSIA is 'the sole basis for obtaining jurisdiction over a foreign state' in a US court.[26]

The ***Micula*** claimants had pleaded that the court had subject-matter jurisdiction over the enforcement of their award against Romania pursuant to the FSIA's 'arbitration exception', which provides that '[a] foreign state shall not be immune . . . in any case . . . in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if . . . the . . . award is governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards'.-[27] Romania (and the European Commission as ***amicus curiae***) countered that the FSIA's arbitration exception could not apply because, consistent with the CJEU's ruling in ***Achmea***, the arbitration agreement contained in the applicable treaty had been retroactively nullified upon Romania's accession to the European Union.[28]

Although an ICSID ***ad hoc*** annulment committee had already rejected this very argument, the US district court proceeded to conduct its own analysis. It ultimately found that 'the concern that animated ***Achmea*** – the unreviewability of an arbitral tribunal's determination of EU law by an EU court' was not present in the case before it and enforced the award. The district court did so for two main reasons.

First, the court observed that, unlike in ***Achmea***, 'all key events to the parties' dispute occurred before Romania acceded to the EU', such that, 'unlike in ***Achmea*** . . . Romania's challenged actions [i.e. the cancellation of the investment incentives] occurred when it remained outside the EU and subject, at least primarily, to its own domestic law.'[29]

Second, the court found that EU law was not yet controlling on Romania at the time of the measures complained of, such that the arbitration did not '"relate to the interpretation or application of EU law" in the sense that concerned the court in ***Achmea***'.[30] The district court appears to have been comforted in this conclusion by the EU General Court's ruling, while the case was pending, that Romania's incentive scheme did not violate EU law.[31]

Having thus distinguished ***Achmea***, the district court rejected Romania's challenge to subject-matter jurisdiction under the FSIA, dismissed other arguments based on the European Union's state aid law as moot and ordered judgment for the ***Micula*** claimants in the amount of US$331 million.[32] The DC Circuit in May 2020 affirmed per curiam on other grounds, noting in dicta that 'as the district carefully explained, Romania did not join the EU until after the underlying events here, so the arbitration agreement applied'.[33]

QUESTIONS RAISED BY THE DISTRICT COURT DECISION IN MICULA

Micula will naturally encourage claimants seeking to enforce intra-EU investor-state awards in the United States. But it does not take the arguments raised by Romania based upon ***Achmea*** off the table. On the contrary, the district court's opinion in ***Micula*** makes clear that parties seeking to enforce awards based upon intra-EU bilateral investment treaties will have to focus on distinguishing Achmea.

On the ***Micula*** district court's approach, key questions likely to arise are:

- whether the measures being challenged under an investment treaty occurred prior to or after a respondent state's EU accession; and

- the degree to which resolution of the dispute involves an arbitral tribunal in the 'interpretation or application of EU law'.

The district court's approach in ***Micula*** – if not its result – may, thus, have created uncertainty about the extent to which US courts will effectuate the United States' treaty obligations – incorporated in federal statute – to enforce investor-state awards under the ICSID Convention.[34]

The district court's approach is open to question in at least three respects.

First, although it accurately stated the standard applied in ICSID enforcement cases, the district court does not seem to have applied it. Under 22 USC section 1650a, the statute implementing the United States' obligations under article 54 of the ICSID Convention, an ICSID 'award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several states'.[35]

That is why, as the ***Micula*** district court recognised, 'a federal court is not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award', all of which are questions for the arbitral tribunal under the ICSID framework.[36] A court's role is limited to confirming the award's authenticity and enforcing its obligations as a judgment.[37]

In ***Micula,*** an ICSID tribunal had already found that it had jurisdiction over the parties, and its conclusion had been upheld by an ICSID annulment committee. Where ICSID tribunals have the power to decide upon their own jurisdiction pursuant to article 41 of the ICSID Convention, there is a strong argument that the jurisdictional findings reached within the arbitration should have been accepted by the district court.[38]

The second respect in which the district court's approach is open to question is that the ***Micula*** district court does not appear to have considered an alternative basis for subject-matter jurisdiction under the FSIA, which would have entirely avoided the need to engage with EU law. In particular, the FSIA authorises a court to exercise subject-matter jurisdiction where a state has waived its sovereign immunity.[39] There is a reasonable argument that by becoming a party to the ICSID Convention, Romania waived any objection to subject-matter jurisdiction in a foreseeable future action to enforce an ICSID award.

The district court's ***Achmea*** analysis was directed at determining whether the FSIA's arbitration exception applied on the basis of a valid arbitration agreement in an intra-EU investment treaty, a finding of waiver could have sidestepped analysis of the treaty itself entirely.[40] The DC Circuit's holdings in ***Creighton v Qatar*** and ***Tatneft v Ukraine***, namely that a sovereign's adoption of the New York Convention waived its immunity from suits to enforce arbitration awards under its terms in other states that signed the New York Convention, supports a waiver theory.[41] Such an approach could make it easier for federal district courts to avoid parsing the significance of ***Achmea*** while honouring the United States' international law obligations to enforce ICSID awards.

The third respect in which the district court's approach is open to question is that it is questionable whether the district court distinguished sufficiently between public international law and specifically European law. The DC Circuit's brief statement that 'Romania did not join the EU until after the underlying events here, so the arbitration agreement applied' arguably implies that ***Achmea*** would otherwise have negated the

agreement to arbitrate contained in the Swedish-Romanian treaty and pre-empted the United States' own treaty obligation to enforce ICSID awards.[42]

A difficulty, however, is that the ICSID Convention is a public international law instrument that imposes obligations on the United States, while ***Achmea*** is part of a specifically European legal order that does not. Investor-state tribunals and ICSID annulment committees have consistently emphasised the distinction between public international law and European law in rejecting challenges to their jurisdiction based on the CJEU's reasoning in ***Achmea***.[43]

For its part, the ***Micula*** decision does not provide a clear explanation of why – had the court found its facts more closely analogous to ***Achmea***'s – European law should have prevailed over the United States' own treaty obligations under article 54 of the ICSID Convention.[44]

Micula's approach could be more pertinent in the case of a non-ICSID award for which enforcement would be sought under the New York Convention. A respondent state might attempt to challenge the validity of the underlying arbitration agreement pursuant to article V of the New York Convention. This might be attempted pursuant to article V(1), which allows (but does not require) a court to withhold recognition and enforcement of a foreign award where the parties to the underlying arbitration agreement 'were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it'.[45] That is fundamentally the position of the European Commission, adopted by the CJEU in ***Achmea***, and by award debtor states resisting enforcement of intra-EU investment treaty awards.

Alternatively, an argument could conceivably be made under article V(2) of the New York Convention that a US court's recognition of an intra-EU investor-state award in spite of the views of the CJEU and European Commission (and presumably also of the respondent state) that the award was contrary to European law would be contrary to US public policy.[46]

Even then, however, there would likely be a strong argument for deference to a tribunal's jurisdictional determination – including of questions related to ***Achmea*** – since the applicable arbitration rules would almost certainly have entrusted jurisdictional questions to the tribunal.[47] In practice, US courts will, where possible, avail themselves of the opportunity to leave questions of European law to the courts of a foreign arbitral seat with primary jurisdiction over an award.

In ***Novenergia v Spain***, for example, a federal district court stayed proceedings to enforce an Energy Charter Treaty (ECT) award in favour of Luxembourg investors pending the decision of the courts of Sweden, the arbitral seat, in respect of whether ***Achmea***'s reasoning applies to an ECT Award. In so doing, the court observed that the issues presented by ***Achmea*** were 'of importance to the EU and better suited for initial review in their courts'.[48]

Similarly, US federal district courts in several pending actions to enforce intra-EU ICSID awards have issued stays pending the result of ICSID annulment proceedings, even when the ad hoc committees constituted to review those same awards under the ICSID Convention had lifted the provisional stay imposed in annulment cases under the ICSID Convention and allowed enforcement to go forward.[49]

FUTURE QUESTIONS

Micula will not be the US courts' last word on intra-EU investor-state awards. Pending and future cases will almost certainly afford the district courts and perhaps the DC Circuit an opportunity to rule on some of the uncertainties identified above.

New issues will arise as well. As reflected in ***Novenergia***, for example, the scope of ***Achmea*** is itself unsettled. EU member states are divided on whether its holding applies to intra-EU investment arbitration under the ECT, a sector-specific, multilateral agreement that provides for investor-state arbitration and to which many non-EU states, as well as the European Union itself, are parties.[50] This is important because a large proportion of the intra-EU investor-state awards for which enforcement is being sought before US courts are ECT awards arising out of disputed reforms to Spain's solar energy sector.[51]

This question has added urgency in the context of another major development: in May 2020, 23 of the 27 EU member states announced a 'Termination Agreement' intended to 'implement' the ***Achmea*** judgment by terminating their intra-EU BITs.[52] This agreement is currently in force for 13 EU states.[53]

Although member states had previously pledged to terminate their intra-EU BITs, the Termination Agreement goes farther: it requires signatories to resist intra-EU awards and is explicitly retroactive.[54] The Termination Agreement also requires states to resist awards concluded before the ***Achmea*** judgment, while ostensibly requiring parties to intra-EU investor-state arbitration pending at the time of the ***Achmea*** judgment to enter into 'structured dialogue' to reach a settlement and obliging European investor claimants to suspend their claims.[55]

Unusually, the Termination Agreement also purports to cancel 'sunset clauses' in the relevant treaties.[56] Such clauses would otherwise extend the period of the relevant treaty for a term of years after notice of its termination.

The Termination Agreement does not apply to arbitration under the ECT[57] nor does it purport to affect participating states' obligations under the ICSID Convention.[58] Although the right of states to terminate treaties is beyond serious question, it is not clear that the retroactive aspects of the Termination Agreement are proper under public international law or that investor-state tribunals will accept them. The Termination Agreement does, however, demonstrate the depth of the European Commission's opposition to intra-EU BITs and is sure to give rise to complex questions about the proper relationship of European and public international law.

The enforceability of intra-EU arbitral awards rendered under the ECT in Europe is uncertain. Although the Termination Agreement does not explicitly apply to arbitration conducted pursuant to the ECT, the European Commission has not concealed its hostility to intra-EU arbitration arising under the treaty.[59]

Moreover, on 3 March 2021, a CJEU Advocate General issued an opinion arguing that ***Achmea*** should be extended to bar intra-EU arbitration under the ECT – a significant development that does not, however, bind the CJEU.[60] Days earlier, a Swedish court had referred this very question to the CJEU, potentially giving the court the opportunity to issue a companion ruling to ***Achmea***.[61]

At the same time, ICSID tribunals have continued to find that they have jurisdiction to hear intra-EU arbitration arising under the ECT.[62] If the CJEU makes a formal ruling that ***Achmea*** applies to intra-EU ECT arbitration, the importance of US courts as a strategic forum is likely only to increase as investors seek a forum in which to enforce their intra-EU ICSID awards.

CONCLUSION

The decision in ***Micula*** has raised many questions and left many unanswered. It is plainly not the end of the story: investors continue to initiate arbitration proceedings and petition US courts to enforce intra-US awards.

US courts are, thus, certain to be considering efforts to enforce those awards for the foreseeable future, and jurisprudence in this area will continue to evolve in the backdrop of an increasingly hostile enforcement environment in Europe. It is critical that US courts address the questions raised by Micula.

Nearly two years on, however, ***Micula*** remains the applicable precedent and signals that, ***Achmea*** notwithstanding, intra-EU investor-state awards remain enforceable in the United States, if not quite assuredly so.

Endnotes

1 See ***Micula v Government of Romania***, 404 F. Supp. 3d 265 (D.D.C. Sept. 11, 2019), aff'd, No. 19-7127, 2020 U.S. App. LEXIS 16008 (D.C. Cir. May 19, 2020). See also S***lowakische Republik (Slovak Republic) v Achmea BV, Court of Justice of the European Union***, Judgment, Case C-284/16 (Mar. 6, 2018) (***Achmea*** judgment). ^ Back to section

2 See, for example, ***Mainstream Renewable Power Ltd v Fed Republic of Germany***, ICSID Case No. ARB/21/26 (registered May 13, 2021); ***Uniper SE v Kingdom of the Netherlands***, ICSID Case No. ARB/21/22 (registered April 30, 2021); ***EP Wind Project (Rom) Six Ltd v Romania***, ICSID Case No. ARB/20/15 (registered May 19, 2020); ***Adria Group BV and Adria Group Holding BV v Republic of Croatia***, ICSID Case No. ARB/20/6, (registered March 2, 2020); ***Hamburg Commercial Bank AG v Italian Republic***, ICSID Case No. ARB/20/3, (registered January 21, 2020). The authors of this article are counsel to the claimants in several such investor-state disputes. ^ Back to section

3 See European Commission 'EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties' (5 May 2020). Signatories of the Termination Agreement are Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. Investors have continued to raise claims under intra-EU BITs. See, for example, ***OTP Bank Plc v Republic of Croatia***, ICSID Case No. ARB/20/43 (registered October 16, 2020); ***JCDecaux SA v Czech Republic***, ICSID Case No. ARB/20/33 (registered September 16, 2020). ***Donatas Aleksandravicius v Denmark*** was registered days before the agreement came into force. See ***Donatas Aleksandravicius v Kingdom of Denmark***, ICSID Case No. ARB/20/43 (registered August 18, 2020). ^ Back to section

4 See ***Novenergia II-Energy & Environment v Kingdom of Spain***, Civ. No. 18-cv-01148 (D.D.C. filed May 16, 2018) ($58.7 million); ***Nextera Energy Global Holdings v Kingdom of Spain***, No.1:19-cv-01618-TSC (D.D.C. filed Jun. 3, 2019) ($291 million); ***9REN Holdings SARL, v Kingdom of Spain***, No. 1:19-cv-01871 (D.D.C. filed Jun. 25, 2019) ($46.56 million); ***CEF ENERGIA, BV v Italy***, No. 1:19-cv-03443 (D.D.C. filed Nov. 15, 2019) ($22 million); ***RREEF Infrastructure (GP) Limited v Kingdom of Spain***, No. 1:19-cv-03783-CJN (D.D.C. filed Dec. 19, 2019) ($66.3 million); ***Magyar Farming v Hungary***, No. 1:20-cv-00637-CKK (D.D.C. filed Mar. 4, 2020) ($7 million); ***Infrared v Kingdom of Spain***, No. 1:20-cv-00817 (D.D.C. filed Mar. 25, 2020) ($28.2 million); ***Foresight Lux. Solar 1 SARL v Kingdom of Spain***, No. 1:19-cv-03171 (S.D.N.Y filed March 30, 2020) ($43.8 million); ***Cube Infrastructure Fund SICA V v Kingdom of Spain***, No. 1:20-cv-01708 (D.D.C. filed June 23, 2020) (€ 33.7 million). The authors of this article are counsel to the Petitioner in ***Infrared v Kingdom of Spain***. ^ Back to section

5 See ***Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania [I]***, ICSID Case No. ARB/05/20, Final Award, (Dec. 11, 2013) (***Micula*** award), ¶ 166. ^ Back to section

6 The acquis communautaire is an accumulated body of laws and regulations to which all EU member states are expected to adhere and to adopt as a condition of entry. Articles 69 and 71 Romania's European Accession Agreement obliged Romania to harmonise its domestic legislation with the acquis. See also Europe Agreement establishing an association between the European Economic Communities and Romania (Feb. 1, 1993), articles 69 to 71 (requiring harmonisation of Romanian and EU law). ^ Back to section

7 See ***Micula*** award, ¶ 178 ('One of the key areas of tension between Romania and the EU during this process was the alignment of Romania's competition policy and state aid laws with the acquis communautaire.'). ^ Back to section

8 The members of the tribunal in ***Micula*** were Dr Stanimir A Alexandrov (President), Dr Laurent Lévy and Prof Georges Abi-Saab. ^ Back to section

9 See ***Micula*** award, ¶ 334 ('The Commission submits that "[i]f the Tribunal rendered an award that is contrary to obligations binding on Romania as an EU Member State, such award could not be implemented in Romania by virtue of the supremacy of EC law, and in particular State aid rules.'"). ^ Back to section

10 See ***Micula*** award, ¶ 321. ^ Back to section

11 See ***Micula*** award, ¶ 1329. During the pendency of the ***Micula*** arbitration, Alexander Yanos was a partner at Freshfields Bruckhaus Deringer US LLP, which acted as counsel to Romania. ^ Back to section

12 See Commission Decision (EU) 2015/1470 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania (30 March 2015). This decision in turn was quashed by the General Court in June 2019, on the basis that the award recognised a right to compensation for the investors existing before Romania's accession to the European Union and, thus, that the Commission was precluded from applying EU state aid rules to this situation. See Judgment of the General Court 18 June 2019, ***European Food SA and Others v Commission***, T-624/15, T-694/15 and T-704/15, ECLI:EU:T:2019:423. The General Court's decision is on appeal to the European Court of Justice. See Appeal brought on 27 August 2019 by European Commission against the judgment of the General Court (Second Chamber, Extended Composition) delivered on 18 June 2019 in Case T-624/15: ***European Food ea v Commission***. Back to section

13 ICSID Convention, article 52. Back to section

14 See ***Ioan Micula, Viorel Micula and others v Romania***, ICSID Case No. ARB/05/20, Decision on Annulment (Feb. 26, 2016) (***Micula*** Annulment) ¶¶ 36-37 ('The Committee found that an appropriate condition, in this case, was a written undertaking by Romania confirming its obligation to enforce the Award under Article 53 of the Convention, which, according to the Committee . . . Romania subsequently declined to provide such written undertaking and, on September 7, 2014, the stay of enforcement of the Award was therefore automatically revoked.'). The ad hoc committee comprised Dr Claus von Wobeser (president), Dr Bernardo M Cremades and Judge Abdulqawi A Yusuf. Ultimately, the committee upheld the Award in 2016. In doing so it specifically rejected the theory – later adopted in ***Achmea*** – that the tribunal had been without jurisdiction because EU Treaties had superseded the Swedish-Romania BIT. See ***Micula*** Annulment ¶ 330. Back to section

15 Article 54 is implemented in US law by 22 USC §1650a ('An award of an arbitral tribunal rendered pursuant to chapter IV of the [ICSID Convention] shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. The Federal Arbitration Act (9. USC §§ 1 et seq) shall not apply to enforcement of awards rendered pursuant to the [ICSID Convention].'). Back to section

16 See ***Achmea BV (formerly known as 'Eureko BV') v The Slovak Republic (UNCITRAL)***, PCA Case No. 2008-13, Final Award (Dec. 7, 2012). Back to section

17 Request for a preliminary ruling under article 267 of the Treaty on the Functioning of the European Union (TFEU) from the Bundesgerichtshof (Federal Court of Justice, Germany) (Mar. 3, 2016). See also ***Achmea BV v The Slovak Republic***, UNCITRAL, PCA Case No. 2008-13 (formerly ***Eureko BV v The Slovak Republic***), Judgment of the Grand Chamber of the European Court of Justice, (Mar. 6, 2018). Back to section

18 ***Achmea*** judgment ¶ ¶ 55-60. Back to section

19 ***Achmea*** judgment ¶ ¶ 35, 60. Back to section

20 *Achmea* judgment ¶ 60. More specifically, the CJEU considered that intra-EU investor-state dispute resolution was incompatible with the supranational framework of EU law and that articles 267 and 344 of the TFEU precluded investor-state dispute settlement provisions in intra-EU BITs. See also Treaty on the Functioning of the European Union, 2008 O.J. C 115/47, articles 267 and 344. Back to section

21 See ***TECO Guat Holdings, LLC v Republic of Guatemala***, No. CV 17-102 (RDM), 2018 WL 4705794, at *2 (D.D.C. Sept. 30, 2018), quoting Mobil Cerro Negro, 863 F.3d at 102; see also ***Mobil Cerro Negro Ltd v Bolivarian Republic of Venez***, 87 F. Supp. 3d 573, 578 (S.D.N.Y. 2015), rev'd on other grounds, 863 F.3d 96 (2d Cir. 2017) (stating that ICSID 'determinations are final' and that national courts 'may review such awards solely to confirm their authenticity'). Back to section

22 See ***Mobil Cerro Negro***, 853 F.3d at 118; ***TECO Guat Holdings, LLC v Republic of Guatemala***, No. CV 17-102 (RDM), 2018 WL 4705794, at *2 (D.D.C. Sept. 30, 2018) (same). Back to section

23 See ***TECO Guat Holdings, LLC v Republic of Guatemala***, No. CV 17-102 (RDM), 2018 WL 4705794, at *2 (D.D.C. Sept. 30, 2018), quoting ***Mobil Cerro Negro Ltd v Bolivarian Republic of Venez***, 87 F. Supp. 3d at 102 (S.D.N.Y. 2015). Back to section

24 Investor-state awards subject to enforcement under the New York Convention are subject to limited but still significantly broader judicial review than ICSID awards. When made at a foreign seat, recognition of such awards may be challenged before a US court on the non-merits grounds listed in the New York Convention. See New York Convention (1958), articles V(1) and (2). US-seated awards may also be challenged pursuant to the grounds for vacatur enumerated in Chapter 1 of the Federal Arbitration Act. See 9 USC § 10(a). Back to section

25 See 28 USC §§ 1605–1607. Back to section

26 See ***Micula v Gov't of Romania***, 404 F. Supp. 3d 265, 276 (D.D.C. 2019). In an earlier ruling, the Micula district court held that even though an ICSID award has the status of a state court judgment under US law, the award may not be registered on an ex parte basis in the same manner as a private court judgment. Instead, ICSID award creditors are still required 'to file a plenary action, subject to the ordinary requirements of process under the Foreign Sovereign Immunities Act'. See ***Micula v Gov't of Rom***, 104 F. Supp. 3d 42, 44 (D.D.C. 2015). Back to section

27 See 28 USC § 1605(a)(6) (discussed in ***Micula***, 404 F. Supp. 3d at 275-78). Back to section

28 See ***Micula***, 404 F. Supp. 3d at 277–80. Back to section

29 See ***Micula***, 404 F. Supp. 3d at 279. Back to section

30 See ***Micula***, 404 F. Supp. 3d at 279. Back to section

31 The General Court reasoned that the incentives, and payment of compensation for their cancellation, did not violate EU state aid rules because the relevant events all preceded Romania's entry into the European Union and the applicability of European law. Judgment of the General Court (Second Chamber, Extended Composition) of 18 June 2019 in Cases T-624/15, T-694/15 and T-704/15 ***European Food SA and Others v European Commission*** (***Micula***) (discussed in ***Micula v Gov't of Romania***, 404 F. Supp. 3d 265, 277 (D.D.C. 2019)). The European Commission appealed the General Court's decision to the CJEU. See appeal brought on 27 August 2019 by the European Commission against the judgment of the General Court (Second Chamber, Extended Composition) (18 June 2019) in Case T-624/15: ***European Food ea v Commission*** (Case C-638/19 P) (2019/C 348/15). ^ Back to section

32 Romania also alleged that the act of state and foreign compulsion doctrines prohibited the award's enforcement and that it had already fully satisfied the award. The district court found both of these defences 'overtaken by events' given the EU General Court's finding that payment of the Micula award would not violate EU state aid rules. Micula v Gov't of Rom, 404 F. Supp. 3d at 281. The district court also rejected Romania's satisfaction defence on the facts. See id. at 285. ^ Back to section

33 See ***Micula v Gov't of Rom***, No. 19-7127, 2020 U.S. App. LEXIS 16008, *2 (D.C. Cir. May 19, 2020). ^ Back to section

34 This is particularly the case given that, with limited exceptions, the District of Columbia is the presumptive venue for all actions against foreign sovereigns, including to enforce investor-state arbitration awards. See 28 USC § 1391(f)(4). ^ Back to section

35 See 22 USC § 1650a(a). ^ Back to section

36 See ***Micula***, 404 F. Supp. 3d at 275 (citing ***Mobil Cerro Negro, Ltd v Bolivarian Republic of Venez***, 863 F.3d at 102, 11 (2d Cir. 2017)). ^ Back to section

37 See ***Mobil Cerro Negro***, 863 F.3d at 102. See also id. at 121 (observing that the ICSID-award debtor can make 'non-merits challenges' to an award, such as to 'the authenticity of the award presented for enforcement, the finality of the award, or the possibility that an offset might apply to the award that would make execution in the full amount improper'). This limited role 'reflects an expectation [under the Convention] that the courts of a member nation will treat the award as final.' ***Micula***, 404 F. Supp. 3d at 275-76. ^ Back to section

38 See ICSID Convention, article41(1) ('The Tribunal shall be the judge of its own competence.'). See also ***First Options of Chicago, Inc v Kaplan***, 514 U.S. 938, 943 (1995). ^ Back to section

39 See 28 U.S.C. § 1605(a)(1) ('A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign state has waived its immunity either explicitly or by implication.'). ^ Back to section

40 This argument was not raised in ***Micula***. Back to section

41 See ***Creighton Ltd v Qatar***, 181 F.3d 118, 123 (D.C. Cir. 1999) (a sovereign, by signing the New York Convention, waives its immunity from arbitration-enforcement actions in other signatory states); ***Tatneft v Ukraine***, 771 Fed. Appx. 9, 10 (D.C. Cir. 2019) ('signatories to the New York Convention must have contemplated arbitration-enforcement actions in other signatory countries, including the United States'). See also ***Process & Indus Devs Ltd v Fed Republic of Nigeria***, No. 18-cv-594(CRC), 2020 U.S. Dist. LEXIS 229283, at *22 (D.D.C. 2020) (finding 'no convincing reason to depart from the persuasive reasoning of . . . Creighton and Taftneft'). Back to section

42 See ***Micula v Gov't of Rom***, No. 19-7127, 2020 U.S. App. at *2 (D.C. Cir. May 19, 2020). Back to section

43 International investment tribunals have consistently rejected intra-EU jurisdictional objections. As expressed in categorical terms by the ***RREEF v Spain*** tribunal, 'in all published or known investment treaty cases in which the intra-EU objection has been invoked by the Respondent, it has been rejected. The present decision on this point therefore falls squarely within the continuity of this consistent pattern of decision-making by international tribunals.' ***RREEF v Spain***, ICSID Case No. ARB/13/30, Decision on Jurisdiction (Jun. 6, 2016) ¶ 89 (emphasis added). More recently, the ICSID Annulment Committee in ***Sodexo Pass International SAS v Hungary*** observed that not a single ICSID tribunal has held that ***Achmea*** renders an intra-EU BIT's arbitration clause null and void and unanimously rejected Hungary's challenge to the award. See Jack Ballantyne, 'Intra-EU award against Hungary upheld', ***Global Arbitration Review*** (25 May 2021); ***Sodexo Pass International SAS v Hungary***, ICSID Case No. Arb/14/20 (May 7, 2021). See also, for example, (1) rejecting the intra-EU objection in claims under bilateral investment treaties: ***Eastern Sugar BV v Czech Republic***, UNCITRAL, Partial Award (Mar. 27, 2007) ¶¶ 159 et seq; ***Rupert Joseph Binder v Czech Republic***, UNCITRAL, Award on Jurisdiction (Jun. 6, 2007) ¶¶ 59-67; ***A11Y Ltd v Czech Republic***, UNCITRAL, Award on Jurisdiction (Feb. 9, 2017) (decision reported by IA Reporter on Feb. 14, 2017); ***Jan Oostergetel and Theodora Laurentius v Slovak Republic***, UNCITRAL, Decision on Jurisdiction (Apr. 30, 2010) ¶¶ 72-109; ***Addiko Bank AG and Addiko Bank dd v Republic of Croatia***, ICSID Case No ARB/17/37, Final Award (Jun. 12, 2020); and (2) rejecting the intra-EU objection in claims under the Energy Charter Treaty (ECT): ***AES Summit Generation Ltd and AES-Tisza Erömü Kft v Hungary***, ICSID Case No. ARB/07/22, Award (Sept. 23, 2010) ¶¶ 7.6.7–7.6.9; ***Electrabel SA v Hungary***, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (Nov. 20, 2012) ¶¶ 4.146 et seq; ***Blusun SA et al v Italy***, ICSID Case No. ARB/14/3, Award (Dec. 27, 2016) ¶¶ 277 et seq; ***Charanne and Construction Investments v Spain***, SCC Case No. V062/2012, Award (Jan. 21, 2016) ¶¶ 424-50; ***RREEF Infrastructure (GP) Limited et al v Spain***, ICSID Case No. ARB/13/30, Decision on Jurisdiction (Jun. 6, 2016) ¶¶ 71-90; ***Isolux Netherlands BV v Spain***, SCC Case V 2013/153, Final Award (Jul. 6, 2016) ¶ 656; ***Landesbank Baden-Württemberg, and others v Spain*** (ICSID Case No. ARB/15/45), Decision on the Intra-EU Jurisdictional Objection, (Feb. 25, 2019) ¶ 202. But see T-***heodoros Adamakopoulos and others v Republic of Cyprus***, ICSID Case No. ARB/15/49, Dissent of Professor Marcelo Kohen (Feb. 3, 2020) (opposing a finding of jurisdiction under an intra-EU bilateral investment treaty). ^ Back to section

44 Cf William W Park & Alexander A Yanos, 'Treaty Obligations and National Law: Emerging Conflicts in International Arbitration', ***Hastings Law Jounral*** 58, No. 2: 251 (discussing tension between US rules on jurisdiction and forum non conveniens with US obligations under the New York Convention). Notably, in a case brought by the ***Micula*** claimants in connection with efforts to enforce their award in the United Kingdom, the UK Supreme Court found that while EU law might control when interpreting a treaty exclusively among EU member states, it could not displace the United Kingdom's award enforcement obligations under the ICSID Convention, which were owed not just to EU member states but to all states party to the ICSID Convention. See ***Micula and others (Respondents/Cross-Appellants) v Romania (Appellant/Cross-Respondent)***, [2020] UKSC 5 at ¶¶ 104-06. ^ Back to section

45 New York Convention, article V(1)(a). Back to section

46 New York Convention, article V(2)(b). Back to section

47 See generally ***First Options***, 514 U.S. at 943; ***BG Group PLC v Republic of Argentina***, 572 U.S. 25, 33 (2014); ***Chevron Corp. v Ecuador***, 795 F.3d 200, 207-08 (D.C. Cir. 2015); ICSID Convention, article 41. Back to section

48 ***Novenergia II — Energy & Env't (SCA) v Kingdom of Spain***, 2020 U.S. Dist. LEXIS 12794. See also ***Cef Energia, BV v Italian Republic***, No. 19-cv-3443(KBJ), 2020 U.S. Dist. LEXIS 120291, at *13 (D.D.C. July 23, 2020). Foreign courts – and especially those outside the European Union – may disagree with the CJEU's position. See, for example, Judgment of the Swiss Supreme Court (Tribunal Fédéral) (4A_34/2015) (Oct. 6, 2015) (upholding the award rendered in ***EDF Int'l v Hungary***, an UNCITRAL arbitration under the France-Hungary BIT seated in Switzerland and rejecting the argument that EU law preempted intra-EU BIT obligations). Back to section

49 See, for example, ***Novenergia II-Engergy & Environment v Kingdom of Spain***, No. 18-cv-01148(TSC), (D.D.C. Jan. 27, 2020); ***Nextera Energy Global Holdings v Kingdom of Spain***, No.1:19-cv-01618-TSC (D.D.C. Sept. 30, 2020); ***9REN Holdings SARL v Kingdom of Spain***, No. 1:19-cv-01871 (D.D.C. Sept. 30, 2020); ***CEF Energia, BV v Italian Republic***, No. 19-cv-3443(KBJ), (D.D.C. July 23, 2020); ***RREEF Infrastructure (GP) Limited v Kingdom of Spain***, No. 1:19-cv-03783-CJN (D.D.C. filed Mar. 31, 2021); ***Cube Infrastructure Fund SICA V v Kingdom of Spain***, No. 1:20-cv-01708 (D.D.C. May 21, 2021). The authors of this article are counsel to the Petitioner in ***Infrared v Kingdom of Spain***. Back to section

50 See the ECT, 34 I.L.M. 360, 385 (1995). It is estimated that some 60 per cent of ECT arbitrations concern intra-EU disputes. See Johannes Tropper, 'The Energy Charter Treaty and its (in)compatibility with EU law: To be or not to be, that is the question?' ***Völkerrechtsblog*** (17 December 2020). In turn, roughly 45 per cent of intra-EU treaty-based arbitrations are brought under the ECT. See UNCTAD, 'Fact Sheet on Intra-European Union Investor-State Arbitration Cases', IIA Issue Note 3.2018, p. 1. EU member states are divided about whether the ECT should meet the same fate as intra-EU bilateral investment treaties. When, in January of 2019, the then-28 EU member states announced their intention to terminate all intra-EU bilateral investment treaties, only 22 were willing to take the position that ***Achmea*** also applied to intra-EU investor-state arbitration under the ECT. See Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union (22 signatories). Another six member states found ***Achmea*** 'silent' in respect of the ECT. Five of these (Sweden, Luxembourg, Finland, Malta and Slovenia) urged that the issue be allowed to be further developed in litigation before member state courts, while Hungary more affirmatively asserted the position that ***Achmea*** did not apply to ECT claims. See also Tom Jones, 'EU countries to cancel BITs post-Achmea,' ***Global Arbitration Review*** (17 January 2019). Back to section

51 See, for example, ***NextEra Energy Glob Holdings BV v Kingdom of Spain***, No. 19-cv-01618(TSC), 2020 U.S. Dist. LEXIS 180119 (D.D.C. Sept. 30, 2020). ^ Back to section

52 See Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, SN/4656/2019/INIT OJ L 169, 29.5.2020, p. 1–41 (BG, ES, CS, DA, DE, ET, EL, EN, FR, HR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL). Signatories of the Termination Agreement are Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain. As at the time of writing, four 'holdouts' – Austria, Finland, Ireland and Sweden – have yet to ratify the Agreement. See European Council, 'Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union', Treaties and Agreements Database (last visited 26 May 2021). ^ Back to section

53 Ratification details for the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union: www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en (last accessed 4 June 2021) (listing Bulgaria, Denmark, Germany, Estonia, Croatia, Cyprus, Latvia, Hungary, Malta, Netherlands, Poland, Slovenia and Slovakia). ^ Back to section

54 Despite Brexit in January 2020, the European Commission has commenced 'infringement proceedings' against both the United Kingdom and Finland for having declined to sign the Termination Agreement. The Commission maintains that EU law continues to apply to UK BITs until the end of 2020. See Tom Jones, 'UK and Finland face legal action over intra-EU BITs', ***Global Arbitration Review*** (14 May 2020). In October 2020, the Commission issued a 'reasoned opinion' maintaining the right to refer the United Kingdom to CJEU if it does not terminate its BITs with EU member states but has not taken further action. See European Commission press corner, 'October Infringements Package: Key Decisions' (30 October 2020); Mark McCloskey, 'Safe Haven for Investors in (and Through) the UK Post-Brexit?', ***AJIL Insights*** (24 February 2021). ^ Back to section

55 See Termination Agreement, article 9. In addition, article 7 of the Termination Agreement requires states to: (1) inform tribunals about the alleged legal consequences of the Achmea judgment; and (2) request that national courts (including non-EU courts) set the arbitral award aside, annul it or refrain from recognising or enforcing it. The Termination Agreement does not affect arbitration in which a final award or settlement was reached before 6 March 2018 (the date of the CJEU's Achmea decision), provided that the award was at that date duly executed with no challenge pending. See Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union SN/4656/2019/INIT OJ L 169, 29.5.2020. ^ Back to section

56 The Termination Agreement purports to make such sunset clauses ineffective, both under treaties terminated as a consequence of the Agreement, as well as under previously terminated treaties of which the sunset clauses would otherwise have remained in effect. See Termination Agreement, articles 2 and 3. ^ Back to section

57 Since the Termination Agreement entered into force, investors have continued to raise intra-EU claims against states under the ECT. See, for example, ***Mainstream Renewable Power Ltd v Fed Republic of Germany***, ICSID No. ARB/21/26 (registered May 13, 2021); ***Uniper SE v Kingdom of the Netherlands***, ICSID No. ARB/21/22 (registered April 30, 2021); ***RWE AG v Kingdom of the Netherlands***, ICSID No. ARB/21/4 (registered February 2, 2021); ***Encavis v Italian Republic***, ICSID No. ARB/20/39 (registered October 6, 2020); ***Fin.Doc Srl v Romania***, ICSID No. ARB/20/35 (registered September 17, 2020). ^ Back to section

58 Irrespective of whether they sign onto the Termination Agreement, there will be a strong argument that, so long as respondent states remain contracting parties to the ICSID Convention, an arbitral tribunal's views on these issues should be decisive for a US court. See ICSID Convention, article 41(a) ('The Tribunal shall be judge of its own competence.'). Likewise, under the New York Convention, if the arbitration agreement embodied in the relevant treaty gives the tribunal competence over its own jurisdiction, and such an award had not otherwise been set aside by the courts of the seat of arbitration, the tribunal's jurisdictional decision likely ought also to control in the U.S. See generally ***First Options***, 514 U.S. at 943; ***Chevron***, 795 F.3d at 207-08. ^ Back to section

59 See Termination Agreement, preamble ('CONSIDERING that this Agreement addresses intra-EU bilateral investment treaties; it does not cover intra-EU proceedings on the basis of Article 26 of the ECT. The European Union and its Member States will deal with this matter at a later stage.'). ^ Back to section

60 See Julian Scheu and Petyo Nikolov, 'AG Szpunar's Opinion in Case C-741/19: Preparing the End of Intra-EU Investment Arbitration Under the Energy Charter Treaty?', ***Kluwer Arbitration Blog*** (25 May 2021). ***Achmea***, notably, was decided contrary to the preceding advice of the then-Advocate General. See Opinion of Advocate General Wathelet delivered on 19 September 2017. ^ Back to section

61 See Lisa Bohmer, 'Swedish Court Asks CJEU to Rule on Compatibility of ECT Arbitration Clause with EU Law', ***IA Reporter*** (1 March 2021). Other states have raised this issue with domestic European courts as well. See, for example, Lisa Bohmer, 'The Netherlands Seeks Anti-Arbitration Ruling from German Courts with Respect to Two ECT-Based ICSID Proceedings', ***IA Reporter*** (17 May 2021). ^ Back to section

62 See, for exmaple, ***Kruck v Kingdom of Spain***, ICSID No. ARB/15/23, Decision on Jurisdiction and Admissibility, ¶¶ 282–295 (April 19, 2021) (dismissing Spain's objection and finding that its jurisdiction is 'not precluded or excluded by provisions of EU law'). ^ Back to section

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