Tamás Kende*

Arbitral Awards Classified as State Aid under European Union Law**

Decisions obtained in international arbitrations against member states of the European Union (EU) may contradict decisions obtained at the final instances of European law and such decisions may declare that measures by member states of the EU were taken in contravention of international law. Many of these measures may have been taken on the initiative of or under pressure from European institutions. While European authorities may shelter member states from implementing such arbitral awards in the EU, enforcement may continue outside the EU.

I Introduction

Bilateral Investment Treaties (BITs) have proliferated since the 1960s.[1] BITs generally provide several investment protection clauses, such as: the fair and equitable treatment of investors, the most favoured nation principle, the national treatment principle, direct or indirect compensation in the event of expropriation, etc.[2] However, the most significant provision included in BITs were those that included investor-state dispute settlement (ISDS), which allowed investors to sue host states at international arbitrations, bypassing domestic courts and domestic legal regimes.[3]

In the 1990s, most European Union (EU) Member States from Western Europe (WE) countries signed BITs with the Central and Eastern European nations (CEE), such as the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Romania and Bulgaria, who became the new Member States of the EU (MS) in 2004 and 2007.[4]

* Tamás Kende PhD, Associate Professor of International and European Law, Elte Law School.

** The author expresses is grateful to Nafisa Kabir, Charlotte School of Law, J.D. 2015 and Amaan A. Shaikh J.D./M.B.A. Candidate Santa Clara University School of Law for the help in research and English drafting.

1 Zachary Elkins, Andrew T. Guzman, Beth Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000' [2008] U.Ill L. Rev. 265.

2 Cecilia Olivet: *A Test for European Solidarity: The Case of Intra-EU Bilateral Investment Treaties* (published in Transnational Institute) 3.

3 *Id.*

4 *Id.* at 8.

The accession of these twelve CEE nations into the European Union transformed these BITs into BITs between EU Member States, or intra-EU BITs.[5] The issue with these BITs was that, after the collapse of the Soviet bloc, in successive waves of privatisations, these nations concluded privatisation agreements with investors, which contained significant advantages for the investors in order for the countries to draw investments into this impoverished region. In many cases, these agreements contained state subsidies of significant proportions. Once these nations joined the EU, these agreements needed to comply with EU law and in many cases were not in-line with EU state aid policy. In many instances, these new Member States, in their accession processes into the EU, had to change their policies and review their prior commitments in order to adjust to the rules of the European single market. This adjustment meant a withdrawal of benefits conferred on investors before EU accession. Arguably, these withdrawals constituted takings within the meaning of BITs.

Since their accession into the European Union in 2004 and 2007, CEE states were inundated with numerous lawsuits by foreign and, in many cases, European investors in front of international tribunals.[6] Around 77 cases were brought against CEE states until mid-2014, which included 18 cases against the Czech Republic, 15 cases against Poland and 10 cases each against Hungary and Slovakia.[7] By comparison, only seven lawsuits were initiated against Western European states such as Germany, Spain, Belgium, Portugal, United Kingdom, Finland, France, Ireland, Italy, Luxembourg, Netherlands, Denmark, Sweden and Austria.[8] Sixty-five percent (50 cases) of all disputes against the CEE states were initiated by European investors based on intra-EU BITs.[9] In short, a majority of international investment arbitrations were initiated against capital importing CEE states by investors from (or investors established in) capital exporting Western European states.

These substantial numbers of lawsuits were politically inconvenient and extremely expensive for CEE states. Many of these cases originated from their adjustment to the EU single market prior to EU accession. However, in some cases, the basis of the complaint by investors in these international arbitrations were not measures adopted during the accession process, but, rather, were based on EU norms or decisions issued subsequent to CEE states' accessions.[10] These EU decisions forced CEE states to take certain measures, often by curtailing contractual rights awarded by CEE states to international or Western European investors. Since these investors realised that CEE states' measures were mostly implementing European norms and decisions of the European Commission (following lobbying in vain against implementation), they tried to invalidate the European Commissions' decisions in front of the EU Court of First

5 Olivet (n 2).
6 *Id.*
7 *Id. Investor to State Dispute Settlement (ISDS) – Some facts and figures page 5 and 6 European Commission DG Trade* <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf> and Recent Trends in IIAs and ISDS in <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> 7.
8 *Id.*
9 Olivet (n 2).
10 *Id.* at 4.

Instance/General Court and subsequently in the Court of Justice. When these initiatives failed, the facts of these cases were subsequently presented again by many of these investors in international fora, such as the International Centre for Settlement Investment Disputes (ICSID), or arbitrations organised under the UNCITRAL rules, among others.

It is here where a host of issues manifested. For one, there is a question as to whether European norms and decisions are part of the domestic law of the states or are part of their international obligations as international law. Special cases exist – such as the European Energy Charter Treaty, which itself gave rise to a large number of investment treaty arbitrations – where the EU itself is a party to the treaty and the treaty itself sets out the relationship between itself and EU law. Another relevant question is if and how arbitral decisions of investment tribunals can be implemented when one takes into account the preceding decisions of the European Commission, judgments by the European Court of First Instance/General Court and the European Court of Justice, especially if the effect of the arbitral decisions is contrary to EU norms and decisions. In some cases, if the Member State adhered to the arbitral award, it would run afoul of EU law, as the award itself is aimed at reinstating a state aid measure that would be declared unlawful under EU law. Analysing this latter problem will form the foundation of this paper.

II State Aid Under European Union Law

State aid is currently (as it has always been) a hot topic in the European Union. The issue with State aid is that certain government entities support industries or private companies by spending public funds and, therefore, it gives an unfair advantage over industries in the similar sector of industry in other EU Member States.[11] As the Member States of the European Union are brought under control, the European Commission has been forced to take responsibility to ensure compliance with State aid rules.[12]

1 What is State Aid?

Under Article 107 of the Treaty of the Functioning of the European Union (TFEU), state aid is any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings.[13] In order for an award to be considered 'State aid,' there are four conditions that must be met: (1) the measure must confer a selective economic advantage upon an undertaking; (2) the measure must be imputable to the State and financed through State resources; (3) the measure distorts or threatens to distort competition; and (4) the measure must have the potential to affect trade between

11 <http://ec.europa.eu/competition/consumers/government_aid_en.html>.
12 <http://ec.europa.eu/competition/state_aid/overview/index_en.html>.
13 EC: Communication from the Commission: Draft Commission Notice on the notion of State Aid pursuant to Article 107(1) of TFEU.

Member States.[14] Based on these factors, the TFEU allows for the interpretation of when State aid is or may be declared compatible.[15] The European Commission has been given great leniency to make normative declarations that certain types or categories of aid are compatible.[16]

2 What Constitutes Illegal State Aid?

Member States are generally required to notify the Commission in advance (ex ante) of any plans to grant state aid, except in cases covered by the conditions set out in block exemption regulations.[17] If the notification ex ante does not take place or if the aid does not conform with the conditions set out in the block exemption regulation then such aid is incompatible. If a notification has taken place but the notified aid has been cleared with conditions and such conditions were not met, that aid is also considered incompatible and, therefore, is illegal.

3 When is a State Aid Measure Imputable to the State?

From the above four formative criteria of state aid, imputability is the most relevant criterion for the purposes of the arbitral disputes and is also the most controversial. In the jurisprudence of the European Commission and the European Court, the provisions of the Treaties on state aid refer

> '…to the decisions of Member States by which, in pursuit of their own economic and social objectives, they give, by unilateral and autonomous decisions, resources to undertakings or other persons or procure for them advantages intended to encourage the attainment of the economic or social objectives sought.'[18] To illustrate this concept, the CJEU in the *Deutsche Bahn* case stated that '…for advantages to be capable of being categorised as aid within the meaning of Article 87(1) EC, they must, inter alia, be imputable to the State…'[19]

In most cases, the issue of imputability concerned whether certain grants of money by seemingly independent entities (funds, foundations, partially state owned enterprises) were in fact channelling state resources to the economy or not.[20] This type of act was considered imputable

---

14 <http://ec.europa.eu/competition/state_aid/overview/index_en.html>.

15 *Id.*

16 Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance OJ L187, 26.6.2014, 1–78 in <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2014:187:FULL&from=EN>.

17 There are also types of aid which are declared compatible by Article 107(2) or may be compatible under Article 107 (3) TFEU.

18 See *Deutsche Bahn AG v. Commission* (Case T-351/02, ECR II-1047) paragraph 101 and Case 61/79 *Amministrazione delle finanze del- lo Stato v Denkavit italiana* [1980] ECR 1205, paragraph 31.

19 *Id.*

20 C-78/76 (ECR 1977., p. 595. o.) 21.; C-206/06. *Essent Netwerk Noord* (ECR 2008., I-5497.) 70; C-83/98 P. *France v. Ladbroke Racing European Commission* (ECR 2000., I-3271.) C-379/98. *Preussen Elektra* (ECR 2001., I-2099.) para 59–62. and C-482/99. *France v. European Commission (Stardust)* (ECR 2002., I-4397.) paras 37–38.

to the state when the persons undertaking the decisions were *either nominated by or were acting under the control of the state.*[21] This seems to be in line with Article 8 of the Draft Articles of State Responsibility for Internationally Wrongful Acts.[22]

4 May a Court Judgement or an Arbitral Award Constitute Illegal State Aid?

It is arguable whether judges in ordinary courts meet the above criterion of control: they have been nominated by the state but nominations come in all EU Member States under some kind of professional ethics clause and under an explicit clause of judicial independence. On the other hand, it would be difficult to argue that arbitrators in international disputes are under the control of the state, since about a third of an arbitral panel would have been nominated by the state party to any ISDS[23] arbitration and the arbitrators must not receive instructions. Hence, from the European law perspective, it is contentious that the decisions of judges and arbitrators are not imputable to the state in the context of State aid law.

If the above were true, 'imputability' in the EU terminology would have a very different meaning from 'attributability', as generally accepted under public international law. In the meaning of Article 2 of the Draft articles on Responsibility of States for Internationally Wrongful Acts[24] of the International Law Commission, 'attributability' seems much broader than imputability in the EU state aid sense, as court decisions are clearly attributable to a state under international law within Article 4 of the Draft Articles (even if the government actively fought those decisions).[25]

Tietje and Wackernagel argue[26] based on the practice of the EU Court of Justice and the European Commission, that 'a contribution by a Member State is involuntary, and accordingly

21 C-482/99. *France v. European Commission (Stardust)* (ECR 2002., I-4397.) para 48 'The Commission points out that the State held the majority of the capital and the voting rights of Crédit Lyonnais and appointed its chairman and most of the members of its administrative board. In those circumstances, it contends that it is impossible to deny either the control exercised by the State over Crédit Lyonnais and, through the latter, over Altus, or, because of that control, the imputability to the State of the investments made by Altus, notwithstanding the malfunctioning of the control exercised by Crédit Lyonnais over the activities of its subsidiary.'

22 Article 8 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.' Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected.

23 Investor-state dispute settlement.

24 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001 Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session A/56/10. in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected.

25 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

26 Christian Tietje, Clemens Wackernagel, 'Outlawing Compliance? – The Enforcement of intra-EU Investment Awards and EU State Aid Law' Policy paper on Transnational Economic Law no. 41. 3.

does not constitute state aid when the state repays charges that have been improperly levied, when the state is obliged to pay damages, and when the state pays compensation for expropriation.' Tietje and Wackernagel cite *Denkavit,* referencing improperly levied charges, in which the Court stated 'it is therefore necessary to reply to the questions on the interpretation of Article 92 of the Treaty that the duty of the authorities of a Member State to repay to taxpayers who apply for such repayment, in accordance with national law, charges or dues which were not payable because they were incompatible with Community law does not constitute an aid within the meaning of Article 92 of the EEC Treaty.'[27]

On the payment of damages, they cite *Asteris*[28] in which the CJEU held that, '…damages which the national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute aid within the meaning of Articles 92 and 93 of the EEC Treaty.'[29] The *ThyssenKrupp*[30] judgment stated, 'compensation granted by the State for an expropriation of assets does not normally qualify as State aid.' The European Commission, – in its letter to Romania following the adverse *Micula* award – also dealt with the judgment in *Asteris,* stating that the *Micula* case (explored in more detail later) is fundamentally different from the *Asteris* case.[31] It states 'in the present case…the damages are awarded on the basis of an intra-EU BIT which the Commission considers incompatible with the Treaty and in order to re-instate the State aid which Romania had abolished. …The principle underlying the Asteris judgment is, therefore, not applicable in the particular circumstances here present.'[32]

The Commission, in its letter to Romania – to counter any arguments based on *Asteris* – cited the opinion of Advocate General Colomer[33] and stated that the award of damages equal to the sum of the amounts of aid that were envisaged to be granted would constitute an indirect grant of the aid found to be illegal and incompatible with the common market. The *Atzori* case[34] showed that the General Court considered that indemnification clauses for the recovery of State aid constituted State aid.

Tietje and Wackernagel also cite *Deutsche Bahn* in a context where an EU Member State implemented EU law and refer to the CJEU judgment, stating, 'Member States are only imple-

[27] Case 61/79, ECR 1980, 1205.

[28] Joint Cases 106 to 120/87, ECR 1988.

[29] 5539 et seq.

[30] Commission Decision of 20 November 2007 on the State aid C 36/A/06 (ex NN 38/06) implemented by Italy in favour of *ThyssenKrupp, Cementir and Nuova Térni Industrie Chimiche,* OJ EC No. L144/37, para. 70.

[31] Judgment of the Court of 26 April 1988. Asteris AE and others and Hellenic Republic v Commission of the European Communities. Production aid for tomato concentrate – Rules applicable to the Hellenic Republic – Consequences of a finding of illegality by the Court. Joined cases 97, 193, 99 and 215/86. European Court Reports 1988–02181 ECLI identifier: ECLI:EU:C:1988:199.

[32] Bruxelles, 01.10.2014 C(2014) 6848 final Subject: State aid SA.38517(2014/C) (ex 2014/NN) – Romania Implementation of Arbitral award *Micula v Romania* of 11 December 2013.

[33] Opinion of 28 April 2005 in Joined Cases C-346/03 and C-529/03 *Atzori* ECLI:EU:C:2005:256, paragraph 198. stating '…if an entitlement to compensation is recognised, the damage cannot be regarded as being equal to the sum of the amounts to be repaid, since this would constitute an indirect grant of the aid found to be illegal and incompatible with the common market.'

[34] Case T-384/08 *Elliniki Nafpigokataskevastiki AE Chartofylakeiou* v *Commission* ECLI:EU:T:2011:650.

menting Community provisions in accordance with their obligations stemming from the Treaty. Therefore, the provision at issue is not imputable to the German State…'[35]

Tietje and Wackernagel claim that '…the legal situation in case of an investment award is comparable to the legal situation in the instances cited above. The sole difference is that the obligation to pay compensation does not stem from domestic law but from international law. This fact, however, does not justify treating the situations differently. …there is no reason to apply different principles on obligations to compensate based in international law.'[36]

In my view, it would be easy to attribute or impute the decisions of an arbitration tribunal to the state, even if it was not naming more than a mere one third of the arbitrators to the tribunal. Arguably, by simply accepting the rules of selections of the arbitrators, the state has agreed to a composition of the arbitral tribunal, even if it has not agreed to specific individuals to be nominated as arbitrators. In sum, there are grounds to argue that, under EU law (save for the exceptions discussed below), an investment award itself, and subsequently, the enforcement of an investment award, does not generally constitute illegal State aid under Article 107 TFEU because the payment of compensation is involuntary. In my view, this argument is seemingly well-supported by authorities under EU law, but also weak because the EU member states themselves had agreed to the ISDS procedures and, therefore, the decisions of the tribunals are as attributable (imputable) to the member states as are the decisions of their ordinary courts.

Even Tietje and Wackernagel concede that when an international arbitral procedure is aimed at restoring state aid that an EU Commission decision confirmed by an EU Court judgment declared illegal, the award in such an international arbitral procedure may be considered as one reinstating illegal State aid, '…enforcement of an intra-EU investment award does not, as a general rule, constitute illegal state aid under Article 107 of the …TFEU… However… enforcement can constitute illegal state aid if the measure found to violate the investment agreement consisted of repealing a legal regime that itself constituted illegal state aid…'[37] They agree to this exception to the rule under EU law.

The European Commission has almost completely evaded the question of whether an arbitral award may be attributable (imputable) to the state as illegal State aid or not. The European Commission introduced related but slightly different arguments in its notice to Romania in the *Micula* case.[38] It is important to note that the Commission has not taken the position that foreign (non-EU) arbitral awards are not enforceable in general in the EU if they are contrary to EU law. Nevertheless, the Commission has taken the position that enforcement of an arbitral award aiming to reinstate the status quo ante with regard to an EU decision declaring aid illegal and ordering such aid to be recovered is illegal, based on the fact that (1) the initial state aid followed by (2) the enforcement of the grant of state aid through arbitration; and (3) an enforcement of the award are single action (process). The European Commission argues the

[35] *Deutsche Bahn AG v. Commission* (Case T-351/02, ECR II-1047) para 102.
[36] See (n 26) 5.
[37] See (n 26) 3.
[38] Bruxelles, 01.10.2014 C(2014) 6848 final State aid SA.38517(2014/C) (ex 2014/NN) – Romania Implementation of Arbitral award *Micula v Romania* 11 December 2013 <http://ec.europa.eu/competition/state_aid/cases/254586/254586_1595781_31_11.pdf>.

following: (1) the initial state aid decision was illegal under EU law; (2) the intra-EU BIT is illegal and is no longer valid; and therefore, (3) the effects of the illegal state aid enforced through an illegal mechanism contravening the EU State aid regime are contrary to EU law.

In support of the first point, the European Commission usually refers to its own decision and the decision of the European Court.[39] The second point refers to the response of Commissioner De Gucht to a Parliamentary oral Question in 2013, when he stated, 'the Commission agrees that bilateral and investment treaties (BITS) between EU Member States do not comply with EU law.'[40] This argument is not new. The European Commission and some Member States have already argued this point successfully in arbitrations. In another companion case, *Eastern Sugar*,[41] the Czech Republic – supported by the European Commission as *amicus curiae* - took the position that, following its accession to the EU, this BIT was automatically terminated, and Dutch investments in its territory have since been governed exclusively under EU law. The arbitral tribunals in the *Eastern Sugar* case answered this question by rejecting the argument that the opinion of the European Commission is neither biding nor persuasive or clear for the tribunal.[42] Moreover, the arbitral tribunal added that neither the European Agreement nor the Accession Treaty, nor the BIT itself provided expressly that the BIT would be terminated.[43] Finally, the arbitral tribunal held that it was not bound by the opinion of the European Commission. This matter was debated in greater depth in the *Eureko v Slovakia* case[44] and was decided in favour of the investors. Based on these awards, Canet and Doremus[45] take the view that 'the general inapplicability question….[is]…answered' and 'remains the question of the inapplicability of specific provisions of Intra-EU bilateral Investment.' Based on the aforementioned, the reference by the Commission to an answer by the former Commissioner to a Parliamentary question does not seem to be a particularly strong argument.

In the final point, the Commission, in *Micula,* had switched to a variant of the effects principle and referenced the *Lucchini* case, where the Court held that a national court was prevented from applying national law if the application of that law would in effect 'frustrate the application of Community law in so far as it would make it impossible to recover State aid that

39 In the *Micula* case, as a condition of its accession to the EU, Romania repealed the tax incentives granted to the *Micula* brothers in 2004 because the EU considered such incentives impermissible state aid. In the Hungarian electricity cases *(Electrabel, AES, EDFI)* there was an EU Commission decision declaring the long term power purchase agreements as illegal under the EU rules.

40 Question O-000043/2013/rev.1 in debate of the plenary of 22 May 2013.

41 *Eastern Sugar B.V.(Netherlands) v. The Czech Republic,* SCC Case No. 088/2004.

42 See the EEC's letter to the tribunal in para 115 of *Eastern Sugar B.V.(Netherlands) v. The Czech Republic,* SCC Case No. 088/2004 see in particular para 125.

43 *Eastern Sugar B.V. (Netherlands) v. The Czech Republic,* SCC Case No. 088/2004 paras 121 and 122.

44 PCA Case No. 2008-13 in the matter of an arbitration before a tribunal constituted in accordance with the agreement on encouragement and reciprocal protection of investments between the Kingdom of The Netherlands and The Czech and Slovak Federal Republic, signed on 29 April 1991, entered into force on 1 October 1992 between EUREKO B.V. ("Claimant") –and the Slovak Republic award on jurisdiction, arbitrability and suspension 26 October 2010.

45 Antoine Canet, Téo Doremus: *Problems and challenges of intra-EU investment treaties* <https://www.academia.edu/8735310/Problems_and_challenges_of_Intra-EU_investment_treaties_Intra-EU_BITS_>.

was granted in breach of Community law.'[46] In this context, the European Commission seems to argue that an intra-EU BIT is similar to a domestic law norm and, therefore, it is considered that the principle to apply is that 'where giving effect to an intra-EU BIT by a Member State would frustrate the application of Union law, that Member State must uphold Union law.' In other words, Member States must uphold Union law over an international agreement.

Hence, based on various points made by the Commission, it is indicative that the Commission took the view that a State aid related arbitral award that is based on an intra-EU BIT is not applicable (enforceable) in the EU, as it is itself state aid (it is attributable to the EU member state) and its effects would frustrate the application of EU law.

III ISDS Awards Incompatible with EU Decisions

Whenever aggrieved European investors seek to relitigate decisions by the European Commission or Court of Justice in international fora, the potential for incompatible and conflicting decisions will arise. One of the international forums that investors turned to was that of ICSID and the other is arbitration under UNCITRAL.

The EU Commission seems to have taken various routes to prevent such conflicts between an arbitral award based on international law and EU law in at least three ways: (1) attempts to force EU Member State to terminate intra-EU BITs; (2) intervening in international arbitrations as amicus curiae; and (3) efforts to preclude enforcement of adverse arbitral decisions based on intra-EU BITs.

1 Attempts to Force EU Member States to Terminate intra EU BITs

The Commission has long argued that intra-EU BITs are outdated and no longer necessary because the same protection is now afforded to investors, pursuant to various EU rules of the single market, including those on cross-border investments (the freedom of establishment and the free movement of capital). The Commission has been arguing that intra-EU BITs are incompatible with EU law. Perhaps the clearest example of the Commission's "dislike" for intra-EU BITs was when it issued the suspension injunction against Romania in *Ioan Micula, Viorel Micula and others v. Romania,* in which the Commission directed Romania not to satisfy the award nor allow to recover any sums already paid.[47] The claimants in *Micula* brought an action against the Commission later in 2014 and the decision is still pending.[48]

46 Judgment of 18.7.2007 — Case C-119/05 Judgment of The Court (Grand Chamber) 18 July 2007, 23.

47 By letter of 26 May 2014, the Commission informed Romania of its decision to issue a suspension injunction pursuant to Article 11(1) of Regulation (CE) No 659/1999 of 22 March 1996, thereby obliging Romania to suspend any action which may lead to the execution or implementation of the part of the Award that had not yet been paid, as such execution would constitute unlawful State aid.

48 *Micula and Others v Commission* Case T-646/14 (currently pending).

As early as 2004, the tribunal in *Eastern Sugar* stated that one of the indications that intra-EU-BITs were not illegal was the fact that the Commission 'did not start infringement proceedings against the Netherlands and the Czech Republic and other Member States for failure to terminate their BITs.'[49] As already mentioned above, in 2013 Commissioner De Gucht questioned the legality of investment treaties between EU Member States in the European Parliament.[50] On June 18 2015, the European Commission issued letters of formal notice to five European Union Member States for intra-EU bilateral investment treaties' (BITs) incompatibility with Article 351 of the Treaty on the Functioning of the European Union (TFEU). The letters further pressure Austria, the Netherlands, Romania, Slovakia and Sweden to terminate their intra-EU BITs. The letters stated that 'all EU investors also benefit from the same protection thanks to EU rules (e.g. non-discrimination on grounds of nationality). By contrast, intra-EU BITs confer rights on a bilateral basis to investors from some Member States only: in accordance with consistent case law from the European Court of Justice, such discrimination based on nationality is incompatible with EU law.'[51]

2 Intervening in International Arbitrations as Amicus Curiae

The EU's position and the arguments the Commission has made relating to unenforceability of international awards contrary to EU law are both readily apparent through a number of ICSID cases where the Commission has intervened as amicus curiae. Here, we will discuss these companion cases such as *Electrabel, AES, EDF International* and *Micula*[52] where the Commission intervened as *amicus curiae*[53] and argued that EU law should prevail if it conflicts with the decisions of international tribunals.

In *Electrabel,* the claimant was a Belgian energy generation and supply company who brought a claim against the Republic of Hungary in 2007.[54] The claim was based on Electrabel's Power Purchase Agreement (PPA) in 1995 with Dunamenti and MVM, a Hungarian generator company which operated and owned a power plant. The PPA provided a supply of capacity in exchange for compensation of a capacity fee. The agreement between Electrabel and Dunamenti and MVM led to Electrabel acquiring nearly 75% of Dunamenti's share. At the time of this arrangement, Hungary (Respondent) owned 99% of MVM.[55] By 2004, the European Commis-

49 *Eastern Sugar B.V. (Netherlands) v. The Czech Republic,* SCC Case No. 088/2004 – <http://www.italaw.com/cases/documents/369#sthash.jwC9Hg9a.dpuf>.

50 Question O-000043/2013/rev.1 in debate of the plenary of 22 May 2013.

51 <http://europa.eu/rapid/press-release_IP-15-5198_en.htm>.

52 *Electrabel S.A. v. Hungary* (ICSID Case ARB 07/19), *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary* (ICSID Case ARB 07/22), *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20) *EDF International v. Hungary* (PCA Case 2009-13).

53 See about this: Carlos González-Bueno and Laura Lozano: *More Than a Friend of the Court: The Evolving Role of the European Commission in Investor-State Arbitration*, <http://kluwerarbitrationblog.com/blog/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration/>.

54 See *Electrabel S.A. v. The Republic of Hungary,* ICSID Case No. ARB/07/19, page 34–37.

55 See *Electrabel S.A. v. The Republic of Hungary,* ICSID ARB/07/19, page 35.

sion had launched an investigation into the PPA because the EC was concerned that there was State aid in conflict with EU law.[56]As a result, Hungary introduced a regulated pricing scheme that required a 40% reduction of Dunamenti's prices.[57] Electrabel claimed that Hungary had terminated the PPA and the compensation scheme was an unlawful expropriation of Electrabel's investments.[58] Although the Arbitral Tribunal rejected Electrabel's claims, this case shows that investment tribunals are not likely to refuse jurisdictional disputes over claims between EU Member States.[59] The decision in *Electrabel* is indicative of the nature of arbitral awards that can pose an issue in terms of compensation.

The *AES* and the *EDFI* cases were largely similar in their context and case history, although the *EDFI* case also concerned district heating and certain particular issues relating to energy production. While in *AES* the tribunal decided in favour of the Respondent, the tribunal in *EDFI* decided in favour of the investor in an essentially similar set of circumstances.

In *Micula*, two Swedish brothers and three Romanian food production businesses initiated a claim after Romania cut incentives that Romania claimed were in conflict with EU state aid law.[60] The brothers set up a business with the belief that the tax incentives would be effective for a decade.[61] Those incentives were later revoked because Romania claimed that this was in conformity with EU law.[62] The tribunal ordered Romania to pay damages for failing to ensure a fair and equitable treatment of claimants' investments, and thereby, violating the Romania–Sweden BIT.[63]

Table 1. Facts of the four cases

Case	Investor	State respondent	Claim	Amicus curiae/state
Electrabel	Belgian	Hungary	Termination of PPA is expropriation	YES/EU decision
AES	UK	Hungary	Termination of PPA, regulatory caps constitute expropriation	YES/EU decision
EDFI	French	Hungary	?	?
Micula	Swedish	Romania	Withdrawal of investment aid violates FET	YES/ EU accession terms required

56 *Id.*
57 *Id.*
58 *See Electrabel S.A. v. The Republic of Hungary,* ICSID ARB/07/19, VI-06 and see Mel Marquis, Roberto Cisotta, *Litigation and Arbitration in EU Competition Law* (Edward Elgar Publishing 2015, Cheltenham) 305.
59 *Id.*
60 See Global Investment Protection AG, *Interference of the European Commission in the enforcement of arbitration awards: The Micula Case,* 1.
61 *Id.*
62 *Id.*
63 *See:* EC: Implementation of Arbitral Award *Micula v. Romania* (2013).

The three Hungarian cases were not based on intra-EU BITs but were based on the Energy Charter Treaty (ECT). Two of these cases were dealt with under ICSID and one by the Permanent Court of Arbitration. In three out of the four cases, the intervention by the European Commission did not resonate well with the tribunals. In the above cases, the Commission argued its position based on the three arguments:

1) Under the Supremacy argument, EU law obligation supersedes the obligation arising out of the intra-EU BIT;
2) Under lex posterior argument, EU-law obligation is lex posterior to the obligation arising out of the intra-EU BIT or to the intra-EU BIT itself; and
3) In the circularity argument, the arbitral award as requested by the claimant would be futile as it would not take effect.

a) The supremacy argument

In *Electrabel* and *AES*, the Commission partially rested its position on the argument that EU law takes supremacy over other international obligations of the Member States. According to the Commission's submission in these cases, if there is any material contradiction between the ECT and EU law, EU law shall reign supreme.[64] This specific argument is also rooted, according to the Commission, on the fact that the '[EU] was the driving force behind the adoption of the Energy Charter of 17 December 1991, and 'played a key role in negotiating the subsequent [ECT].'[65]

b) The lex posterior argument

In *Electrabel, AES,* and *Micula,* the European Commission also utilised the lex posterior argument primarily revolving around the application of Article 16 of the ECT, which states that 'where two or more Contracting Parties have entered into a prior international agreement… nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement.'[66] In response to this, the Commission argued that the Article in question 'applies only to the extent that the ECT is compatible with the Acts of Accession (and thus with EU law).'[67] Moreover, all Member States had already agreed in 2004 'not to apply the conflict rule contained in Article 16 ECT, but the general supremacy rule of EC law.'[68] In essence, because the individual Member States have assented to the primacy of EU rules over prior contractual commitments then so too should the investors from those states.

A recurrent question in the above cases relating to the lex posterior argument is whether the classification of EU law should be considered an international body of law or domestic law. The Commission, along with the Respondents in the above cases, advocated for acknowledging EU law as international law by applying the Vienna Convention on the Law of the Treaties. In *Elec-*

[64] *Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability Part IV–34, section 4.109 (November 30, 2012).
[65] *Id.* at Part IV-31, section 4.99.
[66] Energy Charter Treaty, December 17, 1994, 2080 UNTS 95.
[67] *Electrabel* at Part IV-34, section 4.109.
[68] *Id.*

trabel, for instance, the Commission sought a harmonious interpretation between the ECT and EU law, in line with Article 31 of the Vienna Convention.[69] This section states that, for the purposes of interpretation, a treaty should take into account 'any relevant rules of international law applicable in the relations between the parties.'[70] Such an interpretation, harmonising conflicting treaty obligations, echoes the logic of the Commission's lex posterior argument detailed above. As such, if the classification of EU law is considered international law then the ECT's obligations should be read in the light of the Respondent's obligations under EU law, which it acceded to when the Member State joined the Community. More accurately for the Commission, EU law is not merely international law, but it is *also* domestic law.[71] The Commission's arguments were reflected in the Respondent Hungary's pleadings about EU law overriding the earlier ECT. Hungary set forth that the 'application of EC law is not defeated by Article 16 of the ECT, which is irrelevant both because it only pertains to treaties concerning the same 'subject matter,' and because the conflict of law provisions of a later treaty (the EC Treaty, as applicable to Hungary upon accession) override those of an earlier treaty, even when the earlier treaty (here the ECT) purports to opt out of lex posterior principles.'[72]

Such a line of reasoning stands in stark contrast to the approach advocated by the Claimant in scenarios like that presented in *Electrabel.* There, Electrabel S.A. encouraged analysing EU law not in an international light, but as a type of 'internal or municipal law,' thus being relevant against international treaties like the ECT only as a question of fact.[73] If the court were to adopt such an argument then the ECT, and any other truly international treaty, would reign supreme against the 'internal' laws of the EU.

The arbitration tribunals in *Electrabel* and *AES* both circumvented the question by stating that the cases were not about the conflict between international law and EU law. However, the tribunal in *Electrabel* took a more academic approach by accepting the harmonious interpretation argument when stating that 'there is no material inconsistency between the ECT and EU law' [in the case at hand]. 'The Tribunal has also concluded that if there were any material inconsistency between the ECT and EU law, the ECT and EU law should, if possible, be read in harmony.'[74]

In *AES,* which was very similar in its factual and legal basis, another tribunal concluded that 'properly understood, the dispute under analysis in the present arbitration is not about a conflict between the EC Treaty or Community competition law and the ECT.'[75] This latter tribunal was rather reluctant to take a position in the debate and ultimately determined that 'the Respondent's acts/measures are to be assessed under the ECT as the applicable law but that the EC law is to be considered and taken into account as a relevant fact.'[76]

---

69 *Electrabel* at Part IV-45, section 4.144.
70 Vienna Convention on the Law Of Treaties art. 31, May. 23, 1969, 1155 U.N.T.S. 331.
71 *Electrabel* at Part IV-17, section 4.58.
72 *Electrabel* at Part IV-17, section 4.78.
73 *Id.* at Part IV-7, section 4.26.
74 *Electrabel* at Part IV-17, section 4.167.
75 *AES* at section 7.6.8.
76 *AES* at section 7.6.12.

On the other hand, *Micula* presents a more interesting example, since the court entirely evaded the Commission's lex posterior argument and rejected the circularity theory. It is also worth noting that here the lex posterior argument was raised by the Claimants because the legal basis of the case was that the BIT between Romania and Sweden was adopted nearly a decade after Romania signed the Europe Agreement in 1993.[77] The Claimants pleaded that 'the BIT prevails as lex posterior pursuant to Article 30(3) of the Vienna Convention on the Law of Treaties of 1969.'[78] In turn, both the Respondent and the European Commission as *amicus curiae* argued that the EU law supersedes the BIT. The Respondent Romania claimed that 'where conflicts arise between competing rules of international law which cannot be resolved by systemic interpretation, the intention of the relevant States determines which of the competing rules takes precedence. According to the Respondent, in the present case the common intention of Romania and Sweden is clear: they intended the BIT to be subordinated to EU law. As EU law contains more specific rules on state aid, EU law should prevail by application of the principle lex specialis derogat generali.'[79] The Commission referred to Article 30(3) of the Vienna Convention[80] that Claimants cited to prove that this provision of international law 'directs the Tribunal to apply the EU's state aid law rather than provisions of the BIT that would prove incompatible with the EC Treaty.'[81]

c) The circularity argument

A final argument the Commission utilised in all four cases as an amicus curiae to convince the arbitral tribunal not to rule in favour of the investors was the circularity argument. This argument states that foreign arbitral awards are to be treated in some cases as decisions granting state aid under domestic law. Thus, the circularity argument thwarts application of foreign arbitral awards – and, inter alia, Article 54 (1) of the ICSID Convention – by stating that, if a foreign award granting damages would reinstate state aid if it was implemented by a Member State as a judgement by its domestic courts, the foreign arbitral award itself would constitute state aid and would not be enforceable since it would be have been made in contradiction to EU law.[82]

77 EUROPE AGREEMENT establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part 1993 <http://wits.worldbank.org/GPTAD/PDF/archive/EC-Romania.pdf>.
78 *Micula* at section 294. *b).*
79 *Id* at section 310.
80 Article 30(3) of the Vienna Convention provides that '[w]hen all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.'
81 *Micula* at section 317.
82 *Id.* at Part V-6, section 5.19.

Table 2. Further facts of the four cases

Case	BIT OR ECT, ICSID OR ELSE	Decision	Reaction to state argument	Reaction to amicus
Electrabel	ECT, ICSID	Partially rejected, one issue to be decided in 2016	Dealt with Hungary defence	Dealt with EU amicus
AES	ECT, ICSID	Claim rejected	Did not deal with Hungary defence	Did not deal with amicus
EDFI	ECT, UNCITRAL	Claim accepted	Rejected EU measure defence	Rejected the arguments in the amicus
Micula	BIT, ICSID	Claim accepted, annulment pending	Rejected EU measure defence, established FET violation	Rejected the arguments in the amicus

The impact of these three forms of Commission arguments was mixed. In *Electrabel,* ruling in favour of the Respondent, the ICSID court hypothetically accepted the supremacy and lex posterior arguments, stating that 'the acts of the Respondent implementing… a binding decision under EU law have to be taken into account in the evaluation of its conduct under the ECT' and that 'the ECT does not protect the Claimant, as against the Respondent, from the enforcement by the Respondent of a binding decision of the European Commission under EU law.'[83]

On the other hand, in *AES*, the court bypassed all these arguments and did not consider the Commission's amicus curiae while rejecting the Claimant's claim.[84]

In *Micula,* the Commission put forth that 'any award requiring Romania to reestablish investment schemes which have been found incompatible with the internal market during accession negotiations, is subject to EU State aid rules' and '[t]he execution of such award thus cannot take place if it would contradict the rules of EU State aid policy.'[85] The tribunal however, as already noted above, rejected the circularity argument raised by the Commission on the basis that 'it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters. It is thus inappropriate for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered. It will thus not address the Parties' and the Commission's arguments on enforceability of the Award.'[86] As a result, the court accepted Micula's claim.

83 *Id.* at Part IV-54, section 4.169.

84 *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary,* ICSID Case No. ARB/07/22, Section 16 (September 23, 2010).

85 *Micula* at section 335.

86 *Micula* at section 342.

3 Efforts to Preclude Enforcement of Adverse Arbitral Decisions Based on intra EU BITs

In *Electrabel* and *AES*, the respondent Member State supported by the European Commission came out victorious (for the moment), while in *Micula* and *EDFI,* the investors' arguments have convinced the arbitral tribunals.

In that sense, *Micula* and *EDFI* present excellent case studies of how the EU goes about preventing the enforcement of a tribunal decision after it fails to achieve success in its original intervention by an amicus curiae.

After the ICSID decision granting compensation to the *Micula* brothers for Romania's breach of a BIT, Romania took steps to annul and also partially implement the award.

On April 9, 2014, Romania – with the full backing of the EU Commission – filed an application with ICSID to annul the Award, and requested a stay of enforcement of the Award, based in part on the argument it repeats here – that Romania's payment of the Award would violate European law. On April 18 2014, the Secretary-General of ICSID put in place a provisional stay. On August 7, 2014, an ICSID ad hoc committee conditioned the continuation of the stay on Romania's ability to file a letter with the ICSID Secretary-General within 30 days, 'commit[ing] itself subject to no conditions whatsoever (including those related to E[uropean] law or decisions) to effect the full payment of its pecuniary obligation imposed by the Award…'[87] Romania failed to file the assurance, and in a letter dated September 15, 2014, ICSID confirmed that the stay on enforcement of the Award was "automatically revoked" as of September 7, 2014.[88]

As far as partial implementation is concerned, Romania has cancelled outstanding tax debts of European Food SA against payables by Romania.[89] As a reaction to this step, the EU Commission issued a suspension injunction against Romania which prevented the Member State from complying with the ICSID award until further determinations by the Commission were made.[90] After forming the belief that the award constituted unlawful state aid, the Commission then ordered Romania to recover any and all amounts paid to the Micula brothers in accordance with the ICSID award.[91]

Specifically, the Commission cited Article 14 of Council Regulation No. 659/1999 which 'provides that all unlawful aid may be recovered from the recipient.'[92] For Romania's partial im-

87 Ioan Micula, Et Al., Petitioners, – Against – The Government Of Romania, Respondent. 15 Misc. 107 (Part I) Opinion & Order Usdc Sdny Document Electronically Filed Doc #: Date Filed: 8/5/201 5 *Micula Et Al V. The Government Of Romania* Doc. 66 Dockets.Justia.Com United States District Court Southern District Of New York Lorna G. Schofield, District Judge: Page 3.

88 *Id.*

89 *Romania Implementation of Arbitral award Micula v Romania of 11 December 2013,* European Commission Communication, paragraph 71, October 1 2014.

90 *Id.* at paragraph 5,6.

91 *Id.*

92 *Id.* at paragraph 74.

plementation of an award constituting state aid to be lawful, the aid must have 'been granted in compliance with the procedure laid down in Article 108(3) of the TFEU.'[93]

The Micula brothers reacted by taking an action to annul the above decision.[94] According to the Micula brothers, 'the Commission's decision fails to acknowledge that Romania is obligated by international law to execute the ICSID award without delay and that Romania's international law obligations take primacy over EU law' and also that the decision 'infringes Article 351(1) TFEU and Article 4(3) TEU, which recognise and protect Romania's obligations under the ICSID Convention and under the [BIT].'[95] The issue is that the alleged infringement of Article 351 of the TFEU is not quite as clear-cut as the brothers seem to suggest and the Commission has stated that this particular provision does not apply, since the BIT in question concerns two Member States and not a Member State and a third country.[96]

Unfortunately for the Commission, the Micula brothers are not going to simply wait to collect their ICSID judgment and seek to take advantage of the delocalized nature of ICSID judgment enforcement. Since ICSID judgments are afforded the same 'full faith and credit' as a U.S. state court judgment, the brothers have now filed a petition in the U.S. District of Columbia district court seeing an ex parte confirmation of the ICSID award[97] and also in Bucharest, Romania.[98] Such a procedure is not unprecedented and has been successfully utilised in similar situations in the Southern District of New York.[99] Although the Commission has intervened in both cases, the outcome of the domestic litigations remains to be seen.[100]

[93] The 'Final Decision' of the Commission declaring any payment under the Award a violation of European state aid laws, and ordered Petitioners to return any portion of the award Romania had already paid them. Petitioners have appealed the Suspension Injunction to the General Court of the European Union was issued on March 30, 2015.

[94] Case T-646/14: Action brought on 2 September 2014 – *Micula a.o. v Commission* OJ C439, 8.12.2014, 29–30.

[95] *Action brought on 2 September 2014 – Micula a.o. v Commission,* Case T-646/14, OJ C439/30.

[96] *EC Communication,* at paragraph 51.

[97] Docket, *Micula v. Government of Romania,* District of Columbia District Court; see also 22 U.S.C. § 1605a.

[98] On 24 March 2014, the Bucharest Tribunal allowed the execution of the Award considering that on the basis of Article 54 of ICSID the Award is a directly enforceable act and must be treated as a final domestic judgment excluding thus the procedure to recognize the award on the basis of the Romanian Procedural Civil Code (Art 1123–1132). Thereafter, on 30 March 2014 an executor started the enforcement procedure of the Award by setting the Romanian Ministry of Finance a deadline of 6 months to pay to the four claimants 80% of the award plus the interests and other costs.

[99] *See Mobil Cerro Negro, Ltd., et al v. Bolivarian Republic of Venezuela,* where a New York federal district court rejected Venezuela's sovereign immunity challenge and upheld use of an ex parte procedure available under New York law to convert an ICSID award into a U.S. court judgment.

[100] Romania challenged the execution before the Bucharest Tribunal and asked for interim measures, i.e. a temporary suspension of the execution until the case has been decided on the merits. On 14 May 2014, the Bucharest Court suspended temporarily the execution of the Award until a decision on the merits of Romania's challenge and request to suspend the execution had been taken. On 23 September 2014, the Bucharest Tribunal rejected the suspension claim regarding the execution of the award. The Commission has intervened into those proceedings pursuant to Article 23a(2) of Regulation (CE) No 659/1999 of 22 March 1999.

Additionally, in the ICSID forum, this matter remains in constant flux. The secretary for ICSID has granted a provisional stay of the award's enforcement.[101] Moreover, Romania, in yet another attempt to preclude award enforcement, has also filed for annulment of the award at the behest of the Commission.

Besides these various actions taken by the Commission to prevent enforcement of the ICSID award in *Micula,* the European Commission could, in theory, also issue a regulation to block enforcement of certain international arbitral awards – such as those based on intra-EU BITs – on EU soil. While regulations have not been used within the context of international arbitration awards, their use by the EU is not unprecedented. Blocking statutes were largely used by the EU in response to the U.S.'s Helms-Burton Act. The U.S. passed this legislation in 1996 for two primary reasons, to give U.S. citizens who suffered damage as a result of the Cuban government's appropriation of their property an avenue to sue foreign individuals or corporations and to bar U.S. entry to individuals who used this confiscated property.[102] The Helms-Burton Act had the consequence of creating extra-territorial jurisdiction for U.S. courts, which was fundamentally opposed by the European Commission. As a result, the Commission passed EC Regulation No. 2271/96, which aimed to protect 'against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom.'[103] The essential components of this Regulation were Articles 4 and 5. Article 4 prohibits the recognition and enforcement of any judgment from the U.S. courts that aims to recover from companies or natural persons of the EC due to the Helms-Burton Act.[104] Article 5 mandates non-compliance with any requirement or prohibition, including requests from foreign courts, based on the Helms-Burton Act.[105]

All of this illustrates that EU implementation of blocking statutes to combat the extraterritorial application of 'foreign' norms or decisions is not unprecedented. However, whether the Commission would do so to counter the effects of international tribunals remains to be seen. It should also be noted that the one glaring limitation of blocking statutes, such as EC Regulation No. 2271/96, is that it would only be enforceable within the EU, *not* outside its jurisdictional boundaries.

IV International Tribunal Decisions Enforced Outside the EU

In current events, another issue has become more prevalent concerning awards granted by international tribunals. In the scenario where Member States refuse to honour awards granted by international tribunals for various reasons, including their classification as unlawful state aid,

101 2014-1918 Mealey's Daily News Update 11, ICSID Stays Enforcement Of $ 185 Million Award Pending Application To Annul, April 22, 2014.
102 Anthony M. Solis, 'The Long Arm of U.S. Law: The Helms-Burton Act 19 Loy' (1997) 709 L.A. Int'l & Comp. L. Rev.
103 Commission Regulation No. 2271/96 of November 22 1996, OJ L309.
104 Jürgen Hubner, 'The Helms-Burton Blocking Statute of the E.U.' (1996) 20 Fordham L.J. 699, 704.
105 *Id.* at 704–705.

often other aggrieved investors will seize that Member State's assets in third countries to honour the award determination.

If awards granted by international tribunals are enforced outside the EU, the EU Commission's decisions (or even a regulation) blocking enforcement are not relevant. The EU could however, in theory, conclude international agreements or could issue a domestic regulation to block the international enforceability of intra-EU BITs in such a way as the United States of America has done relating to the application of the decisions of the International Criminal Court to its military service personnel. In 2002, the U.S. Congress passed the American Service-Members' Protection Act, which contained prohibitions on the United States providing military aid to countries which had ratified the treaty establishing the International Criminal Court (ICC). However, there were a number of exceptions to this, including countries which entered into an agreement with the United States not to hand over U.S. nationals to the Court. The so-called 'Nethercutt Amendment' to the Foreign Operations, Export Financing, and Related Programs Appropriations Act suspended Economic Support Fund assistance to ICC States Parties who refused bilateral immunity agreements (BIAs) with the US or were not provided a Presidential waiver. The latter differed from the American Service-Members' Protection Act by imposing economic aid cuts instead of military aid cuts.

The EU could hypothetically use its economic clout and aid policy to make certain non-EU countries accept and pass legislation that decisions based on intra-EU BITs are not enforceable. The policy impact of such a policy move is likely to be detrimental for the EU internationally.

Developments in the *Micula* case clearly show that the applicants proceeded to the enforcement of the ICSID award in the state of New York. As already mentioned above, Romania and the European Commission have forcefully proceeded to stop enforcement of the claim in the US tribunal. Based on Article 54(1) of the ICSID Convention, 'if a party fails to comply with the award, the other party can seek to have the pecuniary obligations recognized and enforced in the courts of any ICSID Member State as though it were a final judgment of that State's courts.' In that sense, a domestic tribunal[106] may only be convinced not to start enforcement of the decision by an ICSID tribunal if it is convinced that the ICSID decision remained, is suspended or is on course to being vacated.[107] Aside from the previous cases mentioned above, various arguments relating to sovereign immunity may be validly made.[108] For example, in the US district court proceedings in

[106] In the US the second sentence of Article 54(1) will also apply: 'A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.'

[107] Stanimir A. Alexandrov, 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention' in Christina Binder, Christoph H. Schreuer et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009); Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, 'Article 54 – Enforcement' in *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 1115.

[108] Article 55 provides: 'Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.' see more in detail: Inna Uchkunova, Oleg Temnikov, 'Enforcement of Awards under the ICSID Convention: What Solutions to the Problem of State Immunity?' (2014) 1 (29) ICSID Review—Foreign Investment Law Journal, 187–211; Schreuer, Malintoppi, Reinisch, Sinclair (n 107) 1151; Aron Broches, 'Awards Rendered Pursuant to the

Micula, the EU Commission argued for a non-enforcement of the ICSID award based on the EU's sovereign interests.[109] The Commission, speaking for the EU as a sovereignty, argued three doctrines: international comity, the act of state doctrine, and the foreign compulsion doctrine. In the latter, the Commission argues that Romania must comply with its obligations as an EU Member State, including the prohibition from paying Petitioners under the Award.[110]

There is some similarity with the events unfolding concerning the Yukos Oil Company shareholders' claims against Russia. These claims, presented in the international forums of both the European Court of Human Rights[111] and the Permanent Arbitration Court,[112] have awarded the oil company damages of $2.5 billion and $50 billion, respectively, after the Russian government's unlawful crackdown and systematic dismantling of the colossal oil company. The main issues arose when it came down to enforcing and collecting the awards from the Russian state.

Predictably, Russia has refused to pay the awards and seeks to contest the validity of both judgments. As a direct result of this refusal and armed with the authority of the New York Convention, Belgium and France have begun seizing certain Russian state owned bank accounts and real estate assets within their borders.[113] Seizing the assets is just a first step in ensuring that these assets will be available for enforcement; this steps shows that there is some promise for the Yukos shareholders. The Yukos case clearly shows that third countries – such as Belgium and France did in relation to a dispute between a Cyprus entity and the Russian state - may also seize Russian assets if Russia chooses not to follow ICSID award determinations. With respect to the *Micula* case, Romanian assets (or similar cases relating to other intra-EU BITs, other EU Member State assets) may be seized by third countries such as the United States or even Russia if the investors choose to enforce their claims in those countries. The value of an EU Commission injunction or decision relating to State aid may be quite limited in those states which are third parties to the Treaty on the Functioning of the European Union.

ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 (2) ICSID Review–Foreign Investment Law Journal, 287.

109 The Second Circuit endorsed the view that the European Community, 'which has been incorporated into the European Union,' derives its sovereignty from its member states. See *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 143 n.15, 147 (2d Cir. 2014) (holding that statutory phrase 'organ of a foreign state' applies to the European Community, 'which serves numerous foreign states').

110 See Michael A. Warner, Jr., Comment, 'Strangers in a Strange Land: Foreign Compulsion and the Extraterritorial Application of United States Employment Law' (1990) 11 Nw. J. Int'l L. & Bus. 371, 373–374.

111 Case Of *Oao Neftyanaya Kompaniya Yukos v. Russia* (Application no. 14902/04) http://hudoc.echr.coe.int/eng?i=001-145730#{"itemid":["001-145730"]}.

112 PCA Case No. AA 227 In The Matter Of An Arbitration Before A Tribunal Constituted In Accordance With Article 26 Of The Energy Charter Treaty And The 1976 Uncitral Arbitration Rules – Between – Yukos Universal Limited (Isle Of Man) – and – The Russian Federation Final Award 18 July 2014 <http://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf>.

113 BBC News, *Russian fury at Belgium asset seizure in Yukos oil case,* <http://www.bbc.com/news/world-europe-33197782> June 19, 2015.