The Arbitration Review of the Americas

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GAR Global Arbitration Review

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The European Commission's efforts to invalidate intra-EU investment treaty arbitration have now reached US courts. In enforcement proceedings brought by EU investors seeking to enforce arbitral awards against EU member states under intra-EU treaties, US federal courts in the District of Columbia must now decide how to balance US treaty and statutory commitments to enforce international arbitration awards with the European Commission (EC) view that intra-EU treaty commitments to arbitrate are unenforceable.

The amount of the intra-EU investment treaty awards currently before US courts total over US$500 million – and future awards could reach into the billions – but the stakes in these enforcement actions may be much higher. With investment treaty arbitration under attack in the United States from both administration and prominent opposition figures, the outcome of these cases may determine not only whether intra-EU arbitrations will continue to be brought and the resulting awards enforced, but whether US courts will enforce US arbitration treaty obligations notwithstanding countervailing political pressures. This article summarises the intra-EU investor-state arbitrations currently subject to US enforcement proceedings, the options available to the US courts and potential consequences of US court decisions.

BACKGROUND

In 2004 and 2007, 12 countries, predominantly from Central and Eastern Europe, became member states of the European Union.[1] At that time, there were very few bilateral investment treaties (BITs) among existing EU member states, but many had BITs with the new member states.[2] The EC, the EU executive branch, took the position that intra-EU BITs are incompatible with EU law and principles of mutual trust and cooperation.[3] The EC advanced two principal reasons for this position:

- application of intra-EU BITs could lead to a more favourable treatment of investors and investments covered by BITs and consequently discriminate against other member states, contrary to the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU); and
- arbitrations under such treaties could take place without questions of EU law being submitted to the Court of Justice of the European Union (CJEU), the judicial body empowered to resolve intra-EU disputes and ensure uniform application of EU law, potentially providing for unequal treatment of investors among member states.

The EC advocated this position in many forums, including submissions in arbitrations and enforcement proceedings, and pressured member states to terminate their intra-EU BITs. These efforts intensified after the Lisbon Treaty in 2009 gave the EU supremacy over trade and common commercial policy and permitted the EU to enter into international agreements on behalf of all member states.[4] As briefly described below, the EU has sought to void awards resulting from intra-EU investment arbitrations in two cases, Micula and Achmea. In the meantime, investors have continued to commence and pursue intra-EU investment arbitrations, particularly against Spain under the Energy Charter Treaty (ECT), four of which have already led to awards in favour of the claimant.

Micula V Romania

In December 2013, an arbitral tribunal convened under International Centre for Settlement of Investment Disputes (ICSID) rules issued a final award in Micula v Romania,[5] awarding Swedish investors approximately US$90 million plus interest. The tribunal held that

Romania's revocation of an incentives regime violated the Romania–Sweden BIT by failing to provide fair and equitable treatment to the claimants' food and beverage businesses. Romania established the incentives in the 1990s to encourage foreign investment and the tribunal held that the Swedish claimants reasonably relied on these incentives when investing in Romania.[6] In 2016, an ICSID ad hoc tribunal refused to annul the award.[7]

However, in 2015, after Romania partially satisfied the award, the EC issued a decision stating that the award constituted illegal state aid in contravention of article 107 of the TFEU.[8] The EC considered that the BIT was incompatible with EU treaties because it conferred the right of compensation only to certain investors (ie, those from Sweden and Romania), rather than all investors in the European Union.[9] The EC instructed Romania to recover the benefits it provided the investors by partially satisfying the award and, in December 2018, referred Romania to the CJEU for failing to do so. Meanwhile, claimants challenged the EC's 2015 decision in the General Court of the European Union, which overturned the EC's decision on 18 June 2019, although on narrow grounds.[10] Claimants have instituted enforcement proceedings in various jurisdictions, including the United States.[11]

Achmea V Slovakia

In December 2012, a UNCITRAL rules tribunal found that the Slovak Republic breached the Netherlands–Slovakia BIT[12] and ordered it to pay claimant Achmea BV over €22 million plus interest.[13] When Slovakia sought to vacate the award at the seat in Frankfurt, Germany's highest court referred the matter to the CJEU for a preliminary ruling on the EU law question.[14]

In March 2018, the CJEU ruled that articles 267 and 344 of the TFEU precluded resolution of intra-EU disputes through investment arbitration.[15] The court found that arbitral tribunals may be called upon to interpret EU law, but would not be able to seek rulings from the CJEU, which could threaten the consistent application of EU law.[16] Further, the CJEU found that judicial enforcement of such awards is not sufficient to ensure EU law consistency (notwithstanding the fact that the CJEU issued this opinion upon referral from the German courts when enforcing an award).[17] The court did not address the Vienna Convention on the Law of Treaties (VCLT),[18] the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[19] or the scope of its decision. Although the court distinguished investor-state arbitration from commercial arbitration as based on party agreement rather than a treaty,[20] it did not explain why this distinction should make a difference. Relying on the CJEU ruling, the German court reversed the lower courts and annulled the Achmea award.[21]

Energy Charter Treaty Arbitrations Against Spain

In January 2019, most EU member states that had not already terminated their intra-EU BITs[22] pledged to do so by the end of the year.[23] Thus it seems inevitable that arbitration under intra-EU BITs will eventually come to an end.

However, many intra-EU investment disputes are based on the ECT, a multilateral treaty that went into effect in 1994 to which both the EU and EU member states are a party.-[24] Furthermore, notwithstanding the CJEU decision in Achmea, investment arbitrations under intra-EU treaties continue to be brought and arbitral tribunals constituted under such treaties continue to issue awards. Arbitral tribunals have consistently rejected challenges to their jurisdiction on the basis of the EC and CJEU reasoning.[25] Spain is involved in the largest number of intra-EU ECT arbitrations. From 1997 to 2007, Spain implemented a series

of measures to encourage investment in the solar energy sector[26] but in 2009, facing rising budget deficits, Spain began to reduce the incentives and by 2013 did away with them altogether.[27] Investors from other EU member states have brought about 40 cases against Spain alleging breach of the ECT.[28] As of 30 June 2019, Spain has prevailed in two of these arbitrations, but has lost four cases[29] and it seems likely that at least some of the remaining cases will lead to awards against Spain.

US ENFORCEMENT PROCEEDINGS

The award creditors in Micula and all the successful claimants in the ECT cases against Spain have sought to enforce their awards in the United States. Spain and Romania are resisting enforcement, with the EC intervening (or requesting to intervene) as amicus curiae, arguing that the ECT does not provide jurisdiction for claims among EU member states or, if it does, this jurisdiction is invalidated by the EU treaties, as is the case with intra-EU BITs.[30] The US courts must now decide whether to enforce these awards.

Pending Proceedings

Micula v Romania (ICSID, BIT)

Claimants have sought to enforce the ICSID award in the DC district court.[31] Romania requested that the proceedings be stayed under principles of comity and international abstention, pending the outcome of the claimants' challenge to the 2015 EC decision before the General Court.[32] The EC has filed an amicus brief in the case.[33] On 21 June 2019, the court denied as moot Romania's stay request because of the General Court's decision and ordered Romania to file its reply to claimants' summary judgment motion.[34]

Eiser V Spain (ICSID, ECT)

In May 2017, Eiser Infrastructure Limited and Energia Solar Lexembourg SARI (together Eiser) obtained an ICSID award against Spain in the amount of €128 million plus interest.-[35] The tribunal addressed Spain's arguments that the ECT did not confer jurisdiction for intra-EU disputes and found them to be meritless.[36] The tribunal agreed with the tribunal in Charanne v Spain[37] – the first arbitration award issued in the ECT renewable energy cases against Spain – in finding that EU law was not being interpreted or applied.[38]

Claimants have filed to enforce the award in DC district court.[39] On 28 January 2019, the parties completed their briefing[40] and the EC subsequently submitted an amicus brief in support of Spain.[41] The claimants' petition to confirm the award and a motion to dismiss the case for lack of jurisdiction under the Foreign Sovereign Immunities Act (FSIA) remain pending as of 30 June 2019.

Novenergia II V Spain (SCC, ECT)

In February 2018, an arbitration tribunal acting under Stockholm Chamber of Commerce (SCC) rules issued a final award under the ECT requiring Spain to pay €53.3 million plus interest to Novenergia II – Energy & Environment (SCA), SICAR (Novenergia).[42] The tribunal rejected Spain's jurisdictional challenge that the ECT did not confer jurisdiction to intra-EU disputes as unsupported by a plain reading of the ECT.[43] The tribunal also rejected Spain's position, based on the EC's amicus and Achmea, that the tribunal would improperly interpret and apply EU law and instead found that the claims before the tribunal were solely based on the ECT.[44]

Novenergia brought an action in the DC district court to enforce the award on 16 May 2018.-[45] The EC requested to file an amicus brief in support of Spain's motion to stay or vacate the award.[46] As of 30 June 2019, motions to enforce the award, to stay the award, two amicus requests and a motion to file a supplemental brief by Spain are pending before the court.

Antin V Spain (ICSID, ECT)

In June 2018, an ICSID arbitral tribunal ordered Spain to pay €112 million plus interest to Antin Infrastructure Services Luxembourg Sarl and Antin Energia Termosolar BV (together Antin) for violation of the ECT.[47] The tribunal rejected Spain's arguments that the ECT did not provide jurisdiction for intra-EU disputes.[48] Although the EC initially petitioned to file a written submission in the arbitration, it ultimately did not do so when ordered to bear the costs related to its intervention.[49]

Antin sought enforcement in the DC district court on 27 July 2018.[50] Spain filed a motion to dismiss the case or in the alternative, to stay the proceedings.[51] The parties completed the briefing schedule on 19 February 2019 and the EC has requested permission to file an amicus brief.[52] On 23 May 2019, Spain filed an annulment application and the ICSID secretary-general notified the parties of the provisional stay to enforce the award.[53]

Masdar V Spain (ICSID, ECT)

In May 2018, an ICSID arbitral tribunal awarded €64.5 million in damages plus interest to Masdar Solar & Wind Cooperatief UA (Masdar).[54] The tribunal followed other tribunals in rejecting the argument that the ECT did not apply to intra-EU claims, despite the EC's intervention in the arbitral proceedings.[55]

Masdar commenced an enforcement action in DC on 28 September 2018.[56] Spain filed its motion to dismiss for lack of jurisdiction or to stay the award on 22 April 2019.[57] The EC was granted its motion to file an amicus brief on 13 May 2019.

US LAW REGARDING ENFORCEMENT OF ARBITRATION AWARDS

Under US law, which incorporates US obligations under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and New York Convention, US courts have very limited discretion to decline to enforce international arbitration awards.

ICSID Convention

The Eiser, Antin and Masdar awards against Spain, as well as the Micula award against Romania, were made under ICSID rules and therefore subject to the ICSID Convention. Article 54 of the ICSID Convention envisions a process for recognition without judicial review.[58] Under the convention, ICSID arbitration is self-contained and denationalised.[59]

US law provides that ICSID awards 'shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction'; the Federal Arbitration Act (FAA) explicitly does not apply.[60] As the Second Circuit explained:

> Member states' courts are thus not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award; under the Convention's terms, they may do no more than

> examine the judgment's authenticity and enforce the obligations imposed by the award. Thus, the Convention reflects an expectation that the courts of a member nation will treat the award as final.[61]

The EC has either filed or requested to file amicus briefs in all of the US enforcement proceedings (each of which has been assigned to a different judge), just as it intervened in most of the underlying arbitrations.[62]

The EC's Arguments

The EC has made three arguments in the ICSID ECT enforcement proceedings, all of which have also been made by Spain. First, it argues that the ECT by its terms does not confer jurisdiction to intra-EU disputes.[63] Article 26 of the ECT provides jurisdiction for 'disputes between a contracting party and an investor of another contracting party relating to an investment of the latter in the area of the former'. The EC argues that the intention of the EU and member states was to act as a single block for the purposes of this treaty.[64] Thus, in interpreting article 26, EU nationals investing in EU member states do not make their 'investment' in the 'area' of another 'contracting party', as those terms are defined in the ECT, and therefore cannot avail themselves of the ECT's jurisdiction.[65]

Second, the EC argues that even if the ECT provides jurisdiction for intra-EU disputes, this invitation to arbitrate is rendered invalid by EU law, which supersedes the ECT;[66] the primacy of EU law is a special rule of conflict pursuant to international law that requires conflicts with the TFEU to prevail over other international agreements between member states.[67] The EC argues that Achmea established that any international treaty permitting intra-EU investment arbitration is contrary to the TFEU and the TFEU supersedes the ECT, so article 26 of the ECT cannot apply in intra-EU relations.[68]

Third, the EC has argued that principles of international comity warrant dismissal of these cases since intra-EU arbitration under the ECT is fundamentally incompatible with EU law and the EU has a paramount and vital interest in resolving any remaining controversy surrounding this position.[69]

No Deference To Tribunal

The EC's first two arguments essentially posit that, according to present EU law, there was no valid agreement to arbitrate intra-EU disputes pursuant to the ECT and that the US court should therefore ignore the arbitral tribunals' rulings on their own jurisdiction.[70]

The ECT claimants counter that under US law codifying the ICSID Convention, ICSID awards are entitled to full faith and credit, with no exception made for a review of whether 'consent' existed.[71] Claimants also note that under US law, questions of arbitrability (ie, arbitral jurisdiction) can be delegated by the parties to the arbitral tribunal and that the parties did this by agreeing to arbitration under the ICSID rules, which provide that the tribunal makes jurisdictional determinations.[72]

Finally, claimants assert that the EC's arguments regarding jurisdiction are unsupported by a plain reading of the ECT or Achmea,[73] and that pursuant to well-established international law, ECT treaty obligations supersede a state's internal law.[74]

International Comity

The authors are not aware of any US case in which a court has declined to enforce an arbitration award subject to enforcement under the ICSID Convention or New York Convention on grounds of international comity. As held by the US Court of Appeals for the District of Columbia Circuit over 30 years ago:

> No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.[75]
>
> Any public policy interest in 'international comity,' therefore, does not here override 'the emphatic federal policy in favor of arbitral dispute resolution'.[76]

This reasoning applies with even great force in the context of ICSID awards, which the United States is internationally obligated to ensure 'shall not be subject to any appeal or to any other remedy except those provided for in [the ICSID] Convention'.[77]

SPAIN'S ARGUMENTS

In addition to the EC arguments, Spain has argued in the ICSID ECT cases that:

- none of the FSIA exceptions to immunity apply and therefore the US courts lack jurisdiction over the enforcement actions; and
- the courts may decline to enforce the awards under the foreign compulsion doctrine.

FSIA Defences

Article 55 of the ICSID Convention provides that execution must comply with national law. Therefore, a party seeking enforcement against a state in the United Stares must comply with the service and subject-matter jurisdiction requirements of the FSIA.[78] The FSIA includes 'arbitration' and 'waiver' exceptions.[79]

Spain argues that a state must intend to waive immunity in regard to arbitration of a particular dispute and Spain did not do that here because it did not consent to arbitrate intra-EU disputes.[79] Claimants respond that waiver occurs when the state becomes a party to a treaty that provides for enforcement in US courts[80] and notes that the ICSID Convention provides that the arbitral tribunal will determine whether the parties have consented to arbitrate and that determination is final and not subject to 'any appeal or . . . other remedy'.[81]

Every US court to have considered the question has held that a state waives its sovereign immunity when it becomes a party to a treaty that contemplates enforcement of an arbitral award in the United States, including cases under the ICSID Convention.[82] As previously stated, US law is also clear that arbitrators, rather than the court, may decide questions of arbitrability if requested by the parties and that those decisions are binding on the court.[83] This is consistent with the ICSID Convention and the intent of its drafters.[84]

FOREIGN COMPULSION DEFENCE

Spain also argues in the ICSID ECT cases the US courts should refuse to enforce the awards on the grounds of the foreign compulsion doctrine, which provides that:

> a state may not require a person to do an act in another state that is prohibited by the law of the state of which he is a national; or to refrain from doing an act in another state that is required by the law of that state or by the law of the state of which he is a national.[85]

Spain argues that the doctrine is 'a complete defence where the judgment of a court in the United States would conflict with a defendant's legal obligations elsewhere'[86] and that if US courts enforced the awards, Spain would be compelled to violate its legal obligations under EU law.[87]

Claimants argue, however, that this doctrine cannot apply given the ICSID Convention's prohibition that the award 'not be subject to any appeal or to any other remedy except those provided for in this convention'.[88] They also argue that the rule is inapposite because the US actions concern only enforcement against Spain's assets in the United States and do not require Spain to take action in another country.[89] Claimants also argue that the rule has never been applied to a foreign sovereign.[90]

The foreign compulsion defence does not appear to have previously been applied by a US court to avoid enforcement of any arbitral award.

New York Convention

The Novenergia II SCC award is subject to enforcement under the New York Convention. The grounds for setting aside an arbitration award under article V of the New York Convention, codified in the FAA, have been narrowly construed by US courts, further to the strong US public policy favouring arbitration.[91]

In Novenergia II, Spain and the EC repeat the above arguments regarding lack of consent to arbitrate an intra-EU dispute under the ECT. However, they, also argue that the New York Convention requires non-enforcement of awards suspended at the seat (article V(1)(e)).-[92] US courts generally will not enforce an award that has been set aside at the seat of arbitration.[93]

Spain brought an action to vacate the Novenergia II award at the seat in Sweden along with a request to refer the jurisdiction question to the CJEU.[94] The Svea Court of Appeals ordered that the award cannot be enforced pending resolution of the matter, but has declined to refer the matter to the CJEU.[95] Spain has argued to the DC court that enforcement of a suspended award is an extraordinary remedy not warranted in this case[96] and requested that the US court stay enforcement of the award pending the decision of the Seva Court of Appeals.

Most courts, including in the DC Circuit, consider factors set out by the Second Circuit in Europocar[97] in determining whether or not to stay a New York Convention award.[98] Here, many of those factors weigh in favour of enforcing the award. The Swedish proceedings may be protracted and Spain, not Novenergia, instituted the proceedings. On the other hand, as Spain points out, the Svea Court of Appeals would not have stayed enforcement of the award if it did not believe there was some likelihood that the court would overturn the award.[99] A US court may hesitate to enforce an award facing potential annulment at the seat.

POTENTIAL CONSEQUENCES OF THE US ENFORCEMENT ACTIONS

The decisions in the US enforcement actions described above could affect not only intra-EU investment treaty arbitration but enforcement of international arbitration awards generally in the United States.

As to intra-EU treaty arbitration, until such time as these treaties are terminated, EU investors are free to commence cases against EU member states under the treaties and arbitral tribunals free to disregard the EC's jurisdictional arguments, as they have done in the past. Should US courts enforce the intra-EU treaty awards, investors are likely to continue to commence and prosecute such cases, whether or not such awards are enforced in EU member state courts.

Most intra-EU treaties terminated to date have been terminated by mutual consent.[100] Most writers agree that the VCLT allows immediate termination of treaties provided mutual state party consent.[101] It is unclear whether mutual termination could apply to the 'sunset provisions' that provide for protection for some period after a treaty has terminated, although arbitral tribunals have consistently enforced sunset provisions in unilaterally terminated investment treaties.[102] The EC arguments in the US enforcement cases, if accepted, would render these issues moot and effectively void the dispute resolution of intra-EU treaties prior to termination consistent with the Achmea decision.

In any case, the manner in which the US courts decide the US enforcement case may give rise to significant questions as to enforcement of international awards generally in the United States. As to the US enforcement cases involving ICSID awards, the EC and Spain are asking US courts to depart from precedent enforcing 'one of the key provisions of the ICSID Convention and . . . one of its striking innovations'[103] (ie, its finality and limited review of ICSID awards and US law that entitles such awards to 'full faith and credit').[104] Failure to enforce such awards may lead to an erosion of the respect of international arbitration awards generally.

This is especially true considering the nature of the EC arguments: that US courts need not defer to the determination of an arbitral tribunal as to whether a state's consent to arbitrate has been rendered retroactively invalid. If this argument is endorsed – or given serious consideration – by a US court, other states, including the US, may be encouraged to invent reasons as to why a consent to arbitrate under a treaty has become 'invalid'.

Indeed, the EC and state arguments in the US enforcement cases bring to mind the recent Pemex case. There, claimants succeeded in an arbitration against Pemex, Mexico's state-owned oil company, concerning termination of a contract. The Mexican Supreme Court set-aside the award, ruling that under Mexican law the dispute was not arbitrable. It relied in part on a law that post-dated both the underlying arbitration agreement and the termination of the relevant contract.

The Second Circuit enforced the award, holding that the retroactive application of newly enacted laws by the Mexican courts effectively deprived claimant of any forum for its claims and was thus 'repugnant' to US public policy principles and was not entitled to deference.-[105]

It remains to be seen whether courts in the US enforcement actions will have a similar view of the EC and state arguments. That these issues arise in the context of enforcement of investor-state awards gives rise to further caution. There is substantial opposition in the United States, as elsewhere, to the current system of Investor-State Dispute Settlement (ISDS). US Trade Representative Robert Lighthizer has referred to ISDS as '"offensive"

for giving non-Americans a "veto" over US law'[106] and argued that investment treaty arbitration is almost a state-subsidized 'political risk insurance'.[107] Similarly, one of the US administration's fiercest critics, Senator Elizabeth Warren, has written that ISDS provides a 'huge handout to global corporations while undermining American sovereignty'.[108]

These are familiar themes of ISDS critics worldwide: investor-state panels are said to be dominated by arbitrators from investor states, and proceedings onerous and expensive, particularly for less developed countries required to pay large awards in actions involving important state resources and policies.

None of these concerns should affect the enforceability of awards under the ICISD or New York Conventions. As one of the ECT claimants has argued to a DC court, the VCLT reflects the 'central premise of treaty law' and explicitly provides that '[a] state may neither "invoke the provisions of its internal law as justification for its failure to perform a treaty", nor "invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to include treaties as invalidating its consent"' unless the 'violation was manifest and concerned a rule of its internal law of fundamental importance', which was not the case here.[109] 'This rule ensures the "stability of treaty relations" by preventing states from "seek[ing] to avoid [their] treaty obligations by invoking decision by [their] courts or other constructions of [their] domestic law."'[110]

Any decision by US courts to allow EU member states to avoid treaty obligations by post-hoc decree could potentially undermine the legitimacy and finality of all arbitration awards and call into question the continued applicability of US enforcement jurisprudence developed in the decades since the United States became a state party to the ICSID Convention in 1965 and the New York Convention in 1970.

CONCLUDING REMARKS

One of the principal achievements of the ICSID Convention was to insulate arbitral awards by arbitral tribunals convened under ICSID rules from state efforts to avoid enforcement. The EC, however, now argues that EU organs may retroactively determine the treaty obligations of EU member states notwithstanding the agreement of treaty state parties that such determinations will be resolved by arbitration and that such awards will be enforced without substantive review. The results of these arguments in US courts certainly merit close attention from everyone interested in the future of international arbitration.

Notes

[1] In 2004, Cyprus, Czechia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia entered the EU. European Union, Countries, https://europa.eu/european-union/about-eu/countries_en#tab-0-1 (accessed 17 June 2019). Bulgaria and Romania joined the EU in 2007. Id.

[2] Cecilia Olivet, 'Intra-EU Bilateral Investment Treaties: A Test for European Solidarity', 1 February 2013, https://www.tni.org/es/node/1567 ('Suddenly, a vast web of BITs between EU Member States . . . emerged. Currently, there are an estimated 190 intra-EU BITs.').

[3] See, eg, Communication from the Commission to the European Parliament and the Council, Protection of intra-EU investments, 19 July 2018, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A547%3AFIN.

[4] Treaty on the Functioning of the European Union, EU, article 3; 13 December 2007; European Parliament, The Treaty of Lisbon, http://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon (accessed 31 May 2019).

[5] Ioan Micula, et al v Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013, paragraph 1329(c) (converted to dollars).

Micula, paragraphs 137–172, 665–725, 825–27, 872.

[6] Ioan Micula et al v Romani, ICSID Case No. ARB/05/20, Annulment Decision, 26 February 2016.

[7] Commission Decision 2015/1470, paragraphs 3, 142, 153, 2015 OJ (L 232) 43 (EC).

[8] Id, at paragraphs 109–15.

[9] Cases T-624/15, T-694/15, and T-704/15, European Food SA, et al v European Commission, ECLI:EU:T:2019:423. The Court held that the EC did not have competence over the portion of the arbitral award that compensated the investors for actions that occurred before Romania's accession to the EU. And because the EC's decision did not differentiate between pre- and post-accession amounts, the entire decision was annulled.

[10] Tom Jones, 'Miculas suffer setback in Sweden', 4 February 2019, Global Arbitration Review, https://globalarbitrationreview.com/article/1179932/miculas-suffer-setback-in-sweden (discussing enforcement proceedings in Sweden, UK, Belgium, Luxembourg, and US).

[11] Achmea BV v The Slovak Republic, PCA Case No. 2008-13, Award, 7 December 2012.

[12] Achmea, paragraph 352.

[13] Lionel Nichols and Liz Tout, 'European investors reconsider their position following the ECJ's decision in Achmea', 18 June 2018, https://www.jdsupra.com/legalnews/european-investors-reconsider-their-65184/.

[14] Case C-284-16, Slovak Republic v Achmea BV, paragraph 60, 2018 ECR 158.

[15] Achmea, paragraphs 39–49.

[16] Id, paragraphs 50–53.

[17] The VCLT governs the interpretation and validity of treaties between States. See VCLT, Article 1, 23 May 1969, 1155 UNTS 331, 8 ILM 679 (1980).

[18] The New York Convention governs the recognition and enforcement of arbitral awards in a signatory state that were made in another signatory state. See New York Convention, Article 1, 10 June 1958, 330 UNTS 38, 21 UST 2517, 7 ILM 1046 (1968).

[19] Achmea, paragraphs 54–55.

[20] Tom Jones, 'Germany's top court shows obedience to Achmea', 9 November 2018, Global Arbitration Review, https://globalarbitrationreview.com/article/1176731/germany%E2%80%99s-top-court-shows-obedience-to-achmea.

[21] Yikang Zhang, 'Mutual Termination of Sunset Clauses in Intra-EU BITs: The Search for Investor Protections', 29 American Review of International Arbitration 173, 174 (2018) (noting the Netherlands, Romania, Poland, Italy, and Ireland have previously announced they will be terminating their BITs); Marie Davois and Markus Burgstaller, 'Another One BIT the Dust: Is the Netherlands' Termination of Intra-EU Treaties the Latest Symptom of a Backlash Against Investor-State Arbitration?', 11 August 2018, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2018/08/11/another-one-bit-dust-netherlands-terminationintra-eu-treatie (discussing same).

[22] Caroline Simson, 'EU Member States Will Terminate Intra-EU Treaties', 17 January 2019, Law360, https://www.law360.com/articles/1119708/eu-member-states-will-terminate-intra-eu-treaties. In April 2019, the CJEU concluded that the Investment Court System provided for by the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) is compatible with EU treaties. Guillaume Croisant, 'Opinion 1/17 – The CJEU Confirms that CETA's Investment Court System is Compatible with EU Law', Kluwer Arbitration Blog, 30 April 2019, http://arbitrationblog.kluwerarbitration.com/2019/04/30/opinion-117-the-cjeu-confirms-that-cetas-investment-court-system-is-compatible-with-eu-law/.

[23] International Energy Charter, The Energy Charter Treaty, https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ (accessed 31 May 2019).

[24] See, eg, Charanne and Construction Investments v Kingdom of Spain, SCC Case No. V062/2012, Award, 21 January 2016, paragraphs 424–50; RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, paragraphs 71–88; Isolux Infrastructure Netherlands, BV v Kingdom of Spain, SCC Case No. V2013/153, 17 July 2016, paragraphs

[25]

424–50; Eiser Infrastructure Limited and Energia Solar Luxembourg SARL v Kingdom of Spain, ICSID Case No. ARB/13/36, Award, 4 May 2017, paragraphs 179–207; Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain, SCC Case No. 2015/063, Award, 15 February 2018, paragraphs 449–66; Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV v Kingdom of Spain, ICSID Case No. ARB/13/31, Award, June 15, 2018, paragraphs 204–30; Masdar Solar & Wind Cooperatief UA v Kingdom of Spain, ICSID Case No. ARB/14/1, Award, 16 May 2018, paragraphs 306–24, 327–42.

[26] See eg, Novenergia, paragraphs 78–103, Antin, paragraphs 74–98.

[27] See eg, Antin, paragraph 99.

[28] Global Arbitration Review, Spain suffers fourth solar loss, June 19, 2018, https://globalarbitrationreview.com/article/1170705/spain-suffers-fourth-solar-loss

[29] Id.

[30] See generally eg, EC Amicus Brief, Eiser Infrastructure Limited et al v The Kingdom of Spain, Civ. No. 18-cv-1686 (18 March 2018).

[31] Global Arbitration Review, 'Miculas bring new action against Romania in DC', 8 November 2017, https://globalarbitrationreview.com/article/1149864/miculas-bring-new-action-against-romania-in-dc.

[32] Respondent's Motion to Stay Proceedings, at 15-21, Micula et al v The Government of Romania, Civ. No. 1:17-cv-2332 (11 December 2018).

[33] EC Amicus Brief, Micula et al v The Government of Romania, Civ. No. 1:17-cv-2332 (11 December 2018).

[34] Order, Micula et al, v Romania, Civ. No. 17-cv-02332 (DDC 21 June 2019).

[35] Eiser Infrastructure Limited and Energia Solar Luxembourg SARL v Kingdom of Spain, ICSID Case No. ARB/13/36, Award, 4 May 2017, paragraph 486.

[36] Eiser and Energia, paragraphs 179–207.

[37] Charanne and Construction Investments v Spain, SCC Case No. V062/2012, Award, 21 January 2016. The tribunal found it had jurisdiction but rejected Charanne's FET claims on the merits as Charanne limited its challenge to the 2010 amendments to the program, rather than the 2013 law which abolished the incentives. Id, paragraphs 475–542.

[38] Eiser and Energia, paragraphs 199, 204.

[39] Eiser Infrastructure Limited, et al v The Kingdom of Spain, Civ. No. 18-cv-01686 (19 July 2018).

[40] See Order, Eiser, Civ. No. 18-cv-01686 (29 November 2018) (setting briefing schedule); Petitioner's Reply to Opposition to Motion to Dismiss, Eiser, Civ. No. 18-cv-01686 (28 January 2019) (final brief per schedule).

[41] EC Amicus Brief, Eiser, Civ. No. 18-cv-1686 (18 March 2018). Eiser were also allowed to file a supplemental brief in response to the EC's amicus.

[42] Novenergia II – Energy & Environment (SCA), SICAR v The Kingdom of Spain, SCC Case No. 2015/063, Award, 15 February 2018, paragraph 860.

[43] Novenergia, paragraphs 453–54.

[44] Id, paragraphs 456–65.

[45] Novenergia II – Energy & Environment (SCA) v The Kingdom of Spain, Civ. No. 18-cv-01148 (16 May 2018).

[46] EC Motion for Leave to File Amicus Brief, Novenergia, Civ. No. 18-cv-01148 (28 February 2019).

[47] Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV v Kingdom of Spain, ICSID Case No. ARB/13/31, Award, 15 June 2018, paragraph 748.

[48] Antin, paragraphs 204–30.

[49] Id, paragraphs 59–68.

[50] Infrastructure Services Luxembourg SARL et al v Kingdom of Spain, Civ. No. 18-cv-01753 (27 July 2018).

[51] See generally Respondent's Motion to Dismiss Petition to Enforce Arbitral Award, Infrastructure Services, Civ. No. 18-cv-1753 (28 December 2018).

[52] See Order, Infrastructure Services, Civ. No. 18-cv-01753 (7 November 2018) (setting briefing schedule); Petitioner's Reply to Opposition to Motion to Dismiss, Infrastructure Services, Civ. No. 18-cv-01753 (19 February 2019) (final brief per schedule). Motion for Leave

to File Amicus Brief by European Commission, Infrastructure Services, Civ. No. 18-cv-01753 (22 March 2019).

[53] ICSID, Case Details, Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV v Kingdom of Spain (ICSID Case No. ARB/13/31), available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/13/31 (accessed 28 May 2019). See also ICSID Convention, Article 51(4) ('If the applicant requests a stay of enforcement of the award in his [annulment] application, enforcement shall be stayed provisionally until the Tribunal rules on such request.').

[54] Masdar Solar & Wind Cooperatief UA, ICSID Case No. ARB/14/1, Award, 16 May 2018, paragraph 697.

[55] Masdar Solar, paragraphs 306–24, 327–42.

[56] Masdar Solar & Wind Cooperatief UA v Kingdom of Spain, Civ. No. 18-cv-02254 (28 September 2018).

[57] Respondent's Motion to Dismiss, Masdar Solar, Civ. No. 18-cv-02254 (22 April 2019).

[58] See ICSID Convention, Article 54(1) ('Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. 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.').

[59] Chistopher Schreuer, International Centre for Settlement of Investment Disputes (ICSID), paragraph 43 available at https://www.univie.ac.at/intlaw/wordpress/pdf/100_icsid_epil.pdf (accessed 23 May 2019). The International Centre for Settlement of Investment Disputes, which administers ICSID arbitration, is located in Washington, DC. ICSID Convention, Article 2. ICSID proceedings take place in Washington, DC absent contrary agreement by the parties. Id, Article 62. However, this is referred to as the 'place of proceedings' and not the legal seat. Id. ICSID has no legal seat. See also Frauke Nitshcke and Kamel Ait-El-Hadj, 'Determining the Place of Arbitration in ICSID Additional Facility Proceedings', 30 ICSID Review 243, 244 (2015).

[60] 22 US Code Section 1650a(a).

[61] Mobil Cerro Negro, Ltd v Bolivarian Republic of Venezuela, 863 F3d 96, 102 (2d Circuit 2017)

[62] Micula, paragraphs 316–17; Charanne, paragraphs 49–51; RREEF Infrastructure, Decision on Jurisdiction, paragraphs 16, 18, 20, 31–32 (requesting twice to intervene, but being rejected by the tribunal); Eiser, paragraphs 59–70 (ultimately deciding it would not intervene because it did not want to bear costs); Novenergia, paragraphs 43–45; Antin, paragraphs 59–68 (ultimately deciding it would not intervene because it did not want to bear costs); Masdar, paragraphs 12–18, 20, 21–23, 25–26, 28.

[63] See eg, EC Amicus Brief, at 12–14, Eiser Infrastructure Limited et al v The Kingdom of Spain, Civ. No. 18-cv-1686 (18 March 2018)

[64] EC Amicus Brief, at 6–7, 13.

[65] Id, at 13–14.

[66] Id, at 14.

[67] Id, at 19–22.

[68] Id, at 14–19.

[69] Id, at 23–25.

[70] Respondent's Motion to Dismiss, at 22-23, Infrastructure Services, Civ. No. 18-cv-01753 (28 December 2018) (relying primarily on Granite Rock Co v International Brotherhood of Teamsters, 561 US 287, 297 (2010) and National R Passenger Corp v Boston & Marine Corp, 850 F2d 756, 761-62 (DC Circuit 1988)); Respondent's Motion to Dismiss, at 20-21, Eiser, Civ. No. 18-cv-01686 (14 December 2018) (relying primarily on Chevron Corp v Republic of Ecuador, 795 F.3d 200, 204-5 (DC Circuit 2015)); Respondent's Motion to Dismiss, at 24–25, Masdar Solar, Civ. No. 18-cv-02254 (22 April 2019) (relying primarily on same cases as Infrastructure Services, but also including Henry Schein, Inc v Archer & White Sales, Inc, 202 L Ed 2d 480, 487 (2019)).

[71] Petitioners' Response to Motion to Dismiss, Infrastructure Services, at 17–18. Id, Eiser, at 18–19.

[72] Id, Infrastructure Services, at 18–19, Id, (Eiser), at 19–22.

Id, Infrastructure Services, at 22–28. Id, (Eiser), at 23–29.

[73] Id, Infrastructure Services, at 28–35. Id, (Eiser), at 29–37.

[74] Later Airways, Ltd v Sabena, Belgian World Airlines, 731 F2d 909, 937 (DC Circuit 1984).

[75] Newco Limited v Government of Belize, 650 Fed. Appx 14, 16 (DC Circuit 2016) (quoting Belize Social Development Ltd v Belize, 668 F3d 724, 727 (DC Circuit 2012)).

[76] ICSID Convention, Article 53(1); see also 22 USC Section 1650a(a) (exempting ICSID awards from review pursuant to the FAA).

[77] See Mobil Cerro Negro, Ltd v Bolivarian Republic of Venezuela, 863 F3d 96 (2d Circuit 2017); Micula v Government of Romania, 104 F Supp 3d 42 (DDC 2014).

[78] 28 USC Section 1605(a)(1) and (6).

[79] Id, Infrastructure Services, at 27–28. Id, Eiser, at 29–30. Masdar Solar, Civ. No. 18-cv-02254 (22 April 2019).

[80] Id, Infrastructure Services, at 14. Id, Eiser, at 13–15.

[81] Id, Infrastructure Services, at 14 (quoting ICSID Convention, Articles 41, 53(1), 54(1)).

[82] Blue Ridge Invs LLC v Republic of Argentina, 753 F3d 72, 84 (2d Circuit 2013) (ICSID Convention contemplates enforcement in the US and therefore a state waived sovereign immunity when it ratified Convention); Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v Navimpex Centrala Navala, 989 F2d 572, 578 (2d Circuit 1993) (finding the same in relation to the New York Convention); Tatneft v Ukraine, 301 F Supp 3d 175, 192 (DDC 2018)(same); Stati v Republic of Kazakhstan, 199 F Supp 3d 179, 189 (DDC 2016) (same); Creighton Ltd v Government of State of Qatar, 181 F3d 118, 123 (DC Circuit 1999) (same).

[83] Henry Schein, Inc v Archer & White Sales, Inc, 139 S Ct 524, 527 (2019); Oxford Health Plans LLC v Sutter, 569 US 564, 569 n2 (2013); Rent-A-Ctr, W, Inc v Jackson, 561 US 63, 68–69 (2010); First Options of Chicago, Inc v Kaplan, 514 US 938, 943–44 (1995).

[84] Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution', 2 ICSID Review – Foreign Investment Law Journal 287, 303 (1987).

[85] Restatement (Third) of Foreign Relations Law Section 441(1) (1987).

[86] Respondent's Motion to Dismiss, at 34, Infrastructure Services, Civ. No. 18-cv-01753 (28 December 2018).

[87] Id, at 35.

[88] ICSID Convention, Article 53(1). Petitioners' Response to Motion to Dismiss, at 38–39, Infrastructure Services, Civ. No. 18-cv-01753 (28 January 2019).

[89] Petitioners' Response to Motion to Dismiss, at 39, Infrastructure Services, Civ. No. 18-cv-01753 (28 January 2019).

[90] Id, at 40.

[91] Chevron Corp v Republic of Ecuador, 949 F Supp 2d 57, 69 (DDC 2013) ('The public-policy exception under the New York Convention is construed extremely narrowly and applied only where enforcement would violate the forum state's most basic notions of morality and justice . . . . The provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy' . . .'. (internal quotations omitted)); Balkan Energy Ltd v Republic of Ghana, 302 F Supp 3d 144, 158 (DDC 2018) ('While [the public policy exception under Article V(2)(b)] is frequently raised, it has rarely been successful.').

[92] Respondent's Motion to Dismiss or Stay, at 19-21, Novenergia, Civ. No. 18-cv-01148 (16 October 2018); Petitioner's Response to Motion to Dismiss or Stay, at 14-20, Novenergia, Civ. No. 18-cv-01148 (30 November 2018).

[93] See Linda Silberman and Nathan Yaffe, 'The US Approach to Recognition and Enforcement of Awards After Set-Asides: The Impact of the Pemex Decision', 40 Fordham International Law Journal 799, 802–3 (2017) (noting that US courts will only enforce an award that has been set aside in extraordinary circumstances where the decision to set aside is 'repugnant to fundamental notions of what is decent and just in the state where the enforcement is sought'.).

[94] Marc J Goldstein, 'Suspended in Sweden: The Achmea Controversy Visits Washington', 15 January 2019, Arbitration Commentaries, http://arbblog.lexmarc.us/2019/01/suspended-in-sweden-the-achmea-controversy-visits-washington/.

[95] Goldstein, supra note 95.

[96]

[97] Respondent's Reply to Motion to Dismiss or Stay, at 8-10, Novenergia, Civ. No. 18-cv-01148 (21 December 2018).

[98] Europcar Italia, SpA v Maiellano Tours, Inc, 156 F3d 310 (2d Circuit 1998).

[99] See eg, Rusoro Minding Ltd v Bolivarian Republic of Venezuela, 300 F Supp 3d 137, 149 (DDC 2018)

[100] Respondent's Reply to Motion to Dismiss or Stay, at 7, Novenergia, Civ. No. 18-cv-01148 (21 December 2018).

[101] Tania Voon and Andrew Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law', 31 ICSID Review 413, 428, 430 (2016); Nikos Lavranos, 'The end of intra-EU BITs is nearing', 31 May 2016, Thomson Reuters, http://arbitrationblog.practicallaw.com/the-end-of-intra-eu-bits-is-nearing/. The following intra-EU BITs have been terminated by consent: Czech Republic–Malta BIT (terminated in 2010), Czech Republic–Slovakia BIT (2004), Italy–Slovenia BIT (2009), Italy–Slovakia BIT (2012), Italy–Latvia BIT (2009), Estonia–Italy BIT (2009), Czech Republic–Ireland BIT (2011), Czech Republic–Italy BIT (2009), Czech Republic–Estonia BIT (2011), Denmark–Romania BIT (2017), Czech Republic–Slovenia BIT (2010), Latvia–Poland BIT (2019), Denmark–Estonia BIT (2017); Czech Republic–Denmark BIT (2009), Italy–Romania BIT (2010), Denmark–Poland BIT (2019), Bulgaria–Italy BIT (2010), Hungary–Italy BIT (2008); Latvia–Poland BIT (2019), Denmark–Poland BIT (1990). Only two intra-EU BITs have been terminated unilaterally: Italy–Poland (2013) and Croatia–Italy (2013).

[102] Voon and Mitchell, supra note 101, at 430; Zhang, supra note 22, at 178-80; Tania Voon, Andrew Mitchell, and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights', 29 ICSID Review 451, 453, 461, 465–72 (2014).

[103] See eg, Walter Bau Ag v The Kingdom of Thailand, UNCITRAL, Award, 1 July 2009, paragraph 9.5; Ping An Life Ins Co of China, Lmtd v Kingdom of Belgium, ICSID Case No. ARB/12/29, Award, 30 April 2015, paragraph 209; UP and CD Holding Internationale v Hungary, ICSID Case No. ARB/13/35, Award, 9 October 2018, paragraph 265; Eskosol SpA in Liquidazione v Italian Republic, ICSID Case No. ARB/15/50, Decision on Jurisdiction, 7 May 2019, paragraph 82. Zhang, supra note 22, at 178–79; Voon, et al, supra note 102, at 465–68; Agnieszka Zarowna, 'Termination of BITs and Sunset Clauses – What Can Investors in Poland Expect?', 28 February 2017, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2017/02/28/booked-22-february-polish-bits/.

[104] Broches, supra note 85, 299.

[105] 22 USC Section 1650a.

[106] Corporación Mexicana De Mantenimiento Integral, S De RL De CV v Pemex Exploración Y Producción, 832 F3d 92, 106-8 (2d Circuit 2016)

[107] James McBride, 'How Are Trade Disputes Resolved?', 25 October 2018, Council on Foreign Relations, https://www.cfr.org/backgrounder/how-are-trade-disputes-resolved.

[108] Phil Levy, 'Critique Of NAFTA Provision Highlights Team Trump's Misconceptions on Investment Abroad', 23 October 2017, Forbes, https://www.forbes.com/sites/phillevy/2017/10/23/should-team-trump-encourage-investment-in-mexico/#3bb2553970b4.

[109] Press Release, 'Warren Urges US Trade Rep to Remove ISDS Provisions During Next Round of NAFTA Negotiations', 19 September 2017, https://www.warren.senate.gov/newsroom/press-releases/warren-urges-us-trade-rep-to-remove-isds-provisions-during-next-round-of-nafta-negotiations.

[110] Petitioners' Response to Motion to Dismiss, at 29, Infrastructure Services, Civ. No. 18-cv-01753 (28 January 2019) (quoting VCLT, articles 27, 46).

[111] Id, at 29–30 (quoting Restatement (Fourth) of Foreign Relations Law: Treaties, Tentative Draft No. 2 Section 102, Reporter's Note 6 (20 March 2017)).

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