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

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

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Summary

IN SUMMARY

A US federal court's September 2019 decision to enforce the ICSID award in ***Micula v Romania*** marks the US judiciary's first decision considering the effect of the Court of Justice of the European Union's (CJEU) 2018 decision in***Slovak Republic v Achmea*** on the enforceability in the US of investor-state awards arising under intra-EU treaties. In ***Achmea-***, the CJEU found investor-state arbitration pursuant to an 'intra-EU' treaty between EU member states contrary to EU law but the relevance of this holding for US enforcement petitions was unclear. In ***Micula***, the US court enforced the award pursuant to the ICSID Convention over objections from Romania and the European Commission itself. The US Court of Appeals for the DC Circuit affirmed that decision in May of 2020.

The district court's reasoning distinguished ***Achmea*** but did not take the opportunity squarely to foreclose the relevance of EU law in proceedings to enforce intra-EU awards before US courts. Since claimants continue to bring major intra-EU treaty claims and to seek enforcement of the resulting awards in the US, while the European Commission's opposition to intra-EU investment arbitration has recently given rise to a 23-state agreement to reciprocally terminate intra-EU investment treaties, ***Micula*** is of particular relevance to investors and European states alike.

DISCUSSION POINTS

- The district court's decision in ***Micula*** rejected ***Achmea's*** applicability on the facts of the case before it but did not foreclose the relevance of EU law in future proceedings to enforce intra-EU investor-state awards before federal courts in the US.
- US federal courts will have to continue to engage with 'intra-EU' jurisdictional objections.

REFERENCED IN THIS ARTICLE

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

In September 2019, a federal district court in Washington DC enforced an ICSID award against Romania in the case of ***Ioan Micula et al v Government of Romania. Micula*** marked the US judiciary's first decision considering the enforceability of an investor-state arbitration award made pursuant to a bilateral investment treaty (an intra-EU BIT) between

two European Union member states since the Court of Justice of the European Union (CJEU) ruled, in ***Slovak Republic v Achmea***,[1] that investor-state arbitration among EU member states was contrary to the constitutional order of the European Union.

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

The ambiguities in the ***Micula*** decision are significant because, notwithstanding ***Achmea*** and the European Commission's long-standing position that the resolution of investment disputes within the European Union should occur only within the framework of the EU's own legal system, European investors continue to bring treaty claims against EU member states. Indeed, at least 55 such intra-EU claims are currently pending before the International Centre for Settlement of Investment Disputes (ICSID) alone.[2] Some of those cases were filed quite recently, even though a majority of EU member states recently agreed to terminate more than 130 intra-EU investment treaties with retroactive effect.[3]

In addition, ***Micula*** is significant because enforcement actions in respect of nearly US$600 million worth of intra-EU investor-state awards are pending before United States federal district courts.[4] This article considers the potential implications of the ***Micula*** decision for the treatment of intra-EU awards in US federal courts.

THE MICULA ICSID ARBITRATION

The ***Micula*** arbitration arose as a consequence of Romania's preparations for its entry into the European Union in 2007. Prior to that time, Romania had extended certain economic incentives to encourage foreign investment in its new post-Soviet economy. The claimants, two brothers of Swedish nationality but Romanian heritage, had relied on these incentives when investing in the food and beverage industry of an impoverished region of Romania.[5] Although the incentives had been meant to last for at least a decade, they were withdrawn as part of Romania's efforts to bring itself into compliance with the ***acquis communautaire*** in preparation for its EU accession.[6] The European Commission had advised Romania that, from the standpoint of European law, the incentives at issue constituted unlawful 'state aid' that distorted incentives and created uneven treatment within an integrated single European economy.[7]

Alleging breaches of their legitimate, investment-backed expectations as protected under the Swedish-Romanian BIT's 'fair and equitable treatment clause', the Miculas commenced arbitration before ICSID in August of 2005.[8] After an ICSID tribunal found their claims admissible, the European Commission warned that any award reinstating the privileges abolished by Romania, or compensating the investors for the loss of those privileges, would itself constitute state aid contrary to the 'supremacy of EU law'.[9] The arbitral tribunal refused, however, to subordinate Romania's international law obligations under the BIT to the Commission's view of European law. It instead refused to 'assume that by virtue of entering into the [EU] Accession Treaty or by virtue of Romania's accession to the EU, either Romania, or Sweden, or the EU sought to amend, modify or otherwise detract from the application of the BIT'.[10] The tribunal ultimately awarded the Micula claimants compensation of approximately €178 million in December 2013 plus interest.[11]

Shortly thereafter, the European Commission issued an order purporting to enjoin Romania from complying with the award. The ***Micula*** claimants promptly challenged that order before the European Union's General Court.[12] Romania, meanwhile, sought review of the award before an ***ad hoc*** annulment committee within the framework of the ICSID Convention.-[13] That committee refused Romania's request to stay enforcement of the award until the conclusion of the annulment procedure, however, because Romania refused to promise that it would comply with the award if it was upheld by the Committee.[14]

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

THE CJEU'S ACHMEA DECISION WAS HANDED DOWN WHILE THE MICULAS' PETITION TO ENFORCE THE ICSID AWARD WAS PENDING IN WASHINGTON, DC

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

The background to the CJEU's decision in ***Achmea*** was as follows: a Dutch investor had brought a claim against Slovakia pursuant to the Netherlands-Slovakia BIT of 1992, challenging measures taken by the government that had adversely impacted its investments in the health insurance sector.[16] The resulting arbitration was conducted pursuant to the UNCITRAL Arbitration Rules with the arbitration seated in Germany. ***Achmea*** was successful in the arbitration. However, Slovakia immediately applied to annul the resulting award on the theory that investor-state arbitration under the treaty was contrary to EU law. Rather than decide the question on its own, the German Federal Court of Justice referred the question to the CJEU.[17]

In its judgment, the CJEU found that the dispute at issue could require the tribunal to apply European Union law and that its resolution within an investor-state arbitration would be final and not fully reviewable before the courts of European member state or the European courts, or both.[18] This, the CJEU reasoned, threatened 'consistency and uniformity in the interpretation of EU law.'[19] Accordingly, the CJEU explained, European Union law 'must be interpreted as precluding a provision in an international agreement concluded between member states . . . under which an investor from one of those member states may, in the event of a dispute concerning investments in the other member state, brings proceedings against the latter . . . before an arbitral tribunal'.[20]

THE DISTRICT COURT IN MICULA REJECTED A JURISDICTIONAL CHALLENGE BASED ON ACHMEA

Under the ICSID Convention and US law, there are no grounds for challenging an ICSID award in the United States courts. Pursuant to 22 USC section 1650a, a federal court is obliged to treat an ICSID award as having the status of a final court from another US state.[21] It may not 'examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award'.[22] A district court's role when presented with an ICSID award consists of nothing more than an 'examin[ation of] the award's authenticity and enforce[ment of] the obligations imposed'.[23] Consistent with the ICSID Convention's

self-contained annulment mechanism, review of ICSID awards is thus much more narrowly circumscribed than that of awards governed by the New York Convention.[24]

As a result, Romania used ***Achmea*** as the basis for an attack on the district court's subject matter jurisdiction with respect to a dispute involving a sovereign (Romania) under the US Foreign Sovereign Immunities Act (FSIA).[25] Under United States law, the FSIA is 'the sole basis for obtaining jurisdiction over a foreign state' in a US court.[26] The ***Micula*** claimants had pleaded that the court had subject matter jurisdiction over their dispute concerning the enforcement of the award against Romania pursuant to the FSIA's 'arbitration exception', which provides that '[a] foreign state shall not be immune . . . in any case . . . in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if . . . the . . . award is governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards'.-[27] Romania (and the European Commission as ***amicus curiae***) countered that the FSIA's arbitration exception could not apply because, consistent with the CJEU's ruling in ***Achmea***, the arbitration agreement contained in the applicable treaty had been retroactively nullified upon Romania's accession to the European Union.[28]

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

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

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

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

QUESTIONS RAISED BY THE DISTRICT COURT'S DECISION IN MICULA

Micula will naturally encourage claimants seeking to enforce intra-EU investor-state awards in the United States. But it does not take the arguments raised by Romania based upon ***Achmea*** off the table. To the contrary, the district court's opinion in ***Micula*** suggests that parties seeking to enforce awards based upon intra-EU bilateral investment treaties will have to focus on distinguishing ***Achmea***. If so, key questions will likely be: whether the measures being challenged under an investment treaty occurred before or after a respondent state's EU accession; and the degree to which resolution of the dispute involves an arbitral tribunal

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

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

First, although it accurately stated the standard applied in ICSID enforcement cases, the district court does not seem to have applied it. Indeed, 22 USC section 1650a, the statute implementing the United States obligations under article 54 of the ICSID Convention provides that an ICSID award 'shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several states'.-[35] That is why, as the ***Micula*** district court recognised, 'a federal court is not permitted to examine an ICSID award's merits, its compliance with international law, or the ICSID tribunal's jurisdiction to render the award', all of which are questions for the arbitral tribunal under the ICSID framework.[36] A court's role is limited to confirming the award's authenticity and enforcing its obligations as a judgment.[37] In the ***Micula*** arbitration, the tribunal had found that it had jurisdiction over the parties and its conclusion had been upheld by an ICSID annulment committee. Where ICSID tribunals have the power to decide upon their own jurisdiction pursuant to article 41 of the ICSID Convention, there is a strong argument that the jurisdictional findings reached within the arbitration should have been accepted by the district court.[38]

Second, the ***Micula*** district court does not appear to have considered an alternative basis for subject-matter jurisdiction under the FSIA, that would have entirely avoided the need to engage with European Union law. In particular, the FSIA authorises a court to exercise subject-matter jurisdiction where a state has waived its sovereign immunity.[39] There is accordingly a reasonable argument that by becoming a party to the ICSID Convention, Romania waived any objection to subject matter jurisdiction in a foreseeable future action to enforce an ICSID award. The district court's ***Achmea*** analysis was directed at determining whether the FSIA's arbitration exception applied on the basis of a valid arbitration agreement in an intra-EU investment treaty, a finding of waiver could have sidestepped analysis of the treaty itself entirely.[40] The DC Circuit's holdings in ***Creighton v Qatar*** and more recently in ***Tatneft v Ukraine***, that a sovereign's adoption of the New York Convention waived its immunity from suits to enforce arbitration awards under its terms in other states that signed the New York Convention, supports a waiver theory.[41] Such an approach could make it easier for federal district courts to avoid parsing the significance of ***Achmea*** while honoring the United States' international law obligations to enforce ICSID awards.

Third, it is questionable whether the district court distinguished sufficiently between public international law and specifically European law. The DC Circuit's brief statement that 'Romania did not join the EU until after the underlying events here, so the arbitration agreement applied', arguably implies that ***Achmea*** would otherwise have negated the agreement to arbitrate contained in the Swedish-Romanian treaty and preempted the United States' own treaty obligation to enforce ICSID awards.[42] A difficulty, however, is that the ICSID Convention is a public international law instrument that imposes obligations on the United States, while ***Achmea*** is part of a specifically European legal order which does not. Indeed, investor-state tribunals and ICSID annulment committees have consistently emphasized the distinction between public international law and European law in rejecting challenges to their jurisdiction based on the CJEU's reasoning in ***Achmea***.[43] For its part,

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

Micula's approach could be more pertinent in the case of a non-ICSID award for which enforcement would be sought under the New York Convention. A respondent state might attempt to challenge the validity of the underlying arbitration agreement pursuant to article V of the New York Convention. This might be attempted pursuant to article V(1), which allows (but does not require) a court to withhold recognition and enforcement of a foreign award where the parties to the underlying arbitration agreement 'were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it'.[45] That is fundamentally the European Commission's position, adopted by the CJEU in ***Achmea***. Alternatively, an argument could conceivably be made under article V(2) that a US court's recognition of an intra-EU investor-state award in spite of the views of the CJEU and European Commission (and presumably also the respondent state) that such an award was contrary to European law would be contrary to US public policy.[46]

Even then, however, there would likely be a strong argument for deference to a tribunals' jurisdictional determination – including of questions related to ***Achmea*** – since the applicable arbitration rules would almost certainly have entrusted jurisdictional questions to the tribunal.[47] In practice, too, US courts will where possible avail themselves of the opportunity to leave questions of European law to the courts of a foreign arbitral seat with primary jurisdiction over an award. In ***Novenergia v Spain***, for example, a federal district court stayed proceedings to enforce an Energy Charter Treaty (ECT) award in favour of Luxembourg investors pending the decision of the courts of Sweden, the arbitral seat, as to whether ***Achmea***'s reasoning applies to an ECT Award. In so doing, the court observed that the issues presented by ***Achmea*** were 'of importance to the EU and better suited for initial review in their courts'.[48]

FUTURE QUESTIONS

Micula will not be the US courts' last word on intra-EU investor-state awards. Future cases may well afford federal district courts and perhaps the DC Circuit an opportunity to resolve some of the uncertainties identified above.

New issues will arise as well. As reflected in ***Novenergia***, for example, the scope of ***Achmea*** is itself unsettled. European Union member states divided as to whether its holding applies to intra-EU investment arbitration under the ECT, a sector-specific, multilateral agreement that provides for investor-state arbitration, and to which many non-EU States, as well as the EU itself, are parties.[49] This is important because a large proportion of the intra-EU investor-state awards for which enforcement is being sought before United States courts are ECT awards arising out of disputed reforms to Spain's solar energy sector.

This question has added urgency in the context of another major development: in May 2020, 23 of the 27 EU member states announced a 'Termination Agreement' intended to 'implement' the ***Achmea*** judgment by terminating their intra-EU BITs.[50] All member states had previously pledged to terminate their intra-EU BITs.[51] The Termination Agreement requires signatories to resist intra-EU awards and is explicitly retroactive. The Termination Agreement also requires states to resist awards concluded before the ***Achmea*** judgment, while ostensibly requiring parties to intra-EU investor-state arbitrations pending at the time

of the *Achmea* judgment to enter into 'structured dialogue' to reach a settlement and obliging European investor claimants to suspend their claims.[52] Unusually, the Termination Agreement also purports to cancel the relevant treaties' 'sunset clauses', which would otherwise extend the period of the relevant treaty for a term of years after notice of its termination.[53] It does not apply to arbitrations under the ECT or purport to affect participating states' obligations under the ICSID Convention.[54]

While the right of states to terminate treaties is beyond serious question, it is not clear that the retroactive aspects of the Termination Agreement are proper under public international law – or that investor-state tribunals will accept them. The agreement does, however, demonstrate the European Commission's commitment to opposing intra-EU BITs and is sure to generate complex issues about the proper relationship of European and public international law.

CONCLUSION

The decision in *Micula* raises many questions and leaves many unanswered. It is plainly not the end of the story – in the United States or Europe. US courts will be considering efforts to enforce intra-EU awards for the foreseeable future and jurisprudence in this area will continue to evolve. For the present, however, *Micula* signals that, *Achmea* notwithstanding, intra-EU investor-state awards remain enforceable in the United States if not quite assuredly so.

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Endnotes

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