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# THE INTERNATIONAL ARBITRATION REVIEW

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SEVENTH EDITION

EDITOR  
JAMES H CARTER

LAW BUSINESS RESEARCH

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# EDITOR'S PREFACE

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International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

**James H Carter**

Wilmer Cutler Pickering Hale and Dorr LLP  
New York  
June 2016

## Chapter 15

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# EUROPEAN UNION

*Edward Borovikov, Bogdan Evtimov and Anna Crevon-Tarassova<sup>1</sup>*

### I INTRODUCTION

Under the Treaty on the Functioning of the European Union (TFEU), the European Union has been provided with a new exclusive competence in respect of foreign direct investment, including the negotiation of treaties protecting such investment. Since the entry into force of the Treaty of Lisbon, Member States must seek authorisation from the European Commission to negotiate and adopt such treaties. The delicate interrelationship between the powers of the EU and the Member States in this area, as well as the legal status of existing bilateral investment treaties (BITs) concluded by the Member States prior to their accession to the European Union, is not settled. Developments in 2015 continued to highlight the legal uncertainty and confirmed the European Commission's persistent intention of taking an assertive position in promoting its views with respect to current and future investment protection treaties.<sup>2</sup>

### II THE YEAR IN REVIEW

#### i Developments affecting investment protection treaties of Member States

##### *Extra-EU BITs*

As explained in previous editions of this chapter, Regulation (EU) No. 1219/2012 confirmed that extra-EU BITs remain binding on the Member States under public international law. These treaties will be progressively replaced by investment protection agreements negotiated

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1 Edward Borovikov, Bogdan Evtimov and Anna Crevon-Tarassova are partners at Dentons.

2 We recommend consulting the 2013, 2014 and 2015 editions for the European Union chapter of the *International Arbitration Review* concerning the same jurisdiction, which may cover important developments from previous years that could not be included in this year's edition by reason of volume.

directly between the European Union and third countries. The transitional period will apply until at least 2020, at which point the Commission will present a report on the application of Regulation (EU) No. 1219/2012 to the European Parliament and the Council.

In 2014 and 2015, the Commission pursued the negotiations of the first EU agreements that will replace the existing BITs. Such negotiations are conducted within the framework of free trade agreements, the investment chapters of which will contain provisions on investment promotion and protection.

On 26 September 2014, the Commission, the EU President and Canada announced the completion of the negotiations on the Canada–EU comprehensive economic and trade agreement (CETA), and published the negotiated text. The legal review of the CETA text has now been completed, including a revision of the investor–state dispute settlement chapter, and the amended treaty text is currently being translated into all EU official languages.<sup>3</sup> At the time of writing, it was reported that the official signature of the CETA may take place before the end of 2016. After the translation process and official signing are completed, the CETA text will be transmitted for ratification. The ratification process is expected to involve further political and legal debate on both sides. Thus, the CETA text is not yet binding. On 15 December 2015, the European Council decided to declassify the trade-negotiating mandate given to the Commission in the course of CETA negotiations.<sup>4</sup>

Similarly, on 17 October 2014, the EU and Singapore concluded the negotiations of the investment chapter of the EU–Singapore free trade agreement (EUSFTA). This marked the successful conclusion of the negotiations of the entire EUSFTA following the initialling of the other parts of the agreement in September 2013.<sup>5</sup>

The investment chapter of the EUSFTA articulates the relationship between this agreement and the previously concluded BITs between the Member States and Singapore. Under Article 9.10, upon its entry into force the EUSFTA will replace and supersede the existing BITs between the Member States and Singapore. In the event of the provisional application of the EUSFTA, the application of the existing BITs between the Member States and Singapore will be suspended as of the date of the provisional application. If such provisional application is terminated, the suspension of the BITs shall cease and the BITs will regain effect. A claim under an existing BIT between a Member State and Singapore regarding treatment accorded while the BIT was in force may be submitted no later than three years from the entry into force of the EUSFTA or the suspension of the BIT. Finally, if the provisional application of the EUSFTA is terminated without the EUSFTA entering into force, a claim on the basis of the EUSFTA in respect of treatment accorded during the provisional application of the EUSFTA may be submitted no later than three years from the date of termination of the provisional application.<sup>6</sup>

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3 Joint statement – Canada-EU Comprehensive Economic and Trade Agreement (CETA), 29 February 2016, available at [trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154330.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154330.pdf).

4 ‘EU-Canada trade negotiating mandate made public’, European Council press release, 15 December 2015.

5 ‘EU and Singapore conclude Investment talks’, European Commission press release, Brussels, 17 October 2014.

6 The negotiated CETA text contains similar provisions. See CETA, Final Provisions Chapter, Article X.07 (text made public on 26 September 2014).

The EUSFTA text is not yet binding and will be subject to ratification. On 4 March 2015, the Commission confirmed its previous intention to request an opinion from the Court of Justice of the European Union on the European Union's competence to sign and ratify the EUSFTA and 'decided to go ahead' with this initiative.<sup>7</sup>

Such request is meant to clarify which provisions of the EUSFTA fall within the EU's exclusive competence and which remain in the Member States' remit. Specifically, the Commission is seeking clarifications on the following points: 'Does the Union have the requisite competence to sign and conclude alone the free trade agreement with Singapore? More specifically:

- a* Which provisions of the agreement fall within the Union's exclusive competence?
- b* Which provisions of the agreement fall within the Union's shared competence? and
- c* Is there any provision of the agreement that falls within the exclusive competence of the Member States?'<sup>8</sup>

The Court of Justice is expected to issue its opinion in late 2016 or early 2017.

### *Intra-EU BITs*

In contrast to extra-EU BITs, the interrelationship between the intra-EU BITs, that is treaties concluded between two Member States prior to the accession of one of them to the EU, and EU law has not yet been set out in EU law. According to the Commission, the relationship between intra-EU BITs and EU law 'remains a cause for concern', as such BITs are 'incompatible with EU law particularly because they appear discriminatory as between investors [...] and because they can lead to parallel jurisprudence through arbitration procedures on matters covered by EU rules without the Court of Justice of the EU (CJEU) being able to exercise its functions of guardian of the EU legal system'.<sup>9</sup>

According to the Commission, all Member States have now been requested to terminate their intra-EU BITs in various meetings and discussions held with the Member States.<sup>10</sup> Moreover, in June 2015 the Commission initiated infringement proceedings against five EU Member States, namely Austria, the Netherlands, Romania, Slovakia and Sweden, expressing the view that certain intra-EU BITs of these states violated EU law and asking them 'to bring the intra-EU BITs between them to an end'.<sup>11</sup> In particular, the Commission expressed the view that the intra-EU BITs in question contain provisions that overlap with the TFEU provisions on the freedom of establishment and the free movement of capital

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7 'European Commission to request a Court of Justice opinion on the trade deal with Singapore', Brussels, 4 March 2015. See also, 'Singapore: The Commission to Request a Court of Justice Opinion on the trade deal', European Commission press release, Brussels, 30 October 2014.

8 Request for an Opinion submitted by the European Commission pursuant to Article 218(11) TFEU (Opinion 2/15) (2015/C 363/22), OJEU C 363/19, 3 November 2015.

9 Commission Staff Working Document, Capital Movements and Investments in the EU, SWD (2012) 6 final, 3 February 2012, p. 3.

10 Id., p. 13.

11 'Commission asks Member States to terminate their intra-EU bilateral investment treaties', European Commission press release, Brussels, 18 June 2015.



and, for this reason, may affect common provisions of EU law or alter their scope.<sup>12</sup> The Commission also argues that the investor–state dispute settlement mechanism in these treaties contravenes the provisions of Article 344 of the TFEU, according to which Member States undertake not to resolve disputes regarding the interpretation or application of EU law other than as determined by EU law, in particular through referral to the Court of Justice.<sup>13</sup> The Commission also suggests that the investor–state arbitration clause constitutes direct discrimination against investors from other Member States that may not have the possibility to refer a dispute to arbitration.<sup>14</sup>

It is noteworthy that the Commission has raised similar arguments in its interventions before the arbitral tribunals constituted on the basis of intra-EU BITs. For instance, in the *amicus curiae* brief filed by the Commission before the *US Steel v. Slovakia* case, which was released in 2015, the Commission expressed the view that the BIT provisions on the fair and equitable treatment and investor–state arbitration ‘have been superseded by subsequent international treaties concluded between the same parties’, namely by the Europe Agreement, the Treaty on Accession and the Treaty of Lisbon.<sup>15</sup> The Commission also argued that BITs between Member States ‘discriminate against investors from Member States that are not party to those bilateral treaties’.<sup>16</sup>

In its response to the Commission’s formal notice, Sweden has expressed its disagreement with the Commission’s arguments, including those relating to investor–state arbitration. Sweden has also indicated that it ‘can accept the termination of its bilateral investment protection treaties with other member states’ provided that such ‘termination should take place in a coordinated manner, under common forms, ensuring predictability, and in a manner that investors are guaranteed continued protection even after termination’.<sup>17</sup> Sweden has also indicated that the suggested ‘notice from the parties that the treaty [...] would terminate with immediate effect would contravene the principle of legal certainty’.<sup>18</sup>

Similarly, Austria has indicated that: ‘termination of intra-EU BITs without their replacement would mean a deterioration of the investment climate in the EU and a

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12 Response to letter of formal notice regarding the Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the promotion and reciprocal protection of investments (COM ref SG-Greffe 2015D/6898, matter number 2013/2207), Sweden, Ministry of Foreign Affairs, Legal Affairs Division, 19 October 2015, paragraph 9 (referring to the Commission’s formal notice of 19 June 2015).

13 Id., paragraph 27.

14 Id.

15 *US Steel v. Slovakia*, PCA Case No. 2013-6, European Commission *amicus curiae* brief, 15 May 2014, paragraphs 20–39. This case was discontinued following the claimant’s withdrawal of its claims prior to the tribunal taking any decision on the issues raised by the Commission. See *US Steel v. Slovakia*, PCA Case No. 2013-6, Procedural Order No. 6, 16 June 2014.

16 Id., paragraphs 31 et seq.

17 See footnote 12, paragraph 40.

18 Id., paragraph 39.

potential disadvantage for European investors over those from third countries. Therefore, Austria supports, together with other Member States, the development of a pan-European acquis-compliant investment protection mechanism.<sup>19</sup>

The gradual phasing out of the intra-EU BITs, as opposed to their automatic termination as a result of Member States' accession to the EU, is consistent with public international law. This approach is also consistent with the existing practice of international arbitral tribunals, as recently confirmed by the *Electrabel v. Hungary* tribunal constituted on the basis of the Energy Charter Treaty.<sup>20</sup>

## ii Developments affecting the interrelationship between EU law and protection granted by BITs

The interrelationship and compatibility between the BITs and EU law is examined on a case-by-case basis in each particular investor–state dispute involving a Member State. Recent decisions rendered by international arbitral tribunals and the Court of Justice of the European Union (Court of Justice) draw a clear distinction between the application of BITs concluded with extra-EU states before and after accession in situations where their provisions are incompatible with EU law. This distinction originates from the wording of Article 351 of the TFEU (former Article 307 of the Treaty of Rome), pursuant to which the ‘rights and obligations arising from agreements concluded [...] for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties’.

As regards existing investment treaties concluded with an extra-EU state before a Member State's accession to the EU, and in light of Article 351 of the TFEU, the conflict between two incompatible obligations (one arising from the bilateral treaty and another from EU law) is resolved in favour of the BIT. As confirmed by the Advocate General in the *Commission v. Slovakia* case, ‘the rights and obligations arising from an agreement concluded before the date of accession of a Member State between it and a third country are not affected by the provisions of the Treaty [TFEU]’.<sup>21</sup>

As far as intra-EU treaties are concerned, as expected the Commission has expressed the opinion that ‘EU law takes supremacy not only over the national legal system, but also over bilateral agreements concluded between Member States’.<sup>22</sup> This position is supported

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19 ‘Bilateral investment protection treaties, including intra-EU BITs’, Austria's Federal Ministry of Science, Research and Economy, statement available at [www.bmwf.gv.at/Aussenwirtschaft/investitionspolitik/Seiten/BilateraleInvestitionsschutzabkommen.aspx](http://www.bmwf.gv.at/Aussenwirtschaft/investitionspolitik/Seiten/BilateraleInvestitionsschutzabkommen.aspx).

20 *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on jurisdiction, applicable law and liability, 30 November 2012, paragraph 4.147. See also *Eastern Sugar v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, paragraph 172; *Eureko v. Slovak Republic*, PCA Case No. 2008-13, Award on jurisdiction, arbitrability and suspension, 26 October 2010, paragraphs 274 and 282–3.

21 Opinion of Advocate General Jääskinen delivered on 15 March 2011 in Case C-264/09, *Commission v. Slovakia*, paragraph 73. See also Case C-264/09, *Commission v. Slovakia*, Judgment of 15 September 2011, paragraph 51.

22 See the Commission's detailed observations of 7 July 2010 quoted in *Eureko v. Slovak Republic*, PCA Case No. 2008-13, Award on jurisdiction, arbitrability and suspension, 26 October 2010, paragraph 180.

by the Court of Justice case law. According to the Court of Justice, 'whilst Article 307 EC allows Member States to honour obligations owed to non-member States under international agreements preceding the Treaty, it does not authorise them to exercise rights under such agreements in intra-Community relations'.<sup>23</sup> A similar position can be extended to investment treaties concluded with extra-EU states after a Member State's accession to the EU.

In its decision of 30 November 2012, the *Electrabel* tribunal considered this interpretation of Article 351 (former Article 307) 'to accord with international rules relating to the interpretation of successive treaties'. The tribunal concluded that 'the pre-eminence of EU law applies not only to pre-accession treaties between EU Members, but also to post-accession treaties between EU Members, as EU Members cannot derogate from EU rules as between themselves'.<sup>24</sup> Based on this analysis, the *Electrabel* tribunal found that if the Energy Charter Treaty (ECT), to which the Member States and the European Union are parties, was materially incompatible with EU law, EU law would prevail in a claim of a Member State national against an EU Member State. Thus, the ECT does not protect an investor of a Member State, as against a respondent Member State, from the enforcement by that Member State of a binding decision of the Commission. In the tribunal's view, the acts of the Member State 'implementing such a binding decision under EU law have to be taken into account in the evaluation of its conduct under the ECT'.<sup>25</sup>

This is the first decision of its kind clearly articulating the interrelationship between the ECT, as applicable between the Member States, and EU law. A number of investor-state disputes filed on the basis of the ECT are currently pending as between nationals of some Member States against other Member States, and it remains to be seen whether the arbitral tribunals constituted to hear these disputes will adopt a similar approach. According to the ICSID caseload statistics released in January 2016, over one-third of all claims registered by ICSID in 2015 were filed against European states, with 15 claims filed against Spain on the basis of the ECT.<sup>26</sup>

In January 2016, an arbitral tribunal constituted in one of the earlier claims filed against Spain by Charanne BV, a Dutch company, and Construction Investments Sarl, a Luxembourg company, held that it had jurisdiction under the ECT to consider an intra-ECT claim.<sup>27</sup> In doing so, the tribunal considered the view expressed by the Commission in an *amicus curiae* brief filed in January 2015 that 'neither Spain nor the Netherlands or Luxembourg have agreed that disputes under the ECT are to be resolved through international arbitration in intra-EU context'.<sup>28</sup>

In support of this view, the Commission argued that 'investors of an EU Member State requesting the settlement of a dispute with another Member State cannot be considered

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23 See, e.g., Case C-147/03, *Commission v. Austria*, Judgment of 7 July 2005, paragraph 58.

24 *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, Decision on jurisdiction, applicable law and liability, 30 November 2012, paragraph 4.186.

25 *Id.*, paragraph 4.169.

26 See ICSID, pending cases, available at [icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=d&rspndnt=spain](http://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=d&rspndnt=spain).

27 *Charanne v. Spain*, SCC Arbitration No. 062/2012, Final Award, 21 January 2016. The tribunal dismissed the case on the merits.

28 *Id.*, paragraph 424 (referring to the Commission's *amicus curiae* brief submitted on 19 January 2015).

investors of another contracting party within the meaning of Article 26, paragraph 1 of the ECT', because 'the EU is a contracting party to the ECT and investors of Member States of the EU are, for the purposes of the Charter, investors of the EU'.<sup>29</sup> The *Charanne* tribunal considered that this argument 'ignore[d] that, although the EU is a Contracting Party of the ECT, the States that compose it have not ceased to be Contracting Parties as well. Both the EU, as its Member States, may have legal standing as Respondent in an action based on the ECT'.<sup>30</sup>

The Commission further argued that the ECT contained an 'implicit disconnection clause for intra-EU relations', the purpose of which is to dissociate Member States, in relations *inter se*, from the ECT.<sup>31</sup> The tribunal also rejected this argument, considering that the terms of the ECT were clear and did not provide for an implicit disconnection clause. The tribunal determined that 'the Contracting Parties to the ECT had no need to agree on a disconnection clause, either implicitly or explicitly', because 'there is no conflict' between the ECT and the TFEU. The tribunal emphasised that 'the competence of the Arbitral Tribunal to decide on a claim filed by an investor of an EU Member State against another EU Member State on the basis of the alleged illegal nature of the actions carried out in the exercise of its national sovereignty, is perfectly compatible with the participation of the EU as a REIO [regional economic integration organization] in the ECT'.<sup>32</sup>

The *Charanne* tribunal also found that, similar to the *Electrabel* case, it did not need to address the question of compatibility between the ECT and EU law because in the case at hand there was 'no contradiction whatsoever between the ECT and EU law'.<sup>33</sup> Specifically, the tribunal considered that Article 344 of the TFEU cannot be interpreted in a way that would 'prohibit Member States to submit any dispute that could involve an interpretation of European treaties to a dispute settlement proceedings other than those provided by the EU framework'.<sup>34</sup>

The *Charanne* tribunal's approach to the Commission's arguments is particularly insightful given that the Commission has submitted similar arguments before the various tribunals currently hearing the intra-ECT claims. The tribunal's award confirms the growing divide between the approaches of the Commission and the arbitration community. It also highlights the Commission's resolve as the EU's executive arm to actively pursue and defend its own views as regards the application and validity of intra-EU investment protection treaties.

### iii Developments affecting enforcement of arbitral awards

In 2012, the European Parliament and the Council approved Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Regulation). The Recast Regulation entered into force on 10 January 2015 and replaced Regulation (EC) 44/2001 (Brussels I Regulation).

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29 Id., paragraph 427 (referring to the Commission's *amicus curiae* brief submitted on 19 January 2015).

30 Id., paragraph 429.

31 Id., paragraph 433 (referring to the Commission's *amicus curiae* brief submitted on 19 January 2015).

32 Id., paragraph 438.

33 Id., paragraph 439.

34 Id., paragraph 444.

### *The arbitration exception*

According to its Recital 12, the Recast Regulation does not apply to arbitration. Moreover, nothing in this Regulation prevents the courts of a Member State, when faced with an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed. The Recast Regulation rejected the previously formulated proposals of partially removing the arbitration exception from the Brussels I Regulation.

The Recast Regulation also confirms that, as far as foreign arbitral awards are concerned, Member State courts should apply the provisions of the New York Convention on the Recognition and Enforcement of Arbitral Awards (1958), which takes precedence over this Regulation. All Member States are parties to the New York Convention.

The scope of the arbitration exception was clarified further by the Court of Justice in the *Gazprom* case.<sup>35</sup> On 14 October 2013, the Lithuanian Supreme Court lodged a request for a preliminary ruling by the Court of Justice. The questions of the Lithuanian Supreme Court related to the procedure for the enforcement in Lithuania of an arbitral award ordering the Ministry of Energy of Lithuania to withdraw certain claims brought before a Lithuanian court, on the ground that those claims were subject to arbitration. The Court of Justice was asked to clarify whether the Brussels I Regulation provides a legal basis to a Member State court to refuse enforcement of such an award, and thus touches upon the discussion on the scope of the arbitration exception in the Brussels I Regulation, prompted by the *West Tankers* case.<sup>36</sup>

In its judgment of 13 May 2015, the Court of Justice confirmed that arbitration was excluded from the scope of the Brussels I Regulation as well as the Recast Regulation.<sup>37</sup> The Court of Justice also explained that *West Tankers* could not be transposed to the circumstances of the *Gazprom* case, and that the prohibition of the anti-suit injunctions issued by Member State courts did not apply to injunctions or awards issued by an arbitral tribunal.<sup>38</sup> The Court of Justice further confirmed that ‘proceedings for the recognition and enforcement of an arbitral award such as that at issue in the main proceedings are covered by the national and international law applicable in the Member State in which recognition and enforcement are sought, and not by Regulation No 44/2001’.<sup>39</sup> However, contrary to the Advocate General’s opinion issued in this case in December 2014, the Court of Justice did not take a position on how the *West Tankers* case should be reconciled with the Recast Regulation.<sup>40</sup>

35 Case C-536/13.

36 See Request for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Lithuania) lodged on 14 October 2013 – *Gazprom OAO*, other party to the proceedings: Republic of Lithuania, OJEU C 377/7, 21 December 2013.

37 Case C-536/13, *Gazprom OAO*, Judgment of the Court (Grand Chamber), 13 May 2015, paragraph 28.

38 *Id.*, paragraphs 31 et seq.

39 *Id.*, paragraph 41.

40 See Case C-536/13, *Gazprom OAO*, Opinion of Advocate General Wathelet, 4 December 2014, paragraph 138 (the Advocate General concluded that the Recast Regulation excludes from its scope not only the recognition and enforcement of arbitral awards, including the award at issue, but also ‘ancillary proceedings, which [...] cove[r] anti-suit injunctions issued by national courts in their capacity as court supporting the arbitration’).

*Enforcement of arbitral awards deemed incompatible with EU law*

In 2015, the Commission continued to take active steps to prevent the enforcement of arbitral awards that it deems contrary to Member States' obligations under EU law.

Following the issuance of the *Micula v. Romania* award, whereby the tribunal found Romania in violation of the Swedish–Romanian BIT,<sup>41</sup> the Commission notified Romania of its decision to initiate the procedure under Article 108(2) of the TFEU concerning the execution of the award and its incompatibility with an abolished investment aid scheme.<sup>42</sup> As a result of that investigation, on 30 March 2015, the Commission concluded that compensation already paid under the ICSID award as well as any further enforcement of the award was incompatible with EU state aid rules, because such payments were tantamount to reinstating an incompatible aid scheme. The Commission ordered Romania to recover the incompatible state aid granted under the award.<sup>43</sup>

According to the Commission's view, Romania's obligations under EU law cannot be reconciled with its international law obligations, in particular those contracted in the framework of the ICSID Convention. This matter will give rise to further developments in 2016, with no guarantee that the conflicting interpretations will be reconciled in the upcoming months. In November 2015, the *Micula* claimants and the associated companies named in the final Commission decision filed annulment applications against the final decision with the General Court of the European Union. Those proceedings are currently pending. The General Court of the European Union is expected to issue its judgment in 2017.

Ultimately, Romania may bring this matter before the CJEU.

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41 In its *amicus curiae* brief submitted before the *Micula v. Romania* tribunal, the Commission argued that if the award was contrary to the obligations binding on Romania as an EU Member State, 'such award could not be implemented in Romania by virtue of the supremacy of EC law, and in particular State aid rules'. The Commission also suggested that enforcement could be refused on the basis of the public policy exception in the 1958 New York Convention. The Commission further suggested that if a Member State were asked to enforce an ICSID award contrary to EU law, 'the proceedings would have to be stayed under the conditions of Article 234 of the EC Treaty so that the ECJ may decide on the applicability of Article 54 of the ICSID Convention, as transposed into the national law of the referring judge'. See *Ioan Micula, Viorel Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paragraphs 334–340.

42 European Commission, State aid SA.38517 (2014/C) (ex 2014/NN) – Romania, Implementation of Arbitral award *Micula v. Romania* of 11 December 2013, Brussels, C(2014) 6848 final. See also European Commission, State aid SA.38517 (2014/C) (ex 2014/NN) – Implementation of Arbitral award *Micula v. Romania* of 11 December 2013, Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union, OJEU C 393/27, 7 November 2014.

43 Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award *Micula v. Romania* of 11 December 2013, OJEU L 232/43, 4 September 2015. See also 'State aid: Commission orders Romania to recover incompatible state aid granted in compensation for abolished investment aid scheme', European Commission press release IP/15/4725, Brussels, 30 March 2015.

To date, the CJEU has not yet had an opportunity to provide its opinion on the compatibility of intra-EU BITs with EU law and the enforcement of awards issued on the basis of such BITs. However, in a press statement released on 10 May 2016,<sup>44</sup> the German Federal Court of Justice confirmed that it will make a preliminary reference to the CJEU in the *Achmea*<sup>45</sup> v. *Slovak Republic* case, brought on the basis of the Netherlands–Slovakia BIT. In that case, Slovakia challenged both the interim and the final award in Germany, the seat of the arbitration. Slovakia requested the Frankfurt Higher Regional Court to set aside the interim award on jurisdiction on the basis of its ‘intra-EU jurisdictional objection’, arguing that the arbitration clause in the intra-EU BIT between the Netherlands and Slovakia was incompatible with EU law. When the Frankfurt Higher Regional Court refused to refer the matter to the Court of Justice, Slovakia appealed the decision before the German Federal Court of Justice.

Slovakia also sought to challenge the final award before the Frankfurt Higher Regional Court on the basis of the same jurisdictional objections, but that challenge was rejected in December 2014. The Frankfurt Higher Regional Court ruled that the TFEU did not prevent an EU national from initiating arbitration against a Member State regardless of whether such arbitration dealt with issues of EU law.<sup>46</sup>

### III OUTLOOK AND CONCLUSIONS

Starting from 2014 onwards, the EU has been reshaping its policy and negotiating position on investment protection treaties. This has affected the negotiation and ratification of EU free trade agreements containing chapters on investment protection. In the meantime, the Commission has assumed a more active role in pending arbitrations initiated on the basis of intra and extra-EU BITs, thus putting emphasis on the unresolved tension between the roles allocated to the European Commission and arbitral tribunals deriving their powers directly from the BITs concluded by individual Member States.

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44 See ‘Bundesgerichtshof puts before the European Court of Justice the question of the effectiveness of the arbitration agreements in investment protection treaties’, Bundesgerichtshof press statement No. 81/2016, 10 May 2016, available at [juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Seite=0&nr=74606&pos=1&anz=82](http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Seite=0&nr=74606&pos=1&anz=82).

45 Previously known as *Eureko*.

46 See decision of the Frankfurt Highest Regional Court, Beschluss, 26 Sch 3/13, 18 December 2014.

## Appendix 1

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# ABOUT THE AUTHORS

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Edward Borovikov is the managing partner of Dentons' Brussels office. Edward is a highly regarded trade and competition law attorney with substantial experience in issues of global trade and investment, cross-border commercial regulations and international trade policy. He has in-depth experience in WTO, EU, and Russian/Customs Union/Eurasian Economic Community trade law and practice, trade policy and international trade and investment negotiations, including those on the EU–Russia partnership and cooperation agreement and Russia's WTO accession, as well as competition law and practice.

Edward's authoritative counsel to clients on issues of international trade and commerce reflects a valuable combination of legal skill and knowledge, broad economic understanding and well-informed diplomatic insight. The major legal rankings recognise him as a leading trade and customs and competition lawyer.

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Bogdan Evtimov is a partner in Dentons' Brussels office. He has been extensively involved in EU, trade and competition law in leading international practices in Brussels since 2001. Bogdan is one of the leading trade lawyers in the EU and worldwide (*Chambers and Partners*, *Who's Who Legal*). Bogdan advises on a broad spectrum of trade, WTO, customs and competition law and policy matters, and confidently handles interdisciplinary issues. He has been admitted to the Bar in Sofia, Bulgaria since 2002 and is an experienced litigator before the European courts.

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Anna Crevon is a partner in Dentons' Paris office. Her practice focuses on international arbitration, both investor-state and commercial. Anna represented clients in a wide range of arbitration cases conducted under the auspices of ICSID, LCIA, ICC and SCC, as well as *ad hoc* arbitrations, with particular emphasis on oil and gas, pharmaceutical and other regulated sectors. She has extensive experience advising on matters relating to the Energy Charter Treaty as well as bilateral investment protection treaties. A graduate of the Moscow State University, University Paris I – Sorbonne and University Paris II – Assas, she was admitted to the Paris Bar in 2004. Anna's working languages are English, French and Russian.

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