15-3109-cv

United States Court of Appeals

for the

Second Circuit

IOAN MICULA, EUROPEAN FOOD S.A., S.C. STARMILL S.R.L., MULTIPACK S.R.L.,

Plaintiffs-Appellees,

– v. –

GOVERNMENT OF ROMANIA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* THE COMMISSION OF THE EUROPEAN UNION IN SUPPORT OF DEFENDANT-APPELLANT

LEE F. BERGER
JOSEPH R. PROFAIZER
IGOR V. TIMOFEYEV
PAUL HASTINGS LLP
Attorneys for Amicus Curiae The Commission of the European Union
875 15th Street, NW
Washington, DC 20005
(202) 551-1700

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The Commission of the European Union ("the Commission") respectfully submits this *amicus curiae* brief in support of the Government of Romania's ("Romania's") appeal of the August 5, 2015 Opinion and Order ("August 2015 Order") (A-14) and September 3, 2015 Opinion and Order (A-29) entered by the United States District Court for the Southern District of New York.[1] By refusing to vacate its April 21, 2015 judgment (Dkt. 3), amended April 28, 2015 (Dkt. 13), ("Judgment") which purported to "recognize" an arbitral award entered against Romania and required the payment of that award to Appellees Ioan Micula, Viorel Micula, European Food S.A., S.C. Starmill s.r.l. and Multipack s.r.l. ("Appellees"), the district court failed to accord due weight to a Commission order on matters of E.U. law involving an E.U. Member State and E.U. citizens and to the existence of parallel E.U. judicial proceedings. The Commission's sovereign interest is to ensure that the U.S. courts, in accordance with the settled rules of international comity, avoid unnecessary interference with the enforcement and efficacy of the E.U. legal order.

[1] The Commission states that no party or person other than the *amicus* and its counsel made a monetary contribution for the preparation or submission of this brief. This brief was not authored, in whole or in part, by counsel for a party. All parties have consented to the filing of this *amicus* brief.

INTEREST OF THE *AMICUS*

The European Union ("E.U.") is a supranational organization comprising twenty-eight nations ("Member States"). The E.U. legal order, which is based on the E.U.'s founding treaties ("the E.U. Treaties")[2] and the secondary legislation adopted under those treaties, is characterized "[by] its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves." See CJEU Opinion 1/09, Mar. 8, 2011 European and Community Patents Court, ECR I-1137, ¶ 65. As an E.U. Member State, Romania is bound by E.U. law.

The Commission is the "guardian" of the E.U. Treaties. See TEU Article 17. In particular, the Commission is entrusted with ensuring and overseeing the proper application of E.U. law. Id. To carry out this task, the Commission is authorized to initiate proceedings before the Court of Justice of the European Union ("the E.U. Court of Justice") against any E.U. Member State that fails to comply with its E.U. law obligations. See

[2] The E.U.'s founding treaties are the Treaty on European Union, originally signed February 7, 1992, consolidated version October 26, 2012, 2012 O.J. (C 326) 13 ("TEU"); the Treaty on the Functioning of the European Union, originally signed March 25, 1957, consolidated version October 26, 2012, 2012 O.J. (C 326) 47 ("TFEU"); and the Treaty Establishing the European Atomic Energy Community (Euratom), originally signed March 25, 1957, consolidated version October 26, 2012, 2012 O.J. (C 327) 1. Consolidated versions of the TEU and TFEU are available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2012:326:FULL&from=EN.

TFEU Article 258. The Commission is also entrusted with representing the European Union externally, with certain unrelated exceptions. See TEU Article 17, TFEU Article 335. It is in this capacity that the Commission submits the present brief on behalf of the European Union.

The Commission has a compelling interest in this appeal. On March 30, 2015, the Commission adopted a decision by which it ruled that any payment by Romania under the arbitration award rendered on December 11, 2013 in ICSID Case No. ARB/05/20 (Ioan Micula, et al. v. Romania) ("the Award") (A-15), whether through voluntary implementation or forced execution, would constitute unlawful State aid incompatible with the European Union's internal market. See Commission Decision C(2015)2112 (30 March 2015) in State aid Case SA.38517 – Arbitral award Micula v Romania of 11 December 2013, 2015 O.J. (L 232) 43 ("the Final Decision") (A-16).

E.U. law prohibits E.U. Member States from granting subsidies to economic operators without the Commission's express authorization. See TFEU Article 107(1) ("any aid granted by a Member State… shall… be incompatible with the internal market"); TFEU Article 108(3) ("The Commission shall be informed… of any plans to grant or alter aid . . . The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision"). Provision of such subsidies without the Commission's express authorization constitutes

unlawful "State aid" under E.U. law, and, if ordered by the Commission, the granting Member State is required to recover such State aid from its beneficiary. See TFEU Article 108(2) ("[the Commission] shall decide that the State concerned shall abolish . . . such aid")[3]; see also Council Regulation 2015/1589, art. 16(1), O.J. (L 248) 99 ("Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary ('recovery decision')."). The Final Decision prohibits Romania from paying the Award and the Commission has ordered it to recover any compensation already paid to Appellees. See Final Decision Article 2. (A-16).[4]

[3] Excerpt of the relevant State aid provisions of the TFEU are available as exhibits to the Commission's *amicus curiae* brief filed before the district court. (Dkt. 43, Ex. 1).

[4] Appellees have sought the Final Decision's annulment from the E.U. Court of Justice. See European Food a.o. v. Commission (Case T-624/15) (Nov. 6, 2015), 2016 O.J. (C 16) 45, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015TN0624&from=EN; Ioan Micula v. Commission (Case T-694/15) (Nov. 30, 2015), 2016 O.J. (C 38) 69, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62015TN0694&rid=4; Viorel Micula a.o. v. Commission (Case T-704/15) (Dec. 23, 2015), not yet published in the O.J. These legal challenges are currently pending.

The Award was rendered on the basis of a bilateral investment treaty ("the BIT") concluded between Romania and Sweden,[5] two E.U. Member States. E.U. law prohibits E.U. Member States from concluding agreements amongst themselves on matters covered by E.U. law and from subjecting disputes arising from those agreements to arbitration. See infra at 27. The Commission has initiated proceedings against Romania and Sweden with respect to the BIT.[6] Since the substantive matters covered by the underlying BIT are covered by E.U. law, the Award is illegal and unenforceable under E.U. law.

As a matter of E.U. law, Romania is squarely prohibited from complying with the Award. See Final Decision Article 2. (A-16). Romania's compliance with the district court's Judgment would directly undermine the Commission's Final Decision, because the Judgment orders Romania to pay Appellees the very same compensation that the Final Decision prohibits. The Judgment also interferes with legal proceedings currently pending before the E.U. Court of Justice regarding the validity of the Final Decision, by requiring Romania to pay the Award before the E.U.

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[5] Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments, Swed.-Rom., May 29, 2002 (entered into force, July 1, 2003). See Award, ¶ 10.

[6] European Commission, Press release, "Commission asks Member States to terminate their intra-EU bilateral investment treaties" (June 18, 2015) (Dkt. 43, Ex. 8).

Court of Justice has an opportunity to decide that same issue, and administrative proceedings between Romania, Sweden and the E.U. regarding the validity of the BIT. The Commission has a strong interest in ensuring that the propriety of its decisions be reviewed by the European Union's highest court, and that other countries' courts defer to these proceedings in the interests of comity.

The Commission has consistently defended its Final Decision in the parallel proceedings in the United States and in Europe. Over Appellees' objections, the district court granted the Commission *amicus curiae* status below. The Commission has also intervened (or intends to intervene) in proceedings concerning the recognition and enforcement of the Award that are currently pending before the domestic courts of five E.U. Member States, with one court already refusing to enforce the Award in deference to the Final Decision.[7]

As the "guardian" of the E.U. Treaties, and as an active participant in a variety of legal proceedings concerning the legality of the Award under E.U. law, the Commission is well placed to offer a unique perspective on the important implications of E.U. law and international comity to this

[7] By judgment of January 26, 2016, the Court of First Instance of Brussels (Tribunal de première instance francophone de Bruxelles – Juge des Saisies) held in Case R.G. 15/7242/A, following the Commission's argument in its *amicus* brief, that as a result of the Final Decision the Award was unenforceable in Belgium.

appeal. The Commission has previously filed *amici* briefs before the U.S. Supreme Court and this Court where the European Union's vital interests were implicated, as they are in this case. See, e.g., Brief for European Communities et al. as *Amici* in Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000); Brief for Commission of European Communities as *Amicus* in Intel Corp. v. Advanced Micro Devices, Inc. 542 U.S. 241 (2004); Brief for European Commission on behalf of the European Union as *Amicus* in Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013); Brief for European Commission as *Amicus* in Balintulo v. Daimler AG, 727 F. 3d 174 (2d Cir. 2013). By filing this brief, the Commission does not waive its sovereign immunity, nor any of its rights or defenses, relating to sovereign immunity or otherwise.

INTRODUCTION

The district court erred in misapplying three long-standing doctrines of judicial restraint designed for instances where important interests of foreign sovereigns are squarely implicated: the doctrine of international comity, the act of state doctrine, and the foreign sovereign compulsion doctrine. The district court sought to justify its refusal to apply these settled principles on the grounds that the proceeding before it "presents the narrow issue of recognition" and "does not involve enforcement." (A-25). But this justification reveals that the district court fundamentally misunderstood the

Judgment and its impact. The Judgment unambiguously mandates that Romania "shall pay" the entire amount of the Award. Judgment at 2.[8] By refusing to vacate that Judgment (entered through an *ex parte* procedure without a notice to Romania, much less to the European Union), the district court let stand a judicial ruling that directly contradicts — and therefore seeks to undermine — the Commission's express holding that prohibits Romania from paying the Award.

This Court should correct the district court's error. First, the district court's August 2015 Order directly interferes with the relationship between the European Union and one of its Member States: this case concerns a dispute subject to E.U. law involving only E.U. nationals and an E.U. Member State. Under the doctrine of international comity, the Commission's decisions regarding the legality of any payment of the Award under E.U. law deserve deference, particularly in light of the pending judicial proceedings before the European Union's highest court regarding the validity of those decisions. Second, the act of state doctrine mandates vacatur of the Judgment. By ordering Romania to pay the awarded compensation, the decision renders ineffective — and thus

[8] "In accordance with the pecuniary obligations contained in the Award, Romania shall pay to Petitioners the sum of RON 373,433,299 together with post-Award interest at a rate of 3-month ROBOR plus 5% compounded quarterly with respect to the amounts and periods detailed in paragraph 1329(d) of the Award." Judgment at 2.

invalidates — an official E.U. act ordering Romania *not* to pay that compensation. Third, the foreign sovereign compulsion doctrine similarly requires vacatur because Romania is prohibited as a matter of E.U. law from paying the Award under threat of sanction.

BACKGROUND

The Award at issue results from Romania's 2005 repeal of a 1998 national law that provided incentives to invest in Romania ("the 1998 law").[9] See Award ¶ 132. In December 1999, Romania was accepted as a candidate for E.U. membership. To accede to the European Union, Romania had to align its domestic legislation with E.U. law.[10] During the accession negotiations, the E.U. Member States unanimously adopted "E.U. Common Positions," which alerted Romania to areas where its domestic legislation was not aligned with E.U. law, including the 1998 law, which was deemed incompatible with E.U. State aid law.[11] On August 31,

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[9] Emergency Government Ordinance 24/1998, published in the Romanian Official Journal 545, 11.8.1999, as approved and modified by Law no 20/1999 and republished on November 8, 1999.

[10] Referred to as the "*acquis communautaire*," this body of law comprises the accumulated treaties, legislation, frameworks, guidelines, and other legal and administrative acts adopted by the E.U. institutions, as well as the judgments of the E.U. Court of Justice.

[11] See Conference on Accession to the European Union – Romania, European Union Common Position of 21 November 2001 on Chapter 6 – Competition Policy, CONF-RO 43/01 (Dkt. 43, Ex. 5); Conference on Accession to the European Union – Romania, European Union

2004 Romania repealed the 1998 law. See Award ¶ 241. The repeal was a necessary precondition for Romania's accession to the European Union on January 1, 2007.

Following that repeal, Appellees filed a request for arbitration under the BIT on August 2, 2005. The Commission submitted an *amicus curiae* brief to the Tribunal, stating its position that the investment incentives under the 1998 law contradicted E.U. law's prohibition of unlawful State aid and that any Award rendered by the Tribunal reinstating or compensating for those incentives would constitute illegal State aid that Romania would be prohibited from paying (A-15). Over the Commission's objections, the Tribunal concluded that by repealing the 1998 law Romania did not ensure a fair and equitable treatment of Appellees' investments in Romania. The Tribunal held that Romania had violated BIT Article 2(3) and ordered it to pay the damages that arose from the repeal of that law. See Award ¶ 1329(c). The compensation awarded to Appellees under the Award is an amount corresponding to the unlawful subsidies foreseen under the 1998 law, which Romania was required to repeal to accede to the European Union.

Common Position of 28 May 2003 on Chapter 6 – Competition Policy, CONF-RO 17/03 (Dkt. 43, Ex. 6).

After issuing an initial suspension injunction[12] and opening a formal State aid investigation regarding Romania's implementation of the Award,[13] the Commission adopted the Final Decision on March 30, 2015. Reasoning that payment of the Award to Appellees for forgone State aid would be the same as paying State aid disallowed under E.U. law, the Final Decision prohibited Romania from paying Appellees the compensation awarded by the Tribunal. The Final Decision also ordered Romania to recover from Appellees any compensation already paid under the Award. See Final Decision Article 1-4.

Outside of the present proceedings, Appellees have sought recognition of the Award in Belgium, France, Luxembourg, Romania and the United Kingdom, as well as in the U.S. District Court for the District of Columbia. Only in Belgium and Romania have enforcement proceedings been commenced, with a Belgian court refusing enforcement in deference to the Final Decision. Notably, the District Court for the District of Columbia rejected Appellees' attempt to recognize the Award through an *ex parte* procedure as contrary to section 3 of the Convention on the Settlement of Investment Disputes Act of 1966, 22 U.S.C. § 1650a — the

[12] Commission decision C(2014)3192 final of 26 May 2014 in State aid Case SA.38517 (2014/NN) – Micula v. Romania, not published in the O.J. (Dkt. 43, Ex. 2).

[13] Commission Decision C(2014)6848 final of 1 October 2014 in State aid Case SA.38517 – Implementation of Arbitral award Micula v Romania of 11 December 2013, summary notice in 2015 O.J. (C 393) 27.

implementing legislation of the ICSID Convention — and the Foreign Sovereign Immunities Act of 1976. Micula v. Romania, 104 F. Supp. 3d 42, 47-52 (D.D.C. 2015).

SUMMARY OF ARGUMENT

The district court erred by holding that the Judgment should not be vacated in light of the European Union's sovereign interests.[14] The district court rejected the three sovereignty doctrines that the Commission invoked by portraying the Judgment as limited to the "narrow issue of [the Award's] recognition," ostensibly devoid of any adverse significance for the European Union. (A-25). The district court distinguished the Judgment from the Award's enforcement, id., opining that "whether Romania must pay is not an issue in this proceeding and should be raised instead during proceedings to enforce the Award." (A-27).

The distinction is deeply flawed. Critically, the Judgment not only recognizes the Award, but also orders Romania to pay Appellees the compensation awarded under the Award. See Judgment at 2 ("Romania shall pay to Petitioners the sum of RON 737,433,229 together with post-Award interest").

[14] The district court correctly acknowledged the E.U.'s sovereign character. (A-24, citing European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 143 n.15, 147 (2d Cir. 2014), *cert. granted*, 136 S. Ct. 28 (2015).

By failing to vacate the Judgment's requirement that Romania pay the Award, the district court disregarded the E.U. law's requirement that the exact same payment is impermissible. The Judgment, if Romania complies with it, will seriously interfere with E.U. administrative and judicial proceedings. The Judgment effectively ordered Romania to circumvent the binding promise it had made to the European Union when it abolished the 1998 law as part of its E.U. accession negotiations. If left uncorrected, the district court's ruling will inflict injury upon the European Union that the international comity, act of state, and foreign sovereign compulsion doctrines are designed to avoid.

The district court's excuse for ignoring these doctrines at the present time — that their serious implications may be addressed during later enforcement proceedings — is jurisprudentially imprudent. Even assuming that the Judgment concerned only recognition and the sovereignty doctrines concerned only enforcement of the Award (which the Judgment currently does not), postponement only serves to waste judicial and party resources. The primary purpose of recognition is to serve as a precursor to enforcement. Instead of addressing the important sovereignty and comity issues at the outset, the district court deferred them to what could be numerous subsequent enforcement proceedings. This Court should not sanction such a waste of judicial resources when it can address the inevitable argument now.

The district court also erred in its application of the three sovereignty doctrines invoked by the Commission. First, as regards the doctrine of international comity, the district court erred by relying on only one factor in refusing abstention under the comity doctrine, rather than examining and balancing the "totality of the circumstances" for and against jurisdiction. Second, the district court erred in the application of the act of state doctrine. It treated the act of state doctrine as a defense to be invoked by a party to the proceeding. But the doctrine is a "rule of decision" requiring that, in the process of deciding a case or controversy, the acts of foreign sovereigns taken within their own jurisdictions be deemed valid. The district court also mistakenly concluded that the act of state doctrine was inapplicable since "no act of any sovereign has been deemed either relevant or invalid." (A-26). Third, the district court erred in its application of the foreign sovereign compulsion doctrine by disregarding the Commission's interpretation of E.U. law and wrongly (and summarily) concluding that "any 'compulsion' by the E.U. is offset by Romania's voluntary submission to the ICSID process through its treaty with Sweden" and that "whether Romania must pay is not at issue in this proceeding and should be raised instead during proceedings to enforce the Award." (A-27).

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO ACCORD DUE WEIGHT TO THE CONSIDERATIONS OF INTERNATIONAL COMITY.

The doctrine of international comity reflects "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." See O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana S.A., 830 F.2d 449, 451 n.3 (2d Cir. 1987) (quoting Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)). Comity can be prescriptive or adjudicative. Prescriptive comity refers to the deference U.S. courts afford to foreign legislative acts by "avoid[ing] unreasonable interference with the sovereign authority of other nations." F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004); see also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) ("prescriptive comity is the respect sovereign nations afford each other by limiting the reach of their laws"). Adjudicative comity, or "comity of courts," is the deference U.S. courts afford to foreign court proceedings. See In re Maxwell Commc'n Corp. PLC by Homan, 93 F.3d 1036, 1047 (2d Cir. 1996) ("[comity among courts] may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state"); see also Hartford Fire, 509

U.S. at 817 (Scalia, J., dissenting) ("comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere").

In this case, the district court improperly downplayed the significance of both prescriptive and adjudicative comity. First, prescriptive comity supports reading 22 U.S.C. § 1650a as not permitting an *ex parte* recognition of the Award. The Commission's Final Decision expressly orders Romania not to pay the compensation under the Award,[15] so the district court's Judgment ordering the contrary intrudes on the European Union's sovereign competences, in contravention of the doctrine of international comity. Had Romania and the Commission received notice before the Judgment was entered, the Commission would have had an opportunity to alert the district court to the impending infringement. Second, as to adjudicative comity, parallel litigation regarding the validity of the Final Decision is currently pending before the E.U. Court of Justice. By ordering Romania to pay Appellees the compensation awarded, the district court improperly intruded on those proceedings as well. Third, had the district court considered a totality of the circumstances, it would have properly implemented the international comity doctrine and vacated the

[15] The fact that Appellees have appealed the Final Decision to the E.U. Court of Justice does suspend the effects of that decision. See TFEU Article 278 ("Actions brought before the Court of Justice of the European Union shall not have suspensory effect.").

Judgment, recognizing that the weight of this matter should remain in the European Union.

A. Prescriptive International Comity Supports Reading Section 1650a as Prohibiting an *Ex Parte* Recognition of the Award.

Considerations of prescriptive comity support Romania's argument that an *ex parte* recognition procedure is not authorized under section 22 U.S.C. § 1650a. Br. of Appellant Romania (Appellate Dkt. 72 at 20). Section 1650a provides only a mechanism for the "enforcement" of the ICSID awards, and neither that provision nor any other federal statute specifies the process by which an award recipient is to convert an ICSID award into a federal court judgment. Micula, 104 F. Supp. 3d at 48, 49-50. Therefore, as the District Court for the District of Columbia persuasively demonstrated, a domestic court may not resort to a provision of state law concerning recognition of judgments as a gap-filling provision. *Id.* at 48-49. Here, by contrast, the district court erroneously decided "to fill [in] the procedural gap in §1650a as to the manner in which a recognition proceeding is to occur" by relying on N.Y. C.P.L.R. Art. 54, the law of the forum state. (A-20).

Federal courts, when deciding upon the recognition of foreign judgments before them, should be especially wary of resorting to state-law provisions where doing so may lead to "'a significant conflict between some federal policy or interest and the use of state law.'" In re Gaston &

Snow, 243 F.3d 599, 606 (2d Cir. 2001) (quoting Atherton v. FDIC, 519 U.S. 213, 218 (1997)). As the Restatement (Second) of Conflict of Laws cautions, federal law often seeks "to prevent application of a State rule on the recognition of foreign nation judgments if such application would result in the disruption or embarrassment of the foreign relations of the United States." Restatement (Second) of Conflict of Laws § 98 cmt. c (1965) see also American Ins. Ass'n v. Garamendi, 539 U.S. 396, 413-29 (2003) (holding pre-empted a California law requiring disclosure of insurance policy information as interfering with the Executive's conduct of U.S. foreign policy). That principle applies with special force here, where federal law contains no reference to the state-law provision invoked by the district court to recognize the Award. Therefore, prescriptive international comity requires the reversal of the district court's failure to vacate the *ex parte* Judgment.

B. This Case Is Parallel to the Ongoing E.U. Proceedings.

Adjudicative international comity applies where an action before a U.S. court is related to a "parallel" proceeding in a foreign jurisdiction. "For two actions to be considered parallel, the parties in the actions need not be the same, but they must be substantially the same, litigating substantially the same issues in both litigations." See Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc., 466 F.3d 88, 94 (2d Cir.

2006). Here, adjudicative comity required the district court to avoid interference in ongoing parallel E.U. proceedings.

The district court tacitly acknowledged that the parties in both proceedings are the same. But the district court opined that the "Commission's proceedings in Europe are not sufficiently 'parallel' for purposes of international comity" because "[t]he narrow issue here is the recognition of the ICSID Award" not "the substance [or] the enforcement of the Award." (A-26). This erroneous conclusion misunderstands the nature and effect of the district court's judgment and the character of the E.U. proceedings.

First, the proceeding before the district court did not only concern the "narrow issue" of recognition. The Judgment also orders Romania to pay Appellees the compensation that the arbitral tribunal awarded. The Judgment's language is stark and mandatory, commanding that "Romania shall pay to Petitioners the sum" awarded to them. See Judgment at 2.

Second, contrary to the district court's erroneous analysis, neither the proceedings below nor those before the E.U. Court of Justice concerning the validity of the Final Decision concern the substance of the Award. Nowhere in the Final Decision did the Commission examine the merits of the Award. Rather, the Final Decision considered the implications under the E.U. State aid laws of Romania paying Appellees the compensation

awarded by the Tribunal, and the E.U. Court of Justice proceedings concern only the validity of the Final Decision.

The same issue is therefore at stake in both proceedings, namely whether Romania may lawfully pay Appellees the compensation awarded. The Judgment orders Romania to pay on the Award, while the Final Decision orders Romania not to pay.

Since the parties in the two proceedings are "the same, litigating substantially the same issue," those proceedings were sufficiently "parallel" to warrant the application of the doctrine of international comity. Royal & Sun Alliance, 466 F.3d at 94. The district court erred by concluding otherwise.

C. A Totality of the Circumstances Supports Deference to the Parallel E.U. Proceedings.

The district court also erred in its comity analysis by failing to conduct the totality of the circumstances analysis when deciding whether to abstain from exercising jurisdiction in the interests of comity. This Court instructed:

> In the context of parallel proceedings in a foreign court, a district court should be guided by the principles upon which international comity is based: the proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency. Proper consideration of these principles will no doubt require an evaluation of various factors, such as the similarity of the parties, the similarity of the issues, the order in which the actions were filed, the adequacy of the alternate forum, the potential prejudice to either party, the convenience

> of the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction. *This list is not exhaustive, and a district court should examine the 'totality of the circumstances'* to determine whether the specific facts before it are sufficiently exceptional to justify abstention.

Royal & Sun Alliance, 466 F.3d at 94 (emphasis added) (internal citations omitted).

The eight-factor test set forth by Restatement (Third) of Foreign Relations Law for determining whether to exercise jurisdiction consistent with the interests of international comity, Restatement (Third) of Foreign Relations Law § 403 (1987), demonstrates the paucity of the district court's analysis. As this Court explained, the Restatement is a valuable guide for courts when deciding comity issues, particularly where (as here) there is a direct conflict with foreign law, and a failure to perform a proper comity analysis under section 403 of the Restatement is grounds for reversal. See Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 139 (2d Cir. 2014) (remanding case to lower court to perform a proper comity analysis with respect to Chinese law under section 403 of the Restatement).

The district court mentioned only one factor in rejecting abstention under the comity doctrine: the importance to American investors of enforcing ICSID awards worldwide. See A-26. But, as the Supreme Court explained, "[n]o one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise

jurisdiction and the combination of factors counselling against that exercise is required." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818-19 (1976).

Moreover, the reliance on that single factor is inappropriate in this particular context. The Award follows from a BIT concluded between two E.U. Member States (Romania and Sweden) providing for arbitration in case of dispute. E.U. law prohibits E.U. Member States from concluding international agreements among themselves on matters covered by E.U. law. The E.U. Court of Justice has expressly and repeatedly held so. See Case C-537/11, Manzi and Compagnia Naviera Orchestra, EU:C:2014:19, ¶ 37 (no international agreement concluded between Member States can affect the allocation of responsibilities as defined in the E.U. Treaties or the autonomy of the E.U. legal system); Case T-76/89, ITP v Commission, [1991] ECR II-575, ¶ 76 (E.U. Member States may not set aside the rules arising out of those Treaties by concluding or maintaining in force an international agreement or convention between them); Case T-70/89, BBC v Commission, [1991] ECR II-535, ¶ 77 (an individual right-holder may not rely on a right granted by a multinational agreement that pre-dates the accession of the Member States to the E.U., if that right is not compatible with E.U. law). E.U. law also expressly prohibits subjecting disputes arising from such intra-E.U. agreements to arbitration. See TFEU Article 344 ("Member States undertake not to submit a dispute concerning the

interpretation or application of the Treaties to any method of settlement other than those provided for therein.").

The situation here is no different to that in which New York and California conclude a bilateral investment treaty between themselves, which would be impermissible under federal law. The U.S. would consider an attempt by an E.U. domestic court to enforce an award under that illegal interstate bilateral investment treaty an interference with its sovereignty. The same applies here.

Had the district court conducted a proper comity analysis on the basis of the eight factors set forth in Restatement (Third) of Foreign Relations Law § 403 (1987), it should have concluded that whether Romania must pay Appellees on the Award is best answered in the European Union:

- Factor (a) favors the European Union: The Award's implementation has a "substantial, direct and foreseeable effect" in the European Union, since it entails the non-compliance with E.U. law (the Final Decision) by an E.U. Member State (Romania).
- Factor (b), which considers "the connections, such as nationality, residence, or economic activity," favors the European Union: Romania is an E.U. Member State, Appellees are E.U. citizens and residents; the companies benefitting from the Award exclusively carry out business in the European Union; the investment

underlying the Award were made in the European Union; the BIT on which the Award is based is an agreement between two E.U. Member States (Romania and Sweden); and Romania had agreed to repeal its 1998 law as a precondition for accession to the European Union.

- Factor (c) favors the European Union: The activity being regulated is the payment of compensation by an E.U. Member State to E.U. citizens and residents for the revocation of illegal subsidies. That revocation was a precondition for that Member State's accession to the European Union. The payment of compensation as damages for that revocation violates the E.U. law prohibition on the grant of illegal State aid, which is considered a matter of public policy. See Case C-126/97, Eco Swiss, [1999] ECR I-3055, ¶ 39 (the competition law provisions of the E.U. Treaties "may be regarded as a matter of public policy").
- Factor (d), dealing with "justified expectations," favors the European Union: Appellees knew as early as 2009 that the Commission opposed the implementation of the Award, which was further confirmed by the three Commission decisions discussed above, see supra n. 12 &13, all of which were adopted before Appellees filed their Petition. Additionally, the European Union has a justified expectation that its Member States and

nationals will abide by E.U. law, Commission decisions, and E.U. Court of Justice decisions.

- Factors (g) and (h) favor the European Union: Considering the European Union's substantial interest in preventing the grant of illegal State aid by E.U. Member States to E.U. economic operators awarded on the basis of a BIT concluded between two Member States that is illegal.

The district court examined none of these factors, all of which weigh in favor of deference to the parallel E.U. proceedings. The district court's reliance on a single factor and disregard of all others, when these other factors weigh in favor of abstention, mandates reversal.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE COMMISSION COULD NOT INVOKE THE ACT OF STATE DOCTRINE AND THAT THE PROCEEDINGS BEFORE IT DID NOT QUESTION THE VALIDITY OF OFFICIAL E.U. ACTS

The district court gave two reasons why the act of state doctrine invoked by the Commission did not apply to the present case. First, it held that since "[t]he E.U. is not a party [to the proceedings, it] cannot raise this defense." (A-26). Second, it held that "the doctrine is inapposite," because the proceeding concerned the narrow issue of the Award's recognition, such that "no act of any sovereign has been deemed either relevant or invalid." Id. Both reasons are unavailing.

The district court's first reason mischaracterizes the act of state doctrine as a defense only to be raised by a party to the proceedings. The act of state doctrine is not a defense, but "a rule of decision" that "requires that, in the process of deciding [a case or controversy], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." W.S. Kirkpatrick & Co. v. Env'l Tectonics Corp., 493 U.S. 400, 409 (1990); see also Ricaud v. Am. Metal Co., 246 U.S. 304, 309-10 (1918) ("[W]hen it is made to appear that the foreign government has acted in a given way . . . the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964) (the act of state doctrine is a "principle of decision binding on federal and state courts alike"). Thus, the fact that Romania did not ask the district court to recognize the validity of the Commission's decisions against Romania did not give the district court free reign to substitute its own judgment for that of the Commission's regarding the Commission's acts taken within its jurisdiction.

As regards the district court's second reason, the Judgment improperly challenges the validity and relevance of an act of a foreign sovereign. The Final Decision, which the Commission adopted before the Appellees filed their petition or the district court issued the Judgment, orders Romania not to pay the Award. By recognizing a judgment that

orders Romania to do the opposite, the Judgment necessarily questions the validity of the Final Decision and seeks to deprive it of practical effect.

The present case differs in this regard from W.S. Kirkpatrick, upon which the district court relied. See A-26. There, the federal district court's decision to hear a civil claim brought before it would have only resulted in that court establishing that the contract being litigated was unlawful and imputing to foreign officials improper motivation in the performance of official acts, not in deciding "to declare invalid, and thus ineffective . . . the official act of a foreign sovereign." W.S. Kirkpatrick, 493 U.S. at 405-07. But here, the Judgment orders Romania to do what it is prohibited from doing under the Final Decision: pay the Award. The Final Decision constitutes an official E.U. act, which the Commission has adopted "in the exercise of governmental authority" by virtue of the exclusive sovereign powers granted to it by the E.U. Member States under the E.U. Treaties to monitor and control the grant of State aid. See Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (the act of state doctrine applies to "acts done within their own states, in the exercise of governmental authority"). Consequently, by not vacating the Judgment that requires Romania to violate the Final Decision by paying the compensation, the district court effectively disregarded the Final Decision.

The district court's error in concluding that the Commission could not invoke act of state doctrine and its error that the Judgment did not question the validity of official E.U. acts mandate reversal.

III. THE DISTRICT COURT'S FAILURE TO APPLY THE FOREIGN SOVEREIGN COMPULSION DOCTRINE MANDATES REVERSAL

The district court gave two reasons why the foreign sovereign compulsion doctrine did not apply. First, it held that "any 'compulsion' by the E.U. is offset by Romania's voluntary submission to the ICSID process through its treaty with Sweden". (A-27). Second, it held that "whether Romania must pay is not at issue in this proceeding and should be raised instead during proceedings to enforce the Award". Id. Both of these reasons miss the mark.

First, the district court had no competence to conclude that Romania's voluntary submission to the ICSID process through the BIT it had concluded with Sweden can "offset" its obligations under the E.U. Treaties to comply with the Final Decision. The Commission had represented to the district court that Romania was compelled under E.U. law not to pay Appellees the compensation awarded. Dkt. 43, at 17-19. A foreign sovereign's formal statements about the interpretation of its own law are "conclusive" in a U.S. court. See United States v. Pink, 315 U.S. 203, 220 (1942); see also Agency of Can. Car & Foundry Co. v. Am. Can

Co., 258 F. 363, 368-69 (2d Cir. 1919) (finding an "authoritative representation by the Russian government . . . binding and conclusive in the courts of the United States"). As such, the district court improperly concluded — in direct contravention of the Commission's statement — that Romania could "offset" its obligations under E.U. law.

Romania's BIT with Sweden (under which Romania has agreed to submit to the ICSID arbitration) is irrelevant to the question whether the Commission has compelled Romania not to pay the Award as a matter of E.U. law. The BIT that Romania concluded with Sweden before Romania's accession to the European Union does not override the facts that (a) E.U. law forbids paying State aid, see TFEU Article 107(1), (b) the Commission's Final Decision, entered over Romania's objections, prohibits Romania from paying the Award, (c) if Romania does not comply with the Final Decision, it faces prosecution in the E.U. Court of Justice and substantial sanctions, see TFEU Articles 108(2), 260(2), and (d) the BIT is illegal under E.U. law. The Commission's Final Decision has compelled Romania, under the force of E.U. law and under penalty of sanction, not to pay the Award. That is the very definition of foreign sovereign compulsion.

Even were it proper for the district court to ignore Commission's compulsion of Romania to follow E.U. law and the Final Decision irrespective of the BIT's requirements – which it was not – Romania's decision, as a matter of its domestic law, to enter the BIT with Sweden

cannot outweigh the Commission's Final Decision. Under the E.U. Treaties, which Romania voluntarily accepted, E.U. law, including Commission decisions, have primacy over domestic state decisions of E.U. Member States. The Final Decision constitutes secondary E.U. legislation, adopted on the basis of TFEU Articles 107(1) and 108(2), that binds Romania and has primacy over any obligations Romania has under its domestic law, including obligations that flow from any international treaties – and, in particular, agreements with other Member States, such as Romania's BIT with Sweden. Consequently, Romania's voluntary submission to the ICSID process through the BIT it concluded with Sweden cannot "offset" its obligations under the E.U. Treaties.

The district court's second reason — that "whether Romania must pay is not at issue in this proceeding," (A-27) — is again plainly wrong. The Judgment expressly stated that "Romania shall pay" the Award. Judgment at 2. The Commission, by virtue of its Final Decision, has compelled Romania not to pay the Award, and this action is the basis for the application of the foreign sovereign compulsion doctrine here. Thus, "whether Romania must pay" is an issue in this proceeding — indeed, it is the issue in this proceeding. The district court erred by side-stepping that fact and refusing to vacate the Judgment under the foreign sovereign compulsion doctrine.

CONCLUSION

For all the foregoing reasons, the Commission respectfully submits that the Court should reverse the August 2015 Order.

By submitting this brief, the Commission specifically reserves all of its rights and does not waive any of its defenses or its sovereign immunity.

Respectfully submitted,

DATED: February 4, 2016

By: /s/ Lee F. Berger

Lee F. Berger
Joseph R. Profaizer
Igor V. Timofeyev
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1700

Attorneys for Amicus Curiae
the Commission of the European Union

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DATED: February 4, 2016 By:

/s/Lee F. Berger

Lee F. Berger
PAUL HASTINGS LLP
875 15th Street N.W.
Washington, DC 20005
Telephone: (202) 551-1700
leeberger@paulhastings.com

CERTIFICATE OF SERVICE

I, Lee F. Berger, hereby certify that, on February 4, 2016, the foregoing document was filed using the CM/ECF system and served on the parties of record via ECF.

BY: /s/ Lee F. Berger

Lee F. Berger
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, D.C. 20005
Tel.: (202) 551-1700
leeberger@paulhastings.com