UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the Matter of the Application of IOAN MICULA, VIOREL MICULA, S.C. EUROPEAN FOOD S.A., S.C. STARMILL S.R.L., and S.C. MULTIPACK S.R.L., Petitioners, v. THE GOVERNMENT OF ROMANIA, Respondent.	Civil Action No. 1:17-cv-02332-APM

BRIEF OF AMICUS CURIAE THE EUROPEAN COMMISSION
IN SUPPORT OF THE GOVERNMENT OF ROMANIA

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INTEREST OF *AMICUS CURIAE*

The European Commission is an institution of the European Union (the "E.U.") that is responsible for ensuring the proper application of the E.U. treaties—including the Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326) 13 (TEU), and the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 47 (TFEU)—and of measures E.U. institutions adopt under those treaties. It has the power to initiate infringement proceedings before the Court of Justice of the European Union ("E.U. Court of Justice") against Member States that fail to comply with their treaty obligations and may ask that court to impose penalty payments on the Member State concerned until it has ceased the infringement. TFEU arts. 258 and 260(2). With the exception of the E.U.'s common foreign and security policy and other matters specifically provided for in the E.U. treaties, the Commission conducts the E.U.'s external representation. TEU art. 17; TFEU art. 335.

The Commission has a substantial interest in this case. Petitioners ask for an order confirming an arbitral award that, if granted, would contravene a judgment of the E.U. Court of Justice, compel Romania to take actions contrary to a binding decision of the Commission, circumvent judgments and orders of five E.U. Member States, and subject Romania to significant legal sanctions under E.U. law. Moreover, the parties have raised significant questions about the meaning of E.U. law, which the Commission is charged with applying. The Commission has intervened or filed as *amicus curiae* in other proceedings in which Petitioners have sought recognition or enforcement of the same arbitral award, including in five E.U. member states, the District Court for the Southern District of New York, and the Second Circuit.[1]

[1] No person other than the Commission and its outside counsel authored this brief or provided funding related to it. 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 AND SUMMARY OF ARGUMENT

Petitioners ask this Court to confirm and require payment of an arbitral award that the European Commission has declared violative of E.U. law; that was issued pursuant to an arbitration agreement that is itself precluded by E.U. law; and that the courts of five E.U. Member States have declined to enforce. The Court should decline as well. Four separate legal barriers founded in principles of comity and judicial restraint stand in the way of confirmation.

First, this Court lacks jurisdiction over Romania under the Foreign Sovereign Immunities Act (FSIA). The only basis Petitioners identify for FSIA jurisdiction is the Act's "arbitration exception." But that exception applies only where the arbitral award was issued pursuant to a *valid* arbitration agreement. The agreement here was not valid: The E.U. Court of Justice has expressly held that E.U. law precludes agreements between two E.U. Member States—like the one at issue here—agreeing to refer investment disputes to arbitration.

Second, the statute that Petitioners invoke, 22 U.S.C. § 1650a, does not permit confirmation of the Award. That statute instructs courts to enforce and give full faith and credit to ICSID awards only to the "same" extent "as if" an award were issued by a state court. A state-court judgment is not entitled to enforcement if (as is the case here) the tribunal was without jurisdiction. Furthermore, multiple European courts have already held the award unenforceable under equivalent statutes, and those judgments are entitled to international comity.

Third, the act of state doctrine bars confirmation. Granting Petitioners' request would require disregarding the validity of two separate E.U. judgments, and ignoring the Commission's unequivocal command that Romania "shall not pay" the Award.

Fourth, confirmation would be inconsistent with the foreign sovereign compulsion doctrine. That doctrine directs courts to abstain from issuing orders that would require

entities to violate the laws of a foreign sovereign. Compelling Romania to pay that which the European Commission has said it "shall not pay" under penalty of severe sanction is plainly such an order.

For each of these reasons, Petitioners' motion for judgment on the pleadings or summary judgment should be denied, and the petition for confirmation of the award should be dismissed.

BACKGROUND

A. E.U. Legal Framework

The E.U. is a supranational organization comprising twenty-eight nations governed by E.U. law. E.U. law is based on the E.U.'s founding treaties as well as secondary legislation adopted on the basis of those treaties. E.U. law has "primacy over the laws of the Member States" and is "applicable to their nationals and to the Member States themselves." *Slovak Republic v. Achmea BV*, Case C0284/16 (6 March 2018), ECLI:EU:C:2018:158, ¶ 33 ("*Achmea*") (ECF No. 51-3).

Romania began a gradual process of integration into the E.U. in 1993. Award, *Micula v. Romania*, ICSID Case No. ARB/05/20 (Dec. 11, 2013) (hereinafter "Award") (ECF No. 51-1), ¶ 179. That year, Romania signed the Europe Agreement, a treaty between Romania, on the one hand, and the European Community (the predecessor to the E.U.) and its Member States, on the other, whereby Romania agreed to abide by certain European Community norms. *Id.* Article 64 of that 1993 Agreement contained a broad prohibition on "state aid" modeled on the prohibition contained in TFEU art. 107: It stated that "any public aid which distorts or threatens to distort competition by favouring certain undertakings of the production of certain goods" was "incompatible with the proper functioning of this Agreement." *Id.* ¶ 180. The Agreement made exceptions to that prohibition only in certain narrow

circumstances, and made the Romanian Competition Council the sole authority competent to authorize the grant of state aid by Romania. *Id.* ¶ 199.

In 1998 Romania enacted a law ("the Incentive Law") that made tax incentives available to persons who invested in certain parts of Romania. *Id.* ¶ 131. In 1999, Romania notified the Romanian Competition Council that it planned to make several modifications to the Incentive Law. The Romanian Competition Council declared that certain of the incentives provided by the Incentive Law constituted illegal "state aid," and ordered Romania to eliminate them. *Id.* ¶ 205; *see* Commission Decision (EU) 2015/1470 of 30 March 2015 (hereinafter "State Aid Decision") (ECF No. 51-2), ¶¶ 13, 16. Romania did not comply with that directive. Instead, in 2000, it modified and expanded its Incentive Law. Award ¶ 207.

Throughout the succeeding five years, the E.U. repeatedly informed Romania that the Incentive Law constituted a violation of the prohibition on state aid, and made the repeal of that law a precondition for its accession to the E.U. *Id.* ¶¶ 216, 235. In 2004, Romania repealed the Incentive Law, effective February 2005. *Id.* ¶¶ 241, 244. Romania signed a Treaty of Accession to the E.U. two months later, and became an E.U. Member State on January 1, 2007. *Id.* ¶¶ 246, 249.

B. Arbitration Proceedings

Romania and Sweden are parties to a bilateral investment treaty (BIT) that entered into force in 2003. *See* Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments ('Romania-Sweden BIT").[2] That treaty accords certain protections to investors of each state in the territory of the other state, including a right of "fair and equitable treatment." *Id.* art. 2(3). Article 7 of the treaty provides that "[a]ny dispute concerning an investment between an

[2] *Available at* https://investmentpolicyhub.unctad.org/Download/TreatyFile/2212.

investor of one Contracting Party shall, if possible be settled amicably," but that if amicable resolution fails, each state agrees to "the submission of the dispute, at the investor's choice, for resolution of international arbitration to . . . the International Centre for Settlement of Investment Disputes (ICSID)." *Id.* art. 7(1)-(2). The conduct of ICSID arbitral proceedings and the enforcement of any award issued by an ICSID arbitral tribunal are governed by the ICSID Convention, a treaty to which 162 states are signatories.

Petitioners are a food and beverage company and investors that are nationals of Sweden. Award ¶¶ 2-4. Petitioners began to make investments in Romania in 1991. *Id.* ¶ 133. Petitioners alleged that, after enactment of the Investment Law in 1998, they expanded their operations in Romania in reliance on certain incentives that law provided. *Id.* ¶ 167. They claim that, in 2000 and 2002, they received certificates pursuant to the Incentive Law that led them to expect that they would continue to benefit from such incentives until April 1, 2009. *Id.* ¶¶ 173-177, 254.

Following the repeal of the Incentive Law in 2005, Petitioners filed a request for arbitration under Article 7 of the Romania-Sweden BIT. *Id.* ¶ 247. They claimed that by repealing the Incentive Law, Romania violated the BIT's guarantee of fair and equitable treatment by undermining their legitimate expectation that they would continue to receive unlawful subsidies until April l, 2009. Award ¶ 256. An ICSID arbitral tribunal was constituted in Paris to hear the dispute. *Id.* ¶¶ 10-16.

The Commission participated as *amicus curiae* in the arbitration proceedings. *Id.* ¶ 27. It argued that the provisions of the BIT should be interpreted in a manner compatible with E.U. law, and that in the event of a conflict, E.U. law should take precedence. *Id.* ¶ 93. It further argued that the Incentive Law was incompatible with the E.U.'s state aid law. *Id.* The Commission also stated that any award rendered by the tribunal reinstating or compensating

Petitioners for the repealed incentives would constitute illegal State aid that Romania would be prohibited from paying. *Id.* ¶¶ 334-336.

In December 2013, the arbitral tribunal issued an award in favor of Petitioners ("the Award"). The tribunal first found that it had "jurisdiction" over the dispute pursuant to Article 7 of the BIT. *Id.* ¶¶ 284-285. It then concluded that Romania violated Article 2(3) of the BIT by repealing the investment law. *Id.* ¶ 872. As part of that analysis, the tribunal engaged in extensive discussion of E.U. law—which it agreed "must be taken into account when interpreting the BIT," *id.* ¶ 327—by finding, among other things, that "it was reasonable for the Claimants to believe that . . . incentives were compatible with EU law." *Id.* ¶ 691. The tribunal ordered Romania to compensate Petitioners in an amount equal to the value of the unlawful incentives they would have received from the date of the law's repeal in 2005 to April 1, 2009, plus interest, amounting in total to approximately 178 million euros. *Id.* ¶ 1329; *see* State Aid Decision ¶ 1.

C. The State Aid Decision

Shortly after issuance of the Award, the Commission informed Romania that implementing or executing the Award could amount to the payment of unlawful state aid in violation of E.U. law. State Aid Decision ¶ 2. Three months later, the Commission issued an injunction prohibiting Romania from paying any part of the Award until the Commission had made a determination of the lawfulness of such payments under E.U. law. *Id.* ¶ 6. The Commission subsequently opened a proceeding pursuant to TFEU art. 108(2) to determine whether payment of the Award would amount to prohibited state aid, and invited and received comments from Petitioners and Romania. *Id.* ¶¶ 7-10; *see id.* ¶¶ 45-78 (describing comments).

In March 2015, the Commission issued a decision ("the State Aid Decision") holding that payment of the Award constituted state aid prohibited by E.U. law. *Id.* ¶ 125. The

Commission explained that the benefits granted by the Incentive Law constituted unlawful state aid, and that payment of the Award would therefore constitute state aid, as well, since "through the implementation or execution of the Award, Romania grants the claimants an amount corresponding exactly to the advantages foreseen under the abolished [law]." *Id.* ¶ 95; *see id.* ¶¶ 109-124. Both Romania and Petitioners argued that enforcement of the award was compelled by Article 54 of the ICSID Convention and the parties' BIT. *Id.* ¶¶ 45, 57. But the Commission disagreed: It explained that the legal restrictions in the E.U. treaties took precedence over the terms of the Romania-Sweden BIT, given that the treaties expressly preserve preexisting treaty rights only between E.U. Member States and third-party countries (not between E.U. Members themselves), and because intra-E.U. BITs "are contrary to Union law, incompatible with provisions of the Union Treaties and should therefore be considered invalid." *Id.* ¶¶ 126-129.

Accordingly, the Commission held that "[t]he payment of the compensation awarded by the arbitral tribunal" against Romania "constitutes State aid . . . which is incompatible with the internal market," *Id.* art. 1. The Commission ordered that "Romania shall not pay out any [such] incompatible aid" and that it "shall ensure that no further payments of the aid . . . shall be effected." *Id.* arts. 2.1, 2.7. The parties appealed the State Aid Decision to the General Court of European Union. That appeal remains pending, but does not suspend application of the Commission's decision. *See* TFEU art. 278.[3]

D. The *Achmea* Judgment

In March 2018, the E.U. Court of Justice also rendered a judgment pertinent to this dispute. That judgment, *Achmea*, arose from a BIT between two E.U. Member States—the

[3] The General Court conducted a hearing on the appeal in March 2018. The Commission estimates that a judgment will be rendered in the first quarter of 2019. That judgment may subsequently be appealed by either party to the E.U. Court of Justice.

Kingdom of the Netherlands and the Czech and Slovak Federative Republic—that went into effect in 1992, twelve years before the Slovak Republic joined the E.U. *Achmea* ¶¶ 3, 6. Like the Romania-Sweden BIT, the Netherlands-Slovak Republic BIT contains a provision agreeing to submit disputes between the investors of one contracting state and the other contracting state to an arbitral tribunal. *Id.* ¶ 4. In 2008, the Dutch company Achmea brought arbitral proceedings against the Slovak Republic pursuant to this BIT, and an arbitral tribunal sitting in Germany issued an award against the Slovak Republic. *Id.* ¶¶ 10-12. The German reviewing court subsequently referred the case to the E.U. Court of Justice for a preliminary ruling on the question whether E.U. law "preclude[s] the application" of an arbitration agreement in a "so-called intra-EU BIT" where the BIT "was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date." *Id.* ¶ 23.

The E.U. Court of Justice held that the arbitration agreement in the Netherlands-Slovak Republic BIT was invalid and unenforceable. The court explained that E.U. law "establishe[s] a judicial system intended to ensure consistency and uniformity in the interpretation of EU law." *Id.* ¶ 35. By agreeing to submit investment disputes to an arbitral panel that is "not part of the judicial system of the EU," but which nevertheless has "final" authority to resolve questions of E.U. law that may arise in the course of those investment disputes, a BIT arbitration clause "prevent[s] those disputes from being resolved in a manner that ensures the full effectiveness of EU law." *Id.* ¶¶ 45, 51, 56-58. Consequently, the court held, E.U. 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, bring proceedings against the latter Member State before an arbitral tribunal." *Id.* ¶ 60.

E. Petitioners' Efforts To Enforce The Arbitral Award

Notwithstanding the Commission's State Aid Decision and the E.U. Court of Justice's *Achmea* judgment, Petitioners have made numerous efforts to obtain enforcement of the Award in European and United States courts. To date, all of those efforts have failed.

Petitioners brought proceedings pursuant to Article 54 of the ICSID Convention in five separate E.U. Member States: Belgium, Luxembourg, Romania, Sweden, and the United Kingdom. No State in the E.U. has enforced the award. Two of those States, Belgium and Luxembourg, held that the award was unenforceable in light of the State Aid Decision. Courts in the other States have stayed enforcement proceedings pending the resolution of the parties' appeal of the State Aid Decision.

Petitioners also brought proceedings to enforce the award in the District Court for the Southern District of New York. The District Court recognized the award pursuant to an *ex parte* proceeding. But the Second Circuit reversed, holding that Petitioners could obtain enforcement of the award only by satisfying the substantive and procedural requirements of the Foreign Sovereign Immunities Act (FSIA), which they had not done. This suit followed.

ARGUMENT

Petitioners ask this Court to give effect to an arbitral award that arose from an agreement Romania lacked legal authority to enter, that the European Commission has ordered Romania not comply with, and that five E.U. Member States have refused to enforce. The Court should also decline Petitioners' invitation. The FSIA, the text of the ICSID enforcement statute, *and* the international comity, act of state, and foreign sovereign compulsion doctrines all make clear that the confirmation of this award—and the concomitant rejection of numerous judgments from the United States' sister sovereigns—would be unlawful and improper.

I. THIS COURT LACKS SUBJECT MATTER JURISIDCTION UNDER THE FSIA.

The FSIA affords "the sole means for suing a foreign sovereign in the courts of the United States." *Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017) (citing *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989)). It establishes a "presumption of immunity" for foreign sovereigns. *Id.* at 784; *see* 28 U.S.C. § 1604. And it provides that plaintiffs may overcome that presumption only by demonstrating that one of the Act's enumerated "exception[s] to immunity . . . applies." *Owens*, 804 F.3d at 784.

The FSIA's rule of immunity applies with full force in a suit, like this one, seeking to confirm an ICSID arbitral award against a foreign state. As the Second Circuit has repeatedly explained—including in an earlier suit brought by Petitioners to enforce this very award—"the FSIA provides the sole source of jurisdiction—subject matter and personal—for federal courts over actions to enforce ICSID awards against foreign sovereigns." *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 112 (2d Cir. 2017); *see Micula v. Gov't of Romania*, 714 F. App'x 18, 21 (2d Cir. 2017) ("[T]he FSIA provides the sole basis for jurisdiction over Romania and sets forth the exclusive procedures for the recognition of the ICSID Award."). Petitioners do not contend otherwise. *See* Mem. 8. Thus, to properly petition this Court to confirm an ICSID award against Romania, Petitioners must demonstrate that that their case falls within one of the Act's limited exceptions to immunity.

Petitioners cannot carry that burden. The only FSIA exception that Petitioners claim is applicable to this case is the "arbitration exception." Mem. 8. That exception provides, as relevant:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case . . . in which the action is brought . . . to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by

> arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a)(6). By its plain terms, this provision grants jurisdiction to "enforce" an arbitral award only if that award was rendered pursuant to an "agreement . . . to submit to arbitration." *Id.* As the D.C. Circuit has explained, that language "requires a *valid* agreement." *Belize Social Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015) (emphasis added; internal quotation marks omitted); *see Chevron Corp. v. Ecuador*, 795 F.3d 200, 205 (D.C. Cir. 2015) (plaintiff must identify a "*valid* arbitration agreement between the parties" (emphasis added)). If the arbitration agreement underlying the award is "void"—for instance, because one or both of the parties "lacked authority to enter into the arbitration agreement"—a petitioner cannot invoke the FSIA to enforce that defective award in U.S. court. *Belize*, 794 F.3d at 102-103.

Here, the arbitration agreement underlying the Award is void. In *Achmea*, the E.U. Court of Justice held that E.U. law "*preclude*[s] 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, bring proceedings against the latter Member State before an arbitral tribunal." *Achmea* p. ¶ 60 (emphasis added). That holding applies foursquare to the arbitration agreement in the Romania-Sweden BIT. Romania and Sweden are both E.U. Member States. The Romania-Sweden BIT is "an international agreement" between them. And Article 7 of that BIT is "a provision . . . under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal." *Id.* Indeed, the language of that article is materially indistinguishable from the language of the Netherlands-Slovak Republic BIT that

the E.U. Court of justice held invalid in *Achmea*. *Compare* Romania-Sweden BIT art. 7(1)-(2) (authorizing "the submission of [investment] dispute[s]" between "an investor of one Contracting Party and the other Contracting Party" for "resolution by international arbitration"), *with Achmea* ¶ 4 (authorizing each party "to submit a[n] [investment] dispute" between "one Contracting Party and an investor of the other Contracting Party" to "an arbitral tribunal"). The relevant article thus suffers from the same fundamental flaw as the one held invalid in *Achmea*: It empowers private arbitrators, rather than "the judicial system of the EU," to resolve disputes between two E.U. Member States concerning investment disputes that may raise questions of E.U. law. *Achmea* ¶ 58.

The arbitration exception accordingly does not apply. The Award that Petitioners seek to enforce was not issued pursuant to "a valid arbitration agreement," *Chevron*, 795 F.3d at 205, but pursuant to a clause that Sweden and Romania, as E.U. Member States, "lacked authority to enter into," *Belize*, 794 F.3d at 102.[4] And that, in turn, means this Court lacks jurisdiction over Romania.

Petitioners note that the Advocate General of the E.U. Court of Justice—an impartial advocate who assists the court in its deliberations—argued in *Achmea* that E.U. law does not bar Member States from agreeing to arbitrate "a dispute arising under an intra-EU BIT" that occurred before one of the states "acceded to the European Union." Mem. 37. Those are indeed the views of the Advocate General, but there is a reason they do not appear in the *Achmea* judgment itself: The E.U. Court of Justice did not adopt them. It held that E.U. law precluded the arbitration clause of the Netherlands-Slovak Republic BIT *notwithstanding* that "the investment protection agreement was concluded before one of the Contracting States

[4] Unlike the agreement the D.C. Circuit enforced in *Belize*, that lack of authority did not go to the BIT generally, but to the arbitration agreement in particular. *Cf. Belize*, 794 F.3d at 102-103.

acceded to the European Union." *Achmea* ¶¶ 23, 60. And for good reason: The concerns animating the court's judgment—that questions of E.U. law cannot be conclusively resolved outside the judicial system established by the E.U.—apply so long as the parties are bound by E.U. law at the time the award was rendered. That is unquestionably the case here; the tribunal stated that E.U. law "*must* be taken into account when interpreting the BIT," Award, ¶ 327 (emphasis added), and the Award is replete with discussions of E.U. law, *see, e.g., id.* ¶ 691. Confirmation of that Award would thus pose the same interference with the E.U.'s allocation of power that the court deemed unacceptable.

Petitioners also suggest that *Achmea* does not apply to ICSID arbitrations. Mem. 38. That proposed carve-out finds no footing in the holding or logic of that decision. The E.U. Court of Justice categorically held that "a provision in an international agreement" agreeing to bring intra-E.U. investment dispute "before an arbitral tribunal" is precluded. And it based that holding on the rationale that any "mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law" is inconsistent with the Union's allocation of power. *Achmea* ¶ 56. That holding and that rationale apply with full force to agreements to resolve disputes by ICSID arbitration.

In short, the essential prerequisite for this Court to exercise jurisdiction over Romania, a foreign sovereign, is not met. The Court may end its inquiry there and dismiss the petition for lack of subject matter jurisdiction.

II. SECTION 1650A DOES NOT AUTHORIZE CONFIRMATION OF THE AWARD.

Even if this Court possessed jurisdiction, confirmation of the award would be improper under 22 U.S.C. § 1650a. Section 1650a was enacted for the purpose of implementing Article 54 of the ICSID Convention, the treaty governing recognition and

enforcement of ICSID Awards. *See* Pub. L. No. 89-532 (1966) ("An Act To Facilitate the carrying out of the obligations of the United States under the [ICSID] Convention"); *see Mobil Cerro*, 863 F.3d at 102. Section 1650a tracks the terms of Article 54 almost verbatim: It states that "[t]he pecuniary obligations imposed by [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." 22 U.S.C. § 1650a; *cf.* ICSID Convention art. 54 ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."). Under both the text of the statute and principles of international comity, Section 1650a does not authorize confirmation here.

A. The Award Should Not Be "Enforce[d]" Or Given "Full Faith And Credit" Because The Tribunal Lacked Jurisdiction.

To start, Section 1650a 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." 22 U.S.C. § 1650a (emphasis added). As the D.C. Circuit has explained, that means that "ICSID arbitrations are to be enforced as judgments of sister states." *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1103 n.14 (D.C. Cir. 1982). They should be given the "same" full faith and credit—no more and no less—"as if" they were state-court judgments. 22 U.S.C. § 1650a.

That language "mean[s] something less than automatic recognition and conversion of the award into a federal judgment." *Mobil Cerro*, 863 F.3d at 123. While state-court judgments are generally entitled to recognition in federal court, there are important and well-established exceptions to that rule. Most pertinent here, state-court judgments are not entitled to full faith and credit "where the rendering forum lacked jurisdiction over the subject matter

or the parties." *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 386 (1996) (describing "the subject-matter jurisdiction exception to full faith and credit"). The Supreme Court has "consistently recognized" as much: It has explained that "a judgment of a court in one State is conclusive upon the merits in a court in another State *only* if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment." *Underwriters Nat'l Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704-705 (1982) (emphasis added). "Consequently, before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree," and "[i]f that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given." *Id.* at 705.

Applying the "same" approach here, 22 U.S.C. § 1650a, confirmation of the Award is not warranted. The arbitral panel asserted that it had "jurisdiction" to render the Award because of "Article 7 of the BIT" between Sweden and Romania. Award ¶ 285(a). But as *Achmea* made clear, that Article—the arbitration agreement—was "precluded" by E.U. law, because it unlawfully deprived the E.U. judicial system of exclusive authority to resolve disputes raising questions of E.U. law. *Achmea* ¶ 60. It follows that the arbitral panel "did not have jurisdiction over the subject matter or the relevant parties," and so "full faith and credit need not be given" under section 1650a. *Underwriters Nat'l*, 455 U.S. at 705.

Indeed, a comparison of this Award to an analogous state-court judgment confirms the unenforceability of the Award. If Nebraska and Oklahoma were to enter a compact purportedly agreeing to resolve all of their disputes in state court, and a state court awarded damages to Nebraska to resolve an interstate water dispute with Oklahoma pursuant to that agreement, that judgment plainly would not be enforceable in federal court: The Supreme Court has "original and exclusive jurisdiction of all controversies between two or more States," and state courts lack subject-matter jurisdiction to resolve those disputes themselves,

no matter what the States purport to agree to. 28 U.S.C. § 1251(a); *see Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992); U.S. Const., art. III, § 2. So too here; E.U. law bars Member States from agreeing to resolve disputes over investment matters potentially involving E.U. law outside the E.U. judicial system, regardless of whether they have a treaty to that effect. *See Achmea* ¶¶ 58-59. Section 1650a therefore instructs that such awards be similarly denied enforcement and the full faith and credit of U.S. courts.

B. Section 1650a Does Not Permit Confirmation Under Principles Of International Comity.

The doctrine of international comity leads to the same result. Comity "summarizes in a brief word a complex and elusive concept—the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum." *de Csepel v. Republic of Hungary*, 714 F.3d 591, 606 (D.C. Cir. 2013) (quoting *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984)). The "central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts." *Laker Airways*, 731 F.2d at 937. So long as a foreign court resolved a question after "full and fair" procedures, comity dictates that "the merits of the case should not . . . be tried afresh based upon the mere assertion of the party that the judgment was erroneous in law or in fact." *de Csepel*, 714 F.3d at 606 (quoting *Hilton v. Guyot*, 159 U.S. 113, 202-203 (1895) (internal quotation marks omitted); *see Royal & Sun All. Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 94 (2d Cir. 2006) (stating that comity applies where "the parties in the actions need not be the same . . . [are] substantially the same, litigating substantially the same issues in both actions").

In this case, the question presented has already been "ful[ly]" and "fair[ly] litigated in multiple fora, and Petitioners have lost in each one. During the investigation leading to the adoption of the State Aid Decision, both Petitioners and Romania argued, just as Petitioners

do here, that under Article 54, "every state party has an obligation to recognise and enforce" the award. State Aid Decision ¶ 45; *see id.* ¶ 65. The Commission rejected that argument, holding that the BIT and the parties' consent to ICSID arbitration were superseded by their obligations under the foundational treaties of the E.U. *Id.* ¶¶ 126-129. The Commission then ordered Romania that it "shall not pay" the Award because to do so would result in the grant of impermissible state aid. *Id.* Art. 2.1. Multiple courts of E.U. Member States have likewise held that Article 54 and domestic statutes that implement that article do not authorize enforcement. *See supra* p. 9.

Those sovereign acts are entitled to comity from this Court. In this proceeding, Petitioners raise "substantially the same issue[]" that was asked and answered in those proceedings: They ask the Court to confirm and order the payment of the Award under Section 1650a, domestic implementing legislation for Article 54 that matches in every relevant particular the scope of the provisions that the European tribunals were interpreting. *Royal & Sun All. Ins. Co.*, 466 F.3d at 94. Each of those proceedings involved "the same parties" as here. *Id.* And in each of the proceedings, the parties received "full and fair" opportunities to present their arguments, before tribunals that complied with all of the requisites of due process, including adversarial procedures, an impartial adjudicator, and a public decision. *de Csepel*, 714 F.3d at 606. This Court should not permit Petitioners to "tr[y] afresh" the merits of the case based merely on their belief that the Commission and multiple European courts got it wrong. *Id.* (quoting *Hilton*, 159 U.S. at 202-203).[5]

What is more, the European tribunals are plainly the more appropriate fora in which to resolve this question. The E.U. and its Member States have a substantial specific interest in

[5] At a minimum, the Court should stay proceeding in this case, much as several European courts have done, until the resolution of Petitioners' appeal of the State Aid Decision. That appeal will afford Petitioners yet additional opportunities to press their arguments in an impartial forum that full complies with all standards of due process.

the implementation of the Award: Romania is an E.U. Member State; Petitioners are E.U. citizens and residents; the companies benefitting from the Award exclusively carry out business in the E.U.; the investments underlying the Award were made in the E.U.; and the BIT on which the Award is based is an agreement between two E.U. Member States (Romania and Sweden). Furthermore, this case presents multiple important issues concerning the structure and laws of the E.U., including the E.U.'s prohibition on state aid, the exclusive jurisdiction of its courts, the permissibility of investment treaties and arbitration agreements between Member States, and the potential imposition of sanctions on an E.U. Member State. *See* Case C-126/97, Jun. 1, 1999, *Eco Swiss China Time Ltd. v. Benetton Int'l N.V.*, EU:C:1999:269, ¶ 39 (the competition law provisions of the E.U. Treaties "may be regarded as a matter of public policy").

In contrast, there is vanishingly little connection between this litigation and the United States. No U.S. property is at issue; no U.S. persons are involved; no part of this dispute took place on U.S. territory; and no U.S. law is implicated, save the same ICSID Convention that is binding on other States with a far greater interest in the dispute. *See Micula*, 714 F. App'x at 21 ("It is also unclear from the face of the petition that there is any conduct connecting this action to New York. The parties are foreign, the arbitration hearings were conducted in Paris, and the property at issue was located in Romania"). Involvement in this case would thus do little to advance U.S. interests, other than embroiling U.S. courts in the internal affairs of the E.U. and showing disrespect for the acts of foreign sovereigns. That is precisely the outcome the doctrine of comity is designed to prevent.

III. THE ACT OF STATE DOCTRINE BARS CONFIRMATION.

The Court should also deny relief and dismiss the petition under the act of state doctrine. That doctrine bars courts from "question[ing] the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have

jurisdiction over a controversy in which one of the litigants has standing to challenge those acts." *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004). The doctrine imposes "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., Inc. v. Envt'l Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990); *see Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309-310 (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"). This doctrine has "constitutional' underpinnings": It recognizes that the political branches are exclusively responsible for the country's foreign affairs, and that courts would interfere in that constitutionally assigned role by impugning the legitimacy of acts taken by a foreign sovereign. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

The act of state doctrine bars confirmation here. In order to conclude that the FSIA grants jurisdiction and that Section 1650a permits confirmation, the Court would need to deny the validity of multiple sovereign acts of the European Union. *Cf. European Cmty. v. RJR Nabisco Inc.*, 764 F.3d 129, 143-147 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016) (concluding that the European Community has the characteristics of a "foreign state"). In particular, to find that the FSIA grants jurisdiction, it would need to find that the parties had a "valid arbitration agreement," notwithstanding that both the State Aid Decision and *Achmea* held the contrary. *See supra* pp. 10-13. And to invoke Section 1650a, the Court would need to find both that the arbitral tribunal had jurisdiction, and that Romania's consent to ICSID Arbitration was not superseded by its accession to the E.U—both judgments that the State Aid Decision and *Achmea* bar. *See supra* pp. 16-18.

Petitioners claim that the act of state doctrine is not implicated because they do not ask the Court to "invalidate any act of the European Commission." Mem. 34. But that is a far too

narrow conception of the doctrine; no court has authority to "invalidate" the acts of a foreign sovereign. What the doctrine prohibits, rather, is any decision that "question[s] the validity" of a foreign sovereign act. *Altmann*, 541 U.S. at 700. And it would be impossible for the Court to resolve this case without concluding that the State Aid Decision and the judgment of the E.U. Court of Justice should not be recognized as valid or given legal effect.

Petitioners also claim that the doctrine does not apply to the State Aid Decision because it is limited to acts "fully performed with a foreign sovereign's own territory." Mem. 35. That criterion is amply satisfied here. The European Commission's prescriptive jurisdiction extends to Romania, an E.U. Member State. And the State Aid Decision commands Romania not to pay the Award. A judgment of this court ordering Romania to do the opposite would contravene that clear command.

IV. THE FOREIGN SOVEREIGN COMPULSION DOCTRINE BARS CONFIRMATION.

Finally, the foreign sovereign compulsion doctrine bars confirmation of the Award. That equitable doctrine holds that U.S. courts should abstain from granting relief that would compel entities to take actions that would violate the laws of a foreign sovereign. *See O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana S.A.*, 830 F.2d 449, 453 (2d Cir. 1987); *see also Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1292 (3d Cir. 1979). It proceeds from the principle that where a foreign entity is required to act in a certain manner by a foreign sovereign, an order from an American court compelling it to act differently would be a direct affront to the laws of the foreign sovereign. *Cf. In re Sealed Case*, 825 F.2d 494, 498-499 (D.C. Cir. 1987) ("We have little doubt . . . that our government and our people would be affronted if a foreign court tried to compel someone to violate our laws within our borders.").

For all of the reasons described above, that doctrine applies here. The European Union is a sovereign entity, which makes laws and issues judgments that have the force of law on E.U. Member States. *See RJR Nabisco Inc.*, 764 F.3d at 144-145. The Commission—the enforcement arm of the E.U.—has issued a decision stating that Romania "shall not pay" the Award and Romania faces severe sanctions under E.U. law if it fails to comply with that decision.[6] If this Court nevertheless confirmed the Award over the Commission's directive to the contrary, it would compel Romania to do precisely what another sovereign entity has barred.

Petitioners contend that the foreign sovereign compulsion doctrine is limited to "antitrust matters," "discovery violations," and "private parties." Mem. 35. To our knowledge, no court has held that the doctrine is limited in that way. And there would be no coherent reason for it to be so limited. The intrusion on foreign sovereignty is dramatically *more* severe in this case than a routine "discovery" dispute, requiring as it would the payment of an award the European Commission has found to result in the grant of unlawful aid prohibited under E.U. law. And it would turn the doctrine on its head to say that it has *less* application when a court is asked to act *directly* against the directive of a sovereign entity. It is true enough that few (if any) cases have applied the foreign sovereign compulsion doctrine in circumstances like these. But that is not for lack of its application; it is because few (if

[6] By decision of December 7, 2018, the Commission decided to launch infringement proceedings against Romania before the E.U. Court of Justice under TFEU Article 108(2) for failure to recover the compensation already paid to Petitioners under the Award. If the Court establishes an infringement and Romania still fails to recover that compensation, the Commission may ask that court to impose penalty payments on Romania as provided by TFEU Article 260(2). For a recent example, see the judgment in Case C-93/17, Nov. 14, 2018, *Commission v. Greece*, EU:C:2018:903 in which the E.U. Court of Justice ordered Greece to pay a lump sum of 10 million euros and a periodic penalty payment of 7,294,000 euros for every six month period in which the unlawful State aid granted by Greece to Hellenic Shipyards had not yet been recovered. If Romania were to fail to make those payments or comply with the Commission's decision, the Commission could offset the penalty payments Romania owed against amounts it was entitled to receive from the E.U.'s budget, for instance from the E.U.'s Social and Cohesion Funds.

any) plaintiffs have asked the court to issue an order like this one. This Court should not be the first.

CONCLUSION

For the foregoing reasons, the motion for judgment on the pleadings or summary judgment should be denied, and the Petition should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on December 11, 2018, the foregoing document was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Catherine E. Stetson