ORAL ARGUMENT SCHEDULED FOR MAY 5, 2020
No. 19-7127

In The United States Court of Appeals
For The District of Columbia Circuit

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

Petitioners-Appellees,

v.

GOVERNMENT OF ROMANIA,

Respondent-Appellant,

MOTION OF AMICUS CURIAE THE EUROPEAN COMMISSION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

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Pursuant to D.C. Circuit Rule 34(e), amicus curiae the European Commission (the "Commission") respectfully moves this Court for leave to participate in oral argument in the above-captioned case. The Commission, as the guardian of European Union ("EU") law, has a substantial and sovereign interest in participating in oral argument: the district court erroneously confirmed an arbitral award that falls outside the jurisdiction of U.S. courts, violates EU law, and circumvents Commission orders barring Romania from paying the compensation awarded.

Because neither party argues the threshold jurisdictional objection advanced by the Commission in this appeal, and because the dispute challenges the respect due the Commission's acts and procedures under EU law, the Commission respectfully requests that the Court grant this motion to participate at oral argument to address these issues. Counsel for the Respondent, the party supported by the amicus brief, has consented to the Commission's participation in argument under Circuit Rule 34(e) and stated that it will allocate five minutes of its argument time to the Commission.

BACKGROUND

1. The Commission is an institution of the European Union, a sovereign treaty-based international organization comprising 27 Member States. The Commission holds primary responsibility for ensuring proper application of EU law and the EU treaties, including the Treaty on European Union (the "TEU") and the

Treaty on the Functioning of the European Union (the "TFEU"), both of which are implicated in this case.

2. Petitioners—the Micula Brothers—filed an arbitration demand in 2005 under the Sweden-Romania bilateral investment treaty alleging Respondent, Romania, had breached that treaty by revoking an economic-development aid scheme from which they had expected to benefit until April 2009. When the demand was filed, Romania had completed its accession negotiations but not yet acceded to the EU, though its relations with the EU were governed by a "Europe Agreement," an international agreement between the EU, its Member States, and Romania. The revocation of the aid scheme was a precondition for the conclusion of Romania's accession negotiations.

3. Once Romania acceded to the EU in 2007, the arbitration provision in the Sweden-Romania bilateral investment treaty became incompatible with EU law. Romania's relations with investors from other EU Member States, like Sweden (the Micula Brothers' state of nationality), then became subject to adjudication under EU law and in European courts. As a result of this conflict between Romania's prior bilateral agreement and its new EU-law obligations, the arbitration provision in the Sweden-Romania treaty ceased to govern disputes involving the two Member States or their nationals. Despite this fundamental shift in the countries' relationship, however, the tribunal that had convened under the International Centre for the

Settlement of Investment Disputes ("ICSID") proceeded to adjudicate the dispute. The tribunal purported to render an award against Romania in December 2013, almost seven years after Romania's EU accession. An *ad hoc* Committee refused to annul the award in 2016, rejecting Romania's and the Commission's objections, including to the tribunal's jurisdiction.

4. The Commission issued three decisions on state aid that prohibited Romania from paying the award. *See* State Aid Procedure SA.38517 (2014/C) (ex 2014/NN). Because Romania was a member of the EU when the award was rendered, EU law—as interpreted and applied by the Commission—barred payment of the compensation awarded, since that compensation amounted to illegal state aid under EU law. Accordingly, the Commission's decisions prohibited Romania from implementing the award, either voluntarily or by forced execution, and required Romania to recoup any amounts previously paid.

5. Petitioners, however, continued to pursue the matter and attempted to enforce the award in five international jurisdictions.[1]

[1] The courts of Sweden and Luxembourg declined to enforce Petitioner's award; appeals are pending in those jurisdictions. The courts of Belgium suspended enforcement proceedings and referred the matter to the Court of Justice of the European Union ("CJEU"). The courts of the United Kingdom initially stayed enforcement of the award, but the Supreme Court lifted the stay. In Romania, the Bucharest Court of Appeal ordered enforcement of the award, but a further hearing is scheduled in Romania's highest court on June 12, 2020. The Commission has invited that court to refer the matter to the CJEU, to prevent conflicting judgments and ensure the unity of interpretation and application of EU law.

6. Meanwhile, Petitioners also sought to confirm the award in multiple U.S. district courts. The district court below ultimately issued an order requiring Romania to pay more than $300 million to satisfy the award, notwithstanding the Commission's decisions prohibiting Romania from paying.

7. During the proceedings below, the Commission filed an amicus brief urging the court to dismiss for lack of jurisdiction and to defer to the Commission's acts and interpretation involving the application of EU law to a dispute among EU Member States and their nationals. That brief largely addressed the same issues of jurisdiction, comity, and deference raised in the Commission's brief to this Court. The district court, however, rejected the Commission's position. It predominantly relied on a decision by the General Court of the European Union ("the General Court"), the lower of two courts making up the Court of Justice of the European Union ("CJEU"). The General Court rejected the Commission's jurisdictional argument in a judgment upholding an annulment action Petitioners brought against one of the three Commission decisions in the aforementioned State aid proceedings. That judgment is now on appeal before the CJEU. The district court gave little consideration to the Commission's authoritative interpretation of EU law, much less the "respectful consideration" that the Commission's interpretation of the EU's own laws is due.

8. In this appeal, Petitioners opposed the Commission's motion for leave to file an amicus brief on the basis that the brief raised issues the parties did not. As the Commission set forth in its Reply, however, the amicus brief addressed the courts' jurisdiction to hear this case—a matter "always before this Court, doubly so if foreign sovereign immunity is implicated." Reply at 1–2 (Feb. 5, 2020).

9. The Court granted the Commission's motion to participate as amicus curiae. *See* Order (Feb. 7, 2020). And it did so for good reason: the proposed amicus brief addressed threshold questions of jurisdiction, comity, and deference that the Parties did not otherwise discuss. Indeed, this appeal concerns the scope and effectiveness of one of the most important international arbitration precedents in years: *Slovak Republic v. Achmea B.V.*, Case C-284/16, 6 March 2018, ECLI:EU:C:2018:158 ("*Achmea*"). In *Achmea*, the CJEU held that the EU treaties preclude investor-state arbitration provisions (such as the one at issue here) in all bilateral investment treaties between EU Member States. Yet the district court, relying on dicta from the General Court's judgment, and notwithstanding the Commission's appeal against that judgment, refused to apply *Achmea* to this proceeding.

ARGUMENT

10. An amicus curiae may participate in oral argument with the Court's permission. Fed. R. App. P. 29(a)(8). This Court may grant amici separate oral

argument time with the consent of the party supported, or for "extraordinary reasons," such as those present here. D.C. Cir. R. 34(e). *See, e.g., Nat'l Ass'n for Surface Finishing v. EPA*, No. 12-1459 (D.C. Cir. Nov. 21, 2014) (granting State amici leave to participate in oral argument). Romania has consented to share its argument time with the Commission under Rule 34(e).

11. Given the centrality of EU law interpretation, enforcement, and procedure in this case, the Commission's participation at oral argument would aid the Court's consideration of the three important issues raised in its brief: jurisdiction, comity, and deference.

12. ***First***, as to subject-matter jurisdiction, Petitioners wrongly contend that Romania "concedes" jurisdiction in the U.S. federal courts. Opp. 3 (Feb. 12, 2020). Parties of course cannot confer subject-matter jurisdiction on a court by agreement or concession in litigation.[2] Nor can Romania's consistent *objection* to the ICSID tribunal's jurisdiction be characterized as consent under the FSIA's arbitration exception. *Contra* Opp. 37 (citing Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.*). No "agreement to arbitrate" exists, § 1605(a)(6), because Romania's

[2] *See, e.g., Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) ("Objections to a tribunal's jurisdiction can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction over the controversy."); *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 511 (D.C. Cir. 2018) ("A defect of subject-matter jurisdiction is non-waivable, such that a court must always assure itself of its subject-matter jurisdiction regardless of whether a party has raised a challenge.").

decision to join the EU and its multilateral dispute-resolution regime "preclud[ed]" the legacy bilateral investment treaty arbitration provision, as *Achmea* confirms. Absent valid consent to arbitrate—indisputably lacking at the time of the award—no statutory exception overcomes Romania's sovereign immunity, and no subject-matter jurisdiction exists.

13. As the CJEU recognized, EU Member States like Romania lacked the capacity to submit to the tribunal's authority in light of Romania's superseding obligations under EU law. *See Achmea*, ¶ 60. EU Member States cannot waive the *Achmea* principle. That judgment was rendered by the highest authority on the meaning of EU law in the world—the CJEU—sitting as a 15-judge Grand Chamber, reserved for adjudication of cases of exceptional importance. The Grand Chamber held that EU Member States lacked *capacity* to agree with each other to remove investor-Member State disputes from the European courts to a private arbitral tribunal. Otherwise, Member States could simply participate by bilateral "agreement" in the very proceedings the CJEU has ruled Member States' multilateral obligations do not allow.

14. In response, Petitioners advance an argument not embraced by the district court: that the district court was powerless even to evaluate the tribunal's

jurisdiction to arbitrate because the ICSID tribunal already resolved the question.[3] This aggressive position would leave U.S. courts powerless to determine their own jurisdiction under FSIA and its arbitration exception. Opp. 38.

15. That position is wrong, as amicus would explain at argument. As a factual matter, the ICSID tribunal did *not* resolve the question whether the FSIA's arbitration and waiver exceptions applied notwithstanding Romania's accession to the EU, and the district court did not suggest otherwise. And as a legal matter, the statute required the district court to give the award "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. Petitioners contend that "such an award cannot be disturbed by this Court." Opp. 38. But that is wrong: "a federal court should not give full faith and credit to a state court judgment if that state court lacked subject-matter or personal jurisdiction." *Teco Guat. Holdings, LLC v. Republic of Guatemala*, 414 F. Supp. 3d 94, 105 (D.D.C. 2019) (interpreting 22 U.S.C.

[3] Given the importance of this question, fundamental to the Court's determination of its jurisdiction, yet almost entirely unaddressed in this Court or the court below, the Commission submits that supplemental briefing from the parties, amicus, or the U.S. government on the question of subject-matter jurisdiction could aid the Court's consideration. *See, e.g.*, *Mobil*, 863 F. 3d at 111 ("This Court, after hearing oral argument from the parties, requested the views of the United States through the Office of Legal Adviser at the Department of State, on … whether 22 U.S.C. § 1650a provides a basis for subject matter jurisdiction over an award enforcement action against a foreign sovereign, or whether the FSIA establishes the sole source of jurisdiction over such actions.").

§ 1650a). This is of course precisely the case here: because the bilateral arbitration provision is void under EU and international law, no exception to sovereign immunity exists and therefore no subject-matter jurisdiction exists.

16. As the Second Circuit recently recognized, Section 1650a does not trump sovereign immunity under the later-enacted FSIA, which remains the exclusive source of subject-matter jurisdiction over a sovereign. *See Mobil Cerro Negro v. Bolivarian Repub. Venezuela*, 863 F. 3d 96 (2d Cir. 2017). The ICSID tribunal's decision deserves no greater or lesser treatment than "a judgment of a court in one State," which "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). Thus, "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," such that "[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. Section 1650(a) does not provide the "rubber stamp" that Petitioners envision. *Mobil*, 863 F.3d at 123 (Section 1650(a) "mean[s] something less than automatic recognition and conversion of the award into a federal judgment.").

17. ***Second***, as to comity, Petitioners appeal to the district court's discretion. Opp. 43. Yet the decision below rested on a misunderstanding of EU law that commands no deference, as amicus is prepared to clarify at argument. The district court concluded that "Romania would risk defying" "*no* extant sovereign act" by paying the award. Order 25 (emphasis added). And Petitioners contend that the Commission's suspension injunction and the opening decision were merely "preparatory" administrative acts that the General Court's judgment has superseded. Opp. 48. Both are wrong: the two decisions in question continue to prohibit Romania's payment under established principles of EU law.[4] Amicus Br. 14–15. As a result, the decision below, if affirmed, would place Romania in direct conflict with its EU legal obligations prohibiting that payment. *Id.* at 13. Rather than deferring to the Commission's (as opposed to Romania's) interpretation of EU law, the district court focused on the declaration of Petitioners' expert, whose opinions Petitioners largely ignore on appeal. *See* Opp. 45, 48. In this dispute between an EU Member State and EU citizens over the applicability of EU sovereign acts and CJEU judgments to events that occurred entirely in the EU, interests of international

[4] The U.K. Supreme Court recently agreed with the Commission's position that the suspension injunction and the opening decision remain valid and binding, notwithstanding the annulment of the final decision by the General Court. *Micula and Others* v. *Romania* [2020] UKSC 5, ¶¶ 51–52.

comity merited far greater consideration than the court below gave the Commission, as guardian of the proper application of EU law.

18. ***Third***, as to deference, Petitioners' emphasis on disputed secondary sources and affidavits repeat the lack of "respectful consideration" afforded by the court below. *Animal Science Products v. Hebei Welcome Pharmaceuticals*, 585 U.S. ___ (2018). Both privilege the General Court's dictum on the interpretation of *Achmea* (now under review on appeal) over the views and acts of the Commission itself. Both reject the Commission's decisions regarding Romania's obligation not to pay the award, and the EU case law supporting this position, in favor of the views of Petitioner's expert on Commission procedures and authority. While the Commission's views may not automatically be "conclusive," Opp. 49, they represent the most authoritative source within this proceeding on the meaning of EU law, orders, and process before. Favoring the dissenting views presented in the lower court, by contrast, amounts to practically no deference whatsoever.

19. ***Finally***, Petitioners entirely ignore the Commission's reasonable suggestion that the Court hold this proceeding in abeyance pending the CJEU's authoritative resolution of the question of *Achmea*'s applicability and the validity of the final decision. This appeal, at a minimum, requires the Court to confront—prematurely and unnecessarily—a momentous question of EU law and arbitral authority. Tribunals, sovereigns, and courts across Europe await the CJEU's

determination of *Achmea*'s applicability to pre-accession conduct. That question is now squarely before the CJEU as a result of the cross-appeal brought by Spain in Case C-638/19 P *Commission and Spain* v *Micula and Others*, which the court should hear by the end of this year and adjudicate by the beginning of 2021. Given the proximity and authoritativeness of that judgment, little justification exists for accelerating this long-running dispute and allowing a U.S. trial court's interpretation of dicta by the lower of the CJEU's two courts to decide such an important question of EU law. Consistent with the comity and deference concerns addressed above, this Court would benefit from considering—at oral argument—the reasons supporting the Commission's request for abeyance.

20. Allowing the Commission to participate in oral argument is consistent with the interest and solicitude federal courts show to sovereign governments. In the Supreme Court's recent decision addressing the level of deference due foreign sovereigns' interpretation of their own laws, for example, the Court granted the sovereign leave to participate at argument. *See Animal Science Prods.*, 138 S. Ct. 1543 (2018). *See also Intel Corp. v. Advanced Micro Devices, Inc.*, 541 U.S. 901 (2004) (granting motion to participate of European Commission); *Air France v. Saks*, 469 U.S. 1103 (1985) (granting motion of France to participate).

21. Counsel for the Commission and Romania have conferred regarding the possibility of dividing Romania's argument time, and have agreed to allot five

minutes—or such other amount as the Court deems appropriate—to allow oral presentation of the Commission's views. Regrettably, pandemic-related demands limited the ability of amicus to address this issue further in advance of this Court's deadline for this motion for leave.

CONCLUSION

The Commission respectfully requests that this Court grant its motion for leave to participate in oral argument.

Respectfully submitted,

/s/ Benjamin Beaton

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CERTIFICATE OF COMPLIANCE

This Motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 2,919 words.

This Motion complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) and Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

/s/ Benjamin Beaton
Benjamin Beaton

CERTIFICATE OF SERVICE

I hereby certify that I have this day served copies on the foregoing Motion for Leave to Participate in Oral Argument upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, and all counsel of record are registered users of CM/ECF for this case.

Dated this 21st day of April, 2020.

/s/ Benjamin Beaton