

EXHIBIT A
to Declaration of Lee F. Berger

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IOAN MICULA, *et al.*,

Petitioners,

Viorel MICULA,

Intervener,

For Recognition and Enforcement of an Arbitration
Award

- against -

GOVERNMENT OF ROMANIA,

Respondent.

Case No. 1:15-mc-00107-P1

**[PROPOSED] AMICUS CURIAE BRIEF OF THE COMMISSION OF THE EUROPEAN
UNION**

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The Commission of the European Union (“the Commission”) respectfully submits this proposed brief as *amicus curiae* in the matter referred to above. In support of the Government of Romania’s (“Romania”) motion to vacate the judgment, proposed *amicus curiae* states as follows:

INTEREST OF THE AMICUS

1. The Commission is one of the institutions of the European Union (“E.U.”), a supranational organization comprising twenty-eight nations (“Member States”). The Commission is entrusted with the task of ensuring the application of the treaties on which the E.U. is founded (“the E.U. Treaties”)¹ and of measures E.U. institutions adopt under those treaties. In that capacity, the Commission is the “guardian” of the E.U. Treaties.² As guardian of the E.U. Treaties, the Commission has the power to initiate infringement procedures against Member States that fail to comply with their treaty obligations before the Court of Justice of the European Union (“E.U. Court of Justice”).³ With the exception of the E.U.’s common foreign and security policy, and other cases specifically provided for in the E.U. Treaties, the Commission ensures the E.U.’s external representation.⁴

¹ The foundational treaties upon which the E.U. is based 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 can be found at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2012:326:FULL&from=EN>.

² TEU Article 17.

³ TFEU Article 258.

⁴ TEU Article 17 and TFEU Article 335 state “[t]he Union shall be represented by the Commission.” See also Case C-131/03 P, *Reynolds Tobacco and Others v Commission*, [2006] ECR I-7795, ¶ 94.

2. This Court has entered judgment against the Government of Romania and in favor of Petitioners Ioan Micula, S.C. European Food S.A., S.C. Starmill S.R.L., S.C. Multipack, and Viorel Micula⁵ (the “Judgment”) on an arbitration award rendered on December 11, 2013 in ICSID Case No. ARB/05/20 (Ioan Micula, Viorel Micula and others v. Romania) (“the Award”).⁶ Romania has moved to vacate that Judgment. The Commission supports Romania’s motion.

3. The Commission has a compelling interest in the outcome of Romania’s motion to vacate the Judgment and these proceedings generally. Romania is an E.U. Member State, and Petitioners are nationals of an E.U. Member State. The Commission considers any payment by Romania of the compensation granted in the Award to Petitioners to entail granting unlawful state subsidies (“State aid”), which is prohibited by Article 107 of the Treaty on the Functioning of the European Union (“TFEU”). Specifically, TFEU Article 107(1) prohibits any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods, insofar as it affects trade between Member States. TFEU Article 108(3) gives the Commission sole authority to authorize and monitor the grant of State aid by the Member States or any of their political subdivisions.⁷ Member States are obliged to notify the Commission of any plans to grant State aid and they are prohibited from putting such aid into effect before the Commission has

⁵ Amended Order and Judgment, Dkt. No. 13 (April 28, 2015) (amended and superseding the Order and Judgment, Dkt. No. 3 April 21, 2015). For avoidance of doubt, to the extent the original Order and Judgment survives the Amended Order and Judgment, any reference to the “Judgment” concerns both orders. Additionally, while Mr. Viorel Micula is technically an intervener in this action, as his position is indistinguishable from the Petitioners, this motion will refer to him as one of the Petitioners as well.

⁶ Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Award (December 11, 2013), not yet reported.

⁷ Excerpt of the relevant State aid provisions of the TFEU attached as **Exhibit 1**.

given an explicit authorization to do so.⁸ State aid granted by a Member State or public authority without the Commission's authorization is unlawful and may not be put into effect.⁹

4. On May 26, 2014 the Commission issued a suspension injunction requiring Romania to suspend any action that could lead to the execution or implementation of the part of the Award that it has not yet paid until the Commission had taken a final decision on the compatibility of the Award with the E.U. Treaties (the "Suspension Injunction").¹⁰ By decision of March 30, 2015 the Commission adopted its final decision on the Award, which prohibits Romania from paying any compensation granted under the Award to Petitioners (the "Final Decision").¹¹ Petitioners have lodged an application for the annulment of the Suspension Injunction before the General Court of the European Union.¹² That litigation, in which the Commission is being supported by three Member States,¹³ is pending.

5. The Commission files this brief to inform the Court of the reasons it believes mandate vacating the Judgment. By submitting this brief, the Commission specifically reserves all of its rights and does not waive any of its defenses or its sovereign immunity.

⁸ Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, Article 3, 1999 O.J. (L 83) 1, as last amended by Council Regulation (EU) No 734/2013 of 22 July 2013, 2013 O.J. (L 204) 15 [hereinafter: Regulation 659/1999]. A consolidated version of this regulation is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1999R0659:20130820:EN:PDF>.

⁹ Regulation 659/1999 Article 1(f).

¹⁰ 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. The official Romanian language version of that decision as well as an unofficial English translation thereof is attached as **Exhibit 2**.

¹¹ Commission Decision C(2015)2112 final of 30 March 2015 in State aid Case SA.38517 – Arbitral award Micula v Romania of 11 December 2013, not yet published in the O.J. The official Romanian language version of that decision as well as an unofficial English translation thereof is attached as **Exhibit 3**.

¹² Action brought on 2 September 2014 — Micula a.o. v Commission (Case T-646/14), 2014 O.J. (C 439) 29. Attached as **Exhibit 4**.

¹³ Germany, Spain and Slovakia.

BACKGROUND

6. The investment dispute giving rise to the Award results from Romania's repeal of a national law enacted in 1998 providing incentives for foreign investors to invest in Romania.¹⁴ The repeal of those investment incentives was a necessary precondition for Romania's accession to the E.U., since Romania's domestic law was required to be in put in compliance with E.U. law prior to accession, while the enactment of the national law providing those investment incentives violated the E.U. law prohibition on the grant of State aid.

7. In December 1999 the then fifteen E.U. Member States accepted Romania as a candidate for membership to the E.U. The accession negotiations between the E.U. and Romania proceeded as follows: the entire body of E.U. law (referred to as the *acquis communautaire*)¹⁵ was divided into 31 chapters for negotiation. On the side of the E.U., the Member States, acting at the level of the Foreign Ministers of the Member States or their deputies, unanimously adopted "E.U. Common Positions" which alerted Romania to areas of its domestic legislation which were not aligned with E.U. law. It was only when Romania amended its domestic legislation in line with E.U. law that conclusion of the chapter for inclusion in the Accession Treaty for accession to the E.U. could take place. Romania's failure to harmonize its domestic legislation with E.U. law could delay and ultimately prevent it from acceding to the E.U.

8. By its Common Positions of November 21, 2001¹⁶ and May 28, 2003¹⁷ on Chapter 6 of the negotiations (competition policy) the E.U. identified the national law providing for the

¹⁴ See Award, ¶ 132.

¹⁵ The "*acquis communautaire*" comprises the accumulated treaties, legislation, frameworks, guidelines and other legal and administrative acts adopted by the E.U. institutions and the judgments of the E.U. Court of Justice.

¹⁶ 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. Attached as **Exhibit 5**.

investment incentives in question as incompatible State aid schemes which were not in line with E.U. law and urged Romania to align that legislation with E.U. law without delay. Romania accordingly repealed the offending national legislation on August 31, 2004, with effect from February 22, 2005. The report accompanying the national act repealing the offending legislation explained:¹⁸

In order to meet the criteria in the Community rules on state aid, and also to complete the negotiations under Chapter No. 6 – Competition Policy it is necessary to eliminate all forms of State aid in national legislation incompatible with the *acquis communautaire* in this area and, in this respect, it is proposed to repeal [...] the provisions of Article 6 paragraph (1), letter (b), letter (d) and letter (e) of the Emergency Government Ordinance no. 24/1998 on the disadvantaged areas [...].

9. On April 25, 2005 the treaty of accession of Romania to the E.U. was signed and on January 1, 2007 Romania acceded to the E.U.¹⁹

10. As a result of the repeal of the investment incentives, Petitioners filed a request for arbitration on August 2, 2005 on the basis of a bilateral investment treaty concluded between

¹⁷ Conference on Accession to the European Union – Romania, European Union Common Position of 28 May 2003 on Chapter 6 – Competition Policy, CONF-RO 17/03. Attached as **Exhibit 6**.

¹⁸ Award, ¶ 241.

¹⁹ Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union, April 25, 2005, 2005 O.J. (L 157) 11. An electronic version of this Treaty can be found at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:L:2005:157:TOC>.

Sweden and Romania which entered into force on April 1, 2003 (“the BIT”).²⁰ Petitioners were considered Swedish nationals for the purposes of the arbitration and could therefore benefit from the BIT.²¹

11. The Commission only became aware of those arbitration proceedings in late 2008. On July 20, 2009 the Commission submitted an *amicus curiae* brief to the arbitration tribunal hearing the dispute in which it explained that the investment incentives provided by the offending legislation were contrary to E.U. State aid law. The Commission further explained that “[a]ny ruling reinstating the privileges abolished by Romania, or compensating the claimants for the loss of these privileges, would lead to the granting of new aid which would not be compatible with the [E.U. Treaties].”²² It also advised the tribunal that the “execution of [any award requiring Romania to re-establish investment schemes which have been found incompatible with the internal market during accession negotiations] can thus not take place if it would contradict the rules of EU State aid policy.”²³

12. By the Award, the arbitration tribunal concluded that by repealing the offending national legislation Romania did not ensure a fair and equitable treatment of Petitioners’ investments in Romania, violating Article 2(3) of the BIT, and ordered Romania to pay the damages plus interest that arose from the repeal of the investment incentives.²⁴ The compensation awarded to Petitioners under the Award is an amount corresponding to the unlawful subsidies

²⁰ 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. Award, ¶ 10.

²¹ Award, ¶ 5.

²² Commission of the European Communities, Written Submission Pursuant to Article 37(2) of the ICSID Arbitration Rules, July 20, 2009, ¶ 42. Attached as Exhibit 7.

²³ *Id.*, ¶ 121.

²⁴ Award, ¶ 1329(c).

foreseen under the offending legislation from the moment that that legislation was repealed by Romania (February 22, 2005) until the alleged scheduled expiry of the investment incentives provided by that legislation (April 1, 2009), plus interest and compensation for lost opportunity and lost profit. The tribunal declined to consider the Commission's arguments on the enforceability of the Award.²⁵

13. On May 26, 2014 the Commission adopted the Suspension Injunction enjoining Romania from granting Petitioners State aid through the implementation or execution of the Award until it had adopted its final decision on the compatibility of the Award with the E.U. State aid rules. On March 30, 2015 the Commission adopted its Final Decision on the Award. Article 1 of the Final Decision declares that payment of the compensation that the arbitration tribunal awarded to the claimants under the Award is State aid within the meaning of TFEU Article 107(1) that is incompatible with the E.U. Treaties. Article 2 of the Final Decision prohibits Romania from paying that compensation to Petitioners and orders Romania to recover any compensation that had already been paid under the Award. Article 3 of the Final Decision orders that recovery must be immediate and effective and that Romania must ensure that the Final Decision is implemented within four months.

14. The Suspension Injunction and the Final Decision impose a legal obligation upon Romania not to implement the Award.²⁶ Implementation of the Award, including enforcement of the Award by a national court, would contravene Romania's obligations as an E.U. Member State

²⁵ Award, ¶ 340.

²⁶ Suspension Injunction Article 1; Final Decision Article 2.

and constitute an infringement of E.U. law for which the Commission may refer Romania to the E.U. Court of Justice and ask that court to impose penalty payments on Romania.²⁷

SUMMARY OF ARGUMENT

15. Three well-established doctrines – the doctrine of international comity, the act of state doctrine, and the sovereign foreign compulsion doctrine – mandate vacating the Judgment. First, the recognition and enforcement of the Award directly interfere in the relationship between the E.U. and one of its Member States, regarding a matter between that Member State and nationals of another E.U. Member State, about a dispute subject to E.U. law arising in the E.U. Under the doctrine of international comity, the Court should give deference to the Commission's decisions regarding entities and acts under its jurisdiction. Second, the recognition and enforcement of the Award render ineffective, and thus invalidate, the Suspension Injunction and the Final Decision, which constitute the official acts of a foreign sovereign. Third, the foreign sovereign compulsion doctrine bars the recognition and enforcement of the Award, since Romania cannot implement the Award without infringing its E.U. law obligations under threat of sanction.

ARGUMENT

I. PRELIMINARY OBSERVATION: THE ACTS OF THE E.U. ARE THOSE OF A SOVEREIGN

16. The E.U. legal order, which is founded on the E.U. Treaties, is, in the words of the E.U. Court of Justice, a “new legal order of international law.”²⁸ “By contrast with ordinary international treaties, the [E.U. Treaties have] created [their] own legal system [...] By creating a

²⁷ TEU Article 4(3) and TFEU Article 107(1), Article 108(2), Article 258 and Article 260.

²⁸ Case 62/26, *Van Gend en Loos v Administratie der Belastingen*, [1963] ECR 1, 12.

Community of unlimited duration, having its [...] real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights [...] and have thus created a body of law which binds both their nationals and themselves.”²⁹ The E.U. legal order is characterized “in particular [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.”³⁰ By creating a union of unlimited duration with its own legal capacity and capacity of representation on the international plane and, more particularly, by creating quasi-governmental bodies (the institutions, including the Commission) that are independent from the national public authorities of the Member States and endowed with legislative, administrative and judicial sovereign powers stemming from a limitation of sovereignty or a transfer of powers from the Member States to the E.U., the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law that binds both their nationals and themselves.³¹

17. The Second Circuit has determined that the E.U. is “an agency or instrumentality of a foreign state” within the meaning of 28 U.S. Code § 1603(b).³² Therefore, the E.U.’s decisions and actions are those of a sovereign.

²⁹ Case 6/64, *Costa v E.N.E.L.*, [1964] ECR 585, 593.

³⁰ Opinion 1/09, *European and Community Patents Court*, [2011] ECR I-1168, ¶ 65.

³¹ Case 6/64, *Costa v E.N.E.L.*, [1964] ECR 585, 593.

³² *European Community v. RJR Nabisco Inc.*, 764 F. 3d 129, 144-145 (2d Cir. 2014) (finding “that the European Community is an organ of a foreign state, and thus an agency or instrumentality of a foreign state.”). Additionally, because the E.U. possesses its own sovereign powers that are binding on its Member States and its nationals, the E.U. is a foreign sovereign and thus a “foreign state” within the meaning of 28 U.S. Code § 1603(a).

II. THE DOCTRINE OF INTERNATIONAL COMITY MANDATES VACATING THE JUDGMENT

18. International comity is an abstention doctrine that reflects “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard to both international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”³³ Under a doctrine of abstention, a federal court possesses jurisdiction but defers to the judgment of an alternative forum.³⁴

19. The doctrine of international comity summarizes “the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum. Since international comity varies according to the factual circumstances surrounding each claim for its recognition, the absolute boundaries of the duties it imposes are inherently uncertain.”³⁵

20. The doctrine of international comity can be applied retrospectively or prospectively. When applied prospectively, courts in the Second Circuit have considered whether to dismiss or stay a domestic action based on (a) the interests of the U.S. government, (b) the strength of the foreign government’s interests, and (c) the adequacy of the foreign forum.³⁶ In the

³³ 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)).

³⁴ See Turner Entertainment Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518 (11th Cir. 1994); Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1235-36 (11th Cir. 2004).

³⁵ Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (DC Cir. 1984)

³⁶ Ungaro-Benages, 379 F.3d at 1235-36 (describing Second Circuit law); see also Bi v. Union Carbide Chems. & Plastics Co., 984 F.2d 582, 585-86 (2d Cir. 1993) (considering the strength of the foreign government’s interest in efficiently addressing a mass tort that took place within its borders); Jota v. Texaco, 157 F.3d 153, 160 (2d Cir. 1998) (holding that courts should consider the adequacy of the foreign forum and the strength of the foreign government’s interests); Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru, 109 F.3d 850, 854-55 (2d Cir. 1997) (considering the strength of U.S. public policy interests in debt enforcement and the foreign government’s interest in debt reorganization).

present case, all three factors favor vacating the Judgment on the basis of the doctrine of international comity.

21. First, the U.S. government has no interest in resolving the dispute underlying the Award. The Award derives from a treaty concluded between two countries (Romania and Sweden) to which the United States is not a signatory and which involves no U.S. nationals' treaty rights. If anything, the only interest the U.S. government may have is its continued interest in maintaining good relations with the E.U.³⁷

22. Second, the E.U. has a substantial interest in the resolution of the dispute underlying the Award. The resolution of that dispute is a matter wholly internal within the E.U. The dispute is between a Member State of the E.U. (Romania) and nationals of another E.U. Member State (Sweden). It concerns an investment carried out wholly in an E.U. Member State (Romania). It results from the repeal of domestic legislation of that Member State, withdrawing investment incentives to the benefit of those E.U. nationals, for the purposes of complying with E.U. law so as to conclude negotiations to accede to the E.U. The dispute underlying the Award falls exclusively within the scope of the E.U. Treaties. The E.U. Treaties and secondary E.U. legislation provide a comprehensive set of rules for the protection of investments which companies and citizens of one E.U. Member State carry out in another E.U. Member State. The E.U. Treaties' provisions on State aid exclusively govern a Member State's granting of

³⁷ See Remarks by Secretary of State Colin L. Powell Honoring 50 Years of U.S.-European Union Cooperation, November 18, 2003: "We embrace the European Union as a global partner. Together we are a global force for peace and security. As the EU has grown in size and stature, so too has the breadth and depth of the U.S. relationship with the EU. . . . That is, because at our core, we are partners. Whether it's combating terrorism and weapons of mass destruction, fostering global growth, good governance or whether it's stemming infectious disease, no nation can meet the challenges of our young century alone. And the world's best hope for meeting these challenges still rests, in large part, on a deep, broad, and lasting partnership between Europe and the United States." available at <http://2001-2009.state.gov/secretary/former/powell/remarks/2003/26307.htm>.

investment incentives to investors, like the ones repealed by Romania, that the compensation awarded by the arbitration tribunal are meant to compensate.

23. The Commission has demonstrated its strong sovereign interest in this matter by entering decisions regarding the prohibition on Romania's provision of State aid to Petitioners through payment of compensation under the Award.³⁸ In addition, the Commission intervened before Romania's domestic courts in recognition and enforcement proceedings concerning the Award brought by Petitioners. The Commission argued against recognition and enforcement of the Award and proposing that those courts refer preliminary questions for the interpretation of E.U. law to the E.U. Court of Justice. The Commission also intervened before the arbitration tribunal hearing the dispute and before the *ad hoc* committee hearing the appeal against the Award, which may result in the Award being annulled. The Commission further intends to intervene in recognition and enforcement proceedings concerning the Award brought by Petitioner Viorel Micula in the United Kingdom and France. Finally, litigation concerning the validity of the Suspension Injunction is pending before the E.U. Court of Justice and the Commission has announced the launch of infringement proceedings against the Member States concerned for maintaining in force the BIT from which the Award derives after Romania's accession to the E.U.,³⁹ which the Commission considers to violate E.U. law. All these actions demonstrate the E.U.'s predominant interest in resolving the dispute underlying the Award.

24. Third, the various courts within the E.U. provide an adequate forum. It cannot be seriously disputed that the E.U. Court of Justice and the national courts of the Member States, all of which play key roles in the enforcement of the E.U. State aid rules, provide full due process,

³⁸ The Suspension Injunction and the Final Decision.

³⁹ Press Release, European Commission, Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties (June 18, 2015). Attached as **Exhibit 8**.

transparency, and fundamental fairness to Petitioners. Indeed, Petitioners have already made use of those fora by filing an action before the E.U. Court of Justice for the annulment of the Suspension Injunction and requests before the national courts of Romania, the United Kingdom and France for the recognition and enforcement of the Award.

25. In sum, the U.S. government has no interest in this dispute, while the E.U. has preeminent interest. That interest is based on the Commission's decisions on E.U. State aid law governing the relationship between Petitioners (E.U. nationals) and Romania (an E.U. Member State). Disputes arising out of those relationships, under E.U. internal rules, should be settled through the abundant mechanisms provided through the E.U. Treaties, and not the *ad hoc* mechanisms of U.S. courts.

26. A decision by this Court to confirm and enforce the Award would directly undermine the Commission's decisions on the enforcement of the Award and policies regarding this purely internal E.U. matter. It would also prejudice the outcome of judicial proceedings currently pending before the E.U. Court of Justice and before the national courts of at least three E.U. Member States. For these reasons, the Court should refuse to confirm or enforce the Award and vacate Judgment.

III. THE ACT OF STATE DOCTRINE MANDATES VACATING THE JUDGMENT

27. The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory."⁴⁰ The policies underlying the doctrine include "international comity, respect for the

⁴⁰ Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations.”⁴¹

28. The act of state doctrine is “designed primarily to avoid judicial inquiry into the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of the foreign government.”⁴² Thus, the act of state doctrine is applicable when “the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within” its boundaries.⁴³

29. The act of state doctrine is “a substantive rule of law” which is applied after the Court concludes it has subject matter jurisdiction over the dispute. “Under that doctrine, the courts of one state will not question 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.”⁴⁴

30. The act of state doctrine applies to “acts done within their own States, in the exercise of governmental authority.”⁴⁵ The application of the doctrine depends on proof of a sovereign decision, as reflected in a “statute, decree, order, or resolution.”⁴⁶ It “requires that, in

⁴¹ W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l, 493 U.S. 400, 408 (1990).

⁴² O.N.E. Shipping, 830 F.2d at 452 (citing Hunt v. Mobil Oil Corp., 550 F.2d 68, 73 (2d Cir. 1977)); see also Konowaloff v. Metropolitan Museum of Art, 702 F.3d 140, 145 (2d Cir. 2012) (the act of state doctrine “expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals in the international sphere.”) (quoting Sabbatino, 376 U.S. at 423).

⁴³ W.S. Kirkpatrick & Co., 493 U.S. at 405.

⁴⁴ Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004).

⁴⁵ Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

⁴⁶ Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 718 (1976) (Marshall, J., dissenting); see also Republic of the Philippines v. Marcos, 862 F.2d 1355, 1369 (9th Cir. 1988) (for the doctrine to apply, “the acts

the process of deciding [a case or controversy], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.”⁴⁷

31. The act of state doctrine mandates vacating the Judgment. A decision by this Court to confirm and enforce the Award necessarily calls into question the validity of the Suspension Injunction and the Final Decision, described in paragraphs 4 and 13 above, and deprives them of any practical effect. By confirming or enforcing the Award or any method of giving it legal or practical effect, Romania would be obliged to grant Petitioners sums corresponding precisely to the State aid that the Commission has prohibited Romania from paying out in the Suspension Injunction and the Final Decision. Those decisions constitute official E.U. acts, 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.⁴⁸

32. To confirm and enforce the Award, in contravention of the Commission’s decisions and in violation of the E.U. State aid rules, would therefore “imperil the amicable relations between governments and vex the peace of nations.”⁴⁹ As such, there would be unavoidable foreign policy implications precisely of the sort that the act of state doctrine is designed to avoid.

in question must have involved public acts of the sovereign”); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1115 n.15 (5th Cir. 1985) (the doctrine only applies when the acts were “invested with the sovereign authority of the state”).

⁴⁷ W.S. Kirkpatrick & Co., 493 U.S. at 409; see also Ricaud v. American Metal Co., 246 U.S. 304, 309 (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.”).

⁴⁸ TFEU Article 108(3).

⁴⁹ Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918).

IV. THE FOREIGN SOVEREIGN COMPULSION DOCTRINE MANDATES VACATING THE JUDGMENT

33. The foreign sovereign compulsion doctrine, which rests on principles of international comity similar to those underlying the act of state doctrine, likewise justifies vacating the Judgment.

34. Where the conduct of a defendant has been compelled by a foreign government, it is entitled to assert the defense of foreign sovereign compulsion.⁵⁰ Under the foreign sovereign compulsion doctrine, the U.S. courts have “no right to condemn the governmental activity of another sovereign.”⁵¹ The foreign sovereign compulsion doctrine exempts a private party for acts or failures to act compelled by a foreign government.⁵² The acts of the private party “become effectively acts of the sovereign” when compelled.⁵³ The foreign sovereign compulsion doctrine reflects a judicial recognition that it is unfair to hold a private party accountable where that party’s refusal to comply with a foreign sovereign act would result in the imposition of significant penalties or the denial of significant benefits.⁵⁴

35. The foreign sovereign compulsion doctrine mandates vacating the Judgment. Romania is an E.U. Member State that must comply with its obligations under E.U. law. E.U. law prohibits Romania from paying out any compensation to Petitioners under the Award. In its Final Decision, over Romania’s objections, the Commission declared payment of compensation under

⁵⁰ O.N.E. Shipping, 830 F.2d at 453 (“where as here the conduct of the appellees has been compelled by the foreign government they are entitled to assert the defense of foreign government compulsion and the act of state doctrine is applicable”).

⁵¹ Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 607 (9th Cir. 1976).

⁵² See Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D. Del. 1970).

⁵³ *Id.*

⁵⁴ *Id.* at 1297-98. See, e.g., Societe Internationale Pour Participations Industrielles et Commerciales v. Rogers, 357 U.S. 197, 200 (1958) (where a Swiss company could not comply with a U.S. discovery order without violating Swiss penal laws, that order would not be enforced).

the Award to constitute State aid incompatible with the E.U. Treaties and ordered Romania to immediately and effectively recover all sums paid out to Petitioners on the basis of the Award. Romania is thus prohibited as a matter of E.U. law from complying with the Award, since that would entail the grant of unlawful and incompatible State aid under TFEU Article 107(1).

36. The E.U. Treaties provide substantial penalties for Member States that persist in infringing the State aid rules. TFEU Article 108(2) provides, insofar as relevant, the following:

If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

...

TFEU Article 260 provides, insofar as relevant, the following:

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.
2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

...

37. Romania's refusal to comply with its obligations under E.U. law in breach of the Commission's decisions would result in severe consequences for it. The Commission may initiate infringement proceedings against Romania for failing to comply with its decisions before the E.U. Court of Justice under TFEU Article 108(2) and may ask that court to impose penalty payments on Romania for failure to comply with a judgment establishing such an infringement as provided by TFEU Article 260(2).

38. Periodic penalty payments – the penalty traditionally imposed on a Member State for the failure to execute a Commission decision mandating the recovery of unlawful and incompatible State aid – are imposed upon the Member State on a repeated, ongoing basis until the Member State complies with the Court's judgment by executing the Commission's decision.⁵⁵ If Romania were to continue to fail to execute the Commission's decision after periodic penalty payments are instituted and refuse to pay the penalty payments, the Commission may offset the penalty payments Romania owes against amounts Romania is entitled to receive from the E.U.'s budget, for instance from the E.U.'s Social and Cohesion Funds.

⁵⁵ The Commission proposes lump sum or periodic penalty payments to the E.U. Court of Justice in infringement proceedings on the basis of a formula laid down in "Communication from the Commission on the Application of Article 228 of the EC Treaty [now TFEU art. 260] SEC(2005) 1658"; most recently updated by "Commission Communication C(2014) 6767 final of September 17, 2014 on Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceeding". Attached as **Exhibit 9**. The E.U. Court of Justice then determines, on the basis of its unlimited jurisdiction, the amount of the penalty to be paid by the Member State into the "European Union own resources" account. For a recent example, see the judgment in Case C-496/09 *Commission v. Italy*, [2011] ECR I-11483 in which the E.U. Court of Justice ordered Italy to pay a lump sum of EUR 30 million and a periodic penalty payment calculated by multiplying EUR 30 million by the percentage of the unlawful State aid that had not yet been recovered for every six months of delay in implementing the necessary measures to comply with the judgment finding an infringement by Italy for failing to comply with a Commission State aid recovery decision.

39. The Commission has compelled Romania (over its objections) not to implement the Award. The foreign sovereign compulsion doctrine therefore mandates vacating the Judgment.

CONCLUSION

40. For all the foregoing reasons, the Commission respectfully submits that the Court should vacate the Judgment. In the alternative, the Court should suspend the proceedings until other pending actions are resolved.

41. 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,

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