DIRITTO DEL COMMERCIO INTERNAZIONALE
ISSN 1593-2605
Anno XXXII Fasc. 4 - 2018

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THE ENFORCEABILITY OF ARBITRAL AWARDS DERIVING FROM INTRA - EU INVESTMENT AGREEMENTS. REFLECTIONS ON TREATY LAW ISSUES AND ON THE EU'S UNSUSTAINABLE POSITION

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THE ENFORCEABILITY OF ARBITRAL AWARDS DERIVING FROM INTRA-EU INVESTMENT AGREEMENTS. REFLECTIONS ON TREATY LAW ISSUES AND ON THE EU'S UNSUSTAINABLE POSITION

1. The stay of the enforcement before English judges in the *Micula* case. — 2. The validity of intra-EU investment agreements and the enforceability of investors' rights. — 3. The enforcement issue in ICSID cases and the irrelevance of the CJEU's *Achmea* Decision. — (*follows*) 3.1. Art. 351 of the TFEU. — (*follows*) 3.2. Art. 54 of the ICSID Convention: the obligation to enforce and the impossibility to justify a stay on the basis of domestic law. — 4. The enforcement issue in non-ICSID cases (in brief). — 5. Conclusions.

Abstract

The paper analyses the issue of the relationship between intra-EU investment agreements and the European treaties, both from the perspective of the arbitrability of disputes arising from the formers and from the one of the enforcement of the resulting awards. The author argues that intra-EU investment disputes are fully arbitrable (both from the point of view of the VCLT and from the perspective of EU law) and, at least in the context of ICSID, there is no doubt that final awards are enforceable (also) before the courts of EU Member States (considering that the ICSID Convention sets forth a self-contained regime, pre-existing to EU law, which imposes the execution of awards and does not allow for any form of review of arbitral decisions by national courts).

1. *The stay of the enforcement before English judges in the Micula case.*

On 27 July 2018 the UK Court of Appeal issued a decision concerning the well-known *Micula* saga (1) through which it stayed the enforcement of an ICSID Award condemning Romania to pay RON 376,433,229 plus

(1) Court of Appeal (Civil Division), *Viorel Micula, Ioan Micula, S.C. European Food S.A., S.C. Starmill s.r.l., S.C. Multipack s.r.l., (claimants/appellants) v. Romania* (defendant/

interest to the Claimants for the breach of the Sweden-Romania BIT (2). This decision is a relevant tile in the process of analysis of the relationships between international investment law (i.e. international investment agreements - IIAs) and European Union law, a subject which is at the centre of political and academic attention since the recent *Achmea* decision of the Court of Justice of the European Union, which boldly declared investment arbitration between EU investors and EU countries contrary to EU law (3). In this regard, not only the decision to which we are referring recalls the issue of conflicts between investment treaties' and European treaties' norms but, mainly, it is relevant for the analysis of the scope of the obligation to enforce ICSID awards, i.e. the relationship between the ICSID Convention and EU law obligations.

It is important, first of all, to recap the content of the decision. Notoriously, the Claimants prevailed in an ICSID arbitration against Romania (4). The case originated from the bilateral investment treaty between Sweden and Romania; this is a so-called intra-EU BIT, i.e. an investment treaty entered into by two European countries prior to the accession in the EU of one of them (in the present case, the treaty was in force since 2002, while Romania joined the EU in 2007). After the issuance of the award (5), Claimants started enforcement proceedings in Romania, USA (6) and UK. On 26 May 2014, after the enforcement was granted in Romania, the EU Commission — who already took part to the arbitration as *amicus curiae*, claiming that intra-EU BITs are ineffective and that any payment made in accordance with those treaties would amount to an illegal state aid — issued a suspension injunction aimed at restraining Romania from taking any action to execute or implement the award. The Commission then started, on 1 October 2014, infringement proceedings against Romania pursuant to art. 108, par. 2, TFEU, and issued the Final Decision 2015/1470 on 30 March 2015, in which it declared that the payment of the award by Romania was illegal state aid, prohibited Romania to make any payment and imposed that amounts already paid shall be immediately recovered. Against this decision, on 6 November 2015 the Claimants

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respondent) *and European Commission* (intervener), [2018] EWCA CIV 1801. An excerpt of the decision is available in this volume under the *Rassegna Di Giurisprudenza* section.

(2) *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, award of 11 December 2013.

(3) Case C-284/16, *Slowakische Republik v. Achmea BV*, Judgment of 6 March 2018, para. 33 ff. On this decision see L. Melchionda, *The European Court of Justice Ruling in Achmea v. Slovak Republic: More Questions than Answers*, in this *Rivista*, 2018, p. 337 ff.

(4) See *supra* note 2.

(5) The Respondent State also tried to obtain the annulment of the award pursuant to art. 52 of the ICSID Convention but this attempt failed. See the Decision on Annulment of 26 February 2016.

(6) The US proceedings will not be subject of the present paper. All relevant information may be found at *https://www.italaw.com/cases/697*.

started annulment proceedings before the General Court of the European Union (GCEU).

In the meanwhile, enforcement proceedings continued also before English courts. Initially, on 17 October 2014 (i.e. prior to the Commission's Final Decision) the award was registered in the UK pursuant to S. 2 of the *Arbitration (International Investment Disputes) Act 1966*, which incorporates the ICSID Convention into domestic law and affirms that an ICSID award shall be of the same force and effect of a judgment of the High Court and that this Court shall have control over the execution of the award as if it had been a domestic judgment. However, on 20 January 2017 Blair J issued a stay order, arguing that the enforcement of the Award should be suspended pending the proceedings before the GCEU concerning the Claimants' request seeking the annulment of the Commission's Final Decision. This because the Commission's Decision prohibits Romania from paying the Award, and the "principle of sincere cooperation" in Art. 4(3) of the Treaty of the European Union precludes national courts from taking decisions which conflict with a decision of the Commission. According to the Judge this did not create a conflict with the duties of the UK under the ICSID Convention, because through registration pursuant to the 1966 Act (which implements the 1965 Washington Convention), an ICSID award is equated to a final domestic judgment for enforcement purposes (so-called "equivalence argument"), and the enforcement of a purely domestic judgment would be subject to EU law (7).

The Claimants appealed against this decision, arguing that the Judge erred in finding that the obligation to enforce the ICSID Award pursuant to art. 54 of the ICSID Convention as incorporated in the UK through the 1966 Act does not prevail over UK Courts' duties under EU law (8). The three appeal judges divided their analysis into two parts, the first concerning the obligations deriving from the ICSID Convention burdening on the UK and the second regarding the applicability of art. 351 of the TFEU to the relationship between the ICSID Convention and the European Union

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(7) See para. 203 of the High Court's decision, available at *https://www.italaw.com/sites/default/files/case-documents/italaw8133_6.pdf*. According to Blair J, alternatively, a stay was appropriate because the issues raised in the case before him substantially overlapped with the arguments raised in the annulment proceedings in respect of the Commission's Final Decision which are being brought by the claimants in the European Court in Luxembourg, giving rise to the risk of inconsistent decisions.

(8) Claimants also argued that the arbitration award was *res judicata* and, according to the CJEU's case law, should prevail over inconsistent EU law rules (or with a determination of the Commission or the CJEU). This argument, concerning the applicability of the so-called *Kapferer* principle in the present case (deriving Court of Justice of the European Union, Judgment of 16 March 2006, *Rosmarie Kapferer v Schlank & Schick GmbH*, in www.curia.europa.eu) is a purely EU law subject which is not of interest for the purpose of the present paper. See, in this regard, R. Ortlep, M. Verhoeven, *The principle of primacy versus the principle of national procedural autonomy*, in *http://www.nall.nl/tijdschrift/nall/2012/06/NALL-D-12-00003/fullscreen*, 2012.

Treaties. It is to be noted that, while the Judges unanimously decided to confirm the stay of the enforcement, they reached such a conclusion on the basis of different argumentations. As a consequence, the reasonings of both parts of the judgment are composed by a majority and a concurring opinion.

As to the analysis concerning the obligation of execution of ICSID awards burdening on the UK, Arden and Legatt LJJ reached the conclusion that S. 2 of the 1966 Act imposes to UK judges to give effect to the ICSID Convention and, differently from what was said by the High Court, they stated that the execution of the ICSID Convention is not subject to EU law (i.e. the execution of the award shall not be refused if it runs against EU law principles) as if the ICSID awards was a domestic judgment. The majority explained that S. 2 of the 1966 Act cannot be interpreted as a simple domestic statute, because it reflects the UK obligations under the ICSID Convention and it implies a presumption of compliance with such an international treaty. It is precluded to national courts to refuse to enforce an ICSID award for reasons which could apply to a national award (9). Hence, "it would not be open to the courts of England and Wales to do more than impose a temporary stay on execution if the award is enforceable" (10). On this basis, provided that the stay does not actually thwart the possibility to execute the award, the Court of Appeal granted the stay *on the basis of its domestic law* because it considered, without any particular explanation, that it was worth waiting for the GCEU's decision and this was not against the purposes of the ICSID Convention (11), which — as known — provides for the applicability of national procedural law for the regulation of the enforcement proceedings (12). Contrariwise, Hamblen LJ approved the equivalence argument used by the High Court and accepted that, as said at first instance by Blair J, "[i]f there was a final judgment of the English court in the terms of the Award and a subsequent Commission decision stating that payment of the judgment was prohibited and would constitute unlawful State aid there can be little doubt that the English court

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(9) Para. 121. As noted by the Judges, the only reason allowing the refusal of enforcement is, therefore, State immunity, as expressly stated by art. 55 of the ICSID Convention.

(10) Para. 125.

(11) Para. 123. In this regard, it is worth noting that at paras. 260-261 Leggatt LJ clearly explains that there is no obligation to stay the enforcement deriving from the alleged contrariety of the enforcement to EU law. The stay is only dictated by domestic law principles which are compliant with the ICSID Convention.

(12) Para. 107 stipulates that a stay is possible "so long as such stay is within the overall purpose of the ICSID Convention. Applying this approach, a stay on execution is justified in this case until the resolution of the GCEU proceedings or further order in the meantime for reasons which are neither dependent on those proceedings nor inconsistent with the overall purpose of the ICSID Convention".

could and would stay enforcement" (13). As a consequence, in his opinion, there was a clear and specific bar to the enforcement of the Award.

With regard to art. 351 TFEU, it is first of all necessary to recall the content of the rule, which stipulates that the rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties (first paragraph). Moreover, to the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established (second paragraph). In this regard, Hamblen and Legatt LJJ agreed in considering that — pursuant to the request to GCEU concerning the applicability of art. 351 TFEU in the present case — Blair J was right in granting the stay on the ground that the risk of conflicting decisions should be avoided. On the contrary, Arden LJ argued that Article 351 TFEU, by imposing the prevalence of pre-accession treaties with third parties, clearly determines the applicability of the ICSID Convention. It is for national courts and not for the EU Courts to carry out an analysis aimed at evaluating the existence of a conflict of norms (14), keeping in mind that it is UK Courts' duty to ensure compliance with international obligations which preceded the accession to the EU. In this regard, the concurring Judge noted the ICSID Convention generates obligations (such as the duty to enforce arbitral awards) the execution of which is a matter of interest for all the contracting parties. According to Arden LJ this is confirmed by the fact that, according to art. 64, all the parties of the Convention may bring a matter before the International Court of Justice in the case they believe that their interests arising from the treaty have been impaired (15). For this reason, the obligation to enforce ICSID awards shall prevail over EU law. However, on the basis of the principle of sincere cooperation between Member States and the EU established by art. 4, para. 3, TEU (16), Arden LJ accepted that a stay could be granted considering that, in her opinion, the possibility to provisionally suspend the execution

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(13) Para. 139.

(14) The reference applies to Court of Justice of the European Union, Judgment of 2 August 1993, Case C-158/91, *Levy*, in *www.curia.europa.eu*, para. 21.

(15) Para. 187 ff. and, in particular, 192, where it is said that "every state has an interest in every other's adherence to its mandatory obligation to enforce awards and has been given the right on an unqualified basis to bring a dispute before that Court. On that basis, even though the current dispute concerns only Romania and Sweden, third countries are involved".

(16) Such rule stipulates that: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

of an award in accordance with provisions of domestic law is (allegedly) not against the purpose of the ICSID Convention.

Given the above, the present paper will try to provide readers with some clarity concerning the relationship among international investment treaties, the ICSID Convention and EU treaties. After having demonstrated — in section 2 — why the EU treaties did not overcome the provisions of investment treaties (something which is the assumption preceding a discussion on the enforceability of intra-EU investment awards), we will focus on the issue of execution of investment awards (both in EU and non-EU countries) focusing, first of all, on ICSID arbitral awards (section 3) and, later, on non-ICSID awards (section 4). Section 5 will be devoted to some brief conclusions.

2. *The validity of intra-EU investment agreements and the enforceability of investors' rights.*

The question whether the rights and obligations contained in intra-EU investment treaties are enforceable and, therefore, whether intra-EU investment disputes are arbitrable is a matter which attracted huge debate in scholarship and has been largely analysed by the case law (17). In brief, the issue may be summarized as follows: the EU Treaties as amended in Lisbon in 2007 now provide for the EU competence in matters of investment. This new content, according to the EU Commission, allegedly overlaps with the one of intra-EU BITs, both from the perspective of substantive obligations (i.e. the BITs' standards of treatment which may collide with EU freedoms) and the one of procedural rights (i.e. the possibility to recur to investment arbitration given by BITs and the necessary recourse to national courts set forth by EU treaties) (18). Indeed, in the Commission's view: (*i*) the protection of intra-EU investments is now subject to the regulation of the Treaty on the Functioning of the European Union (TFEU); (*ii*) the applicability of intra-EU BITs would generate a discrimination among EU nationals on the basis of their nationality; (*iii*) the only judicial organ

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(17) For some recent cases, see note 22 below. For some papers concerning the issue see, *inter alia*, G. Zarra, *The Arbitrability of Disputes Arising from Intra-EU BITs*, in *The American Review of International Arbitration*, 2014, p. 573 ff.; C. Binder, *A Treaty Law Perspective on Intra-EU BITs*, in *Journal of World Investment & Trade*, 2016, p. 964 ff.; A. Reinisch, *Articles 30 and 59 of the Vienna Convention of the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations*, in *Legal Issues of Economic Integration*, 2012, p. 157 ff.; G. Ciliberto, *Intra-EU BIT's Arbitration Clause and EU Law: the Countdown for the CJEU's Final Say*, in this *Rivista*, 2018, p. 217 ff.

(18) S. Hindelang, *Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration*, in *Legal Issues of Economic Integration*, 2012, p. 179 ff.

deputed to have the final say on such provisions is the Court of Justice of the European Union: should intra-EU disputes be arbitrated, this would constitute a violation of art. 344 of the TFEU, setting forth the monopoly of the CJEU for the interpretation of EU Treaties, to be exercised through the mechanism of preliminary rulings (set forth by art. 267 TFEU) ([19]); and (*iv*) the principle of mutual trust, which governs relationship among EU Member States, requires that intra-EU disputes are subject to the jurisdiction of Member States.

Notably, one of the first occasions in which the problem has been analysed was the *Micula* award ([20]) which has led to the English decision which is the subject of the present paper. Here, as in many other cases, the Tribunal noted that there is no conflict of treaties among IIAs and EU law and proceeded to hear the case and condemn Romania. It is therefore necessary, prior to discuss about the execution of arbitral awards dealing with intra-EU investments, to ascertain whether such an approach is correct.

This alleged clash of international norms may be approached both from the perspective of the 1969 Vienna Convention on the Law of Treaties (VCLT) and from the perspective of EU law. We will carry out the analysis from both these points of view and then focus on the most recent developments in the European case law, which, surprisingly enough, completely ignores the law of treaties.

VCLT perspective.

Should a total overlap between investment and EU treaties have occurred, the matter would have been regulated by Article 59(1)(b) VCLT, which provides that a treaty shall be considered as terminated (and therefore invalid) if the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied synchronously ([21]). However, as unanimously confirmed by the arbitral tribunals which dealt with the matter ([22]), Article 59 VCLT re-

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([19]) This last rule has been defined as the "crown jewel" of EU law, because it ensures a very strong internal mechanism of safeguard. See S. Miron, *The Last Bite of the BITs - Supremacy of EU Law versus Investment Treaty Arbitration*, in *European Law Journal*, 2014, p. 333.

([20]) *Supra*, note 2, para. 318 ff.

([21]) See T. Giegerich, *Art. 59*, in O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties*, Berlin - Heidelberg, 2013, p. 1011 ff.

([22]) See, *inter alia*, *Eureko B.V. v. The Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para. 65 ff.; *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Arbitration No. 2004/088, Partial Award of 27 March 2017, para. 168 ff.; *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Arbitration No. V 2014/163, Partial Award of 28 June 2017, para. 306 ff.; *WNC Factoring LTD (United Kingdom) v. The Czech Republic*, PCA Case No. 2014-34, Award of 22 February 2017, para. 294 ff.; *Jurgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen, JSW Solar*

quires that the two allegedly incompatible treaties relate to the same subject matter. This is not the case for BITs (aimed at protecting foreign investments after their establishment) and the TFEU (regarding, at most, the initial phase of investments). Moreover, according to certain scholars ([23]), Article 59 requires, for the effectiveness of the treaty termination, that a formal denunciation process is started in accordance with the procedure set forth in Article 65 VCLT and in none of these cases did this happen.

Contrariwise, if there is only a partial incompatibility between clauses of the first and the second treaties, Article 30(3) VCLT applies, with the consequence that, in cases of treaties "relating to the same subject-matter, (...) when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty *applies* only to the extent that its provisions are compatible with those of the later treaty" (emphasis added) ([24]). In this regard, it shall first of all be ascertained whether the "same subject matter" requirement regards the entire scope of application of the two treaties or only of specific clauses. If the former interpretation is accepted, as we have seen, the issue would not arise in the case of intra-EU BITs, provided that investment treaties have a different (and stricter) scope of application if compared to EU treaties ([25]) (and, indeed, somebody stated that they could be considered as *lex specialis* and shall therefore prevail over EU Treaties) ([26]). This conclusion, however, would

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(zwei) GmbH & Co. KG v. The Czech Republic, PCA Case No. 2014-03, Final Award of 11 October 2017, para. 241 ff.; *Eiser Infrastructure Limited y Energia Solar Luxembourg S.à.r.l. v. Reino de Espana*, ICSID Case No. ARB/13/36, Award of 4 May 2017, para. 160 ff.; *Anglia Auto Accessories Limited v. The Czech Republic*, SCC Arbitration No. V 2014/181, Final Award of 10 March 2017, para. 98 ff.; *I.P. Busta & J.P. Busta v. The Czech Republic*, SCC Arbitration No. V 2015/014, Final award of 10 March 2017, para 95 ff.. In addition, it is worth here mentioning the only recently available decision *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award of 27 December 2016, para. 277 ff.

([23]) A. Reinisch, *supra*, note 17, p. 163. EU States' practice related to the termination of intra-EU BITs seems to confirm this approach. There is, however, no agreement on this issue. See, in general terms, F. Dubuisson, Article 59, in O. Corten, P. Klein (eds.) *The Vienna Convention on the Law of Treaties, A Commentary*, Oxford, 2011, p. 1336 ss.

([24]) On this provision see A. Orakhelashvili, *Art. 30*, in O. Corten, P. Klein, *The Vienna Convention on the Law of Treaties - A Commentary*, Oxford, 2011, para. 65 ff. It is to be stressed that, according to this provision, the norms of the earlier treaty are not invalid but shall simply be considered as ineffective.

([25]) *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, Award of 15 February 2018, SCC Arbitration (2015/063), para. 439, "the ECT and EU law do not regulate the same subject matter. Arbitral tribunals have repeatedly held that '[a]s regards the substantive protections in [...] the ECT, [...] the ECT and EU law [do not] share the same subject-matter', and that 'the EU Treaties and the EU law rooted in, and flowing from them do not relate to the same subject matter as BITs or multilateral treaties for the protection of foreign investment'".

([26]) C. Binder, *supra*, note 17, p. 973 where it is said that "even in a case of a true conflict of norms (...) the result could be the application of the intra-EU BIT in accordance

too much reduce the applicability of art. 30(3) and, indeed, it is not to be preferred (27). It is therefore more advisable to look at specific clauses dealing with the same subject matter and understand if there is an actual overlap between them (28). In other words, it is necessary to ascertain whether — as the Commission affirms — there are EU norms regulating, *e.g.*, the fair and equitable treatment of foreign investments, expropriation, or the investors' right to start arbitration proceedings against host states (29), so as to generate an incompatibility which cannot be resolved through any interpretative technique and requires the disapplication of one of the conflicting norms (30).

From the substantive point of view, it is first of all necessary to deny the Commission's thesis according to which the standards of treatment afforded by intra-EU IIAs generate a discrimination among EU citizens on the basis of their nationality (31). Should the Commission's approach be proved true, this would mean that the substantive provisions contained in intra-EU IIAs are in conflict with art. 19(1) TFEU, which encapsulates the principle of equality (32). In this regard, it is certainly possible to say that

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with the *lex specialis* rule which is firmly established in customary international law. The intra-EU BIT with only two treaty parties is arguably more special than EU Treaties with 28 parties. Also the BIT's subject matter is more special given its specific focus on the protection of investors who are nationals of the other treaty party. Accordingly, the *lex specialis* rule would have arguably called for the application of the intra-EU BIT"; J. Kleinheisterkamp, *Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty*, in *Journal of International Economic Law*, 2012, p. 93, fn. 36, mentioning Court of Justice of the European Union, Case C-264/09, *Commission v. Slovakia* (2011), in *www.curia.europa.eu*, paras. 32, 40 and 50-52.

(27) S. Saluzzo, *Accordi internazionali degli Stati membri dell'Unione Europea e Stati terzi*, Milano, 2018, p. 104.

(28) For this approach see also B. Conforti, *Consistency among Treaty Obligations*, in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford, 2011, p. 187 ff.

(29) For a meaningful comparison of international IIAs standards and EU law see T. Fecak, *International Investment Agreements and EU Law*, The Hague, 2016, p. 54 ff.

(30) "Treaty conflict is probably best defined as a conflict between provisions of different treaties which cannot be resolved through such mechanisms as 'reconciling interpretation' or even 'balancing' or 'proportionality'": see J. Klabbers, *Beyond the Vienna Convention: Conflicting Treaty Provisions*, in E. Cannizzaro (ed.), *supra*, note 28, p. 193.

(31) Such a thesis has been sustained also by S. Hindelang, *Member State BITs — There's Still (Some) Life in the Old Dog Yet*, in *Yearbook of International Investment Law and Policy*, 2011, p. 222 where it is said: "not each and every Member State maintains BITs with all other Member States. In such a situation, a host-State might be perceived to be granting an EU investor protected by a BIT more favourable treatment than an EU investor not protected by a BIT. Not being justifiable, this situation is prohibited by the fundamental freedoms". In general terms on the ground of discrimination based on nationality see G. Zaccaroni, *Differentiating Equality? The Different Advancements in the Protected Grounds in the Case Law of the European Court of Justice*, in L.S. Rossi, F. Casolari (eds.), *The Principle of Equality in EU Law*, Heidelberg, 2017, pp. 169-173.

(32) The rule states that: "Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the

equality is a general principle of EU law (33) which imposes that comparable situations shall be treated in the same way, while different situations shall be treated differently (34). However, this principle shall be actualized in the context of an alleged discrimination put in force by intra-EU IIAs. The following question, therefore, arises: is it possible to say that investor who started their business in a certain historical period and on the basis of a certain political/legal scenario (i.e. investors who decided to invest in a non-EU country on the basis of the incentives existing for such business set forth by IIAs) are comparable to investors who at the same time started businesses in a EU country on the basis of a completely different legal setting (i.e. they knew that their investment was to be regulated on the basis of the provisions contained in EU treaties)? In our opinion such a comparison is not possible (35) given the completely different perspectives from which the two investors started their business. If our assumption is correct, no discrimination can take place on the basis of art. 19 TFEU.

Having said the above, it is to also be noted that the Commission sees a specific conflict between some provisions of EU law (and/or general principles of EU law) and the provisions of intra-EU investment treaties. In this regard, it is worth considering the very recent *Communication from the Commission to the European Parliament and the Council concerning Protection of Intra-EU investment* of 19 July 2018 (36) in which the Commission tried to explain why investors in the EU may fully rely on EU law (instead of IIAs, which are considered incontestably incompatible with EU law) as a source of adequate protection for them (37). First of all, the creation of a new economic activity is protected by the freedom of transfer of capitals from a country to another (as established by Art. 63 TFEU) and by the right to establish in other Member States, set up agencies, branches and subsidiaries (as per Art. 49 TFEU). Secondly, EU law protects investors from unjustified restrictions, through the prohibition of discrimination and of national measures unduly restricting investors' rights. Discrimina-

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consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

(33) Court of Justice of the European Union, Judgment of 19 October 1977, Joined cases 117/76 and 16/77, *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen; Diamalt AG v Hauptzollamt Itzehoe*, in *www.curia.europa.eu*. See also F. Benoit-Rohmer, *Lessons from the Recent Case Law of the EU Court of Justice on the Principle of Non-discrimination*, in L.S. Rossi, F. Casolari (eds.), *supra*, note 31, p. 153.

(34) See, *inter alia*, C. McCrudden, S. Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach*, 2009, in *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762815*; F. Benoit-Rohmer, *supra*, note 33, p. 153.

(35) G. Zarra, *supra*, note 17, p. 590.

(36) COM/2018/547 final, in *https://eur-lex.europa.eu*.

(37) The same position was already sustained by AG Kokott in a scientific article that she wrote. See J. Kokott, C. Sobotta, *Investment Arbitration and EU Law*, in *Cambridge Yearbook of European Legal Studies*, 2016, p. 4.

tory or restricting measures shall be duly justified and, in any case, they shall comply with general principles of EU law, such as proportionality, legal certainty and the respect for legitimate expectations. More generally, all national restrictions shall comply with fundamental rights, e.g. the freedom to conduct a business and the right to property.

While these Commission's statements are certainly true, this does not mean that a general regime of protection of all people's rights (such as the one established by EU law) may be compared (or, even more, equated) to a specific regime which directly deals with a specialized field of international law, i.e. the regulation of foreign investments ([38]). There is no overlap between these fields, in particular if one considers the (already demonstrated) assumption that the legal conditions in which investments were commenced under intra-EU investment treaties are completely different from the current ones under EU Treaties. In addition, if it is true — as the Commission says — that EU law adequately protects investors' legitimate expectations, EU Institutions should not ignore the legitimate expectations created by IIAs freely negotiated by states before their accession in the Union, which cannot be completely ignored once a state's accession in the EU takes place ([39]).

From the procedural point of view, Article 30(3) VCLT does not have the effect that arbitration clauses in IIAs are ineffective, considering that Article 344 — i.e. the treaty clause allegedly superseding consent to arbitration — affirms that "Member States undertake not to submit a dispute [*between themselves*] concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein" and, therefore, does not overlap with a mechanism of dispute resolution involving States, on the one side, and individual investors, on the other. Indeed, the "offer" to arbitrate contained in the vast majority of BITs is not envisaged in EU treaties, even *in nuce*, and, as a consequence, it cannot be considered forbidden ([40]) in light of the alleged contrast with either (*i*) a general provision concerning the competences of the CJEU, or (*ii*) a principle — such as mutual trust — which concerns the relationship among Member States and should not affect private parties. In addition, as recently stated by an Arbitral Tribunal referring to the CJEU's role, "no

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([38]) G. Zarra, *supra*, note 17, pp. 589-590.

([39]) J. Paulsson, *The Power of States to Make Meaningful Promises to Foreigners*, in *Journal of International Dispute Settlement*, 2010, p. 341 ff.

([40]) *Novenergia*, *supra*, note 25, para. 440, "there is no incompatibility between the dispute resolution mechanism in Article 26 ECT and EU law.335 In the words of the *Charanne v. The Kingdom of Spain* tribunal, "there is no rule of EU law preventing EU Member States from resolving through arbitration their disputes with investors of other Member States [,] [n]either is there any rule of EU law preventing an arbitration tribunal from applying EU law to resolve such a dispute". The Tribunal was here mentioning *Charanne and Construction Investments v. Spain*, SCC Case No. 062/2012, Final Award, 21 January 2016, para. 438.

other jurisdiction in the world has asserted a monopoly — much less succeeded in asserting a monopoly — over the interpretation of its law, even though it may of course claim to have 'the last word' on the meaning of the law" (41). Finally, it cannot be neglected that the general jurisdiction of national courts (or the protection that can be afforded by domestic administrative authorities) cannot be compared to the special and specific protection that can be granted by arbitral tribunals established for the sole purpose of solving a certain investment dispute (42).

The issue concerning the alleged overlap between EU law and investment treaties and the related applicability of art. 30(3) VCLT recently emerged in various disputes arising from intra-EU BITs. When intra-EU investment disputes have been started before arbitral tribunals, both respondent States and the EU Commission (acting as *amicus curiae*) objected the jurisdiction of arbitral tribunals by saying that the above mentioned provisions of the VCLT rendered arbitration clauses contained in BITs invalid or ineffective. However, it is not by chance that all the available awards have analysed the issue of intra-EU IIAs reached exactly the same results (43), i.e. they rejected the Respondents' and the Commission's arguments on the basis of the analysis carried out above.

EU Law Perspective.

Some authors (44) have also argued that, regardless the applicability of art. 30(3) VCLT, it is the same TFEU which would dictate the applicability of intra-EU IIAs instead of EU law. The reference applies to art. 351(1) TFUE, according to which, as we already saw, "[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties". According to the abovementioned opinion, this rule should also refer, on the basis of an expansive interpretation, to the survival of rights and obligations conferred to individuals. This idea would find explicit confirmation in the quite dated

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(41) *PL Holdings*, *supra*, note 22, para. 315. This situation is even more aggravated by the well-known refusal by the CJEU to allow preliminary rulings from arbitral tribunals, which could — *ex post* — be interpreted as a signal of a total closure of the EU Court towards investment arbitration.

(42) G. Zarra, *supra*, note 17, p. 583.

(43) See, inter alia, the cases mentioned *supra*, note 22.

(44) K. von Papp, *Solving Conflicts with International Investment Treaty Law from an EU Law Perspective: Article 351 TFEU Revisited*, in *Legal Issues of Economic Integration*, 2015, p. 325 ff.; see also S. Saluzzo, *supra*, note 27, p. 147, who seems to agree with this approach. *Contra* see F. Munari, C. Cellerino, *General Principles of EU Law and International Investment Arbitration*, in this *Rivista*, 2016, pp. 122-123.

CJEU *Burgoa* ([45]) case, where, at para. 10, the Court recognised that EU member states might have obligations under an agreement not just to their treaty partners, but to individuals as well.

Such an approach, which is surely fascinating, does not, however, have any confirmation in more recent case law. In order to this idea be correct, it should be proved that art. 351 TFEU has direct effects and, as a consequence, it can be directly enforced by individuals ([46]); there is no case law or scholar's writing sustaining this opinion. In this regard, it should be also born in mind that the above opinion assumes that investors directly owe (and subsequently enforce) rights which are attributed by BITs (so-called "direct rights" theory) and, while this assumption is accepted by the vast majority of academics, it does not find unanimous acceptance ([47]). In conclusion, the possibility to consider the provision of art. 351 TFEU applicable to individuals is still shrouded in ambiguity.

Recent Developments

Notably, the above conclusions on intra-EU IIAs have been also shared by the EU Advocate General Melchior Wathelet in his opinion delivered in the case *Slowakische Republik v. Achmea BV* ([48]), in which the CJEU has been called upon to rule on the compatibility of intra-EU BITs and EU law. Surprisingly enough, however, the CJEU has recently boldly declared that

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([45]) Court of Justice of the European Union, Decision of 14 October 1984, Case C-812/79, *Attorney General v. Burgoa*, in *www.curia.europa.eu*. On the same vein see *Levy*, *supra*, note 14, paras. 18-19. On these cases see J. Klabbers, *Treaty Conflicts and the European Union*, Cambridge, 2009, p. 129.

([46]) On direct effects see G. Strozzi, R. Mastroianni, *Diritto dell'Unione Europea*, VI ed., Turin, 2013, p. 275; R. Adam, A. Tizzano, *Manuale di diritto dell'Unione europea*, Turin, 2017, p. 172; F. Martines, *Direct Effect of International Agreements of the European Union*, in *European Journal of International Law*, 2014, p. 129 ff.

([47]) In favour of the "direct rights" theory see Z. Douglas, *The Hybrid Foundation of Investment Treaty Arbitration*, in *British Yearbook of International Law*, 2003, p. 182; A. K. Bjorklund, *Private and Public International Law: Why Competition among International Economic Law Tribunals Is Not Working*, in *Hastings Law Journal*, 2007, p. 126. This approach also finds indirect confirmation in all the works (today the vast majority) which attribute international subjectivity to individuals. In this regard, it is noteworthy R. Sapienza, *Individui (dir. int.)*, in *Enciclopedia Treccani online*, 2013, para. 4, according to whom it is to be accepted that — in the fragmented scenario of international law — individuals may be considered as subject in certain areas of international law in which they are addressee of rights and/or obligations, such as human rights law, international criminal law and, we would add, international investment law. On the subjectivity of individuals see, also, in general terms, A. Clapham, *The Role of Individuals in International Law*, in *European Journal of International Law*, 2010, pp. 25-30. The "direct rights" theory is, however, contested by certain scholars, who still consider that in international investment law investors exercise rights which are owed by their states. See T. S. Voon, A. D. Mitchell, J. Munro, *The Impact of Mutual Termination of Investment Treaties on Investor Rights*, in *ICSID Review - Foreign Investment Law Journal*, 2014, p. 455.

([48]) Case C-284/16, Opinion of the AG of 19 September 2017, para. 138 ff. The AG's opinion has been welcomed with enthusiasm by scholarship, at least for the results it reached. See, in this regard, the meaningful comment by G. Ciliberto, *supra*, note 17.

intra-EU BITs are incompatible with EU law (49). Indeed, according to the Court, the EU is an autonomous legal order based on the principle of primacy on Member States' law (50) and such a feature may only be granted by ensuring the monopoly of the CJEU, which — in the opinion of the Judges — would be prejudiced by a system of arbitration which derogates from the general jurisdiction of Member States.

Strong criticisms may be moved against this decision (51), which, at least to a certain extent, seems to be only motivated by the Court's willingness to jealously safeguard its jurisdiction (52). First of all, it completely ignores the treaty law perspective outlined in this paragraph. The CJEU simply did not consider the fact that EU law is still subject to international law and is part of international law (53). Contrariwise, the Court's arguments are simply based on principles of EU law, as if this area of international law (which certainly has its particularities and, therefore, enjoys a certain autonomy) (54) and its primacy appeared "out of the blue" without any foundation in the pre-existing international law framework. This is, from the point of view of legal theory, simply unacceptable and the Court's approach leads us to the conclusion that the Judges in Luxembourg avoided to refer to Art. 30(3) VCLT because the application of this rule would have led them to an unwelcome conclusion, i.e. the validity of intra-EU IIAs. If art. 30 VCLT would have been applied, the long discussion on the principle of primacy of EU law (i.e. an argument which presupposes the applicability of EU law to regulate a certain case) would have resulted misplaced and useless, considering that — from the perspective of the rules governing conflicts of treaty norms — BIT provisions (until in force) (55) shall evidently prevail over EU law (56).

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(49) Case C-284/16, *Slowakische Republik v. Achmea BV*, supra, note 3, para. 33 ff.

(50) On the principle of primacy see A. Arena, "Sul carattere 'assoluto' del primato del diritto dell'Unione europea", Studi sull'integrazione europea, 2018, p. 317 ff.

(51) For a completely contrary opinion see F. Munari, C. Cellerino, *EU Law Is Alive and Healthy: The Achmea Case and a Happy Good-Bye to Intra-EU Bilateral Investment Treaties*, in *http://www.sidiblog.org*, 2018.

(52) This feeling was already perceived when the CJEU issued its opinion 2/13 with regard to the EU's Accession to the ECHR. See, in this regard, S. Peers, *The EU's Accession to the ECHR: The Dream Becomes a Nightmare*, in *German Law Journal*, 2015, p. 213 ff.

(53) For an approach which convincingly subjects EU law to international law see S. Saluzzo, *supra*, note 27, p. 96 ff.

(54) L. Gradoni, *Regime failure nel diritto internazionale*, Padua, 2009, p. 227 ff.

(55) In this regard, it is to be noted that many EU States (including Italy) have started terminating their intra-EU BITs and/or the Energy Charter Treaty. In any case, such treaties — due to the fact that, as we said before, confer rights to individuals — contain the so-called survival clauses aimed at granting the continuity of operation of those rights enshrined in the relevant treaties (i.e. standards of treatment and the right to access to arbitration) for a certain period (usually fifteen to twenty years) after the treaty has been terminated. See, in this regard, J. Harrison, *The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties*, in *The Journal of World Investment & Trade*, 2012, p. 928 ff.

(56) For an analysis of the often unclear ways in which the CJEU makes recourse to the

Secondly, the decision disregards the fact that (at least in non-ICSID cases) the national court of the seat of arbitration may have a say in investment disputes, as it exactly happened in *Achmea* (indeed, the CJEU had the possibility to rule on the case due to a preliminary ruling of the German Supreme Court). As a consequence, in these cases, domestic courts in the EU (and, finally, the CJEU) may always grant the respect of EU law. In this regard, the consideration that the grounds for requesting the annulment of an arbitral award before national courts are very limited ([57]) is misplaced. Contrariwise, the misapplication of the law (not a mere error) can be seen by national courts as an excess of powers by the Tribunal which possibly may lead to an annulment of the award.

Thirdly, the decision represents an unmotivated departure from the Court's case law ([58]) which admitted the compatibility of commercial arbitration with EU law ([59]). In particular, in the *EcoSwiss* case, the CJEU expressly said that it was sufficient that national courts of the seat or of the enforcement granted the applicability of the EU public policy principles. There is no difference between a commercial arbitration based on an arbitration agreement contained in a contract and a non-ICSID investment case in which the consent is expressed in a treaty. In both cases there is a seat of arbitration which can exercise a "second look" on the arbitration proceedings, something which is generally considered sufficient for ensuring the legality of the arbitration, also in cases in which public policy considerations are involved ([60]).

For all the above reasons, it is likely that the *Achmea* decision will not be the final episode of the intra-EU BITs saga. Indeed, in two arbitral decisions issued in 2017, tribunals — acknowledging the pendency of the case before the CJEU — already expressly stated that their jurisdiction is

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VCLT see J. Odermatt, *The Use of International Treaty Law by the Court of Justice of the European Union*, in *Cambridge Yearbook of European Legal Studies*, 2015, p. 121 ff.

([57]) See *Achmea*, *supra*, note 3, para. 53.

([58]) Case C-126/97, *EcoSwiss China Time Ltd v. Benetton International NV*, Judgment of 6 March 1999, ECR, 1999, I-03055, paras. 35-36 and 40; Court of Justice of the European Union, Decision of 26 October 2006, *Elisa María Mostaza Claro v. Centro Móvil Milenium SL*, Case C-168/05, para. 35.

([59]) In this regard, the clarification contained at para. 55 of the judgment (saying that "[h]owever, arbitration proceedings such as those referred to in Article 8 of the BIT are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law") appears hardly understandable. The same opinion has been expressed by L. Melchionda, *supra*, note 3, p. 352, where the author says that "[t]he [CJEU] seems to ignore that the UNCITRAL Arbitration Rules are used in investment and commercial arbitration alike"; hence, the differentiation applied by the Court is nonsensical.

([60]) US Supreme Court, 2 July 1985, *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S.614 (1985).

based on the consent (still validly) expressed in relevant BITs and therefore they would disregard the possible prevalence of a different view expressed by the CJEU (61). Moreover, two arbitral awards issued after the CJEU's *Achmea* ruling have deliberately disapplied its content. In the first of them (62), which was an ECT dispute, after having analysed in depth the *Achmea* decision, the Tribunal stated that its jurisdiction was regulated only by Art. 26 ECT (63) and that such rule (to be interpreted according to the canons of interpretation set forth in the VCLT and not on the basis of EU law) precluded it to refuse jurisdiction on the basis of elements which are different from the parties' manifestation of consent at the time the dispute arose. In the second of these cases (64), the inapplicability of *Achmea* was based on the circumstance that, while *Achmea* was an UNCITRAL case, the one at hand was an ICSID dispute, in which considerations based on the primacy of EU law cannot find any place. Indeed, ICSID arbitration does not have any seat and the judicial review of the validity of the award is not in the competence of any national courts, subject exclusively to the ICSID annulment procedure set forth at art. 52 of the ICSID Convention. After all, there is no reference to ICSID arbitration in the *Achmea* decision and this justifies the Tribunal in avoiding to take into account the CJEU's decision.

3. *The enforcement issue in ICSID cases and the irrelevance of the CJEU's Achmea Decision.*

Having demonstrated that intra-EU IIAs are valid and intra-EU investment disputes are arbitrable, it is now possible to analyse the issue of the enforcement of arbitral awards issued at the end of such disputes in the cases where they are celebrated, as in the case of *Micula*, in the framework of the ICSID Convention (65).

Two preliminary remarks are required. First, as we already briefly said above, the *Achmea* decision is of limited relevance in these cases: the ICSID system is a "closed" regime (66) in which all the possible remedies

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(61) See *WNC*, *supra*, note 22, para. 311; *PL Holdings*, *supra*, note 22, para. 316.

(62) *Vattenfall AB et al. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue of 31 August 2018. This conclusion was also reached before the Achmea case by several other tribunals including *Charanne*, *supra*, note 40, para. 245 ff.; *Eiser*, *supra*, note 22, para. 179 ff.; and *Novenergia*, supra, note 25, para. 439 ff.

(63) Para. 123 ff.

(64) *UP and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award of 9 October 2018, para. 252 ff.

(65) As of today, the topic has been the specific subject of a single academic paper, i.e. H. Wehland, *The Enforcement of Intra-EU BIT Awards: Micula v. Romania and Beyond*, in *Journal of World Investment & Trade*, 2016, p. 942 ff.

(66) See O.K. Fauchald, *The Legal Reasoning of ICSID Tribunals — An Empyrical Analysis*, in *European Journal of International Law*, 2008, p. 313 ff. This does not mean, however, that the ICSID system is completely outside international law, but simply that the

against an award are set forth by art. 49-52 of the Washington Convention. ICSID is, therefore, a truly international system of justice based on a treaty which does not provide for any role (at least in the post-award phase) of national law and/or national courts other from the duty to recognize/enforce the award, which, anyway, cannot be aggravated by provisions of domestic law. Hence, by requiring not to enforce an ICSID award, the EU Commission puts national judges in a paradoxical situation, i.e. to be either in violation of EU law or of international law (67). After all, there is in principle no way in which a decision of the Court of Justice of the European Union may be taken into account in the execution of an ICSID award, provided that — as we will see in this paragraph — it is the same EU law (at art. 351 TFEU) that gives precedence to pre-existing international obligations. Second, there is a substantial difference between the previous discussion on the validity — on the one hand — of intra-EU IIAs, which enshrine bilateral obligations (or, in any case, bilateral duties in the framework of a multilateral treaty), and — on the other hand — of the ICSID Convention, which is a multilateral treaty setting forth objective duties which generate *erga omnes partes* obligations, i.e. obligations the fulfilment of which is a matter of interest for all the treaty parties regardless of the existence of an actual damage to them. If the ICSID Convention establishes the obligation to execute arbitral awards and a State refuses to do so, the damage for all the other States is *in re ipsa*.

On the basis of these considerations, we will now proceed to demonstrate that the applicability of the ICSID Convention is granted by the deference clause contained in Art. 351 TFEU (as Arden LJ says in her dissenting opinion in the *Micula* case) with the consequence that EU law shall not necessarily be considered when evaluating the applicability of a pre-existing international treaty (contrary to what stated by Hamblen and Leggatt LJ). Then, contrary to what has been done in *Micula*, we will deny that the ICSID Convention allows for a stay of the execution on the basis of domestic procedural law mechanisms (as stated by Arden and Leggatt LJJ) or to the total equalization of ICSID awards to domestic decision (sustained by Hamblen LJ).

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life and validity of awards may only be determined in light of the provisions of the convention. See. G. Zarra, *Orderliness and Coherence in International Investment Law and Arbitration: An Analysis through the Lens of State of Necessity*, in *Journal of International Arbitration*, 2017, p. 673 ff.

(67) S. Battini, *Il "caso Micula" - Diritto amministrativo e entanglement globale*, in *Rivista trimestrale di diritto pubblico*, 2017, p. 334. More generally the problem of the relationship between the ECT and EU law has been defined as a "lose-lose" situation for EU Member States. See F. Montanaro, *"Ain't No Sunshine": Photovoltaic Energy Policy in Europe at the Crossroads Between EU Law and Energy Charter Treaty Obligations*, in G. Adinolfi et al. (eds.), *International Economic Law - Contemporary Issues*, Turin - Heidelberg, 2017, p. 212.

3.1. (follows) *Art. 351 of the TFEU.*

Art. 351 TFEU, which — is worth repeating — preserves the obligations of EU Member States under pre-accession treaties (but imposes on them the duty to eliminate inconsistencies), has been recently defined as "[t]he EU deference clause *par excellence*" (68). The norm is considered as a recognition, in EU law, of the principle codified in Art. 30(4) VCLT, according to which a State which concluded a treaty with another State may not suffer the effects of subsequent agreements concluded by the latter with third parties (69).

As it appears from the *Micula* case, different interpretations may arise in relation to this rule (70). In Lady Justice Arden's concurring opinion, it is said that the applicability of art. 351 is to be determined by national

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(68) A. Arena, *The Twin Doctrines of Primacy and Pre-emption*, in R. Schutze, T. Tridimas (eds.), *Oxford Principles of European Union Law*, Oxford, 2018, p. 301. The objective of art. 351 is to self-limit the principle of EU primacy, which imposes the prevalence of EU law over domestic laws (also in merely domestic cases). In intra-EU cases (i.e. in disputes which involve only two Member States), the doctrine of primacy imposes that EU law prevails over previous international treaties concluded by those two States. Contrariwise, in cases involving third States, EU law is self-limited by the functioning of the mechanism set forth by art. 351 TFEU. In this regard, an interesting point was raised at para. 268 of the *Micula* decision by Leggatt LJ, who affirmed that "[t]he power of a member state to implement its pre-existing obligations under international treaties may be seen as an aspect of its constitutional identity" and should therefore prevail over any claim by the EU.

(69) R. Mastroianni, *Art. 351*, in A. Tizzano (ed.), *Trattati dell'Unione Europea*, II ed., Milan, 2014, p. 2543. On this provision see also J. Klabbers, *The Validity of EU Norms Conflicting With International Obligations*, in E. Cannizzaro, P. Palchetti, R. Wessel (eds.), *International Law as Law of the European Union*, The Hague, 2011, p. 111 ff.; S. Saluzzo, *supra*, note 27, p. 96 ff. and in particular p. 99.

(70) A first problem may arise in relation to the applicability of this rule for regulating relationship between the ICSID Convention and EU treaties. Art. 351 refers to obligations assumed prior than 1958 (for EU Founding Members) or preceding the accession of other States. It does not take into account the fact that the competences of the EU have been enlarged in recent years and, in particular, in 2009 with the entry into force of the Lisbon treaty (which, is worth remembering, attributed to the EU the competence in relation to foreign investment). The question may be, therefore, whether States which accessed in the EU before their accession to the ICSID Convention may invoke art. 351 in order to enforce ICSID awards in intra-EU investment cases, considering that when they assumed the obligations deriving from the Washington Convention the EU did not impose any obligation on them concerning the contrariety of this behaviour with the EU treaties. The most agreeable position expressed in scholarship stipulates that Art. 351 shall be extensively interpreted in order to apply also to these situations. See L. Pantaleo, *Member States Prior Agreements and Newly Attributed Competence: What Lesson from Foreign Investment*, in *European Foreign Affairs Review*, 2014, p. 314 ff. The same thesis was sustained by K.M. Meessen, *The Application of Rules of Public International Law within Community Law*, in *Common Market Law Review*, 1976, p. 491, where it is said that art. 351 could be applied to all those agreements concluded by the Member States at a time when they still enjoyed full treaty-making power in the area covered by the agreement in question. The matter is, however, not settled. Contra, see A. Dimopoulos, *EU Foreign Investment Law*, Oxford, 2011, pp. 306-307; T. Eilmansberger, *Bilateral Investment Treaties and EU Law*, in *Common Market Law Review*, 2009, pp. 397-398; P. Terhechte, *Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member States' Bilateral Investmnet Treaties*, in M. Burgenberg, J. Griebel, S. Hindelang (eds.), *International Investment Law and EU Law*, Berlin, 2011, p. 85. The question has not been dealt with in the *Micula* case because the ICSID Convention entered into force in the UK

courts keeping into account the existence of an *actual* conflict between a pre-existing treaty rule and EU law (71); hence, UK Courts may decide to suspend the execution of a pre-existing obligation (such as the obligation to enforce ICSID awards *ex* art. 54 of the Washington Convention) on the basis of their national law, but they are not subject to EU Courts with regard to the application of art. 351. Contrariwise, the majority opinion affirms that the applicability of art. 351 is a matter of EU law and, therefore, the future determination of the EU Courts shall prevail and imposes a stay of national concurrent proceedings (72). However, an analysis of the case law reveals that the same Court of Justice of the European Union attributes to Member States the role of identifying the cases in which art. 351 TFEU applies. *Levy* (73) contains a clear statement pointing in this direction: "*it is not for this Court but for the national court* to determine which obligations are imposed by an earlier international agreement on the Member State concerned and to ascertain their ambit so as to be able to determine the extent to which they constitute an obstacle to the application of [EU law]" (emphasis added). This has also been confirmed in *Evans Medical and Macfarlane Smith* (74).

In addition, according to the majority opinion (Hamblen and Leggatt LJJ) art. 351 cannot apply to any intra-community relation and the *Micula* case involves nationals of a Member State (Sweden), asking the courts of another Member State (UK) to enforce an award against a Member State (Romania). Apparently, there is no direct involvement of any non-EU country, and it is for the GCEU to determine whether this is a case in which art. 351 TFEU can be applied. On the other hand, the concurring opinion (Arden LJ) affirms that "as a matter of the law of England and Wales the obligations which the UK owes under the ICSID Convention are not owed solely to the States which are parties to the BIT, but also to the other States which can bring a claim to establish what its obligations are, as can be done under article 64 ICSID" (75). "[E]very State has an interest in every other's

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in 1967, while the accession to the EU took place in 1973. As a consequence, there is no doubt that art. 351 TFEU is applicable to this case.

(71) Para. 173.

(72) Para. 156.

(73) *Supra*, note 14, para. 21.

(74) Court of Justice of the European Union, Judgment of 28 March 1995, *The Queen v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd*, in *www.curia.europa.eu*, paras. 29-30, where — after having quoted the abovementioned statement made in *Levy* — it is recognized that "[i]t is therefore for the national court to examine whether compliance with the Convention in relation to non-member States requires allocation of quotas among the undertakings concerned and whether allowing imports would make it impossible for the Member State to exercise the degree of control required by the Convention". For a contrary opinion see P. Manzini, *The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law*, in *European Journal of International Law*, 2001, p. 787.

(75) Para. 188.

adherence to its mandatory obligation to enforce awards and has been given the right on an unqualified basis to bring a dispute before [the ICJ]. On that basis, even though the current dispute concerns only Romania and Sweden, third countries are involved and that means that article 351(1) applies" ([76]). The latter approach seems more convincing. This is, first of all, confirmed by the same CJEU in *Levy* ([77]), where the Court allowed the applicability of Art. 351 in judicial proceedings regarding the International Labour Organization Convention No. 89 of 9 July 1948 (a treaty ratified by both EU and non-EU States) in France and in a case in which the dispute was purely French (between the State and people subject to its jurisdiction). The same approach has been sustained also in other cases ([78]). Scholarship also points in this direction ([79]), by saying that every time pre-existing treaties involve an "objective" regime of international duties, i.e. obligations the execution of which is potentially of interest for all contracting States and are not divisible in bilateral relationship (so-called "*erga omnes partes*" obligations) ([80]), art. 351 TFEU is applicable. It seems that the obligation enshrined in art. 54 of the Washington Convention falls into this category, considering that once the ICSID award is issued, an obligation of all Contracting Parties to execute it arises; should the execution not take place, this can be considered as a breach of the trust existing between Member States, entitling them to bring a claim before the ICJ in accordance with art. 64 of the same ICSID Convention, which, indeed, refers to *all* disputes among the Contracting Parties regarding the application of the Convention. In all cases in which the Convention is not applied

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([76]) Para. 192.

([77]) *Supra*, note 14.

([78]) See, inter alia, Court of Justice of the European Union, 14 December 1979, Case C-34/79, *Henn and Darby*, in *www.curia.europa.eu*. Precedents such as Court of Justice of the European Union, Judgment of 27 February 1962, *Commission v. Italy*, Case C-10/61, in *www.curia.europa.eu*, are not relevant in this case, considering that it only regarded intra-EU relationship (even if arising from the GATT). See R. Mastroianni, *supra*, note 69, pp. 2544-2545.

([79]) R. Mastroianni, *supra*, note 69, p. 2545; G. Cohen Jonathan, Art. 234, in V. Constantinesco, R. Kovar, J.P. Jacqué, D. Simon (eds.), *Traité instituant la CEE, Commentaire article par article*, Paris, 1992, p. 1497; S. Saluzzo, *supra*, note 27, p. 133 ff.

([80]) This category has been recently recognized by the International Court of Justice *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment of 20 July 2012, para. 68, in a matter regarding the interest of all Contracting Parties in the enforcement of the obligations contained in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. The Court stated that "The States parties to the Convention *have a common interest* to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity" (emphasis added). *Mutatis mutandis*, it could be recognized that through art. 54 of the ICSID Convention the Contracting Parties showed their common interest to objectively ensure the enforcement of ICSID Awards in light of their common economical interests. When enforcement is refused, therefore, all of them have an interest in obtaining reparation for such an international wrongful act. On this concept see R. Pisillo Mazzeschi, *Diritti umani [dir. int.]. Profili generali*, in *Enciclopedia Treccani online*, 2013, para. 2.2.

(e.g. when an award is not enforced) the objective right to start a claim before the ICJ arises (81).

In conclusion, we feel quite confident in saying that, in a case like *Micula*, English courts (and all other domestic courts of EU Member States) are free to determine the applicability of art. 351 TFEU to a dispute. Indeed, provided that the obligation enshrined in art. 54 of the ICSID Convention is an objective duty involving an interest of all Contracting Parties, the *Micula* controversy is a classic example of the scenario in which art. 351 is applicable. The application of this rule would likely lead to the prevalence of ICSID obligation to enforce the award over EU law rules on state aid. This conclusion should involve — according to authoritative scholars (82) and the CJEU in the *Burgoa* case (83) — the obligation on EU institution not to interfere with the execution of ICSID awards by Member States. Hence, it is to be expected that the European Institutions will act accordingly in the future.

3.2. (follows) *Art. 54 of the ICSID Convention: the obligation to enforce and the impossibility to justify a stay on the basis of domestic law.*

It is now time to ascertain whether art. 54 allows, as Arden and Leggatt LJJ seem to accept (84), a stay of the execution of an ICSID award on the basis of provisions of domestic law. This conclusion appears hurried and it is not by chance that the explanations provided by the Court of Appeal on this point are somehow murky. In particular, the Judges affirm that a temporary stay in the execution is compliant with the spirit and the objectives of the ICSID Convention (85) which at art. 54(3) stipulates that the execution of awards shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such

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(81) See C. Schreuer, *The ICSID Convention - A Commentary*, Oxford, 2009, p. 1261, where it is said, in general terms, that "[r]esort to the ICJ would also be possible against a State party to the ICSID Convention that was not a party to the ICSID proceedings if it fails to recognize and enforce an award in violation of Art. 54". See also p. 1125, where it is recognized that a failure to execute an arbitral award is an internationally wrongful act which involves all the consequences of State responsibility *including* (but not limited to) diplomatic protection by the state of nationality of the investor.

(82) G. Gaja, *Fonti comunitarie*, in *Digesto, disc. pubbl.*, vol. VI, Turin, 1991, p. 451; R. Mastroianni, *supra*, note 69, p. 2545 ff.

(83) *Burgoa*, *supra*, note 45, para. 9: "Although the first paragraph of Article [351] makes mention only of the obligations of the Member States, *it would not achieve its purpose if it did not imply a duty on the part of the institutions of the Community not to impede the performance of the obligations of Member States which stem from a prior agreement*. However, that duty of the Community institutions is directed only to permitting the Member State concerned to perform its obligations under the prior agreement and does not bind the Community as regards the non-member country in question" (emphasis added).

(84) Para. 108 ff.

(85) Para. 125.

execution is sought. As already said, this provision has been incorporated in the UK through S. 2(1)(c) of the 1966 Act, which states that "the High Court shall have the same control over the execution of the award, as if the award had been such a judgment of the High Court". However, it is our opinion that — while the wording of the 1966 Act is to a certain extent obscure and can be interpreted in the sense that domestic courts have broad procedural powers in the enforcement of ICSID awards — this interpretation does not reflect the meaning of art. 54 and the object and purpose of the ICSID Convention. Indeed, the reference which art. 54 makes to domestic procedural laws is only due to the fact that the involvement of domestic courts may be functional to reach one of the goals of the Convention, i.e. the possibility to ensure to investors who are successful in an ICSID case an award which is easily enforceable everywhere. Such an involvement, however, is by no means substantial: national courts may not freely interrupt the execution of the award as if the arbitral decision was a domestic court decision ([86]). There is an international obligation to grant the immediate execution of ICSID awards, save as the possibility for the Respondent State to *only* oppose the immunity argument pursuant to art. 55 of the ICSID Convention. All other limitations and delays in the execution seem not to be envisaged in the Convention.

Contrary to what is stated above, some Authors recently pointed out that it could be possible for a State to file an opposition to the enforcement claim on the basis of the remedies provided by the applicable national law ([87]). However, as we already tried to demonstrate ([88]), even if in principle it is not possible to exclude that the defendant in a national enforcement procedure may try to make recourse to national remedies aimed at opposing enforcement (including a stay), such a conclusion seems wrong. Indeed, by entering into the ICSID Convention, States have assumed an international obligation to give execution to all ICSID awards and they are not entitled to act contrarily (e.g. by equalizing ICSID awards to national decisions for enforcement purposes). Since Article 53 of the ICSID Convention states that "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention", a

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([86]) For an analysis of the problem see S. Davin, *Enforcement of ICSID Awards in the United States: Should The ICSID Convention Be Read as Allowing a 'Second Bite at the Apple'?*, in *New York University Journal of International Law & Politics*, 2016, p. 1256 ff.

([87]) R. Sabia, C. Trecroci, *Ascesa e declino dell'"Investor-State Arbitration", fra contrasto alla corruzione internazionale, regolazione dei mercati e Free Trade Agreements Internazionali*, in *Rivista dell'arbitrato*, 2016, p. 182 ss.

([88]) G. Zarra, *Parallel Proceedings in Investment Arbitration*, Turin - The Hague, 2017, pp. 180-181.

national judge who does not enforce an ICSID award (or unduly suspends the execution) will cause his national State to be in violation of such an international treaty.

In conclusion, considering that Arden and Leggatt LJJ appear fully aware of their obligation to enforce ICSID awards ([89]), their decision to grant a stay of the execution of the *Micula* award seems only supported by political reasoning. UK Judges seem willing to avoid any sort of contrast on this kind of matters with the EU Institutions. Probably, pending the Brexit issue, they preferred to postpone a discussion on this question (which, should the Brexit take place, would be automatically resolved) instead of embarking in complex legal discussions and never-ending contrasts with the EU Commission and the EU Courts on matters which in the next future could have no relevance for the UK.

4. *The enforcement issue in non-ICSID cases (in brief).*

For the sake of completeness, we shall analyse the different situation concerning the enforcement of awards deriving from intra-EU IIAs in the cases where the arbitration is not celebrated in the framework of ICSID ([90]). Here, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is certainly applicable to regulate the matter. As a consequence, the defences to enforcement set forth by art. V of the Convention may be used by the Respondent State ([91]). First of all, it could be argued *ex* art. V(1)(a) that the tribunal did not have jurisdiction because consent to arbitration was revoked through the mechanism set forth by art. 30(3) VCLT pursuant to the adhesion of the Respondent to the EU involving the exclusive jurisdiction of domestic courts. Should this defence be filed, national courts will feel free to fully review the jurisdictional analysis carried out by arbitral tribunal ([92]) and, eventually, refuse the enforcement of the award. Secondly, there is the possibility that EU States asked to enforce awards deriving from intra-EU IIAs consider that this enforcement is against EU public policy ([93]). As well-known, since the *EcoSwiss* case ([94]) celebrated before the CJEU, it is accepted that the

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([89]) Paras. 125, 256 and 261.

([90]) See H. Wehland, *supra*, note 65, p. 950 ff.

([91]) In this regard, it should be noted that usually the reasons which may lead to a refusal of the enforcement are also grounds for annulling the award at the state of the seat. Hence, when the seat is in a EU Member State the present discussion may be applied *mutatis mutandis* to annulment proceedings.

([92]) See High Court of Justice, Queen's Bench Division, Commercial Court (UK), judgment of 2 March 2018, *GPF GP S.à.r.l.* v. *The Republic of Poland*, in this *Rivista*, 2018, p. 791 ff., para. 7, with a comment by G. Zarra.

([93]) O. Feraci, *L'ordine pubblico nel diritto dell'Unione europea*, Milan, 2012, p. 353 ff.

([94]) *Supra*, note 58, para. 36.

enforcement of arbitral awards may be refused for the decision's contrariety to EU fundamental principles, including "fundamental provision[s] which [are] essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market". No doubts, given the importance that the subject of state aid has in EU law, that the CJEU would consider — in a hypothetical judgment on the matter — that rules on state aid are part of EU public policy to be protected against arbitral awards which may run against the principles established in the Treaties (95). The EU public policy defence will, however, not find application in all cases where the enforcement is sought in a non-EU State, where fundamental principles of EU law are not applicable.

Finally, it is to be noted that the above scenario is able to generate a paradox. As well-known, consent to arbitration may, in investment cases, be expressed by states either through treaties (or national laws) or through a contract (96). It seldom happens, indeed, that ICSID or non-ICSID investment cases are started on the basis of arbitration clauses contained in a contract. It is uncertain whether a contractual arbitration clause signed by a state can be considered null and void by national courts by applying the ruling in *Achmea*. At a closer look, a case like this seems closer to the *EcoSwiss* decision (97), in which the CJEU admitted the compatibility of commercial arbitration with EU law, than to the *Achmea* dispute, in which the Court expressly relied on the fact that the arbitral tribunal's jurisdiction originated from a treaty and not from a contract. If this insight is correct, we could have the paradoxical situations in which (non-ICSID) investment arbitration awards *arising from intra-EU IIAs* are not enforceable, while the same award, *if based on a contract*, may be safely enforced.

This is another evidence of the fact that the *Achmea* decision and, more generally, the EU Institutions' position, which blindly runs against investment arbitration, is probably based more on a political aversion to this mechanism of dispute settlement (which is partially outside their control) than on an actual knowledge of all the technicalities of this system.

5. *Conclusions.*

This paper, once again, analysed the issue of intra-EU IIAs, both from the perspective of the arbitrability of disputes arising from those treaties and from the one of the enforcement of resulting awards. It has been argued that these disputes are fully arbitrable (both from the perspective of the VCLT and from the perspective of EU law) and, at least in the context of ICSID, there is no doubt that final awards are enforceable (also) before

(95) See H. Wehland, *supra*, note 65, p. 955, where it is said.
(96) G. Zarra, *supra*, note 17, p. 3 ff.
(97) *Supra*, note 58.

the courts of EU Member States (considering that the ICSID Convention sets forth a self-contained regime pre-existing to EU law which imposes the execution of awards and does not allow for any form of review of arbitral decisions by national courts).

The subject has been dealt with through the prism of the recent UK Court of Appeal's decision which stayed the enforcement of the *Micula* ICSID award. In light of the observations carried out in this article, the decision is unsatisfactory for two main reasons.

First of all, in staying the decision waiting for an assessment of the matter by the GCEU, the Court of Appeal neglected the proper functioning of art. 351 TFEU, which is a deference clause which allows national courts to autonomously give prevalence to pre-existing obligations (such as the ICSID Convention) over EU law.

Secondly, by allowing the stay, the Court of Appeal assumed that this is compliant with the object and purpose of the ICSID Convention, which refers to domestic procedural law as the law governing the execution of ICSID awards. This is, however, not correct. Contracting Parties to the Washington Convention have assumed an objective obligation to enforce ICSID awards without the possibility of opposing any defence based on domestic law, save as for the state immunity exception recognized by art. 55 of the ICSID Convention.

For these reasons, it seems that the decision was mainly driven by political concerns rather than by the necessity to correctly apply international treaties (such as the ICSID Convention) to which the UK has consented.