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Enforcement of ICSID Awards and Conflicts with EU Law

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Christian Tietje/Clemens Wackernagel, Outlawing Compliance? - The Enforcement of intra-EU Investment Awards and EU State Aid Law, Policy Papers on Transnational Economic Law, 41 (6/2014) <http://telc.jura.uni-halle.de/de/node/24>

Christian Tietje/Clemens Wackernagel, Enforcement of Intra-EU ICSID Awards - Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration, The Journal of World Investment & Trade 16 (2015) 201-243

7.11.2014 [EN] Official Journal of the European Union C 393/27

V
(Announcements)

PROCEDURES RELATING TO THE IMPLEMENTATION OF THE COMPETITION
POLICY

EUROPEAN COMMISSION

STATE AID — ROMANIA

State aid SA.38517 (2014/C) (ex 2014/NN) — Implementation of Arbitral award Micula v Romania of
11 December 2013


Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the
European Union

(Text with EEA relevance)

(2014/C 393/03)

By means of the letter dated 1st October 2014 reproduced in the authentic language on the pages following this summary, the Commission notified Romania of its decision to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

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(I) State Aid?

Art. 107 (1) TFEU:

“Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.”

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(I) State Aid?

Broad Definition
“*advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities*” (ECJ)

- specificity
- benefit of recipient
- no equivalent consideration
- voluntary State contribution

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(I) State Aid? – Voluntary Contribution

- ECJ, Cases 106-120/87, Asteris et al., ECR 1988, 5531 para. 23:
“It follows that State aid, that is to say measures of the public authorities favouring certain undertakings or certain products, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals”.

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(I) State Aid? – State Measure

- Measure by public authority
 - requires autonomy of state authority
 - Art. 54 (1) ICSID
 - “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”
 - No autonomy as mandatory recognition/enforcement according to ICSID?
 - Different UNCITRAL/New York Convention
 - ECJ, Case C-126/97, EcoSwiss, Judgment of 1 June 1999

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(I) State Aid?

- Exception, i.e. state aid
 - “In any event, it should be noted that, if an entitlement to compensation is recognised, the damage cannot be regarded as being equal to the sum of the amounts to be repaid, since this would constitute an indirect grant of the aid found to be illegal and incompatible with the common market.”


AG Ruiz-Jarabo Colomer, Cases 346/03 and C-529/03, para. 198

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(II) Conflict ICSID-EU

- Article 53 (1) ICSID
 - “The 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. ...”



- ECJ, Case 6/64, Costa/ENEL, ECR 1964, 1251
 - Supremacy of EU law
 - Obligation of domestic courts to not enforce an award in conflict with EU law

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(II.1.) Perspectives

- European perspective
 - “The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.”
 - AG Maduro, Case C-402/05, Kadi and Al Barakaat International Foundation ./. Council and Commission [2008] para. 24.

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(II.1) Perspectives

- International perspective
 - Presumed EU law is not public international law but a legal order sui generis (for details see paper)
 - Art. 27 VCLT
 - „A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

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(II.2) Consequences

- Decisive is whether there is a conflict EU law / ICSID
 - if no, ok
 - if yes, one has to decide which law (EU or ICSID) is applicable
 - thus, domestic judge has to decide on whether there is a conflict
 - this is not a violation of Art. 53 ICSID
 - („... shall not be subject to any appeal or to any other remedy except those provided for in this Convention...”)

(II.3.) International Perspective

- Art. 27 VCLT
 - problem: ratio legis
 - EU Member States have no legal right to unilaterally change EU law and bring it into conformity with international obligations
 - Art. 27 VCLT teleological reduction
 - applicable only if remaining competence of EU Member States
- What happens in all other situations?
 - Art. 27 WVK is not applicable
 - i.e. Member States have to obey EU and ICSID
 - dilemma

“[i]n a more recent case before the European Court of Human Rights, *Gasparini v. Italy and Belgium* ... [t]he Court said that States, when they transfer part of their sovereign powers to an organization of which they are members, are under an obligation to see that the rights guaranteed by the Convention receive within the organization an “equivalent protection” to that ensured by the Convention mechanism. ... [T]he Court found that this obligation had not been breached, in this case because the procedure within NATO was not tainted with “manifest insufficiency”

ILC, Draft Articles on the Responsibility of International Organizations with Commentary (2011), citing European Court of Human Rights, application No. 10750/03, decision of 12 May 2009

➤ *Bosphorus v Ireland* (App no 45036/98), 30 June 2005

Conclusions

- It is not sufficient for an arbitral tribunal to refer to Art. 53, 54 ICSID in order to wipeout possible problems of enforcement within EU
- Domestic courts within the EU have to assess a possible conflict between an ICSID award and EU law
- Primacy of EU law is a legal principle and not a legal rule, i.e. recognizes possible limitations on it's applicability in a given case
- ISDS has „more“ protection than EU law because of direct right of action of investors
- Thus, ICSID prevails, as long as no fundamental constitutional values of EU are violated
 - Kadi, not EcoSwiss
