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Enforcement of Investor-State arbitration awards and EU State aid law: How to square the circle?

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Abbreviations

BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CJEU	Court of Justice of the European Union
EC	European Commission
ECT	Energy Charter Treaty
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable (treatment)
FTA	Free trade agreement
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ISDS	Investor-state dispute settlement
LE	Legitimate Expectations
MEIP	Market Economy Investor Principle
MFN	Most favored nation (treatment)
MIC	Multilateral investment court
MS	Member States
PIC	Permanent Investor Certificate
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of the Treaties

1. Introduction

The 1980s were a decade of change in many ways. The nuclear disaster in Chernobyl, the tech boom with the launch of the first computer by IBM, the Wall Street Crash and the Fall of the Berlin Wall are just a few examples of events so remarkable that the world as we know it today took a specific course because of them.

The occurrences that influenced and contributed to the issues at stake in the case we propose to examine were twofold: the 1989 Romanian Revolution that overthrew Ceausescu's communist regime and the Treaty of Lisbon, which entered into force in 2009. Both events were in some – direct or indirect – way a result of the above-mentioned decade.

Following the referred revolution, Romania decided to introduce several incentives to attract foreign investment in certain disfavoured regions, such as customs duties exemptions, provided the investors met certain requirements established in the new legislation (EGO 24/1998). When dialogues with the European Union began, one of the concessions that the country had to make in order to eventually accede to it was harmonizing its laws with the community *acquis.* In particular, it meant repelling in 2004 the incentives that Romania had provided because they threatened EU State aid rules. The *Micula* Brothers, who had started investing in one of the disfavoured areas in 1991, initiated arbitration proceedings at the International Centre for Settlement of Investment Disputes (ICSID) claiming that the host state breached provisions of the Romania-Sweden Bilateral Investment Treaty (BIT). The Commission, intervening as *amicus curiae*, asserted that compensating the investors would also consist of illegal State aid. However, the tribunal decided in favour of the two brothers, condemning Romania to pay a compensation for breaching the Fair and Equitable treatment standard (FET)[1].

This controversial case that is still pending before the European Court of Justice mirrors the long-lasting debate as to the compatibility of investment arbitration, more specifically, intra-EU BITs and European Union law. However, this dissertation is not going to analyse the more recurrent allegations[2] that these arbitrations breach the principles of non-

[1] ICSID Case No. ARB/05/20, Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania, accessible here: https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf

[2] Arbitral tribunals have had the opportunity to share their views on the subject. In Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic (ICSID Case No. ARB/14/3, paras. 292-303), the tribunal provided an overview of some of those rulings, quoting: Eastern Sugar B.V. v. Czech Republic, SCC Case No. 088/2004, Partial Award, 27 March 2007; Binder v. Czech Republic, Award on Jurisdiction (UNCITRAL Rules), 6 June 2007; Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, Exhibit CL-251; Electrabel v. Hungary, Exhibit CL-10.

discrimination and equal treatment, and infringe the CJEU's exclusive competence to interpret EU law[3]. Rather, it will mainly focus on the criteria provided in article 107(1) TFEU and on whether a compensation for damages, in compliance with an ICSID arbitral award, fits in that framework.

In order to do so, I will briefly examine the proliferation of investment arbitration, the historical background of EU state aid measures, on one hand, and that of its relationship with investment arbitration, on the other. By doing so, I will point out when and why the conflict arose. Next, I will describe the main facts of the *Micula* case and begin our journey of international arbitration and/versus competition law from there, specially from an *a posteriori* perspective – the compensation granted by the award. Not only will I investigate the potential conflicts between the two legal orders, but also, and primarily, whether a Member State that is enforcing an ICSID award, is applying unlawful State aid. The requirements of imputability and selective advantage are the most problematic ones and will therefore deserve more attention. Whether there is an unconditional obligation to enforce an award, even if it breaches EU law, will also be subject of debate, with Investment Arbitration and EU law experts each claiming superiority over the other. Some have argued that the conflict between the two legal orders is actually not a conflict at all, if one acknowledges article 351 TFEU and the protection it provides. If not, or in the remaining cases where such provision cannot be applied, employing the *Bosphorus*[4] presumption could represent a solution. This may however lead to some discussion, since the investor's legitimate expectations are quite different in EU and Investment law. The main conclusion in this regard is, however, that both legal orders have to give in and try to, as much as legally and factually possible, respect one another.

2. How the conflict began – two worlds colliding?

2.1. The evolution of EU State Aid

There are several reasons for a State to grant aid, such as economic, political, or mixed. A government may want to achieve certain policy goals by steering national economic development and preserving or even boosting employment in specific regions. It may also merely intend to secure votes in a future election as part of a political move.

[3] Especially following the notorious *Achmea* decision (Slowakische Republik v Achmea BV, C-284-16, EU:C:2018:158, 6 March 2018).

[4] Bosphorus v Ireland, App No 45036/98, 30 June 2005, ECHR 2005-VI

Either way, according to the data provided by the European Commission's Competition Directorate General[5] some Member States are more likely to grant aid than others. However, a clear-cut division of Eastern versus Western, Northern versus Southern, rich versus poor, right government versus left government cannot be traced. Four possible categories resulted from the studies and calculations made by the author: Member States that have always given higher or lower values than the EU-27 average and MS that are usually higher or lower than the EU-27 average.

Furthermore, it resulted from the available tables that, regardless of in which of the four categories a State is included, when in crisis, all of them give aid. *This is reflective of the idea that Member States are guided by larger economic policy goals, in this case to help 'save' the engines of their economic systems, highlighting the policy objectives that motivate states to give aid in the first place*[6].

While the reasons behind a government's decision to grant aid are usually understandable, it is also true that these measures may in fact harm competition, including in other jurisdictions, regardless of whether those negative impacts are intended or unintended[7]. State aid control at EU level is, therefore, necessary to manage these so-called "externalities".

Unlike other branches of Competition law, state aid law is a purely European creation meant to prevent a race to the bottom[8], whereby States deregulate and provide certain tax incentives to attract economic activity, driving the race to the lowest possible regulatory standards[9]. In order to avert this so-called *Delaware effect*, a supranational verification process is required, since the abovementioned negative externalities can be felt in jurisdictions other than the one where aid was effectively implemented. As a consequence, this particular field of competition law is more political and raises questions of loss of national sovereignty, which date back to the everlasting debate between

[5]Data sourced from European Commission, 2012. Commission Staff Working Document, Facts and Figures on State Aid in the EU Member States, 2012 Update, p. 29, available at: http://ec.europa.eu/competition/state_aid/ studies_reports/2012_autumn_working_paper_en.pdf. and European Commission, DG Competition, http://ec.europa.eu/ competition/state_aid/scoreboard/non_crisis_en.html.

[6] HOFMANN, Herwig C. H., MICHEAU, Claire - State Aid Law of the European Union, Oxford University Press, 2016, p. 12-17.

[7] FERREIRA, Eduardo Paz, *Integraçao e direito económico europeu*, AAFDL Editora, 2018, Miguel Sousa Ferro – Chapter on State Aid law, p. 283 - 318.

[8] A concept that originated in the United States at the end of the 19th century.

[9] "The Politics of Multinational Corporations." International Political Economy, by Thomas Oatley, 6th ed., Routledge, Taylor & Francis Group, 2019, pp. 183–207.

intergovernmentalists and neofunctionalists in regard to the role of the States versus of the EU institutions, respectively. Even though the Treaty of Rome already established State aid provisions, intergovernmentalists argue that Member States delegated more power to the Commission only in the 80s, after realizing that a stricter control and implementation of the state aid rules was necessary for the single market objective[10] and unreachable without it.

On the other hand, neofunctionalists defend that it was quite the reverse: it was the Commission that convinced the reluctant Member States to attribute to it more power and did so gradually, culminating in the Procedural Regulation of 1999. A factor that contributed to this line of thought was that the institutions themselves were in constant development, particularly the Commission and the Court of Justice. Umut Aydin notes that, while the focus of the Commission's framing of the issue was on the potentially harmful effects of state aid on competition within the EU, it gradually shifted to its harmful effects on the Member State's budgets[11]. Ultimately his article separates four stages of the Commission's involvement and control over State Aid policy: 1960s-1980s origins[12]; 1980s – Acceleration[13]; 1990s – maturation[14] and 2000s – modernization[15]. The latter was guided by the objective of "less and better targeted aid". In addition to the remarkable reform process of the State Aid Action Plan, which led to several Notices and

[10] *It was the convergence of MS interests on the need for a stricter state aid policy in the 80s that prompted them to grant more autonomy in implementing the Treaty's State Aid rules.,* MORAVCSIK, Andrew 1991. "Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community " International Organization 45 (1):19-56. in AYDIN, Umut, *State Aid, Issue Framing and the Politics of Expertise* - Prepared for Presentation at the ECPR Joint Session, Lisbon, 14-19 April 2009, p. 8.
[11] Idem., p. 9.
[12] Where one can highlight the Commission's efforts to control state aid policy through soft law and with the Court's support, especially the notorious *Kohlgesetz* case of 1973 (Case 70/72 – Commission of the European Communities v. Federal Republic of Germany - ECLI:EU:C:1973:87).
[13] Among other developments, the increasing jurisprudence on the recovery of State aid in the CJEU, the Commission's White Paper on Completing the Single Market, the first Survey of State Aids in the European Community and the growing support from the UK, Netherlands and Denmark regarding stricter rules on State Aid, can be noted.
[14] Two Regulations were adopted: the enabling regulation of 1998 by the Council and the 1999 Council Regulation. In the first one, specific types of aid were exempted from notification, pursuant to the Commission's choice. As to the second one, it enhanced the Commission's powers to enforce state aid decisions and officially established that these decisions are bilateral, i.e. between the Member States and the Commission alone. According to the author, in this decade the Commission *tackled the issue of notification and recovery of illegal state aid more forcefully* (p. 21).
[15] It began with the Lisbon Summit, where the MS set their goal to become a competitive force in the economic world. Other advancements followed, such as the Online State Aid Scoreboard to increase transparency and the 2005 State Aid Action Plan to apply the before mentioned goal. Its implementation included a package of measures that afforded more legal certainty regarding service of general economic interest, a document on State Aid Innovation and new Regional Guidelines for 2007-2013 (see https://ec.europa.eu/commission/presscorner/detail/en/IP_06_804).

new Regulations, namely the General Block Exemption Regulation and the *de minimis* Regulation, the State Aid Modernization initiative[16], launched in the aftermath of the economic and financial crisis, must also be highlighted. It involved reviews of said Regulations, clarifications and simplifications of certain measures and procedures. For instance, the Commission issued an Explanatory Notice on the Notion of State Aid in 2016[17], intending to facilitate the Member States' understanding of compatible and incompatible state aid with the internal market. As Phedon Nicolaides explains, all the guidelines and the GBER now use the same criteria to assess said compatibility, analyzing *whether aid is necessary, whether it incentivizes beneficiaries to invest or carry out a project, whether aid is proportional and whether it does not distort competition to an undue extent*[18].

One can therefore argue that the main goal behind a European protection of State Aid is the guarantee and contribution to the internal market[19]-[20], evident in provisions 3(3) of the Treaty of the European Union[21], 3(1)(b) of the Treaty on the Functioning of the European Union[22] and Protocol 27 to the Treaty of Lisbon on the Internal Market and Competition. This can also be easily interpreted by the wording of article 107 of the TFEU[23], which describes state aid that is incompatible with the internal market and, therefore, prohibited. In addition to the referred control being regarded as an *integrating factor*, thereby including other policy objectives linked to the creation of a single market[24], it can also be regarded from a narrower competition-based model, which, unlike the first one, is more economically, rather than legally oriented. It focuses on the

[16] Brussels, 8.5.2012 COM(2012) 209 final – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - EU State Aid Modernisation (SAM).
[17] Commission Notice on the notion of State Aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, [2016] OJ C 262.
[18] NICOLAIDES, Phedon, *Legal developments - A critical review of the Commission Notice on the notion of State Aid (2016)*, p. 2.
[19] FRENZ, Walter, *Handbook of EU Competition Law*, Springer-Verlag Berlin Heidelberg 2016. Before the Single European Act of 1987, which included the internal market goal, the only common goal was the creation of a Common Market. Both imply the "removal of all barriers to intra-community trade with the objective of focusing all national markets into a common market". - ECJ, Case 15/81, ECLI:EU:C:1982:135 (para 33)—Schul; Case C-41/93, ECLI:EU:C:1994:196 (para 19)—France/Commission; Case 32/65, ECLI:EU:C:1966:42 (407 et seq.)—Italy/Council and Commission;
[20] C0M(85) 310 final Brussels, 14 June 1985, COMPLETING THE INTERNAL MARKET White Paper from the Commission to the European Council, paragraphs 157-159.
[21] Henceforth TEU.
[22] Henceforth, TFEU.
[23] And articles 101 et seq. regarding other institutes in competition law.
[24] HOFMANN, Herwig (n 6). - *In that, the design of State aid control is set out to require balancing between competition and industrial policy with many other objectives recognized in the Treaties and now the Charter of Fundamental Rights of the Union.*

distortions that a specific State action may have on competition, affecting neighboring market participants through a negative spill-over effect and calculates the overall welfare reduction that it caused. Lastly, State aid control can be interpreted as a control of public spending. However, this approach is deeply connected to the first two models and embodies a secondary, albeit necessary, objective. *The effect is to protect Member State decision-makers against the internal effects of engaging in wasteful spending as the result of effective lobbying, leading to agency 'capture' by special interests or even outright corruption whilst at the same time protecting the neighbors against the externalities of such approaches*[25].

From a substantial point of view, although the Treaty of Paris already referred to State aid, it was only with the Treaty of Rome that a clear definition was set in place. Another major difference between the two Treaties was the establishment of derogations by the latter under specific circumstances. Despite the Commission's indubitable role in its development and application, some say that it is the Court of Justice that resembles the *architect of current state of law governing state aid*[26], specially when one remembers the 1973 landmark cases *Kohlgesetz*[27], where the principle of recovery of illegal state aid was first affirmed and *Lorenz*[28], which recognized article 108/3 TFEU[29] last sentence's direct effect, thereby preventing Member States from adopting measures until the Commission has issued a final decision.

Broadly speaking, the definitions and criteria of what constitutes compatible and incompatible state aid have not been significantly altered in the past 60 years, with a few exceptions, namely the Treaty of Lisbon's inclusion of the derogations in article 107/2/c, 107/3/a and article 108/4. Nevertheless, the Treaties' broad wording leaves quite some room for the Commission's discretion[30] and the Court'sjudicial scrutiny of the secondary

[25] Idem., quoting Phedon Nicolaïdes, 'The Economics of granting and controlling State aid', in Leigh Hancher, Tom Ottervanger, and Piet Jan Slot, EC State Aids (3rd ed) (London: Thomson Sweet & Maxwell, 2006) 17–29, at 19.
[26] HOFMANN, Herwig (n 6) p.21.
[27] Case 70/72 (n 12).
[28] Case 120/73 Lorenz [1973] ECR 1471.
[29] 108/3: The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.
[30] See "Treaty of Lisbon Annotated and Commented", Almedina Editions, Coordinated by Manuel Lopes Porto and Gonçalo Anastácio, 1st edition, annotation of article 107 by João Nogueira de Almeida, pages 518 to 522.

legislation and soft law on the topic.. In brief, the different concepts that constitute the legal framework of the notion of state aid are the following: State Origin, Undertaking, Advantage, Selectivity, Distortion of Competition and Effect on Trade between EU Member States.

2.2. Investment law and the European Union

As the name suggests, investment law consists of a particular field of law meant to protect investments. Traditionally, the disputes deriving from investment relationships were solved either in the host State's domestic courts, which implied certain partiality risks, or through the investor's recourse to diplomatic protection from its home state. However, governments began to understand that, in order to attract investors, a stable and predictable[31] legal setting was required, which meant, firstly, the signing of treaties – the so-called Bilateral Investment Treaties (BITs) and, secondly, a neutral judicial body for the dispute resolution – Arbitral Tribunal[32]-[33]. In fact, it was by concluding investment treaties that developing countries managed to circumvent their regulatory competitive disadvantage, offering stability, freedom and protection of inward and outward investment[34]. Moreover, international arbitration is the most used dispute resolution mechanism under the investment treaties and the International Centre for Settlement of Investment Disputes (ICSID) the most utilized center. Between 1972 and 1991 it processed 26 cases, whereas in 2019 alone 306 cases were administered, 52 new ones were registered, and 59 arbitrations were concluded[35]. One can note that the 90s "BIT

[31] DOUGLAS, Zachary, *The International Law of Investment Claims*, Cambridge University Press (2009), p.1.

[32] While there are many such forums, namely ICSID, UNCITRAL, the International Chamber of Commerce, the Stockholm chamber of commerce, among others, this dissertation will focus on the first one.

[33] SWEET, Alec Stone and GRISEL, Florian, *The Evolution of International Arbitration - Judicialization, Governance, Legitimacy,* Oxford University Press (2017), p. 66 et seq., claiming that States preferred to 'depoliticize dispute resolution'.

[34] BUNGENBERG, Marc, *The Division of Competences Between the EU and Its Member States in the Area of Investment Politics* in BUNGENBERG, Marc, GRIEBEL, Jorn and HINDELANG, Steffen, *European Yearbook of International Economic Law – Special Issue: International Investment Law and EU Law,* Springer (2011), p. 32.

[35] International Centre for Settlement of Investment Disputes, 'ICSID Annual Report 2019'- https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR19_CRA_Web_Low_DD.pdf, p. 19.

boom" [36] gave a *crucial boost to the Centre's mission*[37], also representing the most common International Investment Agreement (IIA).

BITs are agreements containing standards of protection of investments made abroad and, usually, an Investor-State dispute settlement (ISDS) clause, agreeing to subject a potential dispute to an arbitral tribunal, which can adopt a "cafeteria style" approach or provide for a straightforward *fora,* as the German and French model BITs[38] do. Alec Stone and Florian Grisel describe the common features that these treaties share as threefold: First, they create substantive law for foreign direct investment (FDI)[39], which usually consists of the prohibition of direct and indirect expropriation without due compensation, non-discrimination principles such as national-treatment and most-favored-nation treatment (MFN), and fair and equitable treatment (FET); second, *they establish state liability for the violation of an investor's rights;* third, they attribute states to arbitration. This similarity between the BITs content and form can be explained by the limited number of common sources[40], on one hand, and the MFN clauses, on the other, since each State will strive to provide the same rights and guarantees to investors from every State that it has celebrated a BIT with.

The ICSID was established in 1966, pursuant to the signing of the Washington Convention in 1965[41], counting today 163 signatories, of which 154 are Contracting States[42]. It was negotiated under the auspices of the World Bank and facilitated by a draft convention that had been prepared by its then General Counsel[43]. Two prime factors contributed to the overwhelming adherence to the Convention: the mainly procedural scope of its rules and the fact that contentious issues during the negotiations were not included in the final document, for instance, the definition of "investment". Moreover, the recognition and enforcement of ICSID awards is stricter than in other arbitral awards

[36] BINDER, Christina, KRIEBAUM, Ursula, REINISCH, August, WITTICH, Stephan, *International Investment Law for the 21st century*: Essays in Honour of Christoph Schreuer, Oxford University Press (2009), Chapter 29;
[37] (n 33), p. 69.
[38] QC McLACHLAN, Campbell, SHORE, Laurence and QC WEINIGER, Matthew, *International Investment Arbitration – Substantive Principles*, 2nd edition, Oxford University Press (2017), p. 47-52.
[39] (n 33), p. 68.
[40] (n 38), p. 27. Examples: drafts prepared in 1959 and 1967 by a private group and the OECD, respectively and bilateral treaties of Friendship, Commerce and Navigation (FCN).
[41] https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf
[42] ICSID Annual Report 2019, p. 11, available at: https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR19_CRA_Web_Low_DD.pdf
[43] LIM, C.L., HO, Jean and PAPARINSKIS, Martins, *International Investment Law and Arbitration – Commentary, Awards and other Materials*, Cambridge University Press (2018), p. 63.

that rely on the New York Convention[44]. While the latter separates between the challenging and the setting aside of an award, under ICSID the loosing party may simply seek its annulment by an Ad Hoc Annulment Committee and under limited circumstances provided in article 52. These characteristics will be further addressed throughout this dissertation.

In the context of the European Union, the investment law framework based on BITs, both between Member States themselves and between a Member State and third countries, as well as its dispute settlement provisions slowly but surely triggered critical debate. While it was only in 2009, when the Treaty of Lisbon entered into force, that the EU acquired exclusive competence in the field of foreign direct investment[45], it had already expressed its will to interfere in this area in the "European Convention for a Treaty Establishing a Constitution for Europe". Its proposal of July 2003 included the competences for foreign direct investments within the chapter on the Common Commercial Policy[46], despite the opposition by several Member States such as Germany, France, the UK and Spain. Even though the Constitutional Treaty did not enter into force, the *modified chapter on the CCP was integrated into the Lisbon Treaty[47]*, constituting the first official mention of foreign investment in EU primary law[48]. In addition, the EU Minimum Platform on Investment adopted in 2006 was the basis for the negotiation of several Free Trade Agreements (FTAs), such as the 2008 EU–CARIFORUM Economic Partnership Agreement (EPA) and the 2010 EU–South Korea FTA[49], mirroring the EU's long-lasting agenda on investment and its already existing competence over the conclusion of treaties that covered the pre-establishment phase. The above-mentioned developments coupled with ECJ jurisprudence, namely cases between the Commission and the Republic of Austria[50] and the Kingdom of Sweden[51], demonstrate the EU's tendency, and in particular the

[44] UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). Available here: https://www.newyorkconvention.org/english .
[45] Article 207/1 TFEU.
[46] (n 34), p. 31. CONV 685/03, Document of 23 April 2003 and Communication COM(2006) 567 final on "Global Europe: Competing in the World".
[47] DIRECTORATE-GENERAL for External Policies of the Union, Policy Department Study – The EU Approach to International Investment Policy after the Lisbon Treaty (2010), p. 10-11.
[48] One of the reasons behind this 'delay' was the States' reluctance to accept the use of the same terminology by the EU of a field that traditionally belonged to the individual countries, fearing that it would confuse the division of competences between them and the Community. See DIMOPOLOUS, Angelus, *EU Foreign Investment Law*, Oxford University Press (2011), p. 36.
[49] Titi, Catherine, *International Investment Law and the European Union: Towards a New Generation of International Investment Agreements*, The European Journal of International Law Vol. 26 no. 3 (2015).
[50] Case C-205/06 Commission v. Republic of Austria.
[51] Case C-249/06 Commission v. Kingdom of Sweden.

Commission's attempts, to *encroach upon MS' current BIT practice even before the entry into force of the Treaty of Lisbon*[52]. The main objection of the Commission regarding arbitration as the applicable ISDS mechanism was that the tribunals could be required to interpret matters of EU law, thereby violating the ECJ's exclusive competence to do so[53]-[54] and its autonomy. Faced with its exclusive competence to celebrate investment treaties with third countries, it sought to avoid this potential conflict and replace the ISDS system of arbitration by an Investment Court System (ICS), which was officially proposed by the Commission on September 16th 2015 and was intended to be adopted in every investment partnership[55]. This new system's compatibility with EU law was confirmed by the Court of Justice in Opinion 01/17[56] and already implemented in the Comprehensive Economic Trade Agreement (CETA), the EU-Vietnam FTA, the EU-Singapore FTA and the EU-Mexico FTA. The next step would be the establishment of a multilateral investment court (MIC), replacing the ICS, which had already been announced in the Commission's Concept Paper "Investment in TTIP and beyond – the path to reform". In 2018 the Council mandated the Commission to negotiate a convention establishing a MIC following a public consultation and impact assessment in 2016-2017[57]. It is currently being evaluated and discussed among the institutions.

The plot further thickens when one considers intra-EU BITs and their derived arbitrations, considering that they pose issues related not only with jurisdiction, but also with the applicable law and enforcement[58], which I will explain in more detail throughout this dissertation. For now, it suffices to say that the EU has struggled with them at every stage.

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[52] BURGSTALLER, Markus, *European Law Challenges to Investment Arbitration* (chapter 19) in WAIBEL, Michael, KAUSHAL, Asha, CHUNG, Kyo-Hwa Liz and BALCHIN, Claire, The Backlash against Investment Arbitration – Perceptions and Reality, Wolters Kluwer Law & Business (2010), p. 455-482.

[53] Article 344 TFEU. Furthermore, since the Arbitral tribunals are not considered as Courts within the meaning of article 267 TFEU, they could not request a preliminary ruling. For an extensive analysis of the so called 'monopoly of jurisdiction of the Court of Justice" see DUARTE, Francisco de Abreu, *"But the last word is ours" – The monopoly of jurisdiction of the Court of Justice of the European Union in light of the investment court system*, NYU School of Law (2018).

[54] It was not the first time the issue of a threat to ECJ's autonomy emerged. See Opinions 1/91 (European Economic Area), Opinion 1/00 (European Common Aviation Area) and 2/13 (Accession to the ECtHR).

[55] (N 54). And TITI, Catherine, *Recent Developments in International Investment Law* in BUNGENBERG, Marc, KRAJEWSKI, Markus, TAMS, Christian J., TERHECHTE, Jörg Philipp and ZIEGLER, Andreas R., European Yearbook of International Economic Law, Springer (2018), p. 383-402.

[56] http://curia.europa.eu/juris/document/document.jsf?docid=213502&doclang=EN

[57] For the establishment of the Multilateral court system's *legislative train schedule* see: https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-multilateral-investment-court-(mic) .

[58] CREMONA, Marise, THIES, Anne and WESSEL, Ramses A, *The European Union and International Dispute Settlement* (2017), p. 41.

The solution that was finally reached in May 2020 was the termination agreement signed by 23 Member States, which was to be expected, considering the *Achmea*[59] decision and the infringement actions against several Member States[60]. The Commission had already intervened multiple times in several arbitral cases as *amicus curiae*, although its allegations were largely contradicted in their respective final awards. It believed that they constituted a *challenge to the unity of the internal market*[61].

Returning to the 1990s, facing increasing globalization, undertakings sought to compete at a larger scale, while the Central and Eastern European countries (EEC) desperately wanted to attract foreign investment[62]. This combination resulted in investment treaties being negotiated on the Western States' terms and being rather investor-friendly, presenting broad clauses such as 'Fair and Equitable Treatment'. Before the 2004 enlargement, there were only two intra-EU BITs[63]. After that enlargement, the number grew to 150 and with the 2007 accessions, it increased to 191 intra-EU BITs.

In conclusion, the conflict effectively began after these enlargements, when the then "pure" BITs converted to intra-European BITs and the new Member States became subject to the primacy and autonomy of EU law. However, one could argue that the conflict could have been previously anticipated, since accession negotiations take time and, already then, the states had to compromise and adapt their legislation to that of the Community. This process often involved the withdrawal of aid or plans that were in place and protected under the BITs. Observing in parallel the evolution of State aid and how the Commission *tackled the issue of notification and recovery of illegal state aid more forcefully*[64] in the 90s the increasing tensions were bound to emerge.

We are well to remember in this respect what the arbitral tribunal in CMS v. Argentina wrote: the right of host states to adapt its economic policies together with the rights of the

[59] Upon a German Supreme Court's reference for preliminary ruling, the ECJ held that investment disputes arising of intra-EU BITs cannot validly be resolved by arbitral tribunals, because it would breach the autonomy of the EU legal order, since only national courts are capable of requesting preliminary rulings to the ECJ on matters of EU law.

[60] Austria, the Netherlands, Romania, Slovakia and Sweden. Available here: https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5198

[61] CREMONA, (n 58), p. 40.

[62] Some argue that the aim of attracting foreign investment has shifted in the past decades and is now considered to be the removal of barriers to trade and investment and the final goal of liberalizing investment flows. See SAUVANT, Karl P and SACHS, Lisa E, *The Effect Of Treaties On Foreign Direct Investment*, Oxford University Press (2009), Page 13- 15, 27.

[63] Between Germany and Greece (1981), and Germany and Portugal (1980). MOSKVAN, Dominik, *Reforming intra-EU Investment protection amid a Running of Battle of interests*, 22 MJ 5 (2015).

[64] (N 14).

investors under a system of guarantees and protection are at the very heart of this difficult balance[65].

When we add the law of a supranational organization such as the European Union to this already sensitive and complicated balance, it is not surprising that the many different rights and obligations eventually collide.

3. Micula v. Romania – *You can run but you can't hide*

The origin of the arbitral award issued on December 11th 2013 under the ICSID[66] that led to the dichotomy we propose to discuss – the alleged compensation as state aid – relates in essence to the revocation of a Romanian incentive scheme called EGO 24. First and foremost, we need to examine the background and the legality of that scheme in order to arrive at the above-mentioned conflict derived from the award. Chronologically speaking, the EGO 24/1998 was adopted in the context of negotiations of Romania's accession to the EU. In the early 90s, Romania signed the Europe Agreement with the European Community and its Member States, which was meant to promote the country's economic development in the hope of future integration into the Union and entered into force in 1995. One of the covered areas was competition law. Broadly speaking, it provided the same criteria as the Treaties. The European Council explained in 1993 that the acceding countries had to satisfy the so-called Copenhagen criteria, including *existence of functioning market economy and capacity to cope with competitive pressure and market forces within the EU*[67]. However, despite its efforts[68] in the transition from communism to a democracy, the Commission concluded that Romania did not meet the referred criteria yet and therefore would not begin accession talks. However, a year later, the Commission adopted Guidelines for Regional Aid and in its Annual Report regarding the Program of community aid to the countries of Central and Eastern Europe (PHARE), it affirmed that Romania met the Copenhagen conditions. It was in this context that the

[65] *CMS Gas Transmission Co v. Argentina* (Decision on Jurisdiction) ICSID Case No ARB/01/8, para. 28.
[66] ICSID Case No. ARB/05/20, Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania, accessible here: https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf .
[67] Idem., para. 184.
[68] Decree Law 96/1990 "on certain measures for the attraction of foreign capital investment in Romania" (included customs duties exemptions and profit-tax exemptions); Law 35/1991 on foreign investment; Government Ordinance No. 27/1996; Law 151/1998 on Regional Development.

Romanian government adopted EGO 24/1998[69], which could (and would) be altered if the Commission found that an existing aid scheme was incompatible with the common market, according to the Council Regulation No. 659/1999. The formal accession talks began in 2000.

EGO 24 established the legal framework for the granting of incentives to certain investors in disfavored regions. Among them we could find three separate Facilities: Machinery, Raw Materials and Profit Tax. The first one included exemptions from payment of customs duties and value added tax; the second one involved refunds of customs duties on raw materials and the latter consisted on an exemption from payment of profit tax. In March 1999, Romania decided that Stei-Nucet, Bihor county, was a disfavored area and would be considered as such for 10 years.

The Micula brothers had already began investing in Romania since 1991 and in 2000 and 2002 three of their companies, European Food SA, and Starmill SRL and Multipack SRL, respectively, obtained Permanent investor certificates (PICs), which allowed them to benefit from the incentives and invest in the mining area of Stei-Nucet until April of 2009.

Shortly after the accession talks began, the Romanian Competition Council[70] found that several incentives of EGO 24 were incompatible with State aid rules and threatened to distort competition. It decided that some of them had to be revoked. While EGO 75/2000 amended the previous Government Ordinance, it did not fully eliminate the Raw Materials Facility per the Council's request, resulting in further complications. It was in 2004, pressured by the Union, that Romania decided to repeal all the incentives provided under EGO 24 and EGO 75, apart from the Profit Tax Facility. The revocation took effect on February 2005 and on January 1st 2007 Romania acceded to the EU.

In the meantime, effectively since 2003, a BIT between Sweden and Romania entered into force, granting investors from both countries certain protections when investing in one or the other country. One of its clauses, article 7, stipulated that any conflict was to be settled by an arbitral tribunal under the ICSID.

When the EGO schemes were withdrawn, the five Claimants – the two brothers and their three companies – initiated arbitral proceedings, claiming that the Fair and Equitable treatment, article 2(3) of the BIT, of their investments had been breached. According to

[69] Emergency Government Ordinance No. 24/1998.
[70] Established by Law No. 143/1999 on State aid.

the PICs that were granted to them, they were expecting to use the schemes' benefits until 2009 and invested/planned accordingly. Originally, the Claimants aim was to request the re-establishment of the repealed incentives. However, still relatively early in the proceedings, they decided to simply ask for **compensation for the damages** they suffered due to the revocation. The European Commission intervened as *amicus curiae*[71], arguing that the incentives were incompatible with Community rules on Regional aid, consubstantiating operating aid, which is (usually) prohibited under state aid law[72] and that any ruling reinstating or compensating the investors would represent a granting of new, incompatible, aid, which requires prior approval by that European institution. During the arbitration both the Respondent and the Commission contended that *the payment of compensation in lieu of aid must be regarded as equivalent to a payment of the relevant aid itself*[73]. Due to the supremacy of EU law and, in this case, State aid rules, enforcing such an award could not take place, they argued.

The Commission refered to the *EcoSwiss*[74] case law, where it was established that national courts must also consider competition law when assessing an arbitral award's conformity with the EU public policy under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral. Even if the ICSID Convention, unlike the previous Convention, does not provide such an exception and demands an automatic recognition and enforcement by the national courts, the Commission defends that the same is applicable in these cases, since the ICSID Convention is not binding on the EU under article 218(7) TFEU[75].

Similarly to many other arbitrations that followed[76], when it came to discussing the enforcement stage of an arbitral award, the Tribunal chose not to address this issue

[71] The Commission's intervention on intra-EU arbitrations has become quite usual as demonstrated in *The European Commission as Amicus Curiae of Arbitral Tribunal: Is it a legitimate relationship,* Revista de Arbitragem e Mediação | vol. 60/2019 | p. 237 – 257. A few cases are: Eastern Sugar BV (Netherlands) v. Czech Republic, SCC Case No 088/2004; AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID case no. ARB/07/22; Electrabel S.A. v. Republic of Hungary, ICSID case no. ARB/07/19; Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain, ICSID case no. ARB/13/31; Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Spain, ICSID case no. ARB/13/36.

[72] Micula v Romania (n 1) p. 59.

[73] Idem. Para. 331-336.

[74] ECJ, Case C-126/97 Eco Swiss v. Benetton ECR (1999) 1-3055, para. 35-41.

[75] At that time it was article 300(7).

[76] United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia (ICSID Case No. ARB/14/24), para. 541; RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain (ICSID Case No. ARB/14/34), para. 374; B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia (ICSID Case No. ARB/15/5), para. 564-567; Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No.

extensively, rather considering it inappropriate to base a decision on future predictions of unenforceability.

The Arbitral Tribunal issued the final award on December 2013, finding that Romania had breached the fair and equitable treatment provided in article 2(3) of the BIT by revoking the incentives, which were meant to last until April 2009, prematurely and ordering the payment of a compensation for the resulting damages. The amount of compensation was broken down into the following categories: increased costs of sugar, increased costs of raw materials other than sugar, lost opportunity to stockpile sugar, lost profits on sales of finished goods[77] and interest. While the Claimants had also invoked breaches of other standard, such as the umbrella clause (article 2(4) of the BIT) and that of expropriation (article 4(1)), the tribunal dismissed them.

A regular and intense dialogue between the European Commission and Romanian authorities began shortly after. Eventually, the first informed the latter that it had decided to begin the formal investigation laid down in article 108(2) TFEU regarding Romania's partial implementation of the award earlier in 2014[78].

In the meantime, on April 2014 Romania filed for annulment of the award before an ad hoc committee, based on article 52 of the ICSID Convention[79], in which proceedings the Commission intervened as amicus curiae once again. The Committee decided to lift the stay of enforcement, which it had previously accepted. It was in this context that between January and February 2015 the appointed executor seized more amounts of compensation and informed the Commission that the award was fully implemented. The investors also sought recognition of the award in the US, UK, Luxembourgish, Belgian and Swedish Courts.

ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019, para. 235; BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain (ICSID Case No. ARB/15/16), para. 569(f); Silver Ridge Power BV v. Italian Republic (ICSID Case No. ARB/15/37), para 232-237; Belenergia S.A. v. Italian Republic (ICSID Case No. ARB/15/40), para. 338-339.

[77] Micula (n 1) para 1329.

[78] C (2014) 6848 final, 1.10.2014

[79] Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (…)

A month later the Commission adopted its decision[80] where it explained in detail the reasons for considering the compensation as new aid, incompatible with the internal market and ordered the investors to repay the sums resulting from the implementation of the award immediately. The other parties' response was to bring actions against the Commission before the General Court (GC), requesting it to annul the decision, or, at least, allow them not to repay the alleged aid. The European Court decided in favor of the investors[81], considering that, since compensation can only be regarded as aid if it has *the effect of compensating for the withdrawal of unlawful or incompatible aid*[82] and EGO 24 could not be regarded as such because at the time of its adoption, as well as of its revocation, Romania was not a Member State, the Commission had applied EU law retroactively to a situation pre-dating EU accession[83]. The institution appealed to the European Court of Justice, whose final say is anxiously awaited.

This case gained a special notoriety, not only because of the jurisdictional issues raised by an intra-EU dispute that is not solved by an EU court, but mainly due to the risks inherent to the enforcement of the tribunal's award. For the first time, it was not the conflict's underlying actions that were being debated, that is, a State's breaches of its international obligations laid down in BITs or the ECT. Rather, the problematic arises later, when the award has already been rendered, yet the national court is legally impeded from enforcing it, pursuant to EU law and, by extension, national law.

Although the GC focused more on the matter of pre- and post-accession and defining the moment in which the investors' right to receive compensation arose, it recalled the basic conditions for considering a measure as state aid according to article 107(1) TFEU and illustrated through case law that classifying an arbitral award as such would be a mistake within the meaning of that provision.

4. Compensation as State aid

[80] Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA. 38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013.
[81] Judgement of the General Court in 18 June 2019, Cases T-624/15, T-694/15 and T-704/15, ECLI:EU:T:2019:423.
[82] Idem. Para. 103.
[83] Debevoise & Plimpton – General Court of the European Union Annuls European Commission Decision on State aid, 11 of July 2019. Accessible here: https://www.debevoise.com/insights/publications/2019/07/general-court-of-the-european-union-annuls .

Article 107(1) provides that *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.* EU Courts have had on several occasions the opportunity to interpret and clarify some of these notions. They highlight the following cumulative criteria: *first, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient and, fourth, it must distort or threaten to distort competition*[84].

Not all of them are equally controversial and while some of the conditions may pose doubts in certain cases, they will be undisputed in others. In the *Micula* case and other arbitrations that followed[85] it became clear that, when discussing enforcement, i.e the payment of a compensation for damages to investors, two of these criteria stand out – state origin and selective advantage.

In addition, article 351 TFEU states *that the rights and obligations arising from agreements concluded, 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.* Whether it embarks in its protection intra-EU BITs or the ICSID Convention itself, plays an important role. If it does, then there does not truly exist a conflict of legal orders and the issue can be resolved solely under EU law. In other words, the claimants will remain protected by the BIT celebrated between its country and the other party to the Treaty, prevailing over other EU provisions, in this case, state aid rules. Some have also argued that an equilibrium between the two orders can indeed be achieved, applying doctrines established in past EU case law, for instance, in *Bosphorus*[86]. However, as we have discovered, this option can be problematic, considering that they do not provide similar levels of protection, particularly, when it comes to legitimate expectations.

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[84] GC in Micula (n 81), para. 101; *Trapeza Eurobank Ergasias*, C-690/13, EU:C:2015:235, para. 17; *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, para. 38; *Banco Privado Português and Massa Insolvente do Banco Privado Portuguê*s, C-667/13, EU:C:2015:151, para. 45; Case C-237/04 *Enirisorse* [2006] ECR I-2843, paras. 38-39; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, para. 56; Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-0000, para. 52;

[85] (N 76).

[86] Which I will explain in the next chapter regarding the enforcement obligation.

4.1. Imputability

One of the criteria necessary for a measure to be considered as state aid is for it to originate from the State. This notion has been described by scholars, as well as by case law, as being constituted of two cumulative elements[87]. First, the aid measure must be imputable to the State and, second, the financing of such aid must derive from its resources[88]. While the second element does not raise concerns when it comes to compensation or, more specifically, the enforcement of an ICSID award that compensates investors for damages, the first one deserves closer attention.

The European Commission claims that domestic courts, as well as executors, should be considered state organs and, therefore, be subject to article 4(3) TEU[89], which establishes their duty of sincere cooperation vis-à-vis the EU[90]. According to that institution, the only exception to this rule can be found if a Member State is obliged by Union law to implement a measure without discretion[91], which, in my opinion, is not the case of the enforcement of arbitral awards.

To help prove my point, before examining the particularities of the ICSID Convention and its awards, it is important to acknowledge a few European Courts' decisions on similar cases, that is, cases that involved a Member State paying a company a lump sum and being possibly considered as state aid.

In *Denkavit*[92], a legal dispute that concerned the repayment of charges, the CJEU held that article 107 refers to **unilateral** and **autonomous** decisions of Member States to grant certain advantages to specific undertakings. As a result, it decided that *a national tax system which enables the taxpayer to contest or claim repayment of tax does not constitute an aid within the meaning of article 92 of the Treaty*[93]-[94].

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[87] Court of Justice: General Court, judgment of 5 April 2006, case T-351/02, *Deutsche Bahn AG v. Commission*, para. 103; judgment of 7 May 1998, joined cases from C-52/97 to C-54/97, *Viscido v. Ente Poste Italiane*, para. 13; judgment of 17 June 1999, case C-295/97, *Rinaldo Piaggio s.p.a. v. Ifitalia s.p.a. and Others*, para. 35; judgment of 17 March 1993, joined cases C-72/91 and C-73/91, *Sloman Neptun*, paras 19 and 20.

[88] VITALE, Grazia, *The General Court's Ruling in Tercas: Between Imputability of the Aid to the State and Use of State Resources*, p. 8, in European Papers, Vol.4, 2019, No 3, European Forum, Insight of 12 January 2020, pp. 895-905. Available here: https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2020_I_002_Grazia_Vitale_00330.pdf.

[89] 4(3) TEU- 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.

[90] Commission Decision (EU) 2015/1470 on Micula (n 81), recital 120.

[91] Idem.

[92] Case 61/79 Aministrazione delle finanze dello Stato v Denkavit italiana (1980) ECR 1205.

[93] Idem. Para. 31.

[94] Now, article 107 TFEU.

The same argument of lack of imputability was later invoked in *Deutsche Bahn AG v. Commission*[95], where the Court explained that Germany, faced with the obligation to implement a Directive, transposing a tax exemption contained therein into its national system, was merely abiding by its Treaty duties. In conclusion, the State did not possess the necessary autonomy for the alleged aid to be attributable to it[96]. The applicant contended during the proceedings that, according to EU law, a directive is only binding regarding the results to be achieved and not the specific form or method of transposition, which are left to the national authorities, as stated in article 288 TFEU. As such, it argued that the act was in fact attributable to Germany, since, allegedly, Member States do have *room for manoeuvre*[97].

The way I see it, if the CJEU excluded imputability in a case concerning the implementation of a Directive, which leaves, as asserted by the applicant in the above-mentioned case and unlike EU Regulations, a considerable margin of discretion to the Member State in its transposition[98], there is no reasonable reason to deny the same conclusion in the case of the enforcement of an arbitral award. In the latter, national courts are left with no leeway whatsoever to refuse the recognition and enforcement of said award. According to article 54(1) of the ICSID Convention, the contracting states must recognize the award as binding and enforce it *as if it were a final judgment of a court in that State*[99]. While in *Deutsche Bahn AG* the European Court refused to apply article 107 considering that Germany was simply complying with its EU law obligations, in the case of arbitral awards, the Respondent State is bound by its international obligations, which it must also respect[100].

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[95] Case T-351/02, Deutsche Bahn AG v. Commission, ECR II 1047, para 100-101.

[96] TIETJE, Christian and WACKERNAGEL, Clemens, *Outlawing Compliance? – The Enforcement of intra-EU Investment Awards and EU State Aid Law*, Transnational Economic Law Research Center, June 2014, p. 6.

[97] Deutsche Bahn AG v. Commission, para. 70.

[98] CHALMERS, Damian, DAVIES, Gareth and MONTI, Giorgio, *European Union Law, Cases and Materials*, 2nd edition, Cambridge University Press, 2010, p. 98-100; BORCHARDT, Klaus-Dieter, *ABC of EU law*, 2016, p. 101-105.

[99] Article 54

(1) 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. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

[100] ORTOLANI, Pietro, *Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance*, Journal of International Dispute Settlement, 2015, p. 124.

Akzo Nobel[101] further clarifies the matter. The dispute arose from the repeal of an environmental permit by the Dutch government, forcing the chemical company to move one of its plants to another city. To compensate the firm, the Dutch government offered 80% of the damage it suffered due to the displacement, such as housing costs, divestments, among other factors. The European Commission decided that the large amount of compensation was in fact compatible with state aid rules. One of the justifications that it gave, was the fact that the undertaking was legally entitled to such compensation under national law[102].

Naturally, when it comes to international obligations, it may become more complicated to discern the 'applicable national law' criteria advanced in Akzo Nobel and to dismiss the applicability of article 107 TFEU so promptly. Regarding international investment law, this is further enhanced, when one remembers the broad concepts provided in the BITs, such as the umbrella clause and the Fair and Equitable Treatment[103]. As explained by Michiel Tjepkema[104], national courts tend to apply the principle of equality when faced with a lack of legal provision that would justify the payment of a compensation to an undertaking. However, according to *Akzo Nobel* and the narrow criteria that it established, Member States cannot rule out imputability when such a general principle is invoked without a binding court judgement[105].

If one considers the FET to be analogous to the principle of equality, namely due to their common broad meanings and margins for interpretation, then it can be admitted that those broad standards of protection contained in investment treaties trigger the Akzo Nobel 'doctrine', if an arbitral tribunal has found the State liable. In other words, article 107 TFEU can be ruled out for lack of imputability to the state **only if** an arbitral tribunal has condemned a state to pay a compensation for the damages it caused to investors by violating certain rights provided under particular investment treaty. The crucial element here is the tribunal's decision, since it not only confirms the alleged violation of the international treaty, but also gives rise to Respondent State's obligation to compensate. The payment made by a State to an undertaking ceases to be a voluntary choice and becomes a duty.

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[101] C (2004) 2026 fin, Commission Decision of 16 June 2004, OJ 2005 C81.
[102] ORTOLANI, Pietro (n 100), p. 121.
[103] Some say that the overly broad interpretations of the FET by tribunals is one of the reasons for the recent backlash against investment arbitration. See LIM, Ho (n 44), p. 260 and 481 ff.
[104] TJEPKEMA, Michiel, *Damages Granted by the State and their Relation to State Aid Law*, (2013) 3 European State aid law Quarterly, 485-487.
[105] ORTOLANI, Pietro (n 100) p. 122.

Furthermore, just as in Akzo Nobel the Commission concluded that the compensation derived from national law which it was bound to apply, the same respect ought to be offered to international investment agreements to which a state has entered into, even if in the latter case, a conviction by a tribunal is further required.

One could potentially counter-argue that it depends on each country's system of incorporation of international rules into national law. However, Pietro Ortolani clarifies that, firstly, *even where the international obligations deriving from investment law are not transposed into domestic law,* the Member State must be regarded as not having any freedom to refuse to pay, since the IIA is *directly applicable to the legal relationship between the investor and the host state*[106]. Secondly, to assert whether those obligations, i.e. the ones enshrined in those agreements/treaties and explained by a tribunal, *exclude imputability, the relevance of the applicable investment treaty must be assessed on the basis of the domestic system of sources of law and hierarchy of norms.* According to his line of thought, the investment treaty should be seen as a source of law that is binding domestically.

From the CJEU judgements in *Commerz Nederland*[107] and *France v. Commission*[108] one can also draw certain conclusions on the notion at stake. Both cases concerned aid granted by publicly owned undertakings in which the Court decided that for imputability to the State to be found one had to examine whether public authorities were in fact involved in the adoption of the measure, in *deciding its compass, its content and its conditions*[109]. If we transpose this set of conditions to the role of a domestic court faced with its obligation to recognize and enforce an arbitral award, it is not difficult to find that they are actually in comparable situations, hence deserving of the same deference.

The same can be said regarding the judgement *DEI v. Commission*[110]. This time, it was the European Commission that defended the dismissal of any further state aid

[106] Idem.
[107] CJEU, Judgement of 17 September 2014, Commerz Nederland, C-242/13, EU:C:2014:2224, paras 31-33.
[108] CJEU, Judgement of 16 May 2002, France v. Commission, C-482/99, EU:C:2002:294, paras 51-56.
[109] PASCHALIDIS, Paschalis, *The Impact of EU State Aid Law on International Investment Law and Arbitration*, p. 183 in GOMÉZ, K. Fach et al., *International Investment Law and Competition Law*, European Yearbook of International Economic Law, Springer 2020, p. 179-200.
[110] Judgement 31 May 2017, Dimosia Epicheirisi Ilektrismou AE (DEI) v. Commission, C-228/16 P, CLI:EU:C:2017:409

investigation, claiming that the Greek *State did not seem to have had the possibility to dictate the decision of the arbitration tribunal*[111]-[112].

However, although the general rule is that, as demonstrated above, the payment made by a state of a compensation to an undertaking is not imputable to that state, there are some exceptions. When the compensation pertains to a previous measure that was in itself illegal state aid, paying the undertaking an amount for the revocation of such aid would result in an indirect granting of illegal state aid. In such cases, the first requirement for a measure to be considered state aid – imputability - under article 107(1) would be met.

When it comes to Micula, even though the arbitral award was issued in 2013, six years after Romania's accession to the EU, the exception described in the paragraph above could never apply because EGO 24, the incentive scheme that was revoked and originated the arbitral proceedings, was adopted (as well as repealed) before the accession. As a result, any analysis of the award, which consisted of Romania's obligation to compensate the investors for damages, cannot depend on a retroactive evaluation of the measures whose repealing gave rise to the dispute, regardless of the hypothetical verification of all the criteria provided in article 107 TFEU.

Consequently, compensating the investors for a violation of the BIT pursuant to an arbitral court's decision, could also never be viewed as re-installing illegal state aid.

In conclusion, when a domestic court recognizes and enforces an award that consists on that State's payment of a compensation to an undertaking, that exact measure cannot be, in principle, considered imputable to the State, because the national judicial organ did not decide to grant the said payment unilaterally, nor autonomously.

4.2. Selective advantage

Article 107(1) TFEU further stipulates that the measure which is being examined as potentially consisting of incompatible state aid favours certain undertakings or the production of certain goods[113]. One can identify two separate conditions: the granting of an economic advantage and its selectivity.

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[111] Opinion of Advocate General Wathelet in DEI v. Commission, para. 8, quoting the Commission Letter dated 12 June 2014.

[112] The underlying conflict involved a pricing dispute between the Greek public power company DEI and Alouminion SA, whose arbitral award, according to DEI, set an electricity price that was *so far below market price that the selling of electricity to* Alouminion *at such a low price constituted state aid*..- (n 109).

[113] Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 94, and Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 52.

First of all, it is important to remember two set of ideas. On one hand, that compensation can constitute state aid if it aims to reinstall a legal regime that was in itself illegal state aid. On the other hand, that compensation is not supposed to, and will cease to be considered as such, if it leaves the person or, in this case, undertaking, in a better position than it was before the violation of its right(s).

It has been clarified by Tietje and Wackernagel[114] that, as a rule, compensation will not be voluntary and therefore will not constitute state aid, in three different scenarios. First, when the Respondent state repays charges that have been improperly levied; second, when the state has an obligation to pay damages and lastly, when it pays a compensation for expropriation. The two authors also provide one judicial example for each scenario – *Denkavit*, *Asteris*[115] and *Thyssenkrupp*, respectively.

The judgement that best described the intricate relationship between compensation and state aid can be found in the second one: *Asteris*. Indeed, in *Micula*, the main point of discussion within the criteria of economic advantage revolved around this case[116].

It involved a reference for a preliminary ruling by a Greek court, in a dispute that concerned a technical error in a Community Regulation, which resulted in the non-payment of aid under the EU's common agricultural policy. The national court asked the CJEU if granting a compensation to the undertakings concerned, Greek tomato concentrate producers, would amount to incompatible state aid. The EU Court replied that a compensation for damages incurred by the State had a different legal nature from state aid.

In the EC Decision on Micula, the institution provided two arguments that can be easily rebutted. First, it argued that *no advantage is granted where such liability merely ensures that the damaged party is given what it is entitled to just as any other undertaking would be, under the general rules of civil liability in that Member State* and that *compensation granted under those general rules differ from state aid to the extent that they cannot result in damaged individual being better off after receiving compensation*[117].

[114] TIETJE, Christian and WACKERNAGEL (n 96); Same authors also wrote *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, 205-2014.

[115] Joint cases 106 to 120/87 Asteris EU:C:1988:457

[116] *The central question in this regard is whether the principles laid down in the CJEU's Asteris judgement are applicable to the case at hand* – Commission Decision (EU) 2015/1470 on Micula (n 80), recital 100.

[117] Idem. recital 101.

In my view, while it is true that the amount of compensation is a necessary indicator of the compensatory character of the measure[118] – compensation – paying to the investors what they were entitled to receive before their legitimate expectations were breached by the State, is not leaving them "better off". It is retrieving what was rightfully theirs. Of course, that is not the case when the value of the compensation is equivalent to the amount promised in a state aid scheme that was in itself illegal. Indeed, according to AG Ruiz-Jarabo Colomer, in those circumstances *the damage cannot be regarded as equal to the sum of amounts to be repaid*[119]. However, that is not the case in Micula, as explained regarding imputability.

The Commission also claimed that, under *Asteris*, compensation rules out state aid only if based on a general rule of compensation and, since the intra-EU BITs lose its validity upon accession of both parties to the EU, that would not be present. As we have mentioned before, investment arbitration case law does not accept this argument[120]. The fact that the Commission initiated infringement actions against a few Member States only proves that their own termination of those agreements was necessary in order for the BITs to lose its validity.

Another argument to rule out state aid due to a lack of economic advantage can be found in the Market Economy Investor Principle (MEIP), which has been developed throughout the years and been the main instrument to identify the presence of an economic advantage ever since its endorsement in *Meura*[121] and *Boch*[122]. It determines whether a State intervention grants an economic advantage to an undertaking, which it would not have received under normal market conditions, under similar circumstances[123]. It relies on articles 107(1) and 345[124] TFEU, the latter of which safeguards the principles of equality of public and private undertakings, and neutrality, while distinguishing between the State's obligations as a public authority and as a private shareholder. For the purposes of the MEIP, only the State's actions as an entrepreneur matter. Indeed, *if the state behaves like a normal, profit-oriented, private investor would have behaved in similar*

[118] TJEPKEMA, Michiel, *Damages* (n 104), p. 485.
[119] Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-346/03 and C-529/03, para. 198.
[120] Cases indicated in (n 2);
[121] Case 234/84 Meura (1986) ECLI-302.
[122] Case 40/85 Boch II (1986) ECLI-305.
[123] CYNDECKA, Małgorzata Agnieszka, *The Applicability and Application of the Market Economy Investor Principle: Lessons Learnt from the Financial Crisis,* European State Aid Law Quarterly Vol. 16, No. 4 (2017), pp. 512-526.
[124] Article 345: The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

circumstances under normal market conditions, it does not grant aid, but enters a typical business transaction[125]. Malgorzata Cyndecka advanced several examples of tests that have been developed besides the private investor test, such as private creditor, guarantor, reinsurer, vender, purchaser, lender, supplier, among others. To decide whether the MEIP is applicable, the State's economic interest must be verified, that is, if it *sought to maximise profits or minimize losses*[126]. Thus, only after assessing the MEIP's applicability, can it be applied.

It seems quite clear to me that in the case of the payment of a compensation, that applicability is not met. The state, under the form of a domestic court, is not acting as an entrepreneur or a shareholder, pursuing economic objectives. It is purely complying with its international law obligations, namely by enforcing an ICSID award. Even if one tried to compare a court's or arbitral tribunal's award of damages, its quantification is unlikely to differ if those damages were due by a private investor[127].

Regarding selectivity, several tests have been put forward. One of them is the so-called material selectivity test, which involves three steps. It first requires an identification of the objective of that measure; secondly, a comparison between undertakings in similar, that is, comparable legal and factual situations; finally, an assessment of whether that measure is justified under the *nature and general logic* of the system in which it is inserted[128].

European case law has contented itself with an analysis of the first two steps[129].

To assess the first step – the objective of the measure, or better yet, of the regime underlying the granted measure – I believe one could start from two different standpoints. One possibility would be to acknowledge the more general framework of the ICSID Convention and the contracting parties' rights and obligations. From this perspective, the objective would be to satisfy judgement debts against the State. If so, then *the payment*

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[125] CYNDECKA, Malgorzata,*The burden of proof and evidence required under the Market Economy Operator Principle. Lessons learnt from the recent case law,* Nordic Academic Network in Competition Law Conference Jan 31 - Feb 1, 2019.

[126] (n 123), p. 513-514.

[127] PASCHALIDIS (n 109), p. 195.

[128] ARNULL, Anthony and CHALMERS, Damian, The Oxford Handbook of European Union Law, Oxford University Press, 2015. On selective advantage pages 680-682.

[129] *Portugal* v *Commission*, para. 56; Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, para. 41; Case C-172/03 *Heiser* [2005] ECR I-1627, para. 40; Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, para. 68 and Case C-403/10 *Mediaset v. Commission* [2010], ECLI:EU:C:2011:533, para. 36.

of an award would only be selective if the Member State in question did not generally satisfy its judgement debts[130].

Another perspective, leading however to the same result, would be to focus on the *raison d'être* of that payment, namely the *obligation upon the state committing the international wrong to make reparation by way of restitution or, if this is not possible, to pay monetary compensation for the loss sustained*[131]. From this starting point, the objective of the payment is not the satisfaction of a judgement debt, but the offering of an appropriate remedy for the damages suffered by the undertaking.

Either way, the objective of the measure and/or of its surrounding regime, is not selective since it does not seek to favor or benefit an individual undertaking in contrast to other competitors. Indeed, the government is legally bound, not only by written law – BIT, ICSID Convention -, legal doctrine and previous case law, but also by the fundamental principle of *restitutio in integrum*.

As to the second step of the test - the comparison - Advocate General Wahl in the case *Commission v. MOL*, stated that what must be assessed is the availability of a measure to other undertakings, which are in similar situations[132]. Thus, just because a measure only benefits one undertaking, does not necessarily mean that it is selective. It is true that the compensation is only due to the undertaking(s) that suffered damages as a consequence of state action and sought justice for said damages before courts – either judicial or arbitral. However, this only leads to a confirmation of the nature of civil proceedings. A court cannot by its own free will decide to condemn a State to pay damages to a company that is not party to the dispute in the first place[133]. One cannot understand these elementary rules of procedure as meaning that other companies, faced with the same breaches of their legal rights and initiating similar legal proceedings before dispute resolution bodies, would not be entitled to the same "benefits".

It only confirms the main idea underneath *Asteris*, in that *State aid is fundamentally different in its legal nature from damages which the competent national authorities may*

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[130] STRUCKMANN, Kai, FORWOOD, Genevra and KADRI, Aqeel, *Investor-State Arbitrations and EU State Aid Rules: Conflict or Co-existence?*, European State Aid Law Quarterly, Vol. 15, No. 2 (2016), pp. 258-269.

[131] Factory of Chorzów (Germany v. Poland) (Merits) (1928) PCIJ Rep Series A No 17, 47; ILC 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' (2001) 2(2) YB ILC 26, arts 34-6. In QC, Campbell McLachlan (n 38), p. 413-414.

[132] Opinion of Advocate General Wahl in Case C-15/14 P, Commission v. MOL (2015) ECLI-32, para 84.

[133] A judge is limited to the parties' claims and its final judgement cannot go beyond what was asked and alleged by the parties nor decide on issues that were not claimed by the parties in due time. FREITAS, José Lebre de, *A Ação Declarativa Comum à luz do Código de Processo Civil de 2013*, 3ª edição, Coimbra Editora, 2013, p. 321.

be ordered to pay to individuals in compensation for the damage they have caused to those individuals.

The involuntariness of the domestic courts' enforcement, deriving from articles 53 and 54 of the ICSID Convention, plays once again a decisive role. It had already contributed to the exclusion of imputability to the State and will now serve to also rule out the criteria of selective advantage. As written by the Commission in *Akzo Nobel*: A compensation will normally not selectively benefit an individual undertaking.

Selecting means choosing. Compensating an undertaking for damages suffered due to a State's breach of its legal obligations clearly should not and does not fall under this category.

5. (Un)conditional enforcement

A fundamental question remains, namely whether the Respondent state in an investment arbitration is under an unconditional obligation to enforce the resulting award, even if said enforcement would breach its national or EU law, if the Respondent state is an EU Member State.

The answer to this issue depends on the chosen forum, i.e. ICSID or non-ICSID, and on the place where the enforcement is sought – within or outside the EU[134]. However, it is important to acknowledge that only a limited amount of cases raise such enforcement complications, since the awards are usually complied with immediately, without the investors needing to request the enforcement[135]. In addition, as we have argued before, said enforcement does not, as a rule, constitute state aid, which means that finding awards that are not voluntarily enforced and that violate EU competition law is rather rare.

Focusing for the purposes of this dissertation only on intra-EU arbitrations, the least problematic scenarios are the ones pertaining to enforcement outside of the EU. In those cases, any imputability to the MS must be excluded, thereby inevitably removing the chance of constituting state aid. Furthermore, even if the awards' enforcement would breach EU law, it is unlikely that a State exterior to the EU, particularly in the case of

[134] Because of limited characters I will concentrate more on ICSID awards, enforced within the EU.

[135] REINISCH, August, *Enforcement of Investment Treaty Awards* in YANNACA-SMALL, Katia *Arbitration under International Investment Agreements –A Guide to the Key Issues*, 2nd edition, Oxford University Press (2018), p. 797. See also Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitrations*, 74 Brit. Y.B. of Int'l L. 151, 227 (2003).

ICSID arbitrations, would choose to violate its international obligations to respect a legal order that does not even apply to it[136].

Within the EU, whether or not the award derives from an ICSID arbitration is of crucial importance. While the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards established public policy as one of the exhaustive grounds for refusal to such recognition and enforcement[137], the same cannot be found in the Washington Convention. Indeed, in *Eco Swiss*[138], the CJEU ruled that EU competition law is included in EU public policy, therefore consubstantiating a valid ground to set aside the (non-ICSID) award.

Legal literature is split in half regarding ICSID awards whose enforcement is sought within the EU. From one perspective we can mainly find public international law and investment arbitration experts that defend a clear-cut, almost automatic duty to enforce every ICSID award, whereas EU law scholars and courts argue against article 54's applicability, when it would violate EU law, thereby transposing the *Eco Swiss* 'rule' to ICSID awards.

It is widely accepted that the Washington Convention's uniqueness lies in its post-award regime. Section 6 of Chapter IV establishes the recognition and enforcement stage. Unlike most legal instruments that govern international disputes, the ICSID Convention addresses this stage clearly and exhaustively, rather than conceding it to the national legal orders, or other applicable treaties, such as the NY Convention. That is why, according to Christoph Schreuer, article 54 is *one of the most important provisions* and a *distinctive feature* of the Convention[139]. August Reinisch summarizes its main features as threefold: (i) *a genuine and autonomous international law obligation to comply with the award*, whose refusal can lead to diplomatic protection of the home state and recourse to the International Court of Justice[140]-[141]; (ii) exclusivity of the grounds for refusal provided in

[136] The Contracting states' courts may still make use of the doctrine of comity, taking foreign and domestic interests into consideration.
[137] Article V(2)(b)
[138] CJEU, Judgement of 1 June 1999, *Eco Swiss v. Benetton*, C-126/97, EU: C1999:269, paras. 36-39.
[139] SCHREUER, Christoph H., MALINTOPPI, Loretta, REINISCH, August and SINCLAIR, Anthony, *The ICSID Convention: A Commentary*, 2nd edition, Cambridge University Press (2009), p. 1117.
[140] Article 64 ICSID Convention
[141] *The investor's State has the right, according to Article 27, to exercise diplomatic protection against the State which does not respect its obligation to enforce an arbitral award of the Centre; but also, according to Article 64, to have recourse to the International Court of Justice.* - Patrick Mitchell v. Democratic Republic of the Congo, Decision on the Stay of Enforcement of the Award (Nov. 30 2004).

the Convention, prohibiting any other, for instance the NY Convention's public policy exception; (iii) a strict duty to recognize and enforce the awards, excluding any substantive review by domestic courts[142].

In the recognition stage, the only valid condition posed by the national courts relates to the authenticity of the award by the ICSID Secretary-General[143]. It confirms the award's bindingness, turning it into *res judicata*. As to the merits of the award, neither upon its recognition nor enforcement[144], can national authorities revisit the substantive elements of the award, due to the latter's finality and non-reviewability[145]-[146]. These principles also apply to concerns of a potential breach of international law or international *ordre public*, obviously including EU public law and policy, and, thereby, marking the significant difference between the NY Convention and the one under discussion[147]. It is also the reason why investment law experts convince investors to opt for ICSID arbitration, rather than another forum[148], since it provides investors with a greater certainty as to seeing an award that is in their favor being enforced, enhancing their confidence and promoting FDI[149].

While the above-mentioned description of the recognition and enforcement process under the ICSID Convention has been somewhat consensual and indeed seems to be the most reasonable literal and teleological interpretation of articles 53 and 54, EU institutions, courts and states have developed since the 21st century a different conception.

The Micula case is a clear example thereof. The claimants, entitled to compensation, sought enforcement of the award before several EU MS courts: Belgian, Luxemburgish,

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[142] REINISCH, August, (n 135). It also mentions how article 55 of the ICSID Convention safeguards state immunity rules, which can bar the enforcement of ICSID awards.
[143] Article 54(2). Widely held view explained in BERMANN, George A., *Understanding ICSID Article 54*, ICSID Review, 2020, pp.1-33, p. 11
[144] We are adopting Schreuer's opinion and identifying enforcement with execution, even though this is not consensual among scholars. See George Bermann (n 143), p. 8.
[145] SCHREUER, Christoph (n 139), p. 1139-1141.
[146] SCHEU, Julian and NIKOLOV, Petyo, *The setting aside and enforcement of intra-EU investment arbitration awards after Achmea*, Arbitration International, 2020, p. 8.
[147] France did not always understand this distinction. See *Benvenuti & Bonfant v. Congo*, Award, 15 August 1980 and *SOABI v. Senegal*, Cour de cassation, Judgment, 11 June 1991, 2 ICSID Reports 341. For explanation of both cases see DUARTE, Tiago, *O Reconhecimento e a Execução de sentenças ICSID/CIRDI: Portugal à espera da primeira vez* in 'Estudos comemorativos dos 10 anos da Faculdade de Direito da Universidade Nova de Lisboa', Vol. II, Almedina (2008), p. 782-785.
[148] BURGSTALLER, Markus and ROSENBERG, Charles B., *Challenging International Arbitral Awards: To ICSID or not to ICSID*?, Arbitration International, Vol. 27, No. 1, p. 93. BROWN, Chester and MILES, Kate, *Evolution in Investment Treaty Law & Arbitration*, Cambridge University Press (2011), p. 403-405.
[149] ICSID Secretary-General Meg Kinnear in 'Foreword' in FOURET, Julien, *Enforcement of Investment Treaty Arbitration Awards: A Global Guide* (2015).

Swedish, Romanian and English. All except the last, which gave primacy to international law over EU law[150], refused enforcement, respecting the Commission Decision.

Several arguments can be, and indeed have been, put forward from this 'European' perspective, which I will seek to deconstruct one by one. Firstly, since the EU is not a party to the ICSID Convention, the EC's suspension injunction in Micula, for instance, does not in principle violate article 54. This type of argumentation also follows from previous ECJ case law, such as *Kadi*, where international obligations were allowed to be challenged if they breached principles forming the *very foundations of the Community legal order*[151]. In this case it would mean that EU state aid law concerns should take precedence over the MS's international obligations. In my opinion, the fact that the EU is not a party to the Convention is not enough to ignore it and render it irrelevant, especially considering the EU's obligation to contribute to "the strict observance and development of international law"[152]. As Pietro Ortolani explains, such a severe separation between the MS's and the EU's international obligations is no longer coherent, considering the latter's increased competences in international investment law[153] and the similarities with GATT 1947, so far the *only exception to the general rule that the EU is only bound by agreements to which itself is a party*[154]. In the *International Fruit Company*[155] case, the ECJ ruled that the Community was bound by said treaty even if it was not a party to it, since all EU MS had acceded to GATT and had transferred exclusive competence in the tariff and trade policy area to the EU. The same argument can be extended to the ICSID Convention, since all EU MS, except Poland, are contracting members.

Another, rather weak, contention invoked by the EC is that the ICSID obligation to enforce an award is only imposed on the host state. The Swedish court[156], where the Micula brothers sought enforcement, while still denying enforcement mainly due to

[150] UKSC 2018/0177 Micula and others v. Romania (2020). Available here: https://www.supremecourt.uk/cases/uksc-2018-0177.html.
[151] CJEU, Joined cases C-402&415/05P, *Kadi & Al Barakaat Int'L Found v Council &Commission* (2008), ECR i-6351, 301-304.
[152] Art. 3(5) TEU.
[153] the EU's exclusive competence regarding foreign direct investment – Art. 207 TFEU. Also the ISDS clauses in CETA, TTIP and the ECT.
[154] ORTOLANI (n 100), p. 133.
[155] Joined cases 21 to 24/72, *International Fruit Company NV and Others v Produktschap voor Groenten en Fruit* (1972) ECR 1219.
[156] Nacka Tingsratt, Micula et al v Romania, Judgement, Case A 2550-1, 23 Jan 2019,12.

respect of the principle of sincere cooperation[157], rejected this argument, since it would contradict the wording and *raison d'être* of article 54[158].

The notorious *Achmea*[159] judgement of 2018 also raised voices claiming its applicability to intra-EU **ICSID** arbitrations[160]. The ECJ held that intra-EU arbitrations breach the autonomy of the EU legal order, since arbitral tribunals, not national courts, were interpreting EU law. As such, the BIT's arbitration clause was invalid, resulting in the tribunal's lack of jurisdiction and an award that may not be enforced[161]. Whether this ruling should be extended to ICSID arbitrations has been debated. However, in my opinion the answer is clear: the ICSID Convention drafters intended to regulate the post-award phase in a new and innovative manner[162]. The tribunal in *Vivendi v. Argentina*[163] specifically stated that *one of the fundamental issues which the drafters of the ICSID Convention were keen to achieve was a total divorce from the recognition and enforcement system which prevailed under domestic laws or under the 1958 New York Convention*. Treating them both equally would not do justice to the founding fathers of the ICSID. To prove it, since *Achmea*, several tribunals before intra-EU ICSID arbitrations have proven that judgement's inapplicability to ICSID disputes[164], each of them on different grounds as summarized by BERMANN.

Finally, the Commission recognizes that even though, in its opinion, EU law must prevail over an enforcement that violates that legal order, article 351 TFEU must not be

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[157] Art 4(3) TEU.
[158] BERMANN, (n 143), p. 19.
[159] Slowakische Republik v Achmea BV, C-284-16, EU:C:2018:158, 6 March 2018.
[160] Still in Micula, the EC in its amicus curiae brief before the US District Court of Columbia relied on this case – Final Brief for Amicus Curiae the European Commission in Support of Reversal, 23 March 2020. Available here: https://www.italaw.com/sites/default/files/case-documents/italaw11503.pdf.
[161] This arbitration was governed by the NYC, which, unlike ICSID, admits judicial review (article V).
[162] *The drafters of the ICSID Convention could have made ICSID 'awards subject to the enforcement mechanism in the New York Convention in those countries bound by it'. However, [they] chose a more innovative path. They created a system insulated from domestic laws and court involvement: an entirely self-contained treaty (...).* MUSA, Ruqiya BH and POLASEK, Martina, *The Origins and Specificities of the ICSID Enforcement Mechanism* in Julien Fouret (n 149).
[163] *Compania de Aguas del Aconquija SA & Vivendi Universal SA v Argentine Republic*, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, ICSID Case No ARB/97/3 (Annulment Proceeding), 4 November 2008 para 35. Furthermore, *all sort of recourse to domestic courts was to be avoided in all States who are Members of the ICSID Convention*.
[164] *Vattenfall v Germany*, ICSID Case No ARB/12/12, Decision on the Achmea Issue (31 August 2018) para 229; *Masdar Solar & Wind Cooperatief UA v Kingdom of Spain*, ICSID Case No ARB/14/1, Award (16 May 2018) para 682; *Gavrilovic v Republic of Croatia*, ICSID Case No ARB/12/39, Decision on the Respondent's Request of 4 April 2018 (30 April 2018) para 39; *UP and C.D. Holding Internationale v Hungary*, ICSID Case No ARB/13/35, Award (9 October 2018) paras 257–260; *Opera Fund Eco-Invest SICAV PLC and Schwab Holding AG v Kingdom of Spain*, Award 6 September 2019 ICSID Case No ARB/15/36 paras 384–85.

overlooked. This provision safeguards *the rights and obligations arising from agreements concluded by 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*. However, the EC in Micula made the mistake of concluding that it does not apply to intra-EU arbitrations, since the inherent BITs, in this case, the Romania-Sweden BIT, do not involve a third state. The above-mentioned observation by the EC is true. Intra-EU BITs should not enjoy the protection of article 351 TFEU[165]. However, I believe that the enforcement obligation does not derive from the BIT, but from the ICSID Convention, a multilateral treaty between over 150 States, naturally including third states. In *T. Port GmbH & Co. v Hauptzollamt Hamburg-Jonas*[166], the Court clarified that *for a Community provision to be deprived of effect as a result of an international agreement, two conditions must be fulfilled: the agreement must have been concluded before the entry into force of the Treaty and the third country concerned must derive from it rights which it can require the Member State concerned to respect*. As to the first criteria, only eight MS did not ratify the Convention before acceding to the EU[167], which means that most awards, including Micula, must be enforced by EU MS, even for the supporters of EU primacy over ICSID. The second element is also verified, in view of article 54(1)[168]. This was also confirmed by the UK Supreme Court when it allowed the enforcement in *Micula* to proceed[169].

The way I see it, when it comes to enforcement in intra-EU ICSID arbitrations, there usually is no real conflict, since the majority of EU MS' ICSID obligations are safeguarded by article 351. As to the other nine MS, a minority, I believe that the international (ICSID) and the EU legal order can and should be coordinated, so that neither one is jeopardized.

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[165] ROSAS, Allan, *The Status in EU Law of International Agreements Concluded by EU Member States*, Fordham International Law Journal Volume 34, Issue 5 (2011) Article 7, p. 1317-1321. For a different opinion see European State Aid Law Quarterly, Vol. 15 (n 130), p. 260.

[166] Judgment of the Court of 10 March 1998, *T. Port GmbH & Co. v Hauptzollamt Hamburg-Jonas*, Joined cases C-364/95 and C-365/95, ECLI:EU:C:1998:95, para. 61.

[167] Germany, Spain, Ireland, Belgium, Italy, Luxembourg, France and the Netherlands. Poland never became a party.

[168] ***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.*

[169] Micula and Others v Romania [2020] UKSC 5, Judgment, 19 February 2020 para 101 and 118.

5.1 The *Bosphorus* presumption as a solution?

Tietje and Wackernagel seem to have found a satisfactory solution to the conflict described in the previous chapter on enforcement. Should an EU MS and Contracting party to the ICSID Convention have to choose between complying with one legal order, at the expense of the other, suffering consequences either way? The two authors defend the coordination of the conflicting legal orders[170], relying on the European Court of Human Right's (ECtHR) jurisprudence in *Bosphorus*[171]. In brief, the Court decided that if EU law provides a comparable[172] human rights protection as the European Convention on Human Rights (ECHR), then EU MS do not violate the latter, when exercising Community law. The same idea could be extended to investment law, i.e. instead of the ECHR, the comparison would be with IIAs, such as BITs. In other words, if the latter provides the investors with an equivalent level of protection to the EU's substantive legal standards, then EU law should not interfere with investment disputes, effectively putting an end to the ICSID vs EU law enforcement conflict. According to the authors, said coordination would occur at the merits stage, for instance in assessing if the FET had been breached[173].

In my opinion, investor's legitimate expectations are very disparate among the two legal orders. While one is too wide-reaching – ICSID –, the other is too restrictive and narrow – EU State aid law. This can easily be understood, considering the differing aims of both legal fields. The first seeks to attract FDI, whereas the second wishes to promote a European Single Market[174], resulting in the principle of legitimate expectation being *functionally shaped in face of those goals*[175].

Cláudia Saavedra Pinto identified four requirements for this principle's protection that are common to both fields: (i) a specific assurance; (ii) the beneficiary's (investor's) reliance on that assurance[176]; (iii) a diligent conduct by the latter and (iv) a *positive result*

[170] TIETJE, Christian and WACKERNAGEL, Clemens, *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, p. 241-246.
[171] Bosphorus v Ireland, App No 45036/98, 30 June 2005, ECHR 2005-VI.
[172] But not necessarily equal – *Bosphorus*, para. 155.
[173] TIETJE, (n 170) p. 243.
[174] PINTO, Cláudia Saavedra, *The 'Narrow' Meaning of the Legitimate Expectations Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations: A Hopeless Clash or an Opportunity for Convergence*, European State Aid Law Quarterly, Vol. 15, No. 2 (2016), pp. 270-285.
[175] Idem. p. 278.
[176] The first two requirements have been confirmed by QC, Campbell McLachlan (n 38), p. 316.

on the weighing test between the investor's reasonable expectations and the State's duty to pursue common good. However, as the author noted, these apparently consensual conditions are applied differently.

While in investment arbitration the tribunals acknowledge assurances from any source, including States, under EU State aid law only the ones deriving from EU institutions count and, even then, they are interpreted narrowly. While in investment arbitration tribunals the diligent businessman benchmark only requires the investor to be aware of the socio and political surrounding of its investment, under EU state aid law, the beneficiary is expected to know if the aid is lawful, meaning that it followed the procedures laid down in article 108 TFEU[177]. Lastly, while in investment arbitration the tribunals tend to benefit the investors, under EU State aid law the single market objectives usually prevail.

Legitimate expectations in investment treaty law have been described as the dominant element[178] of the FET standard, being at its heart[179]. The tribunal in *El paso v. Argentina* also confirmed this idea stating the *overwhelming trend to consider LE as the touchstones of FET*[180]. Arbitral tribunals have acknowledged, of course, that it must be balanced with the host States' right to regulate and to modify their legislation, thereby not resembling an *insurance policy against the risk of any changes in the host state's legal and economic framework*[181].

[177] MS that did not comply with said procedure may not, in principle, rely on their own or on the beneficiaries' LE in order to escape the obligation to recover the received aid to the MS, pursuant to Article 16(1) of Regulation 2015/1589. See CJEU judgement of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, para. 104; Case C-5/89, *Commission v. Germany*, EU:C:1990:320, paras. 1–5, 9–12 and 17–18; Case C-310/99, *Italy v Commission*, EU:C:2002:143, para. 104

[178] Saluka Investments v. Czech Republic, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, para 302.

[179] REED, Lucy and CONSEDINE, Simon, *Fair and equitable treatment: legitimate expectations and transparency* in KINNEAR, Meg, FISCHER, Geraldine R., ALMEIDA, Jara Minguez, TORRES, Luisa Fernanda, BIDEGAIN, Mairée Uran, *Building international investment law – the first 50 years of ICSID* (2015).

[180] El Paso Energy International Company v The Argentine Republic, ICSID Case No. ARB/03/15, para. 348.

[181] EDF Ltd v Romania, ICSID Case No ARB/05/13, Award, 8 October 2009, para 217. See also Saluka Investments v. Czech Republic, UNCITRAL, PCA Case No. 2001-04, Partial Award, 17 March 2006, para. 305. See also, to the same effect, Arif v. Moldova, ICSID Case No. ARB/11/ 23, Award, 8 April 2013, para. 537; Micula v. Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 666; Electrabel v. Hungary, ICSID Case No. ARB/07/19, Award, 25 November 2015, paras 165–166; Eiser v. Spain, ICSID Case No. ARB/13/36, Award, 4 May 2017, para. 362; Novenergia v. Spain, SCC Case No. 2015/063, Final Arbitral Award, 15 February 2018, para. 688.

Paschalidis[182] explains the scenarios in which the FET standard and EU state aid law collide, namely when a MS *encourages investment in a way that both gives rise to LE and constitutes incompatible or unlawful state aid.* Under this 'umbrella', the author distinguishes between two situations: when the EC has explicitly found that the investor benefitted from such aid[183] and when it did not, but there is a valid *reason to believe that the state conduct relied upon by the investor constitutes state aid[184]*.

In short, all the referred cases mirror the existing conflict in the application of this principle, which, in my opinion, is not granted a comparable level of protection in both legal orders, therefore departing from the *Bosphorus* doctrine.

Be that as it may, I do agree with the solution provided by Tietje and Wackernagel, when they defend Ronald Dworkin's vision of *imagining both legal orders' claims to superiority as principles rather than rules[185]*. In multilevel systems of governance, each legal order cannot function as an island, oblivious from its neighbors. As clear and strict as the wording of articles 53 and 54 of the ICSID Convention might be, *context matters* and it should take the EU MS and Contracting parties limitations into consideration. Similarly, the EC should not push the MS "between a rock and a hard place" demanding them to blindly breach their international obligations.

For that reason, as the authors contend, only an *evident, gross or outright violation of EU state aid law is beyond the ICSID Convention's claim to superiority*, such as *a complete lack of a tribunal's acknowledgement of the relevance of EU state aid law for the dispute, a gross misrepresentation of EU state aid rules, or an unjustifiable and biased standard for damages under the IIA[186]*.

Naturally, this would mean that both orders would have to given in: the EU would be abdicating from a small portion of its own autonomy by letting an arbitral tribunal analyze

[182] (n 109), p. 186-191.
[183] Electrabel SA v Republic of Hungary, ICSID Case No. ARB/07/19, Award, 25 November 2015 and EDF International SA v. Republic of Hungary, Award, 4 December 2014
[184] Blusun v. Italy, ICSID Case No. ARB/14/3, Award, 27 December 2016; ICSID case no. ARB/13/36, Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Spain, Award, 4 May 2017; Greentech & NovEnergia v. Italy, SCC Arbitration V (2015/095), Final Award, 23 December 2018; SCC Case No. V 062/2012, Charanne BV & Construction Investments SARL v Spain, final award, 21 January 2016; SCC Case No. 2015/063, Novenergia v. Kingdom of Spain, Final Arbitral Award, 15 February 2018; SCC Case No. 2013/153, Isolux v Kingdom of Spain, Award, 12 July 2016; SCC Case No. 2015/150, Foresight Luxembourg Solar 1 S.Á. R1. et al v Kingdom of Spain, Final Award, 14 November 2018; 9REN Holding S.a.r.l v. Kingdom of Spain, ICSID Case No. ARB/15/15, Award, 31 May 2019.
[185] (n 170), p. 241.
[186] Idem p. 243-244.

EU state aid law, whereas the ICSID would forgo some of its strictness in the prohibition of national courts to review and scrutinize the award, since the latter would have to revisit its merits in order to see if there was a gross, evident or outright violation of EU law.

Ultimately, this seems to be the more feasible and just solution to the conflict, rather than each of the legal orders claiming primacy over the other and leaving disputing States at a dead end.

6. Conclusion

The *Micula* case, just like *Achmea*, exposed an already recurrent debate regarding the compatibility of intra-EU investor-state arbitration and the EU legal order. However, it focused on the enforcement issue and its potential threat to EU State aid law – a debate, which was bound to emerge, considering, on one hand, the European Commission's significant margin of discretion when it comes to deciding on State aid issues and safeguarding the internal market, and, on the other, the 90's proliferation of BITs, that, after the 2004 and 2007 accessions, became intra-EU BITs. The fact that almost all MS became Contracting Parties to the ICSID Convention naturally played a role, leaving them divided between their international and European law obligations.

This dissertation sought to demonstrate that, as a rule, the enforcement of ICSID awards by an EU MS cannot be seen as constituting State aid, since two of the necessary requirements provided in article 107(1) TFEU are not met: imputability and selective advantage.

Firstly, the State, through one of its Courts, is faced with an obligation derived from an international treaty, that leaves no leeway to decide on such enforcement. The grant of said payment in compliance with an arbitral award is not unilateral, nor autonomous, as stated in previous CJEU case law.

Secondly, by compensating an undertaking for a wrongful act that breached the investors' legitimate expectations, a State is not granting an advantage, but merely giving what they were entitled to receive before the violation of the FET. In addition, the Market economy investor principle (MEIP) does not seem to be applicable in such cases of compensation, considering that a court, enforcing an award, is not seeking to *maximize profits or minimize losses*. Moreover, selectivity must be excluded, since the compensation does

not benefit an individual competitor. It would be due to any competitor faced with a breach of its rights, pursuant to the principle of *restitutio in integrum*.

We concluded that, exceptionally, the enforcement of ICSID awards could result in granting state aid, when it aims to reinstall a scheme that was in itself unlawful state aid.

However, even in those cases, whether the enforcement of awards that would breach EU law could be banned was subject of debate. While the NY Convention admits a public policy defense, which has already been used in competition law cases such as *EcoSwiss*, articles 53 and 54 of the ICSID Convention are more restrictive, leaving the Contracting States with no power of review in the post-award phase. Still, the EU MS have already stayed enforcement proceedings in respect of the EC's opinion that EU law must take primacy over their international law obligations.

Be that as it may, in my opinion, article 351(1) TFEU solves this matter, because most MS ratified the ICSID Convention, a multilateral treaty, before acceding to the EU. Therefore, the rights and obligations deriving from that Treaty remain safeguarded.

Some have argued that the *Bosphorus* presumption could be extended to this debate, meaning that, if Investment agreements provide a comparable level of protection to EU law, the latter should not interfere with the first. However, I do not agree with such applicability, since investor's legitimate expectations are treated quite differently in both scenarios – BITs and EU state aid law.

As to the rare occasions where the exceptional rule that the enforcement constitutes state aid is met, in an ICSID arbitration, where the host State is one of the nine EU MS not safeguarded by article 351 TFEU, the answer lies in coordination. Both legal orders would have to try to respect the other and only manifest violations would result in one taking primacy over the other.

In the end it seems more productive and fruitful than simply having to choose one and breach the other.

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