A TALE OF TWO BROTHERS AND TWO LEGAL ORDERS: INVESTMENT ARBITRATION AND EU STATE AID LAW[1]

La historia de dos hermanos y dos ordenamientos jurídicos: arbitraje de inversión y la normativa europea de ayudas de Estado

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ABSTRACT

This article deals with the relation between investment arbitration and EU State aid law. Investment arbitration is a mechanism for settling investor-State disputes under an investment treaty. Such treaties offer assurances of regulatory stability that may come into conflict with EU State aid law. However, investment arbitration is regulated by international treaties that do not form part of the EU legal order. This has not prevented the European Commission from vigorously asserting the primacy of Union law, especially in relation to investment arbitration awards between two EU parties. This interaction between two parallel legal orders, with no clear hierarchical relation between them, has given rise to conflicting decisions and jurisdictional claims, with no clear solution in sight.

RESUMEN

Este artículo aborda la relación entre el arbitraje internacional de inversiones y la normativa sobre ayudas de Estado de la UE. El arbitraje de inversiones es un mecanismo ideado para resolver disputas entre un inversor extranjero y un Estado receptor en relación con un tratado de inversión, por medio del cual el Estado ofrece ciertas garantías de estabilidad regulatoria. Tales garantías pueden entrar en conflicto con la normativa europea de ayudas públicas. No obstante, el arbitraje de inversiones se encuentra regulado por tratados internacionales que no forman parte del ordenamiento jurídico europeo, lo cual no ha evitado que la Comisión Europea insista en la primacía del Derecho de la Unión, especialmente en lo que respecta a disputas entre dos partes en la UE. Este solapamiento entre dos ordenamientos jurídicos paralelos, sin una relación jerárquica clara entre ellos, ha dado lugar a decisiones contradictorias y conflictos de competencia; sin que se vislumbre una solución a estos problemas a corto plazo.

Palabras clave: Tratados de inversión, Arbitraje de inversión, Ayudas de Estado, Micula, Asteris, Achmea, Daños, Primacía del Derecho de la Unión, Derecho internacional, Reconocimiento y ejecución de laudos arbitrales, Recuperación de ayudas

[1] Las opiniones expresadas en este artículo son personales de los autores. No necesariamente reflejan el punto de vista de Linklaters o de sus clientes.

Keywords: Investment treaties, Investment arbitration, State aid, Micula, Asteris, Achmea, Damages, Primacy of Union law, International law, Recognition and enforcement of arbitral awards, Recovery of aid

I. INTRODUCTION

This article deals with the areas of potential conflict between international arbitration awards and EU State aid law. Under most investment treaties, the host State offers assurances regarding regulatory stability and security to investors from the other contracting State or States. The abrupt withdrawal of an incentive scheme by a State may infringe such assurances and investors may be entitled to claim damages for such regulatory changes. Disputes regarding such rights are resolved by arbitral tribunals. However, the European Commission takes the view that damages that put the investor in the same position as if the withdrawn incentives had been paid fall within the scope of EU State aid law and require approval under this set of rules. But investment treaties and investment arbitration are regulated in international treaties that do not form part of the EU legal order and do not recognise the primacy of Union law. This situation has triggered abundant litigation both within and outside the EU with investors seeking to enforce their rights under international law against a host State which will often argue, with the support of the European Commission, that it is prevented from complying with any award of damages because of its obligations under Union law.

Few have as much first-hand experience of such litigation as brothers Viorel and Ioan Micula. For the past fifteen years, they have been embroiled in a legal dispute, spanning at least 9 jurisdictions, against Romania and the European Commission to enforce the brothers' rights as investors under international law. In June 2019, the EU General Court annulled a European Commission decision in which it had found that the damages awarded to the brothers amounted to illegal State aid; the case is now pending before the EU Court of Justice ("**ECJ**").[2]

The wave of claims brought against the Spanish government in relation to the dramatic 2013 cutbacks to support offered to renewable energy investments are perhaps better known in Spain and raise equally intricate issues regarding the relationship between investment arbitration and Union law. Many of these claims have been decided and the investors' claims have been upheld in most cases.

We will return to the *Micula* case and the Spanish renewables energy claims throughout this article to illustrate the different problems arising out of the far from peaceful co-existence between these parallel legal orders.

Section II of this article contains an introduction to investment treaties and investment arbitration. In this section we also comment on the ECJ's ruling in the *Achmea* case about arbitration as a mechanism for settling investor-State disputes regarding investment treaties among EU Member States.[3] In Section III, we turn to EU State aid law and discuss the possibility of classifying damages awarded by an arbitral tribunal as State aid under Union law. The leading EU precedent (*Asteris*) indicates that damages normally do not amount to State aid, but there are, as we will see, exceptions to this rule.[4] In this section, we also provide the background to the *Micula* case and the Spanish renewable energy claims. In Section IV, we discuss the State aid issues that may arise during enforcement of an arbitral award. Arbitral tribunals usually give preference to the investment treaty they are set to enforce over Union law, and judicial review of awards is either limited or non-existent. This means that the enforcement stage is often the only opportunity for the host State to bring its objections based on Union law before a court.

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[2] General Court judgment of 18 June 2019, *European Food and Others v Commission*, T-624/15, EU:T:2019:423 (pending appeal before the ECJ, C-638/19 P).
[3] ECJ judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158.
[4] ECJ judgment of 27 September 1988, *Asteris,* C-106/87, EU:C:1988:457.

Finally, in the concluding remarks in Section V, we consider potential solutions to the problems discussed in this article as well as their shortcomings.

II. INVESTMENT ARBITRATION

II.1 Investment treaties

Bilateral investment treaties ("**BITs**") have become increasingly common over the last 30 years. A BIT is a treaty between two sovereign States, governed by international law. The aim of such treaties is to promote bilateral investments by offering assurances to nationals and companies of each State investing in the other in the form of a transparent, stable, predictable and secure regulatory framework. According to UNCTAD's online database, there are (as of June 2020) about 2,240 BITs in force world-wide, of which Spain is party to 79.[5]

Multilateral investment treaties also exist but are less common.[6] The Energy Charter Treaty, with 65 contracting parties, including the EU, Spain and all other EU Member States, is perhaps the most well-known multilateral investment treaty.[7] The aims of the Energy Charter Treaty go beyond investment protection however, and also include sustainable development, energy security and trade in energy. Moreover, many free-trade agreements the EU has entered into with non-EU Member States contain investment protection provisions of some kind.[8]

Investment treaties typically contain assurances concerning one or more of the following matters:

- Protection from expropriation;
- Fair and equitable treatment;
- National treatment (i.e. no less favourable than that accorded to national investors);
- Most-favoured-nation treatment;
- Freedom to transfer funds;
- Full protection and security (i.e. a duty to protect the security of the investment); and
- Umbrella clause (i.e. the host State's duty to observe specific undertakings towards foreign investors).

However, investment treaties do not offer complete protection against acts of the host State that may harm foreign investments. In relation to the "fair and equitable treatment" standard —which plays a key role in most cases raising State aid issues– this does not prevent a contracting party from changing its laws and regulations but affords certain protection of investors' legitimate expectations and against discriminatory and arbitrary regulatory changes.[9] The concept of legitimate expectations in investment treaties is however broader than in EU State aid law, where only the acts of EU institutions

5 See: https://investmentpolicy.unctad.org/international-investment-agreements.

6 It is common to refer to BITs and multilateral investment treaties as "international investment agreements" or "IIAs".

7 L 380, 31.12.94, p. 24. See, for more information: https://www.energycharter.org.

8 The Treaty of Lisbon reinforced the European Union's powers in this field. Article 3(1) TFEU provides that the Union shall have exclusive competence over the common commercial policy. Article 307(1) TFEU states that the common commercial policy shall be based on e.g. the *"conclusion of tariff and trade agreements"*.

9 See UNCTAD, "Fair and Equitable Treatment", *UNCTAD Series on Issues in International Investment Agreements II*, 2011.

can give rise to legitimate expectations and, as a general rule, only if the correct procedure in Union law has been followed.[10]

II.2 Investment arbitration[11]

Most investment treaties provide for arbitration to settle claims brought by an investor from one contracting party against another contracting party (the host State). Indeed, having access to independent and experienced arbitrators in a neutral jurisdiction, invested with the power to award damages and render enforceable awards, is an important guarantee for many investors.

As in commercial arbitration, the principle of "party autonomy" means that the contracting parties are free to agree on the applicable law, the place and composition of the arbitral tribunal, and on the applicable procedure.

Many investment treaties refer disputes to arbitration by the International Centre for Settlement of Investment Disputes (the "**ICSID**"), established pursuant to the Convention on the Settlement of Investment Disputes between States (the "**ICSID Convention**").[12] An ICSID tribunal typically consists of three members: each party appoints one member and the third is appointed by agreement of the parties.[13] The ICSID is based in Washington, D.C. (USA) and was established in 1966 for the specific purpose of settling investment disputes. The convention has 154 contracting parties, including Spain and all other EU Member States aside from Poland.[14] The US and China are also contracting parties.

However, ICSID arbitration is not the only option. Some investment treaties refer to commercial arbitration venues such as the Arbitration Institute of the Stockholm Chamber of Commerce or the London Court of International Arbitration. Others provide for an *ad hoc* tribunal, not linked to an established institution. In such cases, the arbitrators will often apply the Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL**").

The 2017 free-trade agreement between the EU and Canada provides for a novel solution: investor-State disputes are to be settled by a permanent tribunal set up for the purposes of the agreement, the members of which are appointed by the EU and Canada, without any involvement of the investor concerned.[15]

(a) Law applicable to the merits of the dispute

As mentioned above, the contracting parties are free to choose the applicable law which will govern the investment treaty and apply in the event of a dispute (*lex causae*). Disputes normally concern the substantive rules of the treaty itself and these will be the principal set of rules the arbitrators will apply.

However, it is common for investment treaties to refer to international law as a complement to the treaty provisions. For example, Article 26(6) of the Energy Charter Treaty states that arbitral tribunals established pursuant to the treaty *"shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of*

[10] General Court judgment of 16 October 2010, *Eurallumina v Commission*, T-308/11, EU:T:2014:894, paragraph 59; and ECJ judgment of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 104.

[11] See, for a helpful overview, UNCTAD, "Investor-State dispute settlement", *UNCTAD Series on Issues in International Investment Agreements II*, 2014.

[12] See, for more information: https://icsid.worldbank.org.

[13] Article 37(2) of the ICSID Convention.

[14] Information about the ICSID Convention's contracting parties' and their date of ratification of the treaty is available at: https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.

[15] See Section F of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, OJ L11, 14.1.2017, p. 23.

international law". Some BITs also refer to the national law of the host State or that of both contracting parties. Other BITs lack any applicable law clause. In such cases, Article 42(1) of the ICSID Convention provides that the national law of the host State and international law shall apply.

(b) Judicial review

As a general rule, arbitral awards are subject to judicial review in the country where the arbitration takes place and according to its national law (*lex loci arbitri*).

However, most national legislation, including Article 41(1) of the Spanish Arbitration Act (*Ley 60/2003, de 23 de diciembre, de Arbitraje*) is inspired by the 1985 UNCITRAL Model Law on International Commercial Arbitration, which, in turn, is based on Article V of the 1958 New York Convention on recognition and enforcement of awards. Such legislation limits the power to set aside awards to grounds such as invalidity of the arbitration clause, that the dispute falls outside the scope of this clause or is not arbitrable, or that the arbitral award is contrary to public policy of the country in question. Accordingly, national courts should not review the merits of a case, unless the outcome is contrary to public policy.

A distinguishing feature of ICSID arbitration, however, is that the Contracting States, according to Article 53(1) of the ICSID Convention, accept to treat ICSID awards as binding and not subject to any judicial appeal before national courts. There exists however the possibility to apply for the annulment before the ICSID Secretary-General who will appoint an *ad hoc* Committee to review the application.[16] The *res judicata* effect of ICSID awards means that the place of arbitration has little relevance. For this reason, ICSID arbitration is said to be "self-contained" and "delocalised", i.e. not subject to the courts of any specific State.

(b) Recognition and enforcement

Recognition (*exequatur*) and enforcement of arbitral awards is governed by the New York Convention from 1958, with 163 contracting parties including Spain and all other EU Member States.[17] Article V of the Convention restricts the grounds for refusing recognition and enforcement of an arbitral award. As mentioned, this article has inspired most national laws regarding judicial review of arbitral awards, which means that the grounds for refusing recognition and enforcement are essentially the same as those mentioned above i.e. relating to the validity and scope of the arbitration clause, arbitrability and public policy.

Again, awards adopted pursuant to ICSID arbitration have a privileged role. Article 54(1) of the ICSID Convention provides that Contracting States 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"*.

II.3 Investment arbitration and Union law

The EU has traditionally been supportive of investment arbitration in so far as it concerns external relations with non-EU Member States. However, the European Commission takes the view that it is contrary to Union law to apply investment treaties

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[16] See Chapter VII of the ICSID Convention.
[17] See Article 46(2) of the Spanish Arbitration Act.

to intra-EU situations.[18] Its main arguments in relation to this are (i) intra-EU investors are already protected by Union law; (ii) BITs create a situation in which different levels of protection are afforded to investors depending on which Member State they are from (which amounts to discrimination based on nationality); and (iii) the arbitration clauses in the BITs puts the effectiveness of Union law and the single market at risk, since arbitral tribunals cannot ask the ECJ for a preliminary ruling to assist them in interpreting Union law.[19]

The European Commission's view finds some support in the case-law of the ECJ. In its 2018 ruling in the *Achmea* case, the ECJ was asked by a German court to consider whether the arbitration clause in a 1992 BIT between the Netherlands and the then Czech and Slovak Federal Republic was compatible with Union law.[20] A Dutch investor had brought proceedings against the Slovak Republic under this BIT and Frankfurt-am-Main (Germany) was chosen as the place of arbitration. The arbitral tribunal ruled in favour of the investor and the Slovak Republic applied for the award to be set aside by a German court, arguing that the arbitration clause in the BIT was invalid since it was incompatible with Union law. The first instance court dismissed the application, but the appeals court decided to seek the ECJ's view as regards the question raised by the Slovak Republic.

In its reply to the referring court, the ECJ held that an arbitration clause such as the one in the 1992 BIT does infringe Union law. A key reason for reaching this conclusion was that the applicable law clause in the BIT referred to the national laws of the contracting party in question, as well as to any agreement between the contracting parties. The ECJ recalled that Union law forms part of the national laws of each Member State and derives from an agreement between them. Accordingly, an arbitral tribunal set up to resolve disputes under the 1992 BIT would have to apply Union law. However, as noted above, arbitral tribunals are prevented from making preliminary references to the ECJ. Consequently, the only way to guarantee the correct interpretation of Union law is for national courts considering an application to set aside an award to refer the question to the ECJ. This possibility was considered sufficient to guarantee the effectiveness of Union law in a commercial arbitration context in the *Eco Swiss* judgment from 1999[21], but is, according to the *Achmea* ruling, insufficient in an investment arbitration context. The Court stressed that commercial arbitration is based on the freely expressed wishes of the parties to a contract, while intra-EU BIT arbitration is based on an international treaty between Member States. The situations are not comparable: Member States are under an obligation to ensure the effectiveness of Union law which goes beyond what is required from the parties to a commercial contract.

Following *Achmea*, it is clear that investment arbitration is incompatible with Union law in intra-EU BITs, at least to the extent that the arbitral tribunal must apply Union law. However, if the arbitrators exclusively apply the provisions in the investment treaty itself, this arguably counters any risk of an incorrect interpretation of Union law. Moreover, it is important to note that the ECJ did not go as far as saying that intra-EU BITs as such are unlawful. Nor did it uphold the legality of intra-EU BITs. The question put by the referring court in Germany was limited to the legality of the arbitration clause and the ECJ did not stray beyond that question.

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[18] See e.g. European Commission press release of 18 June 2015, "Commission asks Member States to terminate their intra-EU bilateral investment treaties", IP/15/5198; and Communication from the Commission to the European Parliament and the Council, "Protection of intra-EU investment", COM(2018) 547 final.

[19] The case-law of the ECJ clarifies that an arbitral tribunal does not amount to a "court or tribunal" in the meaning of Article 267 TFEU. See ECJ judgment of 23 March 1982, *Nordsee*, 102/81, EU:C:1982:107.

[20] See footnote 3 above.

[21] ECJ judgment of 1 June 1990, *Eco Swiss*, C-126/97, EU:C:1999:269.

However, there is an unmistakable trend towards a phasing-out of intra-EU BITs. On 5 May 2020, 23 out of 27 EU Member States, including Spain, signed an agreement to eliminate the intra-EU BITs between them.[22] This agreement also states that the arbitration clauses in such BITs shall not serve as a legal basis for initiating proceedings on or after 6 March 2018, i.e. the date of the ECJ's ruling in the *Achmea* case. It remains to be seen, however, whether arbitral tribunals with cases pending that were initiated before the date of the 5 May 2020 agreement will accept that this agreement affects their jurisdiction.

Another open question is the extent to which the ECJ's reasoning in *Achmea* is relevant to multilateral investment treaties such as the Energy Charter Treaty, which has been ratified by the EU itself and counts many non-EU Member States among its contracting parties. The European Commission argues that the arbitration clause in the Energy Charter Treaty, although not part of the EU legal order, should nevertheless be interpreted in light of Union law and must therefore be understood as not being intended to apply to intra-EU disputes.[23] However, the above-mentioned agreement among 23 Member States to eliminate intra-EU BITs does not affect the arbitration clauses in the Energy Charter Treaty. Indeed, it is unclear whether it would be possible to set aside the arbitration clause in this treaty for intra-EU disputes without a treaty amendment, which would also require the consent of the non-EU contracting parties to the treaty.[24]

Many in the international arbitration community are less than convinced by the European Commission's Union law-based interpretation of the Energy Charter Treaty's arbitration clause. Indeed, most ICSID tribunals set up under the treaty to resolve intra-EU disputes after the *Achmea* ruling have rejected the host State's jurisdictional objections, noting (i) that the ECJ did not discuss the Energy Charter Treaty in *Achmea*, and (ii) that the established methods for interpreting treaties in international law do not support the European Commission's interpretation.[25]

Arbitration clauses in BITs between EU Member States and a non-EU Member State ("**Extra-EU BITs**") have so far not been targeted by the European Commission, even though also such arbitral tribunals may need to apply Union law. The EU's long-term ambition is to gradually replace the extra-EU BITs with the free-trade agreements the EU is negotiating on behalf of the Member States.[26] The ECJ has confirmed, in an opinion regarding the above-mentioned free-trade agreement between the EU and Canada, that the EU is entitled to agree to investment arbitration in order to settle investment protection disputes, provided that certain conditions are met to safeguard the effectiveness of Union law.[27]

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22 Agreement for the termination of bilateral investment treaties between the Member States of the European Union, OJ L169, 29.05.2020, p. 1. Austria, Finland, Ireland and Sweden did not sign the agreement.

23 Communication from the Commission to the European Parliament and the Council, "Protection of intra-EU investment", COM(2018) 547 final, pages 3-4; and Proposed brief of the European Commission on behalf of the European Union as amicus curiae in support of the Kingdom of Spain of 13 March 2019 before the United States District Court for the District of Columbia in Civil Action No. 1:18-cv-1686, pages 6-9.

24 In international law, treaties which amend the relations among a select group of contracting parties are referred to as "*inter se* agreements". Some argue that *inter se* agreements are not allowed under the Energy Charter Treaty. See Tietje, "The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs. EU Member States", *Beiträge zum transnationalen Wirtschaftsrecht*, Issue 78, pages 8-15.

25 See, for example, award of 21 January 2020, *Watkins*, ICSID Case No. ARB/15/44, paragraph 205-226.

26 Recital 6 of Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries provides that *"In the interest of Union investors and their investments in third countries, and of Member States hosting foreign investors and investments, bilateral investment agreements that specify and guarantee the conditions of investment should be maintained in force and progressively replaced by investment agreements of the Union, providing for high standards of investment protection"*.

27 ECJ Opinion of 30 April 2019, *EU-Canada CET Agreement,* 1/17*,* EU:C:2019:341.

All in all, with the exception of cases brought under the Energy Charter Treaty, intra-EU investment arbitration is likely to be a rare occurrence in the future. By contrast, extra-EU investment arbitration has so far not been affected by the developments in the wake of the ECJ's *Achmea* ruling.

III. DAMAGES AS STATE AID

The possibility of classifying damages awarded by an arbitral tribunal as State aid lies at the core of the potential conflict between investment arbitration and State aid law. As background to this discussion, we start by providing a brief account of the system of State aid control under the Treaty on the Functioning of the European Union ("**TFEU**") and the definition of "State aid".

III.1 System of State aid control

The system of State aid control under the TFEU is a unique feature of Union law that lacks an equivalent in other jurisdictions.[28] The cornerstones of this system are:

- *European Commission monopoly on declaring aid compatible:* the European Commission is the only authority with the power to apply the TFEU provisions and declare State aid compatible with the internal market. Member States must notify aid to the Commission for approval. Certain defined categories of aid are, however, exempt from the notification obligation pursuant to the General Block Exemption Regulation.[29]
- *Standstill rule:* Article 108(3) TFEU provides that Member States must not put aid into effect until the European Commission has adopted a decision declaring the aid compatible with the internal market. This is called the "standstill rule". Aid paid in breach of this rule amounts to "unlawful aid".
- *Duty to recover incompatible aid:* if the European Commission finds that aid is incompatible with the internal market, but the aid has already been paid, the Commission may order the Member State to recover this aid from the aid beneficiary.

III.2 Concept of State aid

For a measure to amount to State aid within the meaning of Article 107(1) TFEU, the case-law of the Union courts provides that the following requisite criteria must be satisfied[30]:

- *State origin*: the measure must involve the transfer of resources controlled by a Member State, e.g. a direct transfer, income foregone or a commitment to make resources available. The measure must also be imputable to the State.

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[28] For completeness, we note that there is a subsidies regime applicable under the auspices of the World Trade Organisation Subsidies and Countervailing Measures Agreement, but unlike the EU regime this does not involve an *ex-ante* control tool or the possibility for an authority to order the recovery of illegal subsidies (only countervailing measures may be adopted by the country who has been harmed by those subsidies). Some free-trade agreements between the EU and non-EU Member States also include provisions about domestic control over subsidies, but these are limited unless the non-EU Member State is a potential candidate for EU accession (e.g. Ukraine).

[29] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty. In addition, certain measures are deemed not to amount to State aid according to Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid.

[30] See, for a summary, the Commission's 2016 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/C 262/01, (the "Commission Notice on the notion of State aid").

- *Economic advantage to an undertaking:* the measure must provide an economic advantage to one or more undertakings, which the undertaking(s) in question would not have received under normal market conditions.
- *Selective:* the measure must favour certain undertakings or sectors, but not others.
- *Distort competition and trade:* the measure must distort or at least threaten to distort competition and trade flows between the EU Member States.

III.3 *Asteris* case-law concerning damages as State aid

The extent to which damages may amount to State aid is a debated issue. Damages compensate for the loss caused by a wrongful act. A wrongful act can be defined as the departure from a required standard of conduct, which may derive from e.g. a contract, a statute or a treaty. That the wrongful act defined in this manner is linked to a liability to pay damages to the victims may likewise have a contractual, statutory or treaty origin.

The ECJ has held that to make good the damage caused by a wrongful act is a general principle of the Member State's legal orders and that the effectiveness of a rule is impaired unless damages are available to the victims in case of breach.[31]

The leading case in Union law regarding the relation between State aid and damages is the ECJ's *Asteris* ruling from 1988.[32] This case concerned aid which had not been paid by the Greek authorities as a result of a technical error. One of the aid beneficiaries sued the Greek State for damages, which was calculated as the difference between actual aid paid and the amount of aid that would have been paid absent the error. The national court asked the ECJ whether such damages would amount to State aid. The ECJ's response to the referring court was that:

> *"State aid, that is to say measures of the public authorities favouring certain undertakings or certain products, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals* […] *damages which the national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute aid within the meaning of [the Treaty]"*.[33]

Indeed, the purpose of damages is not to create an economic advantage in the meaning of Article 107(1) TFEU, but simply to restore the victim's economic position as if the wrongful act had never occurred (*restitutio in integrum*).

However, there are exceptions to the general rule established in the *Asteris* judgment: it is a widely held view that not all damages are "fundamentally different" from State aid. In his opinion in the *Asteris* case, Advocate General Slynn pointed out that to receive damages, as a result of a Member States' failure to fulfil a promise to pay incompatible aid to an undertaking, would subvert the system of State aid control if the compensation amounts to an equivalent sum.

> *"It happens that a Member State promises aid to an undertaking which, on examination by the Commission, is held incompatible with the common market. If the undertaking were to receive an equivalent sum by suing on the promise, the*

[31] ECJ judgment of 5 March 1996, *Brasserie du Pêcheur*, C-46/93, EU:C:1996:79, paragraphs 20 and 29.

[32] See footnote 4 above.

[33] Paragraph 23 of the judgment. See also General Court judgments of 1 July 2010, *Italy v Commission*, T-53/08, EU:T:2010:267, paragraph 52; and of 1 July 2010, *ThyssenKrupp Acciai Speciali Terni v Commission*, T-62/08, EU:T:2010:268, paragraph 60.

> *application of Articles 92 to 94 would be subverted. A similar situation would arise if a recipient undertaking sues the State for damages following a Commission decision ordering the State to recover illegal aid. It is therefore of prime importance for the proper operation of the Treaty rules on State aids that court awards fall within their reach in appropriate cases."*[34]

Advocate General Ruiz-Jarabo Colomer reached a similar conclusion in his 2005 opinion in the *Atzori* case regarding a compensation claim brought following the recovery of State aid, which the European Commission had declared incompatible with the internal market.

> *"In any event, it should be noted that, if an entitlement to compensation is recognised, the damage cannot be regarded as being equal to the sum of the amounts to be repaid, since this would constitute an indirect grant of the aid found to be illegal and incompatible with the common market."*[35]

Likewise, in the 2016 ruling of the General Court in the *Simet* case, the court found that compensation awarded for costs incurred while carrying out a public service obligation in bus transport could not avoid the system of State aid control under the TFEU simply by being classified as "damages" and awarded by a court instead of following a decision by the authority that imposed the original obligation.[36]

III.4 Case studies: Micula and Spanish renewable energy claims

Most cases in which State aid issues arise in investment arbitration concern the withdrawal of aid schemes and claims from investors for damages on the grounds that such withdrawal breaches the "fair and equitable treatment" standard. This is what occurred in the *Micula* and Spanish renewable energy cases.

(a) Micula[37]

Viorel and Ioan Micula are brothers born in Romania who became Swedish nationals in the 1990s, renouncing their Romanian nationality.

In 1999, Romania adopted a tax incentive scheme designed to promote investment in certain disadvantaged regions (the so-called "**EGO 24**" scheme). The Romanian Government had designated the Ștei-Nucet region in North-western Romania as a disadvantaged region for a ten-year period and stated that the incentive scheme would be available throughout this period.

During the early 2000s, the Micula brothers, in reliance on the EGO 24 incentive, carried out significant investments in relation to an integrated beverage production business in the Ștei-Nucet region.

In 2002, Romania signed a BIT with Sweden which entered into force the year after. The BIT provided for ICSID arbitration or *ad hoc* arbitration applying the Arbitration Rules of UNICTRAL.

In the context of preparations for Romania's accession to the EU, which finally occurred in 2007, and in order to align Romanian legislation with EU State aid rules, Romania repealed the vast majority of incentives provided for in EGO 24 in 2005, four years ahead of time.

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[34] Opinion of Advocate General Slynn of 27 September 1988, *Asteris*, 106 to 120/87, EU:C:1988:363.

[35] Opinion of Advocate General Ruiz-Jarabo Colomer of 28 April 2005, *Aztori*, C-346/03 and C-529/03, EU:C:2005:256, paragraph 198.

[36] General Court judgment of 3 March 2016, *Simet*, T-15/14, EU:T:2016:124, paragraphs 102-104.

[37] For a detailed account of the facts, see award of 11 December 2013, *Micula*, ICSID Case No. ARB/05/20.

Later that year, the Micula brothers filed a request for arbitration with ICSID, claiming the early repeal of the incentive scheme breached the BIT with Sweden.

In 2013, the ICSID arbitral tribunal handed down its final award in which it agreed with the Micula brothers that they could reasonably have expected the EGO 24 incentive scheme to be maintained for ten years and that the premature repeal of the scheme infringed the fair and equitable treatment standard in the BIT and awarded damages of approximately €178 million.

(b) Spanish renewable energy claims[38]

The claims against Spain in the renewable energy cases also concern the withdrawal of an aid scheme and whether this withdrawal breached the "fair and equitable treatment" standard under the Energy Charter Treaty.

The origin of the cases dates back to 2007, when Spain introduced a scheme to incentivise investments in renewable energy production with a view to meeting targets for the renewable sector's share of total energy consumption. The scheme was introduced pursuant to the 2001 EU Renewable Energy Directive, which encouraged Member States to use State aid to reach the national targets.[39]

The scheme was based on two alternative support models (i) a so-called "feed-in tariff"; or (ii) a "feed-in premium". The feed-in tariff meant that a producer was guaranteed to receive a certain regulated remuneration. Under the feed-in premium model, the electricity was sold in the market, at the prevailing market price, and the producer received a fixed premium on top of the market price.

The Spanish authorities actively promoted the 2007 aid scheme to investors and recognised that regulatory stability was important in this respect.

The scheme was successful in attracting investments to Spain. For example, in June 2007, an investment fund set up by UK-based asset manager Eiser decided to invest in so-called CSP technology.[40] The construction works on two 50MW plants at Alcázar de San Juan (Ciudad Real) and one 50 MW plant at Badajoz commenced in 2010 and the plants were completed and began operations in 2012.

However, the Spanish support scheme also proved expensive. The original idea was that the aid scheme should be financed by users of electricity through mandatory charges included as part of monthly electricity bills. However, the Spanish authorities were reluctant to pass on the spiralling costs of the scheme to consumers. At the same time, the financial crisis, which began in 2008 and peaked in Spain in 2013, limited the Government's ability to fund the shortfall as part of the public budget.

In 2013, as part of Government spending cuts, the feed-in premium option was abolished and, a few months later, an entirely new renewables support scheme replaced the one introduced in 2007. The new scheme had a completely different set-up. Using standardised investment and operating cost estimates for a hypothetical "well-run and efficient" plant, it aimed at enabling cost recovery as well as a reasonable rate of return.

However, many investors had incurred much higher actual investments costs than the estimates used to fix remuneration under the new aid scheme. CSP plants, which are expensive and tend to have high capital costs, were particularly hard hit. The capital costs for the plants Eiser had invested in were about 40% higher than the level accepted as

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[38] For a detailed account of the facts, see award of 4 May 2017, *Eiser*, ICSID Case No. ARB/13/36.

[39] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market.

[40] Concentrated solar power ("CSP") is an expensive and complex technology compared with photovoltaic ("PV") technology, which is the currently the leading solar power generation technology.

efficient under the new support scheme. For many investors, including Eiser, the dramatic reduction in revenues meant that all income exceeding operating costs had to be used to pay external lenders.

The cut-backs in 2013 triggered a wave of investment arbitration claims against Spain.[41] Eiser filed a request for ICSID arbitration in December 2013. Like the majority of the investor claims against Spain, Eiser argued that the abrupt cut-backs after initially having incentivised investments based on more or less overt promises of regulatory stability amounted to a breach of the "fair and equitable treatment" standard in the Energy Charter Treaty.

Eiser's claim was the first ICSID case to be decided and the first claim to be upheld. In the award from 2017, the arbitral tribunal qualified Spain's changes to the renewables support scheme in 2013 as *"total and unreasonable"* and as *"stripping Claimants of virtually all of the value of their investment"*, and awarded €128 million in damages to Eiser. To date, the final award has been delivered in 17 cases and in all but four the arbitral tribunal has ruled against Spain.

Final awards Spanish renewable energy claims (as of June 2020)

Case	**Claim upheld***	**Damages awarded****
21.1.2016, *Charanne*, SCC Case No. 062/2012	No	-
12.7.2016, *Isolux*, SCC Case 2013/153	No	-
4.5.2017, *Eiser*, ICSID Case No. ARB/13/36	Yes	€128m
15.2.2018, *Novenergia*, SCC Case No. 2015/063	Yes	€53.3m
16.5.2018, *Masdar*, ICSID Case No. ARB/14/1	Yes	€64.4m
15.6.2018, *Antin*, ICSID Case No. ARB/13/31	Yes	€112m
14.11.2018, *Foresight*, SCC Case No. 2015/150	Yes	€39m
11.12.2019, *RREEF*, ICSID Case No. ARB/13/30	Yes	€59.6m
26.6.2019, *Cube*, ICSID Case No. ARB/15/20	Yes	€2.89m
31.5.2019, *NextEra*, ICSID Case No. ARB/14/11	Yes	€290.6m
31.5.2019, *9REN*, ICSID Case No. ARB/15/15	Yes	€41.76m
31.7.2019, *Soles Badajoz*, ICSID Case No. ARB/15/38	Yes	€40.98m
6.9. 2019, *OperaFund*, ICSID Case No. ARB/15/36	Yes	€29.3m
2.12.2019, *Stadtwerke*, ICSID Case No. ARB/15/1	No	-
2.12.2019, *BayWa*, ICSID Case No. ARB/15/16	No	-
21.1.2020, *Watkins*, ICSID Case No. ARB/15/44	Yes	€77m
28.2.2020, *PV Investors*, PCA Case No. 2012-14	Yes	€91.1m

* In full or in part ** Excluding interest payments

[41] Claims were also brought under national law before Spanish courts, but these were unsuccessful. See, for example, Spanish Supreme Court judgment of 1 June 2016, no. 1259/2016, ES:TS:2016:2424.

Spain has applied for the annulment of the majority of the ICSID awards that uphold the claim for damages before the ICSID Secretary-General. In an unexpected turn of events, the *Eiser* award handed down in 2017 was set aside, in June 2020, by an *ad hoc* Committee due to undisclosed connections between one of the members of the arbitral tribunal and an economic consultancy used by the claimant to quantify its damages.[42] However, it should be stressed that to annul an award is a limited and exceptional remedy: statistics from 2016 show that only about 6 percent of all ICSID awards have been annulled in full or in part.[43]

III.5 Arbitral awards that may trigger State aid concerns

Following the ICSID arbitral award in the *Micula* case and Romania's partial payment of the damages (by offsetting tax debts), the European Commission opened a formal State aid investigation pursuant to Article 108(2) TFEU in 2014 and, in 2015, adopted a final decision addressed to Romania.[44] The Micula brothers argued that the damages awarded to them did not amount to State aid under the *Asteris* case-law, since the ICSID tribunal had merely enforced a binding legal obligation, assumed by the Romanian State in the 2002 BIT, and since the ICSID award and its enforcement pursuant to the ICSID Convention was not imputable to Romania. The European Commission, however, rejected this view and its decision contains a detailed discussion in which it explains why it considered that the damages did constitute State aid, which can be summarised as follows:

- *State origin:* the decision to enter into the BIT and accept investment arbitration was a voluntary decision of the Romanian State and any involvement of the Romanian State, including a court, in implementing the award would be imputable to the State.[45]
- *Economic advantage:* the amount of damages awarded was equivalent to the incentives foreseen under the abolished EGO 24 scheme. This scheme compensated the beneficiaries for operating costs they would have to pay themselves under normal market conditions. Reference is made to Advocate General Ruiz-Jarabo Colomer's statement in *Atzori*, as quoted above.
- *Selectivity:* the right to damages did not follow from a generally applicable rule on governmental liability, but from a specific rule in the BIT that only applied to certain investors.
- *Distortion of competition and trade:* Lastly, the European Commission recalled that to grant a selective economic advantage in a market open to competition can be assumed to be liable to distort competition and trade.

Accordingly, the European Commission concluded that the partial payment of the damages awarded to the Micula brothers breached the standstill rule in Article 108(3) TFEU. It also assessed whether this unlawful aid was nevertheless compatible with the internal market, as regional aid, but found that it was not. The Commission therefore ordered Romania to recover the aid from the brothers.

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42 Decision of 11 June 2020, *Eiser*, ICSID Case No. ARB/13/36.

43 ICSID, "Updated Background Paper on Annulment for the Administrative Council of ICSID", 5 May 2016, paragraphs 109-111.

44 European Commission decision of 30 March 2015, *Micula v Romania (ICSID arbitration award) SA.38517*.

45 The connection made between national courts and authorities' involvement in the implementation of the award and the "imputability" criterion means that enforcement outside the EU may be relevant to the classification of damages as State aid. The argument has been made that if no Member State is involved in enforcing the award, the damages paid to the aggrieved investor cannot be "imputed" to any Member State.

The decision was appealed to the General Court which considered that the relevant events had occurred before Romania's accession to the EU and therefore outside the temporal scope of application (*ratione temporis)* of Article 107(1) TFEU. For this reason, the General Court did not consider the extent to which the damages awarded by the arbitral tribunal were shielded from State aid review in application of the *Asteris* case-law.[46]

The General Court's judgment still offers certain guidance, however, because the court considered that the relevant question was not whether the post-accession arbitral award gave rise to aid. Instead, the court stated that the arbitral award is as such an "ancillary" element, since it merely "recognises" a pre-existing right.[47] In this respect, the court recalls that State aid is, according to case-law, deemed awarded when the right to receive the aid is conferred on the beneficiary under national law.[48] In the *Micula* case, the General Court suggests that this right came into existence in 2005, when the aid scheme was withdrawn.

In our view, it could be argued that the right came into existence already in 1999, when Romania made the commitment to maintain the scheme for ten years, or in 2003, when the BIT's fair and equitable standard entered into force.

In any event, the key takeaway is that the General Court considers that it is necessary to look at the pre-existing right that is enforced by the arbitral tribunal rather than the award itself. In the *Micula* case, this right derived from the broken promise to maintain the EGO 24 scheme in place for a ten-year period.

Though we cannot tell for sure, the General Court's argumentation suggests that, had it considered Article 107(1) TFEU applicable*,* the court would have found that damages that put the investor in the same position as if it had continued to receive the incentives under the Romanian EGO 24 scheme, which had never been approved by the European Commission, would also amount to unlawful aid.

Damages are, as discussed, intended to restore the position of the victim as if the wrongful act had not happened. If the position of the victim that is intended to be restored would in itself be illegal, since it would be the result of the granting of unlawful or incompatible aid, damages with the equivalent effect are likely to be seen as undermining the effectiveness of EU State aid law and not be accepted by the EU institutions.[49]

III.6 Awards unlikely to raise State aid concerns

The *Asteris* judgment and the *Micula* case do not support the view that any damages award related to the breach of investment treaty assurances will raise State aid concerns. In its *Micula* ruling, the General Court states:

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46 See footnote 2 above. The court also mentioned (at paragraph 91) that, even if it is assumed that damages relating to incentives payable during the period *after* Romania's EU-accession amounted to State aid, the European Commission never made such a distinction in its decision.

47 Paragraphs 77-78 of the judgment. See also European Commission decision of 28 January 2004, *Česká spořitelna*, Case 14/2003, paragraph 17.

48 Paragraph 69 of the judgment. The General Court referred to the ECJ judgments of 21 March 2013, *Magdeburger Mühlenwerke*, C-129/12, EU:C:2013:200, paragraphs 40 and 41, and of 6 July 2017, *Nerea*, C-245/16, EU:C:2017:521, paragraph 32.

49 This would not be dissimilar to the situation where a State acting as the vendor of assets or a company which has benefitted from State aid grants an indemnity which could potentially lead to circumvention of a recovery obligation. See for example, *Hytasa II,* OJ L96, 11.04.1997, p. 30, at p.36, where the European Commission held that a guarantee provided by the State which was intended to reimburse the purchaser of assets in the event that State aid had to be reclaimed could not be put into effect as this obligation would "*neutralize the essence of its Decision and would perpetuate the distortion of competition caused by the aid. This would constitute a means of circumventing the provisions regarding State aid contained in the Treaty, rendering them ineffective. Therefore, on the basis of the principle of the primacy of Community law, this provision shall not be carried out, and the company benefiting from the undue advantage conferred by the illegal aid will have to reimburse it …*".

> *"In addition, compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of unlawful or incompatible aid (see, to that effect, judgment of 27 September 1988, Asteris and Others, 106/87 to 120/87, EU:C:1988:457, paragraphs 23 and 24), as recalled by the Commission in recital 104 of the contested decision."* [50]

Accordingly, the problematic awards are those that concern damages linked to the withdrawal of unlawful or incompatible aid. By contrast, damages linked to the non-payment of compatible aid are unlikely to trigger State aid concerns. In such cases, the position the damages aim to restore is legal. Accordingly, to award damages to the victim of the wrongful act does not put the effectiveness of EU State aid law at risk and should therefore be compatible with this set of rules.

A first, straight-forward scenario is where a compatible aid scheme is maintained but the aid is simply not paid. This is essentially what happened in the *Asteris* case. A second scenario is where a compatible aid scheme is abruptly eliminated. In our view, to award damages to the investors should be compatible with EU State aid law in both cases. The authorisation from the European Commission means that it would have been lawful for the Member State to continue to pay the aid in question. Accordingly, to apply the "fair and equitable treatment" standard in an investment treaty and award damages with a view to restore this (lawful) position should also be lawful and should therefore either fall outside the scope of Article 107(1) TFEU, as suggested by the *Asteris* judgment, or at least be seen as compatible aid. Furthermore, if the aid scheme has been approved by the European Commission, there is arguably no conflict between the broader notion of legitimate expectations under the "fair and equitable treatment" standard and its more restrictive Union law equivalent.[51]

Moreover, damages payable due to a breach of investment treaty assurances will not necessarily be linked to the withdrawal of State aid. The relevant question in such cases ought to be whether the assurances offered to investors in the investment treaty in themselves amount to aid. This will normally not be the case.

When ratifying an international agreement, such as an investment treaty, a Member State is acting as a sovereign State. It is inherent to the general scheme of international law that the reciprocal assurances in such treaties only apply to investors from one of the contracting parties, which in our view indicates that such assurances should not be viewed as "selective" simply because they do not apply to all foreign investors.[52] Moreover, since such assurances are normally connected to the Member State's role as public authority, State aid rules do not require the Member State to charge for the benefit investors may derive from the treaty.[53]

IV. ENFORCING THE AWARD

Most arbitral tribunals, even if they accept that Union law is applicable to the merits of the case, will give preference to the provisions of the investment treaty itself. They

50 Paragraph 103 of the judgment.

51 See footnotes 9 and 10 above.

52 See, for an analogous reasoning regarding bilateral tax treaties, ECJ judgment of 5 July 2005, *D*, C-376/03, EU:C:2005:424, paragraphs 61-62. The ECJ was asked in the *Achmea* case (see footnote 3 above) whether the intra-EU BIT was discriminatory but the court did not consider it necessary to reply to that question.

53 ECJ judgments of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraphs 43-44; of 28 February 2013, *Ordem dos Técnicos Oficiais de Contas*, C-1/12, EU:C:2013:127, paragraph 40; of 14 September 1994, *Spain v Commission*, C-178/92 to C-280/92, EU:C:1994:325, paragraph 22; and Commission Notice on the notion of State aid, paragraph 17

tend not to accept the idea that EU State aid law has a privileged position and should override the assurances offered in the investment treaty.

In the *Micula* case, the arbitral tribunal, in line with the General Court, found that Union law did not apply in Romania during the relevant period.[54]

In the Spanish renewable energy cases, where it was clear that Union law did apply during the relevant time period, most arbitral tribunals have reached the conclusion, if faced with an argument based on EU State aid law, that the Energy Charter Treaty prevails in the event of a discrepancy with Union law.[55] Accordingly, they have not accepted the Union law-based argument that no investor can entertain a legitimate expectation as regards maintaining the scheme in place unless the aid has been notified to and approved by the European Commission.

In addition, since most claims are brought under the ICSID Convention, there is, as we have seen, no judicial review available under national law, which means that there is no opportunity, even if the place of arbitration is within the EU, to set aside the award applying EU State aid law as mandatory public policy.

Instead, the Member States must wait until the investor attempts to enforce the arbitral award and obtain payment and then invoke EU State aid law as part of its defence in national enforcement proceedings.

IV.1 Enforcement within the EU: Article 351 TFEU

As discussed above, it is important to distinguish between enforcing arbitral awards pursuant to the New York Convention and pursuant to the ICSID Convention. If the New York Convention applies, Article V enables national courts to refuse recognition and enforcement based on public policy grounds and ECJ case-law suggests that the courts are expected to take advantage of this possibility, if necessary, to guarantee the effectiveness of EU State aid law.[56]

However, under the ICSID Convention, the arbitral award has the same status as a final judgment from a national court (*res judicata*).[57]

Nevertheless, the ICSID Convention does not provide for fully self-executing enforcement and national authorities or courts will intervene as part of this process, which means that there is at least at that instance an opportunity for the Member State in question to argue that recognition and enforcement should be refused. The legal argument deployed is that EU State aid law, according to Article 351 TFEU, takes preference over the Member State's obligations under the ICSID Convention. The first sentence of Article 351 TFEU provides that:

> *"The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties."*

Article 351 TFEU therefore departs from the general principle of primacy of Union law and establishes that Union law does not affect the obligations of a Member State

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[54] *Micula* award, paragraph 319.

[55] *Watkins* award, paragraph 490; and decision of 6 June 2016, *RREEF*, ICSID Case No. ARB/13/30.

[56] ECJ judgments of 1 June 1999, *Eco Swiss,* C-126/97, EU:C:1999:269; and of 20 September 1990*, Commission v Germany,* C-5/89, EU:C:1990:320.

[57] See also ECJ judgment of 10 July 2014, *Impresa Pizzarotti*, C-213/13, EU:C:2014:2067, paragraph 59: "*EU law does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law*".

under international treaties with non-EU Member States that were entered into prior to the Member State's accession to the EU. Conversely, if the treaty only gives rise to rights for other Member States, i.e. an "intra-EU treaty", or was entered into after EU accession, Union law will prevail.[58]

If the treaty at hand gives rise to rights for both Member States and non-EU Member States, the question is whether the relevant treaty provision affects the rights of non-EU Member States or only those of other Member States.[59]

When the Micula brothers attempted to enforce the ICSID award in the United Kingdom, Romania opposed registration. It sought to have enforcement stayed until the General Court had ruled on the appeal against the European Commission's 2015 decision finding that the damages awarded amounted to incompatible aid. After the General Court ruling, and when the case finally reached the UK Supreme Court, the court took the view that the question of what the UK's obligations under the ICSID Convention, ratified by the UK in 1966, were, went to the heart of the application of Article 351 TFEU and the enforceability of the arbitral award.[60]

The court noted that Article 351 TFEU does not apply to purely intra-EU situations, where rights of non-EU Member States are not in play. Where, however, it is established that obligations are owed to non-EU Member States, Article 351 TFEU does apply and there is no additional requirement that the dispute as such must relate to extra-EU activities or transactions.

The key question for the Supreme Court was therefore whether the UK's obligation to enforce the *Micula* award under the ICSID Convention was owed to non-EU Member States. Romania, supported by the European Commission as intervener, argued that the United Kingdom owed its duty to enforce the arbitral award to Sweden only (as the contracting party to the Romania-Sweden BIT). Since Sweden is an EU Member State, Article 351 did not apply. The Micula brothers disagreed and claimed that the UK owed its obligation to enforce the arbitral award in their favour to all contracting parties to the ICSID Convention.

According to the Supreme Court, the question of to whom the UK owed its obligation under the ICSID Convention is a matter of interpretation of the convention, rather than Article 351 TFEU. The ICSID Convention is not part of the EU legal order and the interpretation of pre-accession treaties for the purpose of applying Article 351 is not, according to ECJ case-law, reserved to the Union courts.[61] For this reason, the Supreme Court concluded that the Union courts are no better placed to interpret the ICSID Convention than the courts of the Member State concerned.[62]

The court referenced Articles 54 and 69 of the ICSID Convention. As discussed previously, Article 54(1) provides that each contracting party shall recognise an ICSID award as binding and shall enforce such an award as if it were a final judgment of a court in that State. Article 69, on the other hand, provides that each contracting party shall take such legislative or other measures as may be necessary to make the ICSID Convention effective in its territory.

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58 ECJ judgment of 14 October 1980, *Burgoa*, C-812/79, EU:C:1980, paragraphs 8-9.

59 ECJ judgment of 6 April 1995, *RTE v Commission*, C-241/91 P, EU:C:1995:98, paragraph 84.

60 UK Supreme Court judgment of 17 February 2020, *Micula and others v. Romania*, [2020] UKSC 5, paragraph 96.

61 ECJ judgments of 2 August 1993, *Levy*, Case C-158/91, EU:C:1993:332, paragraphs 11-21; and of 28 March 1995, *Evans Medical*, Case C-324/93, EU:C:1995:84, paragraphs 28-30). As a general rule, the ECJ lacks jurisdiction under Article 234 TFEU to interpret international treaties between Member States and non-EU Member States (ECJ judgment of 4 May 2010, *TNT Express Nederland*, C-533/08, ECLI:EU:C:2010:243, paragraph 61).

62 Paragraph 99 of the judgment.

Based on a careful analysis of the text of the ICSID Convention, leading commentaries and the *travaux preparatoires,* the Supreme Court concluded that the duties in Articles 54 and 69 were owed to all other contracting parties, including non-EU Member States. The scheme of the convention is based on mutual trust and confidence, which depends on the effective participation and compliance of every contracting party. The failure of a contracting party to enforce an award would undermine the ICSID Convention scheme on which investors and contracting parties all rely. Any contracting party can bring a claim before the International Court of Justice in the event of the failure of any other contracting party to comply with its obligations.[63] Accordingly, the Supreme Court concluded that the UK's obligation under the convention to enforce the arbitral award in favour of the Micula brothers prevailed over Union law and therefore lifted the stay on enforcement.[64]

In our view, the UK Supreme Court's interpretation of the ICSID Convention is persuasive and is aligned with case-law regarding Article 351 TFEU. It is unfair to argue, as some critics have, that the court did not take the UK's obligations under Union law seriously. That said, the correct interpretation of the ICSID Convention for the purposes of applying Article 351 TFEU is open to debate. The Micula brothers have also attempted to enforce the award in other Member States and a Swedish first instance court (*Nacka tingsrätt*) ruled that the case concerned an intra-EU situation in which Article 351 TFEU is inapplicable.[65] Given the divergent views, the issue is likely to be brought to the attention of the ECJ.

From a Spanish perspective, it is important to add that the ICSID Convention was ratified by Spain in 1994, i.e. after its EU-accession. This means that Spain's obligations under Union law predate the ratification of the ICSID Convention and should therefore prevail over the convention for the purposes of applying Article 351 TFEU. The same applies to the founding members of the EU (i.e. Belgium, France, Germany, Italy, Luxembourg and the Netherlands), as well as to Ireland.[66]

The Micula brothers have attempted to enforce the award in their favour also in Belgium, France and Luxembourg.[67] A Belgian court (*Cour d'appel de Bruxelles*) has stayed the enforcement proceedings and asked for a preliminary ruling from the ECJ as regards the classification of the damages as aid if the award is enforced in Belgium and the interplay of EU State aid law and the *res judicata* effect of ICSID awards.[68] However, the ECJ's response will not clarify the role of Article 351 TFEU, since the ICSID Convention is a post-accession treaty in Belgium.

Lastly, it should be added that the UK Supreme Court accepted Romania and the European Commission's argument that the General Court's annulment of the Commission's 2015 decision did not mean that it became lawful, as a matter of Union law, to enforce the *Micula* award. The annulment only affected the European Commission's final decision, but not its earlier decision in 2014, to open a formal investigation.[69] This investigation was still open when the Supreme Court delivered its judgment. According to the ECJ's ruling in the *Deutsche Lufthansa* case, the mere provisional classification of a

63 See Article 64 of the ICSID Convention.

64 Paragraphs 103-108 of the judgment.

65 Nacka tingsrätt judgment dated 23 January 2019, Case No. Ä 2550-17. Sweden ratified the ICSID Convention in 1966 and joined the EU in 1995.

66 See footnote 14 above.

67 See paragraph 25 of the UK Supreme Court judgment.

68 Request for a preliminary ruling from the *Cour d'appel de Bruxelles* (Belgium) lodged on 24 April 2019, C-333/19, OJ C220, 1.7.2019, p. 24. Presumably, the question of the Belgian court will be assessed by the ECJ in parallel to the appeal of the General Court's judgment in the *Micula* case (see footnote 2 above).

69 European Commission decision of 1 October 2014, SA.38517, *Romania — Arbitral award Micula v Romania of 11 December 2013*.

measure as State aid in an opening decision is sufficient to give rise to a duty for Member States to refrain from any action which might come into conflict with the final decision of the European Commission (and to respect the standstill rule).[70] Allowing the aid to be put into effect could come into conflict with the final decision, which, according to the *Deutsche Lufthansa* case, means that the standstill rule should be enforced by the national authorities and courts from the point of the opening decision until the European Commission adopts a final decision.[71] However, since the Supreme Court found that the UK's obligation to enforce the ICSID award prevailed over Union law, this ultimately did not affect the outcome of the case.[72]

IV.2 Enforcement outside the EU

In order to minimise the risk of Union law-based obstacles to enforcement, some investors seek to enforce arbitral awards in a non-EU Member State which is a contracting party to the ICSID Convention and in whose territory the losing Member State has seizable assets. This will often be the United States.

Article 351 TFEU obviously does not apply in a non-EU Member State, which means that the discussion regarding whether EU State aid law prevails over the obligations under the ICSID Convention is generally not at issue. Instead, the losing Member State will typically focus its efforts on jurisdictional issues, such as arguing that the arbitration clause is invalid under the *Achmea* case-law or invoking State immunity or State compulsion doctrines under the applicable national law.

In the *Micula* case, the US District Court for the District of Colombia rejected Romania's jurisdictional objections in a decision from September 2019.[73] However, while the District Court noted that the possibilities to review an ICSID award are very limited, it also attached importance to the General Court's annulment of the European Commission's decision and distinguished the facts from the *Achmea* case. This raises questions about how other cases will be dealt with in the US.

In the *Eiser* case, the investor has attempted to enforce the 2017 arbitral award against Spain e.g. in the US and Australia. The European Commission has made *amicus curiae* submissions in support of Spain in the US court proceedings,[74] which are still pending, while in Australia the Federal Court of Australia rejected Spain's State immunity defence in a ruling handed down in February 2020 and ordered Spain to pay to Eiser the compensation awarded by the arbitral tribunal.[75]

IV.3 Recovery of damages as incompatible or unlawful aid

However, the successful enforcement of an arbitral award, possibly outside the EU, does not necessarily mean that the State aid-related litigation ends. As we will see, the losing Member State may attempt to claw back such damages.

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70 ECJ judgment of 21 November 2013, *Deutsche Lufthansa,* Case C-284/12*,* EU:C:2013:755. See also ECJ judgment of 21 December 2016, *Commission v Hansestadt Lubeck,* Case C-524/14 P, EU:C:2016:971.

71 The obligation to refrain from taking such measures is derived from the duty of sincere cooperation reflected in Article 4(3) of the Treaty on the European Union.

72 See paragraphs 51-52 of the judgment.

73 US District Court for the District of Columbia memorandum opinion of 11 September 2009, *Micula v. Romania*, Case No. 17-cv-02332 (APM).

74 See footnote 23 above.

75 Federal Court of Australia judgment of 24 February 2020, *Eiser Infrastructure Ltd v Kingdom of Spain*, [2020] FCA 157. As noted above, however, the Eiser award handed down in 2017 was set aside, in June 2020, by an ad hoc Committee due to undisclosed connections between one of the members of the arbitral tribunal and an economic consultancy used by the claimant to quantify its damages (see footnote 42 above).

(a) Recovery of damages as incompatible aid

In the *Micula* case, Romania made a partial payment of the damages awarded in early 2014. The European Commission issued an interim injunction in May 2014 to suspend any further payment of damages.[76] In October the same year, it opened a formal State aid investigation against Romania.[77]

The final decision in this investigation was adopted in 2015.[78] In it, and as already mentioned, the European Commission stated that the damages awarded pursuant to the arbitral award amounted to "incompatible aid" and ordered Romania to recover any such aid that had already been paid or that was paid later.

However, and as discussed, the General Court later annulled the European Commission's decision due to the inapplicability *ratione temporis* of Article 107(1) TFEU. The ruling has now been appealed to the ECJ, which may reverse the General Court's findings. If the European Commission decision from 2015 were to be reinstated following the ECJ's judgment, Romania would (again) be under an obligation to adopt all necessary measures to recover the damages so far successfully enforced by the Micula brothers.

However, unless there are seizable assets in Romania, it might prove difficult for the Romanian State to comply with such a recovery order.

(b) Recovery of damages as unlawful aid

It is improbable however that the European Commission will open a formal state aid investigation in all on-going investment arbitration cases raising State aid concerns. Such investigations are a resource-consuming process and so the European Commission must prioritise which cases to pursue. In addition, an investigation by the European Commission into the matter may, as we will see, actually benefit the investors and therefore not always be in the interests of the Member State concerned.

The European Commission has so far not adopted any interim injunctions or opened any formal investigation in the Spanish renewable energy cases, despite the fact that a large number of arbitral awards in favour of investors have been handed down. Instead, it has limited its intervention to an *obiter dictum* in its 2017 decision, in which it authorised the 2013 support scheme that replaced the 2007 scheme, stating that any damages awarded on the basis of the withdrawal of the 2007 scheme would be notifiable aid and therefore be subject to the standstill rule:

> *"The Commission recalls that any compensation which an Arbitration Tribunal were to grant to an investor on the basis that Spain has modified the premium economic scheme by the notified scheme would constitute in and of itself State aid. However, the Arbitration Tribunals are not competent to authorise the granting of State aid. That is an exclusive competence of the Commission. If they award compensation, such as in Eiser v Spain, or were to do so in the future, this compensation would be notifiable State aid pursuant to Article 108(3) TFEU and be subject to the standstill obligation."*[79]

The Member States must, according to established case-law, take action to address the consequences of a breach of the standstill rule, including in relation to the validity of

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[76] European Commission decision of 26 May 2014, SA.38517, *Romania — Arbitral award Micula v Romania of 11 December 2013*.
[77] See footnote 69 above.
[78] European Commission decision of 30 March 2015, SA.38517, *Romania — Arbitral award Micula v Romania of 11 December 2013*.
[79] European Commission decision of 10 November 2017, SA.40348, *Spain: support for electricity generation from renewable energy sources, cogeneration and waste*, paragraph 165.

the measure giving rise to the aid and the recovery of unlawful aid.[80] In the *Eesti Pagar* case from 2019, the ECJ clarified that it is the duty of national authorities to recover on their own initiative aid that has been unlawfully granted.[81]

This means that that a Member State can invoke the standstill rule in order to seek to recover damages that amounts to State aid. The Member State does not depend on the intervention of the European Commission in order to do so.

In this respect, it is important, however, to recall a key difference between "incompatible aid" and "unlawful aid". Aid that has been found incompatible will always be illegal, while unlawful aid can be declared compatible by the European Commission with retroactive effect. If the European Commission finds that unlawful aid is compatible, it will no longer be possible to order recovery of the aid.[82]

This is particularly relevant in cases such as the many claims related to the withdrawal of the renewable energy aid scheme in Spain. As mentioned above, this aid scheme was set up in 2007 in application of the 2001 Renewable Energy Directive. We have no reason to believe that the European Commission would not have found at the time, or indeed now, this scheme to be compatible with the internal market.[83]

However, the Spanish authorities, in breach of their obligation under Article 108(3) TFEU, never notified the 2007 aid scheme to the European Commission. Nor have the Spanish authorities notified the damages awarded, despite the European Commission's classification of the damages as "notifiable aid". It would be unsatisfactory to allow a Member State to benefit from its own breach of the TFEU and block any possibility of a European Commission investigation. Only the Member State itself can formally notify the aid to the European Commission,[84] but one option open to an investor in such a situation would be to report the non-notified aid scheme, and the arbitral awards, to the European Commission as a complaint, with the aim of triggering an *ex officio* investigation and a decision that supports the compatibility of the aid.[85] By contrast, it would be difficult for an investor to compel the Member State to comply with its duty to notify, since the ECJ has held only the standstill obligation in Article 108(3) TFEU has "direct effect", i.e. creates rights that a national court can enforce against the Member State.[86]

This touches upon the broader question of whether a Member State in such situations is under any obligation to at least try, in good faith, to overcome the obstacles created by the standstill rule and to obtain a positive decision from the European Commission. Clauses imposing such obligations are common when State aid is granted pursuant to a

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80 ECJ judgment of 21 November 1991, *Fédération nationale du commerce extérieur*, C-354/90, EU:C:1991:440, paragraphs 11 and 12.

81 ECJ judgment of 5 March 2019, *Eesti Pagar,* C-349/17, EU:C:2019:172, paragraph 92.

82 Articles 9(5) and 16(1) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, and ECJ judgment of 12 February 2008, *CELF and Ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraphs 45-46. However, it should be noted that even if an aid measure is later declared compatible, the beneficiaries may still need to pay interest in respect of the period until approval by the European Commission was obtained (paragraphs 52 and 55 of CELF judgment).

83 The compatibility of aid shall be assessed according to the substantive rules in force when the aid was granted.

84 General Court judgment of 5 August 2003, *P & O European Ferries (Vizcaya) v Commission*, T-116/01 and T-118/01, EU:T:2003:217, paragraph 64.

85 Article 24(2) of Council Regulation (EU) 2015/1589 provides that *"any interested party"* may submit a complaint. Article 1(h) of the regulation defines "interested party" as *"any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations"*.

86 ECJ judgments of 15 July 1964, *Costa v E.N.E.L.*, 6/64, EU:C:1964:66; and of 11 December 1973, *Lorenz*, 120/73, EU:C:1973:152.

contract. Some arbitral tribunals appear to consider that a similar obligation is inherent in the "fair and equitable treatment" standard.[87]

In any event, any attempt to recover damages after successful enforcement in a foreign jurisdiction, by classifying them as unlawful aid paid in breach of the standstill obligation, would trigger further litigation with an uncertain outcome.

An interesting question arises as to the interplay between Article 17 of Council Regulation (EU) 2015/1589, which sets out a limitation period of ten years from the date when unlawful aid was awarded for the European Commission to order recovery of such aid,[88] and the ability for the Commission to declare an aid scheme compatible. The lack of any decision or measure that interrupts the limitation period within this ten year period would result in the aid in question becoming "existing aid" (as opposed to "new aid") and therefore deemed as approved (since recovery is no longer possible).[89] Applying this principle by analogy to any unnotified aid measure (regardless of whether it would be declared compatible or not), would mean that after ten years from the granting of unlawful aid, the standstill obligation in Article 108(3) TFEU no longer applies.[90] If, as is well established in EU case law,[91] the award of the aid is deemed to take place at the time when the right to the payment arose under national law rather than when the damages for breach of the investment treaty are awarded, then so long as this right arose more than ten years ago, payment of the damages would arguably not be a breach of the standstill obligation. If the promised aid, had it been paid, would amount to "existing aid", any damages with an equivalent effect should be treated in the same manner.

V. CONCLUDING REMARKS

There is no short-term solution in sight to the problems we describe in this article. The investment arbitration community guards its autonomy against what it perceives as an EU-centric application of Union law, while the EU institutions see the risk of State aid slipping through the net as an unacceptable threat to the effectiveness of Union law and the single market. The delocalised nature of ICSID arbitration and the ability to enforce arbitral awards outside the EU mean that the European Commission must to a large extent fight this battle in non-EU courts. For the same reason, even if the upcoming ECJ rulings related to the *Micula* case (i.e. the appeal against the General Court judgment and the preliminary ruling request from the Belgian court) may shed light on issues such as the application of the *Asteris* case-law in an investment arbitration context, it is unlikely that this will have a major impact on the outcome of cases decided and enforced by arbitral tribunals and courts outside the ECJ's jurisdiction.

All in all, it is likely that political measures and agreements are needed to resolve this lack of coordination between parallel legal orders.

As mentioned, a majority of the EU Member States have agreed to eliminate intra-EU BITs. The prominent role of the EU Member States in the Energy Charter Treaty

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87 See Swiss Federal Court judgment of 6 October 2015, *EDF v Hungary*, 4A_34/2015. The ruling concerned a 2013 award from a Swiss arbitral tribunal that has not been made public. Hungary had withdrawn an aid scheme in 2008 and notified a new scheme that replaced the old one. The new scheme was approved by the European Commission. However, the judgment suggests that the arbitral tribunal took the view that Hungary failed to take advantage of the possibilities under Union law and could have obtained approval of a more favourable scheme.

88 Under Article 17(2) of Council Regulation (EU) 2015/1589, the limitation period will be interrupted by an action taken by the Commission, or by the Member State at the request of the Commission, during that period.

89 Article 17(3) of Council Regulation (EU) 2015/1589.

90 See Article 3 of Council Regulation (EU) 2015/1589 which states that the standstill rule only applies to notifiable aid pursuant to Article 2(1) of the regulation and this article only refers to the notification of "new aid".

91 See footnotes 47 and 48.

suggests that it is possible that intra-EU disputes might be brought outside the scope of this treaty in the future (but not with retroactive effects).

However, putting an end to intra-EU investment arbitration would not avoid the risk for conflict with EU State aid law when the claimant is domiciled in a non-EU Member State. EU free-trade agreements will, over time, replace some of the extra-EU BITs currently in force, and the agreement between the EU and Canada expressly states that it does not prevent a party from *"discontinuing the granting of a subsidy"*.[92] But many extra-EU BITs will remain in force without any such wording, and to amend hundreds of existing BITs would be an arduous task.

The EU and its Member States have also put forward an ambitious proposal to replace the current investment arbitration system with a standing investment tribunal, whose members would be appointed by the contracting parties to the treaty, and not by the parties to the dispute, and with the possibility for an appeal to an appellate tribunal (but no national judicial review).[93] This proposal is inspired by the permanent tribunal set up under the free-trade agreement with Canada.

But putting such solutions into place will take time and require broad, international consensus. In the short- to medium-term at least, we will continue to see cases in which investment arbitration is pitted against EU State aid law. Indeed, the victories of the Micula brothers before the UK Supreme Court and of Eiser in Australia will no doubt encourage other investors to follow the same path.

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[92] See Article 8.9(4) of the agreement.

[93] Submission of the European Union and its Member States to UNCITRAL Working Group III: 18 January 2019, "Establishing a standing mechanism for the settlement of international investment disputes".