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ARTICLE

Compensation or Competitive Advantage? Reconciling Investment Arbitration with EU State Aid Law

Johannes Hendrik Fahner[1]

Abstract——International investment law and EU State aid law have clashed on multiple occasions, most famously in the *Micula* case but also in disputes over subsidies in the renewable energy sector. In the view of the European Commission, investors should not be able to use investment arbitration to obtain compensation for the withdrawal of unlawful State aid, as this would jeopardize the effectiveness of EU State aid law. For this reason, the Commission has intervened in numerous investment arbitrations, arguing that investors cannot have legitimate expectations in respect of State aid that was granted in violation of EU law, and that any compensation awarded by a tribunal in such circumstances would also constitute State aid. This article argues that while EU State aid law should inform an assessment of the investor's legitimate expectations, tribunals need to conduct a comprehensive evaluation that also considers other relevant factors, such as the respondent State's representations and the foreseeability of the State aid qualification. If a tribunal determines that an investor was entitled to legitimate expectations despite EU State aid law, any compensation awarded by the tribunal should be accepted as damages that fall outside the scope of EU State aid law. In this way, a conflict between the two fields of law, which only encourages investors to seek enforcement outside the European Union, can be avoided.

I. INTRODUCTION

In parallel to its fight against intra-EU BITs culminating in the *Achmea* judgment, the European Commission has instigated another conflict between EU law and international investment law, which has received less attention.[2] This conflict focuses on the EU's rules on subsidies ('State aid') that prohibit member States from granting advantages to companies without prior approval by the European Commission. According to the Commission, a subsidy or other advantage granted to an investor in violation of EU State aid law cannot give rise to legitimate expectations on the side of the investor, and the withdrawal of such a measure should not be compensated.

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[2] *BayWa re Renewable Energy GmbH and BayWa re Asset Holding GmbH v Kingdom of Spain*, ICSID Case No ARB/15/16, Award (2 December 2019) para 588: 'State aid issues have been largely ignored [by ECT tribunals], although with little reasoning'.

If an investment tribunal nonetheless finds that the withdrawal of the advantage violated an investment treaty and orders damages, the Commission considers that the implementation of the resulting award would itself constitute State aid that should not be granted without the Commission's prior approval. This argument was initially developed in the *Micula* case,[3] but the Commission's recent decision to open the formal State aid investigation procedure in respect of the award issued in *Antin v Spain* shows that the approach taken in *Micula* will be replicated in other cases.[4]

Unlike the arguments that prevailed in *Achmea*, the State aid argument has potential ramifications outside the intra-EU context. In the case of *Eurus v Spain*, a majority of the Tribunal found that a Japanese investor could not entertain legitimate expectations that conflicted with EU State aid law.[5] Similarly, the Commission's argument that the effectiveness of EU law is jeopardized if foreign investors can reobtain advantages that were previously withdrawn on grounds of EU State aid law likely applies to non-EU investors as much as to EU investors.

In this article, I address the interactions between international investment law and EU State aid law, proposing a more harmonious solution than the approach advanced by the Commission. I argue that EU State aid law is relevant to an assessment of an investor's legitimate expectations in an EU member State, but that it is not the only and necessarily decisive element to be taken into account. Moreover, once a tribunal has determined that the investor's legitimate expectations have been violated, the subsequent award should be respected as a form of compensation that is due under international law and that falls outside the scope of the EU law notion of State aid.

II. THE ANTECEDENTS OF THE CONFLICT: *MICULA* AND BEYOND

Article 107 of the Treaty on the Functioning of the European Union (TFEU) provides:

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

By virtue of article 108 TFEU, member States are obliged to inform the European Commission of any plans to grant or alter aid. Such plans will then be investigated by the Commission, which decides whether the aid is compatible with EU

[3] *Ioan Micula and others v Romania*, ICSID Case No ARB/05/20, Final Award (11 December 2013) paras 333–36. Commission Decision 2015/1470/EU 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 (notified under document C (2015) 2112) (EC *Micula* Decision). The EC *Micula* Decision was annulled by the GCEU in Cases T624/15, T694/15 and T704/15 *European Food SA and others, v European Commission* Digital reports (Court Reports - general), ECLI:EU:T:2019:423 (GCEU, *European Food*). This judgment, in turn, was set aside by the CJEU, which remanded the case to the General Court, Case C-638/19 P *European Commission v. European Food SA and others*, Digital reports (Court Reports - general - 'Information on unpublished decisions' section), ECLI:EU:C:2022:50 (CJEU, *European Food*).

[4] European Commission, State Aid SA.54155, Letter of 19 July 2021 (EC *Antin* Letter). See also Johannes Fahner, 'From State Aid to Autonomy and Back: The Commission's Continuing Campaign Against Intra-EU ISDS' (2021) 48 LIEI 339.

[5] *Eurus Energy Holdings Corporation v Kingdom of Spain*, ICSID Case No ARB/16/4, Decision on Jurisdiction and Liability (17 March 2021) paras 232, 236.

law and can be implemented. Under the standstill obligation of article 108(3), member States are not allowed to implement State aid measures until the Commission has concluded its review. If a member State grants aid without notifying the Commission or before the latter has approved it, such aid is considered 'unlawful' aid, as distinguished from 'incompatible' aid that has been reviewed by the Commission and found incompatible with EU law.[6]

The potential conflict between the protection offered by investment treaties and EU State aid rules came to the fore in the case of *Micula*. The initial ICSID arbitration concerned the withdrawal of tax incentives by the Romanian authorities in preparation of Romania's accession to the EU. In response to this withdrawal, the brothers Micula and several of their companies brought proceedings against Romania on the basis of the BIT between Romania and Sweden. In the ICSID proceedings, the European Commission submitted comments as *amicus curiae*, arguing that the BIT should be interpreted in accordance with EU State aid law and that, in case of conflict, the latter should prevail.[7] Moreover, the respondent and the European Commission argued that 'any payment of compensation arising out of this Award would constitute illegal State aid under EU law and render the Award unenforceable within the EU'.[8]

The Tribunal considered that 'pertinent provisions of EU law … may be relevant to the determination of whether … Romania's actions were reasonable in light of all the circumstances, or whether Claimants' expectations were legitimate'.[9] As to the second point, the Tribunal reasoned that it was 'not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered' and that it was inappropriate 'for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered'.[10] On the merits, the Tribunal concluded that it had been reasonable for the claimants, when they made their investments, to believe that the tax incentives were compatible with EU law.[11] The Tribunal accordingly found a breach of the treaty's FET provision and ordered Romania to pay damages of circa €82 million.

Romania partly implemented the award before filing an annulment request, which was rejected.[12] Meanwhile, the European Commission announced that it would open a formal investigation under article 108(2) TFEU, provisionally concluding that any execution of the award would amount to the granting of prohibited State aid.[13] This finding was confirmed in a decision of 30 March 2015, which stipulated that Romania should recover any amounts paid under the award and that no further payments should be made. The Commission reasoned that the award granted the investors an amount 'corresponding exactly to the advantages foreseen' under

[6] See European Commission, 'Commission Notice on the Recovery of Unlawful and Incompatible State Aid' 2019/C 247/01, 23 July 2019 para 13.

[7] *Micula v Romania* (n 3) para 317. The Commission referred to Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 30(3) in this context.

[8] *Micula v Romania* (n 3) para 330. See for a discussion of other cases where the Commission raised similar arguments, Tamás Kende, 'Arbitral Awards Classified as State Aid under European Union Law' (2015) ELTE LJ 37.

[9] *Micula v Romania* (n 3) para 328.

[10] ibid para 340.

[11] ibid para 691.

[12] *Ioan Micula and others v Romania*, ICSID Case No ARB/05/20, Decision on Annulment (26 February 2016).

[13] European Commission, State Aid SA.38517, Letter of 1 October 2014.

the abolished tax scheme,[14] whereas the revocation of that scheme had served to re-establish normal competition conditions. Consequently, any attempt to compensate the investors for this revocation would grant an advantage not available under normal market conditions, and therefore constitute State aid.[15]

The Micula brothers successfully appealed the Commission Decision before the General Court of the European Union. In its judgment of 18 June 2019, the General Court annulled the Decision, for reasons particular to the accession context of the *Micula* case. The Court noted that the damages awarded by the tribunal recognized a right to compensation that arose when Romania repealed the tax incentives, *i.e.* before its accession to the EU.[16] The damages covered the period between 22 February 2005, the moment when the incentives were withdrawn, and 1 April 2009, the date of their scheduled expiry. Since Romania acceded to the European Union only on 1 January 2007, the Court ruled that the Commission was not competent to assess the original tax incentives, nor the compensation granted for their withdrawal, at least not insofar that compensation covered the period predating accession.[17] In this way, the General Court annulled the Commission Decision in light of the limited temporal jurisdiction of the Commission, without providing a clear answer to the more general question of whether and how EU State aid law applies to the execution of investor-State arbitration awards.[18]

On 25 January 2022, the Court of Justice of the European Union (CJEU) upheld the Commission's appeal and referred the case back to the General Court. Like the Advocate General before it, the Court considered that the Miculas acquired the alleged State aid at the moment 'of the conclusion of the arbitral proceedings', because only at that point were the investors 'able to obtain actual payment' of the compensation awarded to them.[19] Since the award was rendered after Romania's accession, the Commission was competent to assess it in light of EU State aid law.[20] Remanding the case to the General Court, the CJEU explicitly refused to comment on the substantive question as to whether the arbitral award could be qualified as State aid.[21]

Meanwhile, the controversy over the relationship between international investment law and EU State aid law has resurfaced in a series of investment arbitrations under the Energy Charter Treaty (ECT) concerning subsidies in the field of renewable energy.[22] In a number of these cases, the Commission repeated the argument

[14] EC *Micula* Decision (n 3) para 95.
[15] ibid para 96.
[16] GCEU, *European Food* (n 3) para 78.
[17] ibid paras 79, 90. Accordingly, neither the timing of the award nor its implementation was relevant in this context (paras 78, 80). The Court left nonetheless open whether the damages awarded with regard to the post-accession period could constitute State aid (paras 91, 108).
[18] See for an extensive discussion, Begoña Pérez Bernabeu, 'Taxation, State Aid Rules and Arbitral Courts: A BIT of a Mess in the *Micula* Saga' (2020) 3 EStAL 329.
[19] CJEU, *European Food* (n 3) para 124.
[20] ibid paras 135–36, 151.
[21] ibid paras 130–32, 154.
[22] Gloria Alvarez, 'Redefining the Relationship between the Energy Charter Treaty and the Treaty of Functioning of the European Union: From a Normative Conflict to Policy Tension' (2018) 33 ICSID Rev—FILJ 560; Ana López-Rodríguez, 'The Sun Behind the Clouds? Enforcement of Renewable Energy Awards in the EU' (2019) 8 TEL 279; Belen Olmos Giupponi, 'Are Market Competition and Investment Protection Incompatible in the EU Energy Sector?' in Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi (eds), *International Investment Law and Competition Law* (Springer 2020) 113; Millán Requena Casanova, 'The Complex Relationship Between Competition Law and Investment Arbitration After *Achmea:* The *Novenergia v Spain* Case' in Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi (eds), *International Investment Law and Competition Law* (Springer 2020) 203.

that EU State aid law precludes a finding that the investor's legitimate expectations were violated by the modification or withdrawal of subsidies that were not approved by the Commission, and that any award compensating for this would constitute State aid itself.[23] The Commission made the same claims in two letters assessing support schemes for renewable energy industries in the Czech Republic and Spain.[24]

The ongoing debate on the relationship between EU State aid law and investment arbitration demonstrates the need to find a solution to the conflict instigated by the Commission. For that purpose, the remainder of this article discusses, first, whether EU State aid law is relevant to a determination of whether a revocation of subsidies violated a foreign investor's rights under international investment law and, second, whether the payment of damages under an investment arbitration award falls within the scope of EU State aid law.

III. THE RELEVANCE OF EU STATE AID LAW TO AN ASSESSMENT OF AN INVESTOR'S LEGITIMATE EXPECTATIONS

In its interventions in investment arbitrations, the European Commission has consistently argued that tribunals should apply or consider EU State aid law when determining whether the withdrawal of subsidies or other advantages by member States constituted a breach of an investment protection treaty.[25] The argument holds that EU State aid law is part of international law and applicable to the dispute,[26] or part of the domestic law of the respondent State and for that reason relevant as a factual circumstance.[27] In either case, the conclusion is that investors should have been aware of the unlawfulness of subsidies granted without prior approval by the Commission.[28] Investment tribunals have adopted divergent views on this point.

In agreement with the Commission, the *Electrabel* Tribunal considered that EU law formed part of the rules and principles of international law applicable to the dispute under article 26(6) ECT. The Tribunal then considered that Hungary was obliged, under EU law, to comply with a Commission decision ordering the termination of a power purchase agreement on grounds of EU State aid law. According to the Tribunal, 'it would be absurd if Hungary could be liable under the ECT for doing

[23] eg *Jürgen Wirtgen and others v Czech Republic*, PCA Case No 2014-3, Award (11 October 2017) para 352; *SunReserve Luxco Holdings Sarl and others v Italian Republic*, SCC Case No 2016/32, Final Award (25 March 2020) para 349; *RWE Innogy GmbH and RWE Innogy Aersa SAU v Kingdom of Spain*, ICSID Case No ARB/14/34, Award (18 December 2020) para 293; *Eurus v Spain* (n 5) paras 394–95.

[24] European Commission, State Aid SA 40171, Letter of 28 November 2016 paras 136, 149–50; European Commission, State Aid SA 40348, Letter of 10 November 2017 paras 158, 164.

[25] eg *Micula v Romania* (n 3) para 317; *Wirtgen v Czech Republic* (n 23) para 352.

[26] See for an extensive overview of the arguments supporting the view that EU law should guide an interpretation of the ECT, *Eskosol SpA in Liquidazione v Italian Republic*, ICSID Case No 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) paras 111ff. See for a comment, Matthew Happold, '*Eskosol v Italy*: EU Law and the ECT as Distinct and Separate Legal Regimes' (2021) 36 ICSID Rev—FILJ 278.

[27] Some tribunals have accepted this dual relevance of EU law: *Electrabel SA v Hungary*, ICSID Case No ARB/07/19, Award (25 November 2015) para 4.195; *Eurus v Spain* (n 5) paras 232, 236.

[28] *BayWa v Spain* (n 2) fn 819: 'Some tribunals have been content to dismiss EU law arguments as irrelevant to international law responsibility, but whether an investor has a legitimate expectation at the time of the investment is not a pure question of international law, quite apart from Art 26.6 of the ECT.' See also *Antin Infrastructure Services Luxembourg Sàrl and Antin Energia Termosolar BV v Kingdom of Spain*, ICSID Case No ARB13/31, Award (15 June 2018) para 658.

precisely that which it was ordered to do by a supranational authority whose decisions the ECT itself recognises as legally binding on Hungary'.[29] Moreover, 'investors in EU Member States, including Hungary, [could not] have acquired any legitimate expectations that the ECT would necessarily shield their investments from the effects of EU law as regards anti-competitive conduct'.[30]

The *ICW* Tribunal held that 'the law of the European Union on State Aid precluded … any legitimate expectation that plants which entered into operation in 2009–2010 would necessarily maintain the benefit of the support system as it then existed, as long as this support system was not duly notified'.[31] The Tribunal ruled that '[i]n the absence of due notification and any [Commission] decision, the investor … was not entitled to hold any legitimate expectations that the un-notified support system would not be changed'.[32] This conclusion could not be affected by any statements made by domestic authorities, since 'it is not for a Member State to declare its own aid schemes compatible with EU law'.[33] The majority of the *BayWa* Tribunal held that '[a]lthough arguably harsh on recipients as they risk bearing the harmful consequences of the subsidizing State's omission to notify the aid',[34] it was at least 'arguable that state aid law should have been seen as relevant' at the moment when the investment was made.[35]

Several other tribunals have adopted a different approach. The *Cube* Tribunal ruled that '[t]he obligations regarding State aid were incumbent upon the Respondent, and investors were entitled to assume that they had been taken into account by the Respondent when drafting its legislation'.[36] The *InfraRed* Tribunal considered that 'there is no provision to be found in any of the EU laws or regulations cited by the Respondent which could have alerted Claimants to the impending enactment' of the contested measures.[37] According to the Tribunal, the respondent had failed to point to 'any specific telltale sign that might have tipped Claimants to the foreseeability of the Measures at Issue even had Claimants assessed the EU regulations on state

[29] *Electrabel v Hungary* (n 27) para 6.72.

[30] ibid para 4.141.

[31] *ICW Europe Investments Ltd v Czech Republic*, PCA Case No 2014–22, Award (15 May 2019) para 558.

[32] ibid para 566. See also para 576: 'the Incentive Regime, although State aid, had not been notified to, and approved by, the EC. Under EU law, it therefore follows that as at that time, there could not have been any legitimate expectations as alleged by the Claimant'.

[33] ibid para 566.

[34] *BayWa v Spain* (n 2) para 569(b). See however Dissenting Opinion of Horacio Grigera Naón, para 33: 'The essential failure to comply with European law or the hypothetical unlawfulness of the Special Regime is first and foremost imputable to the Respondent, which is indeed alleging, for the first time in this arbitration, its own fault in order to shirk its obligations and responsibilities under the EC Treaty FET standards, in violation of the principle *nemo turpitudem suam allegarem potest*.' The findings of the *BayWa* Tribunal were copied in *Eurus v Spain* (n 5) paras 423–24.

[35] *BayWa v Spain* (n 2) para 569(c). See however Dissenting Opinion of Horacio Grigera Naón, paras 41–42: 'A higher level of due diligence regarding the situation of Spanish law cannot be required from the foreign investor than the one incumbent on the Respondent in enforcing European law and its own law incorporating State Aid provisions … From the perspective of the ECT and international law, such facts and circumstances lead to concluding that the expectations of the Claimants arising out of the Special Regime are not illegitimate and, therefore, that are entitled to protection under the ECT FET standard'.

See also, critically, Martin Jarrett, 'The Triumph of European Union Law in International Investment Law—The Phenomenon, the Problems, and the Solution' (2021) 81 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 885.

[36] *Cube Infrastructure Fund SICAV and others v Kingdom of Spain*, ICSID Case No ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum (19 February 2019) para 306; see also *STEAG GmbH v Kingdom of Spain*, ICSID Case No ARB/15/4, Decisión sobre Jurisdicción, Responsabilidad e Instrucciones sobre Cuantificación de Daños (8 October 2020) para 522.

[37] *InfraRed Environmental Infrastructure GP Ltd and others v Kingdom of Spain*, ICSID Case No ARB/14/12, Award (2 August 2019) para 443.

aid with the rigour proposed by Respondent'.[38] Since the Spanish authorities had made 'a specific commitment of stability', the tribunal concluded that 'the content and interpretation of EU law and regulations [was] largely irrelevant to resolve the merits of the present dispute'.[39]

The different tribunals cited so far expressed divergent views on the relevance of EU State aid law to an assessment of the investor's legitimate expectations. While it is not controversial that the legality of host State conduct under domestic law is relevant to this assessment,[40] tribunals differ as to whether the host State's non-compliance with EU State aid law precludes legitimate expectations on the side of the investor. Some have concluded that the host State's failure to comply with EU law cannot be held against the investor, while others have reasoned that the adoption of a measure in violation of EU law cannot create a legitimate expectation. In this context, the Commission has urged tribunals to follow the approach taken by the Court of Justice of the European Union (CJEU),[41] which considers there is little room for legitimate expectations with regard to aid granted in contravention of the procedure prescribed by article 108 TFEU.[42]

Arguably, an assessment of legitimate expectations as protected by an international investment treaty is not necessarily identical to the same assessment under EU law.[43] According to the CJEU, 'an economic operator exercising due care should normally be able to determine' whether State aid was duly notified and approved by the European Commission.[44] In practice, however, the qualification of a specific measure as State aid is often complex and controversial,[45] which may cause both host States and investors to be unaware of State aid risks. Moreover, especially in respect of a non-EU

[38] ibid para 444.

[39] ibid.

[40] *BayWa v Spain* (n 2) para 569. See eg Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 146: 'while the principle of legitimate expectations inherent in FET has an objective core, its application will depend upon the expectations nurtured and fostered by the local laws as they stand specifically at the time of the investment'; Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Rev—FILJ 1, 120: '[i]f the investor knows (or ought to have known by acquiring proper legal advice) that it cannot attain a certain result or act because that would contravene the host State's domestic law, then a legitimate expectation cannot be said to have arisen'.

[41] See eg EC *Micula* Decision (n 3) para 156; *BayWa v Spain* (n 2) para 539.

[42] See eg Case C-148/04 *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1* [2005] ECR I-11137, ECLI:EU:C:2005:774, para 104; Case C-349/17 *Eesti Pagar AS v Ettevõtluse Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium* Digital Reports (Court Reports - General), ECLI:EU:C:2019:172, para 98, with references to older case law. The Court ruled that: 'in view of the mandatory nature of the supervision of State aid by the Commission pursuant to Article 108 TFEU, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article'. See also Paschalis Paschalidis, 'The Impact of EU State Aid Law on International Investment Law and Arbitration' in Fach Gómez, Gourgourinis and Titi (n 22) 179, 187.

[43] *Novenergia II—Energy and Environment (SCA) SICAR v Kingdom of Spain*, SCC Case No 2015/063, Final Award (15 February 2018) para 465, noting that the notion of fair and equitable treatment to foreign investors does not exist in EU law. Cláudia Saavedra Pinto, '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?' (2016) 15 EStAL 270–85, noting that 'despite assuming roughly the same set of requirements, the two fields of law interpret and apply these in entirely different ways, leading to an overly-narrow acceptance of undertaking's expectations in State aid law and to an overly-broad and unqualified formulation of FET clause in investment treaty law'. See for a criticism of the 'amplified' version of the concept of legitimate expectations in investment law, as compared to domestic law versions, Josef Ostřanský, 'An Exercise in Equivocation: A Critique of Legitimate Expectations as a General Principle of Law under the Fair and Equitable Treatment Standard' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Nijhoff 2018). See also Lucy Reed and Simon Consedine, 'Fair and Equitable Treatment: Legitimate Expectations and Transparency' in Meg Kinnear and others (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer 2015); Diego Zannoni, 'The Legitimate Expectation of Regulatory Stability under the Energy Charter Treaty' (2020) 33 LJIL 451.

[44] CJEU, *Eesti Pagar* (n 42) para 98.

[45] This is further demonstrated by the number of Commission decisions that have been annulled by the General Court. Pablo Ibáñez Colomo, 'State Aid Litigation before EU Courts (2004–2012): A Statistical Overview' (2013) 4

investor, the level of due care that can be reasonably expected from a foreign investor might be more limited than what can be expected from a national. It has been argued that the purpose of international investment law is to provide foreign investors with stronger protection than domestic investors,[46] among other reasons because foreign investors are less familiar with domestic law.[47] Consequently, there might be reason to accept a foreign investor's expectations more readily as legitimate, especially in cases where it is debatable whether the contested advantage qualified as State aid,[48] or where the host State made specific representations on the matter.[49]

In any event, an assessment of an investor's legitimate expectations requires a comprehensive and contextual analysis, which precludes categorical answers on the basis of EU State aid law alone.[50] In this context, the host State's actual reasons for withdrawing the advantage should also be assessed, in order to determine whether the host State did not resort to EU State aid law as a convenient post-fact excuse to justify the termination of certain advantages given to the investor.[51] Depending on the circumstances, a tribunal may come to the conclusion that an investor was entitled to assume the legality of the advantage, even if it was later qualified as State aid.

IV. ARBITRAL AWARDS AS STATE AID

The capstone of the Commission's State aid law campaign is the argument that an award granting compensation for the withdrawal of unlawful or incompatible State aid constitutes State aid itself.[52] This position has resulted in the somewhat circular argument that tribunals should decline jurisdiction because a prospective award would be unenforceable.[53] Unsurprisingly, tribunals have not been persuaded by this point.[54] The *CEF Energia* Tribunal considered that 'it would give support to a sovereign state being able to avoid an international promise to arbitrate disputes with a two-fold argument which relies on rules which such sovereign itself created and

JECL & Pract 465, concluding that in the period under review, 35.84 per cent of Commission State aid decisions were annulled.

[46] *Quasar de Valores SICAV SA and others v Russian Federation*, SCC Case No 24/2007, Award (20 July 2012) para 21.

[47] *International Thunderbird Gaming Corp v United Mexican States*, UNCITRAL, Separate Opinion of Thomas Wälde (December 2005) paras 12, 33. There is, however, an increasing emphasis on the investor's duty to exercise due diligence. See Gian Maria Farnelli, 'Recent Trends in Investment Arbitration Concerning Legitimate Expectations' (2021) 23 Int C L Rev 27.

[48] cf *Cube v Spain* (n 36) para 306: 'at the time that the investments were made it was not at all clear that the tariff regime should be regarded as State aid, let alone as impermissible State aid'.

[49] See Jack Biggs, 'The Scope of Investors' Legitimate Expectations under the FET Standard in the European Renewable Energy Cases' (2021) 36 ICSID Rev—FILJ 99. For a different view, see *ICW v Czech Republic* (n 31) para 566.

[50] A number of tribunals have held that EU State aid law is part of the 'factual matrix' of the dispute: eg *Micula v Romania* (n 3) para 328; *Cube v Spain* (n 36) para 160; *STEAG v Spain* (n 36) para 293.

[51] Pietro Ortolani, 'Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance' (2015) 6 JIDS 118, 129: 'the claims brought against the Czech Republic by solar energy investors revolve around measures which were revoked spontaneously by the host state, but may also have been incompatible with Article 107 TFEU'. See also *RWE v Spain* (n 23) para 356 sub b, noting that '[t]here is no evidence that the Disputed Measures were motivated by State aid concerns, as the relevant preambles do not mention State aid'. Jarrett (n 35) 890–91.

[52] *Micula v Spain* (n 3) paras 334–36; *Wirtgen v Czech Republic* (n 23) para 468.

[53] As argued by the respondent in *CEF Energia BV v Italian Republic*, SCC Case No 2015/158, Award (16 January 2019) para 69.

[54] Markus Burgstaller, 'Recognition and Enforcement of ICSID Awards: The ICSID Convention and the European Union' in Crina Baltag (ed), *ICSID Convention After 50 Years: Unsettled Issues* (Kluwer 2016) 425: '[t]ribunals, although under obligation to render an enforceable award, were reluctant to address enforcement issues regarding the perceived incompatibility with EU law in their awards'.

simply foreshadows putative future issues with enforcement'.[55] The *BayWa* Tribunal considered that the enforceability of its award concerned a 'separate matter' that could not impinge upon jurisdiction.[56] The *RWE* Tribunal noted that 'the issue[s] of recognition and enforcement are ultimately a matter for the courts of concerned ICSID Contracting States in accordance with Article 54 of the ICSID Convention, and the Tribunal cannot determine its jurisdiction by reference to how differing Contracting States may understand and apply their obligations under Article 54'.[57]

While tribunals have categorically rejected the claim that EU State aid law deprives them of jurisdiction, this does not mean that the enforceability argument is otherwise without merit. The Commission has raised the State aid argument not only to contest arbitral jurisdiction but also to oppose enforcement,[58] contending that the implementation of an investment arbitration award may result in State aid that requires notification to the Commission in accordance with article 108 TFEU. This argument can only be valid, however, if an award fulfils all the elements of article 107 TFEU, some of which raise complicated questions when applied to investment arbitration awards.

First of all, according to article 107, State aid needs to be 'aid granted by a Member State or through State resources'. The Court has inferred from this phrase that in order to qualify as State aid, a measure must not only be financed with State resources but also be 'imputable' or 'attributable' to the member State.[59] Arguably, this means that an arbitral award can only be qualified as State aid when the member State implements the award, and not when the award is issued by the tribunal.[60] Even at that point, however, it is debatable whether the decision to implement the award is attributable to the State. Scholars have argued that when a tribunal obliges a member State to pay compensation, that decision is made by the tribunal,[61] while the respondent State is simply obliged to comply.[62]

[55] *CEF Energia v Italy* (n 53) para 72. The Tribunal emphasized that State aid law was a 'product of the sovereign choices of member states' para 71.

[56] *BayWa v Spain* (n 2) para 568, quoting *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12, Decision on the *Achmea* (31 August 2018) para 230.

[57] *RWE v Spain* (n 23) Decision on Jurisdiction, Liability and Certain Issues of Quantum (30 December 2019) para 374.

[58] The Commission's *Micula* Decision was followed by the Court of Appeal of Luxembourg, Decision of 21 March 2018, Arrêt No 71/18—VII—REF; District Court of Nacka (Sweden), Decision of 23 January 2019, Case Ä 2550–17.

[59] See eg Case C-482/99 *French Republic v Commission of the European Communities* [2002] I-04397, ECLI:EU:C:2002:294, para 24, with further references; Case T-351/02 *Deutsche Bahn AG v Commission of the European Communities* [2006] ECR II-01047, ECLI:EU:T:2006:104, para 103; Cases C-434/19 and C-435/19 *Poste Italiane SpA v Riscossione Sicilia SpA agente riscossione per la provincia di Palermo e delle altre provincie siciliane and Agenzia delle entrate – Riscossione v Poste Italiane SpA* Digital Reports (Court Reports - general), ECLI:EU:C:2021:162, paras 38–39.

[60] Paschalidis (n 42) 193. See also EC *Antin* Letter (n 4) para 83. In this context, the debate held in the *Micula* case on the timing of the alleged aid is relevant. The CJEU's suggestion in CJEU, *European Food* (n 3) para 134 that the aid was granted 'by the adoption of the arbitral award' is difficult to reconcile with the imputability requirement.

[61] See CJEU, *European Food* (n 3) para 125, noting that the Tribunal 'not only found the existence of [the] right [to compensation], but also quantified the amount thereof'.

[62] Ortolani (n 51) 122–23; Burgstaller (n 54) 414; López-Rodríguez (n 22) 287. Ortolani argues that the execution of an investment arbitration award is generally not imputable to the member State, except when the award compensates for the revocation of illegal State aid. In my view, the extent to which the award compensates for withdrawn State aid concerns the requirement of 'advantage' rather than 'imputability'. cf Paschalidis (n 42) 196: '[i]f the aid in question is incompatible and unlawful state aid, compensation representing the amount of promised but unpaid aid is in itself such aid. The fact that the arbitral award may not be imputable to the state does not alter the fact that the amount of compensation is state aid in disguise.' However, if the award is not imputable to the member State, one of the criteria for State aid is not fulfilled.

In the Commission's view, the obligation to implement an award results from treaty commitments voluntarily assumed by the State and is therefore attributable.[63] There is only one 'narrow exemption' from this logic: 'a measure is not imputable to a Member State if that Member State is under an obligation under Union law to implement that measure without any discretion'.[64] Arguably, a similar exemption could be applied to investment arbitration awards: States party to investment treaties or the ICSID Convention are bound to comply with obligations they voluntarily assumed, in the same manner as EU member States are bound to comply with measures adopted by the Union legislature because they voluntarily acceded to the EU treaties.[65]

There has been some discussion as to whether States have a meaningful margin of discretion to refuse the enforcement of investment arbitration awards, which might permit the conclusion that a decision to execute an award is imputable to the implementing State. As concerns the ICSID Convention, scholars generally agree that no such discretion exists.[66] By contrast, the New York Convention offers several grounds to refuse enforcement, including public policy,[67] which could lead to the conclusion that a State's decision to enforce despite potential grounds for non-enforcement is attributable to that State. Moreover, even if one were to conclude that a State is legally obliged to enforce an award, this does not necessarily exclude imputability, as States can choose to resist enforcement despite their international obligations,[68] which might suggest that the choice to comply with these commitments is attributable to them.

The question of imputability becomes even more complex when enforcement is sought in a member State other than the respondent in the arbitration proceedings.[69] State aid law serves to protect competition within the internal market, and there seems to be no reason to limit the State aid analysis to the situation where the respondent implements the award.[70] However, applying the State aid argument to enforcement by a member State other than the respondent would mean that the alleged aid measure is financed by the respondent's resources, whereas the adoption of the measure is imputable to a different member State. Alternatively, one would have to argue that even the enforcement by another member State is attributable

[63] EC *Micula* Decision (n 3) para 118; EC *Antin* Letter (n 4) para 82. But see Kai Struckmann, Genevra Forwood and Aqeel Kadri, 'Investor-State Arbitrations and EU State Aid Rules: Conflict or Co-existence?' (2016) 2 EStAL 258, 265: 'the precise aid measure identified by the Commission is not the conclusion of the BIT but the payment'.

[64] EC *Micula* Decision (n 3) para 120. See also *Deutsche Bahn* (n 59) para 102.

[65] Christian Tietje and Clemens Wackernagel, 'Enforcement of Intra-EU ICSID Awards' (2015) 16 JWIT 205, 221–22, noting that 'imputability' was not the most logical angle to avoid conflicts between EU State aid law and other rules of EU law; Struckmann, Forwood and Kadri (n 63) 264.

[66] Ortolani (n 51) 124; Jack Beatson, 'International Arbitration, Public Policy Considerations, and Conflicts of Law: The Perspectives of Reviewing and Enforcing Courts' (2017) 33 Arbitration Intl 175, 183–84. It has been argued that since art 54 obliges States to treat an award 'as if it were a final judgment' of domestic courts, an ICSID award could be subjected to exceptional remedies available under domestic law against final judgments. In *Micula*, the UK Supreme Court left this possibility open: *Micula and others v Romania* [2020] UKSC 5 para 78. See on this judgment, Aikaterini Florou, 'The UK Supreme Court Judgment in *Micula v Romania*: A Landmark Judgment for the Relationship between EU Law and International Investment Law?' (2021) 36 ICSID Rev—FILJ 295.

[67] Incidentally, the CJEU has held that current art 107 TFEU 'may be regarded as a matter of public policy within the meaning of the New York Convention'. Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-03055, ECLI:EU:C:1999:269, para 39. Arguably, this specific reason to refuse enforcement cannot serve as a ground for imputability, since the existence of State aid is conditional upon imputability. Ortolani (n 51) 124.

[68] This is precisely what the Commission asks member States to do; see EC *Micula* Decision (n 3) para 104.

[69] See also the pending preliminary reference in Case C-333/19 *Romatsa and others*, on the conflict between obligations under the ICSID Convention and a State aid law decision of the European Commission.

[70] But see Struckmann, Forwood and Kadri (n 63) 265: 'it is in the nature of a Commission Decision to be binding only on its addressees … On this basis, the *Micula* decision binds only the Romanian State (and by extension its courts)'.

to the respondent, because the award results from international obligations voluntarily accepted by the respondent.[71] This approach would stretch the notion of imputability, especially when the respondent State itself refused to implement the award.

While the criterion of imputability already raises intricate conceptual questions, the other elements of article 107 TFEU also need to be fulfilled before the execution of an award can be qualified as State aid.[72] Crucially, in order to fall within the scope of article 107, a measure needs to provide an advantage, *i.e.* an 'economic benefit which an undertaking would not have obtained under normal market conditions'.[73] A controversial question is whether an investment arbitration award entails such a benefit or whether it merely compensates for damage resulting from unlawful conduct. In the *Asteris* judgment, the CJEU ruled that compensation for damage does not confer an advantage in the sense of current article 107 TFEU. According to the Court, 'State aid … 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'.[74] It has been suggested that the compensation granted by an investment tribunal differs from State aid for the same reasons.[75] The purpose of such compensation is not to grant an advantage to the beneficiary, but to compensate for damage caused by a violation of the relevant investment protection treaty.

The Commission has persistently argued that the *Asteris* judgment does not imply 'that every award of damages is automatically outside the scope of Union State aid law'.[76] According to the Commission, *Asteris* only applies where compensation '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'.[77] It is unclear, however, why the *Asteris* exception would be relevant only when compensation is awarded on the basis of domestic law and not when it is awarded on the basis of international law. Arguably, the relevant difference between compensation for damage and State aid is that compensation, unlike State aid, does not 'result in the damaged individual being better off',[78] but only restores the situation in which the recipients would have found themselves if the damage would not have occurred.[79]

[71] Leo Flynn, 'Editorial: EU State Aid Law and International Investment Treaties: An Arm-Wrestling Contest?' (2016) EStAL 2: '[a]s for the enforcement of arbitral awards in courts outside the signatory State, it is hard to see the logic in a claim that the mechanism set in motion by that State is outside its responsibility even if that mechanism is no longer within its control once activated'.

[72] See for some considerations on the element of 'selectivity', Struckmann, Forwood and Kadri (n 63) 265–66.

[73] See EC *Micula* Decision (n 3) para 92 and case law cited.

[74] Cases 106 to 120/87 *Asteris AE and others v Hellenic Republic and European Economic Community* [1988] ECR 05515, ECLI:EU:C:1988:457, para 23. In this case, the referring court asked whether damages paid by national authorities in compensation for damage resulting from technical errors in Community legislation would constitute State aid. The preliminary reference followed after a prior case in which the Court had annulled a Commission Regulation concerning production aid for tomato concentrates but had rejected an action for damages against the Community itself.

[75] Tietje and Wackernagel (n 65) 221: '[i]f an EU Member State is allowed to oblige itself to pay compensation under certain circumstances in domestic law, then it must be able to do so as well under international law'. *AES Summit Generation Ltd and AES-Tisza Erömü Kft v Hungary*, ICSID Case No ARB/07/22, Expert Opinion of Piet Eeckhout (30 October 2008) para 121.

[76] EC *Micula* Decision (n 3) para 101.

[77] ibid.

[78] ibid.

[79] Carlos Lapuerta and Jack Stirzaker, 'EU State Aid as a Ground for Non-Enforcement of Arbitral Awards' in Ana Stanič and Crina Baltag (eds), *The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter*

The Commission does not explain why this logic would apply differently depending on the legal basis giving rise to the obligation to pay compensation.[80]

The fundamental reason underlying the Commission's reluctance to apply the *Asteris* exception to investment arbitration awards is its concern for the effectiveness of EU State aid law.[81] In its *Micula* decision, the Commission emphasized that 'the implementation or execution of the Award re-establishes the situation the claimants would have, in all likelihood, found themselves in' if the advantages had not been repealed.[82] It would 'frustrate the application of Union law' if foreign investors would be able to circumvent EU State aid law by seeking awards granting 'damages equal to the sum of the amounts of aid that were envisaged to be granted'.[83] In its *Micula* judgment, the General Court seemed to accept the Commission's reasoning by noting that 'compensation for damage suffered cannot be regarded as aid unless it has the effect of compensating for the withdrawal of unlawful or incompatible aid'.[84]

The Commission's exception to the *Asteris* exception raises a range of questions. First of all, the Commission assumes that one can draw a clear distinction between damages that compensate for the withdrawal of State aid and other types of damages. In practice, it is often debatable whether a measure qualified as State aid. This means that unless the Commission has adopted a final decision on the original aid measure, it will be difficult to determine whether an award compensates for the withdrawal of State aid. In its *Micula* decision, the Commission took the view that there is no need for a prior formal decision on the original aid measure before assessing a subsequent award related to the withdrawal of that aid.[85] Accordingly, absent a final Commission decision on the original measure, an assessment of an arbitral award under State aid law would require a double analysis: one would first have to assess whether the original measure qualified as State aid in order to determine whether the award compensating for the withdrawal of that measure would also qualify as State aid.[86] It seems that this is indeed the approach followed by the Commission in the case of *Antin*.[87]

More fundamentally, the approach of the Commission disregards the legal basis of the damages granted in investment arbitration. The purpose of an award is not to restore State aid that was withdrawn or recovered, but to compensate for a breach of

Treaty, and the Multilateral Investment Court (Kluwer 2020), arguing that a lump sum award does not have the same effect on competition as the original subsidies may have had.

[80] In *Micula*, the Commission refused to recognize the Sweden–Romania BIT as a valid legal basis for compensation, in line with its general opposition to intra-EU BITs, EC *Micula* Decision (n 3) para 102. The General Court distinguished the *Micula* case from the *Achmea* case, since all relevant events to be taken into account by the *Micula* tribunal took place before Romania's accession to the EU. The CJEU dismissed this view, considering that as of Romania's accession, the arbitration agreement in the BIT 'lacked any force', CJEU, *European Food* (n 3) para 145. In any event, the *Achmea* issue does not affect obligations derived from extra-EU BITs.

[81] See also Tietje and Wackernagel (n 65) 222–23.

[82] EC *Micula* Decision (n 3) para 95.

[83] ibid paras 103, 104.

[84] GCEU, *European Food* (n 3) para 103. The CJEU explicitly refused to comment on this point, see CJEU, *European Food* (n 3) para 131.

[85] EC *Micula* Decision (n 3) paras 105–06. Such a decision did not exist in *Micula*. See Struckmann, Forwood and Kadri (n 63) 267.

[86] In the Spanish renewable energy decision, the Commission only reviewed the modified support scheme and not the original scheme. European Commission, Letter of 10 November 2017 (n 24) para 156. Nevertheless, the Commission held that any award ordering compensation for the modification of the scheme would constitute notifiable State aid. See ibid para 165. See *Foresight Luxembourg Solar 1 SARL and others v Kingdom of Spain*, SCC Case No 2015/150, Final Award (14 November 2018) para 381; *RWE v Spain* (n 23) paras 356, 358.

[87] EC *Antin* Letter (n 4) para 76.

an investment treaty. The investor is compensated for losses incurred because the host State breached legitimate expectations that benefitted from extra protection under an investment treaty.[88] To the extent that such compensation would jeopardize the effectiveness of EU State aid law, this would be an unintended consequence of the conclusion of investment treaties giving special guarantees to foreign investors. It could be argued that investment protection treaties are discriminatory by nature and contradictory to the logic of the internal market,[89] but this policy conflict should not be retroactively resolved by flouting international commitments. The Commission's attempt to preserve the effectiveness of State aid law by objecting to the enforcement of investment arbitration awards will only encourage to enforce awards outside of the European Union, where courts may not feel bound to consider EU State aid law.[90]

The more harmful implication of the Commission's refusal to qualify awards as damages that fall outside the scope of State aid law under the *Asteris* exception is the emergence of another conflict between EU and international law. In this context, the Commission has pointed to the CJEU's judgment in the *Lucchini* case, where the Court denounced the application of domestic law which prevented 'the recovery of State aid granted in breach of Community law'.[91] According to the Commission, the same principle applies 'where the liability flows from an international law treaty concluded between two Member States'.[92] Consequently, '[w]here giving effect to an intra-EU treaty by a Member State would frustrate the application of Union law, that Member State must uphold Union law since Union primary law, such as Articles 107 and 108 of the Treaty, takes precedence over that Member State's international obligations'.[93]

The Commission's categorical subordination of international law in this context is not convincing.[94] Whereas the CJEU has claimed the primacy of primary EU law

[88] Accordingly, an award can be higher or lower than the original amount of State aid, which would shed further doubt on the equation of an arbitral award with a prior State aid measure. López-Rodríguez (n 22) 288, commenting on the *Micula* award: '[t]he wrongful act was not the withdrawal but the manner of withdrawal. The equivalence between the amount of withdrawn incentives and the damages awarded for the wrongful conduct of the state was coincidental. Conceivably, the amount of damages could have been greater.'

[89] Alesia Tsiabus and Guillaume Croisant, 'Investment Arbitration and EU (Competition) Law—Lessons Learned from the *Micula* Saga' (2020) 5 Eur Investment Law and Arbitration Review Online 330, 353: '[t]he prohibition of state aid is indeed intended to ensure that all market operators are treated equally, whereas a key objective of investment protection is to attract market operators by granting additional rights to certain categories of investors'. See also EC *Antin* Letter (n 4) para 101.

[90] cf *Ioan Micula and others v Romania*, Opinion and Order (SDNY Cir 2015) (No 1:15-mc-00107-LGS) 13: 'As a party to the ICSID Convention, the United States has a compelling interest in fulfilling its obligation under Article 54 to recognize and enforce ICSID awards regardless of the actions of another state. To do otherwise would undermine the ICSID Convention's expansive spirit on which many American investors rely when they seek to confirm awards in the national courts of the Convention's other member states.'

[91] Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* [2007] ECR I-06199, ECLI:EU:C:2007:434 para 63.

[92] EC *Micula* Decision (n 3) para 104. See also Ortolani (n 51) fn 33: 'the case law of the CJEU clearly demonstrates that a Member State must in any case recover illegal state aid, even if this requires the violation of obligations stemming from different legal orders'.

[93] EC *Micula* Decision (n 3) para 104. It is unclear if the issue of hierarchy would apply differently in a case where one of the States party to the relevant investment treaty is not an EU member. Ulrich Wölker, 'The EU as a Player in the BIT Arena: Current and Future Legal Challenges' (2009) 24 ICSID Rev—FILJ 434, 441: '[t]he rights of [third] countries cannot be affected by EU competences and the substantive rules of EU law'.

[94] There has been extensive academic debate about the hierarchy between EU law and international investment law. See eg Jan Kleinheisterkamp, 'European Policy Space in International Investment Law' (2012) 27 ICSID Rev—FILJ 416; Inga Witte, 'Interactions between International Investment Law and Constitutional Law: Promoting the Dialogue. A European Perspective on Judicial Cooperation and Deference' (2018) 21 Max Planck Yrbk UN L Online 467; David Restrepo Amariles, Amir Ardelan Farhadi and Arnaud Van Waeyenberge, 'Reconciling International Investment Law and European Union Law in the Wake of *Achmea*' (2020) 69 ICLQ 907. For the view that EU law takes precedence over bilateral investment treaties, see Steffen Hindelang, 'Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-Se Treaties? The Case of Intra-EU

over national law, this primacy does not equally apply in respect of international law. In the case of *Kadi*, the CJEU accepted that in some cases EU law can prevail over international law, but this concerned 'the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights'.[95] EU State aid law, even if part of the primary law of the EU, does not necessarily form part of these constitutional principles.[96] Consequently, if there were a conflict between international investment law and EU State aid law, it is not evident that EU law would prevail.[97]

In a decision on the implications of the *Achmea* decision, one investment arbitration tribunal reasoned that EU law is a 'sub-system' of international law, governed by its own applicable norms and vesting authority in particular dispute settlement bodies. EU law could not, however, displace other subsystems of international law.[98] According to this view, 'EU law certainly has primacy over the national laws of EU Member States, but not in the same fashion over independent rules of international law'.[99] The Commission's categorical pronouncement on the hierarchy between EU law and international law is difficult to reconcile with the Union's commitment 'to the strict observance of international law'[100] and, if one characterizes EU law as domestic law from an international perspective, with the general international legal rule that internal law cannot justify a failure to perform a treaty.[101]

The better approach, in my view, is to avoid a conflict between EU and international law by qualifying investment arbitration awards as a form of compensation that falls outside the scope of EU State aid law on grounds of the *Asteris* judgment. In this way, EU law offers a solution to the conundrum posed by arbitral awards that compensate foreign investors for the withdrawal of State aid. Admittedly, this approach might make some inroads into the effectiveness of EU State aid law, to the extent that some foreign investors will be able to regain amounts previously withdrawn on grounds of EU State aid law, but this is an inevitable implication of the decision of member States to offer exceptional forms of protection to foreign investors under investment treaties. Accepting this state of affairs under the *Asteris* exception is a more constructive response than instigating a conflict between international and

Investment Arbitration' (2012) 39 LIEI 179; Nico Basener, *Investment Protection in the European Union: Considering EU Law in Investment Arbitrations Arising from Intra-EU and Extra-EU Bilateral Investment Agreements* (Nomos 2017).

[95] Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351, ECLI:EU:C:2008:461, para 285.

[96] *AES v Hungary*, Expert Opinion of Eeckhout (n 75) para 100: '[t]he EC Treaty State aid provisions are, admittedly, of vital importance for a proper functioning of the EU internal market. But so is the common commercial policy. *Kadi and Al Barakaat*, by contrast, was a highly exceptional case, in which the very foundations and core values of the EU, in terms of respect for fundamental rights, were in issue.' One might even argue that investment treaties protect the fundamental right to property, which might outweigh competition law concerns.

[97] Tietje and Wackernagel (n 65) 244. See also Expert Opinion of Eeckhout in *AES v Hungary* (n 75) para 19, arguing that if an ICSID award would conflict with an EC State aid decision, 'it is the latter decision which could not be enforced'. According to Van Eeckhout, member States could rely on 'an absolute impossibility of recovery', the only ground accepted by EU law as a justification for a failure to recover State aid.

[98] *Eskosol v Italy* (n 26) para 181.

[99] ibid para 182. See also, *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Jurisdiction (6 June 2016) para 87: 'EU law does not and cannot "*trump*" public international law'.

[100] Consolidated Version of the Treaty on European Union [2012] OJ C326/13, art 3(5).

[101] VCLT (n 7) art 7. cf *AES Summit Generation Ltd and AES-Tisza Eromu Kft v Hungary*, ICSID Case No ARB/07/22, Award (23 September 2010) para 7.6.6, where the Tribunal considered EU law as fact, 'always taking into account that a state may not invoke its domestic law as an excuse for alleged breaches of its international obligations'. If, alternatively, EU law would be considered as international law, the conflict rules of the VCLT would be applicable. See Tomas Fecak, *International Investment Agreements and EU Law* (Kluwer 2016) 381–95.

European law, which forces member States to choose between different obligations, and encourages investors to seek enforcement outside of the European Union.[102]

V. CONCLUSIONS

In a number of investment arbitration cases, foreign investors have been awarded compensation for the withdrawal of subsidies or other benefits. The European Commission has persistently objected to such compensation if it considered that the original advantage was granted in violation of EU State aid law, arguing that EU law precludes a finding of legitimate expectations in such circumstances. However, under international investment treaties, tribunals have the final authority to determine whether the withdrawal of an advantage violated an investor's legitimate expectations as protected by the applicable treaty. Arguably, EU State aid law should inform this assessment, especially when EU law is part of the domestic law of the investor's home State as well as the host State, but it should not be considered the only relevant factor. Depending on the foreseeability of the State aid qualification and any representations made by the host State in this context, tribunals might find that legitimate expectations were violated even if the original measure was later found to be unlawful under EU State aid law.

Once a tribunal has authoritatively determined that the withdrawal of a benefit constituted a treaty breach, the execution of the award should not be hindered on grounds of State aid law. The CJEU has acknowledged that the payment of compensation for damage resulting from unlawful conduct does not confer an advantage on the recipient and therefore does not constitute State aid. The distinction between an advantage and compensation for damage suggests that investment arbitration awards should be excluded from the scope of article 107 TFEU, which would prevent an unnecessary conflict between EU law and international investment law when tribunals order compensation for the withdrawal of State aid.

The Commission's invocation of State aid law in the investment arbitration context fits with its broader campaign against intra-EU investment arbitration, which has moved towards a successful conclusion in the form of the *Achmea* judgment. The State aid argument, however, may have an even wider impact than *Achmea* since it could apply also outside the intra-EU context. Moreover, although the Commission has until now limited its State aid objection to awards compensating for the withdrawal of measures that it qualified as State aid, potentially any investment arbitration award could be subjected to the Commission's State aid control, regardless of the type of host State conduct that was compensated. In light of these potentially far-reaching implications, the applicability of EU State aid law to investment arbitration awards should be thoroughly and critically examined.

[102] cf George Bermann, 'Navigating EU Law and the Law of International Arbitration' (2012) 28 Arbitration International 397, 431: '[d]isrespect for international arbitral awards not only exacts reputational costs, but also encourages disrespect for awards by other actors in other circumstances … Member States may come to be viewed as less attractive arbitration venues, due to the annulment risks they present'. See also Panos Koutrakos, 'The Relevance of EU Law for Arbitral Tribunals: (Not) Managing the Lingering Tension' (2016) 17 JWIT 873, 894, warning of 'open conflicts which both the EU legal order and international investment law can ill afford'.