

Arbitration

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I. INTRODUCTION

CERTAIN CURRENT EUROPEAN Union (EU) Member States, prior to joining the EU, entered into investment treaties with certain other Member States. Notably, formerly Communist Eastern and Central European States entered into investment agreements with EU Member States to reassure potential foreign investors at a time when investors' confidence in the stability and rule of law in these countries was not as high as it is today. These States eventually acceded to the EU, but many of these pre-accession intra-EU bilateral investment treaties (BITs) remain in force today.

Attitudes to these treaties have changed drastically in recent years. Today, there is a growing tension between EU law and investment treaty arbitration. Specifically, the European Commission (EC) today takes the view that the accession of new Member States has made intra-EU BITs between old and new Member States superfluous. All Member States are subject to the same legal rules under EU law, and all investors in these Member States benefit from the same protections, for example, against discriminatory treatment or disproportionate interference with property rights. The EC considers intra-EU BITs not only superfluous but also illegal under EU law. It has initiated infringement proceedings against certain EU Member States under Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) and it has also intervened in annulment proceedings, which related to an arbitral award based on an intra-EU BIT, to advance its view that intra-EU BITs violate EU law. Among other things, the EC claims that these BITs confer certain rights to some but not to all EU investors, on a bilateral basis, leading to discriminatory treatment based on nationality, which is incompatible with EU law.

This arguably discriminatory treatment has both a procedural and a substantive dimension. Procedurally, BITs grant foreign investors of one Contracting State the right to sue the other Contracting State in international arbitral proceedings for violation of the substantive rights granted by these treaties. This right does not extend to investors from other States that are not party to a BIT, regardless of whether they are investors from EU Member States or not. Substantively, tensions between EU law and BITs exist because arbitral tribunals have held that the scope of the rights and protections granted to investors under BITs are not identical to those provided

by EU law to investors from other Member States. This tension becomes particularly apparent with respect to the EU law rules on State aid. Under EU law, any advantage, economic or otherwise, granted by a Member State on a selective basis to a particular company or business, that has the effect of distorting the competition of the internal market, is defined as illegal State aid.¹ Although EU State aid law offers some protections for an investor's legitimate expectations, the substantive protections granted by BITs go beyond the scope of the protections under EU mandatory State aid law. This is not a theoretical problem, as has been illustrated by the widely publicised *Micula* matter. In the *Micula* case, an investment arbitration based upon an intra-EU BIT produced a result that the EC considered plainly incompatible with EU law, as compliance with the arbitral award would, in the view of the EC, constitute illegal State aid. The issues are made more complex by the fact that the EU itself has, together with each of its Member States, entered into the Energy Charter Treaty (ECT) which is a multilateral investment treaty.

The analysis that follows discusses the different investment protections under investment agreements and under EU law (in particular, the different conceptions of the principle of protection of legitimate expectation under each regime) and examines how these differences result in a seemingly irreconcilable clash between investment arbitration and EU State aid law. Following this introduction, section II explains the principle of legitimate expectations in EU State aid law. Section III explains the fair and equitable treatment ('FET') standards and the principle of legitimate expectations under international investment agreements (IIAs or IIA for singular). Section IV contains a summary of prominent cases in which arbitral tribunals applied investment protection standards to measures taken in the pursuance of compliance with EU State aid rules. Section V explains the practical implications of these different standards of protection as it relates to the enforcement of arbitral awards inside and outside of the EU. Finally, the conclusion attempts to explore the reasons for the diverging standards applied by EU institutions, on the one hand, and investment arbitration tribunals, on the other.

II. PROTECTION OF LEGITIMATE EXPECTATIONS IN EU LAW STATE AID PROCEEDINGS

To understand the tension between EU State aid law and investment treaty protection, it is first necessary to compare the standard by which the hopes and expectations of recipients of State aid are protected within the EU legal order against the standard applied under IIAs. Seen as 'the corollary of the principle of

¹ Art 107(1) '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 in Consolidated Version of the Treaty of the Functioning on the European Union' [2012] OJ C316/01.

legal certainty’,² the principle of the protection of legitimate expectations is well established under EU law. It has been described as a ‘superior rule of law’ for the protection of individuals,³ ‘one of the fundamental principles of the Community’,⁴ and as a ‘general principle’⁵ of EU law against which the legality of the acts of the Community institutions are to be reviewed, including in proceedings aimed at the recovery of State aid.

Article 16 of Council Regulation (EU) 2015/1589 of 13 July 2015 providing detailed rules for the application of Article 108 of the TFEU makes this requirement express. It obliges the EC not to demand recovery of State aid if to do so would be contrary to a ‘general principle of Union law’. While ‘general principles of Union law’ include the principle of protection of legitimate expectations, in practice, the EU courts narrowly construe the principle of protection of legitimate expectations.

A. Legitimate Expectations as a Defence to Recovery Demands in Administrative and Judicial Proceedings Relating to State Aid

A recipient of illegal State aid may assert its legitimate expectations as a defence to a demand for recovery of such aid⁶ in both administrative and judicial proceedings:

- First, in proceedings before the EC dealing with a request for the recovery of State aid.⁷
- Second, before the EU courts in support of a claim for annulment of the EC’s decision requiring recovery.⁸

² Joined Cases C-182/03 and C-217/03 *Kingdom of Belgium and Forum 187 v Commission*, Opinion of AG Leger, EU:C:2006:89, para 366.

³ Case C-74/74 *CNTA v Commission*, EU:C:1975:59, para 44; Case C-152/88 *Sofrimport SARL v Commission* EU:C:1990:259, para 26.

⁴ Case C-104/97 P *Atlanta v European Community*, EU:C:1999:498, para 52; Case C-17/03 *Vereniging voor Energie, Milieu en Water v Directeur van de Dienst uitvoering en toezicht energie*, EU:C:2005:362, para 73.

⁵ Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission*, EU:C:2000:38, para 15; Case C-403/99 *Italian Republic v Commission*, EU:C:2001:507, para 35.

⁶ The principle of protection of legitimate expectations cannot be relied upon by the Member States. To do so would deprive Arts 107 and 108 TFEU of practical force, ‘since national authorities would thus be able to rely on their own unlawful conduct in order to render decisions taken by the Commission under those provisions of the Treaty ineffectual’ in Joined Cases T-116/01 and T-118/01 *P & O European Ferries (Vizcaya) v Commission*, EU:T:2003:217, para 202.

⁷ There are a number of decisions in which the Commission has refrained from demanding the recovery of illegal aid in order to secure the protection of legitimate expectations. See generally *Industrie Ottiche Riunite (ORI)* Commission Decision 92/329/EEC [1992] OJ L183/30, para VIII; *Pari Mutuel Urbain (PMU)* Commission Decision 93/625/EEC [1993] OJ L300/15; *Temporary Withdrawal of Vessels* Commission Decision 95/195/EC [1995] L126/32, para VI; *Acciaierie di Bolzano* Commission Decision 96/617/ECSC [1996] OJ L274/30; *Large Firms in Crisis* (Case C68/1999) Commission Decision 2001/212/EC [2001] OJ L79/29; *Régime fiscal des centres de coordination* (Case C15/200) Commission Decision 2003/755/EC [2003] OJ L282/25, para VI.4.

⁸ Case T-62/08 *ThyssenKrupp Acciai Speciali Terni SpA v European Commission*, EU:T:2010:268, paras 272–76.

- Third, in administrative proceedings before the Member State national authorities dealing with the requests for the recovery of State aid.
- Finally, before Member State national courts as a defence in State aid recovery cases, particularly in circumstances where the EC has examined the general characteristics of a State aid scheme without conducting an analysis of the aid granted in individual cases.⁹

To successfully invoke the principle of legitimate expectations in any of these proceedings, the recipient of State aid must be able to satisfy three conditions: (i) there must be a reasonable basis for the legitimate expectation; (ii) the adverse change must not have been foreseeable to a prudent and diligent operator; and (iii) the legitimate expectation of the beneficiary must outweigh the public policy interests that are at stake.

B. Basis for Legitimate Expectations under EU Law

The beneficiary of legitimate expectations must show that there was an act or conduct of the EU administration capable of creating legitimate expectations. This includes specific statements or assurances by the EU institution in question, as well as conduct that creates confusion in the mind of a recipient of State aid acting in good faith.¹⁰ For example, the principle of protection of legitimate expectations precludes the recovery of State Aid if the beneficiary has complied with aid conditions laid down by the EC in an authorising decision.¹¹ A person not acting in good faith (eg, a person who has manifestly violated the applicable law), in contrast, cannot successfully invoke the protection of legitimate expectations.¹²

While silence or inaction normally cannot preclude the recovery of State aid, this may be different when the EC fails to act over a very protracted period of time. For example, in *RSV*, the European Court of Justice (ECJ) held that where, without sufficient reason, it took the EC 26 months to declare that a given State aid measure was incompatible with the common market and order its cancellation, that delay

⁹ Case T-394/08 *Regione autonoma della Sardegna v Commission*, EU:T:2011:493, para 91: 'Furthermore, the specific circumstances of the individual recipients of an aid scheme can be assessed only at the stage of recovery of the aid by the Member State concerned'.

¹⁰ Joined Cases C-182/03 and C-217/03 *Kingdom of Belgium*, Opinion of AG Leger (n 2) para 366; AP Rossi, 'Recovery of Unlawful and Incompatible Aid' in A. Santa Maria (ed), *International Competition Law Series: Competition & State Aid*, 2nd. edn. (The Hague, Kluwer Law International, 2015) para 4.03[A].

¹¹ Joined Cases T-227/99 and T-134/00 *Kvaerner Warnow Werft GmbH v Commission*, EU:T:2002:54, para 92.

¹² Case T-394/08 *Regione autonoma della Sardegna v Commission* (n 9) para 261: 'In accordance with settled case-law, any person on whose part an institution has given rise to justified hopes has the right to rely on the protection of legitimate expectations. However, the principle of the protection of legitimate expectations may not be relied upon by a person who has committed a manifest infringement of the rules in force (Case C-96/89 *Commission v Netherlands* [1991] ECR I-2461, para 30; Joined Cases C-65/02 P and C-73/02 P *ThyssenKrupp v Commission* [2005] ECR I-6773, para 41; and Case T-217/01 *Forum des migrants v Commission* [2003] ECR II-1563, para 76)'.

could give rise to a legitimate expectation on the part of the beneficiary such as to prevent the EC from ordering the national authorities to demand the refund of the aid.¹³ On the other hand, a failure to act on the part of the Commission is ‘irrelevant when an aid scheme has not been notified to [the Commission]’.¹⁴

Not even a positive decision by the EC on a duly notified State aid measure is sufficient to create a legitimate expectation that the aid has been lawfully granted. As long as such a positive decision can be challenged by third parties (ie, the beneficiary’s competitors) in the EU courts, a recipient of State aid cannot be said to have any legitimate expectations that the measure is lawful.¹⁵ Consequently, prior to the expiry of the relevant time periods for challenging the act in question, as well as the conclusion of any proceedings that might have been initiated, the recipient of aid uses that aid at its own peril.

This case law significantly limits the efficacy of the legitimate expectations doctrine in EU State aid cases. In the view of the European courts, the narrow scope of protection of State aid beneficiaries is necessary to promote public interest in enforcing EU competition rules. Moreover, to protect the recipient’s hopes more efficiently could otherwise frustrate the beneficiary’s competitors’ right to have a State aid measure reviewed by an independent judicial body.¹⁶ The incentive to bring an action against a positive decision by the EC would be severely diminished if there was only little prospect of the unlawful State aid measure being revoked.

C. Lack of Foreseeability and the Diligent Business Man

Second, the recipient of State aid can only successfully invoke legitimate expectations if the measure in question that contradicts the recipient’s alleged expectations was not reasonably foreseeable.¹⁷ Expectations are only ‘legitimate’ and worthy of protection where the recipient of the State aid could ‘reasonably rely on the maintenance or the stability of the situation thus created, in the same way as a “prudent and circumspect” trader’.¹⁸ This is not the case where the recipient could have ascertained that the aid had not been duly notified and approved, even if the Member State has mistakenly indicated that the aid is covered by a Commission approval.¹⁹ The beneficiary’s duty to ascertain whether the procedure in Article 108(3) TFEU has been duly followed also applies to small businesses.²⁰

¹³ Case C-223/85 *Rijn-Schelde-Verolme (RSV) Machinefabrieken en Scheepswerven NV v Commission*, EU:C:1987:502.

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ Joined Cases T-116/01 and T-118/01 *P & O European Ferries (Vizcaya) (n 6)*, para 219.

¹⁷ Case C-265/85 *Van den Bergh en Jurgens BV v Commission*, EU:C:1987:121, para 44: ‘On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a community measure likely to affect his interests, he cannot plead [the principle of protection of legitimate interests] if the measure is adopted’.

¹⁸ Joined Cases C-182/03 and C-217/03 *Kingdom of Belgium*, Opinion of AG Leger (n 2), para 369.

¹⁹ Case T-109/01 *Fleuren Compost BV v Commission*, EU:T:2004:4, paras 143–44.

²⁰ *ibid.*, para 140.

Thus, under normal circumstances, only the EU administration's conduct, but not the acts of the State granting the aid, can give rise to a legitimate expectation that the aid is lawful.²¹ It is only in exceptional circumstances that a beneficiary can successfully plead legitimate circumstances despite the fact that it has not verified that the Article 108(3) TFEU procedure has been followed. Such cases may include atypical instances in which it is unclear whether a given measure constitutes State aid at all.²²

D. Legitimate Expectations Must Outweigh Public Policy Interest

Finally, in balancing the interests at stake, the public policy interest in recovering the unlawful State aid must not override the aid beneficiary's interest in the maintenance of a situation which it was entitled to regard as stable.²³ In the field of State aid, the relevant public interest consists of

preventing the operation of the market from being distorted by State aid injurious to competition, a fact which, in accordance with settled case-law, requires unlawful aid to be repaid in order to re-establish the previously existing situation ... That public interest thus encompasses, in particular, the protection of competitors who, themselves, have a clear interest in being able to challenge Commission measures which adversely affect them.²⁴

In the relatively rare cases where the beneficiary is deemed to have a legitimate expectation, this balancing act prevents the recovery of the unlawful State aid, while its termination or modification remains possible.²⁵

Thus, as this brief overview illustrates, in balancing the different interests involved, the European courts attach more significance to public policy interests (in enforcing the EU competition rules to prevent the distortion of the relevant markets by State aid), as well as the interests of affected third parties (ie, the State aid beneficiary's competitors), than to the hope of the beneficiary that its situation would not be

²¹ Rossi (n 10), para 4.03[A].

²² Case C-5/89 *Commission v Federal Republic of Germany*, Opinion of AG Darmon, EU:C:1990:187, para 26: 'However, both the principle of the protection of legitimate expectations itself and the jurisdiction of the national courts to determine such matters must be preserved, and allowance must therefore be made for cases in which the fundamental rights of an undertaking, although it has not verified whether the aid had been notified, are such that it should none the less be accorded the benefit of the protection of legitimate expectations. In such cases, the national court must be able to assess the conduct of the recipient undertaking in concreto, if necessary after having referred a preliminary question to this Court. The doubts with which some undertakings may be assailed, when faced with 'atypical' forms of aid, as to whether notification is necessary should not be made light of. But the concrete nature of the assessment to be carried out by the national court must be contrasted with the abstract concept of legitimate expectations on which Germany relies in support of its refusal to implement the Community decision ordering the recovery of aid in question. The existence of legitimate expectations is not presumed, it must be proved'.

²³ Joined Cases C-182/03 and C-217/03 *Kingdom of Belgium*, Opinion of AG Leger (n 2), para 366.

²⁴ Joined Cases T-116/01 and T-118/01 *P & O European Ferries (Vizcaya)* (n 6), para 208.

²⁵ D Grespan, A Pelin and L Rossi, 'Recovery of Unlawful and Incompatible State Aid' in N Pesaresi and K Van de Castele (eds), *EU Competition Law, Vol IV: State Aid*, 2nd edn (Leuven, Claeys & Casteels, 2016), para 5.453.

subject to an adverse change. This narrow conception leaves only a very limited scope of application for the legitimate expectations principle in EU law State aid recovery proceedings. By comparison, the concept of legitimate expectations under IIAs is more extensive.

III. LEGITIMATE EXPECTATIONS AS KEY CRITERION UNDER THE FET STANDARD PURSUANT TO IIAs

Under most modern IIAs, host States must uphold foreign investors' legitimate expectations. The tribunal in *Thunderbird v Mexico* explained:

[T]he concept of 'legitimate expectations' relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.²⁶

This statement in the context of NAFTA is relevant also for other IIAs.

Legitimate expectations derive from the host State's commitments to investors. They can be created by the host State's conduct or specific legal undertakings given in individual contracts. Stabilisation clauses in investment contracts provide good examples. Stabilisation clauses freeze the regulatory framework applicable to investments. Through such clauses, host States commit not to alter (or not to apply fully) this regulatory framework.²⁷ In turn, stabilisation clauses create a legitimate expectation under IIAs that the host State will abide by these commitments.²⁸

IIAs protect investors' legitimate expectations through the notion of fair and equitable treatment (FET). Modern bilateral investment treaties,²⁹ multilateral

²⁶ *International Thunderbird Gaming Corp v United Mexican States*, UNCITRAL (NAFTA) Award (26 January 2006), para 147.

²⁷ Stabilisation clauses take many forms. But see, eg, the Oman Model Exploration and Production Sharing Agreement of 2002, Art 26.2: 'In the event that any provisions contained in the laws, rules or regulations of the Government are inconsistent with the terms and conditions of this Agreement, the Government shall take such action as is necessary to relieve the Company from any loss, liability or jeopardy as a result of such inconsistency and shall also take such action as may be necessary to maintain the economic equilibrium existing between the Parties on the Effective Date of this Agreement'. Reprinted in R Doak Bishop, JR Crawford and WM Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary*, 2nd edn (The Hague, Kluwer Law International, 2014) 259.

²⁸ See, eg, *Parkerings Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007), para 332: 'It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion. *Save for the existence of an agreement, in the form of a stabilisation clause or otherwise*, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power' (emphasis added).

²⁹ There are numerous examples. See, eg, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Mozambique for the Promotion and Protection of Investments (opened for signature 18 March 2004, entered into force 27 February 2007) 2490 UNTS 221, Art 2(2): 'Investments of Nationals or Companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the Territory of the other Contracting Party'.

investment treaties³⁰ and free trade agreements³¹ routinely contain this standard of protection, obliging host States to treat foreign investments fairly and equitably. The ECT provides for the FET of investments protected under that treaty.³²

The FET standard is broad. It obliges States to treat foreign investments transparently and without coercion, arbitrariness, discrimination, due process or bad faith. According to some tribunals, legitimate expectations are the ‘dominant element’ of the FET standard.³³ Recent attempts to define the FET standard in major free trade agreements expressly protect legitimate expectations as part of that standard.³⁴

International arbitration tribunals have identified at least four factors to give content to the legitimate expectations protected under IIAs. In the words of the tribunal in *LG&E v Argentina*:

It can be said that the investor’s fair expectations have the following characteristics: they are *based on the conditions offered by the host State at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law*; in the event of infringement by the host State, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, *the investor’s fair expectations cannot fail to consider parameters such as business risk or industry’s regular patterns* (emphasis added).³⁵

First, the investor must prove that the host State has made a ‘specific’ commitment to the investor that gives rise to legitimate expectations. The investor must prove that the State has made a representation or promise, which ‘must be precise as to its content and clear as to its form’.³⁶ Investment arbitration tribunals have held that legitimate expectations arise ‘as a result’ of such commitments.³⁷

³⁰ ASEAN Comprehensive Investment Agreement (opened for signature 26 February 2009, entered into force 29 March 2012) Art 11(1): ‘Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security’.

³¹ See, eg, North American Free Trade Agreement (opened for signature 17 December 1992, entered into force 1 January 1994) Art 1105(1): ‘Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security’.

³² Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95, Art 10(1): ‘Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment’.

³³ *Saluka Investments BV v Czech Republic*, PCA (UNCITRAL) Partial Award (17 March 2006), para 302.

³⁴ EU–Canada Comprehensive Economic and Trade Agreement (pending ratification): trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf (CETA) Art 8(10)(4): ‘When applying the above fair and equitable treatment obligation, a Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated’.

³⁵ *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability (3 October 2006), para 130.

³⁶ *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award (4 April 2016), para 547.

³⁷ *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste GmbH & Co v Czech Republic*, PCA Case No 2010-5 (UNCITRAL) Award (19 September 2013), para 4.762.

The host State's commitment may be express (eg, 'an explicit promise or guaranty from the host-State')³⁸ or may be implied from the circumstances (eg, the host State's conduct).³⁹

In the absence of such commitments, an investor's claims for legitimate expectations may fail. In *Ulysseas v Ecuador*, an investor in electricity barges claimed a legitimate expectation that the fuel credits available at the time it made its investment would remain in place throughout the lifetime of the investment. The tribunal dismissed this claim. It found that these credits formed part of an emergency regime subject to modification. It therefore found that the investor had no legitimate expectation 'in the absence of a specific commitment in that regard by the State'.⁴⁰

Second, and building on the above, legitimate expectations cannot be established unilaterally.⁴¹ Legitimate expectations 'cannot exclusively be determined by foreign investors' subjective motivations and considerations'.⁴² Thus, in order to prove the existence and scope of the host State's commitment, the investor must point to objective elements (eg, a document or contract).⁴³ Consequently, tribunals may enquire whether the investor's claimed expectations are reasonable in light of the host State's representations.⁴⁴

Third, the investor must show that it based its decision to make an investment on the legitimate expectations it claims to have relied upon.⁴⁵ In this regard, the investor must normally show that the host State made its assurances 'prior to or at the time of the making of the investment'.⁴⁶ The investor's FET claim routinely fails if it is based on the post-investment conduct of the host State. In *Duke v Ecuador*, for example, the investor based some of its expectations on mediation and arbitration agreements concluded after the investment. The tribunal dismissed this claim,

³⁸ *Parkerings Compagniet AS*, ICSID Case No ARB/05/8, Award (n 28), para 331: 'The expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate. In order to determine the legitimate expectation of an investor, it is also necessary to analyse the conduct of the State at the time of the investment' (footnotes omitted; emphasis added).

³⁹ See *ibid.*

⁴⁰ *Ulysseas, Inc v Republic of Ecuador*, PCA Case No 2009-19 (UNCITRAL) Final Award (12 June 2012), para 254.

⁴¹ *LG&E Energy Corp*, ICSID Case No ARB/02/1, Decision on Liability (n 35), para 130.

⁴² *Saluka Investments BV*, PCA (UNCITRAL) Partial Award, para 304.

⁴³ See, eg, *Franck Charles Arif v Republic of Moldova*, ICSID Case No ARB/11/23, Award (8 April 2013), para 535: 'a claim based on legitimate expectations must proceed from the exact identification of the origin of the expectation alleged, so that its scope can be formulated with precision'.

⁴⁴ *Charanne BV and Construction Investments SÀRL v Kingdom of Spain*, SCC Arb No 062/2012, Final Award (21 January 2016), para 495.

⁴⁵ See, eg, *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador*, ICSID Case No ARB/04/19, Award (18 August 2008), para 365: 'the legitimate expectations which are protected are those on which the foreign party relied when deciding to invest'.

⁴⁶ *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtund-sechzigste GmbH & Co*, PCA Case No 2010-5 (UNCITRAL), Award (n 37), para 4.762. There is extensive support for this notion. See, eg, *Duke Energy Electroquil Partners and Electroquil SA*, ICSID Case No ARB/04/19, Award (n 45), para 365.

as '[t]he Med-Arb Agreements were concluded more than two years later and can thus in no event give rise to expectations protected under the fair and equitable treatment standard'.⁴⁷

Fourth, the investor must take into account all relevant circumstances surrounding its legitimate expectations. IIAs do not exempt the investor from all business or political risk. In particular, the investor must become aware of any relevant host State legislation, regulation, or policies as part of its due diligence when making an investment.⁴⁸

Recently, the vagueness of standards protected under IIAs has attracted scrutiny and criticism. The crux of defining the FET standard is to strike the right balance between States' right to regulate their economies, on the one hand, and an investor's legitimate expectations, on the other. A broad and undefined standard allows (and arguably obliges) arbitrators to use their own criteria in defining the FET standard. There is a perception that broad and undefined standards included in traditional IIAs and arbitrator discretion hinder States' right to regulate. Because of this, recent IIAs have sought to define more precisely (and thus to circumscribe) both the FET standard⁴⁹ and legitimate expectations.⁵⁰

IV. INVESTMENT TREATY CASES DEALING WITH STATE AID

As shown in sections II and III, EU State aid law and IIAs take different approaches to the protection of an investor's legitimate expectation. How do these differences play out in practice when IIAs and the State aid rules coincide? This section focuses on three cases in which arbitral tribunals applied investment protection standards to measures taken in pursuance of EU State aid rules. The first two cases were brought simultaneously against Hungary by two power generators (Electrabel and AES) whose power purchasing agreements (PPAs or PPA for singular) were affected by Hungary's accession to the EU. These two cases are discussed in order of relevance, as the *AES* case ultimately turned on a different issue.⁵¹ Their common feature is that their respective outcomes each in their own way avoided open contradiction between investment treaty protections and EU State aid rules. The third case, *Micula v Romania*, concerned the repeal of free zone benefits in anticipation of

⁴⁷ *Duke Energy Electroquil Partners and Electroquil SA*, ICSID Case No ARB/04/19, Award (n 45), para 365.

⁴⁸ *Frontier Petroleum Ltd v Czech Republic*, PCA (UNCITRAL) Final Award (12 November 2010), para 287: 'a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the time of the investment'.

⁴⁹ See, eg, CETA, Art 8.10(2); Free Trade Agreement between the European Union and the Socialist Republic of Vietnam (pending ratification): www.trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (EU-Vietnam FTA) ch 8, s 2, Art 14; Trans-Pacific Partnership (pending ratification), available at: www.ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text, Art 9.6. See also US Model Bilateral Investment Treaty (2012), Art 5.

⁵⁰ See, eg, CETA, Art 8.10(4); EU-Vietnam FTA, ch 8, s 2, Art 14(5).

⁵¹ The award in a third case against Hungary, *EDF International v Hungary*, UNCITRAL Award (3 December 2014), is not public.

EU accession, and its outcome has, by contrast, led to an outright clash between investment treaty arbitration and EU rules on State aid.

A. *Electrabel v Hungary*

Electrabel, a Belgian electricity company brought a claim against Hungary for terminating a PPA, signed prior to Hungary's accession to the EU. After Hungary became a Member State, the EC, which has the exclusive mandate to determine whether a State measure distorts the common market, found that Hungary had not notified the EC about the PPA and that the PPA constituted illegal State aid.⁵² The EC equally held that the PPAs about which Hungary did notify the EC were also illegal State aid. The EC ordered Hungary to 'end the State aid contained in the PPAs' and recover the aid received by the beneficiaries since the effective date of Hungary's accession to the EU (ie, since 1 May 2004).⁵³

Once Hungary began to implement the EC's decision, Electrabel commenced arbitration proceedings under the ECT against Hungary claiming a breach of fair and equitable treatment and regulatory expropriation of its investment, among other things.

The tribunal allowed the EC to submit a brief as a non-disputing party pursuant to Article 37(2) of the ICSID Arbitration Rules.⁵⁴ The EC put forward four arguments on why the tribunal should refuse jurisdiction.

First, the EC submitted that the claim should have been brought against the EU because State aid falls within the exclusive mandate of the EU. The tribunal stated that it agreed with the EC's analysis only if and to the extent that the relevant dispute engaged the legal responsibility of the EU under the ECT for a decision of the EC. The tribunal held, however, that this was not the issue before it. Electrabel did not bring a claim against the EU or the EC or under EU law, or against a Community measure,⁵⁵ and did not dispute the EC's decision. This was a claim brought under the ECT for measures taken by Hungary and, as such, Hungary was the right respondent.⁵⁶

Second, the EC submitted that Hungary, by applying the EC's decision to revoke the PPA and recover the aid, was not breaching the ECT, but merely complying with its EU obligations under the State aid regime. There is a presumption under the ECT, it argued, that compliance with EU law on State aid cannot be a breach of the ECT, if EU law offers substantive and procedural guarantees equivalent to the protections contained in the ECT (as, according to the EC, it does).⁵⁷ The tribunal did not accept

⁵² *Electrabel SA (Belgium) v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), para 4.97.

⁵³ *ibid.*

⁵⁴ *ibid.*, para 4.89.

⁵⁵ *ibid.*, para 5.33.

⁵⁶ *ibid.*, para 4.171.

⁵⁷ *ibid.*, para 5.13–5.14.

the EC's jurisdictional arguments nor did it adopt its terms when the tribunal turned to the merits of the dispute. The issue on the merits was whether Hungary's view that it was required to terminate the claimant's PPA to comply with State aid law was consistent with Hungary's ECT obligations, given that termination of the PPAs was not expressly provided for in the EC's decision on State aid.

The tribunal's ruling on this question was broadly consistent with the EC's desired outcome (although not with the EC's view as to who should have the final word on the issue). The tribunal held that Hungary's implementation of the EC decision regarding State aid in connection with the PPAs was not irrational or arbitrary and therefore not contrary to the ECT duty to afford fair and equitable treatment.

Third, the EC submitted that the ECT must be interpreted in such a way so that it does not conflict with EU law as there is a general international law principle of harmonious interpretation.⁵⁸ The tribunal held this was an ideal objective but that international law did not prescribe a particular method or conflict rule for this purpose. It concluded that there was 'no material inconsistency between the ECT and EU law'.⁵⁹

Fourth, the EC submitted that EU Member States are obliged to comply with the EC's decisions on State aid and if they do not, the EC can bring proceedings against the State in front of the ECJ.⁶⁰ If the tribunal were to issue an award substituting compensation for State aid which has been declared unlawful under EU law, such an award would be unenforceable in any Member State court as it would be contrary to EU law.⁶¹ The tribunal addressed this argument in its discussion concerning the applicable law. The tribunal noted that it operated under international law, with no seat within the EU and its award was enforceable both within and outside the EU. It concluded that none of these factors affected its jurisdiction.⁶²

The tribunal left for a further phase of the proceedings the issue of the compensation method applied by Hungary for Electrabel's stranded costs following cancellation of the PPA. That method resulted in Hungary foregoing the recovery of the State aid it had paid for Electrabel's PPA, paying no additional amounts of compensation. The tribunal applied the tests of arbitrariness and protection of legitimate expectations, as invoked by the claimant. The tribunal first concluded that Hungary's method of compensation was reasonable and non-arbitrary, given that under EU rules it was required to undertake a balancing of relevant considerations in use of its discretion. Such a balancing exercise would be negated if the claimant was entitled to the maximum degree of possible compensation. Hungary's determination of compensation demonstrated a reasonable connection to a rational policy.⁶³ The tribunal also held that Electrabel had no reasonable grounds (and, in particular, had received no representations) to expect that Hungary would apply the maximum

⁵⁸ *ibid*, para 5.15.

⁵⁹ *ibid*, para 4.196.

⁶⁰ *ibid*, para 5.16.

⁶¹ *ibid*, paras 4.110, 5.16.

⁶² *ibid*, para 4.199.

⁶³ *ibid*, paras 179 and 209–21.

possible level of compensation under EU rules, and that therefore Hungary did not violate the claimant's legitimate expectations.⁶⁴ As a result, the tribunal dismissed Electrabel's claims in their entirety. Electrabel did not seek the annulment of the award under the ICSID Convention.

B. *AES v Hungary*

In this second case involving a power generator whose PPA was affected by EU State aid rules (in this case applied by Hungary as a prospective EU Member State), the claimants also alleged, among other things, regulatory expropriation and a breach of fair and equitable treatment against Hungary under the ECT. The PPA that Hungary had signed with an AES subsidiary prior to becoming an EU Member State was being examined by the EC on the grounds that it could constitute illegal State aid. In anticipation of a possible decision by the EC to terminate the PPA and recover the aid, Hungary reintroduced administrative pricing in the form of a price cap to avoid having to terminate the PPA.⁶⁵ The EC again intervened as a non-disputing party in the proceeding. The disputing parties and the EC discussed the issue of the compatibility of investor protection under the ECT with the obligations of Member States under the EU State aid regime.

The tribunal held that if Hungary wanted to address the eventual concerns of the EC regarding illegal State aid, the reintroduction of administrative pricing would have been a legitimate exercise of public policy. However, because the EC had not issued a decision on State aid, Hungary had no legal obligation to comply with any particular EU decision, even if Hungary believed the EC would issue such a decision in due course.⁶⁶ During the hearing, it became clear that when the government issued the price cap regulations, the Hungarian State aid agency had not been consulted and the price cap was not related to State aid at all.⁶⁷ As a result of the tribunal, it was decided that Hungary's decision to reintroduce an administrative price cap was not motivated by pressure from the EC.⁶⁸

Co-arbitrator Brigitte Stern disagreed with the majority. She expressed the view that, even before the EC's decision on State aid was announced, it was made clear to Hungary that the PPA raised serious State aid concerns for the EC and would have to be terminated or at the very least renegotiated. In arbitrator Stern's view, the evidence 'is overwhelming[ly clear that the] decision to reintroduce maximum administrative prices was a rational, non-arbitrary response to a complex set of legitimate policy concerns'.⁶⁹

⁶⁴ *ibid*, para 155.

⁶⁵ *AES Summit Generation Limited and AES-Tisza Erőmű Kft v Hungary*, ICSID Case No ARB 07/22, Award (23 September 2010), para 9.2.13.

⁶⁶ *ibid*, para 10.3.16.

⁶⁷ *ibid*, para 10.3.17.

⁶⁸ *ibid*, para 10.3.18.

⁶⁹ *ibid*, para 10.3.19.

Hungary prevailed on the merits for other reasons. The tribunal found that Hungary had reintroduced price caps to control the ‘luxury profits’ accrued by power generators, that this was a legitimate public policy objective, and that the price cap measures were reasonable and non-discriminatory.

C. *Micula v Romania*

The third case was the case that brought the tension between EU State aid law and investment treaty law to the fore. In 1993, Romania entered into an agreement laying out the procedures for its accession to the EU, including the steps required to harmonise matters relating to State aid with the requirements of EU law. With a view towards its EU accession, Romania enacted a series of regional aid measures around 1998 to attract foreign investment to ‘disfavoured regions’. The Miculas, Swedish nationals, were among those investors who took advantage of the incentive programmes, which involved Romania’s provision of assurances that were to be valid until 2009. However, after formal accession negotiations were initiated, the EU began to raise questions as to the compatibility of Romania’s existing State aid measures with EU law, and Romania repealed the regional aid measures in 2004. In 2005, the Miculas commenced an ICSID Convention arbitration against Romania and alleged that Romania’s repeal of the regional aid measures was a breach of its obligations under the Sweden–Romania BIT. In 2013, the arbitral tribunal issued an award in favour of the Miculas, despite Romania having argued, with support from the EC, that the relevant BIT had to be interpreted consistently with EU law, including the State aid rules.

The tribunal allowed the EC to make an *amicus* submission as to the applicable law of the dispute. The EC submitted that the tribunal should interpret the BIT taking into account the BIT’s European context and origin.⁷⁰ The EC also argued that Article 30(3) of the Vienna Convention on the Law of Treaties (VCLT) required the primacy of EU rules on State aid over any incompatible provisions of the BIT.⁷¹ The tribunal disagreed with the EC’s position, making the following three points:

- First, the BIT is the primary source of the tribunal’s jurisdiction,⁷² and there are no references in it to EU accession.⁷³ Furthermore, there were no references to the BIT in the Accession Treaty that Romania signed in 2005, so the tribunal cannot assume that the parties intended Romania’s EU membership to modify its obligations under the BIT.⁷⁴

⁷⁰ *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Award (11 December 2013), para 317.

⁷¹ *ibid.*, para 317. Art 30 of the VCLT concerns the application of successive treaties concerning the same subject matter. Art 30(3) of the VCLT provides as follows: ‘When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Art 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty’.

⁷² *ibid.*, para 318.

⁷³ *ibid.*, para 321.

⁷⁴ *ibid.*

- Second, Article 31 of the VCLT provides that a treaty should be interpreted in good faith in accordance with the ordinary meaning of the words and in light of the treaty's object and purpose, including taking into account any preamble or annexes.⁷⁵ The tribunal proposed to follow this rule of interpretation.
- Third, the tribunal would interpret all the treaties at issue having due regard to all the other applicable treaties assuming that parties entered into each of those treaties fully aware of their legal obligations under all other treaties.⁷⁶ The treaties at issue included the Europe Treaty of 1995 on which Romania placed particular reliance.

The EC made further submissions arguing that any award issued by the tribunal ordering compensation for the investors would be unenforceable as it would constitute illegal State aid under EU law. The tribunal refused to consider these arguments, saying it would not speculate about the future actions of different actors and stating that the enforceability of the award is not an appropriate consideration for a tribunal.⁷⁷

The tribunal was divided on the merits of the dispute. By majority, the tribunal held that the claimants had not shown that Romania was bound to keep in place and enforce the free zone benefits for the entire stipulated 10-year period under Romanian law. Romania therefore did not breach the BIT's so-called umbrella clause.⁷⁸

By majority, the tribunal also found that Romania had violated the claimants' legitimate expectations with respect to the availability of the free zone benefits. The tribunal held that, on the basis of the pattern of State conduct over several years, it was objectively reasonable for the claimants to rely on Romania's stipulation that it would maintain the free zone benefits for the full 10-year period, despite finding that the claimants had not proven a legal obligation to do so under Romanian law.⁷⁹ As a result, the tribunal held that Romania had breached its duty of FET towards the claimants.

The tribunal also addressed additional arguments made by the Parties. It held that Romania had not acted in bad faith. The tribunal found, however, that Romania had not been forthcoming to the affected investors regarding the status and potential consequences of its preparations for EU accession. The tribunal therefore held that 'the manner in which Romania carried out' the termination of the free zone benefits 'was not sufficiently transparent to meet the fair and equitable treatment standard'.⁸⁰ The tribunal also held that Romania acted unreasonably by maintaining the claimants' obligations under the free zone regime while abolishing the free zone benefits (but otherwise did not act unreasonably or arbitrarily in repealing the free zone benefits).

⁷⁵ *ibid.*, para 322.

⁷⁶ *ibid.*, para 326.

⁷⁷ *ibid.*, para 340.

⁷⁸ *ibid.*, paras 418–19.

⁷⁹ *ibid.*, paras 690–717 and 726.

⁸⁰ *ibid.*, para 864.

The tribunal issued an award for damages for increased costs and the lost profits occasioned by the revocation of these incentives, notwithstanding the fact that from an EU law perspective, the claimants' hopes that Romania would maintain the free zone benefits for the full 10-year period were not worthy of protection. When considering the same facts, the EC emphasised that under its conception of legitimate expectations, the claimants could not expect that the State aid was lawful as long as the national authority had not authorised that aid:

Absent such an authorisation from the Competition Council and in line with the case-law of the CJEU, which applied by virtue of the Article 64 of the 1995 Europe Agreement, Article 1 of the Implementing Rules to Decision No 4/2000 of the EU-Romanian Association Council and the *acquis communautaire*, SC European Food SA could never have entertained a legitimate expectation that the incentives granted under EGO 24 constituted compatible State aid, regardless of the subsequent actions of the Romanian Government after Decision No 244/2000 was adopted.⁸¹

Because the EC concluded that the claimants' expectations were not worthy of protection, it also considered that compliance with the award would constitute a reinstatement of illegal State aid, violative of EU law. It was that conflict that subsequently gave rise to extremely difficult conflicts during the enforcement stage. These conflicts are still unresolved, as will be shown in the following section.

V. THE ENFORCEMENT OF INVESTMENT ARBITRATION AWARDS IN CONFLICT WITH EU LAW

As a practical matter, an arbitral award against a Member State will have little value to an investor unless the investor can successfully enforce it. For an investor, therefore, a primary question will be whether the investor can enforce that award in a jurisdiction where the Member State has assets, if they obtain an award in an arbitration under an IIA. The interaction between international investment arbitration and EU law complicates that question, particularly where the award is based on a measure that may constitute illegal State aid under Article 107 TFEU.

The *Micula* case shows that the tension between international investment arbitration and EU State aid law emerges most clearly at the enforcement stage. If a tribunal issues an award granting an investor compensation for the discontinuation of a Member State measure where such measure would have constituted illegal State aid under Article 107 TFEU, payment of such compensation may be seen (as it is viewed by the EC) as a reinstatement of the illegal State aid. Under such circumstances, will a court enforce the award if the payment of compensation under the award will result in the reinstatement of the illegal State aid by the Member State? The answer will likely depend on whether the enforcing court is located in an EU Member State (courts outside the EU appear far more likely to enforce such an award).

⁸¹ *Arbitral award Micula v Romania* (Case SA.38517) Commission Decision 2015/1470 [2015] OJ L232/43 (*Micula* Commission Decision), para 159.

This section examines the likelihood of the enforcement of an award linked to illegal State aid in courts inside and outside the EU. As a starting point, subsection V.A briefly reviews the two principal instruments under which the enforcement of such an award against a Member State may be sought, the ICSID Convention and New York Convention. Subsection V.B discusses the difficulties of enforcing such an award in a Member State. Finally, subsection V.C evaluates the significantly better chances of enforcement in non-EU courts.

A. Recognition and Enforcement Under the ICSID and New York Conventions

In the IIA context, an investor seeking to enforce an award against an EU Member State will likely rely on one of two instruments: the ICSID Convention or the New York Convention. This subsection provides a summary of the recognition and enforcement provisions of each of these instruments.

ICSID awards are binding and cannot be subject to appeal or review before a court.⁸² Once an award becomes final, the ICSID Convention provides for the automatic recognition and enforcement of the award in any State party to the ICSID Convention. Article 54(1) requires State parties to recognise the award as binding and enforce monetary obligations imposed by the award ‘as if it were a final judgment of a court in that State’. The ICSID Convention offers no grounds for national courts to refuse recognition and enforcement of an award. ICSID awards are thus extremely favourable to claimants, as the national court should have no option but to recognise and enforce the award (at least from a treaty perspective).⁸³

As for non-ICSID awards, the New York Convention will likely be the relevant instrument for enforcement. The New York Convention facilitates the enforcement of foreign arbitral awards by requiring each of its 153 State parties to recognise and enforce an award made in the territory of another State.⁸⁴ However, unlike the ICSID Convention, the New York Convention provides on whether a national court may refuse to enforce a foreign award, although these grounds are limited. Under Article V of the New York Convention, a national court may refuse to enforce an award only if either (i) the party against whom the award is invoked is able to prove one of several enumerated grounds⁸⁵ or (ii) the court finds that the subject matter of the award is not capable of arbitration under the law of the country where the court is located or recognition or enforcement would violate the public policy of that country.⁸⁶ The general view is that these grounds should be ‘construed narrowly’,

⁸² ICSID Convention, Art 53(1) (ICSID Convention awards ‘shall not be subject to any appeal or to any other remedy except those provided for in this Convention’).

⁸³ See L Reed and J Paulson et al, *Guide to ICSID Arbitration* (Netherlands, Kluwer Law International, 2010) 179–82.

⁸⁴ New York Convention, Art III.

⁸⁵ These grounds are the lack of a valid arbitration agreement (Art V(1)(a)); the violation of due process (Art V(1)(b)); an excess of the tribunal’s authority (Art V(1)(c)); irregularity in the tribunal’s composition or in the arbitral procedure (Art V(1)(d)); and if the award has not yet become binding (Art V(1)(e)), or the award has been set aside or suspended (Art V(1)(e)).

⁸⁶ New York Convention, Art V(2).

and with respect to the public policy exception, courts should hesitate to find a public policy violation except ‘in extreme cases only’.⁸⁷

Both Conventions take an extremely pro-enforcement approach. With this background in mind, we now turn to the question whether EU State aid concerns may result in deviation from this approach.

B. Enforcement Inside the European Union

For an investor holding an award against a Member State, the most attractive forum for enforcement may be a jurisdiction within the EU. Unfortunately for such an investor, after the EC’s decision in *Micula*, an EU Member State court may be reluctant to enforce an award if the compensation could be considered incompatible new aid under the State aid rules, in particular where the award was rendered in a non-ICSID Convention arbitration. In this subsection, we examine, first, the general rule that enforcement of an award requiring a Member State to pay compensation pursuant to an IIA does not constitute the provision of illegal State aid and, second, the exception to this rule in cases where the compensation has been awarded as a remedy for the Member State’s discontinuation of illegal State aid.

i. Generally, Enforcement of an Arbitral Award Granting Compensation Pursuant to an IIA does not Constitute Illegal State Aid

Generally, payment of compensation by an EU Member State pursuant to an award rendered in an investment arbitration is unlikely to fall foul of the EU State aid rules, and therefore an investor should encounter no difficulties in this regard when seeking to enforce such an award in Member State courts. Although neither the ECJ nor the EC has explicitly expressed a view on this issue, the general position may be extrapolated from decisions holding that payment of compensation under a Member State’s domestic law will not constitute illegal State aid.

According to the ECJ and the EC, an economic advantage granted by a Member State must be voluntary for such an advantage to amount to illegal State aid within the meaning of Article 107 TFEU.⁸⁸ A series of ECJ and EC decisions have made clear that, where a Member State’s domestic law requires it to pay compensation if the Member State infringes on an otherwise legally protected right or interest of a private party, such payment is not voluntary and therefore does not constitute

⁸⁷ A van den Berg, *The New York Convention of 1958: An Overview* (International Council for Commercial Arbitration, available at: www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf), 13.

⁸⁸ C Tietje and C Wakernagel ‘Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the *Micula* Arbitration’ (2015) 16 *The Journal of World Investment & Trade* 201, 220–21.

illegal State aid.⁸⁹ In particular, in the *Asteris* case, the ECJ indicated that 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’.⁹⁰ In *Akzo Nobel*, the EC further explained that compensation ‘usually’ does not amount to State aid, even if paid in the absence of a court order requiring payment, so long as (i) it does no more than compensate the injured party for the damages caused by government action and (ii) the right to compensation arises under a general rule of national law.⁹¹ Relying on that same rationale, it seems reasonable to consider the payment of compensation pursuant to an award under an IIA as comparably involuntary, as it arises out of a binding international law obligation to pay compensation for the government’s actions in accordance with a substantive standard of protection.⁹²

It could also be argued that the enforcement of an award under an IIA cannot be illegal State aid because it is not imputable to the Member State. However, this line of reasoning is less satisfactory. Under the doctrine of imputability, a measure must be attributable to the Member State for it to be State aid under Article 107 TFEU. For example, in *Deutsche Bahn AG v Commission*, the Court of First Instance (now known as the General Court) of the Court of Justice of the European Union (CJEU) concluded that a measure was not imputable to the Member State because the measure was required for the implementation of mandatory EU law.⁹³ It could be argued, at least with respect to ICSID awards, that Articles 53 and 54 of the ICSID Convention leave the Member State with no autonomy as to whether to enforce the award. Therefore, as with the implementation of EU law, the implementation of such provisions cannot be attributable to the State.⁹⁴

However, it has been suggested that the same reasoning does not translate quite as easily to awards enforced under the New York Convention.⁹⁵ This is because of the public policy exception to enforcement under the New York Convention. Article V(2)(b) provides a safety valve for courts to refuse to enforce an award where it would be contrary to public policy, and according to the *Eco Swiss* ruling,⁹⁶

⁸⁹ *ibid*; Case C-61/79 *Amministrazione delle finanze dello Stato v Denkavit italiana* [1980] ECR 1205 (repayment for improper tax levies); Joined Cases C-106/87-120/87 *Asteris v Greece & EEC* [1988] ECR 5515, 5539 et seq (payment of damages); Commission Decision 2008/408/EC on the State Aid C 36/A/06 (ex NN 38/06) [2008] OJ L144/37 (compensation for expropriation); Commission Decision 304/2005 of Authorisation for State aid pursuant to Articles 87 and 88 of the EC Treaty—*Akzo Nobel* [2005] OJ C81/48 (compensation for expropriation).

⁹⁰ *Asteris v Greece* (n 89), paras 22–23.

⁹¹ Letter from the European Commission to Netherlands re Aid in favour of Akzo-Nobel in order to minimise chlorine transports (Brussels, 16 June 2004) para 18: www.ec.europa.eu/competition/state_aid/cases/138128/138128_460621_53_2.pdf.

⁹² Tietje and Wakernagel (n 88) 221; P Ortolani, ‘Intra-EU Arbitral Awards vis-à-vis Art 107 TFEU: State Aid Law as a Limit to Compliance’ (2015) 6 *Journal of International Dispute Settlement* 118, 122–23.

⁹³ Case T-351/02 *Deutsche Bahn AG v Commission*, EU:T:2006:104.

⁹⁴ Tietje and Wakernagel (n 88) 221–22.

⁹⁵ Ortolani (n 92) 124.

⁹⁶ Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV*, EU:C:1999:269.

an EU Member State's public policy must incorporate the core rules of EU competition law.⁹⁷ Therefore, a violation of the key EU competition law provision contained in Article 107 TFEU would likely constitute a breach of EU public policy and accordingly provide a ground for denying enforcement under Article V(2)(b). At least one commentator has observed that this has the potential to create circular reasoning.⁹⁸ The public policy exception in the New York Convention would not apply because, due to the applicability of the New York Convention, there is no imputability to the Member State.⁹⁹ The New York Convention therefore provides an unsatisfactory source of non-imputability: 'If we accept that the New York Convention applies because of non-imputability, the non-imputability cannot derive from the applicability of the New York Convention'.¹⁰⁰

In any event, as the same commentator concludes, non-imputability can be derived from the fact that the compensatory obligation, when an arbitral tribunal has found it to exist in its award, arises out of an IIA and is non-voluntary.¹⁰¹

ii. An Award Requiring a Member State to Pay Compensation under an IIA is Unlikely to be Enforced where it could be seen as Resulting in the Indirect Reinstitution of Illegal State Aid

Although the foregoing discussion shows that arbitral awards under IIAs generally should be enforced, there is an exception to the general rule whereby the obligation to pay compensation under the award arises from the Member State's discontinuation of a measure that would itself have constituted illegal State aid under Article 107 TFEU. At least in the case of a non-ICSID Convention arbitration award, it seems uncertain whether any EU Member State court would enforce such an award, as the EC has made it clear that payment of compensation under such an award will constitute impermissible new State aid in violation of Article 107 TFEU.

The saga surrounding the *Micula* case illustrates the type of scenario where concerns about illegal State aid make a Member State court unlikely to enforce an award under an IIA. After the tribunal issued the award, the situation became even more complex. Romania informed the EC in February 2014 that it had partially implemented the award by offsetting certain taxes owed by a Micula-owned company against the amount of the award. In response, the EC issued a suspension injunction in May 2014 ordering Romania not to comply with the arbitral award until the EC had made a final decision on the compatibility of the compensation awarded with EU State aid law. At the time, the EC took the view that the payment of the compensation awarded to the Miculas would effectively amount to new State aid because it would have the effect of reinstating the discontinued regional aid measures.

⁹⁷ Ortolani (n 92) 124.

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*

After conducting an investigation, the EC issued a final decision on 30 March 2015. In its decision, the EC confirmed its conclusion that payment of compensation under the award would constitute illegal State aid in violation of Article 107 TFEU and ordered Romania not to make further payment pursuant to the award and to recover any portion of the award already paid to the Miculas. In its decision, the EC distinguished the facts of *Micula* from the cases discussed above, which hold that damages do not amount to State aid, on the grounds that the amounts the Miculas were seeking to recover as damages were in effect those amounts that, had they been received under the regional aid scheme, would have amounted to illegal State aid. It stated:

[T]he purpose of the Award is to compensate the applicants for the incentives which Romania had promised under [the incentive programme] but had been required to abolish by the Union to complete the negotiation process for its accession to the Union. Thus, in contrast to the *Asteris* case, the reason the applicants claim compensation in this case is because they were denied the incentives Romania promised to grant them in violations of its obligations ... not to grant unlawful State aid ... [A]n award of damages equal to the sum of the amounts of aid that were envisaged to be granted would constitute an indirect grant of State aid found to be illegal and incompatible with the internal market.¹⁰²

It further explained its view:

In the present case, the compensation awarded to the claimants by the Tribunal refers to the losses directly linked to the revocation of the EGO 24 incentives and are aimed at placing the beneficiary in the position in which it would ‘in all probability’ have found itself in had the EGO 24 incentives had not been revoked. In effect, the implementation of the award re-establishes the situation in which the claimants would have in all likelihood, found themselves if EGO 24 had never been repealed by Romania. As the advantages granted under EGO 24 were connected to the recurrent costs of the claimants and were not linked to an initial investment, those advantages constituted operating aid. Therefore, placing the beneficiary in the position in which it would have been if the EGO 24 incentives had not been revoked and thus compensating the losses linked to this revocation constitutes operating aid.¹⁰³

In its *Micula* decision, the EC further reasoned that, under the *Asteris* line of cases discussed above, damages must be based on a general rule of compensation in order to fall outside the EU State aid rules. However, the EC considers intra-EU IIAs, such as the Sweden–Romania BIT relied on by the *Micula* claimants, as incompatible with the EU treaties and therefore invalid.¹⁰⁴ As a result, according

¹⁰² *Micula* Commission Decision, para 103.

¹⁰³ *ibid.*, para 146.

¹⁰⁴ *Micula* Commission Decision, para 102. In a case involving a BIT between Slovakia and the Netherlands, the German Federal Court of Justice (the Bundesgerichtshof or BGH) has recently asked the ECJ to issue a preliminary ruling as to whether intra-EU BITS are incompatible with EU law on 3 March 2016: www.juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&Sort=3&nr=74606&pos=1&anz=82. The case is now pending before the ECJ as C-284/16. Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 23 May 2016—*Slovak Republic v Achmea BV*. See also *Eureko BV v Slovak Republic*, UNCITRAL arbitration, PCA Case No 2008-13, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010); Award upheld by the Frankfurt Higher Regional Court, 10 May 2012, 26 SchH 11/10: www.italaw.com/documents/26schh01110.pdf.

to the EC, compensation awarded pursuant to the provisions of an intra-EU IIA is not awarded based on a valid general rule of compensation that would make the payment of such compensation involuntary and exclude it from the application of Article 107 TFEU.

Although some commentators have been vehemently critical of the EC's position that compensation for breach of an IIA in a case like *Micula* constitutes illegal State aid,¹⁰⁵ an EU Member State court is likely to accept the EC's view as to EU law, unless and until the EU courts rule otherwise. In the *Micula* case, an action has been lodged with the General Court seeking annulment of the EC's decision.¹⁰⁶ However, until the EU courts render a decision, the EC's view of EU law, as propounded in *Micula*, is likely to have authoritative import, which means that courts would be requiring a breach of EU law if they required payment pursuant to an award ordering compensation under an intra-EU IIA for the discontinuation of State aid measures.

Further complicating matters, in the interim while the EC considered the award, Romania filed an application for annulment of the award on the basis of Article 52 of the ICSID Convention in April 2014. The EC received permission to intervene in the annulment proceeding, but the ad hoc ICSID committee refused to annul the award in its decision issued in February 2016. As discussed before, Articles 53 and 54 of the ICSID Convention theoretically oblige ICSID convention parties to treat the award as binding and automatically enforceable. This creates a conflict of obligations for EU Member State courts, which must decide whether to follow the EC's decision under EU law or uphold their obligations under the ICSID Convention.

For a Member State court faced with the question of whether to follow the commands of the EC or the ICSID Convention, the question is whether EU law should prevail. In its *Micula* decision, the EC has suggested that EU law does prevail. The prevalence of EU law over the ICSID Convention can be justified through multiple rationales, and an EU Member State court would rarely (or never) enter an order requiring the enforcement of an award contrary to EU law.

Under one approach, if one views the EU treaties as a source of international law, then one could argue that Articles 53 and 54 of the ICSID Convention do not apply to the extent their provisions are incompatible with EU law, as the Lisbon Treaty requiring Member State compliance with EU law is the latter as between itself and the ICSID Convention and treaty under Articles 30(2) and 30(4) of the VCLT.¹⁰⁷ Moreover, in the *Kadi* cases, the ECJ effectively ruled that acts mandated by

¹⁰⁵ C Söderlund, 'Does compensation for a treat breach qualify as state aid?' (*Global Arbitration Review*, 13 May 2015).

¹⁰⁶ Action brought on 28 November 2015. Case T-704/15 *Micula ea v Commission* [2016] OJ C68/30. The annulment application was lodged on 28 November 2015. The legal arguments advanced in the application include the following: (i) the IIA relied on by the Miculas in bringing their claim against Romania establish 'a system of general liability that is equally applicable to any investor', and therefore there is no selectivity for purposes of the EU State aid rules; (ii) there is no imputability because Romania has no discretion as to enforcing the award; (iii) the EU encouraged the conclusion of BITs and created a legitimate expectation that their enforcement would not be blocked by the EU State aid rules; and (iv) the underlying revoked measures had never been subject to an independent State aid incompatibility determination.

¹⁰⁷ Tietje and Wakernagel (n 88) 224–28.

international law (in that case, UN Security Council Resolutions imposing targeted sanctions on individuals and entities associated with terrorism) could be challenged to the extent that they are contrary to the core founding principles of EU law.¹⁰⁸ With the ECJ's rulings in *Kadi* and the EC's decision in *Micula* in the background, an investor holding an ICSID award should not expect an EU Member State court to enforce the award if the compensation could be viewed as a violation of the EU State aid rules.

In one example of the not surprising reluctance of EU Member State courts to fall afoul of the EC's view as to EU law, after the EC issued its *Micula* decision, a Belgian court reversed its earlier order allowing the *Micula* claimants to recover compensation through the garnishment of funds payable to a Romanian State-owned entity.¹⁰⁹ While the Belgian court acknowledged the *res judicata* effect of the arbitral award, it held that the EC's decision that payment of compensation would constitute illegal State aid in violation of Article 107 TFEU would render its enforcement illegal.

A recent English court decision dealing with the *Micula* award took a similar approach to reconciling the Member State's seemingly divergent obligations.¹¹⁰ The English court considered whether it was required to recognise (or 'register') and enforce the *Micula* award, despite the EC's position. In order to reconcile the seemingly conflicting EU and ICSID regimes, the Court focused on the distinction between the registration of an award, on the one hand, and the enforcement of the award, on the other. The operative act that the EC had found would violate EU law was the payment of the amounts awarded, and only enforcement of the award, not its mere registration, would require Romania to make such prohibited payment. The Arbitration Act 1966, which implemented the ICSID Convention into English law, required only that the English court recognise and enforce an ICSID award as if it were a final judgment of an English court, and thus such an award (once registered) could still be denied enforcement on the same grounds as an English court judgment. One such example given by the Court for denying enforcement was English sovereign immunity law, which would equally prevent the enforcement of a court judgment or arbitral award.

The Court concluded that it would not enforce an English court judgment if to do so would, in contravention of the principle of sincere cooperation enshrined in Article 4(3) of the TFEU, require it to make a decision that would be contrary to a decision of the EC.¹¹¹ Accordingly, the Court could refuse to enforce an arbitral award on the same grounds, without going against the requirements of the Arbitration Act 1966. The Court summarised the crux of its reasoning:

In the present case, a judgment of the High Court is subject to the EU rules as to State aid ... [T]he court must refrain from taking a decision which conflicts with a decision of

¹⁰⁸ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, EU:C:2008:461; See also the more recent decision C-584/10 P *European Commission and Others v Yassin Abdullah Kadi*, EU:C:2013:518.

¹⁰⁹ Tribunal de première instance francophone de Bruxelles, S Civile, Jugement, 25 January 2016, 15/7241/A and 15/7242/A.

¹¹⁰ *Micula v Romania* [2017] EWHC 31 (Comm).

¹¹¹ *ibid*, para 69 (citing *Air Canada v Emerald Supplies* [2015] EWCA Civ 1024, para 70).

the Commission. Whilst this case law may be consonant with what is seen as public policy, it is not based on it. As the Court of Appeal put it in the passage from *Emerald Supplies* cited above, ‘The general principle of legal certainty, which underpins the duty of sincere cooperation, requires Member States to avoid making decisions that could conflict with a decision contemplated by the Commission’. This applies to the court itself: ‘national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission’ (*Deutsche Lufthansa*, *ibid*, para 41).

This court cannot therefore proceed to enforce the judgment consequent on registration of the Award in circumstances in which the Commission has prohibited Romania from making any payment under the Award to the claimants because in doing so, the court would, in effect, be acting unlawfully. This does not (in the court’s view) create a conflict with the international obligations of the UK as contained in the 1966 Arbitration Act implementing the ICSID Convention in UK law, because a purely domestic judgment would be subject to the same limitation.¹¹²

For those reasons, the Court did not reverse its registration of the *Micula* award but granted a stay of its enforcement pending the anticipated decision of the ECJ.

Other EU Member State courts are likely to look for similar ways to justify adherence to the EC’s position as consistent with international law obligations. However, because the English court appears to have focused on the duty of cooperation as a bar to its acting contrary to an EC decision (or at least a contemplated EC decision), a question may remain as to how the court would decide in a case where there *may* be an EU-law problem with enforcing an award but there is no prospect of an EC decision.

In the case of non-ICSID awards, it will likely be far less complicated for EU Member State courts to refuse to enforce awards under the New York Convention. Under that convention, the Article V(2)(b) public policy exception is available to courts, and after the *EcoSwiss* case, it is clear that the national courts of Member States must take into account EU public policy, which includes the EU principles on State aid.¹¹³ Therefore, if enforcement of an award would entail a violation of EU State aid rules, a Member State court could arguably deny recognition and enforcement on the basis of Article V(2)(b). This makes it extremely unlikely that such an award would be enforced within the EU.

Some commentators have suggested that the public policy exception in Article V(2)(b) of the New York Convention should not be invoked as a ‘blanket rule’ covering all situations where a revoked measure might be considered incompatible with EU State aid rules.¹¹⁴ On the basis that, among other things, the public policy exception should be given a restrictive and pro-enforcement interpretation, the argument would be that a court should only rely on Article V(2)(b) to refuse to enforce an arbitral award where the EC has found a violation of Article 107 TFEU and issued a decision under Article 108 TFEU requiring recovery of the illegal State aid.¹¹⁵

¹¹² *Micula v Romania* (n 110), paras 131–32.

¹¹³ Case C-126/97 *Eco Swiss China Time* (n 96).

¹¹⁴ *Ortolani* (n 92) 129.

¹¹⁵ *ibid*, 129–31.

Under this approach, a court would not refuse to enforce an award where, for example, the measure had been revoked of the Member State's own volition without any decision of the EC having been issued.

However, the likelihood that a Member State would follow this course seems doubtful, particularly after the *Micula* case in which the EC had never formally found the revoked measures to be illegal State aid prior to the arbitration and only issued a decision finding the measures to be State aid after the fact as part of its consideration as to whether payment of compensation under the award would be illegal State aid. Moreover, the EC's willingness to intervene in a number of recent arbitrations involving measures voluntarily revoked by Member States make it exceedingly unlikely that an EU Member State court must decide whether to enforce an award without the EC's input on whether the measures involved constitute illegal State aid. Therefore, it appears that, if the measures on which the award is based are incompatible with EU State aid rules, the claimant will face an uphill battle when enforcing the award in Member State courts.

C. Enforcement Outside the European Union

In courts outside the EU, an investor's chances of successfully enforcing an award that is potentially incompatible with EU State aid law appear to be substantially better. This is seemingly the case for both ICSID and non-ICSID awards.

As stated before, Articles 53 and 54 of the ICSID Convention require State parties to recognise and enforce ICSID awards. When these States are not bound by EU treaties, there should be no concern in non-EU national courts about treaty conflicts that might be invoked to prevent the application of the ICSID Convention provisions. Significantly, given the United Kingdom's anticipated departure from the EU, English courts could soon be among those not bound by EU law, and therefore more likely to enforce an award even where there are EU law concerns.

As one example, the US District Court for the Southern District of New York has confirmed the arbitral award in the *Micula* case, converting it into an enforceable judgment.¹¹⁶ In recognising the award, the District Court rejected arguments that it

¹¹⁶ In April 2014, one of the Micula brothers commenced an ex parte action seeking to confirm the arbitral award in the US District Court for the District of Columbia. The Court denied the petition without prejudice in April 2015 on the grounds that ICSID Convention awards may not be converted into judgments by way of summary ex parte proceedings—*Micula v Gov't of Romania*, 104 F Supp 3d 42 (DDC 2015). Proceedings also were initiated in the District Court for the Southern District of New York, and that Court took a different view as to whether an ICSID award could be confirmed in summary ex parte proceedings. That Court converted the award into a judgment in summary ex parte proceedings in April 2015. In August 2015, the District Court permitted the EC to file an amicus curiae brief in support of Romania's motion to vacate and/or stay the April 2015 judgment but then denied that motion—*Micula v Gov't of Romania*, Case No 15 Misc 107 (Part I), 2015 WL 4643180 (SDNY 5 August 2015). Romania's subsequent motion for reconsideration was also denied—*Micula v Gov't of Romania*, Case No 15 Misc 107 (LGS), 2015 WL 5257013 (SDNY 9 September 2015). Romania has appealed the judgment to the Second Circuit Court of Appeals, and the EC has submitted an amicus curiae brief in support of the appeal.

should defer to the EU's position in a 'wholly internal matter' and emphasised that there was no basis for reviewing an award outside the ICSID Convention process. In particular, in rejecting arguments that international comity required it to defer to the EC, it stated:

A party with an ICSID award can convert it into a judgment in any Member State. As a party to the ICSID Convention, the United States has a compelling interest in fulfilling its obligation under Article 54 to recognise 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.¹¹⁷

In the case of non-ICSID awards, non-EU national courts also seem fairly likely to enforce awards, even where such awards might involve compensation for the revocation of measures that breached the EU State aid rules. In particular, non-EU national courts appear reluctant to find that a violation of EU State aid rules would constitute a violation of their own jurisdiction's public policy sufficient to refuse enforcement.

For example, in its October 2015 decision 4A-34/2015, the Federal Supreme Court of Switzerland considered an application to set aside an award rendered against Hungary under the ECT.¹¹⁸ The award provided compensation relating to certain power purchase agreements (PPAs) that Hungary had terminated after the EC had concluded that the PPAs were incompatible with EU State aid rules. Hungary argued, *inter alia*, that the award should be set aside under Article 190(2) (e) of the Swiss Private International Law Act (PILA), which permits Swiss courts to set aside arbitral awards that are 'incompatible with public policy'. Relying on the EC's decision in *Micula*, Hungary asserted that the award obliged it to breach its obligations under international law (in particular, under the TFEU provisions relating to State aid) and therefore contravened Swiss public policy as a violation of the principle of *pacta sunt servanda*. The Swiss Supreme Court reiterated that an award is incompatible with public policy within the meaning of Article 190(2)(e) PILA 'when it disregards the essential and broadly recognised values which, according to prevailing concepts in Switzerland, should constitute the basis of any legal order'.¹¹⁹ Although it decided the issue on other grounds, the Swiss Supreme Court concluded that it was not necessarily the case that 'an award ordering a party to compensate its opponent fairly would be incompatible'¹²⁰ with this definition of public policy, 'even if it would contradict a standard of supranational law'.¹²¹ Although it left the question open, the Court thus suggested that concerns about the possible breach of

¹¹⁷ *Micula v Gov't of Romania*, Case No 15 Misc 107 (Part I) (n 116) 7.

¹¹⁸ *Republic A v B International*, 4A 34/2015, Federal Supreme Court of Switzerland, 6 October 2015: www.swissarbitrationdecisions.com/sites/default/files/6%20octobre%202015%204A%2034%202015.pdf.

¹¹⁹ *ibid*, para 5.1.

¹²⁰ *ibid*, para 5.3.1.

¹²¹ *ibid*.

EU State aid rules under the TFEU may not sufficiently rise to the level of public policy sufficient to set aside an award of compensation pursuant to the obligations and standards in an IIA.

VI. CONCLUSION

The clash between investment treaty arbitration, on the one hand, and EU State aid rules, on the other, appears to arise out of the two regimes' differing conceptions of the principle of legitimate expectations.

Formally, the principal elements constituting legitimate expectations are quite similar under both international investment arbitration and EU law standards. Under both legal systems, legitimate expectations require (i) a commitment or assurance by the State or the EU institutions; (ii) reliance by the recipient or the investor, or a lack of foreseeability of adverse change; and (iii) a balance of interests tilting in the recipient's or investor's favour.

However, in practice, the interpretation and application of the concept by the EU courts and the EC is narrower than those adopted by investment arbitration tribunals. The EU law concept imposes more constraints on the doctrine. For example, it imposes a duty on the recipient or investor to investigate that the Member State has complied with the notification procedure; it does not recognise legitimate expectations based on assurances given by a Member State in violation of EU procedure; and it does not acknowledge legitimate expectations as long as an EC decision approving State aid can be challenged (or is being challenged).

By contrast, the concept of legitimate expectations under IIAs tends to be broader. The host State's failure to comply with the applicable procedure is not held against the investor/recipient of State aid, but against the host State itself. The *Micula* case illustrates this divergence with particular clarity. While the Investment Arbitration Tribunal ruled that it was 'objectively reasonable' for the claimants to rely on Romania's stipulation that it would maintain the free zone benefits for the full 10-year period, despite finding that the claimants had not proven a legal obligation to do so under Romanian law,¹²² the EC held that 'the claimants cannot justifiably claim a legitimate expectation as to the validity and continued existence of that scheme until 1 April 2009'.¹²³

Why is there such divergence in the scope of protections? The answer may be gleaned from the very different *raison d'être* of the two legal orders: EU institutions consider legitimate expectations in the context of a legal order designed to promote competition within the Single Market, while arbitration tribunals acting under IIAs

¹²² *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL* ICSID Case No ARB/05/20, Award (n 70), paras 690–717 and 726.

¹²³ *Micula* Commission Decision, para 158.

are acting within the framework of an order designed to resolve bilateral investor-State disputes and ensure investor protection.¹²⁴

Beyond this public policy interest that the EC and EU courts are mandated to protect, an additional reason for their restrictive interpretation of the concept of legitimate expectation is their duty to protect the interests of the aid beneficiary's competitors as well. A broader interpretation of legitimate expectations in the area of State aid would inevitably risk harm to the competitors' interests. The beneficiary's competitors would have little incentive to bring actions against EC decisions approving State aid if the EU courts were not prepared to order recovery of that aid save in exceptional circumstances. Thus, the narrow conception of legitimate expectations ensures the control and implementation of the State aid rules.

Investment arbitration tribunals, in contrast, have no mandate to ensure the effective implementation of State aid rules. Nor are they tasked with taking account of third-party interests. Unlike in the recovery proceedings before the EU and national courts where the beneficiary's competitors may participate as parties or third parties, those competitors normally have no standing to participate in the arbitration proceedings. The primary mission of an investment arbitration tribunal is to resolve a specific dispute between the investor and the host State.

In this regard, it is also relevant that the decision-makers are different in each legal regime: government entities with public agendas in the EU context, and party-appointed tribunals under IIAs. This difference in identity of the decision-makers impacts not only the motivations for the differing interpretations of legitimate expectations under the two regimes, but also how the tension between the two regimes is dealt with when cases like *Micula* arise. The EC would no doubt resolve such clashes from the outset in favour of the EU understanding of legitimate expectations, by arguing that IIA tribunals have no jurisdiction to rule over EU law as between an EU Member State and an EU investor. By contrast, IIA tribunals have found themselves competent to decide such questions of EU law, and to date there has been no judicial pronouncement to the contrary.

The divergence in EU State aid law and investment arbitration creates serious practical problems for investors who, like those in *Micula*, hold a potentially unenforceable arbitration award. The predicament in *Micula* serves as a warning both to investment arbitration tribunals as well as to potential claimants, as it illustrates that it will be almost impossible to enforce an arbitral award against an EU Member State over the EC's objection, at least within the EU where it is likely to be most desirable from an asset availability perspective.

However, on an optimistic note, few investors are likely to find themselves in this predicament going forward. It seems unlikely that dilemmas like those posed by *Micula* will arise with any frequency, for several reasons.

¹²⁴ C Saavedra Pinto, 'The "Narrow" Meaning of the Legitimate Expectations Principle in State Aid Law Versus the Foreign Investor's Legitimate Expectations' (2016) 15(2) *European State Aid Law Quarterly* 270.

First, as discussed above, there has been a general backlash against a perceived overly investor-friendly interpretation of the FET standard under IIAs which hinders a State's right to regulate. More modern IIAs purport to limit the FET concept and specifically clarify that the concept cannot be invoked against the discontinuation of State aid. For example, the EC proposed the following language for inclusion in the Transatlantic Trade and Investment Partnership under discussion between the EU and United States:

For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy and/or requesting its reimbursement, or as requiring that Party to compensate the investor therefor, where such action has been ordered by one of its competent authorities listed in Annex III.¹²⁵

Second, the EU has revealed plans for a multilateral investment court to replace the system of privately appointed arbitrators deciding investor–state disputes. The proposal would include a roster of publicly appointed judges in place of arbitrators and an appellate mechanism. If implemented, it is likely that the interpretation of the FET standard would take greater account of public policy interests, such as the promotion of competition within the Single Market.

Third, investment arbitration tribunals increasingly permit third-party intervention in cases affecting those third parties' interests. As a result, investment arbitration tribunals may consider a fuller picture, including third-party interests, in reaching decisions.

Taken together, these factors may lead investment arbitration tribunals to adopt a narrower concept of legitimate expectations in the context of State aid. At the same time, the widespread criticism of EU institutions' narrow interpretation of legitimate expectations may make an increased convergence of the two legal orders in this respect more likely.

¹²⁵ Commission Draft Text Transatlantic Trade and Investment Partnership (14 July 2016) Ch II Investment, Art 2(3), available at: www.trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf.

