EU State Aid Law and the Enforcement of intra-EU investment arbitral awards

European Law and Law of International Arbitration: a Game of Thrones without a winner.

Charoula Chr. Makrygianni

SCHOOL OF ECONOMICS, BUSINESS ADMINISTRATION & LEGAL STUDIES


January 2016
Thessaloniki – Greece
DECLARATION

Student Name: Charoula Chr. Makrygianni
SID: 1104140028
Supervisors: Prof. Dr. Pavlos Masouros, Dr.iur. Komninos Komnios.

I hereby declare that the work submitted is mine and that where I have made use of another’s work, I have attributed the sources according to the Regulations set in the Student’s Handbook.

January 2016
Thessaloniki - Greece
DEDICATION

“[…]/Have Ithaca always in your mind.
Your arrival there is what you are destined for.
But hurry not the journey in the least.
Better that it last for many years,
so you are by the time you reach the island,
being rich in riches gathered on the way,
not expecting Ithaca to make you rich.

Ithaca gave you the beautiful journey.
Without her you would not have set upon the road.
She has nothing left to give you now.

And if you find her poor, Ithaca will not have deceived you.
Wise as you will have become, so full of experience,
you will have understood by then what these Ithacas mean.”

by C. P. Cavafy

Dedicated to those who dare travel on roads less travelled upon.
ACKNOWLEDGEMENTS

I wish to acknowledge my supervisors, Prof. Dr. Pavlos Masouros and Dr. iur. Komninos Komnios for the invaluable contribution to my dissertation. I would like to convey my deep gratitude and respect to my supervisors, who offered their unreserved help and guidance so as to complete my dissertation step by step. Not only did they provide me valuable suggestions and advices in order to immerse myself in the complex interaction of European law and law of international arbitration, but also they helped me to realize the power of critical reasoning. Without their assistance, I could not have reached to the end of this legal path so as to find my Ithaca.
ABSTRACT

This dissertation, written as part of the LLM in “Transnational and European Commercial Law, Arbitration, Mediation and Energy Law” at the International Hellenic University addresses the EU law challenges on investor-state arbitration under intra-EU BITs, concluded by countries of Central and Easter Europe newly acceded to EU, taking as example the legal issues that emerged in Micula arbitration. The arguments posed by the EC and respondent states against the validity and applicability of intra-EU BITs have been proved unsubstantial, while the applicability of EU law on the merits by investment tribunals portrays their failure to strike a balance between the EU law obligations of states and the legitimate expectations of investors under the BITs. The main challenge concerns the compliance of intra-EU investment awards with EU state aid law, arguing that only compliance with an award mandating indirectly illegal state aid, such as the Micula award, violates art.107 TFEU. Compliance with such awards rendered under ICSID Convention places the respondent state in a dilemma, namely to respect EU state aid law and defy the consequences derived from the award or to honor ICSID Convention and unconditionally enforce it. Since the relationship between EU law and ICSID Convention remains unresolved, the superiority of each legal order would be established as a principle and not as a rule in the dispute at hand. With respect to non-ICSID awards involving competition law issues, their enforcement would be denied under the public policy exception V(2)(b) of NYC by the EU MS courts. Concluding that EU competition law forms EU public policy which is included in international public policy that applies in NYC, the court should verify through restrained review if the enforcement of the award entails flagrant violation of competition law, capable of jeopardizing the public policy of the state which enforcement is sought. These conclusions are premised on an attempt to reconcile EU law policy with the policy of law of international arbitration.

Keywords: intra-EU BITs, Micula award, state aid, enforcement, public policy.
I could not imagine that the world of international arbitration and European law could hide such mysteries in the context of enforcement of intra-EU investment arbitral awards. My interest was triggered with the issuance of an intra-EU ICSID investment arbitral award, the Micula award. This award mandated the re-installment of state aid measure which had been considered as incompatible with article 107 TFEU. The enforcement of this award raised an array of legal issues mirroring a formidable debate between EU state aid law and ICSID Convention, a conflict between European Law and international law. This complex and improbable interaction of these competing legal orders made me to leave my comfort zone and write a thesis addressing the issue of EU state aid law as a limit to compliance with intra-EU investment arbitral awards in order to fulfill my graduation requirements for the acquisition of the degree LLM in “Transnational and European Commercial Law, Arbitration, Mediation and Energy Law” from the International Hellenic University. I hope this thesis to shed light into the legal problems that are emerging in this context and to commence a discussion on how these hindrances could be overcome in order to prevent states, such as Romania in the case concerned, from being in a quandary, namely to choose to respect their European law obligations and breach international law or to honor their international obligations and violate European law.
CONTENTS

TITLE OF DISSERTATION ........................................................................................................ I
DECLARATION ......................................................................................................................... II
DEDICATION ............................................................................................................................ III
ACKNOWLEDGEMENTS ........................................................................................................ IV
ABSTRACT ................................................................................................................................ V
PREFACE .................................................................................................................................. VI
CONTENTS ................................................................................................................................ VII
ABBREVIATIONS ................................................................................................................... X
INTRODUCTION ........................................................................................................................ 1

CHAPTER I. “MICULA V ROMANIA” AWARD AND POST-AWARD DEVELOPMENTS. .......................................................... 5

CHAPTER II. EU LAW CHALLENGES TO INVESTOR-STATE ARBITRATION UNDER A BIT DUE TO ACCESSION OF CEE COUNTRIES TO EU ............... 10

1. EU LAW CHALLENGES ON THE JURISDICTION: THE VALIDITY AND APPLICABILITY OF INTRA-EU BITS ........................................................................................................... 11
   1.1. EU law challenges concerning the very validity of intra-EU BITs................. 11
   1.2. EU law challenges concerning the inapplicability of intra-EU BITs on the ground of discrimination .............................................................. 12
   1.3. EU law challenges concerning the inapplicability of intra-EU BITs on the ground of infringement upon CJEU competence ................................................. 13

2. EU LAW CHALLENGES ON THE MERITS: THE APPLICABILITY OF EU LAW IN INVESTMENT ARBITRATION ........................................................................................................ 15
3. EU LAW CHALLENGES TO THE ENFORCEMENT OF INVESTMENT ARBITRAL AWARDS: COMPENSATION AWARDS VIS-À-VIS ART.107 TFEU ................................................................. 17

3.1. The General Rule: Compliance with intra-EU investment arbitral awards does not constitute a violation of art. 107 TFEU ................................................................. 18

3.2. Exception to the General Rule: Compliance with intra-EU investment arbitral awards, establishing an illegal state aid, constitutes a violation of art. 107 TFEU ........................................................................................................ 21

CHAPTER III. RECONCILING EUROPEAN LAW POLICY WITH INTERNATIONAL ARBITRATION LAW POLICY ............................................. 25

1. ENFORCEMENT OF “MICULA-TYPE” ICSID AWARDS: ICSID CONVENTION AND EU LAW IN A GAME OF THRONES ................................................................................................. 26

1.1. EU law as international law from an international angle ........................................ 27

1.2. EU law as international law from a European angle ............................................. 30

1.3. EU law as sui generis legal order from an international angle ............................ 32

1.4. EU law as sui generis legal order from a European angle .................................... 34

1.5. Moving towards to a co-ordination of these competing legal orders ............... 35

2. ENFORCEMENT OF “MICULA-TYPE” NON-ICSID AWARDS ........................................ 37

2.1. The notion of public policy under art.V(2)(b) exception of NYC ..................... 37

2.2. European public policy and Competition Law ..................................................... 41

2.3. The extent of the court review of awards with competition law issues .......... 46

2.4. An appropriate standard of review: Moving towards to a reconciliation of competition law and law of international arbitration demands ....................... 48

CONCLUSION REMARKS ................................................................................. 51

BIBLIOGRAPHY ............................................................................................... 54
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>art.</td>
<td>article</td>
</tr>
<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
</tr>
<tr>
<td>CCE</td>
<td>Central and Easter Europe</td>
</tr>
<tr>
<td>CJEU</td>
<td>Court of Justice of European Union</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
</tr>
<tr>
<td>ECT</td>
<td>Energy Charter Treaty</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>eds.</td>
<td>editors</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Centre for the Settlement of Investment Disputes</td>
</tr>
<tr>
<td>MS(s)</td>
<td>Member State(s)</td>
</tr>
<tr>
<td>n.</td>
<td>note</td>
</tr>
<tr>
<td>NYC</td>
<td>Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention (1958)</td>
</tr>
<tr>
<td>p.</td>
<td>page</td>
</tr>
<tr>
<td>para(s).</td>
<td>paragraph(s)</td>
</tr>
<tr>
<td>seq.</td>
<td>sequence</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on the European Union</td>
</tr>
<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of European Union</td>
</tr>
<tr>
<td>Vol.</td>
<td>Volume</td>
</tr>
</tbody>
</table>
INTRODUCTION

EU law has integrated into investment law with the passage of time, setting an end to the era of parallelism of these regimes.¹ This interaction has been intensified after the collapse of the communist era when a new legal order emerged for the countries of Central and Eastern Europe² wishing to be free market economies.³ Romania was one of these states which was struggling to reborn from its ashes by resorting to privatizations, legal reforms and foreign investments, ensuring a reliable system of investment protection⁴ through the conclusion of Bilateral Investment Treaties.⁵ However, the accession of CEE states to the EU sharpened this tension with respect to the compatibility of EU law in recently acceded MSs with their preexisting treaties protecting foreign investment.

This tension was mirrored in the *Micula a.o. v Romania*⁶ case in which compensation was awarded in favour of the investors due to Romania’s failure to ensure a fair and equitable treatment under Romania and Sweden Bilateral Investment Treaty.⁷ The bone of contention was the revocation of economic incentives to disadvantaged regions where Micula brothers had invested. The European Commission,⁸ during the proceedings, intervened as amicus curiae and raised the issue

---


²Hereafter referred as countries of CEE.


⁵Hereafter referred as BITs.

⁶ICSID Case No ARB/05/20, Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania, final award, 11 December 2013, hereafter referred as Micula award.

⁷Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments, entered into force in 2003. Hereafter referred as Sweden-Romania BIT.

⁸Hereafter referred as EC.
that any compensation for the loss of these privileges would constitute a new illegal state aid under EU law and the award would be unenforceable within the EU.⁹ The tribunal’s failure to engage with EU state aid law rules with regard to enforceability of the award, led to a suspension injunction¹⁰ by the EC requiring the government to suspend the execution of the award. The EC’s decision was challenged before the General Court¹¹ by Micula brothers who have presented the case as a conflict between international and European law on the grounds of violations of art.351(1) TFEU and art.4(3) TEU which safeguard the respect of international obligations of Romania under the ICSID Convention and the applicable BIT.

This case sparked a debate regarding the EU law challenges to investor-state arbitration, portrayed in the context of intra-EU BITs¹² after the accession of CEE states to the EU. The aim of this thesis is not to provide a thorough analysis of EU law challenges to investment arbitration, but to provide a well rounded understanding of the relationship of EU law with international investment law, taking the “Micula” award as a food for thought. Although a jurisdictional issue of the tribunal as a conflict between the BIT and EU law was not raised, it is considered necessary to highlight the arguments raised by the EC and the respondent states against the very existence and applicability of intra-EU BITs for acceded CEE countries to EU. In a similar vein, the applicability of EU law in investment arbitration will be addressed, which is inextricably related with the enforceability of the award within EU. In light of the later, the issue of whether or not a compensation award constitutes illegal state aid under art.107(1) TFEU will be discussed.

---

⁹Micula award (n.6), para.330.


¹²These are treaties which are concluded between the “old” EU Member States with “new” EU Member States, namely with CEE countries before their accession to EU. See C. Söderlund, ‘Intra-EU BIT Investment Protection and the EC Treaty’, Journal of International Arbitration, Vol.24, Issue 5, 2007, p.455.
Being aware of the EC Decision\textsuperscript{13} which characterized the execution of the award as illegal state aid under EU law, Romania was under a dilemma, namely to respect EU law or international law. So, the purpose of this thesis is to initiate a discussion so as to eliminate such quagmire by reconciling the demands of EU law and law of international arbitration. To this end, the legal issues emerged from the enforcement of investment arbitral awards having the same factual background with the Micula case will be mentioned. With regard to intra-EU ICSID “Micula-type” awards in the enforcement stage, the unresolved relationship between the competing legal orders, asserting superiority-namely the ICSID Convention\textsuperscript{14} claiming unconditional enforcement of the award under art.54 and the EU law claiming supremacy over international law-will be presented, concluding as a solution to this endless conflict a harmonious co-existence of them in the light of the \textit{Bosphorus} case of the European Court of Human Rights.\textsuperscript{15}

With respect to the enforcement of intra-EU non-ICSID “Micula-type” awards, the courts of MSs may refuse the recognition and the enforcement of such award under the public policy exception of art.V(2)(b) of New York Convention\textsuperscript{16} due to the Eco Swiss doctrine. Ergo, this notion of public policy will be analyzed, focusing on the content on European public policy and in particular whether any or all the rules of competition law pertain to European public policy. Assuming that Competition law is part of European public policy, the different approaches taken by the courts of MSs with respect to the review of the awards raising competition law issues will be mentioned. Finally, a standard of review will be proposed aiming to strike a balance between the principle of the finality of awards and the necessity of effective enforcement of EU competition law.


\textsuperscript{14}Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Hereafter referred as ICSID Convention.

\textsuperscript{15}Hereafter referred as ECtHR.

In this context, the Micula award would be the starting point of this work which shall unfold, through case law and academic literature, specific legal issues raised due to the clash of EU law with the law of international arbitration.
CHAPTER I. “MICULA V ROMANIA” AWARD AND POST-AWARD DEVELOPMENTS.

In an ICSID award issued in 2013, compensation of RON 376.433.229 plus interest\(^{17}\) awarded in favour of the Micula brothers against Romania due to a breach of the fair and equitable treatment under the Sweden-Romania BIT. The premature revocation of the Emergency Government Ordinance 24/1998 (EGO 24),\(^{18}\) granting to certain investors, tax and customs duty incentives in disfavored regions\(^{19}\) for a period of ten years, as a precondition for Romania’s accession to EU,\(^{20}\) was the factual background of the dispute in question. In other words, the abrogation of this investment scheme was essential step for the alignment of Romania’s legislation to EU state aid rules. This scheme had already been qualified as illegal stated aid according to the No.44/2000 Decision of Romanian Competition Council which was consistent with the legal framework for Romania’s accession to the EU, as it was provided in the Europe Agreement between Romania and European Community, entered into force in 1995. The later decision envisaged amendments to the existing ECO 24, included in the draft EGO 75. Romania’s failure to comply with these amendments, led the Competition Council to enforce its decision before the Romanian Courts without result because of the dismissal of its action on admissibility grounds.\(^{21}\)

In 2004, Romania revoked all the incentives included in EGO 24, as amended by EGO 75 with the exemption of Profit Tax Facility. The revocation of the

\(^{17}\)Compensation of EUR 82.000 million according to the exchange rate of European Central Bank on the day of the issuance of the award was awarded to the Micula brothers (1 EUR= 4,45 RON). By 11 December 2013 the total liability held by Romania to the Micula brothers amounted to RON 791.882.452 or EUR 178.000 million. For the precise presentation of damages with the interest calculated, see Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), para.27.

\(^{18}\)The Emergency Ordinance 24/98 was consisted of a Machinery Facility, a Raw Materials Facility and a Profit Tax Facility. For an analytical description of the investment scheme see Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), para.14.

\(^{19}\)According to the decision of 25 March 1999 of Romania’s Government, the mining region of Stei-Nucet, Bihor country was characterized as a disadvantaged area for a period of 10 years, commencing on 1 April 1999. See Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), para.15.

\(^{20}\)Romania was acceded to European Union on 1 January 2007.

\(^{21}\)See the Micula award (n.6), para.219, 224 and also the Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), paras.16-18.
investment regime took effect on 22.02.2005, four years before the scheme’s scheduled expiry in 2009, resulting in the reaction of the investors and subsequently in the dispute in question.22

During the proceedings, although the jurisdiction of the arbitral tribunal was not challenged on the ground of a clash between the applicable BIT and EU law,23 the tribunal had to confront with the applicability on the EU law on the merits.24 Put simply, Romania argued that the revocation of the incentives was necessary for the accomplishment of Romanian accession and thus the interpretation of the BIT should be consistent with Romania’s obligations under the Europe Agreement and the EU Treaty. Romania added that in case the tribunal adopted that the obligations under the BIT and the EU law could not be reconciled, the later would prevail.25 The Micula brothers asserted that there was no conflict between the BIT and EU law, but if there were, the conflict should be only with Europe Agreement since Romania had not yet acceded to the EU during the disputed period. Therefore, EU law was not directly applicable and in any case, the BIT should prevail.26 However, since EU law was considered by the parties as a part of the “factual matrix” of the case,27 the tribunal held that when interpreting a BIT, “the general context of EU accession must be taken into account” so as to rule whether Romania’s actions were reasonable or the expectations of investors were legitimate.28 Although the tribunal concluded that

---


23ICSID Case No ARB/05/20, Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania, Decision on Jurisdiction and Admissibility, 24 September 2008.

24Although the parties agreed that the substantive provisions of the BIT would be the governing law of the dispute, they disagreed with respect to the role of the EU law in the interpretation of the BIT, see Micula award, (n.6), paras.288, 289.

25Micula award, (n.6), paras.303-312.

26Micula award, (n.6), paras.391-302.

27Micula award, (n.6), para.328.

28Micula award, (n.6), para.327.
Romania’s policy was rational due to its imminent accession to the EU, it held that the investors were treated unfairly due to Romania’s failure to act transparently regarding the timely information of investors for the premature revocation of the incentives and thus resulting to a breach of the fair and equitable treatment standard under the art.2(3) of the BIT.

However, the end of story has not yet been written. On 20 February 2014, Romania had partially implemented the award by offsetting its debt with tax duties of S.C. European Food S.A, owned by Micula. On 18 April 2014, Romania requested the annulment of the award under art.52 of ICSID Convention before an ad hoc committee and the stay of the enforcement of the award until the committee had decided on the application for annulment. The later issued a decision on the continuation of the stay of the enforcement of the award subject to the condition of fully compliance with the award. Romania’s failure to provide such assurance led to the revocation of this decision. On 26 May 2014, the EC issued a suspension injunction against Romania, ordering it to refrain from executing fully the award, until the formal investigation under art.108(2) TFEU will be completed regarding whether the partial implementation of the award and any further payment would constitute illegal state aid or not. The EC affirmed, once the investigation is completed, that the partial payment of the award constituted illegal state aid under art.107(1) TFEU due to the notification breach of art.108(3) TFEU, ordering the

---

29 Micula award, (n.6), para.827.
30 Micula award, (n.6), para.872.
31 The tax debt was amounted to RON 337.492.864 (EUR 76 million), see Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), para.2.
recovery of any compensation paid to Micula brothers. The later requested the annulment of the issuance of the injunction before the General Court of the CJEU.

Apart from this, they requested the recognition and enforcement of the award before the Bucharest Tribunal which allowed the execution of the award pursuant to art.54 of the ICSID Convention despite their obligation to comply with the Commission Decision. As a result, on 5 January 2015, the court-appointed executor seized the amount of RON 36.484.232 from Romania’s Ministry of Finance, transferring the amount of RON 34.004.232 to Micula brothers and keeping the remainder for the execution costs. From 5 February to 25 February 2015, the amount of RON 9.197.482 was seized from the Ministry of Finance and on 9 March 2015 the amount of RON 472.788.675 had been voluntarily transferred to Micula brothers. Furthermore, Mr. Viorel Micula sought ex parte recognition of the award before United States District Court for the District of Columbia, but the later held that the ICSID award creditor must file a plenary action in order to recognize an ICSID award. On the contrary, the application for ex parte recognition of the award before the New York District Court was successfully granted to the rest petitioners of Micula arbitration, while Mr. Viorel Micula was permitted to intervene in the enforcement action.

The fully implementation of the award by Romanian authorities and ergo Romania’s decision to comply with ICSID Convention instead of complying with the EU legal order shows that Romania chose to respect its international obligations. A breach of art.54 of ICSID Convention which requires each Contracting State to recognize the award as binding and enforce its pecuniary obligations as if it were a

36 See n.11.
40 Ioan Micula et.al.v Government of Romania, No. 15 MISC. 107, 2015 U.S.Dist. LEXIS 102907, 5 August 2015.
final judgment, could undermine the investor’s trust to arbitration as a dispute resolution mechanism and it would provoke its political embarrassment and a serious strike in Romania’s foreign investment policy as well.\textsuperscript{43}
CHAPTER II. EU LAW CHALLENGES TO INVESTOR-STATE ARBITRATION
UNDER A BIT DUE TO ACCESSION OF CEE COUNTRIES TO EU.

After the EU enlargement and the EU’s acquisition of exclusive competence for foreign direct investment under art.207 TFEU, doubts were raised regarding the conformity of existing BITS, protecting foreign investments of the newly acceded MSs, with the EU legal order. EU law challenges to investor-state arbitration were presented by the respondent states and the EC before arbitral tribunals concerning the validity and the applicability of these BITs, already transformed to intra-EU BITs, since they were regarded as "an anomaly within the EU internal market". Arguments against the applicability of substantive BIT provisions due to their conflict with EU law were asserted, whereas the enforceability of the arbitral awards within the EU was doubted due to supremacy of EU law. The main arguments will be highlighted in order to realize where the European investment path leads since the EC insists for the termination of the existing intra-EU BITs.


46 Eureko v Czech Republic, PCA, Case No.2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para.177; see also European Commission, ‘Monitoring Activities and Analysis, Bilateral Investment Treaties between Member States’, available from http://ec.europa.eu/internal_market/capital/analysis/monitoring_activities_and_analysis/index_en.htm#maincontentSec5, (accessed on 24-11-2015), where the intra-EU BITS are characterized as “not compatible with the EU single market”.

1. EU LAW CHALLENGES ON THE JURISDICTION: THE validity AND THE APPLICABILITY OF INTRA-EU BITS.

1.1. EU law challenges concerning the very validity of intra-EU BITs.

The invalidity argument against intra-EU BITs rested on the regulation of capital movements between MSs, since there is an overlap between the BIT provisions and the provisions of free movement of capital under art.63 et seq. TFEU, which are both protecting foreign investments.

Under international law, this overlap poses the question of termination or suspension of intra-EU BITs under art.59 VCLT, since the accession constitutes a new agreement between the two MSs concerning the same subject matter. Nevertheless, coverage of the same issue does not suffice for a termination or suspension of a treaty by a subsequent treaty under art.59 VCLT. The crucial element is the intention of the states that the matter in question should be regulated by the later treaty or the incompatibility of the treaties is so apparent and thus, they cannot apply simultaneously.

With regard to the subject matter in consideration, the BIT provisions pursue to promote investments by securing the protection of investors once the investment

---


50 Apart from the provision protecting the free movement of capital in art.63 TFEU, we should mention the provision of freedom of establishment in art.46 TFEU. In the following references to free movement of capital provisions, the above mentioned provision should be taken in account.


52 H. Wehland, (n.3), pp.303-305.
has been made, whereas art. 63 TFEU safeguards the elimination of obstacles for cross-border capital movements and forbids any investment measure that constitutes an obstacle.\textsuperscript{53} Apart from their different purpose, they differ on the fact that BITs provide also arbitration as a dispute resolution mechanism not only between the states but also between the investor and the host state. This unique characteristic of BITs cannot be ignored so as to naively assume that the common intention of parties was that the investments would exclusively regulated by art.63 TFEU.\textsuperscript{54} Under EU law, this overlap is not sufficient to challenge the validity of an intra-EU BIT. Only a breach upon an exclusive competence of the EU to govern all matters concerning the free movement of capital between MSs would suffice, which is not the case in the internal market area, since the Union has shared competency with the MSs.\textsuperscript{55}

Consequently, it is apparent that the very validity of intra-EU BITs is kept intact by the accession of CEE states to EU under EU law and international law.\textsuperscript{56}

\textit{1.2. EU law challenges concerning the inapplicability of intra-EU BITs on the ground of discrimination.}

The inapplicability of intra-EU BITs due to discrimination is premised under the arguments of the EC that the standards of investor protection under BITs compared to the respective provisions of EU law, might lead to unequal treatment of investors among MSs. Moreover, the advantage of investors having an additional forum to pursue their claims before tribunals strikes with the principle of non-discrimination on the ground of nationality under art.18 TFEU.\textsuperscript{57}

With respect to the enhanced protection of investors under BITs leading to a clash with EU law, a conflict is not existent. Although there is an overlap between the

\textsuperscript{53}T. Eilmansberger, (n.47), pp.518-519.

\textsuperscript{54}T. Eilmansberger, (n.47), p.519.

\textsuperscript{55}CJEU, Case C-491/01, \textit{British American Tobacco}, 10 December 2002, ECR I-11453, para.179.

\textsuperscript{56}T. Eilmansberger, (n.47), pp.518-519.

\textsuperscript{57}H. Wehland, (n.3), pp.309-312.
rights provided under BITs and EU law, the protection afforded is not the same. As EU law provides the minimum standards of protection, a higher level of protection under a BIT would not be a hurdle. In a similar vein, a lower protection under a BIT than under EU law would not be challenged.\textsuperscript{58} BITs can only provide additional protection which is \textit{a priori} consistent with the aim of TEU.\textsuperscript{59} Therefore, the mere difference in the standards of protection cannot suffice for rendering an intra-EU BIT as invalid and inapplicable.

The equality of treatment might be distorted with regard to the enforcement of foreign investors’ rights. Violation of investors’ rights under art.63 TFEU could be brought before a court with a potential reference to the CJEU or alternatively the EC could initiate infringement proceedings against the State concerned. However, an investor protected by a BIT has the privilege of submitting its claims before an arbitral tribunal independent from the violating host state. This preferential treatment under a BIT could not be incompatible with EU law and even if there would be a clash with EU law, this is not capable of rendering the BIT inapplicable.\textsuperscript{60}

\textbf{1.3. EU law challenges concerning the inapplicability of intra-EU BITs on the ground of infringement upon CJEU competence.}

The argument against the applicability of intra-EU BITs is based on the premise that arbitration clauses into BITs have been emasculated due to jurisdictional monopoly of the CJEU in matters reserved for the Union under art.344 TFEU. This argument, although supported in \textit{MOX Plant} case,\textsuperscript{61} has not room in the

\textsuperscript{58} H. Wehland, (n.3), p.311.
\textsuperscript{59} C. Söderlund, (n.12), p.461.
\textsuperscript{60} In case of conflict, the extension of favourable treatment to investors from other MS would be preferable rather than the inapplicability of intra-EU BIT. See CJEU, Case C-235/87 \textit{Annuanziata Matteucci v Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium}, 27 September 1988, para, 23, where the CJEU stated that the reservation of a certain privilege to nationals of a certain MS could “\textit{not prevent the application of the principle of equality of treatment}”; See also H. Wehland, (n.3), p.318; T. Eilmansberger, (n.47), p.521.
\textsuperscript{61} CJEU, Case C-459/03, \textit{Commission v Ireland} (MOX plant), 30 May 2006, ECR I-4635. In this case Ireland had violated EU law and in particular art.344 TFEU and the duty of loyalty cooperation by
BIT context. This ruling does not pertain to investor-state disputes, since there are not EU law rules conferring an exclusive competence to CJEU upon such disputes. In addition, the BIT that it had to be applied by the tribunal does not belong to EU legal order, namely with the meaning of “Treaty” under art.344 TFEU.

A concern was also expressed due to the existing overlap between the BITs provisions and the provisions in internal market under EU law. Because of this overlap, state measures infringing art.63 TFEU may be challenged before tribunals instead of national courts. Therefore, the CJEU would not have the opportunity to rule upon EU law matters, due to the ineligibility of tribunals to submit a reference for a preliminary ruling to the CJEU under art.267 TFEU. However, a potential forum shopping or misapplication and ignorance of EU law by a tribunal cannot justify the jurisdictional inapplicability of intra-EU BITs, since there are adequate mechanisms to secure the application of EU law. For example, the EC could safeguard the legal integrity of EU legal order by initiating proceedings against a MS, which in execution of the award, would violate EU law. This happened in the Micula case with the issuance of a suspension injunction by the EC against Romania. Furthermore, arbitration mechanisms in intra-EU BITs do not confer exclusive jurisdiction to instituting dispute settlement proceedings against the UK under the UN Convention on the Law of the Sea with regard to the MOX plant located at Sellafield.


\[64\] T. Eilmansberger, (n.47), p.523.
tribunals excluding any procedure before national courts, if it is provided under national law.\textsuperscript{65} A court also seized with the enforcement of an award, may resort to the CJEU for a correct application of EU law or even the arbitral tribunal may be granted the right to referral to the CJEU.\textsuperscript{66} However, the CJEU generally refuses to recognize arbitral tribunals in voluntarily arbitrations as courts or tribunals with the meaning of art.267 TFEU.

\section*{2. EU LAW CHALLENGES ON THE MERITS: THE APPLICABILITY OF EU LAW IN INVESTMENT ARBITRATION.}

The tension between EU law and investment arbitration was revealed not only through jurisdictional defenses against the validity and applicability of intra-EU BITs before arbitral tribunals, but also when EU law was presented as a defense for violations of substantive provisions of BITs and in particular of the legitimate expectations of investors. However, the applicability of EU law in investment disputes was addressed with different approaches by arbitral tribunals.\textsuperscript{67}

In particular, in Eastern Sugar\textsuperscript{68} the tribunal, considering the relationship of national and international law, stated that “international law generally applies”,\textsuperscript{69} without mentioning EU law at all. Hence, it failed to specify whether EU law is considered as subsystem of international law or as a law in force of the Contracting State in question under the BIT. In any case, EU law fell in the scope of the applicable law under the BIT. In AES Summit,\textsuperscript{71} the tribunal, being aware of the dual nature of

\textsuperscript{65}E. Böhm, M.C. Motaabbed, (n.45), p.381.
\textsuperscript{66}T. Eilmansberger, (n.47), pp.521-523, 535-536.
\textsuperscript{67}H. Wehland, (n.3), pp.300-307.
\textsuperscript{68}In this case, Eastern Sugar had invested in the Czech sugar industry. Due to imminent accession of Czech Republic to the EU in 2004, it introduced measures reducing its domestic sugar production quotas. Eastern Sugar commenced arbitration proceedings against the Czech Republic under the Dutch-Czech Republic BIT, asserting that these measures breached the standard of fair and equitable treatment. The tribunal indeed found that it was a breach of BIT. See M. Burgstaller, 2010, (n.47), pp.455-464 for a detailed analysis of this case which is focusing on the arguments raised against the validity of intra-EU BIT in question.
\textsuperscript{69}Eastern Sugar B.V. v. The Czech Republic, (n.45), paras.196-197.
EU Law, namely as international law and as a part of national legal orders, considered EU law as a fact, asserting that domestic law cannot justify breaches of international obligations. So, the tribunal implied that EU law was part of domestic law and as a result, investment law trumped EU law. In *Micula*, the tribunal took EU law into account as a “factual matrix” of the case so as to assess whether Romania acted reasonably or the investors had indeed legitimate expectations. In *Electrabel*, the tribunal found EU law as a part of the applicable law, namely that it is part of international law as regional international law. Surprisingly, the tribunal asserted that ECT should be interpreted with harmony with EU law, treating EU law both as a matter of law and as a fact.

This lack of inconsistency of the applicability of EU law in investment treaty arbitration mirrors the parochial stance of arbitral tribunals towards EU law and their failure to balance the interplay of EU law with investment law by countervailing the interests of EU with the investor’s legitimate expectations. The tribunal in Micula arbitration is a step to the right side of the investment path, since instead of taking as a blanket rule the non-breach of an investor’s legitimate expectations due to

---

71 ICSID tribunal found that AES had no legitimate expectation that Hungary would not impose a regime of administrative electricity prices in the liberalization process of Hungary’s accession to the EU. See M. T. Parish, C. B. Rosenberg, (n.47), p.151 for a concise summary of this case.


74 The Micula case is described in details in the Chapter I.

75 Micula award, (n.6), para.327.

76 Electrabel S.A instituted arbitration proceedings against Hungary for a breach of fair and equitable treatment under ECT due to the decision of Hungary to change the pricing regime and terminate a power purchase agreement with Electrabel’s Hungarian subsidiary in the course of its accession to EU. The termination was essential due to the characterization of the agreement as illegal state aid by EC. The tribunal rejected Electrabel’s claims concluding that acts required by EU law cannot breach an investor’s legitimate expectations. See A. Stanič, (n.63), p.45.


78 *Electrabel S.A. v. Republic of Hungary*, (n.77), para.4.130.

79 A. Stanič, (n.63), p.44.

compliance with EU law—an approach taken in *Electrabel*—it recognized that investor’s expectations, regarding the governance of a EU candidate country, cannot rely only on the fact of a conclusion of a Europe Agreement, but it attached importance to the need of candidate EU states to make credible commitments.  

3. EU LAW CHALLENGES TO ENFORCEMENT OF INVESTMENT ARBITRAL AWARDS: COMPENSATION AWARDS VIS-À-VIS ART.107 TFEU.

Because of the blinkered attitude of tribunals towards EU law, the later may be misapplied, it may not be applied at all or it may be misinterpreted leading to false conclusions concerning the existence of a breach of substantive BIT provisions. The supremacy of EU law may be also stepped aside or the awards rendered may be unenforceable within EU.  

The unenforceability of the award was highlighted in *Micula* due to the alleged conflict between EU state aid law and compliance with intra-EU ICSID arbitral awards. However, the tribunal failed to engage with EU law and the enforceability of the award with a mere citation of the art.53 and 54 of ICSID Convention. This unanswered question by the tribunal, namely whether compliance with intra-EU arbitral award violates or not art. 107(1) TFEU will be discussed through case law, arguing that compliance of a MS with intra-EU compensation arbitral awards does not constitute a violation of EU state aid law, while compliance with intra-EU compensation arbitral awards mandating indirectly the introduction of illegal state aid amounts to a violation of EU state aid law.

---


83*Micula* award, (n.6), paras.340, 341.
3.1. The General Rule: Compliance with intra-EU investment arbitral awards does not constitute a violation of art.107 TFEU.

According to art.107(1) TFEU “any aid granted by a MS 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 MSs, be incompatible with the internal market.” Applying this article, the doctrine of imputability, as developed by CJEU and EC decisions, dictates that only voluntarily measures fall within the scope of this article. Therefore, compensation granted by a MS to a private investor is not qualified as an economic advantage attributable to a state once there is an obligation for compensation. The question is if the doctrine of imputability is also applicable to the context of intra-EU awards. Although the doctrine of imputability in relation to obligation for compensation is referred to court judgments, there is no reason to exempt a priori its application to investment arbitration, since arbitral awards have comparable effects to court judgments. In support of this conclusion a closer look at the relevant jurisprudence of the CJEU is considered necessary.

In Asteris the CJEU held that “State aid...is fundamentally different in its legal nature from damages which the competent national authorities may be ordered...

---

84For a thorough definition of state aid for the purposes of ar. 107(1) TFEU and an analysis of the legal issues that they will be discussed in this section, placing emphasis on the doctrine of imputability and whether the compensation awards lead to illegal state aid, see L. Hancher, ‘Chapter 28: Arbitrating EU State Aid Issues’ in G. Blanke and P. Landolt (eds.), EU and US Antitrust Arbitration: A Handbook for Practitioners, Kluwer Law International, 2011, pp.965-1016.

85Case 482/99, France v Commission (Stardust Marine), 16 May 2002, para.51.

86EU Commission, ‘Draft Commission Notice on the notion of State aid pursuant to Article 107(1) TFEU’, available from http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf, (accessed on 09-12-2015). The EC precisely stated that “the existence of an advantage should be ruled out in the case of...an obligation condemnation on the national authorities to compensate for damage they have caused to certain undertakings or the payment of compensation for an expropriation.”


88This case is emerged after the inclusion of technical errors by the EC in a regulation, resulting to the non-payment of aid to a group of Greek tomato producers. The later filed an action before the national competent national court alleging that the Hellenic Republic was liable to them for compensation. Upon a preliminary reference ordered by the court to the CJEU asking whether any
to pay to individuals in compensation for the damage they have caused to those individuals." Thus, a contribution by a MS does not violate EU state aid law if there is an obligation for payment. However, the CJEU did not shed light on whether “the fundamental difference” lied on the existence of a right of compensation under national law or on the fact that state liability was recognized by a court. The later was addressed in Akzo Nobel where the EC concluded that the payment of compensation is not illegal state aid, notwithstanding it has been ordered by a court, as long as the payment is compensatory for a wrongness incurred to an undertaking and the later has a right to it, recognizable by the courts, under the applicable law. Thus, imputability of a state is excluded when compensation is voluntarily afforded to a recipient due to the existence of a legal obligation, written or not, without having to resort to a national court.

Nevertheless, reliance to Akzo Nobel requirements might be problematic in investment arbitration due to the broad wording of protective standards enshrined in BITs. In light of this, only the case of awarding compensation by an arbitral tribunal due to a breach of an investment agreement could warrant the exclusion of imputability of a state, having an obligation to pay damages under the applicable treaty. Therefore, once the award has been rendered, the EC must consider the

---


90 This case is emerged when the chemical company Akzo Nobel was forced to displace one of its plants due to the repeal of an environmental permit by the Dutch Government. The later offering a lump sum in compensation, asked the EC whether this payment would violate EU state aid law rules or not.


93 One of the most often invoked standards of protection in BITs is the fair and equitable treatment whose interpretation varies. For a thorough overview of the interpretations of this clause see A. Diehl, The core Standard of International Investment Protection: Fair and Equitable Treatment, Kluwer Law International, 2012.

94 P. Ortolani, (n.87), pp.122-123.
international obligations undertaken by a MS as binding, since there is no reason to treat differently the MSs’ obligations stemming either from international law or domestic law. To be more precise, this is evident in cases where a MS incorporates the international obligations found in international investment agreements into domestic law. However, imputability is ruled out not only in the case when a MS has ad hoc incorporated its international obligations into its domestic law, but also when a MS follows the model of automatic standing corporation to the extent that it recognizes an international investment agreement as a source of law within its hierarchy of rules, having direct effects domestically.95

The relationship between compensation attributable to a state with state aid law was not only discussed in Asteris. In Denkavit, where the state repaid charges which have been wrongly levied, the CJEU held “that a national tax system which enables the taxpayer to contest or claim repayment of tax does not constitute an aid with the meaning of art.92 of the Treaty”.96 Moreover, attribution is excluded in case of expropriation, since the compensation granted to the recipient is prerequisite for the legality of expropriation. Thus, the EC argued in ThyssenKrupp that “compensation granted by the State for an expropriation of assets does not normally qualify as State aid”.97 The same point of reference in these cases is the existence of obligation under domestic law to compensate private actors because of illegal or potential illegal state action. In such cases, the payment is not voluntary and does not infringe art.107 TFEU. The legal situation in these cases is analogous with those of ICSID arbitral awards with the only difference that in the later, the obligation for compensation derives from international law. So, the principles portrayed in these


cases could be applied in investment arbitration since any differentiation between obligations derived from domestic law and international law is irrational. Furthermore, another argument in favour of respecting equally the international obligations undertaken by a MS could be found in Deutsche Bahn where the CJEU held that a measure is not imputable to the state if that MS is obliged under EU law to implement it without discretion. In a similar vein, it could be argued that a MS which complies with an arbitral award is merely honoring its supranational obligations. However, this assertion is valid with respect to ICSID MSs due to their lack of autonomy concerning the enforcement of arbitral awards according to art.53 and 54 of ICSID Convention, since the enforcement of non-ICSID awards can be impeded due to the public policy exception under art.V(2)(b) of NYC.

Consequently, not only compliance with a domestic obligation, but also compliance with an international obligation to compensate does not contravene with art.107 TFEU. Accordingly, compliance with intra-EU investment arbitral awards does not constitute illegal state aid, since the deference towards the legislative framework enacted under national law and international investment agreement must be the same in the context of EU state aid law regarding the doctrine of imputability.

3.2. Exception to the General Rule: Compliance with intra-EU investment arbitral awards, establishing indirectly an illegal state aid, constitutes a violation of art.107 TFEU.

Although compliance with intra-EU investment arbitral awards does not generally constitute illegal state aid, there is an exception to this rule in order to avoid the easily circumvention of prohibition of EU state aid law. In other words,

---

98 C. Tietje and C. Wackernagel, (n.95), p.5.

99 CJEU, Case T-351/02, Deutsche Bahn AG v Commission, 5 April 2006 , ECR II – 1047, paras. 101-102. In this case, tax exemptions for aviation fuel, provided by the Council Directive 92/81, had been examined if they constituted state aid under art.107 TFEU.

100 Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), para.120.

101 C. Tietje and C. Wackernagel, (n.95), pp.6-7; P. Ortolani, (n.87), p.124.
compliance with an award constitutes illegal state aid in cases where the compensation ordered by the tribunal indirectly establishes illegal state aid.\footnote{C. Tietje and C. Wackernagel, (n.95), p.7.}

This was the case in \textit{Micula} arbitration where the payment of compensation to investors amounted to a re-installment of the same economic benefit which was repealed due to its conflict with EU state aid law.\footnote{P. Ortolani, (n.87), p.125.} In particular, the EC concluded, after the conduction of its formal investigation, that the claimants constituted an undertaking with the meaning of art. 107 TFEU as they formed one economic unit, engaging with economic activities.\footnote{Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), paras.81-91.} The execution of the award by Romania to these certain claimants would confer to them a selective\footnote{Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), paras.109-115.} economic advantage, not otherwise available on the market.\footnote{Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), para.96.} The compensation corresponded exactly to the privileges foreseen under the repealed EGO24 scheme from the moment it was abolished until its expiry\footnote{Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), para.95.} because the damages awarded on the rationale that “\textit{the claimant must be placed back in the position it would have been in all probability but for the international wrong.}”\footnote{Micula award, (n.6), para.917.} The existence of economic advantage is not precluded on the fact that damages were ordered due to a breach of the BIT, since the application of EU state aid law\footnote{Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), para.104.} cannot be frustrated by giving effect to obligations arising out of an intra-EU BIT. The fact that aid is granted with the execution of the award is irrelevant since aid can be given in “any form whatsoever”\footnote{Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), para.106.} though state recourses,\footnote{Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), para.116.} such as in the case of Romania. The later implemented the award through voluntarily direct payments, by setting off part of
compensation against taxes owned by one of the claimants and by transferring assets though court-ordered execution.\(^{112}\) As a result, according to the EC, the measure is undeniably imputable to Romania.\(^{113}\) Finally, the EC acknowledging that the execution of the award would confer an advantage capable of distorting competition and effecting trade between MSs, concluded that the implementation of the award was a “new aid”\(^{114}\) which has unlawfully been put into effect in violation of art. 108(3) TFEU\(^{115}\).

Arguments in favour of the existence of an exception to the general rule cannot be found only in investment arbitration. In the Joined Cases C-346/03 and C-529/03, the company concerned asked compensation by a MS which granted state aid without notifying the EC and thus, state aid had to be repaid. Advocate General Ruiz-Jarobo Colomer opined that “if an entitlement to compensation is recognized, the damage cannot be regarded as being equal to the sum of amounts to be repaid, since this would constitute an indirect grant of the aid found to be illegal and incompatible with the common market.”\(^{116}\) Violation of EU state aid law can also be established in cases where the payment is not only compensatory but it is a mechanism of indirectly granting state aid, as in ThyssenKrupp. In this case, Italy, which compensated some electricity companies due to their nationalization through implementation of an open-ended energy tariff scheme, was found to violate art.107 TFEU, since the measure was not merely compensatory but it was qualified as an operating aid.\(^{117}\) In a similar vein, the EC found that measures which do not

---

\(^{112}\) For a thorough overview see Chapter I: “Micula v Romania” award and post-award developments.


\(^{114}\) Commission Decision (EU) 2015/1470 of 30 March 2015, (n.13), paras.130-140.


exclusively aim to compensate private actors, but an operating aid was concealed, constitute illegal state aid, as in the case regarding the reunification of the city of Berlin.

Consequently, these cases portray that the existence of a legal obligation for payment does not suffice for the exclusion of imputability of a state when the measure in question indirectly grants state aid under the guise of compensation. The extent of damages awarded and the existence of a side aim other than mere compensation are crucial indicators for the determination of the compatibility of the measure with EU state aid law. Therefore, the enforcement of intra-EU investment arbitral awards constitutes illegal state aid when they indirectly grant illegal state aid instead of simply compensating the private actors.

---


119 Overcompensation is inextricably related to the compatibility of intra-EU arbitral awards with art.107 TFEU. This is illustrated in the Yukos case where the arbitral tribunal reduced the awarded damages so as to avoid over-compensation. See W. Sadowski, ‘Yukos and Contributory Fault’, Journal of Damages in International Arbitration, Vol.2, 2015.

120 The pursuit of side goals, other than compensation, does not mean per se that state aid is given. However, state aid might be granted when not compensatory goals have impact on the extent of the compensation leading to a violation of the principle of “restitution in integrum”, namely damages aim to bring the damaged individual back to the situation before the damaging event. See M. Tjepkema, (n.92), pp.485-486.
CHAPTER III. RECONCILING EUROPEAN LAW POLICY WITH INTERNATIONAL ARBITRATION LAW POLICY.

The intersection of EU law exigencies with the exigencies of investment arbitration led to a perpetual rivalry. However, it is questionable whether this rivalry will end up having a winner. Neither the ignorance of EU law by arbitral tribunals nor the dominance of EU law principles over the principles of the law of international arbitration would be considered as a victory of international arbitration law or European law respectively. Only the effective protection of the disputed parties in BIT proceedings could be considered as a victory and it cannot be achieved without treating these fields of law with equal respect.

Their harmonious co-existence would be accomplished with the correct application of EU law by arbitral tribunals in the context of BITs. The first option to secure this would be to grant arbitration panels seated in MSs the status of the court of tribunal with the meaning of art. 267 TFEU.121 The recourse to make a reference to the CJEU for a preliminary ruling when EU law issues emerged would be effective only if tribunals would accept the primacy of EU law and the exclusive right of the CJEU to interpret it.122 For the time being, the case law of the CJEU123 constitutes a hindrance and reconsideration of the ability of arbitral tribunals’ right to referral to the CJEU124 would be a first step to bridge the gap between EU law and international arbitration practice. A second option would be the institution of infringement

proceedings by the EC under art.258 TFEU against MSs which disregard the mandatory application of EU law.\textsuperscript{125} This was the case in Micula arbitration where the issuance of award misapplying the MSs’ EU law obligations led the EC to exercise a suspension injunction\textsuperscript{126} and initiate the first stage of these proceedings by sending a letter of formal notice, requesting Romania to terminate its intra-EU BIT.\textsuperscript{127} This threat of the EC, that is to take MSs to Court, may suffice to motivate tribunals to take into account EU law during arbitration proceedings. In contrast to these options, the last one requires direct intervention in the enforcement stage of an arbitral award.\textsuperscript{128} This option will be discussed in the following sections addressing the legal issues that arise in the enforcement of intra-EU ICSID and non-ICSID awards which are incompatible with EU law and in particular with competition law with the aim of reconciling the policies of EU law and law of international arbitration in this respect.

1. ENFORCEMENT OF “MICULA-TYPE” ICSID AWARDS: ICSID CONVENTION AND EU LAW IN A GAME OF THRONES.

The framework of ICSID Convention constitutes a threat of the integrity and autonomy of EU legal order with respect to the enforcement of intra-EU awards. According to art.53 and 54 of ICSID Convention, the award shall be binding on the parties, being subject only to any appeal or remedy provided for in the Convention. Moreover, each Contracting State is obliged to recognize an award as binding and to enforce its pecuniary obligations imposed as if it were a final judgment of the court of that state. The self-contained review system of the Convention requiring unconditional enforcement of the ICSID awards mirrors that not even the public policy of the forum of the Contracting State, premised on EU law principles, could


\textsuperscript{126}See n.10.

\textsuperscript{127}See n.49.

prevent their recognition and enforcement, as opposed to non-ICSID awards which are subject to NYC.\textsuperscript{129}

The reliance of Micula tribunal to these articles and its reluctance to engage with EU law and the enforceability of an intra-EU ICISD award contravening with EU state aid law led Romania to a dilemma, namely to honor ICISID Convention and comply with the award or to respect the primacy of EU law and refuse to implement it. Such a dilemma would not be existed if the tribunal would have unfolded the legal issues of the enforcement of intra-EU ICISD awards taking into consideration both EU law and ICISID Convention. The complex interplay of these competitive legal orders will be analyzed based on two factors, namely the angle from which it is examined and the “nature” of EU law. The first factor concerns the viewpoint of courts of MSs and the EC on one hand, called as European angle and on the other hand the point of view of ICISID tribunals, called as international angle. The second factor refers to the characterization of EU law as international law or \textit{sui generis} legal order and its relationship with ICISID Convention. The legal outcomes derived from the combination of these factors will be presented with a view to reconciling these legal orders, claiming each one superiority over the other.\textsuperscript{130}

\textit{1.1. EU law as international law from an international angle.}

An ICISID tribunal confronted with the enforceability of an intra-EU ICISD award will opt for the international angle, since it is not bound by EU law but by the ICISID Convention and the applicable BIT\textsuperscript{131} which are “creatures” of international law.


\textsuperscript{130}This section reflects the legal opinions of C. Tietje and C. Wackernagel, as they are expressed in C. Tietje and C. Wackernagel, ‘Enforcement of Intra-EU ICISD Awards, Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration’, \textit{The Journal of Word Investment &Trade}, Vol.16, 2015, pp.205-246.

\textsuperscript{131}C. Tietje and C. Wackernagel, (n.130), p.209.
An ICSID EU MS is bound to respect EU law and the obligations arising from art.53 and 54 of ICSID Convention simultaneously. These exclusive obligations are in conflict only if enforcement of an ICSID award leads to circumvention of EU law, such as in cases of “Micula-type” awards.\textsuperscript{132} If an ICSID tribunal regards EU law as international law, the later is governed by international law, as it is provided by art.1 VCTL. The international origination of EU law\textsuperscript{133} was affirmed in \textit{Van Gend and Loos} when the CJEU characterized EU law as “\textit{a new legal order of international law}”\textsuperscript{134} or in the words of AG Maduro in \textit{Kadi} as “\textit{a municipal legal order of transnational dimensions}”.\textsuperscript{135} It is regarded as a self-contained regime of international law,\textsuperscript{136} as an international organisation which restrains sovereignty of MSs through the principles of direct effect and primacy of EU law,\textsuperscript{137} premised on its founding treaties which are international agreements.\textsuperscript{138}

Regarding EU law as international law, its relationship with ICSID Convention, which is a multilateral international treaty between MSs and third states,\textsuperscript{139} will be

\textsuperscript{132}See section 3. EU law challenges to enforcement of investment arbitral awards: Compensation awards vis-à-vis art.107 TFEU and in particular subsection 3.2.


\textsuperscript{134}CJEU, Case 26-62, \textit{NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue AdministrationVan}, 5 February 1963, ECR 1, para.23.


\textsuperscript{138}C. Tietje and C. Wackernagel, (n.130), p.217.

\textsuperscript{139}The ICSID Convention is an international treaty where all EU MSs are ICSID members with the exception of Poland. It was entered into force in 1966, as opposed to the treaty of Lisbon which was entered into force in 2009.
governed by the conflict of rules of international agreements\textsuperscript{140} under art.30(2) and (4) VCLT.\textsuperscript{141} Although art. 30(2) VCLT provides for the subordination of the treaty which has a clause concurring priority over the other treaty, it does not impede States from stipulating a clause conferring superiority to another treaty.\textsuperscript{142} Such a clause does not exist in EU Treaties so as to grant superiority over the ICSID Convention. Nevertheless, according to Hindelang, it is argued that “by means of interpretation of the European Treaties on the basis of Article 31(3)(b) VCLT\textsuperscript{143} relating to subsequent practice in the application of the treaty, including judicial activities, which establishes the agreement of the parties regarding its interpretation – an inherent conflict rule in EU law”\textsuperscript{144} might be concluded. Relying on the principle of primacy of EU law over national law, the inapplicability of the later is inevitable in case of its incompatibility with EU law. In a similar vein, this could be applied to international treaties between MSs. Actually, this was addressed in \textit{Commission v Italy}, where it was held that “in matters governed by the EEC Treaty

\footnotesize

\textsuperscript{140}S. Hindelang, ‘Circumventing Primacy of EU Law and the CJEU’s Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration’, \textit{Legal Issues of Economic Integration}, 2012, Vol. 39, pp.185 et seq.

\textsuperscript{141}Art.30(1) VCLT: Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

Art.30(2) VCLT: When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

Art.30(3) VCLT: 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 Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

Art.30(4) VCLT: When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.


\textsuperscript{143}Art. 31(3)(b) VCLT: There shall be taken into account, together with the context: (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

\textsuperscript{144}S. Hindelang, (n.140), p.186.
(now TFEU), that Treaty takes precedence over agreements concluded between MSs before its entry into force.”\(^{145}\)

Assuming that the principle of primacy of EU law is considered as a clause claiming superiority over ICSID Convention, the later is inapplicable between MSs to the extent that it is incompatible with EU law, as art.30(2) VCLT requires. The inapplicability of ICSID Convention arises also under art.30(4) VCLT even in the case that we deduce that there is not an implicit priority clause in the Treaty of Lisbon.\(^{146}\) Consequently, ICSID tribunals would render the ICSID Convention inapplicable once it would be in conflict with EU law, since the Lisbon Treaty is *lex posterior* to the ICSID Convention.\(^{147}\)

1.2. *EU law as international law from a European angle.*

An EU MS court seized with the enforcement of an ICSID award would consider the status of ICSID Convention within the EU through EU law rules, since it is EU law that determines the status of international agreements within it.\(^{148}\) Nevertheless, the relevant rules, namely the art.351 TFEU\(^{149}\) and 216(2) TFEU,\(^{150}\) are not applicable.\(^{151}\) Put simply, although EU law is silent on the relationship of EU law with international law, art.351 TFEU constitutes a rule of conflict in order

\(^{145}\)CJEU, Case C-10/61, *Commission of European Economic Community v Italy Republic*, 27 February 1962, ECR 1, p.10.

\(^{146}\)C. Tietje and C. Wackernagel, (n.130), pp.218-219.


\(^{148}\)Opinion of AG Maduro in Case C-402/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, 16 January 2008, (n.135), para.24: “The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community”.

\(^{149}\)Art. 351 TFEU: The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

\(^{150}\)Art. 216(2) TFEU: Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

\(^{151}\)C. Tietje and C. Wackernagel, (n.130), pp.210-214.
to solve any incompatibility between the obligations arisen from pre-accession treaties of MSs and their EU law obligations in favour of the former.\footnote{N. Lavranos, ‘Protecting EU law from international law’, European Foreign Affairs Review, Vol.15, Issue 2, 2010, p.266.} However, this exception to the principle of supremacy of EU law, namely the principle of pacta sunt servanda,\footnote{P. Koutrakos, EU International Relations Law, Oxford Hart Publishing, 2006, p.301.} applies only to agreements between MSs and third states.\footnote{A. Rossas, ‘The Status in EU Law of International Agreements Concluded by EU Member States’, Fordham International Law Journal, Vol.34, Issue 5, 2011, p.1320.} Therefore, agreements concluded between MSs \textit{inter se} cannot lead to a derogation of the principle of primacy of EU law.\footnote{According to N. Lavranos, art. 351 TFEU is applicable in the Micula case since Romania’s accession to the EU was in 2007, whereas the Sweden and Romania BIT entered into force on 1st April 2003. Ergo, the applicable BIT was a treaty between an EU MS and a third state. See N. Lavranos, ‘Interference of the European Commission in the Enforcement of Arbitration Awards: The Micula case’, 2014, p. 4, available from http://www.globalinvestmentprotection.com/index.php/interference-of-the-european-commission-in-the-enforcement-of-arbitration-awards-the-micula-case/, (accessed on 17-12-2015).} As far as art.216(2) TFEU is concerned, ICSID Convention will be binding upon the EU only if a “functional succession” of the EU into the ICSID obligations of the MSs would occur. This presupposes that all MSs would be parties to the international agreement in question.\footnote{CJEU, Joined Cases C-21/72- 24/72 International Fruit Company NV and others v Produktschap voor Groenten en Fruit, ECR, 12 December 1972. In this case, the CJEU held that even though the Union had not acceded to the GATT 1947, it was bound due to the fact that all MSs had become parties to that treaty, transferring to the Union exclusive competence in matters of tariff and trade policy.} Nevertheless, this is not feasible since Poland is not a party to ICSID Convention. Apart from this, an exclusive competence of the EU is prerequisite for the functional succession, which is not the case in the context of dispute settlement.\footnote{C. Tietje and C. Wackernagel, (n.130), p.214. However, P. Ortolani argues that this precondition is fulfilled because he regards that foreign direct investment is the field in question, not the dispute settlement. Therefore, Union has acquired exclusive competence in this field. See P. Ortolani, (n.87), p.133.}

Since these rules are inapplicable, the EU MS court, confronted with the enforcement of an intra-EU ICSID award, would resort to general principles regarding the status of international agreements between MSs. In such case, the nature of EU law is crucial factor. Generally, EU courts would give effect to the primacy of EU law. However, in case that they would regard EU law as international law, international
rules of conflict will apply. Under art.30(2) and (4) VCLT, ICSID Convention which requires unconditional enforcement of awards, is applicable “only to the extent that its provisions are compatible with those of the later treaty”, namely the Lisbon Treaty. Ergo, if enforcement of ICSID awards circumvents EU law, ICSID Convention is in conflict with EU law and thus, inapplicable.\(^{158}\)

The determination of whether the enforcement of an ICSID award violates EU law and as a consequence whether there is a conflict between these legal orders is upon to courts. This kind of “review” does not override the obligation of courts not to scrutinize ICSID awards and to enforce them as if they were final judgments. Not only does not this procedure lead to any appeal or any other remedy against the award, but also it precedes to any assessment of obligations arisen from ICSID Convention,\(^{159}\) determining its applicability or not. If this reflection indeed contravenes with the intention of the drafters of ICSID Convention\(^ {160}\) who wanted to include an implied superiority clause over other subsequent treaties, the EU court seized with enforcement would be confronted with two exclusive superiority clauses, namely ICSID superiority and EU law superiority. A MS court would generally uphold the primacy of EU law, as it is already mentioned. Alternatively, an offset of these clauses would occur, leading again to the application of VCLT’s rules of conflict. Consequently, ICSID Convention would not be applicable to the extent that it is in conflict with EU law because Lisbon Treaty is \textit{lex posterior} to ICSID Convention.\(^ {161}\)

\subsection*{1.3. EU law as sui generis legal order from an international angle.}

When an ICSID tribunal has to rule upon the enforceability of an ICSID award within the EU, it might view EU law as a \textit{sui generis} legal order, as a new and

\[\begin{array}{l}
\text{158} \ C. \ Tietje \ and \ C. \ Wackernagel, \ (n.130), \ p.225.
\text{159} \ C. \ Tietje \ and \ C. \ Wackernagel, \ (n.130), \ p.225.
\text{160} \ A. \ Broches, \ ‘Awards \ Rendered \ Pursuant \ to \ the \ ICSID \ Convention: \ Binding \ Force, \ Finality, \ Recognition, \ Enforcement, \ Execution’, \ \textit{ICSID Review-Foreign Investment Law Journal}, \ Vol.2, 1987, \ p.288.
\text{161} \ C. \ Tietje \ and \ C. \ Wackernagel, \ (n.130), \ p.225.
\end{array}\]
autonomous legal order. Accepting the *sui generis* character of EU legal order, this by definition means that it is not international law. In such case, a conflict between EU law and the ICSID Convention cannot be resolved with the rules of conflict of VCT, since the later refers only to international law and internal law. Ergo, its rules of conflict can apply analogously. If EU law is similar to international law, the VCT’s rules of conflict between international treaties apply, leading to the inapplicability of ICSID Convention in case of conflict with EU law, as described above. However, the *sui generis* nature of EU law resembles better to domestic law and an analogous application of art.27 VCT would be appropriate in order to determine the relationship of these competing legal orders.

If EU law is treated as the internal law of a MS, art.27 VCT provides that EU law cannot impede the automatic enforcement of ICSID awards, since a state cannot escape from its international obligations by referring to its domestic legislation. Nevertheless, this legal outcome would lead to impossible demands because art.27 VCT would require an action on behalf of Romania to change its legal regime on EU state aid law so as to conform to its international obligation. This is not feasible because MSs cannot unilaterally change EU law in areas of competence that have been transferred to the EU and are subject to European governance. Any change of EU law would be possible only with the commencement of an amendment.

---

162 The autonomy of the EU legal order and its *sui generis* character were upheld in *Costa* decision where the CJEU evolved its previous argumentation in Van Gen and Loos. The CJEU not only dropped the characterization of EU legal order as a new order of international law but also it compared international law to Union Law arguing that ”By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own legal capacity and capacity of representation on the international plan, and more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves....[T]he law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question”, see CJEU, Case C-6/64, *Flaminio Costa v ENEL*, ECR, 15 July 1964, para.593.

163 Art.27 VCT: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

procedure according to art.48 TEU. Since, the sovereignty of MSs had been fragmented in areas where the EU legislates autonomously, such as in state aid law rules, MSs do not have the means to comply with their international obligations. Art.27 VCLT could entail legal consequences only in areas where states have still competence to exercise their public authority, which is not the case in EU state aid law. Therefore an ICSID EU MS, like Romania, cannot escape from its quagmire, namely to respect its international and European obligations without issues of international responsibility raised because of the absence of rule of conflict for sui generis legal orders. Consequently, an ICSID tribunal, confronted with the enforceability of an award which is in conflict with EU state aid law, cannot assert that ICSID Convention would be applicable in any case due to the legal implications arising of ratio legis of art.27 VCLT.\(^{166}\)

1.4. EU law as sui generis legal order from a European angle.

In cases where EU MS courts, dealing with the enforcement of intra-EU ICSID awards, have regarded EU law as a sui generis legal order, the legal situation is straightforward. The court initially has to scrutinize ICSID awards in order to discern the awards circumventing EU law from the awards conforming to EU law. As it is elaborated above, this kind of scrutiny does not violate art.53 and 54 of ICSID Convention. Once a conflict of ICSID Convention with EU law becomes a reality, such in Micula award, the court would resort to an analogous application of art.27 VCLT, since the EU law rules determining the status of international agreements within the EU are not applicable. If a MS court would treat EU law as domestic law under art.27 VCLT, the legal outcome of the conflict would not be the primacy of ICSID Convention over EU law, since art.27 VCLT cannot determine the hierarchy of these orders in areas subject to European public authority, such in state aid law. Despite the lack of a rule of conflict determining the relationship between EU law and the ICSID Convention, a MS court would not leave the legal situation unresolved. Relying


\(^{166}\)C. Tietje and C. Wackernagel, (n.130), pp.228-231.
on the *Kadi* judgment and the recent jurisprudence where the principle of the autonomy of EU legal order and the primacy of EU law over international law were strengthened, the court would generally give precedence to EU law regardless of the existence of an international rule granting superiority to international law because it is bound by EU law.\(^{169}\)

These approaches of the hierarchical relationship of ICSID Convention and EU law portray the dominating uncertainty with respect to the enforcement of intra-EU ICSID awards. How this uncertainty would be dissipated without an explicit rule of conflict?

1.5. *Moving towards to a co-ordination of these competing legal orders.*

All these legal approaches concerning the hierarchical relationship of ICSID Convention and EU law lead to a conundrum. Both legal orders should abdicate their superiority and adopt a collaborative attitude which entails respect of each legal order for the identity of the competing legal order. In other words, EU law has to honor the international obligations of MSs, claiming superiority only if the application of ICSID Convention jeopardizes the identity of EU legal order. In a similar vein, ICSID Convention has to respect the primacy of EU law in intra-EU relations, claiming primacy only if the application of EU law threatens the identity of ICSID legal order. Each legal order could triumph as long as it is factually and legally feasible. This approach of co-ordinating these rivaling legal orders is premised on ECtHR jurisprudence in *Bosphorus* and *Gasparini*. In these cases, it was held that MSs do not infringe the European Convention on Human Rights\(^ {170}\) as long the protection of

---


\(^{169}\) C. Tietje and C. Wackernagel, (n.130), pp.235-236.

\(^{170}\) Hereafter referred as ECHR.
human rights by EU law is comparable to the protection of ECHR, meaning as comparable that the afforded protection is not manifestly insufficient. Applying the ECtHR’s approach to the investment context, we could argue that the initial task of tribunals is to decide whether or not the investors are comparably protected under EU law as they are protected under a BIT, granting or not superiority to EU legal order accordingly.

The co-ordination of ICSID Convention and EU law could be also mirrored in the enforcement stage. Put simply, ICSID Convention cannot assert unconditional enforcement of ICSID awards that circumvent EU state aid law and EU law cannot assert absolute primacy of EU state aid law when principles of ICSID Convention are jeopardized. With regard to Micula-type cases, this means that only a gross and an evident violation of EU state aid law would impede the enforcement of an ICSID award. Such violation would have been established if the tribunal had granted damages to the investors without assessing whether they had legitimate expectations with respect to the continuation of a legal scheme, assailable to state aid. This would be mainly determined by the fact of whether the EC was notified or not. In addition, EU state aid law would be grossly violated if the tribunal had not taken into account it at all or it had misapplied it in the concerned dispute.

Consequently, any establishment of rule of hierarchy between these orders is meaningless and it would lead to unsatisfactory results since both legal orders are determining factors in the enforcement of intra-EU ICSID awards. As such, this approach is premised on the conception that each legal order is equal and respectable, claiming superiority over the other as a principle and not as a rule. Therefore, it would be appropriate to examine each case individually taking into consideration the core principles of each legal order that might be jeopardized by the application of the other competing legal order.


172 ECtHR, Gasparini v Italy and Belgium, App. No. 10750/03, Decision, 12 May 2009; C. Tietje and C. Wackernagel, (n.130), p. 234.

173 C. Tietje and C. Wackernagel, (n.130), pp.241-244.
2. ENFORCEMENT OF “MICULA-TYPE” NON ICSID AWARDS.

As it is already stated the self-contained regime of ICSID Convention, providing the direct enforcement of the award, does not allow its assessment from the perspective of *ordre public*. However, this is not the case for non-ICSID awards which are circulated under NYC. Assuming that Micula award is a non-ICSID award, the EU MS courts may refuse the recognition and the enforcement of such award under the public policy exception of art.V(2)(b) NYC due to *Eco Swiss* doctrine. By analysing this notion of public policy, the question of whether competition law pertains to public policy will be addressed after assessing critically the criteria posed in *Eco Swiss*. Finally, a standard of review of awards raising competition law issues will be proposed not until the current approaches of review by courts will be presented.

2.1. The notion of public policy under art.V(2)(b) exception of NYC.

Under art.V(2)(b) NYC, a court may refuse ex officio the recognition and enforcement of an intra-EU non-ICSID award if the enforcement would undermine the public policy of the state in which is sought. Although, it is a last resort defense, it is rarely accepted due to its narrow interpretation and the intention of drafters of NYC to encourage recognition and enforcement of international

---


175 P. Ortolani, (n.87), pp.128-129.


suffice to establish a violation of international public policy. An attempt for a uniform definition of this concept was made by ILA which recommended that it is consisted of “fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; rules designed to serve the essential political, social or economic interests of the State, these being known as “lois de police” or “public policy rules”; and the duty of the State to respect its obligations towards other States or international organisations.”

A further concept of public policy was developed which is narrower than international public policy of each state, called as transnational public policy or truly international public policy, having a reference point to public international law and to the principles of morality and justice, generally accepted among the civilized nations. Moreover, another kind of public policy was emerged, known as European public policy, due to harmonization of EU law, being applied to MSs. Although public policy, as a concept, encompasses the protection of the fundamental rules of law, European public policy is different to the public policy of each MS, since they serve different purposes. European public policy is to safeguard the application of EU law in arbitration whereas the public policy of each MS constrains its application,


194 A. Chong, (n.192), p.90.

as provided by art.36 TFEU, the free movement of goods. The existence of this regional public policy was established by the CJEU in Eco Swiss, where a provision of EU competition law, as part of European public policy, elevated to the status of international public policy. In particular, in Eco Swiss, the CJEU held that art.81 EC (101 TFEU) is qualified as public policy with the meaning of NYC since it is a fundamental mandatory provision, essential for the function of internal market in EU. Thus, any breach of this rule could establish a ground for refusal of recognition and enforcement of the award under art.V(2)(b) NYC. However, this ruling did not provide any guidance with respect to which provisions of EU law and specifically whether any or every rule of competition law pertains to European public policy.

---

196 Art.36 TFEU: The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

197 C. Liebscher, (n.188), pp.75-76.


200 This is a landmark decision where the CJEU addressed the relationship of competition law with arbitration. It held that the provisions of art. 81 EC, which prohibits agreements of undertaking having as their object or effect the prevention, restriction or distortion of competition within the internal market, must be treated as rules of national public policy by the courts of MSs. The EU legal order will not demand anything more of MSs with respect their public policy review of arbitral awards with competition law issues than their ordinary public policy review.


202 C. Liebscher, (n.188), p.77.
2.2. European Public policy and Competition Law.

The CJEU in *Eco Swiss* regarded art.101 TFEU not merely as a mandatory rule but it crowned it with the public policy title with the meaning of NYC without identifying the scope of public policy in this context and without providing unambiguously the criteria for determining the public policy character of EU law provision in question.\(^{203}\) This uncertainty commenced a discussion among academics with regard to which rules of EU law and of competition law have a public policy character.

More specifically, Mustill and Boyd\(^{204}\) stated that “*it appears that any point of EEC law which is in the realm of public policy or ordre public may be raised by way of defence to proceedings to enforce the award*”. Berger asserted that with regard to EU competition law rules that “*there is a domestic ordre public with community law origin which may become relevant in setting aside any enforcement proceedings*”.\(^{205}\) Baumert\(^{206}\) and Raeschke-Kessler\(^{207}\) claimed that “*all mandatory rules of European law are part of European public policy*” while Geimer and Schütze\(^{208}\) and Martiny\(^{209}\) held that in the context of enforcement of foreign judgments, “*it is not clear which European rules pertain to public policy*”. The French Court de Cassation held that “*only certain rules of European law pertain to international public policy*”.

---

\(^{203}\) N. Shelkoplyas, (n.181), pp.582, 584.


and are to be taken into account when granting or refusing exequatur”.

Guliano and Lagarde stated with respect to the public policy provision in Article 16 Rome Convention that “it goes without saying that this expression includes Community public policy, which has become an integral part of the public policy of the MSs of the European Community”. Idot held that some rules of European law may be qualified as international public policy, whereas Schlosser moved a step further providing examples of European public policy, such as “art. 81 ECT and 82 ECT (now art. 101 and art. 102 TFEU), the five freedoms (transnational trade, services, establishment, movement of capital, movement of workers); all provisions of the EC Treaty against discrimination based on nationality or gender; and the compensation of the agent according to Article 19 of the Directive 86/653/EEC on commercial agents.”

Stanič mentioned that the Electrabel tribunal held that “state aid is a mandatory provision of EU law and a provision of international public policy,” Ortolani sustained “that article 107 TFEU...constitutes one of the core principles of EU competition law and forms EU public policy” and finally Tietje and Wackernagel said that “Eco Swiss

---


213 Art.82 ECT (102 TFEU): Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.


215 A. Stanič, (n.63), p.46.

216 P. Ortolani, (n.87), p.129.
Consequently, the only safe conclusion that it could be drawn for the time being is that not every rule of European law has a public policy character. In order to assess which rules of EU law pertain to public policy, any reliance on the arguments posed by the CJEU in *Eco Swiss* for the justification of the public policy character of a rule of competition law would be full of pitfalls. The CJEU, citing art.3(1)(g) EC of Treaty, held that art.85 of the Treaty (101 TFEU) is fundamental because of its importance for the accomplishment of the Community's goals and the functioning of the internal market. However, it based this argument in connection with art.85(2) EC of Treaty, stressing that the fundamental nature of the rule in consideration derives from the provision sanctioning nullity. These arguments, nevertheless, are not sufficiently persuasive. Put simply, art.3 EC of Treaty enumerates merely the instruments to accomplish Community objectives, as they set out in art.2 EC of Treaty. Reliance to that article would be more appropriate

---


218 C. Liebscher, (n.188), p.77.

219 Article 3 EC Treaty (see now articles 3,4,5 6 TFEU): For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: (g) a system ensuring that competition in the internal market is not distorted.

220 In order to avoid confusion, I will use the numbering of articles that the CJEU mentioned in *Eco Swiss*.

221 Art. 85(2) EC of Treaty: Any agreements or decisions prohibited pursuant to this Article shall be automatically void.


225 Art.2 ECT: The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.
since it reflects the underlying principles of public policy of the Union. Otherwise, a reference to art.3 EC of Treaty as a measuring stick to characterize rules as European public policy would mean that all EU law rules pertain to European public policy, which is not in line with the general principle that refusal of enforcement “should be possible only in exceptional circumstances”. The fact that the importance of the provision is illustrated by the sanction of nullity is not convincing, since it would imply that rules lacking nullity would not be important, which is not a convincing conclusion. Therefore, the nullity provision alone is not a sufficient criterion so as to characterize whether which rules of competition law are qualified as European public policy. The CJEU neither mentioned the direct effect of this provision nor the uniform application and consequently supremacy of the EU law rule in question as criteria to establish the public policy character of the rule. The CJEU emphasized the fundamental nature of art.85(1) EC of Treaty. Thus, the fundamental nature of a rule is the criterion which differentiates mandatory rules pertaining to European public policy from those which are not.

It is already held that art.101 and 102 TFEU are fundamental rules, being qualified as international public policy, whereas art.107 TFEU has not explicitly

---

226 N. Shelkoplyas, (n.181), p.581
227 C. Liebscher, (n.188), p.81.
229 C. Liebscher, (n.188), p.81.
230 C. Liebscher, (n.188), pp.79-81.
231 C. Liebscher, (n.188), p.82.
been characterized as public policy by the CJEU for the time being. Although it is for the CJEU to answer whether state aid rules are so fundamental for the accomplishment of the tasks entrusted to the Union in the context of the internal market and under which conditions could have public policy character, in my opinion state aid provisions could be qualified as public policy on equal terms with the above mentioned provisions. As art.101 and art.102 TFEU had elevated the status of public policy, there is no reason to treat differently art.107 TFEU. Having an insight into the purpose of these articles, we could conclude that they serve the same ultimate aim, namely the protection of a single internal market within EU and the creation of a level playing field on which undertakings could compete each other equally. In other words, art.101 and art.102 TFEU safeguard the maintenance of a single internal market by preventing the distortion of competition through prohibition of anticompetitive agreements between undertakings and abusive business conduct of a dominant undertaking in a given market within the EU. In a similar vein, state aid rules prohibit MSs for granting aid to undertakings that could confer to them a comparable advantage vis-à-vis their competitors, ensuring the competitiveness among undertakings within the internal market. Therefore, since market fragmentation and distortion of competition are deterred due to the existence of art.101, 102 and 107 TFEU, it would be reasonable to hold that state aid rules could be qualified as public policy with the meaning of NYC.

In any case, it would be wise for courts not to be blinkered, taking the public policy exception of NYC as a blanket rule for the rules of competition law. In other words, courts should review each award with competition law issues on a case-by-case basis since the CJEU have not yet employed a list of public policy provisions.

---


2.3. The extent of the court review of awards with competition law issues.

Having as starting point that EU competition law is part of European public policy, the EU MS courts have to review awards with competition law issues in order to ascertain if the alleged violation of competition law constitutes an infringement of public policy and hence a ground for refusal of recognition and enforcement of the award. While the orthodox view, known as minimalist approach, is that awards should not be subject to any review on the merits by courts in the enforcement stage, a more interventionist approach was presented, known as maximalist approach, dictating an in depth-review of the award so as to enforce the competition law effectively.235

The minimalist approach, premised on the second look doctrine which is established in Mitsubishi,236 contends that the role of reviewing court is limited to affirm that arbitrators have addressed the emerging competition law issues in a competent manner without examining thoroughly the facts and the legal issues of the award. This approach is consistent with the arbitrability of competition law, respecting not only arbitration as dispute settlement mechanism but also the finality of awards. It is argued that even a restrained review is capable of identifying serious and hence unquestionable breaches of competition law, since competition policy is not threatened if competition law is applied in a manner dubious.237 The avoidance of an intrusive scrutiny of the award is reflected in Eco Swiss which held that “review of arbitration awards should be limited”238 and afterwards in Thalès v Euromissible239 which held that only a “flagrant, effective and concrete” violation could impede the recognition and enforcement of an award involving competition law issues. The later approach was confirmed in SNF v. Cytec which was not in favour

238Case C-126/97, Eco Swiss China Time Ltd v. Benetton International NV, (n.123), para.35.
of reviewing the merits.\textsuperscript{240} Despite the general acceptance of this standard of review as the most appropriate, it was criticized on the ground that it diminishes the role of reviewing court.\textsuperscript{241}

Opponents of the maximalist approach assert that a restrained review is capable of setting arbitration as a tool for circumventing competition law. An in-depth review of the award derives from the public policy nature of competition law with a view to ensuring that arbitrators have correctly applied competition law. This extreme version of second look doctrine was endorsed in the Belgian Tribunal of First Instance in \textit{SNF v. Cytec} during the annulment proceedings, in which the reasoning of arbitrators was reviewed in order to detect potential violations of public policy.\textsuperscript{242} In a similar vein, the Court of Appeal of Hague in \textit{Marketing Displays} refused to enforce the award because of the mistaken application of competition law by arbitrators.\textsuperscript{243} The maximalist standpoint was criticized on the idea that not every violation or non compliance with mandatory law, as competition law, could be qualified as breach of international public policy. Since only serious breaches of competition law could justify an infringement of public policy, an in-depth review of the merits of an award is superfluous.\textsuperscript{244} With respect to the belief of maximalists to apply correctly competition law, it seems not reasonable to believe that in sophisticated cases with competition law implications the court would always consider a more “correct” application of competition law than those of arbitrators, especially when an economic analysis of facts is to be taken into account.\textsuperscript{245} Apart from this, the losing party in arbitration could use an allegation of violation of competition law under the guise of correct application of competition law as a


\textsuperscript{241}L. G. Radicati di Brozolo, (n.233), p.769.


\textsuperscript{244}L. G. Radicati di Brozolo, (n.233), p.764.

\textsuperscript{245}L. G. Radicati di Brozolo, (n.233), p.764.
method for dilatory tactics which could endanger one of the core principles of arbitration, namely the finality of awards.\textsuperscript{246}

Therefore, having as benchmark the effective enforcement of competition law and the safeguard of the finality of awards, a standard of review of awards by court could be proposed so as to balance these competing policies.

2.4. An appropriate standard of review: Moving towards to a reconciliation of competition law and law of international arbitration demands.

A standard of review of award with competition law implications under the public policy perspective, could reconcile competition law and law of international arbitration demands, once two issues would be addressed, namely which types of violations of competition law constitute infringement of international public policy and which level of scrutiny should the courts apply so as to ascertain these violations.

With regard to the first issue, a reviewing court should be aware of the fact that not any allegation of violation of competition law could justify infringement of international public policy. Thus, erroneous or non application of competition law could not constitute breach of public policy. Only serious, concrete and effective violations of competition law threatening the goals of competition policy at hand, could be capable of refusing the enforcement of an award. Moreover, an intentional ignorance of competition law could be a public policy ground for refusal of enforcement of an award. In practice, a reviewing court should take into consideration that hard-core violations of competition law under art. 101 TFEU, such as market sharing, price fixing, or information sharing in a horizontal agreement, could breach EU public policy rather than a vertical restriction. In a similar vein, blatant abuses of dominant position under art.102 TFEU and conspicuous violations of state aid rules under art.107(1) TFEU could raise public policy issues.\textsuperscript{247}

\textsuperscript{246} L. G. Radicati di Brozolo, (n.233), p.764.

\textsuperscript{247} L. G. Radicati di Brozolo, (n.233), pp.774-776.
As far as state aid law is concerned, art. V(2)(b) NYC should be activated only in cases where the measure in question has been declared incompatible by the EC under art.108 TFEU. Hence, if the EC remains silent with respect to a state aid measure, a violation of art.107 TFEU might exist, but it may not be so manifest so as to breach the public policy. Therefore, the Micula award re-installing indirectly, through compensation, illegal state aid, violates EU public policy and consequently international public policy since it has been declared incompatible with internal market by the EC. However, we should mention that awards ordering damages for foregoing actions do not contravene with public policy once the anticompetitive behavior has ended, which is not the case in Micula.248

With respect to the scrutiny of awards, the court should abstain from reviewing the merits, since a reconsideration of the dispute not only contravenes with the finality of awards but also provides easily a second opportunity for the losing party to overturn the outcome of the dispute. The court should verify through restrained review on the award and its reasoning that arbitrators have addressed competition law matters in due diligence, avoiding to ascertain if arbitrators’ conclusions are correct or not. The reasoning of award usually reveals the underlying legal and factual problems and the grounds on which arbitrators relied on their decision for competition law matters. Hence, a perusal of the reasoning of an award may portray if the tribunal allowed the continuation of an anticompetitive behaviour or wrongfully pardoned actions incompatible with competition policy. However, in exceptional circumstances, the court could review beyond the reasoning of award so as to evaluate if the enforcement of the award entails a violation of public policy. This would be appropriate for awards lacking exhaustive reasoning, in situations that competition law concerns have not been raised in arbitration proceedings or when the award itself appears legitimate on competition law perspective but there are indications of a concealing illegal transaction. In any case, courts should bear in mind that a full-fledged review on the merits is unacceptable.249

248P. Ortolani, (n.87), pp.129-130.
Consequently, the reconciliation of competition law demands with the demands of the law of international arbitration depends on the wisdom of the courts to follow a restrained review of awards with competition law issues without abnegating their authority to safeguard public policy.
CONCLUSION REMARKS

The issuance of the Micula award, an award rendered under ICSID Convention, mandating indirectly, through compensatory damages, the re-installment of an illegal state aid opened the Bandora’s box concerning the EU law challenges in investor-state arbitration. The intersection of EU law and investment arbitration was intensified after EU enlargement with the accession of countries of Central and Eastern Europe to the EU. The existing BITs, having been transformed to intra-EU BITs, are under the threat of termination since, according to the EC, not only the protection afforded by the BITs is comparable to the protection provided by EU law in the context of single market and cross-border investments, but also they are incompatible with EU law.

Several arguments by the EC and respondent states against the validity and the applicability of intra-EU BITs in investor-state arbitrations were stated on the grounds of unequal treatment of investors among MSs with respect to the privileged protection of investors under BITs and their right to enforce it in an additional forum, namely before an arbitral tribunal. Apart from these, it is argued that the jurisdictional monopoly of the CJEU in Union matters under art.344 TFEU is jeopardized due to the ineligibility of arbitral tribunals to submit a reference for a preliminary ruling to the CJEU under art.267 TFEU. However, investment tribunals uphold the validity and applicability of intra-EU BITs since the arguments raised by the EC through amicus curiae briefs are not convincing. With regard to EU law challenges on the merits, EU law had been used as a defense mechanism by states for breaches of investors’ legitimate expectations. Nevertheless, investment tribunals have the tendency to ignore or misapply EU law on the merits ruling usually in favour of investors. This parochial stance towards the EU law implications in investment disputes constitutes a hindrance to the contribution of justice since a reasoning of an award detached from the EU law as applicable law and as a factual background endangers the enforceability of award within EU. This was the case in Micula arbitration where compliance with such award would contravene with EU state aid law.
In general, compliance with intra-EU investment arbitral awards does not constitute a breach of EU state aid law. A measure could be qualified as illegal state aid, once it is imputable to the MS, provided that the other preconditions of art.107(1) are fulfilled. Hence, imputability is ruled out when a MS is merely complying with a legal obligation since the element of “voluntariness” does not exist in granting an economic benefit to an undertaking. The doctrine of imputability could be applied in investment arbitration, concluding that compliance with an award ordering compensation does not constitute illegal state aid. By way of exception to the general rule, compliance with an award ordering compensatory damages for a revoked illegal state aid breaches art.107 TFEU, since the compensation indirectly re-introduces the aid, namely the economic advantage that the investor legitimately expected under the applicable BIT. This was the case in Micula arbitration and thus, compliance with such award placed Romania in a dilemma, that is, to comply with an ICSID award and violate EU state aid law or to respect EU law defying the ICSID Convention which provides direct enforcement of the award without any further scrutiny. Although Romania chose to honor its international obligations by complying with the award, we cannot ignore that it is liable for paying illegal state aid in violation of art.107(1) TFEU.

This quagmire could be avoided by allowing EU MS courts to scrutinize ICSID awards so as to identify the troublesome Micula-type cases. Such scrutiny does not violate art.53 and 54 of ICSID Convention because this question is anterior to the obligations arising from ICSID Convention. We have examined the relationship of EU law and ICSID Convention by the perspective of an EU MS court and a tribunal taking into account EU law as international law and as sui generis legal order. However, an EU MS court would certainly view EU law as sui generis legal order, following the CJEU jurisprudence and it would give primacy to EU law. Such an approach, namely to consciously ignore international obligations of states is unacceptable. An alternative approach, premised on ECtHR jurisprudence, would be a co-ordination of these legal orders on equal terms. Each legal order would claim superiority over the other, if it is legally and factually feasible. This would entail that only an obviously flagrant violation of art.107(1) TFEU would justify non-enforcement of an ICSID award.
With respect to non-ISCID awards, a circulation under the NYC on the prism of public policy perspective is inevitable. We have argued that public policy with the meaning of NYC is international public policy, which is a concept narrower than domestic policy. Due to *Eco Swiss* doctrine, a further concept was developed, that is European public policy, allowing courts to refuse the enforcement of an award that contravenes with EU competition law. Based on the criteria of *Eco Swiss*, we have concluded that not all EU law rules, but only the fundamental ones, comprise European public policy. Since the CJEU have not provided such exhaustive list of these rules, a court confronted with the enforcement of an award that violates EU law and in particular EU competition law, should adopt a restrictive interpretation of European public policy, assessing the fundamentality of the rule in consideration. Moreover, being aware of the fact that not every violation of competition law constitutes breach of European public policy, the court, through restrained review, would assess whether arbitrators dealt with competition law issues in due diligence and whether the enforcement of the award constitutes a serious and gross violation of competition law, capable of jeopardizing the public policy of the state where the enforcement is sought.

Consequently, it is apparent that neither EU law nor the law of international arbitration is victor in the battle of the enforcement of intra-EU arbitral awards. The equal treatment of these legal orders and the reconciliation of EU law demands with the demands of the law of international arbitration would portray, through their uniqueness and the necessity of their existence, a new path detached from traditional legal rationalities.
BIBLIOGRAPHY

Legislation

- Convention on the Settlement of Investment Disputes between States and Nationals of Other States, (ICSID Convention).
- Treaty on the European Union.
- Treaty on the Function of European Union.

Case Law

- Binder v. Czech Republic, UNCITRAL, Award on Jurisdiction, 6 June 2007.
- Case 482/99, France v Commission (Stardust Marine), 16 May 2002.


- CJEU, Case C-10/61, Commission of European Economic Community v Italy Republic, 27 February 1962, ECR 1.


- CJEU, Case C-308/06, Intertanko and Others, ECR I-4057, 3 June 2008.

- CJEU, Case C-459/03, Commission v Ireland (MOX plant), 30 May 2006, ECR I 4635.

- CJEU, Case C-491/01, British American Tobacco, 10 December 2002, ECR I 11453.

- CJEU, Case C-6/64, Flaminio Costa v ENEL, ECR, 15 July 1964.


- CJEU, Case T-351/02, Deutsche Bahn AG v Commission, 5 April 2006, ECR-II 1047.


- *Eureko B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (later known as *Achmea B.V. v. The Slovak Republic*).

- *Eureko v Czech Republic*, PCA, Case No.2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.


- ICSID Case No ARB/05/20, Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRI, SC Multipack SRL v Romania, Decision on Jurisdiction and Admissibility, 24 September 2008.

- Ioan Micula et al. v Government of Romania, No. 15 MISC. 107, 2015 U.S. Dist. LEXIS 102907, 5 August 2015.


- Joined cases C-295-298/04, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA (C-295/04), Antonio Cannito v Fondiaaria Sai SpA (C-296/04) and Nicolò Tricaric (C-297/04) and Pasqualina Murgolo (C-298/04) v Assitalia SpA, Judgement of the Court, 13 July 2006, ECR I-6619.

- Joined cases C-448/10 P to C-450/10 P, ThyssenKrupp Acciai Speciali Terni SpA (C-448/10 P), Cementir Italia Srl (C-449/10 P) and Nuova Terni Industrie Chimiche SpA (C-450/10 P) v European Commission, 6 October 2011, ECR I-147.


- Opinion of AG Maduro, joined Cases C-222/05 to C-225/05, J. Van der Werd and others, 2007, ECR I-4233.

Books


- Diederik de Groot, T., ‘Chapter 16: The Ex Officio Application of European Competition Law by Arbitrators’ in G. Blanke and P. Landolt (eds.), *EU and US


**Articles**


• Billiet, P., “‘Arbitrators” means to ensure compliance with competition law and limits of court review on awards in Europe’, *Arbitration*, 2010, pp.86-97.


*Other sources*


• International Law Association on International Commercial Arbitration (ILA), New Delhi Conference, Committee on International Commercial Arbitration,

