Small tensions: EU state aid and international investment law

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I. Introduction

EU state aid law and international investment law seem to be inextricably contradictory, as recent practice suggests. EU state aid legislation does not regulate how it intends to deal with international investment protection issues – and vice versa. In bilateral investment protection treaties, the treatment of state aid in the broader sense is not regulated at all, inconsistently or even partially contradictorily. Therefore, potential conflicts seem to be unavoidable. There are substantive conflicts of judgements as well as procedural head-on collisions. In that process, a frequently raised question is whether European commercial law is being upset by international law – or the other way around. The following short contribution does not intend to present clear resolutions of the conflicts but wants to highlight the problems and areas of tension currently in existence.

Several constellations are conceivable, in which EU state aid law and international investment law can come together and lead to a certain tension. The two most relevant areas to date appear to be the recovery of aid and the objection in investment proceedings that that does, in fact, constitute (formally and/or materially) unlawful state

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aid, as well as the investor-state arbitration proceedings because of cuts by states in long-term aid programs. The basic constellations from state aid perspective are that, on the one hand, an entrepreneur receives state aid in breach of European law due to failure to register, which is accordingly being recovered, and, on the other hand, that state aid is reduced *ex post*, given it pertains an originally long-term program and not just a one-off payment. These constellations are to be outlined as the starting point for further discussion, but of course, other areas of conflict that are not yet foreseeable today are conceivable.

Both of these current major constellations are of enormous economic importance, both for national budgets and for investing companies. It is not about *de minimis* problems but usually amounts from two to three-digit millions are involved. In addition, these are by no means individual cases, but in particular, the subsequent reduction of long-term programs concern a large number of investors who were favored in the past and large Member States – possibly also Germany in the future, if it decides to reduce feed-in tariffs in the nationwide switch to renewable energy.

II. Recovery of unlawful state aid – Micula, AES, EDF, Electrabel

The often-discussed situation here is when state aid is recovered, and such recovery is then challenged before an investment arbitration tribunal. This recovery of unlawful aid is discussed[1] in the context of the *Micula* case.[2] Similar constellations were already assessed in the *AES* case,[3] *EDF* case[4] and *Electrabel* case.[5]

In the '*Micula*-saga', an investment arbitration tribunal ordered Romania to pay damages[6] for having reclaimed state aid after it joined the EU and upon the EU Commission calling on the state authorities to recover that aid.[7] The investor and, at the same time, the original beneficiaries sought a declaration of enforceability of the award

1 ICSID, case No. ARB/05/20, *Micula v. Romania (I)*, Decision on Jurisdiction and Admissibility of 24 September 2008, Award of 11 December 2013. Still pending is the procedure in ICSID, case No. ARB/14/29, *Micula v. Romania (II)*.

2 *Ortolani*, Intra-EU Arbitral Awards vis-à-vis Article 107 TFEU: State Aid Law as a Limit to Compliance, Journal of International Dispute Settlement 6/2015, pp. 118 ff.; *Matei*, SA. 38517 – Commission Decision of 30 March 2015 on State Aid Granted by Romania to Micula, EStAL 1, 2016, pp. 134 ff.; *Rovetta/Gambardella*, Intra-EU BITs and EU Law: What to Learn from the Micula Battle, GTCJ 10/2015, pp. 19 ff.; *Tietje/Wackernagel*, Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the Micula Arbitration, JWIT 16/2015, pp. 205 ff.; *Tietje/Wackernagel*, Outlawing Compliance? – The Enforcement of intra-EU Investment Awards and EU State Aid Law, Policy Paper on Transnational Economic Law No. 41/2014.

3 ICSID, case No. ARB/07/22, *AES and others v. Hungary (II)*, Award of 23 September 2010.

4 UNCITRAL Arbitration, *EDF v. Hungary*, Award of 3 December 2014, (not publicly available).

5 ICSID, case No. ARB/07/19, *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liablity of 30 November 2012; Award of 25 November 2015.

6 ICSID, *Micula v. Romania (I)*, (fn. 1), para. 872.

7 Ibid., paras 234 f.

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in Romania and other countries.[8] The Romanian courts declared the award enforceable on the basis of the ICSID Convention,[9] with which the state of Romania did not agree. The Commission took the view that the declaration of enforceability of the award should be rejected since the execution of the damages payment would result in unlawful state aid, the recovery of which would be required by European law.[10] It appears that the Commission also expected companies from states that are in the accession process or companies that intend to invest in such countries to inform themselves fully about possible future unlawfulness of aid following EU accession.[11]

1. Fulfillment of an arbitral award as a violation of the EU state aid regime

This raises the question, first of all, of whether an arbitral award, or more precisely the payment of compensation on the basis of an arbitral award, can in principle constitute state aid. The consequence would be that all arbitration decisions against EU Member States would have to be notified to the Commission in accordance with Art. 108(3) TFEU. The Commission has accordingly stated that *'[t]he payment of the compensation awarded by the arbitral tribunal established under the auspices of the International Center for Settlement of Investment Disputes (ICSID) by award of 11 December 2013 in Case No ARB/05/20 Micula a.o. v Romania to the single economic unit comprising Viorel Micula, Ioan Micula, S.C. European Food SA, S.C. Starmill S.R.L., S.C. Multipack, European Drinks SA, Rieni Drinks SA, Scandic Distilleries SA, Transilvania General Import-Export S.R.L., and West Leasing S.R.L constitutes State aid within the meaning of Article 107(1) of the Treaty which is incompatible with the internal market.'*[12]

However, considering the case law of the European Court of Justice, the classification of an arbitral award as state aid should be rejected, as the payment of the damages cannot be attributed to the losing state.[13] It is not the free decision of the Member State whether the compensation is paid, but the decision of the arbitral tribunal. Therefore, any payment resulting from an award is not one from the Member State but stems from the arbitral tribunal that requires to compensate.[14] However, if there is no voluntariness of the EU Member State concerned and therefore no imputability

8 See, for instance, the decision of the *US District of Columbia*, Civil Action No. 17-CV-2332, 11/06/2011 and the unsuccessful request for the revocation of enforceability in the United Kingdom by Romania, UK High Court, case No. CL-2014-000251, 20/01/2017.

9 Compare with Investment Arbitration Reporter, As Romania Seeks Annulment of $250 Million Award at ICSID, Enforceability Questions Loom, 22 April 2014.

10 *European Commission*, Decision (EU) 2015/1470 of the Commission of 30 March 2015, OJ L 232 of 04/09/2015, pp. 43 ff., Consideration 79 ff.

11 See thereto *Blanchard*, What Can a Foreign Investor in a Future EU Member State Legitimately Expect?: Negotiating Legal Certainty and Regulatory Flexibility During EU Accession, MPILux Working Paper 4/2014, pp. 11 ff.

12 *European Commission*, (fn. 10), pp. 43 ff., Art. 1.

13 Fundamental to the criterion of imputability, CJEU, case C-61/79, *Denkavit*, ECLI:EU:C:1980:100, para. 31; CJEU, case C-482/99, *Stardust Marine*, ECLI:EU:C:2002:294, para. 51.

14 *Makrygianni*, EU State Aid Law and the Enforcement of intra-EU investment arbitral awards, 2016, p. 18; *Ortolani*, (fn. 2), pp. 122-123.

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to it, the ECJ also points out that no aid exists as long as the beneficiary has a claim under the applicable law.[15] Indeed, '*for advantages to be capable of being categorised as aid within the meaning of Article 87(1) EC, they must, inter alia, be imputable to the State […]. That is not the case here. [The national law] implements [a Directive]. The Court of Justice has held that the latter provision imposes on Member States a clear and precise obligation […]. In transposing the exemption into national law, Member States are only implementing Community provisions in accordance with their obligations stemming from the Treaty. Therefore, the provision at issue is not imputable to the German State, but in actual fact stems from an act of the Community legislature.*'[16] The Commission also stated in the *ThyssenKrupp* case that '*[c]ompensation granted by the State for an expropriation of assets does not normally qualify as State aid.*'[17] In principle, the above case law can be transferred to investment protection law, if one recognizes the comparability of the international arbitration tribunals and national courts within the meaning of the ECJ case law.[18] The payment then takes place within the framework of the internationally agreed satisfaction of an international arbitral award.

It can also be argued that there is a lack of benefit or economic advantage required for state aid. The payment is made specifically for a damage suffered or an infringement and so-called treble damages or similar forms of punitive damages in excess of the extent of damage suffered are not covered by investment protection law. '*It follows that State aid, that is to say measures of the public authorities favouring certain undertakings or certain products, is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals. […] [D]amages which the national authorities may be ordered to pay to individuals in compensation for damage they have caused to those individuals do not constitute aid within the meaning of Articles 92 and 93 of the EEC Treaty.*'[19] If this case law is considered to be transferable to the present constellation, compensation payments from states to investors following lost arbitration proceedings do in principle not constitute state aid within the meaning of Art. 107 TFEU, which would require a notification. Nevertheless, it is argued, particularly with reference to the *Lucchini* case law of the ECJ,[20] that there could be an exception from this, if the arbitration decision could be used to circumvent the (EU) state aid rules; this could particularly be the case when the investor received damages based on the recovery of state aid, in the amount of the

15 GC, case T-351/02, *Deutsche Bahn/Commission*, ECLI:EU:T:2006:104, paras 101-102.
16 Ibid.
17 *European Commission*, Decision of the Commission of 20 November 2007, OJ L 144 of 04/06/2008, p. 37, para. 70.
18 *Makrygianni*, (fn. 14), pp. 18 ff.; *Ortolani*, (fn. 2), pp. 122 ff.; *Tietje/Wackernagel*, Enforcement, (fn. 2), pp. 221-222; *Tietje/Wackernagel*, Outlawing, (fn. 2), pp. 3 ff. Critical, to the contrary, *Kende*, Arbitral Awards Classified as State Aid under European Union Law, ELTE Law Journal 2015, p. 43.
19 CJEU, joined cases C-106 to C-120/87, *Asteris and others*, ECLI:EU:C:1988:457, paras 23-24.
20 CJEU, case C-119/05, *Lucchini*, ECLI:EU:C:2007:434.

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originally granted unlawful state aid.[21] Otherwise, the prohibition of aid codified in Art. 107(1) TFEU could easily be repealed, since the implementation of the arbitral award would otherwise prevent the application of EU law.[22] However, the ECJ still does not clarify the transferability of the cited case law to investment protection law, as it did not assess European conformity with the state aid regulations of Arts 107 and 108 in its often-discussed *Achmea* decision.[23]

2. Possible solutions in the context of enforcement

Accordingly, while the Member States concerned may be required under European law not to comply with the arbitration rulings, the question arises as to whether and how a dissolution of the tension can take place, even in case of forced enforcement by the investor.

In this context, however, a differentiation must first be made between an ICSID award or any other arbitral award. For ICSID awards, enforcement is governed by Arts 53 and 54 of the ICSID Convention;[24] domestic review of the arbitral award is not explicitly provided for here. However, if an arbitral decision made under the SCC or UNCITRAL Rules of Arbitration, for instance, is enforced according to the 1958 New York Convention (NYC), a review of possible public policy breaches under Art. 5 may follow. In this sense, it could be argued that an infringement of EU state aid law, for instance, when it would be 'circumvented' by an arbitral award, constitutes an *ordre public* infringement. State aid law, in particular the prohibition of state aid under Art. 107(1) TFEU, has, according to the case law of the ECJ,[25] to be included in this public policy ground because of its indispensability for the functioning of the internal market.

Another problem is the review of arbitral decisions and their enforcement. Arbitral awards, even when made on the basis of investment protection treaties of the EU Member States, can be enforced worldwide under the ICSID Convention as well as the NYC.[26] Enforcement in the EU may not be possible because of conflicting Euro-

21 *Makrygianni*, (fn. 14), pp. 21 ff.; *Ortolani*, (fn. 2), pp. 125 ff.; *Tietje/Wackernagel*, (fn. 2), pp. 222 ff.; *Tietje/Wackernagel*, (fn. 2), 2014, pp. 7 ff.

22 CJEU, case C-119/05, *Lucchini*, ECLI:EU:C:2007:434, para. 59.

23 CJEU, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, paras 31 ff.

24 Art. 53 ICSID Convention: '*(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention. […]*'
Art. 54 ICSID Convention: '*(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. […]*'.

25 CJEU, case C-126/97, *EcoSwiss*, ECLI:EU:C:1999:269, paras 36 ff.

26 *Ding*, Enforcement in International Investment and Trade Law: History, Assessment, and Proposed Solutions, Georgetown Journal of International Law 47/2016, pp. 1142 ff.; *Cho*, Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions, New York University Journal of International Law and Politics 28/1995-96, pp. 175 ff.

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pean law under the NYC (*ordre public* reservation). With regard to such a public policy exception, it could be argued that, as previously stated, enforcement in case of an infringement of European law is precluded, when unlawful state aid factually stays in place, or also possibly when the jurisdiction of the arbitral tribunal per se is doubted in an intra-EU procedure in the sense of the *Achmea* judgement.[27] In the context of enforcement under the ICSID Convention, under European law, public authorities may also be prevented from participating in the enforcement process. When enforced in third countries outside the EU, enforcement according to the NYC could possibly be refused on the grounds of international *Courtoisie*; in any case, enforcement under the ICSID Convention then seems to be promising. So, in case of a so-called ICSID arbitration and enforcement according to the ICSID Convention, a corresponding objection of European illegality in the national enforcement proceedings in non-EU countries does not hold up.

III. Subsequent reduction of Feed-In Tariffs

The subsequent limitation or withdrawal of feed-in tariffs that were promised in the past is currently the most controversial and, from an investment law perspective, the practically most relevant issue on the intersection between state aid and investment law. Investor-state arbitration is pending or already decided in proceedings against several Member States of the EU due to changes in their framework conditions for investments to promote the development of renewable energies. Here, in particular, the tension between the much-discussed right to regulate sovereign states and the protection interests of private investors becomes very clear.

In 2010, Spain started to reduce its subsidies for solar energy drastically due to financial problems in the wake of the financial crisis, which meant significant losses for many investors. From 2013 onwards, only photovoltaic plants were promoted which had a certain profitability and which calculated feed-in tariffs based on a model plant, which, however, varied widely from the actual plants and their amortization periods.[28] Many operators were unable to meet the specifications or, due to the calculation methods, could no longer run their plants profitably.[29] A large number of investors who were affected by this procedure therefore initiated arbitration proceedings against Spain, in particular under the Energy Charter Treaty; currently, 40 pro-

27 CJEU, *Achmea*, (fn. 23), paras 31 ff.

28 *Restrepo*, Modification of Renewable Energy Support Schemes Under the Energy Charter Treaty: Eiser and Charanne in the Context of Climate Change, GJIL 8/2017, pp. 106 ff. In detail about the Spanish legal framework, *García-Castrillón*, Spain and Investment Arbitration: The Renewable Energy Exposion, CIGI Investor-State Arbitration Series No. 17, 2016, pp. 3 ff.

29 See, for instance, SCC, case No. 063/2015, *Novenergia II v. Spain*, Award of 15 February 2018, paras 78 ff.; ICSID, case No. ARB/14/1, *Masdar v. Spain*, Award of 16 May 2018, paras 81 ff.; ICSID, case No. ARB/13/31, *Antin v. Spain*, Award of 15 June 2018, paras 69 ff.

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ceedings are known,[30] some of which are governed by the ICSID rules and some by the UNCITRAL or the SCC rules. Spain ranks third among the countries most frequently sued – only against Colombia and India there are even more procedures running.

A first 'Spain decision' was taken in January 2016 by an arbitral tribunal operating under the SCC Rules of Procedure. In the case of *Charanne/Construction Investments*, a Dutch company domiciled in Luxembourg sued Spain. The arbitral tribunal dismissed the claim and stated that changes in the subsidy scheme are permissible, as long as they do not result in disproportionate discrimination against the investors. That is only the case if the basic provisions of the original subsidy regime are abolished. Accordingly, the 2010 changes were not so serious, as they merely modified existing regulations such as the guaranteed feed-in tariff.[31] However, in the dissenting opinion, Professor *Guido Santiago Tawil* also considered the measures taken by Spain in 2010 as a violation of the FET standard.[32] A similar outcome to the tribunal in *Charanne* was reached a few months later by an arbitral tribunal in the *ISOLUX* case,[33] again with a dissenting opinion from arbitrator *Tawil*.[34] However, further proceedings were and are directed against the later interventions of the year 2013, which are much more

30 Decided are so far (28/06/2018): ICSID, case No. ARB/13/31, *Antin v. Spain*, Award of 15 June 2018; ICSID, case No. ARB/14/1, *Masdar v. Spain*, Award of 16 May 2018; SCC, Case No. 063/2015, *Novenergia II v. Spain*, Award of 15 February 2018; ICSID, case No. ARB/13/36, *Eiser v. Spain*, Award of 4 May 2017; SCC, case No. 2013/153, *Isolux v. Spain*, Award of 12 July 2016; SCC, case No. 062/2012, *Charanne and Construction Investments v. Spain*, Award of 21 January 2016. Still pending are: ICSID, case No. ARB/17/41, *DCM Energy and others v. Spain*; SCC, case No. 2017/060, *FREIF Eurowind v. Spain*; ICSID, case No. ARB/17/15 *Portigon v. Spain*; ICSID, case No. ARB/16/17, *Biram and others v. Spain*; ICSID, case No. ARB/16/27, *Cordoba Beheer and others v. Spain*; UNCITRAL Arbitration, *EDF v. Spain*; ICSID, case No. ARB/16/4, *Eurus Energy v. Spain*; SCC, case No. 2016/135, *Green Power and Obton v. Spain*; ICSID, case No. ARB/16/18, *Infracapital v. Spain*; ICSID, case No. ARB/15/15, *9REN Holding v. Spain*; SCC Arbitration, *Alten Renewable v. Spain*; ICSID, case No. ARB/15/16, *BayWa r.e. v. Spain*; ICSID, case No. ARB/15/34, *Cavalum SGPS v. Spain*; ICSID, case No. ARB/15/20, *Cube Infrastructure v. Spain*; ICSID, case No. ARB/15/35, *E.ON SE and others v. Spain*; SCC, case No. 2015/150, *Foresight and others v. Spain*; ICSID, case No. ARB/15/42, *Hydro Energy 1 and Hydroxana v. Spain*; ICSID, case No. ARB/15/27, *JGC v. Spain*; ICSID, case No. ARB/15/23, *Kruck and others v. Spain*; ICSID, case No. ARB/15/25, *KS and TLS Invest v. Spain*; ICSID, case No. ARB/15/45, *Landesbank Baden-Würtemberg and others v. Spain*; ICSID, case No. ARB/15/36, *OperaFund v. Spain*; SCC, case No. 2015/163, *Solarpark v. Spain*; ICSID, case No. ARB/15/38, *SolEs Badajoz v. Spain*; ICSID, case No. ARB/15/1, *Stadtwerke München and others v. Spain*; ICSID, case No. ARB/15/4, *STEAG v. Spain*; ICSID, case No. ARB/15/44, *Watkins Holding v. Spain*; ICSID, case No. ARB/14/12, *InfraRed and others v. Spain*; ICSID, case No. ARB/14/11, *NextEra v. Spain*; ICSID, case No. ARB/14/18, *RENERGY v. Spain*; ICSID, case No. ARB/14/34, *RWE Innogy v. Spain*; SCC, case No. 094/2013, *CSP Equity Investment v. Spain*; ICSID, case No. ARB/13/30, *RREEF v. Spain*; PCA, case No. 2012-14, *The PV Investors v. Spain*.

31 SCC, *Charanne and Construction Investments v. Spain*, (fn. 30), paras 476 ff.

32 SCC, *Charanne and Construction Investments v. Spain*, (fn. 30), Dissenting Opinion of Prof. Dr. Guido Santiago Tawil, paras 7 ff.

33 SCC, case No. 2013/153, *Isolux v. Spain*, Award of 12 July 2016, paras 773 ff.

34 SCC, *Isolux v. Spain*, (fn. 33), Dissenting Opinion of Prof. Dr. Guido Santiago Tawil, paras 5 ff.

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burdensome from the investor's point of view. Unlike the case of *Charanne*, the tribunal ruled in favor of the British *Eiser Infrastructure* and its Luxembourgish subsidiary by awarding 124 million euro[35] In *Novenegia (II)*,[36] the plaintiff was awarded compensation of 53.3 million euro, in *Masdar*[37] 64.5 million euro and in *Antin*[38] 112 million euro.

Decisive for the solution of this problem of possible liability for state regulation in the renewable energy sector is the timing of the investment and the question of what requirements should be placed on a beneficiary of state aid or an investor so that his legitimate expectations can be considered as worthy of protection. If the legal developments, for instance in the form of an announcement of a reduction of the feed-in tariff, are already foreseeable, a legitimate expectation can hardly exist. If, on the other hand, a long-term stable legal position of the sovereign state is guaranteed for the entire duration of the project, a violation of the principle of legitimate expectation and thus the principle of fair and equitable treatment can exist, which, in turn, would in turn result in a payment of compensation.[39] In the context of the arbitration proceedings against Spain, the question of whether a specific assurance of the administration is necessary or whether the general state aid regime in conjunction with any marketing campaigns of the government are sufficient to justify the legitimate trust of the investor is crucial.[40]

The Czech Republic also initially attracted investors with comprehensive commitments and investment incentive schemes. As from the year 2010, the subsidy amounts were reduced, and 26% tax was levied retroactively on income from solar power, the production of which had benefited from state aid programs.[41] This is a factual retroactive state aid reduction. A total of approximately 10 ECT proceedings were initiated

35 ICSID, *Eiser v. Spain*, (fn. 30).
36 SCC, case No. 063/2015, *Novenergia II v. Spain*, Award of 15 February 2018.
37 ICSID, case No. ARB/14/1, *Masdar v. Spain*, Award of 16 May 2018.
38 ICSID, case No. ARB/13/31, *Antin v. Spain*, Award of 15 June 2018.
39 For example in SCC, *Novenergia II v. Spain*, (fn. 36), para. 667: 'These were the legal sources in force in the Kingdom of Spain when the Claimant made its investment and the Tribunal agrees with the Claimant that the above statements and assurances were indeed aimed at incentivising companies to invest heavily in the Spanish electricity sector and that the Claimant made its investment in reliance of the terms provided in RD 661/2007. The commitment from the Kingdom of Spain could not have been clearer. A considerable number of RE companies also invested in reliance on these statements and assurances'.
40 Restrictive SCC, *Charanne and Construction Investments v. Spain*, (fn. 30), paras 498 ff. Extensive ICSID, *Eiser v. Spain*, (fn. 30), paras 362 ff. See thereto, *Restrepo*, (fn. 24), pp. 123 ff.
41 International Energy Agency, Act on the Promotion of the Use of Renewable Energy Sources (Act No. 180/2005 Coll.), www.iea.org/policiesandmeasures/pams/czechrepublic/name-23893-en.php (28/06/2018). See thereto, *Dias Simões*, When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking, Denver Journal of International Law and Policy 45/2017, p. 259. For the state aid policy of the Eastern European countries after their accession to the EU in general, see *Hölscher/Nulsch/Stephan*, State Aid in the New EU Member States, JCMS 55/2017, pp. 779 ff.

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against the Czech Republic.[42] So far, however, no final decisions have been taken in any of the pending cases.

In Italy, as in other states, in order to rehabilitate the state budget, in 2011, the conditions for the subsidization of solar power plants with a capacity of more than 200 kilowatts changed retroactively. In a second step, in 2013, annual charges were levied based on the size of the generators and billed per installed kilowatt. With a third amending measure, plant operators were deprived of the option of selling the VAT tax to the competent authority *Gestore dei Servici Energetici* (GSE).[43] There are currently nine arbitration proceedings pending against Italy under international energy treaties.[44]

Finally, the recent initiation of an arbitration proceeding against Romania was announced – also due to feed-in tariff reductions.[45]

IV. Future Investor-State proceedings against Germany?

For its part, the Federal Republic of Germany could be subject to investment protection procedures in the future, if the incentive systems for implementing the energy transition to renewable energy, in particular the feed-in tariffs, were to be cut or significantly changed.

These cases are also in a field of tension between on the one hand the investors' legitimate expectations that the initial situation, based on which they have calculated their investment and their amortization period, will not undergo any significant change and the possibility for states to adapt their legal framework for instance during a financial crisis, on the other hand.

A particular problem in these cases is likely to be the principle of protection of legitimate expectations. In these cases, it becomes clear that the protection of legitimate expectations has differing degrees of protection in EU and investment law. If the investment protection law extends its protection standard comparatively far, European law steers in exactly the opposite direction. Thus, in EU law, a state aid recipient can rely on the protection of legitimate expectation solely in extremely exceptional cases. It is well known that the ECJ has set very high standards since its *Alcan* decision on

42 UNCITRAL Arbitration, *Antaris v. Czech Republic*; UNCITRAL Arbitration, *Europa Nova v. Czech Republic*; PCA, case No. 2013-35, *G.I.H.G. and others v. Czech Republic*; UNCITRAL Arbitration, *I.C.W. v. Czech Republic*; UNCITRAL Arbitration, *Photovoltaik Knopf Betriebs-GmbH v. Czech Republic*; UNCITRAL Arbitration, *Voltaic Network GmbH v. Czech Republic*.

43 In whole, ICSID, case No. ARB/14/3, *Blusun v. Italy*, Award of 27 December 2016, paras 63 ff.

44 Pending are: ICSID, case No. ARB/16/39, *CIC Renewable and others v. Italy*; ICSID, case No. ARB/16/5, *ESPF and others v. Italy*; SCC, case No. 132/2016, *Sun Reserve v. Italy*; ICSID, case No. ARB/15/40, *Belenergia v. Italy*; SCC, case No. 158/2015, *CEF Energia v. Italy*; ICSID, case No. ARB/15/50, *Eskosol v. Italy*; SCC, case No. 095/2015, *Greentech and Novenergia v. Italy*; ICSID, case No. ARB/15/37, *Silver Ridge v. Italy*. Decided is the case ICSID, case No. ARB/14/3, *Blusun v. Italy*, Award of 27 December 2016.

45 ICSID, case No. ARB/18/19, *LSG and others v. Romania*.

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the aid recipient and has specified the principle of the protection of legitimate expectations for European law as follows:[46] '*[I]t must be noted that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure [= notification of the proposed aid and examination of the Commission before it gets granted] laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed.*' According to EU legal practice, it is therefore regularly possible for a diligent trader to ensure that a notification procedure has been carried out. If he does not inform himself, the creation of a legitimate trust is excluded.

In investment protection law, the protection of legitimate expectations covers both deviations from contractual agreements and changes in the stability of the legal framework. The scope of protection of legitimate expectations, as a subgroup of the FET protection standard, is assessed differently, in particular, because, unlike EU law, investment protection legislation is characterized by very fragmented legislation and divergent decision-making practice.

A solution to the divergence of legitimate expectations can only be achieved if both principles are harmonized. At the present stage, the Commission does not appear to be willing to compromise. On the contrary, it states in a decision of 10 November 2017 that legitimate expectations are excluded if the notification obligations under Art. 108(3) TFEU have not been complied with.[47] However, this raises the specific problem that, until 2015, it cannot be conclusively clarified whether feed-in tariffs in principle have a subsidy relevance – and are therefore subject to notification. This relevance for state aid was initially rejected, in particular with reference to the *PreussenElektra* decision of the ECJ in 2001;[48] later, around 2010, re-examined taking into account the subsequent case law;[49] and finally decided by the General Court, in 2012, when it classified the remuneration system of the German *Erneubare-Energien-Gesetz* (EEG) of 2012 as state aid in the case *Germany/Commission*.[50] The decision of the ECJ in the matter, however, is still pending.[51]

Consequently, it appears doubtful to deny the legitimate expectations of companies investing in the Federal Republic of Germany under the EEG 2012 investing scheme relying solely on the EU requirement of notification. In particular, from an investment law point of view, in the case of an unclear legal situation described above, this cannot necessarily lead to a ground for refusal for the formation of legitimate expectations.

46 CJEU, case C-24/95, *Alcan*, ECLI:EU:C:1997:163, para. 25.
47 Decision of the Commission C(2017) 7384 final of 10/11/2017, paras 157 ff., in particular para. 164.
48 CJEU, case C-379/98, *PreussenElektra*, ECLI:EU:C:2001:160.
49 Thereto, in detail, *Bungenberg/Motzkus*, Das EEG-2012-Modell und die Privilegierung stromintensiver Unternehmen aus dem Blickwinkel des EU-Behilfenrechts, in: Graf Kielmansegg (ed.), Die EEG-Reform – Bilanz, Konzeptionen, Perspektiven, 2015, pp. 81 ff., in particular paras 98 ff.
50 GC, case T-47/15, *Germany/Commission*, ECLI:EU:T:2016:281.
51 CJEU, case C-405/16 P, *Germany/Commission*, OJ C 326 of 05/09/2016, pp. 18 ff.

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On the contrary, such an argument is based on the understanding of a clear hierarchy between EU law and international investment law with the primacy of EU law, which, according to the above, is not substantiated. Rather, it is a matter of investment protection law whether legitimate trust could emerge in such cases and not the EU Commission's cause to make this binding for the ECT, for example.

V. *De lege ferenda*: investment protection and state aid in future EU FTAs

Looking to the future, the still-to-be-developed EU investment protection law wants to ensure that such conflicting situations are eliminated. In that sense, in Art. 8.9(1) CETA, 'the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives', for instance for the protection of public health or the environment. Art. 8.9(2) CETA then clarifies that a change in the legal framework that adversely affects an investment or affects an investor's (profit) expectations does not fall within the scope of the investment protection chapter. Arts 8.9(3) and (4) CETA then explicitly refer to the granting of subsidies and stipulate that decisions on the (non-)issuance, renewal or recovery of a subsidy are only covered by the investment protection provisions, if there is a corresponding legal or contractual obligation to do so or the measure has not been carried out in accordance with the relevant subsidy conditions.[52] By limiting and clarifying the protection of legitimate expectations, in particular, the regulation creates legal certainty in granting subsidies and at the same time counteracts the 'regulatory chill'.[53]

These regulations on the conflict area between state aid and investment protection law are unique in CETA and to this extent cannot be found in any other agreement. The CETA arrangements, therefore, represent a response to recent cases and, from an EU, and, in particular a competition law perspective, success in the negotiation of CETA.

VI. Conclusion

The treatment of state aid in the broader sense is regulated in bilateral investment treaties unequally and sometimes contradictorily. So far, the retroactive reduction of subsidies in the field of renewable energy – in particular of guaranteed feed-in tariffs – as well as the question of recovery of unlawful subsidies play an outstanding role in the discussion in investment practice. The latter concerns the interplay of EU law and

52 In this sense, Art. 8.9(4) CETA foresees: 'For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy or requesting its reimbursement where such measure is necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Party to compensate the investor therefor' (footnotes omitted).

53 Compare *Reinhold*, CETA: A 'good deal' für die europäische Beihilfenpolitik?, EWS 2016, p. 144.

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investment protection law/international law, the former problem can be the subject of investment protection procedures 'everywhere'.

Funding cuts, especially in the area of renewable energy, can violate investment protection standards. Whether such a shortening of the funding represents a measure equivalent to expropriation or a violation of the FET principle, of course, depends on the circumstances of the individual case. Compensatory payments for lost arbitration proceedings, which states have to pay to investors, do not constitute state aid within the meaning of Art. 107 TFEU, which would require notification.

This recovery of unlawful state aid is discussed in particular in the context of the *Micula* case. In particular, an arbitration award on the basis of the ICSID Convention is problematic. In this case, two different legal systems take influence on the enforcement of the award. However, the protection of legitimate expectations differs between EU and investment protection law. Thus, in EU law, a state aid recipient can rely on the protection of legitimate expectations only in extremely exceptional circumstances. In investment protection law, legal practice on the requirements for 'legitimate expectations' is different.

Less problematic is the situation when enforcement of an arbitration award is based on the New York Convention of 1958. Thus, Art. 5(2)(b) NYC provides that the recognition and enforcement of an arbitration award may be refused if contrary to the public policy of the state concerned. Consequently, in this case, a ranking can be deduced from the '*ordre public*' clause of the New York Convention, which grants the EU state aid law priority over the investment protection provisions in case of conflict; but this can only apply to the recognition and enforcement of arbitration decisions in the EU.

The recent EU trade and investment protection agreements explicitly exclude subsidy-related problems from the scope of the investment protection chapters, probably in response to the above-mentioned cases. How far this exclusion can go in individual cases is subject to the examination competence of the investment arbitration tribunals. It should be noted that existing investment protection agreements would not be directly affected by new EU agreements, as long as the former remain in force.

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