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Pamela Finckenberg-Broman

Weaponizing EU State Aid Law to Impact the Future of EU Investment Policy in the Global Context

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Foreword

EU State Aid Law as a Policy Tool for Tame Investment Protection

Investment protection has been a hotly debated topic in international economic law. For some it is perceived as a condicio sine qua non to facilitate investments in trade, and for harvesting the benefits connected to it. For others, investment protection is a vehicle of capitalism which deprives vulnerable groups of their rights and privileges and needs to be tamed. This work can be localised in the middle of these two camps, probably leaning a bit more to the latter side. If investment protection needs taming, why not by the rules of EU state aid law? And if so, how does this relate to the specific rationale to the legal system of EU state aids?

The author starts in Chap. 1 with providing the reader with an overview of investment protection schemes from the perspective of EU law. Investor State Dispute Settlement (ISDS) systems, which are at the heart of global investment protection regimes, sit uneasy with EU state aid law. Likewise, she investigates whether Bilateral Investment Treaties (BITs) as a major substantive regulative tool shall be replaced by Free Trade Agreements. She hence covers an assessment of the two major regulative tools of investment protection regimes: ISDS and BITs. Thereby, she sets the general framework for the assessment to come. In Chap. 2, the author investigates the parallel development of FDI and WTO and EU competition policy, substantiating the major argument that state aid law can be used as a tool to control investment protection policy from a theoretical perspective. In Chap. 3, she builds upon these insights, providing an in-depth analysis of EU state aid laws through the lens of assessing its suitability as a policy tool to tame investment protection. She devotes Chap. 5 to exemplifying these insights looking on the example of the Court proceedings concerning the Micula Award. She does not stop at a mere analysis of the decision, but rather excellently puts it into the bigger context by using the thorny dilemma as an analytical framework. Chapters 6 and 7 concern the illustration of the dilemma identified before, presenting likewise

potential solutions to solve the conflict between the two regimes which seem to have divergent rationales. She summarises this book by presenting three clear arguments concerning the future of BITs and ISDS under the scrutiny of EU state aid law.

The book covers an area which has so far not been subject to intensive research on the borderline of EU competition law, external relations, and international economic law. The author took on this difficult task and presented a book covering the question from many angles, starting from a broad introduction to specific application soundly embedded in economic theory.

I am happy to have the opportunity to welcome this new addition to our series.

University of Bayreuth, Bayreuth, Germany
May 2022

Kai P. Purnhagen

Foreword

This monograph, derived from the Ph.D. thesis of Dr Pamela Finckenberg-Broman, constitutes an original contribution to this topical issue of the effects of state aid law on the future of EU investment policy in a global context. I was very glad to act as an examiner of this Ph.D. thesis, which was submitted to Griffith University, Queensland, Australia. The main research question, 'How does EU state aid law affect the future of EU investment policy in a global context?' is certainly an original one. This monograph provides a comprehensive and in-depth analysis of this topic by articulating and underpinning some original arguments and proposals. It is of great interest because it covers a very topical and evolving area of EU law and international investment law. The detailed examination of how the policy of EU state aid practice collaborates with the EU investment regime within the internal market, and from there reflects on the external trade relations of the Member States and the EU through this practice, constitutes the original contribution of this monograph. More specifically, its originality lies in the exhaustive examination of the interplay of state aid rules and EU investment policy internally and externally, either within the EU or on a global level. This dual approach—that is, within the EU and on a global level—is a distinctive characteristic of this monograph. The analysis of both the internal and external dimension is probably its biggest advantage. This cumulative research on both the internal and external dimension widens the scope of this research and results in some very interesting overarching conclusions. Dr Finckenberg-Broman demonstrates impressive critical thinking, expresses her personal view on the matter, and analyses and judges the previous bibliographical materials. Her critical comments are very interesting. Her in-depth knowledge of the international bibliography assists her in commenting successfully on various issues of the effects of state aid law on the future of EU investment policy in a global context.

Apart from the general research question, the originality of this monograph is proved by the more specialised research questions answered by each chapter. Chapter 2 answers the questions 'What drives and shapes international subsidy control and investment law?' and 'How do these interact and what are the inherent tensions?' Chapter 3 responds to the question 'What are the dimensions of law,

policy, and institutions of state aid?' Chapter 4 identifies and scrutinises the problems deriving from the *Micula Award* and intra-EU BITs. Chapter 5 answers the question of 'How and why do the EU's procedural and substantial rules collide with ISDS?' I stress that Chap. 4 on the *Micula Award* and Chap. 5 are particularly remarkable. Chapter 6 answers the question 'How is EU law going (from regional) international (to global)?' by examining the EU's multilateral agreements, plurilateral agreements, and bilateral agreements. Chapter 7 analyses the dilemma of extra-EU BITs 'adjusting to a new reality or being phased out'. It asks, 'Is there really a problem? And if yes, can this problem be solved?' Chapters 6 and 7 indisputably contain some original thoughts. All these more specialised questions answered by individual chapters are characterised by coherency and evolve from the main research question, 'How does the EU state aid law affect the future of EU investment policy in a global context?' Actually, all these more specialised research questions facilitate the answer to the main research question, making it easy for the reader to follow her original arguments and contribute to the overall coherency, clarity, and succinctness of this monograph.

This monograph constitutes a contribution to the scientific research of the issue in question. It considers a topical issue of EU and international law. It is a contribution to the ongoing debate on the effects of state aid law on the future of EU investment policy in a global context. It should be stressed that this monograph is absolutely important. Dr Finckenberg-Broman develops this topic comprehensively and discovers new intricacies of this area of law. This monograph would definitely attract the interest of academics, practitioners, and policy makers at the EU and global level.

Dr Finckenberg-Broman covers all issues of this complex topic. She manages to identify and develop sufficiently all the crucial problems of this topic and, on the basis of this, to express some original thoughts. At the end, she reaches some excellent conclusions. She takes into account views expressed in the relevant international bibliography and identifies the crucial problems arising from the interplay of state aid rules and EU investment policy internally and externally. Her comprehensive analysis covers all aspects of the effects of state aid law on the future of EU investment policy in a global context. The categories of literature with emphasis on legal literature, which have been used for the analysis of the subject of this monograph, are more than satisfactory and sufficient.

After a detailed literature review, Dr Finckenberg-Broman proceeds to an original and detailed analysis of her answer to the research question by reaching three main arguments. Her arguments are presented in a clear, succinct, and precise way. She underpins successfully and convincingly these three main arguments analysing how EU state aid law is affecting the future of EU investment policy in a global context. First, Dr Finckenberg-Broman argues that state aid law applies to the EU's incorporation of clauses promoting fair competition and state aid policy in international trade agreements. Second, she argues that state aid law and policy has contributed to recent EU internal development, which led the EU Member States to terminate their bilateral agreements with each other (intra-EU BITs) by the end of 2019. Third, she argues that the EU has been working towards replacing the existing BITs between the EU's Member States and third countries (extra-EU BITs) with the EU's own

trade agreements, which are aligned with EU legislation. This argumentation is based on solid and satisfactory justification. The debate on who gets to decide on the scope of state aid law now and in the future is one of the most remarkable parts of this monograph. This debate on competence is one of the most interesting parts of this monograph as it sheds light on a question with great potential and, more specifically, on which body delineates the scope of state aid law and policy with regard to investment protection. I am sure that this detailed analysis of this competence issue is crucial for future developments and will be taken into account by future similar discussions in bibliography, case law, and policy documents. The analysis of case law and the various analogies and conclusions inferred from it constitute a strength of this monograph.

Every chapter develops its primary theme clearly and in depth by exhaustive reference to the relevant bibliography and by the expression of original arguments and ideas. Chapter 1 is an introductory one setting the scene of this research. Chapter 2 examines the development and rationale of trade agreements, subsidies control, and investment law and discusses their parallels, interlinkage, and conflicts. Chapter 3 has a legal, policy, and institutional analysis of what state aid is. Chapter 4 focuses on a case study of giving power to EU and various intricacies deriving from this issue. Chapter 5 examines the procedural differences between International Investment Law and EU law through a state aid lens and scrutinises how elements in BITs eventually threaten to erode EU's procedural autonomy and the right to regulate. It also discusses EU's sui generis nature and how this translates to the legal aspects behind investment protection and state aid. Chapter 6 analyses how EU translates into international dimensions by using trade instruments to structure and to confirm that argument. Chapter 7 examines the clash between bilateral agreements in international conflict tribunal and EU law (going outside the EU for enforcement). Chapter 8 provides a summary, an overview of the previous analysis, and some very interesting and challenging concluding remarks about the central topic of this monograph on the effect of EU state aid law on EU investment policy.

Although Dr Finckenberg-Broman touches many different aspects of EU state aid law, the cohesion of the book remains solid, as all these aspects are evolving around the subject matter of the interplay of state aid rules and EU investment policy internally and externally, either within the EU or on a global level. She scrutinises succinctly the crucial elements of these areas of state aid law without expanding into superfluous issues and without deviating from its goal, which is the analysis of the effects of state aid law on the future of EU investment policy in a global context. The cohesion of this monograph is strengthened by the fact that the three main arguments mentioned above are intertwined on such a common basis.

The application of a doctrinal approach by Dr Finckenberg-Broman is excellent. This doctrinal approach is based on an analysis and discussion of legal provisions, texts of international agreements, opinio juris, case law, and literature on the subject where relevant. She also takes into account practical implications of law by scrutinising the combination of concepts, considerations, and actions of states and their institutions, and their interaction with international institutions, such as the EU. It is remarkable that this monograph scrutinises this topic in the light of EU law and international law through an analysis of the interaction of the EU's trade, state

aid, and investment policy. This combined analysis of two different areas of law, EU law and international law, results in some very interesting conclusions. She extensively scrutinises various EU and international law materials. This doctrinal approach affects also the audience that could be interested in this monograph, which is addressed to a wider audience at the global level because of its focus on EU's interactions with other international organisations. This doctrinal approach is excellent and assists Dr Finckenberg-Broman in structuring and underpinning her arguments in a concrete manner. This doctrinal approach is certainly one of the major advantages of this monograph. Moreover, this doctrinal approach scrutinises thoroughly the roles and the interaction of the legislative (European Parliament and Council), judicial (CJEU), and enforcement (Commission) organs of the EU in this content. The approach that she follows towards the analysis of the *Micula Award* by adapting to any situation, including an extra-EU BIT and BITs or by drawing analogies to FTAs concluded between the EU and a third country is really impressive.

This is undoubtedly a well-documented monograph. The thorough study of bibliographical materials sharpened Dr Finckenberg-Broman's critical ability and resulted in some original and remarkable arguments. Additionally, this thorough study of international bibliography made her capable of scrutinising carefully these topical issues and of commenting extensively on them. At the end of each chapter, there is an impressive bibliography of EU and international case law and of EU, international and domestic legislative and policy documents, which Dr Finckenberg-Broman considered carefully. There are also four Appendixes at the end of the monograph: Appendix 1: The EU's BITs, TIPs, and IPAs with countries (state of play, October 2018), Appendix 2: EU's BITs, TIPs, and IPAs with trading blocs (state of play in October 2018), Appendix 3: Micula case timeline, and Appendix 4: Map of EU's free trade agreements in 2018.

This monograph offers a wide scope by examining both EU investment policy internally and externally in the context of EU state aid rules, but Dr Finckenberg-Broman manages to scrutinise comprehensively all available EU and international bibliographical materials and to justify her arguments. The need to discuss the topic internally and externally was a quite challenging task, which she fulfilled successfully. Dr Finckenberg-Broman considers carefully all relevant EU and international legislative, jurisprudential, and policy materials. This latter issue is quite important as EU and international legislative, jurisprudential, and policy materials play a crucial role in this area of law and were taken into account to a great extent in her work.

I was delighted to examine the Ph.D. thesis, which evolved into this excellent and original monograph, and to write this foreword. I strongly recommend this remarkable and distinguished monograph to readers.

Department of Law, University of Cyprus, Nicosia, Cyprus
September 2020

Thomas Papadopoulos

Preface[1]

On July 2017, the Commission of the European Union (Commission) officially rejected investor state dispute settlement (ISDS). Apart from the fundamental public distrust of ISDS, its rejection by the European Union (EU) is a symptom of several underlying causes, the foremost of which is the need to protect the autonomy of the EU legal order and its right to regulate public policy objectives, as well as to avoid jurisdictional conflicts. With this backdrop, EU state aid law, which enjoys public policy status, has emerged as a major example of the conflict between investor protection and the right to regulate. As state aid law imposes measures on the EU Member States that conflict with these states' international obligations to foreign investors under bilateral investment treaties (BITs), they have become subject to claims and substantial liabilities. This dilemma can arise in any setting that involves the EU or one or more of its Member States. It also includes relations with non-EU countries, as the web of international investment agreements (IIAs) operates, in different forms, on an international scale.

Therefore, this dilemma and the EU's responses to it is analysed through different forms in which EU state aid law appears, dependent on the EU investment policy aspect utilised as a platform for analysis. Utilising a doctrinal analysis by studying, discussing, and analysing the impact of EU state aid law on the EU Member States' BITs and EU Trade Agreements, this monograph provides an insight into the function and logic behind international treaties involving the EU's competition and investment policy. This is done by utilising the research question: *How does the European Union (EU) state aid law affect the future of EU investment policy in a global context?* Further, this thesis puts forward three arguments in which EU state aid law is affecting the future of EU investment policy in a global context.

[1] Parts of the abstract of this thesis were introduced at the ANZIL 2018 HDR workshop at the Victoria University of Wellington, New Zealand and hence were published by the Australian and New Zealand Society of International Law Postgraduate Workshop information booklet, available at https://www.anzsil.org.au/resources/Documents/ANZSIL%20Postgraduate%20Workshop%202018%20Booklet.pdf.

First, state aid law applies in the EU's incorporation of clauses promoting fair competition and state aid policy in international trade agreements. Second, state aid law and policy has contributed to recent EU internal development, which led the EU Member States to terminate their bilateral agreements with each other (intra-EU BITs) by the end of 2019. Third, the EU has been working towards replacing the existing BITs between the EU's Member States and third countries (extra-EU BITs) with the EU's own trade agreements, which are aligned with EU legislation.

Essentially, this book's golden thread is a debate on who gets to decide on the scope of state aid law now and in the future. In other words, is it the EU that sets the borders and the status of state aid law and policy law regarding investment protection or the international investment tribunals by their legal practice? Hence, this monograph offers a glimpse of a conceivable future of EU investment policy in a global context.

An analysis of the relevant literature, and observation of recent policy changes on its subject matter, as reflected in the Commission's policy documents, the EU's international agreements and declarations by the Member States, leads to the findings of this dissertation. A conflict situation that originated from legal conflicts within the EU, the EU experience of investment protection and state aid regarding intra-EU BITs, provided some lessons to learn for the EU organs. These lessons learned have found expression on a global scale. By incorporating fair competition and state aid policy in international trade, the EU is reasserting that it is the EU that decides on state aid law and policy law regarding investment protection. Indeed, the EU is attempting to tame investment protection in such a way that fair competition and investment protection can peacefully coexist in international trade. Ultimately, the interplay of state aid and the EU's investment policy within the internal market reflects on the external trade relations of both the Member States and the EU through this practice. Thus, state aid law affects and will continue to affect the future of EU investment policy in a global context.

Gold Coast, QLD, Australia Pamela Finckenberg-Broman

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This book is derived from my Ph.D. thesis for Griffith University Law School and has also benefited from the support of Charles Darwin University and Griffith Law School as a whole, as well as several individuals. I wish to express my heartfelt gratitude and sincere thanks to them all. I wish to specially mention Sue Harris Rimmer, Charles Lawson from Griffith University, Kieran Tranter from the Queensland of Technology, and Jörgen Hettne from Lund University in Sweden who have greatly supported me through this process. Also, I would like to sincerely acknowledge Susan Jarvis for her great editing. My book looked beautiful after her work. A special thank you also goes to Thomas Papadopoulos for encouraging and supporting me to publish this book with Springer Nature.

Also, this book would have never came to be without my family. You are my strength and inspiration. My husband Morgan Broman, you are my rock, my greatest support, and you never fail to listen and give great advice. My children Chany, Charlie, and Cassie, I am eternally grateful for all your patience and understanding through these years when you have had to share me with my love for researching law.

Contents

Abbreviations

EU Specific

Acquis/acquis communautaire	The body of EU legislation
AFFGN	The non-paper tabled by Austria, Finland, France, Germany, and the Netherlands
CETA	EU–Canada Comprehensive Economic and Trade Agreement
CIL	Customary International Law
CJEU	Court of Justice of the European Union, which constitutes the ECJ and the GC
Commission	European Commission
DCFTA	Deep and Comprehensive Free Trade Area
DG	Directorate General (a department in the European Commission)
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECI	European Citizens' Initiative
ECJ	European Court of Justice
ECLI	European Case Law Identifier
ECR	European Court Reports
ECSC	European Coal and Steel Community (1951)
EEC	European Economic Community (1957)
EP	European Parliament
EU	European Union
EUSFTA	EU–Singapore Free Trade Agreement and Investment Protection Agreement
EVFTA	EU–Vietnam Free Trade Agreement and Investment Protection Agreement

Extra-EU	External EU
GC	General Court (of the Court of Justice of the European Union)
GPEUL	General Principles of EU Law
Internal market	The internal market of the EU is one market in which goods, services, capital, and persons enjoy free movement
Intra-EU	Internal EU
JEEPA	Japan–EU Economic Partnership Agreement
Member States	Member State of the EU
MoU	Understanding Concerning Certain U.S. Bilateral Investment Treaties, signed by the United States, the European Commission, and acceding and candidate countries for accession to the European Union
O.J.	Official Journal of the European Union (previously of the EC)
SAAs	Stabilisation and Association Agreement(s)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
The Charter	The Charter of Fundamental Rights in the European Union
Third countries	Countries not part of the EU
Third-country nationals	Individuals and legal entities that are not EU nationals

International

BIT	Bilateral Investment Treaty
CCP	Common Commercial Policy
CPSNR	UN Commission on Permanent Sovereignty over Natural Resources
ECOWAS	Economic Community of West African States
ECT	Energy Charter Treaty
EPA	Economic Partnership Agreement
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights 1966
ICSID Convention	Convention on the Settlement of Investment Disputes Between States of Investment Disputes
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement

IIL	International Investment Law
IPA	Investment Protection Agreements
ISA	Investor State Arbitration
ISDS	Investor State Dispute Settlement
ITA	Investment Treaty Arbitration
MERCOSUR	A South American trade bloc formed by Argentina, Brazil, Paraguay, and Uruguay
MFN	Most-Favoured-Nation
NAFTA	North American Free Trade Agreement
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-Operation and Development
PTA	Preferential Trade Agreement
PTIA	Preferential Trade and Investment Agreement
Subsidies agreement	Agreement on Subsidies and Countervailing Measures
TIP	Trade and Investment Partnership
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCITRAL	The United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNGA	The United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties 1969
WTO	World Trade Organization

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Chapter 1
Introduction

1.1 Structure

For a smooth and comprehensive reading, this book is divided into eight chapters, each with themes and sub-questions.

The present chapter provides an introduction to the subject of the book, describing the legal framework used for the subject matter of the book, providing an insight into the relevant legal situation. It specifies and explains EU Law and the EU's investment regime, as well as international law relevant to investment treaty arbitration. This chapter also clarifies the focus of this book.

Chapter 2 offers a historical and comparative perspective, focusing on the parallel development of norms governing FDI and competition policy through international legal instruments. It links these two central concepts to trade, providing the reader with an insight into how, despite being supportive of each other, these concepts can also diverge and contradict. It shows that, besides the common economic objective of enhanced global wealth, current competition policy (particularly in the EU) also has other objectives, which create tensions when these policies are implemented and applied nationally and supranationally. Finally, it explains how, in an EU context, competition rules cover all type of anti-competitive practices, thus infusing the control of anti-competitive behaviour by both private enterprises and state interventions under the same law. Furthermore, state aid rules apply similarly to goods, services and capital alike, while other public international norms, such as those of the World Trade Organization (WTO) treat goods, services and capital movements differently.

Chapter 3 focuses on the examination of EU state aid law and policy to give the reader an insight into how EU state aid law affects the future of EU investment policy in a global context. It clarifies the law and its evolution through the EU Courts and Commission's practice of it, and examines how it has developed into such a complex legal framework and potent policy tool. It explains how state aid law

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enables the EU to influence the behaviour of its Member States' policy choices and how countries outside of the EU are not necessarily immune to the effect of EU state aid rules. This chapter also explains the reason for the unique features of state aid control, which puts the State aid norms in context with the global subsidies control by the WTO. Further, some essential procedural aspects of state aid control—such as the notification obligation and enforcement—are introduced.

Chapter 4 demonstrates the issues arising from situations when a Member State's investment policy is not in line with EU State aid law, and an international investment treaty is entered into between EU Member States that challenges the EU judicial system. It particularly asks what problems follow where the international investment regime, as applied and interpreted by international investment tribunals, necessitates that the Member States act against EU state aid law. Using a case study of the *Micula Award*, and the substantial and procedural legal complications that followed, as an example of how this situation can play out in practice. Besides causing substantial legal uncertainty to all parties, a sovereign state of the EU is faced with two conflicting obligations: one to follow the terms of the BIT and the other to abide by EU state aid law.

In Chap. 5, investment law in respect of intra-EU BITs vs EU law is examined from a procedural perspective (through a state aid lens), as it is these elements in BITs that eventually threaten to erode the EU's procedural autonomy and right to regulate. It explains the EU's unique status of *sui generis* and how this status translates to the legal aspects behind investment protection and state aid. It further examines how a critical common denominator behind the current treaty collision is that both regimes have gradually expanded their scope through their jurisprudence until these have overlapped, leading to a collision which is both legal procedural and substantial, which stems from their procedural (principle of legitimate expectations) nature. This discussion is developed from an internal aspect to cover the spill-over effect on the EU's external relations. The link between FDI and competition policy is elaborated upon—particularly where they diverge and collide within the sphere of state aid law and investment protection.

Chapter 6 provides the global perspective. This chapter provides an insight into how the EU uses trade instruments for regulatory export of state aid law and how this practice interacts with the EU's IAAs (including both bilateral investment agreements and investment chapters in trade agreements). It shows how EU state aid law translates into the international dimensions by observing and analysing the EU's trade instruments. Hence, this chapter explicitly discusses how the EU incorporates provisions of fair competition and state aid policy in international trade agreements to guarantee that these agreements in general, and investment chapters in particular, will not conflict with EU state aid law. Further, the EU's current actions to hinder future conflicts from claims arising of government measures that are not compatible with EU state aid law are explained to provide an insight into whether arbitration Awards that are incompatible with EU state aid law are enforceable.

With the aim of providing some legal certainty, Chap. 7 adds another global perspective by looking at how the situation of intra-EU BITs has affected/will affect the extra-EU BITs of the EU's Member States and third countries. In particular, the

reform of Member States' model BITs will be analysed by studying and assessing ongoing reform on the subject matter. Furthermore, the enforceability of extra EU-BIT claims/Awards stemming from illegal state aid will be focused upon to identify which judicial forum would be optimal for disputes between investors and states in claims of which the EU or an EU Member State is part.

Chapter 8, the final chapter of this book, summarises the discussion around, and analysis of the materials presented, and based on this analysis presents its conclusion.

1.2 'For the EU: ISDS Is Dead'

On 1 July 2017, the Commission announced that investor state dispute settlement (ISDS)[1] was dead in a fact sheet on the Agreement between Japan and the European Union (EU) for an Economic Partnership Agreement (JEEPA).[2] Within a few days, the EU confirmed that this decision, starting a new chapter in its new investment policy, was permanent.[3] It was a bold standpoint, as the other party to the treaty, Japan, had systematically included ISDS, in the form of traditional investor state arbitration, in all its investment and economic partnership agreements.[4] Within the global arbitrations circles reactions ranged from unconvinced to rejection.[5] Yet the final text of the JEEPA does not include an investment chapter, as the parties did not reach consensus on ISDS and investment protection.[6] It does, however, contain an extensive subsidies chapter.

While ISDS features in headlines and on billboards carried by protesting crowds, the civil society or conventional academia rarely recognises the existence of state aid, which is present in our everyday lives in various forms of subsidies from public resources. It takes place as energy subsidies where countries support coal mining or renewables in line with national energy policies. It is also present when an undertaking[7] benefits from government action. In relation to cross-border investments—

[1] ISDS is an international arbitration procedure to resolve conflicts, with substantial and procedural provisions. It enables investors, through a specific dispute-resolution procedure, to sue states on grounds of breach of investment protection obligations bypassing national courts by bringing a case directly before an international tribunal.

[2] EC (2017c), p. 6. See also the Commission's 6 July 2017 media release on the importance of JEEPA (EC 2017f).

[3] Key elements of the EU–Japan Economic Partnership Agreement (EC 2017b), pp. 5–6.

[4] Adascalitei (2017).

[5] Allen (2017); Fietta (2017); Trehearne (2017).

[6] See the Commission's media release of 8 December 2017 (EC 2018c).

[7] An undertaking in EU competition law context means 'any entity engaged in an economic activity, that is an activity consisting in offering goods or services on a given market, regardless of its legal status and the way in which it is financed'. See *Cassa di Risparmio di Firenze and Others* (2006), paras 107–108.

especially foreign direct investment (FDI)—subsidies are often in the form of grants based on a bilateral agreement between the public authority of an EU Member State and the foreign investor anywhere on the globe within a long-term investment support program.[8] These types of state aid/subsidies, often used as an investment policy instrument, are also called investment incentives.[9] In other words, subsidies/state aids are a built-in feature of investment policy.

In contrast to worldwide practice and norms, where this type of arrangement would rarely run afoul of rules on subsidies control,[10] the stringent control over state aid within the EU can lead to a different outcome, with consequences. Since all international agreements entered by the EU, its Member States or both must be compatible with EU primary law, these must not breach state aid law. Therefore, the investment policy of both the EU and its Member States, including investment incentives, must be consistent with the state aid provisions of the Treaty of the Functioning of the European Union (TFEU).

State aid rules in Articles 107–109 of the TFEU address actions of states.[11] Intervention under EU state aid law happens to an investment when public support, through resources imputable[12] by the Member State, is selectively granted for the benefit of certain entities in such a way that it can distort the competition on the internal market.[13] State aid law prohibits the Member States from offering state aid under other than specified exemptions that are codified by state aid law.[14] If a Member State implements state aid measures in breach of these laws, it must apply remedies, as stated in the same law. These remedies require the Member State to discontinue the unlawful measure and possibly to retroactively recover paid aid from its recipient.[15] Hence, the most visible manifestation of the impact of state aid rules for the investors is being cut off from economic enticements they have been receiving from the host Member State due to a discontinuation of an unlawful scheme or even being obliged to repay the money to the granting state.[16]

[8] Most of the disputes on intra EU BITs have the discontinuation of these type of arrangements at their core. For a definition of investment incentives, see Sect. 2.1.

[9] UNCTAD (2004), p. 1. For more on investment incentives, see Sect. 2.4.3 in Chap. 2.

[10] Because subsidies control on a multilateral level is limited to actionable subsidies affecting trade in goods in the WTO and lack of transparency obligations. See Sect. 2.4.1 in Chap. 2 and Sect. 3.3 in Chap. 3.

[11] See Chap. 3 for details on the EU state aid regime.

[12] This means the state must have granted the benefit independently. See Sect. 3.2.2 in Chap. 3 for more details.

[13] 'The internal market of the European Union (EU) is a single market in which the free movement of goods, services, capital and persons is assured, and in which citizens are free to live, work, study and do business' (EUR-Lex n.d.).

[14] There are some exceptions to this general prohibition: see Chap. 3.

[15] *Alcan Deutschland* (1997), para 25, and *BUG-Alutechnik* (1990), para 16.

[16] The remedy for state aid illegally granted is the restoration of the competition neutrality on the internal market through a clawback procedure.

The EU also has the strictest state aid/subsidies control in the world. Bound by the general prohibition of state aid, Member States have limited means of supporting European firms and investors. Consequently, the EU is not competing on the same terms or level for FDI as the rest of the world. Uneven management of state aid norms internationally, therefore, becomes a significant dilemma for international businesses operating within the EU,[17] nation-states, supranational organisations and national courts/arbitration tribunals. The EU is therefore driven to export its state aid rules through trade instruments.[18] According to a 2015 International Centre for Trade and Sustainable Development E15 Expert Group on Competition Policy, competition law and policy have never before figured so prominently in the international trade system.[19] Within the EU, the implications of this belief catch a wide variety of public and private actors as the EU's competition policy and law consist of two main branches—those applicable to enterprises and those applicable to state aid.

Given that the EU is aware that state aid rules need to be recognised and also respected in the international field for comprehensive competition policy, the EU is an active proponent of multilateral subsidies control in line with its Common Commercial Policy (CCP) Articles 206 and 207 TFEU.[20] EU also imposes stringent state aid-related obligations derived from EU law on their accession and neighbouring countries.[21] The disrespect of these rules by investment tribunals when in conflict with international investment agreements (IIAs), embodied in the case *Micula*,[22] is one more reason why the EU has rejected ISDS in its trade agreements.

Rejection of ISDS in bilateral trade agreements is a relatively new trend, whereas regulatory transfer of state aid is not.[23] Yet the time for the denunciation of traditional investor state arbitration by the EU was ripe. By unilaterally declaring the ISDS dead just months before the intended signing of the JEEPA, the EU broadcast a reform of the only ten-year-old investment policy of the European Union. No longer would the EU tolerate the traditional investor state arbitration, the legal regime of which has been reproached by many. Instead, the EU's

[17] Businesseurope (2015).

[18] These rules also benefit other countries. See Blomström and Kokko (2003), p. 20. For specific concerns relating to substantial subsidies to foreign investors, see also EC (2017e), p. 11.

[19] Laprévote et al. (2015).

[20] EU (2008). Accordingly, the EU shall contribute towards harmonisation of global trade, especially in removing trade barriers on *inter alia* foreign direct investment Article 206 and protection of distortion of trade by dumping or subsidies. See also Rubini (2004), p. 1.

[21] See EEA agreement and association agreements with Turkey and Albania. See also bilateral agreements with Switzerland and Israel (EC 2015c). See also Cremona (2003); Rydelski (2004).

[22] The Commission refers to the *Micula Award* (2013) as one of the factors that it no longer trusts in investor state arbitration (EC 2015a).

[23] Japan, like other nations, is aware of the EU's protagonist role on promotion of global subsidies policy and would have expected the Commission to insist on subsidies regulation being included in the Economic Partnership Agreement (EPA) between the parties, even before starting negotiations with the EU in March 2013. See Italianer (2013), p. 4.

proposition for an Investment Court System (ICS)—a permanent, unbiased, and more transparent dispute settlement system designed to be compatible with EU law—would be applicable to future investment disputes.

Unsurprisingly, many do not share the EU's enthusiasm about ICS, strongly doubting its success in the face of the global tradition of old-style investor state arbitration[24] or its compatibility with EU law.[25] Nevertheless, the finalisation of the negotiations on the JEEPA, without the inclusion of investment protection,[26] signals the EU's commitment to stand firm in its position. The EU's abandoning of the ISDS system, globally seen as an essential element of investment agreement protection,[27] signals the culmination of a process that has been ongoing for many years within the EU.

This process, adopted by the Commission, due to increased, mainly state aid-related litigation on intra-EU BITs[28] and years of debate[29] within political,[30] academic[31] and legal circles,[32] on the heavily criticised legal regime of ISDS, was in the end taken out of the hands of the Commission.[33] Responding to the strong opposition of ISDS, the European Parliament rejected the use of investor state arbitration in EU's international agreements,[34] effectively rendering ISDS dead for the EU in an attempt to ease the tension and conflict caused to the EU's legal order by international investment agreements.

[24] Allen (2017); Deli and Marceddu (2015), pp. 4–5. On 6 September 2017, Belgium requested the CJEU's opinion on the compatibility of CETA's ICS with EU law (Kingdom of Belgium 2017) and *Opinion 1/17* (2019) on ICS in CETA.

[25] German Association of Judges (Schneiderhan 2016; see also Eberhardt 2016; Van Harten 2015a).

[26] See the Commission's media release dated 8 December 2017 (EC 2018c).

[27] The ISDS system has especially strong ties with European nations because it originates from a post-World War II European project, just like the Treaty of Rome ('Treaty of Rome (EEC)', 1958).

[28] See UNCTAD database for data (UNCTAD 2016a, b). See also EC (2015d), pp. 5, 6.

[29] Byström (2016); EC (2015e), Politico (2015).

[30] E.g., a compromise solution tabled by a delegation formed of Austria, Finland, France, Germany and the Netherlands (the AFFGN states) to redeem the intra-EU BITs (AFFGN 2016), pp. 6, 8. On TTIP, see Sims and Stone (2016). See also European Parliament think tanks workshop in April 2014 (EP 2014), p. 21; Bierbrauer 2014, Ch. 3.3) and European Parliament report (Cole 2014).

[31] For example: Ankersmit (2015, 2016a, b); Konttinen and Teivainen (2013); Fleming (2014); Schneiderman (2016); Van Harten (2015b); Kleinheisterkamp (2015). See also legal statement on investment protection and investor-state dispute settlement mechanisms in TTIP and CETA signed by several high-ranking academics (Albi et al. 2016). For pro-ISDS, see Happ and Tietje (2013); Tietje et al. (2012); Ortolani (2015); Struckmann et al. (2016).

[32] Statement from the European Association of Judges on the proposal from the European Commission on a new Investment Court System (EAJ) 2015); *Achmea C-284/16* (2018). See also Dimopoulos (2011); Tietje (2013), pp. 16–17; Hindelang (2012b), p. 1; Gubrynowicz and Wierzbowski 2009), p. 3; Andersen and Hindelang (2016), p. 1; Moskvan (2015), pp. 101–38.

[33] The European Parliament approval is mandatory for most international commitments of the EU, including FTAs and IIAs: see Articles 207 and 218 TFEU.

[34] Parliament (2015), paras (xiv)–(xv).

1.3 EU's Rationale for Abolishing ISDS from a State Aid Law Perspective

ISDS has been argued to favour the capital owners at the cost of the public interest,[35] so is an easy target for distrust.[36] However, besides the fundamental distrust by the public of ISDS,[37] its rejection by the EU is a symptom of several underlying reasons. Tensions caused by an uncoordinated investment policy between EU internal and external action as well as the unwillingness of EU Member States to let go of their investment agreements have played a vital role in this development.[38] Above all, as shown by Kleinsterkamp,[39] Eckes,[40] and Gallo and Nicola,[41] is the need to protect 'the autonomy of the EU legal order' and the right to regulate public policy objectives, as well as to avoid jurisdictional conflicts.[42]

To preserve the autonomy of the EU law, the Court of Justice of the European Union (CJEU) has rejected the ability of international courts to interpret the provisions of an international agreement that are binding on EU institutions if this adversely affects the autonomy of the EU legal order.[43] EU law has an autonomous position concerning national and other public international law, with primacy over national law and provisions with direct effect for EU citizens and the Member States. Thus, EU law is part of and in force in Member States' national law—and arises from an international agreement entered by those states.[44] EU autonomy serves as

[35] Communication from the Commission *Trade for All* (EC 2015b), p. 13.

[36] ISDS has been fiercely resisted by EU citizens (ECI 2017), who can make their voices heard by the public consultation process (EC 2017d) and the European Citizens' Initiative (ECI). See the European Parliament decision of 22 May 2012 amending Parliament's Rules of Procedure regarding the implementation of the ECI (2011/2302(REG) (EP), 2013) and (EC 2017a).

[37] Trade commissioner Cecilia Malmström official blog (Malmstom 2015). After the massive opposition to ISDS, a multilateral reform of ISDS became imminent (EC 2015e). This led to two public consultations on a multilateral reform of investment dispute resolution, initiated on 21 December 2016.

[38] Kleinheisterkamp (2012, b). For the Commission's infringement proceedings against Austria, Sweden, Belgium, Luxembourg, Portugal, Romania and Italy for not effectively removing their intra-EU BITs see https://ec.europa.eu/commission/presscorner/detail/EN/INF_21_6201.

[39] Kleinheisterkamp (2012, 2015).

[40] Eckes (2016), pp. 10 and 31.

[41] Gallo and Nicola (2015).

[42] For a detailed explanation of these issues and the structure of the EU, see Chap. 4.

[43] See *Opinion 1/91* (1991) EEA Agreement of 14 December 1991, paras 40 and 70; *'Opinion 1/09'* (2011) Agreement creating a unified patent litigation system of 8 March 2011, paras 74 and 76; *Opinion 2/13 of the Court (Full Court)* (2014) paras 182 and 183; and *Achmea C-284/16* (2018).

[44] *Case 6-64 – Costa v ENEL* (1964); *Case 26-62 van Gend & Loos* (1963); *Achmea C-284/16* (2018). This makes EU law a *sui generis* legal order. The source of the validity of EU law, being integrated and applied within the national legal orders of its Member States as a result of its supranational source, is not merely dependent on a wilful act: it belongs to the Member States. In public international law, where the application of international law usually depends upon the intent of the state (Maduro 2007), p. 4 et seq.