Case No: CL-2014-000251

Neutral Citation Number: [2017] EWHC 31 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION (INTERNATIONAL INVESTMENT DISPUTES) ACT 1966

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20/01/2017

Before:

MR JUSTICE BLAIR

- -

Between:

(1) VIOREL MICULA **(2) IOAN MICULA** **(3) S.C. EUROPEAN FOOD S.A.** **(4) S.C. STARMILL S.R.L.** **(5) S.C. MULTIPACK S.R.L.**	**Claimants/ Respondents**
- and -	
ROMANIA	**Defendant/ Applicant**
- and -	
EUROPEAN COMMISSION	**Intervener**

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- -

Sir Alan Dashwood QC, Patrick Green QC, and Matthieu Grégoire (instructed by **Shearman & Sterling (London) LLP**) for the **First Claimant**
Marie Demetriou QC and Hugo Leith (instructed by **White & Case LLP**) for the **Second to Fifth Claimants**

Robert O'Donoghue and Emily MacKenzie (instructed by **Thrings LLP**) for the **Defendant**

Nicholas Khan for the **European Commission**

Hearing dates: 1-3 November 2016

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Judgment

Mr Justice Blair:

Introduction

1. The 1st and 2nd claimants are nationals of Sweden, and the 3rd to 5th claimants are Romanian companies owned directly or indirectly by them. The defendant/applicant is Romania, and the intervening party is the European Commission.

2. This application arises out of an ICSID arbitration award (Case No. ARB/05/20) rendered against Romania in favour of the claimants on 11 December 2013 (the "Award"). ICSID is the International Centre for Settlement of Investment Disputes set up under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). According to the claimants, as at 31 August 2016 and including interest, the outstanding amount of the Award converted into sterling is about £173m.

3. The Arbitral Tribunal that rendered the Award was established pursuant to the bilateral investment treaty entered into between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments on April 1, 2003 (the "Sweden/Romania BIT").

4. On 17 October 2014, the Award was registered in the High Court by Order of Burton J pursuant to the provisions of the Arbitration (International Investment Disputes) Act 1966, which implemented the ICSID Convention in the UK (the "Registration Order").

5. By this application, Romania (supported by the European Commission) applies to set aside the Registration Order, alternatively to stay the Registration Order, alternatively that the questions which arise should be submitted to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

6. In summary, the issue that arises is as follows. Reflecting the terms of the ICSID Convention, registration of an ICSID award is an entitlement under the 1966 Act. There is no equivalent in the 1966 Act of s. 103 of the Arbitration Act 1996 which incorporates the grounds for the refusal of recognition or enforcement of a New York Convention Award set out in Article V of the Convention. Accordingly, the claimants argue that the court should dismiss the application and enforce the Award as a judgment in the normal way.

7. The complication in the present case is most easily shown by decisions issued by the European Commission. Following an injunction addressed to Romania dated 26 May 2014, a final decision was issued by the European Commission on 30 March 2015 (Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517) (the "Final Decision"). By the Final Decision, the Commission found that

implementation or execution of the Award by Romania (including payment) would constitute new incompatible State aid. (In very broad terms, the European Union rules on State aid are rules which prohibit state subsidies that distort competition.)

8. Supported by the European Commission, Romania argues that consequent on the Final Decision, this court is duty-bound, as a matter of domestic constitutional law which incorporates EU law, to refuse registration or execution of the Award, and therefore to set aside any Order which has already purported to register or execute the Award.

9. In summary, Romania's case supported by the Commission (except as to paragraph (1)(i) below in respect of which the Commission does not take a position) is that:

(1) The Registration Order be set aside because:

(i) Romania has in fact paid the Award in full; and/or

(ii) This court is obliged to refuse recognition (and any further enforcement) of the Award, given the terms of the Final Decision.

(2) Alternatively, that the court vary the Registration Order so as to stay proceedings until:

(i) The claimants' applications to annul the Final Decision are determined by the EU Courts; or

(ii) The CJEU issues a preliminary ruling pursuant to Art. 267 TFEU (assuming that this court makes a preliminary reference, as Romania supported by the Commission submits in the alternative that it should).

10. On their part, the claimants invite the court to assume for the purposes of this hearing that the Commission's Final Decision is valid (though they are challenging it in annulment proceedings (equivalent to an appeal) in the General Court of the European Union, the "GCEU"). They submit that, even on the premise of the decision's validity, the court is under a duty to recognise and enforce the Award. There is no basis for setting aside the Registration Order, or for a stay, or for a reference to the CJEU, the claimants submit, because:

(1) The Award is *res judicata*.

(2) The terms of the 1966 Act are clear and allow no derogation.

(3) Art.351 TFEU applies because the ICSID Convention imposes applicable prior multilateral international obligations on the UK owed to non-EU Member States which take precedence.

(4) The European Communities Act 1972 was not intended to put the UK in breach of pre-accession international obligations nor confer primacy on EU law in the relevant respect.

(5) Rejecting the application would not infringe the UK's EU law obligations of "sincere cooperation" under Art. 4(3) TEU (nor any other EU law duty).

(6) The Award has not been paid in full.

11. The Commission further argues that upon Romania's accession to the EU in 2007, at which point both parties to the treaty were members of the EU, the Sweden-Romania BIT became invalid. It submits that this issue should be included in a reference to the CJEU. The claimants say that the question is irrelevant to this case.

12. In this regard, it is to be noted that the question of the validity of BITs entered into between Member States of the EU (as in the present case between Sweden and Romania) has a wider significance for the Commission, raising questions as to the proper discharge of its duties in this situation. On 3 March 2016, in the case of *Achmea B.V. v Slovak Republic*, the Bundesgerichtshof (the Federal Court of Justice of Germany) requested a preliminary ruling from the CJEU on the compatibility of investor-state arbitration clauses in investment treaties between EU Member States. The Commission has recently issued a reasoned opinion under the infringement procedure under Article 258 TFEU to a number of EU Member States to the effect that they must terminate their intra-EU bilateral investment treaties.

13. The key issues that arise on the parties' submissions have been agreed in a joint table submitted by the parties after the close of the hearing.

14. If contrary to the claimants' primary contention, the court finds that a stay should be ordered, by application issued on 29 September 2016 the claimants ask the court to make the grant of such stay conditional upon the grant of full or substantial security for the Award.

The facts

15. The facts are largely not in dispute, though the parties interpret them differently.

16. The claimants maintain that they have made investments in Romania which were and still are protected by the Sweden/Romania BIT, and that they have a valid arbitration award in their favour which has been subject to an *ex post* attempt to nullify it. They maintain further that in its dealings towards them Romania has not behaved in good faith.

17. Romania denies bad faith on its part, and maintains that its actions are dictated by the necessity to comply with the legal regime of the European Union of which the claimants have at all times been aware.

18. The facts up to the date of the Award are set out fully and carefully in the ICSID Award of 11 December 2013 which is available on the internet. What is set out below is an outline. It is not for present purposes usually necessary to distinguish between the claimants.

19. In 1975, the ICSID Convention came into force in Romania. This was during the Communist period, which came to an end at the end of 1989.

20. Following Romania's application for membership in 1993, in 1995 the Europe Agreement between the European Community and Romania entered into force. This required the eventual adoption of the European rules on State aid.

21. In 1997, Romania was urged by the Commission to pursue "rapid privatisation", secure foreign direct investment and restructure the industrial and agricultural sectors. The Commission's 1998 Annual Report also emphasised the importance of regional development for Romania.

22. In 1998, Romania adopted an investment incentive scheme in the form of Emergency Government Ordinance No. 24/1998 ("EGO 24").

23. In 1999, the Ştei-Nucet region of Romania was designated as a disfavoured region for a 10-year period commencing 1 April 1999. It was later extended to include Drăgăneşti.

24. At the beginning of 2000, and in preparation for eventual accession to the EU, Romanian Law no. 143/1999 on State aid entered into force.

25. During the early 2000s, and (as explained in the Award) in reliance on the investment incentives, the claimants heavily invested in a large, highly integrated food production operation in the Şeti-Nucet-Drăgăneşti region as part of a 10-year business plan.

26. In 2002, Romania and Sweden (which was an existing member of the EU) signed the Sweden-Romania bilateral investment treaty which came into force in 2003. The BIT provided reciprocal protections for investments, and consent to investor-state dispute resolution under the ICSID Convention. The claimants say that Romania was being encouraged by the Commission to enter into such agreements at this time.

27. In 2004, Romania passed a Government Ordinance repealing all but one of the tax incentives provided under EGO 24, effective 22 February 2005. This was because it was seen as State aid.

28. On 28 July 2005, the claimants filed a Request for Arbitration with ICSID under the terms of the Sweden-Romania BIT. In due course, the European Commission participated as *amicus* in the arbitration, making submissions on EU law. Both Romania and the Commission argued that "any payment of compensation arising out of this Award would constitute illegal State aid under EU law and render the Award unenforceable in the EU".

29. On 1 January 2007, Romania became a member of the EU.

30. On 11 December 2013, the ICSID Tribunal issued the Award in the claimants' favour. It found by a majority that Romania had violated the claimants' legitimate expectations and had failed to act transparently. It did not deal with the issue of enforceability under the EU State aid rules, stating that it was "not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters".

31. The Award orders Romania to pay RON 376,433,229 (the RON is the Romanian Leu) as damages, together with interest of RON 424,159,150 and further interest accruing until the defendant satisfies the Award in full. The court was told that this was the equivalent of the assistance which it would have received but for the measures taken by the State to withdraw the aid which had been extended.

32. On 14 January 2014, Romania purported to set-off RON 337,492,864 in respect of the third claimant's unpaid taxes against the Award. The claimants subsequently challenged the set-off in the Romanian courts in one of a number of court proceedings in Romania, including in the Romanian Supreme Court. The set-off was the first of various such steps which are relied on by Romania as constituting payment of the Award, and which are further identified in the relevant section of this judgment.

33. On 9 April 2014, and in accordance with ICSID procedures, Romania filed an application for the annulment of the Award to the ICSID "*ad hoc* Committee" and requested a stay of enforcement of the Award, which was granted provisionally.

34. The position of the European Commission was that implementation of the Award would constitute new State aid. On 26 May 2014, the Commission issued a suspension injunction to restrain Romania from taking any action to execute or implement the Award until it had taken a final decision on the compatibility of State aid (the "Injunction Decision").

35. On 7 August 2014, the ICSID *ad hoc* Committee agreed to a continuation of the stay of enforcement of the Award, provided that Romania filed an assurance that it would pay the Award in full and subject to no conditions whatsoever if the annulment application was dismissed. Romania did not give this assurance, and the stay was revoked.

36. On 2 September 2014, the claimants applied to the GCEU to annul the Commission's Injunction Decision.

37. Pursuant to an application made by the 1st claimant on 2 October 2014, (Claim No 2014-000251, which constitutes these proceedings), on 17 October 2014 the Award was registered in the English High Court pursuant to the Order of Mr Justice Burton. The Registration Order was made on the documents in the usual way, giving the defendant (Romania) the right to apply to vary or set it aside.

38. On 30 March 2015, the Commission adopted Final Decision 2015/1470 in which it, in summary: (i) declared that payment of the Award by Romania constituted new State aid within the meaning of Article 107(1) of TFEU (the Treaty on the Functioning of the European Union); (ii) prohibited Romania from making any payment under the Award to the claimants; (iii) demanded that Romania recover any sums already paid out under the Award; (iv) provided that the claimants, together with S.C. European Drinks S.A., S.C. Rieni Drinks S.A., S.C. Scandic Distilleries S.A., , S.C. Transilvania General Import Export S.R.L. and S.C. West Leasing International S.R.L. (being entities owned directly or indirectly by the 1st and 2nd claimants), shall be jointly liable to repay any sums received by any one of them as part-payment of the Award.

39. On 28 July 2015, the defendant filed its application to set aside or vary the Registration Order. By consent, the 2nd to 5th claimants joined the proceedings. Shortly afterwards, the Commission decided to intervene.

40. On 6 November 2015, the 3rd to 5th claimants commenced proceedings before the GCEU seeking annulment of the Commission's Final Decision (each of the parties

sometimes refer to this as the claimants' "appeal" against the decision). The other claimants commenced similar proceedings shortly afterwards.

41. On 26 February 2016, the ICSID *ad hoc* Committee rejected Romania's Annulment Application.

42. On 29 September 2016, the claimants filed a cross-application for security for damages in these proceedings in the event of the court acceding to Romania's application.

43. To complete the picture, it should be noted that there are ongoing enforcement proceedings by the claimants in the United States, France, Belgium, Luxembourg and Sweden, though none has so far yielded any recovery.

44. The court was told that the Belgian court set aside the initial garnishment order obtained on the Award, and that this is currently being appealed.

45. At the time of this judgment, an appeal to US Court of Appeals for the Second Circuit is pending by Romania against certain decisions of the District Court for the Southern District of New York recognising the Award.

46. Further ICSID proceedings were begun on 24 November 2014 by the 1st and 2nd claimants and their companies, but the court was told that these proceedings are not relevant for present purposes.

The ICSID Award of 11 December 2013

47. The Tribunal decided (see para 1329) that:

    i) The claimants' claim that Romania violated Art. 2(4) of the Sweden/Romania BIT by failing to observe obligations entered into with the claimants with regard to their investments was dismissed by majority.

    ii) The claimants' claim that Romania had violated Art. 2(3) of the BIT by failing to ensure fair and equitable treatment of the claimants' investments was upheld by majority.

    iii) In view of its decision, the Tribunal did not need to determine whether Romania had breached the BIT by impairing the claimants' investments through unreasonable or discriminatory measures (Art. 2(3) of the BIT) or by expropriating the claimants' investments without the payment of prompt, adequate, and effective compensation (Art. 4(1) of the BIT).

    iv) The Award ordered Romania to pay RON 376,433,229 as damages, together with interest of RON 424,159,150 and further interest accruing until the defendant satisfies the Award in full.

The principles as regards registration of ICSID awards

48. The Arbitration (International Investment Disputes) Act 1966 implemented the ICSID Convention in the UK.

49. Section 1(2) of the 1966 Act provides that a person seeking recognition or enforcement of a Convention award "shall be entitled to have the award registered in the High Court".

50. The award is not to be registered, however, if the pecuniary obligations it imposes have been wholly satisfied (s. 1(5)). There is an issue between the parties on this point.

51. Section 2(1) of the 1966 Act provides for the effects of registration in accordance with Art. 54 of the ICSID Convention, effectively equating a registered Convention award to a judgment of the High Court:

    i) As respects the pecuniary obligations which it imposes, the award is "of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act, …".

    ii) So far as relates to such pecuniary obligations, "(a) proceedings may be taken on the award, (b) the sum for which the award is registered shall carry interest, [and] (c) the High Court shall have the same control over the execution of the award, as if the award had been such a judgment of the High Court".

52. There is no equivalent in the 1966 Act of s. 103 of the Arbitration Act 1996, which contains grounds for the refusal of recognition or enforcement of a New York Convention award, reflecting the grounds provided for in Article V of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

53. The ICSID Convention operates so as to bind the State signatories, including the United Kingdom, so that "unless an ICSID award is revised or annulled under ICSID's own internal procedures, each contracting state must recognise an ICSID award as if it were a final judgment of its own national courts and enforce the obligation imposed by that award…only an ICSID annulment committee may annul the award. Setting aside or any other review of ICSID awards by domestic courts is not available" (Nigel Blackaby, Constantine Partasides, et al. *Redfern and Hunter on International Arbitration* (6th ed, 2015), §11.125-11.127; and see Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, (2nd ed., 2012), p.310-311, and *AIG Capital Partners Inc v Republic of Kazakhstan* [2006] 1 W.L.R. 1420 at [71], Aikens J).

54. In the present case, the ICSID *ad hoc* Committee upheld the Award on 12 February 2016. It is common ground that there is no further recourse available to Romania under the ICSID Convention. As a matter of English law, therefore, the claimants are entitled to be in the same position as if there was a judgment of the High Court in their favour. The term "judgment" in this context means "final judgment" (Art. 54(1) of the ICSID Convention). This is an important part of the fulfilment of the UK's international obligations in respect of investment disputes decided under the Convention.

<u>The Final Decision of the European Commission of 30 March 2015</u>

55. On 30 March 2015, the Commission issued a Final Decision (EU 2015/1470), in which it found that payment under the Award would constitute new incompatible State aid within the meaning of Art. 107(1) TFEU. The Final Decision is a lengthy document in which the history (as the Commission sees it) is set out in recitals.

56. The Commission found that:

i) The implementation or execution of the Award "re-establishes the situation the claimants would have, in all likelihood, found themselves in if the EGO 24 [investment incentive] scheme had never been repealed" and therefore it grants the claimants an economic advantage not otherwise available on the market.

ii) This is a selective advantage because (i) it only awards compensation to the claimants and the Sweden/Romania BIT only confers the right of compensation to a certain group of investors (*i.e.*, those from Sweden and Romania), and (ii) the Award compensates the claimants for the repeal of investment incentives "which themselves are selective in nature".

iii) Paying the Award would be imputable to Romania notwithstanding that it is an automatic and involuntary consequence of Romania's obligations under the ICSID Convention.

iv) It would be a measure liable to distort competition and affect trade between Member States because the claimants actively compete on a "liberalised market" and the Award relieves them of their "ordinary operating expenses".

57. The operative part of the Final Decision:

i) Prohibited Romania from making any payment under the Award to the claimants.

ii) Required Romania to recover any incompatible aid already paid out.

iii) Provided that the claimants shall be jointly liable to repay the State aid received by any one of them.

iv) Provided that recovery of the aid "shall be immediate and effective" and that Romania shall ensure that the Decision is implemented within four months.

v) Required Romania to submit within two months information as to (i) the total amount of aid received by each entity; (ii) a detailed description of the measures already taken and planned to comply with the Decision; and (iii) submit documents demonstrating that the beneficiaries have been ordered to repay the aid.

58. The validity of the Commission's Final Decision is the subject of annulment proceedings before the GCEU (there are three sets of such proceedings), which (as noted above) is sometimes referred to by the parties as the claimants' appeal against the Final Decision.

59. The claimants argue, among other things, that the Final Decision was ultra vires, since the international wrongs for which the Award compensates were crystallised upon the

cancellation of the EGO 24 incentives in February 2005, some two years before Romania acceded to the EU. By treating payment of the Award as the granting of illegal 'new' State aid, the Final Decision effectively applies the EU State aid rules retrospectively, to a time when the rules, and the Commission's powers under them, were not yet applicable in Romania – Romania was not a Member State and the EU had no relevant competence under the Treaties, or the power to adopt the Final Decision on which Romania and the Commission now rely. The claimants contend that the decision represents an extravagant and unfounded assertion of a jurisdiction which the Commission plainly does not have, designed to manufacture a competence over events before Romania joined the EU, thereby protecting Romania against the consequences of its wrongdoing.

60. The Commission has filed defences asserting the validity of the Final Decision, the claimants have filed replies, and the Commission has filed rejoinders in response to the replies.

61. As stated elsewhere, the claimants invite the court to assume, for the purposes of this hearing, that the Commission's Final Decision is valid.

The relevant principles of EU law as regards State aid applicable in National courts

The principles

62. Supported by Romania, the Commission argues that this court cannot assist the claimants by preventing or impeding Romania's compliance with its EU law obligations as regards State aid.

63. The principles are mainly not in dispute, and can be stated as follows. Art. 107(1) TFEU provides that "State aid" is, in principle, incompatible with the internal market. The Commission's role is to examine the compatibility of aid measures with the internal market, based on the criteria laid down in Arts. 107(2) and (3) TFEU. This compatibility assessment is the exclusive responsibility of the Commission, subject to review by the EU Courts. National courts have a complementary role, and must not disregard the limits of their own jurisdiction to prejudice the effectiveness of these articles—see the recent decision of the CJEU in Case C-590/14 P, Dimosia Epicheirisi Ilektrismou AE (DEI), EU:C:2016:797.

64. This is based on the duty of sincere cooperation contained in Art. 4(3) TEU which provides that:

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

65. As appears from Art. 4(3) TEU, the ambit of the "principle of sincere cooperation" is broad; it implies both positive and negative duties and may be engaged irrespective of to whom the relevant EU act is addressed. As the CJEU has held in Case C-344/98, *Masterfoods*, EU:C:2000:689, paragraphs 45 to 60 (in the case of antitrust law), and in Case C-284/12 *Deutsche Lufthansa*, EU:C:2013:755, paragraph 41 (in the case of State aid law), that duty is as follows:

> "The application of the European Union rules on State aid is based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the Courts of the European Union, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty. In the context of that cooperation, national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under European Union law and refrain from those which may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU. Therefore, national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission." (*Deutsche Lufthansa* para 41).

66. This was reiterated by the CJEU in *Dimosia Epicheirisi Ilektrismou AE (DEI),* ibid, (a judgment of 26 October 2016) at paragraph 105 as follows:

> "It must be borne in mind that the application of the EU State aid rules is based on a duty of sincere cooperation between the national courts, on the one hand, and the Commission and the European Union courts, on the other, in the context of which each acts on the basis of the role assigned to it by the FEU Treaty. In the context of that cooperation, national courts must take all the measures, whether general or specific, necessary to ensure fulfilment of the obligations under EU law and must refrain from those that may jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU. Accordingly, national courts must, in particular, refrain from taking decisions that conflict with a decision of the Commission (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 41)."

67. Article 288 TFEU provides that a decision "shall be binding in its entirety" and Article 278 TFEU provides that the bringing of actions for annulment before the GCEU (as the claimants have) does not suspend the obligations flowing from an act of the EU.

68. The principle as regards State aid law as stated by the CJEU is, therefore, that national courts must refrain from taking decisions which conflict with a decision of the Commission.

69. In reliance on these and other authorities, the general principle has been stated in the same terms by the Court of Appeal in *Air Canada v Emerald Supplies* [2015] EWCA Civ 1024 at [70]:

> "The duty under Article 4(3) TEU is binding on all authorities of the Member States, including the courts: see Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11369 ("*Masterfood*s") at [49]. The general principle of legal certainty, which underpins the duty of sincere cooperation, requires Member States to avoid making decisions that could conflict with a decision contemplated by the Commission: see Case C-234/89 *Delimitis v Henniger Brau* [1991] ECR I-935 at [47] ("*Delimitis*"); *Masterfoods* at [51] and *National Grid Electricity Transmission v ABB Ltd* [2009] EWHC 1326 at [24.] It is only where, in the words of the Commission in *Delimitis* at [50], there is "scarcely any risk" of a conflict between decisions of domestic and EU institutions, that the national authorities should proceed. Where the EU and domestic authorities have overlapping jurisdictions i.e. considering the same or similar matters, the risk of conflicting decisions will be high."

70. This is the jurisprudential basis for the case made by the Commission and Romania that the court should set aside the registration of the Award since, they maintain, it conflicts with a decision of the Commission.

71. Similar principles arise on their alternative case as to a stay. They submit that the duty on national courts to refrain from taking steps which conflict with a decision of the Commission may require a national court to stay proceedings pending the resolution of a challenge to that decision in the European Court. This is so as to avoid the risk of the national court coming to a different conclusion.

72. As noted earlier, in November 2015 the claimants commenced proceedings before the GCEU seeking annulment of the Commission's Final Decision, and a ruling by the GCEU is awaited.

73. The position in such a case was analysed by the English court in *Iberian U.K. Ltd. v B.P.B. Industries Plc* [1997] I.C.R. 164 (a competition case), in which it was said at p.186F:

> "In my view these cases reinforce and support the following propositions. (1) The courts here should take all reasonable steps to avoid or reduce the risk of arriving at a conclusion which is at variance with a decision of, or on appeal from, the Commission in relation to competition law. (2) Except in the clearest cases of breach or non-breach, it will be a proper exercise of discretion to stay proceedings here to await the outcome of the Community proceedings."

The same approach applies in relation to State aid law (Kelyn Bacon, *European Union Law of State Aid* (2nd edn. OUP, 2013), para 20.49).

74. This is subject to a materiality threshold: in other words, the risk of a potential conflict with a decision of the European Court must be a real one (see e.g. *Crehan v Inntrepreneur Pub Co* [2007] 1 A.C. 333). This does not apply where there is "scarcely any risk" of a conflict between decisions of domestic and EU institutions (see the passage cited from *Emerald Supplies* above).

75. In summary and so far as relevant, as Romania and the Commission submit, in cases concerning State aid (1) a national court must refrain from taking decisions which conflict with a decision of the European Commission, and (2) where proceedings are on foot in the European Court (i.e. the GCEU or CJEU) to annul such a decision, a national court should stay domestic proceedings where there is a material risk of conflict with the decision of the European Court pending its decision.

76. The question is as to the application of these principles in this case.

The parties' submissions

77. The claimants largely accept the above statements of principle, accepting that the UK courts bear duties under Art. 4(3) TEU not to take decisions in conflict with decisions of the Commission. However, their submission is that no conflict arises by upholding the registration of the Award with the prospect of the Award's eventual execution against commercial property held by Romania in the UK. This would not entail any infringement of obligations binding the UK under EU law primarily because of the principle of *res judicata* as upheld in the European case law, and because Art. 351 TFEU preserves the force of a Member States' pre-accession international obligations. So far as there is any conflict, their submission is that the UK court must put its obligation under the ICSID Convention first.

78. Romania and the Commission on the other hand submit that court is obliged to refuse recognition and any further enforcement of the Award because of the terms of the Commission's Final Decision. Applying the principles set out above, the court cannot act in a way contrary to the decision, and the questions of law raised by the claimants are already before the GCEU in the claimants' appeal against the Final Decision, and it is the European court that is the correct forum in which to resolve them, not this court.

79. The claimants contest the applicability of the principles set out above based on Art. 4(3) TEU on two grounds:

    (1) The UK's duty of sincere cooperation is not engaged at all. Any satisfaction of the Award, or part of it, achieved as a consequence of execution pursuant to registration would not amount to an act imputable to Romania because it would be involuntary, and not pursuant to an autonomous decision by Romania. It could not, therefore, entail the granting of illegal State aid by Romania to the claimants. It appeared at one point in the hearing that this argument would not be pursued by the claimants, but it was later clarified that the argument stood, but would not be developed beyond the claimants' written submissions. It is dealt with further below.

(2) Invocation of the duty of sincere cooperation against the UK in the circumstances of this case would constitute an unprecedented and exorbitant application of Art. 4(3) TEU.

80. As to (2), the claimants submit that there is no authority to support the proposition that a court of Member State A can be prevented by that State's duty of sincere cooperation under Art. 4(3) from awarding or enforcing an award of damages because the effect of such a decision would be to enable Member State B to circumvent the EU rules on State aid, particularly where (as they submit) this would put State A in violation of international obligations. All of the State aid cases cited by Romania and the Commission were ones in which the courts obliged to refrain from determining a certain matter belonged to the same Member State whose authorities were responsible for the granting of the State aid in question.

81. However, as Romania and the Commission point out, the effect of the claimants' submissions would be that a Commission decision on State aid would be observed only in the country directly concerned, and in no other Member State. The court agrees that this would run contrary to the underlying principles as to State aid, which on this basis could be readily circumvented. Whilst, as the claimants say, the decided cases involve the courts of the country whose authorities were responsible for granting the State aid, this reflects the fact situation that arose in those cases. It may well be, as Romania and the Commission put it, that the precise obligations of the national courts would vary from country to country depending on the particular action which is sought. But no EU national court can take measures which run contrary to a final, binding Commission decision on unlawful State aid, and there is no reason to apply a different approach where the issue arises as regards enforcement elsewhere in the EU, which is the fact situation that arises in this case.

82. In oral argument, it was accepted on behalf of the claimants that Art. 4(3) applies both vertically and horizontally, but submitted that when applied with the principle of conferral, the constraint comes from the ancillary character of the duty of sincere cooperation. The principle, it is submitted, always has to be read in context, and is not an independent source of rights and duties.

83. Reliance is placed by the claimants on Koen Lenaerts and Piet van Nuffel, *European Union Law* (3rd ed, 2011), where it is stated at §7-042:

> "Article 4 (3) does not have direct effect in itself, but it can be used as an additional argument where the Member State in question is alleged to have breached an unconditional and sufficiently precise obligation. In such a case, the national court, as an institution of the Member State, has to refrain from applying the provisions of domestic law which prevent EU law from having its full effect."

84. However, in the present case breach of the Commission's Final Decision by Romania paying the Award would clearly be a breach of an unconditional and sufficiently precise obligation set out in the decision. That is the context in which this court, as a national court, albeit of a different Member State, has to consider and apply the duty of sincere cooperation. The duty has been called the most important general principle of Community law (*Edward and Lane on European Union Law*, para 2.24, p.45).

85. The claimants further submit that Romania and the Commission have failed to demonstrate that rejection of the Application by the court would amount to a "measure" within the meaning of Art. 4(3) TEU.

86. However, the Commission's Final Decision establishes that (i) payment under the Award would constitute new incompatible State aid; and (ii) that such State aid is incompatible with Art. 108 TFEU. Romania emphasised, correctly in the court's view, that the relevant measure for these purposes is the satisfaction of the Award, and not (as the claimants submitted) the ratification of the ICSID Convention by the UK.

87. The claimants submit that Art. 4(2) which obliges the Union to respect "the equality of Member States before the Treaties, as well as their national identities…" and also "their essential state functions", must be taken to include the good standing of Member States as subjects of the international legal order. This raises the question whether the application of the principles stated above would create a conflict between the EU rules as to State aid and the obligations of the UK under the ICSID Convention so far as relevant to this case. The question is considered below.

The issues agreed by the parties in the joint table

88. The key issues that arise on the parties' submissions have been agreed in a joint table submitted by the parties after the close of the hearing.

89. The issues do not seem to be ordered entirely logically in the table. For example, in the 1st claimant's skeleton argument the question, "Does the ECA 1972, properly interpreted, mean that this Court should give priority to its obligations under the Arbitration Act 1966 over its obligations under EU law?", is treated as "necessarily anterior", whereas in the joint table, the issue comes in the middle of the list. But for convenience, the issues are addressed below in the order in the table. Some of the arguments raised under particular issues repeat or refer to the same points under different issues: each has been considered under the relevant issue whether expressly referred to or not. In the light of the court's overall conclusion, the court has not expressed a final view on the substance of the issues where to do so would risk creating a possible conflict with the proceedings before the GCEU.

Issue 1: finality of decisions

90. Issue 1 is formulated by the parties as follows. Does the Award have the status of *res judicata*? If so, does EU law require this court to disregard national law rules as to finality of decisions, or does the *Klausner* exception apply?

91. The essence of the issue is whether the Commission's Final Decision of 30 March 2015 can affect the validity of the Award issued on 11 December 2013, since it postdates it. (The Commission's Injunction Decision of 26 May 2014 also postdates it.)

92. The claimants contend that the Award has the status of *res judicata* and that the rule in Case C-234/04 *Kapferer* [2006] ECR I-2605 applies. This case draws attention "to the importance, both for the Community legal order and national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations

and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after the expiry of time-limits provided for in that connection can no longer be called into question" (paragraph 20).

93. The claimants submit that:

i) The content of the Award's findings as to application of State aid law to enforcement is irrelevant to the status of the Award as *res judicata*.

ii) The Award was binding and *res judicata* when rendered on 11 December 2013 (see ss. 1 and 2 of the 1966 Act, and CPR 40.7), which is when the obligation on States to recognise it arose.

iii) The assertion of EU law rights was clearly possible in this case, meeting the requirements of the principle of effectiveness. This is not a case of circumvention of State aid law (as in the cases of Case C-505/14 *Klausner Holz Niedersachsen v Land Nordrhein-Westfalen*, EU:C:2015:742 and Case C-119/05 *Lucchini* [2007] ECR I-6199 relied on by Romania and the Commission).

94. Romania and the Commission submit that the Award does not have the status of *res judicata* because:

i) There is no *res judicata* because the Award expressly refused to make any findings on enforcement (see Award, para 330*ff*).

ii) The Commission's Injunction Decision of 26 May 2014 and Final Decision of 30 March 2015 pre-date the *res judicata* of the Award, which was 26 February 2016, so that the *Kapferer* principles do not apply.

iii) The *Klausner* exception applies: in *Lucchini*, the CJEU ruled that EU law precludes the application of a provision of national law which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of EU law which has been found to be incompatible with the common market in a final Commission decision.

95. The court's view on these issues is as follows.

96. The claimants' argument as to the applicability of the *res judicata* principle gains weight from cases upholding the finality of arbitration awards generally (Case C-126/97 *Eco Swiss* [1999] ECR I-3079, and Case C-40/08 *Asturcom* [2012] 1 CMLR 34). (As to finality of awards under English law principles, see *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm)).

97. However, the immediate issue for the court is as to the effect of the Commission's Final Decision in this regard. The claimants' submission is that the respect accorded by EU law to the finality of decisions applies even if an EU institution makes a directly inconsistent finding. So even where the Commission finds a measure to be a

State aid, the status of a contrary prior final decision of a national court as *res judicata* and thus enforceable is unaffected. Reliance is placed on Case C-507/08 *Commission v Slovak Republic* [2010] ECR I-13512.

98. The question is as to when the Award became *res judicata*, in the sense of acquiring finality.

99. The claimants submit that this occurred on the date of the Award, which was 11 December 2013, before either of the Commission's Decisions. This is supported by s. 2(1) of the Arbitration (International Investment Disputes) Act 1966, which provides that:

> "… an award registered under section 1 above shall, as respects the pecuniary obligations which it imposes, be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act, …".

Though nothing seems to turn on this, a judgment of the English High Court would usually be considered as "given" when it is handed down, and "entered" on the date of the formal order recording the court's decision.

100. Romania and the Commission submit that finality did not occur until 26 February 2016 when the ICSID *ad hoc* Committee rejected Romania's Annulment Application. Reliance is placed on Christoph Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn, 2009), at p.1105, which states that:

> "The exclusion of another remedy [that is, other than under the ICSID Convention review procedures] means that a party to ICSID proceedings that is dissatisfied with the Award may not turn to another forum to seek relief for the same claim. Once the ICSID tribunal has rendered its award and the review procedures under the Convention have been exhausted, the case is *res judicata*. The principle *ne bis in idem* precludes resort to any national or international remedy."

Romania points out that the review procedures under the Convention are not exhausted until after the decision of the ICSID *ad hoc* Committee, which happened on 26 February 2016.

101. The court begins by considering *Commission v Slovak Republic* (ibid), where the issue was as to the recovery of a tax claim the writing off of which was confirmed by the Slovak court in 2004 as part of an arrangement with creditors. On the expiry of the period for an appeal, the decision of the Slovak court acquired the force of *res judicata* (see para 7). By a decision issued in 2007, it was found by the Commission to be State aid granted in breach of European Union law, and the Slovak Republic was required to recover it.

102. The CJEU considered (at para 55) whether, where, as part of a procedure for arrangement with creditors under court supervision, a national court judgment decides

on an arrangement which involves a debt to a public authority being partly written off, and that write-off is thereafter categorised by the Commission as State aid, the finality of that judgment can prevent the recovery of that aid.

103. In that regard, the Fourth Chamber stated as follows:

> "56 In that regard, it must, first, be stated that the situation at issue here is distinguishable from that in *Lucchini*, relied on by the Commission, where the Court held that European Union law precludes the application of a provision of national law which seeks to lay down the principle of *res judicata* in so far as the application of that provision prevents the recovery of State aid granted in breach of European Union law which has been found to be incompatible with the common market in a decision of the Commission which has become final (see, to that effect, paragraph 63 of *Lucchini*).
>
> 57 In the present case, the court judgment possessed of the force of *res judicata* relied on by the Slovak Republic precedes the decision whereby the Commission requires the recovery of the aid at issue.
>
> 58 Consequently, as maintained by the Slovak Republic, *Lucchini* cannot be of direct relevance to this case.
>
> 59 Secondly, attention should be drawn to the importance, both in the European Union legal order and in the national legal orders, of the principle of *res judicata*. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided to exercise those rights can no longer be called into question (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38; Case C-234/04 *Kapferer* [2006] ECR I-2585, paragraph 20; and Case C-2/08 *Fallimento Olimpiclub* [2009] ECR I-7501, paragraph 22).
>
> 60 Accordingly, European Union law does not in all circumstances require a national court to disapply domestic rules of procedure conferring the force of *res judicata* on a judgment, even if to do so would make it possible to remedy an infringement of European Union law by the judgment in question (see, to that effect, *Kapferer*, paragraph 21, and *Fallimento Olimpiclub*, paragraph 23)."

104. Turning to the present case, as explained above, the European Commission participated as *amicus* in the ICSID arbitration, both Romania and the Commission arguing that "any payment of compensation arising out of this Award would constitute illegal state aid under EU law and render the Award unenforceable in the EU". As explained above, the Tribunal did not decide that question.

105. An asserted failure to decide whether Romania was prohibited from paying compensation for the repeal of illegal State aid was one of Romania's annulment grounds. The Commission participated as *amicus* in the annulment proceedings as well. The challenge was rejected by the ICSID *ad hoc* Committee, which decided that "… it is clear that the Tribunal dealt with the issue posed by Romania. The Tribunal gave reasons for its conclusion that it was not useful to determine whether the Award would be unenforceable: it considered that this was not an issue before the Tribunal because it was not its duty to address the potential non-enforceability of the Award after it had been rendered" (para 230).

106. Drawing these points together, the court accepts that there is force in Romania's contentions that the issue of non-enforceability has never been decided in the ICSID proceedings, and that the Award only achieved finality for ICSID purposes after the Annulment Application was decided against Romania on 26 February 2016, so post-dating the Commission's Final Decision.

107. As a matter of English law, however, s. 2(1) of the 1966 Act provides that as respects the pecuniary obligations which it imposes, the Award is "of the same force and effect for the purposes of execution as if it had been a judgment of the High Court given when the award was rendered pursuant to the Convention and entered on the date of registration under this Act, …". A judgment or order takes effect from the day when it is given (CPR 4.40.7). Read with Art. 54 of the ICSID Convention, this shows that finality occurs at the time of the Award, because that is the time at which a final judgment of the High Court is deemed to be given for enforcement purposes, and not at the time of the resolution of annulment proceedings under the Convention.

108. It is true that the term "*res judicata*" may have several different meanings. But in the court's view the claimants are correct to submit that, as a matter of English law, the Award became *res judicata* in the sense of acquiring finality on 11 December 2013, not on 26 February 2016, and so pre-dated both the Commission's Decisions.

109. The question is what follows from this conclusion. If the court proceeds to enforce the Award against the assets of Romania as if it were a judgment of the court, as the claimants invite it to do, it would be acting in direct contradiction with the Commission's Final Decision the effect of which is to prohibit payment by Romania. In this regard, the case is different from *Commission v Slovak Republic*, where the proceedings in the national court had closed, and the issue was as to recovery (see para 10). In the present case, enforcement has not yet begun in the English court, and court-sanctioned steps to enforce the Award would appear to engender a direct conflict between the court and the Commission.

110. Further, account has to be taken of the claimants' annulment proceedings in respect of the Final Decision. The claimants' position is that the *res judicata* principle is not addressed in the Final Decision (this is not in dispute), and is not in issue in the claimants' proceedings in the GCEU to annul that decision. In that regard, the claimants have two points, first that *res judicata* is not a ground that they advance for annulment of the Final Decision, and second that it does not arise for consideration before the GCEU.

111. The first point is not in dispute. However, the second point is in dispute. In its defence in the annulment proceedings, the Commission relies on the *Klausner* case,

contending that it shows that the courts will not accept an outcome that produces a circumvention of the State aid rules by way of *res judicata*. Whilst the claimants do not raise *res judicata* as a ground on annulment of the Commission's Final Decision, therefore, the issue of *res judicata* in the context of the decisions of national courts is raised by the Commission. In the court's view, Romania and the Commission are correct to say that the meaning and scope of *Klausner* forms part of GCEU appeals, and because it forms part of the argument in these proceedings, there would be a real risk of inconsistent decisions if this court were now to decide as a matter of European law that the Award can be enforced.

112. On this basis, applying the principles set out above, the court considers that the final determination of the issue should be stayed pending the decision of the European Court.

Issue 2: the effect of the Arbitration (International Investment Disputes) Act 1966

113. Issue 2 is formulated by the parties as follows. Leaving aside questions of EU law, does this court have a duty under the 1966 Act to register/enforce the Award?

114. The claimants submit that the 1966 Act requires the court to enforce the Award.

i) The terms of the 1966 Arbitration Act (implementing Art. 54 of the ICSID Convention) are clear and allow for no derogation—especially in not providing a public policy exception.

ii) Romania's argument flies in the face of the purpose of the 1966 Act, especially as interpreted in light of the UK's clear underlying international obligations.

iii) In any event, if the Award were a High Court judgment it would be enforced, applying *Kapferer* (ibid).

115. The claimants submit that enforcement of the Award is therefore mandatory under the 1966 Act, and that EU law provides no ground for departing from this position, for the reasons set out in the claimants' submissions on issues 1 and 3-5. Romania's application should be dismissed.

116. Romania and the Commission submit that the 1966 Act only requires that the Award be treated in the same way the court would treat a judgment of the High Court, and that the obligation is one of non-discrimination, not result. The High Court would also give priority to EU law and refuse to enforce a judgment in these circumstances, so no conflict arises. The 1966 Act imposes no requirement on this court to register/enforce the Award, and the Order of 17 October 2014 registering the Award must be set aside, alternatively stayed.

117. In setting out the court's reasons, it is convenient to consider these alternative submissions as to setting aside registration and staying enforcement separately.

(i) The submission that the registration of the Award must be set aside

118. The primary case of Romania and the Commission is that the Order of the English court made on 17 October 2014 registering the Award must be set aside.

119. This submission, if correct, would (in the court's view) conflict with the terms of s. 1(2) of the Arbitration (International Investment Disputes) Act 1966, which provides for what has been called "automatic" registration of an ICSID award:

> "A person seeking recognition or enforcement of such an award shall be entitled to have the award registered in the High Court subject to proof of the prescribed matters and to the other provisions of this Act."

120. Romania and the Commission have placed emphasis on the fact that at the time of registration, the Commission had already issued its Injunction Decision of 26 May 2014 restraining Romania from taking any action in execution or implementation of the Award until it had taken a final decision on the compatibility of State aid. At this time, Romania itself had purported to satisfy the Award by a set-off against taxes.

121. However, in the court's view, it is important to note the scope of the Injunction Decision. It is addressed to Romania, the requirement in the operative part of the decision being that "Romania shall immediately suspend any action which may lead to the execution or implementation or execution of the Award of 11 December 2013 … as the execution of the award appears to constitute unlawful State aid, until the Commission has taken a final decision on the compatibility of that State aid with the internal market".

122. In the usual way, the registration of the Award by the English court was on the application of the claimants as the holders of the Award in their favour. The application was submitted by the claimants to the judge *ex parte* on the documents, and Romania took no action, and indeed played no part in the process at that time. The Registration Order entitled Romania to apply to set aside or vary the Registration Order, which it does in the present application.

123. Clearly therefore, the registration of the Award did not place Romania in breach of the Injunction Decision, and the claimants were not in breach by registering the Award. The operative part of the Injunction Decision (which consists of a single article) is directed solely at Romania not the claimants (c.f. the operative part of the Commission's Final Decision set out above).

124. Of course, registration is a step that may lead to enforcement action in due course. The claimants make clear (as one would expect) that leaving the Registration Order intact carries with it "the prospect of the Award's eventual execution against commercial property held by Romania in the UK".

125. However, in the court's view, just as there is a distinction between the giving of a judgment and the enforcement of it, so there is a distinction between registering an award, and enforcing it. Registration is not necessarily a precursor to execution, though it may lead to it. In commercial terms, there may be good reason to register an award aside from imminent enforcement, for example for reasons of priority as against other creditors, or as a precaution. So in this case, the claimants who have a binding award in their favour could be prejudiced by setting aside the registration whilst the State aid issue is resolved in the European courts. In the court's view, care should be taken not to derogate from the entitlement to have an award registered as a judgment outside the confines of the 1966 Act (as to such confines, see for example

the provisions as to proving authenticity (s.1(6)(b)), and where there has been prior satisfaction of the award in part or in whole (s.1(5)).

126. The issue can be resolved on the facts of the present case. As both Romania and the Commission have been at pains to emphasise, the prohibited State aid measure is *payment* of the Award, whether by implementation or execution. Thus, the Commission's Final Decision stipulates that "Romania shall not *pay* any incompatible aid …" (italics added). Registration of the Award is not comprehended within the Final Decision, and there is no reason to read it in. Registration in itself does not create a risk of conflict between decisions of domestic and EU institutions in the sense established in the case law. The court does not accept the submissions of Romania and the Commission in this respect.

(ii) The submission that enforcement proceedings should be stayed

127. The alternative submission of Romania and the Commission is that enforcement proceedings on the Registration Order should be stayed until the claimants' applications to annul the Commission's Final Decision are determined by the EU Courts.

128. The court's conclusion is as follows. It is correct, as the claimants say, that the 1966 Act is clear, and unlike the Arbitration Act 1996, it does not provide a public policy exception. As explained above, subject to narrow exceptions, a party holding an ICSID award is entitled to have it registered in England and Wales, and is thereafter in the same position as regards enforcement of pecuniary obligations as if the award was a final judgment of the High Court.

129. Enforcement is subject to the law applicable to enforcing such a judgment (see e.g. *AIG Capital Partners Inc v Republic of Kazakhstan*, ibid, at [87], in which it was held that enforcement of an ICSID award was subject to the restrictions in the State Immunity Act 1978). In other words, by registration, the Award is equated to a final domestic judgment for these purposes, but is not in a better (or worse) position. As is recorded in Schreuer, *The ICSID Convention: A Commentary*, ibid, at p.1124, the 1965 Report of the Executive Directors on the Convention confirms in paragraph 42 that, "… Article 54 requires every Contracting State to recognize the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic court".

130. The constraint on enforcement inherent in sovereign immunity was specifically recognised in the Report. In paragraph 43 it reads:

> "The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed. In order to leave no doubt on this point Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State

> relating to immunity of that State or of any foreign State from execution."

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

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

133. The court accepts the submission of Romania and the Commission in this respect. Contrary to the claimants' submissions, there is no question of this being "tantamount to granting states a power of full review of an ICSID Award". There is no such review available on grounds of public policy or otherwise. The question is a very limited and specific one of legality in enforcement.

134. This can be seen from the Award itself. The question of the effect of the State aid rules on the claimants' claim was an issue in the arbitration. Submissions were made to the Tribunal by the European Commission as well as the parties. Understandably, the Tribunal felt it right not to rule on them. In paragraph 340 of the Award, the Tribunal left the position open, saying:

> "The Tribunal finds that it is not desirable to embark on predictions as to the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters. It is thus inappropriate for the Tribunal to base its decisions in this case on matters of EU law that may come to apply after the Award has been rendered. It will thus not address the Parties' and the Commission's arguments on enforceability of the Award."

The position that the Tribunal foreshadowed as regards enforcement has in fact happened.

135. Similarly, as set out above, where proceedings are on foot in the European Court (i.e. the GCEU or CJEU) to annul a decision of the Commission, a national court may be required to stay domestic proceedings where there is a material risk of conflict with the decision of the European Court pending the resolution of the challenge: this is as

to avoid the risk of inconsistent conclusions. The principle is not in dispute. Again, a purely domestic judgment is subject to this limitation.

Issue 3: Article 351 TFEU

136. Issue 3 is formulated by the parties as follows. Is the UK and this Court obliged to enforce the Award under the ICSID Convention, and if so is that obligation unaffected by EU law, by reason of Art. 351 TFEU?

137. The claimants' case is that EU law contemplates the case of a conflict arising between duties under EU law and an international agreement entered by a Member State before its accession to the Union. Art. 351 TFEU provides for the Member State's obligations under a prior international agreement with a non-Member State to continue despite its subsequent accession to the EU, and in the case of the UK, the ICSID Convention is such a prior international agreement.

138. Art. 351 TFEU provides that:

> "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."

139. Art. 351 goes on to provide that, "To the extent that such agreements are not compatible with the Treaties, the Member State … concerned shall take all appropriate steps to eliminate the incompatibilities established".

140. The claimants' case is that Art. 351 reflects the general principle of public international law that an agreement between two states cannot affect the obligations that those parties may have under prior agreements with third parties: Case C-205/06 *Commission v Austria* [2009] 2 CMLR 50, at para 33. Where Art. 351 applies, the national courts of Member States may apply national legislation implementing international obligations, even if this would otherwise be contrary to a provision of EU law: see Case C-158/91 *Levy* [1993] ECR I-4300, at para 22. The ECJ has repeatedly held that Art. 351 "is of general scope and applies to any international agreement, irrespective of subject-matter, which is capable of affecting application of the Treaty": see Case C-466/98 *Commission v UK* [2002] ECR I-9496, para 23.

141. The claimants' case is that Art. 351 plainly applies in this case:

i) The UK signed the ICSID Convention in 1965, and enacted the 1966 Act to implement the obligations contained in it. The ICSID Convention has more than 150 State parties, most of which are not EU Member States, and which were parties prior to the UK's accession to the then European Economic Community in 1973.

ii) Art. 54(1) of the ICSID Convention establishes obligations for all parties to recognise and enforce awards: "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."

iii) The 1966 Act in turn implements this international obligation in domestic law in the provisions set out above.

iv) The UK's membership of the ICSID Convention and the 1966 Act both took effect in 1967, several years prior to the UK joining the EEC.

v) The UK accordingly bears obligations to non-Member States to recognise and enforce any award rendered under the ICSID Convention, including the Award here, and has created under national law parallel duties on this court to register such awards. The existence of this obligation engages Art. 351.

142. The claimants' case as summarised in the joint table is that enforcement is required under the ICSID Convention and Art.351 applies:

i) The ICSID Convention requires the court to enforce the Award as if it were a final judgment of a UK court. Such a judgment would be enforced, applying *Kapferer* (for the same reasons as contended for in Issues 1 and 2). Enforcement of the Award is therefore mandatory under the ICSID Convention.

ii) Art. 351 applies because the ICSID Convention imposes applicable prior multilateral international obligations on the UK owed to non-EU Member States, and creates an enforcement system in which all ICSID parties have a shared interest.

iii) EU law imposes no requirement on this court to disregard the ICSID Convention or the 1966 Act, which require enforcement here, even if enforcement would otherwise be incompatible with EU law duties (as to which see Issue 4 below).

143. Romania and the Commission submit in summary that Art. 351 TFEU does not apply because:

i) The UK's ICSID obligations do not require enforcement for the same reasons as contended for under Issue 2: that is, a final judgment of a UK court would not be enforced, so that no conflict of the UK's international obligations with EU law arises.

ii) Art. 351 does not apply because this is a case of "intra-Community relations" (i.e. no third country State is involved), and EU law does not require priority to be given to the ICSID Convention in such a case (Case T-69/89, *RTE v Commission*, EU:T:1991:39).

iii) EU law requires this court to give priority to its duties under EU law, over those under the 1966 Act, so that the Registration Order must be set aside or stayed.

144. So far as the parties' reasoning refers to other issues, reference is made to the parts of the judgment dealing with those other issues. Otherwise, the court's conclusion is as follows.

145. Romania and the Commission rely on the Final Decision, in which the Commission determined that Art. 351 TFEU "is not relevant for this case". The reasons given are that (1) the BIT is a treaty concluded between two Member States of the Union (Sweden and Romania), and is not a treaty "between one or more Member States on the one hand, and one or more third countries on the other", and (2) no third country Contracting Party to the ICSID Convention is party to the BIT.

146. Romania and the Commission submit that the "short, but complete answer to the claimants' argument under this heading is that unless and until the Commission's Final Decision is annulled by the EU Courts, it is not open to a national court to find that the Commission's conclusions in this regard are wrong".

147. The claimants' response is that the issue before the court is different, because the court is concerned solely with the UK's obligations to enforce the Award under the ICSID Convention.

148. However in the court's view, much the same considerations arise in that regard as are set out above. If the court enforces the Award, Romania will be required to pay the Award, which is what the Commission's Final Decision prohibits.

149. As Romania put it, although the claimants' position is that they are not seeking to call into question the validity of the Commission's Final Decision, in substance that is what they are doing. On their own appeal to the GCEU, this point, if they are correct, is a complete answer to the validity of the decision. (And as Romania submitted, these are not questions of fact, but are legal issues.)

150. Much the same considerations arise as regards possible conflict with the decision of the GCEU in the annulment proceedings brought by the claimants. There is no question in this regard that the claimants raise the Art. 351 issue: it is one of the grounds on which they seek annulment of the Commission's Final Decision.

151. The claimants argue that the Art. 351 issue in the GCEU is different, focusing on the Sweden/Romania BIT which is not relevant in this court and involving only Romania's ICSID duties, not those of the UK. The GCEU will not make any ruling on UK's ICSID duties.

152. However, even accepting that there is a difference in how the Art. 351 issue arises in the two proceedings, it is difficult to see how the risk of conflicting decisions could be avoided if this court was now to rule on the issue. As Romania and the Commission point out, at the minimum the GCEU will be considering the same cases and the same principles decided under Art. 351 (including the *RTE* case) as this court is being asked to consider. In the circumstances, applying the principles set out above, the case for a stay of these proceedings while the annulment action goes forward is a strong one.

Issue 4: European Communities Act 1972

153. The European Communities Act 1972 (the "ECA 1972") is the Act which legislated for the accession of the United Kingdom to what is now the European Union.

154. Issue 4 is formulated by the parties as follows. Does the ECA 1972, properly interpreted, mean that this Court should give priority to its obligations under the Arbitration Act 1966 over its obligations under EU law?

155. The claimants' submissions as to the ICSID Convention are set out above. They submit further that the implicit premise of the case of Romania and the Commission is that the UK and the court are subject to binding EU law obligations enjoying supremacy over English law. However this, they submit, overlooks the necessarily anterior question as to whether in the ECA 1972 Parliament is to be taken to have intended to put the UK (and its courts) in breach of the UK's pre-accession international obligations.

156. The claimants submit that the first task for the court, as a matter of English law, is to consider Parliament's intention when enacting the ECA 1972 and the proper scope of s. 2(1), which did not repeal the 1966 Act. In that regard, it is submitted that:

(1) The proper construction of s.2 is a question of domestic English law: *Schindler v Chancellor of The Duchy of Lancaster* [2016] EWCA Civ 469; and UKSC 2016/0105.

(2) On a proper construction of s.2, Parliament should not be taken to have intended to override the implementation of prior international obligations of the UK in the 1966 Act.

(3) Art. 5(1) TEU states, "The limits of Union competences are governed by the principle of conferral". Under that principle, Art. 5(2) TEU goes on to provide, "the Union shall act only within the limits of the competences conferred on it by the Member States in the Treaties to attain the objectives set out therein".

(4) Accession does not, therefore, entail a transfer of sovereignty to the EU but voluntary limitation by the Member States of their respective sovereignties (Opinion 1/91 ECLI:EU:C:1991:490, para 21, citing Case 26/62, *Van Gend en Loos ECLI:*EU*:C:1963:1*). How such limitation may be achieved by a given Member State is dependent on its particular constitutional arrangements.

(5) Therefore, primary English law such as that contained in the 1966 Act may fall to be disapplied on the ground that it conflicts with directly effective EU law if, but only if, the matter to which it relates falls within the scope of the authorisation given by Parliament under s.2(1) of the ECA 1972 (see *Shindler* in the Court of Appeal at [58]). The crucial question is the presumed intention of Parliament when passing the ECA 1972 (*Pham v Secretary of State for the Home Department* [2015] UKSC 19 at [82]).

(6) The question before the court is whether Parliament could have intended, when enacting s.2(1) of the 1972 Act, that it should have the effect of

empowering the EU to put the UK in breach of pre-accession international obligations. That could not have been Parliament's intention for two reasons.

(7) First, it is a settled principle of English law that a statute should, if possible, be interpreted so as fully to respect international obligations of the UK under treaties concluded on its behalf.

(8) Second, before Parliament was a Treaty that expressly provided, in what has become Art. 351 TFEU, that it would not affect the pre-accession international obligations of Member States. The effect of the ECA 1972 was to confer defined competences "within limited fields" (Case 6-64 *Costa v E.N.E.L.*: ECLI: EU: C:1964:66, p.593), such limitation including the preservation of the prior international obligations falling under Art. 351.

(9) As a matter of English law, therefore, no authority has been given by Parliament for this Court to disapply the 1966 Act, even if the enforcement of the Award were incompatible with directly effective EU law.

(10) Romania's application should therefore be dismissed.

157. Romania accepts that whether or not a provision falls within or outside s. 2(1) ECA 1972 is a matter of construction. It submits that State aid rules plainly fall within s.2, because Art. 3 TFEU provides that the Union shall have exclusive competence in competition matters. It follows that the effect of State aid rules on the UK's pre-Accession obligations in the 1966 Act is within the scope of Art. 351 TFEU (which is set out above) and the matter is one in which jurisdiction is conferred on the EU. In any case, Romania submits that there is no analogy with the cases of *Schindler* and *Pham* which raised (respectively) the question of a country leaving the EU altogether, and citizenship matters, both of which (unlike State aid) are outside the competences conferred on the EU. Romania accordingly submits that EU law has primacy in respect of the 1966 Act and that the Registration Order must be set aside or stayed.

158. The court's conclusion on this issue is as follows.

159. The issue as formulated assumes a conflict between the provisions of the ECA 1972 and the court's obligations under the Arbitration (International Investment Disputes) Act 1966, so that the question arises as to whether such obligations have primacy over its obligations under EU law.

160. However, for reasons set out elsewhere, this conflict does not arise in the present case. The claimants were entitled to register the Award by way of the Registration Order of 17 October 2014, and there are no grounds for setting aside the registration. As regards enforcement, Art. 54 of the ICSID Convention requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. The court cannot enforce the judgment consequent on registration of the Award in circumstances in which the Commission has prohibited Romania from making any payment under the Award to the claimants. However, a purely domestic judgment would be subject to the same limitation, so that a stay would not put the UK in breach of pre-accession international obligations.

Issue 5: EU duties, especially Art. 4(3)

161. Issue 5 is formulated by the parties as follows. Subject to the answers to points (1) to (4) above, do Art. 4(3) TEU (sincere cooperation), Art. 19 TEU (effective judicial protection), and/or the principle of effectiveness require the court not to recognise/enforce the Award?

162. The claimants say no: rejecting the application would not infringe the UK's EU law obligations under Art. 4(3) TEU (nor any other EU law duty) because:

i) The terms of the Commission's Final Decision do not apply to execution outside Romania;

ii) Compulsory execution of the Award in the UK is not imputable to Romania;

iii) Romania's arguments would lead to an unprecedented and exorbitant application of Art. 4(3) TEU, read together with Art. 4(2), or any other provision of EU law on which Romania or the European Commission rely.

163. Consequently, the claimants contend that there is no conflict between the Commission's Final Decision, Art. 4(3) TEU or any other EU law duty, and the UK court's obligations under the 1966 Act, as those EU law duties would not be breached by execution or enforcement. In any event, if the claimants succeed on any of (i) *Kapferer*, (ii) Art.351 or (iii) the ECA 1972 (see above), Romania's arguments on this issue (5) will be insufficient, and its application must fail.

164. Romania and the Commission say yes: if the Registration Order is not set-aside/stayed, the UK courts would render the Commission's Final Decision ineffective by forcing Romania to do the very thing prohibited. On imputability:

i) This is no need to show that payment pursuant to an order of the UK courts is "imputable" to Romania because sincere cooperation and effectiveness are standalone principles of EU law that can be breached independently by the UK courts.

ii) Any requirement of "imputability" is in any event satisfied by Romania entering into the BIT and creating the conditions for payment of compensation (see the Commission's Final Decision, para 118).

165. Consequently, Romania and the Commission submit that there is a conflict between the court's duties under EU law and its duties under the 1966 Act, and EU law must take priority, so that the Registration Order must be set aside/stayed.

166. The court's conclusion on this issue is as follows. There is no need to deal separately with Art. 19 TEU, which does not add to Art. 4(3) in this context. For the points raised by the claimants other than imputability, see elsewhere in this judgment.

167. The claimants' case on imputability has been referred to above. It is not in dispute that in order to constitute State aid, a measure must be imputable to the Member State concerned. As the Court of Justice has said, the rules on State aid apply to "decisions by Member States by which the latter, in pursuit of their own economic and social objectives give, by unilateral and autonomous decisions, undertakings or other

persons resources or procure for them advantages intended to encourage the attainment of the economic or social objectives sought" (Case 61/79, *Amministrazione delle Finanze dello Stato* v *Denkavit Italia*, EU:C:1980:100, para 31).

168. The claimants' case is that any satisfaction of the Award, or part of it, achieved as a consequence of execution pursuant to registration would not amount to an act imputable to Romania because it would be involuntary, and not pursuant to an autonomous decision by Romania. It could not, therefore, entail the granting of illegal State aid by Romania to the claimants.

169. The Commission's Final Decision deals with imputability in paras 117 *et seq*, concluding in para 121 that the measure, that is payment of the Award by Romania, is imputable to Romania.

170. The claimants are seeking to annul the Final Decision in the GCEU, but they contend that the issue of imputability in the GCEU is different, and the GCEU will not rule on whether the decision or Art. 4(3) TEU apply to compulsory execution outside Romania.

171. Romania and the Commission contend that the meaning and scope of the Commission's Final Decision, particularly para 118, forms part of GCEU appeals, the point being that any requirement of "imputability" is satisfied by Romania entering into the BIT with Sweden and creating the conditions for payment of compensation.

172. Whether this point is right or wrong, in the court's view it is before the GCEU for decision in the annulment proceedings, and a decision by this court as to imputability would risk a conflict. In any case, if the court were now to enforce the Award, Romania would be required to pay the Award, which is what the Commission's Final Decision prohibits. Reference is made to the principles set out above.

Issue 6: payment

173. Issue 6 is formulated by the parties as follows. Must the Registration Order be set aside because the Award has been paid in full?

174. Romania contends that the Award has been paid in full, but it did no more than touch on the point in its oral argument, and states it without elaboration in the joint table of submissions on key issues.

175. The claimants contend that (i) s. 1(5) of the 1966 Act provides for registration of the Award or balance outstanding at the date of application, and even on Romania's case there was no payment in full on that date, and (ii) in any event, there has been no payment in full at any subsequent point (this is not elaborated either).

176. The court will deal with the payment issue equally briefly:

(1) In early 2015, the Romanian court executor seized sums amounting to 45,681,713 RON (approximately £9m) from the Romanian Ministry of Public Finance's account. Some of this was subsequently recovered by the authorities. So far as the money went to the claimants, the Award was satisfied *pro rata*: the parties can agree the figures.

(2) In January 2014, Romania offset a portion of the compensation awarded to the claimants by the ICSID Tribunal against RON 337,492,864 (approximately £66m) of taxes owed by European Food S.A. (the 3rd claimant). However, on 11 May 2015 the Oradea Court of Appeal annulled the set-off. Romania appealed this decision to the Romanian Supreme Court on 18 June 2015, but no decision has yet been handed down. Romania argues that that its pending appeal means that the claimants continue to benefit from the set-off (*e.g.*, they cannot be pursued for the tax debt that would be outstanding were the set-off not operative), and so the set-off remains effective. The court does not agree, because set-off does not amount to payment unless the debt in question is extinguished, which is not the case if the set-off has been annulled.

(3) A Special Treasury Account was set up in the name of both the claimants and the Romanian court executor on 9 March 2015, and RON 472,788,675 (approximately £93m, which Romania says was the remaining balance of the Award) was transferred into it by the Romanian Ministry of Finance. This was a "blocked" account: neither party could withdraw funds from it unless and until the European Commission gave its final decision. As has been explained, this was forthcoming on 30 March 2015, whereupon the sums paid in were withdrawn by the Romanian authorities. These arrangements plainly do not constitute payment.

(4) It follows that most of the Award remains unpaid.

Issue 7: the Romania-Sweden BIT

177. Issue 7 is formulated by the parties as follows. Is the Romania-Sweden BIT invalid?

178. The Commission's position is that the Sweden-Romania BIT impinges generally upon the Union's exclusive competence to regulate intra-EU cross-border investments. The court's understanding is that this position is taken as regards all extant intra-EU BITs. It is further submitted by the Commission that the Sweden–Romania BIT became invalid as a matter of international law as from the date of Romania's accession to the European Union. This (it is submitted) follows from the general principle of primacy of Union law. The consequence is that no question of the application of Art. 351 TFEU arises, since the Award was given *per incuriam* and cannot be regarded as valid.

179. The claimants submit that the argument is irrelevant to the matter for decision by the court.

180. The court's conclusion is as follows. The English court cannot rule on the validity of a treaty between Sweden and Romania, though it perhaps could refer the question to the CJEU (see below). However, the court agrees with the claimants that, reference aside, validity of the Romania-Sweden BIT is not relevant to the issues to be decided in this case.

<u>Reference to the CJEU</u>

181. An alternative to a stay, namely an Article 267 TFEU reference to the CJEU, is supported by Romania and the Commission, but the claimants are strongly opposed to this course. In fact, the questions to be referred on such a reference are not straightforward to identify. The matter is already before the European court by way of the current annulment proceedings brought by the claimants, and in the circumstances, the court does not consider a reference to be appropriate, bearing in mind that a reference by a first instance court is discretionary.

Security

182. If contrary to the claimants' primary contention the court finds that a stay should be ordered, by application issued on 29 September 2016 the claimants ask the court to make the grant of such stay conditional upon the grant of full or substantial security for the Award. Skeleton arguments were filed by the claimants on 27 October 2016 and by Romania on 28 October 2016.

183. As indicated above, the court does consider that a stay should be granted pending the outcome of the claimants' annulment proceedings in the European court, and so the issue does arise.

184. There was insufficient time at the hearing to receive oral submissions on the issue of security. However:

i) The Commission appeared to accept in oral argument that the court had power to order security, but that acceptance may have been linked to the limitations expressed by the CJEU in C-304/09 *Commission v Italy* EU:C:2010:812 in connection with interim measures from a national court in the case of recovery proceedings relating to State aid.

ii) The claimants appeared to submit in oral argument that security would not be of assistance, since it would not be paid to them. However, in written submissions they contend that security would assist them in securing credit facilities for them to pursue their business operations and/or allow them to continue enforce the Award, and would ensure that, should a stay be granted but the European Court rule in their favour, they would be able promptly to recover sums due to them.

185. On 14 November 2016, the court indicated to the parties that it would deal with the security application in the judgment, and the parties indicated that they were content for the court to deal with the matter on the documents. The court then received further written submissions on 22 November and 25 November 2016 from Romania and the claimants respectively, followed by letters dated 6 December 2016, 9 December 2016 and 10 January 2017 as regards other matters. No further submissions have been lodged by the Commission.

186. Though it is the claimants' application, Romania's submissions came first, and it is convenient to take them in that order.

187. In summary, Romania submits that:

i) There is no legal basis for imposing security. Requiring it to lodge security in the amount of the ICSID Award before enforcement in circumstances where the legality of recognition is in genuine dispute would circumvent the 1966 Act process.

ii) Nothing practical would be achieved in lodging security, since the claimants would not get the money. By contrast, there would be considerable prejudice to Romania if it had to lodge a substantial security now.

iii) Even on the claimants' case, the EGO 24 incentives that alleviated certain of their tax liabilities would have expired in 2009. So, there is no basis for refusing to pay taxes due since 2009 – a period of 7 years – and the court should be slow to "reward" the claimants for not paying their taxes since this date.

iv) There is a significant risk that imposing security would violate EU law, because if the court were to order such a security to be paid, that might itself fail to respect the Commission's Final Decision in a way that violates EU law.

v) The court should not exercise any discretion it has in the claimants' favour, in particular because they could have sought interim relief from the GCEU under Art. 278 TFEU.

vi) The UK's connection with the claim is tenuous at best. It appears to be a purely speculative claim by the claimants that some relevant and unattached and/or accessible Romanian assets may be located here.

vii) The claimants have sought to make a series of prejudicial allegations about "delay" by Romania. These are baseless, and the simple reality is that Romania faces a quandary while the legal effects of the Award and Commission's Final Decision co-exist.

188. In summary, the claimants submit that:

i) The court has jurisdiction to grant security pursuant to the court's inherent jurisdiction, CPR 25.1 and/or CPR 3.1(3).

ii) There is a contradiction in Romania's argument that staying enforcement of an ICSID Award would not circumvent the process of the 1966 Act, whereas the granting of security would do so.

iii) If, contrary to the claimants' case, this court has power to grant a stay, then it follows that it has power to grant security. The source of such a power would inevitably be the same.

iv) The claimants commenced the arbitration proceedings 11 years ago, and the Award itself was issued nearly 3 years ago. They have yet to recover more than a fraction of the sums due to them.

v) Romania continues to make persistent efforts to avoid its obligations under the Award, pursuing its avowed strategy of delay. Romania has not committed

unequivocally to pay the damages forthwith should the GCEU annul the Commission's Final Decision.

vi) Romania is attempting to recover from the claimants monies it alleges have been paid under the Award (including interest on such amounts, notably monies placed in the Special Treasury Account that were never actually paid to the claimants).

vii) At the least, Romania is invited to confirm to the court that it does not presently intend to take enforcement actions against any of the claimants in furtherance of the Commission's Final Decision, thereby further aggravating the prejudice to claimants.

viii) There is no risk that imposing security would violate EU law.

ix) Romania has been the subject of a request to disclose its assets in this jurisdiction. It has so far declined to do so, and so it is open to the claimants to infer that there may well be assets in this jurisdiction against which the Award may be enforced.

x) The UK's connection to the claim is the same as that of any other party to the ICSID Convention.

xi) As regards delay, it is Romania, not the claimants, that has been in breach of its international obligations for over a decade now.

xii) Security should be ordered for the full amount of the Award outstanding less what was paid by way of court-ordered execution (see above).

xiii) At 31 August 2016, the amount outstanding, including interest, was RON 918,631,643 which equates to roughly £173m at today's rate of 1 RON = 0.189055 GBP. The claimants invite the court to set the amount of security at no less than £150m.

189. A further matter arises from the exchange of letters of 6 and 9 December 2016. In short, it seems that Romania is taking enforcement action to recover from the claimants the sums they received by way of court-ordered execution (see above), and also the amount they are said to have received by way of set off against tax liabilities (see above). Romania says that it is obliged to do so because it is required to recover payments under the Commission's Final Decision. This is subject to a further letter of explanation from Romania dated 10 January 2017.

190. As to the set-off, as explained above, in 2015 the Oradea Court of Appeal annulled the set-off against taxes owed by the 3rd claimant, and though Romania has appealed this decision to the Supreme Court, no decision has yet been handed down. As held earlier in this judgment, set-off does not amount to payment unless the debt in question is extinguished, which is not the case if the set-off has been annulled.

191. The court recognises that there are discretionary arguments against, as well as in favour of, the claimants' application for an order requiring Romania to provide

security as a term of the stay, on the assumption that there is power to make such an order.

192. Nevertheless, having considered at this stage the parties' written submissions only, the court considers that the claimants have advanced a persuasive case for an order requiring Romania to provide security as a term of the stay. This is subject to the points identified below. It reflects the fact that (i) the proceedings relate to an ICSID Award which pre-dates the decisions of the Commission, (ii) the Award is to be treated as a final judgment of the English court given at the time of the Award, and (iii) the Award has been unpaid for some years. More generally, although security is not the same as enforcement or payment because the monies may never be paid to the claimants, the grant of security is at least consonant with the obligation placed on the UK under the ICSID Convention is to enforce awards. Finally, as the claimants say, should the European Court rule in their favour, security would assist in enabling them promptly to recover the sums due to them. This is particularly important given the long duration of this dispute.

193. At the same time, all the parties recognise the exceptional nature of this case. There are two points in particular which the court has not been able to resolve on the written material the parties have provided.

194. First, the power to order security must be properly identified. In the case of a New York Convention award, by statute security may be ordered in defined circumstances where the court is not proceeding to immediate enforcement of the award (see s. 103(5) Arbitration Act 1996 discussed recently in *Travis Coal Restructured Holdings Llc v Essar Global Fund Ltd* [2014] 2 Lloyd's Rep. 494). There is no equivalent in the 1966 Act which, as pointed out above, provides in s. 1(2) for what has been called "automatic" registration of an ICSID award.

195. There is a real question therefore as to the legal basis for imposing security in the circumstances of this case. Both parties deal with the issue relatively briefly in their pre- and post-hearing written submissions.

196. The claimants say that the application "is made pursuant to the Court's inherent jurisdiction, CPR 25.1 and/or CPR 3.1(3) and/or on such basis as may flow from the Court's decision that it has power to grant a stay and in its judgment should do so. Put simply, if, contrary to the Cs' case, this Court has power to grant a stay, then it follows that it has power to grant security. The source of such a power would inevitably be the same".

197. Romania points out that security is not listed as an interim remedy available under CPR 25.1, and contends that whilst the general power under CPR 3.1(3) is in broad terms, there are difficulties in founding the grant of security on the court's general powers of case management. Its case is that there is no power to order security under the court's inherent jurisdiction or otherwise.

198. The court considers that further clarity is required as to whether there is power to grant security and if so on what basis.

199. Second, Romania submits that if the court were to order such security to be paid, that might itself fail to respect the Commission's Final Decision in a way that violates EU law.

200. For obvious reasons, this is a significant issue for the court. The parties have sought to address it, but it raises a further question as to the practical consequences of making an order for security. The court should have an understanding of the steps that it would be asked to take in the event of non-compliance, and the implication of such steps. This may affect the exercise of its discretion in deciding whether or not to make the order.

201. It is to be hoped that the possibility of non-compliance is academic, but in the light of the history of this dispute that cannot be taken for granted. The court needs to be assured that the making of an order for security and such steps as may be consequent on any non-compliance would not themselves be treated as a violation of EU law. The Commission went some way to providing such assurance in the oral submissions referred to above, and may be able to dispel the concerns altogether. As the jurisprudence shows, the national court is entitled to look to the Commission for assistance, and the Commission has assured the court that it will continue to provide any assistance it can.

202. For these reasons, it is not appropriate for the court finally to decide the security question on the post-hearing written submissions, though these have been useful in narrowing the issues. The parties will have the opportunity to make further submissions at the hearing of consequential matters subsequent to the handing down of this judgment. The parties can argue all the points they have raised in writing, but the court makes it clear that it will need to be satisfied in particular as to the matters set out above. The court would wish the Commission to continue to be represented at the hearing. It would also wish to explore the possible alternative suggested by the claimants by way of confirmation that further action will not be taken by Romania in relation to enforcement proceedings.

Conclusion

203. In summary, the court has decided that:

(1) Other than the amounts already received by the claimants in Romania by way of court-ordered execution, Romania has not made any payments under the Award.

(2) The application of Romania and the Commission to set aside the court's Order of 17 October 2014 registering the ICSID Award is refused. This is because the registration of the Award did not place Romania in breach of the Commission's Injunction Decision of 26 May 2014, and the claimants themselves were not in breach by registering the Award.

(3) Enforcement of the Award is stayed pending the resolution of the claimants' proceedings in the European court seeking the annulment of the Commission's Final Decision of 30 March 2015. This is because the Commission's Final Decision prohibits Romania from paying the Award,

and the "principle of sincere cooperation" in Art. 4(3) TEU as interpreted both in European and in English case law precludes national courts from taking decisions which conflict with a decision of the Commission.

(4) This does not create a conflict with the duties of the UK under the ICSID Convention, because by registration under the Arbitration (International Investment Disputes) Act 1966 which implements the Convention, an ICSID award is equated to a final domestic judgment for enforcement purposes, and a purely domestic judgment would be subject to the same principle.

(5) Alternatively, applying the above case law, a stay is appropriate because the issues raised in the present application substantially overlap with the arguments raised in the annulment proceedings in respect of the Commission's Final Decision which are being brought by the claimants in the European Court in Luxembourg, giving rise to the risk of inconsistent decisions.

(6) Bearing in mind that a reference by a first instance court is discretionary, an Art. 267 TFEU reference to the CJEU will not be made. This is because the questions to be referred on such a reference are not straightforward to identify, and the dispute is already before the European court by way of the current annulment proceedings.

(7) As regards security, having considered at this stage the parties' written submissions only, the court considers that claimants have advanced a persuasive case for an order requiring Romania to provide security as a term of the stay. This is subject to (8) below. It reflects the fact that (i) the proceedings relate to an ICSID Award which pre-dates the decisions of the Commission, (ii) the Award is to be treated as a final judgment of the English court given at the time of the Award, and (iii) the Award has been unpaid for some years.

(8) However, before reaching a decision, the court will require (i) to be satisfied that there is legal power to make an order for security, and (ii) to be assured that the making of an order for security and such steps as may be consequent on any non-compliance would not themselves be treated as a violation of EU law.

204. These and other consequential matters will be dealt with when this judgment is handed down. The parties should agree a timetable. The court expresses its appreciation to the parties for their assistance.