OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 9 November 2023(1)

Case C-516/22

European Commission
v
United Kingdom of Great Britain and Northern Ireland

(Failure of a Member State to fulfil obligations – Judgment by default – Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community – Transition period – Jurisdiction of the Court – Judgment of the Supreme Court of the United Kingdom – Enforcement of an arbitral award — Article 4(3) TEU – Duty of sincere cooperation – Stay of proceedings – First paragraph of Article 351 TFEU – Agreements between Member States and third countries concluded before the date of their accession to the European Union – Multilateral treaties – Article 267 TFEU – Failure to refer a question for a preliminary ruling – National court adjudicating at last instance – Article 108(3) TFEU – State aid – Standstill obligation)

I. Introduction

1. In an article co-authored in 1970, writing extrajudicially, the then Judge Mertens de Wilmars – later to become the sixth President of (what is now) the Court of Justice of the European Union – noted that, under classic public international law, States are liable for the actions of their judiciary. However, he added that the then EEC Treaty had established a very special relationship between national and Community judicial authorities. On that basis, Judge Mertens de Wilmars argued that 'a decision of a national judge on the scope of Community norms … or more generally, a judgment applying Community Law, can never as such be considered as a failure of a Member State'. In his view, in the context of infringement proceedings, a Member State would be responsible for the conduct of its courts only in the event of a systematic refusal by a court of last instance to make use of the preliminary ruling procedure. (2)

2. Some 50 years later, EU law has evolved significantly. It is by now well established that a

Member State's failure to fulfil obligations may, as a matter of principle, be established under Articles 258 to 260 TFEU, whatever the institution, body or agency of that State whose action or inaction is the cause of the failure, even in the case of a constitutionally independent institution. (3) It follows that, in the context of infringement proceedings, a Member State may be held liable for breaches of EU law resulting from decisions of national courts.(4)

3. However, the peculiarity of the present case is that the breaches of EU law alleged by the European Commission have not been committed by a court of a Member State, but by a court that – by the time it rendered the contested judgment, given the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union ('Brexit') – belonged to a third State: the Supreme Court of the United Kingdom.

4. In the present case, I am of the view that, in spite of Brexit, and of the particular caution that is required in finding a judicial infringement, (5) the contested judgment of the Supreme Court gave rise to some breaches of EU law which can be declared in the present proceedings.

II. Legal background

A. European Union law

5. The first paragraph of Article 351 TFEU, provides:

'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.' (6)

6. Pursuant to Article 2(e) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, (7) the 'transition period' means the period provided in Article 126 thereof.

7. Article 86(2) of the Withdrawal Agreement, concerning 'Pending cases before the Court of Justice of the European Union', provides:

'The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period.'

8. Article 87(1) of the Withdrawal Agreement, concerning 'New cases before the Court of Justice', states:

'If the European Commission considers that the United Kingdom has failed to fulfil an obligation under the Treaties or under Part Four of this Agreement before the end of the transition period, the European Commission may, within 4 years after the end of the transition period, bring the matter before the Court of Justice of the European Union in accordance with the requirements laid down in Article 258 TFEU … The Court of Justice of the European Union shall have jurisdiction over such cases.'

9. Article 126 of the Withdrawal Agreement, entitled 'Transition period', states:

‘There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.’

10. Article 127 of the Withdrawal Agreement, entitled ‘Scope of the transition’, reads:

‘1. Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period.

…

3. During the transition period, the Union law applicable pursuant to paragraph 1 shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union.

…

6. Unless otherwise provided in this Agreement, during the transition period, any reference to Member States in the Union law applicable pursuant to paragraph 1, including as implemented and applied by Member States, shall be understood as including the United Kingdom.

…’

B. International law

11. The Bilateral Investment Treaty concluded on 29 May 2002 between the Swedish Government and the Romanian Government on the Promotion and Reciprocal Protection of Investments (‘the BIT’), which entered into force on 1 July 2003, provides, in Article 2(3):

‘Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof as well as the acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures.’.

12. Article 7 of the BIT provides that any dispute between investors and the Contracting Parties is to be settled, inter alia, by an arbitral tribunal which applies the ICSID Convention (‘the arbitration clause’).

13. Articles 53 and 54 of the Convention on the settlement of investment disputes between States and nationals of other States, concluded in Washington on 18 March 1965 (‘the ICSID Convention’) are to be found in Section 6 (‘Recognition and Enforcement of the Award’) of Chapter IV (‘Arbitration’) thereof. Article 53(1) reads:

‘The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.’

14. Article 54(1) provides:

‘Each Contracting State shall recognise 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. Background to the case and the pre-litigation procedure

15. The relevant factual background to the dispute, as appearing in the case file, can be summarised as follows.

A. The arbitral award, the Commission’s decisions and the proceedings before the Court of Justice of the European Union

16. On 26 August 2004, Romania repealed, with effect from 22 February 2005, a regional State aid scheme in the form of various tax incentives that had been established in 1998. On 28 July 2005, Swedish investors Ioan and Viorel Micula and three companies they controlled which were established in Romania (‘the investors’) – which had benefited from the scheme before its repeal – requested the establishment of an arbitral tribunal pursuant to Article 7 of the BIT, in order to obtain compensation for the damage resulting from the revocation of the tax incentives scheme at issue.

17. In its arbitral award of 11 December 2013 (‘the award’), the arbitral tribunal found that, by repealing the tax incentives scheme at issue prior to 1 April 2009, Romania had violated the legitimate expectations of the investors, had failed to act transparently by failing to inform them in a timely manner and had failed to ensure fair and equitable treatment of their investments, within the meaning of Article 2(3) of the BIT. Consequently, the arbitral tribunal ordered Romania to pay the investors, by way of damages, the sum of Romanian lei (RON) 791 882 452 (approximately EUR 160 million at the current exchange rate).

18. On 26 May 2014, the Commission adopted Decision C(2014) 3192 final, obliging Romania immediately to suspend any action that might lead to the implementation or execution of the award, on the ground that such action appeared to constitute unlawful State aid, until the Commission had taken a final decision on the compatibility of the suspected aid with the internal market (‘the suspension injunction’).

19. On 1 October 2014, the Commission informed Romania that it had decided to initiate the formal investigation procedure laid down in Article 108(2) TFEU in respect of the suspected aid (‘the opening decision’).

20. Subsequently, on 30 March 2015, the Commission adopted Decision (EU) 2015/1470 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013 (‘the 2015 final decision’). That decision provided, in essence, that (i) the payment of the compensation granted by the award to the investors constituted ‘State aid’ within the meaning of Article 107(1) TFEU which was incompatible with the internal market, and (ii) Romania was required not to pay out any incompatible aid, and must recover such aid which had already been paid out to the investors.

21. The investors challenged the validity of the 2015 final decision before the General Court, which, by the judgment of 18 June 2019 in *European Food and Others* v *Commission*, annulled that

decision. (8) In essence, the General Court upheld the investors' pleas alleging (i) the Commission's lack of competence and the inapplicability of EU law to a situation predating Romania's accession, and (ii) an error in classifying the award as an 'advantage' and 'aid' within the meaning of Article 107 TFEU.

22. On 27 August 2019, the Commission lodged an appeal against the judgment of the General Court before the Court of Justice. By its judgment of 25 January 2022, the Court of Justice set aside the judgment of the General Court. (9) In essence, the Court of Justice found, first, that the alleged aid was granted after Romania's accession to the European Union and, consequently, the General Court had erred in law in holding that the Commission lacked competence *ratione temporis* to adopt the 2015 final decision. In addition, the Court of Justice found that the General Court had also erred in law when it held that the judgment in *Achmea* (10) was irrelevant in the case at hand. It followed – according to the Court of Justice – that Romania's consent to the arbitration system laid down in the BIT became inapplicable following the accession of that Member State to the European Union. Since the General Court had not, in its judgment, examined all the pleas relied on by the investors, the Court of Justice referred the case back to the General Court for a fresh judgment. To date, that case is pending before the General Court.

23. Finally, by its order of 21 September 2022 in *Romatsa and Others*, the Court of Justice – answering a request for a preliminary ruling referred by a Belgian court in a dispute which involved the investors – ruled that Article 267 TFEU and Article 344 TFEU must be interpreted as meaning that a court of a Member State seised of the enforcement of the award is 'obliged to set aside that award and, consequently, cannot in any event proceed with its enforcement in order to enable its beneficiaries to obtain payment of the damages which it awarded to them'. (11)

B. The proceedings before the United Kingdom Courts

24. On 17 October 2014, the award was registered with the High Court of England and Wales pursuant to the provisions of the Arbitration (International Investment Disputes) Act 1966, which implements the ICSID Convention in the United Kingdom.

25. On 20 January 2017, the High Court (Blair J) dismissed Romania's application to set aside registration, but granted its Romania's application to stay enforcement until the proceedings before the EU Courts were completed. (12) Subsequently, on 27 July 2018, the Court of Appeal (Arden, Hamblen and Leggatt LJJ) found that the English courts were barred, on the basis of the principle of sincere cooperation laid down in Article 4(3) TEU, from ordering immediate enforcement of the award, so long as a Commission decision prohibited Romania from paying the compensation awarded. On that basis, it dismissed an appeal the investors had brought against the stay of enforcement the High Court ordered, but ordered Romania to provide a security.(13)

26. By its judgment of 19 February 2020 in *Micula* v *Romania* ('the contested judgment'), the Supreme Court ordered the enforcement of the award. Relying on the first paragraph of Article 351 TFEU, the Supreme Court concluded that the enforcement of that award was governed by a multilateral treaty, the ICSID Convention, which the United Kingdom entered into before it acceded to the European Union and which imposed obligations on the United Kingdom, the performance of which can be required by third countries that are parties to that agreement.

C. The pre-litigation procedure

27. On 3 December 2020, the Commission sent a letter of formal notice to the United Kingdom, alleging four breaches of EU law resulting from the contested judgment. In its response to the letter of formal notice, dated 1 April 2021, the United Kingdom contested the alleged breaches.

28. Being unconvinced by the arguments put forward in the response to the letter of formal notice, on 17 July 2021 the Commission addressed a reasoned opinion to the United Kingdom. By letter of 23 August 2021, the United Kingdom requested an extension to respond to the reasoned opinion, which the Commission granted. The United Kingdom did not respond to the reasoned opinion.

IV. Procedure before the Court and forms of order sought

29. In its application, lodged on 29 July 2022, the Commission claims that the Court should:

– declare that the United Kingdom, in authorising the enforcement of the arbitral award rendered in ICSID Case No ARB/05/20, failed to fulfil its obligations:

  – under Article 4(3) TEU, read in conjunction with Article 127(1) of the Withdrawal Agreement, by deciding on the interpretation of the first paragraph of Article 351 TFEU and its application to the implementation of the arbitral award while the same matter had been decided by extant Commission decisions and was awaiting adjudication before the EU Courts,

  – under the first paragraph of Article 351 TFEU, read in conjunction with Article 127(1) of the Withdrawal Agreement, by misinterpreting and misapplying the notions of ‘rights’ of ‘one or more third countries’ and ‘affected by … the Treaties’,

  – under points (a) and (b) of the first paragraph, and the third paragraph, of Article 267 TFEU, read in conjunction with Article 127(1) of the Withdrawal Agreement, by failing to refer a question on validity of the Commission’s 2014 suspension decision and the Commission’s 2014 opening decision, and by failing, as a court of last instance, to refer a question on the interpretation of EU law that was neither *acte clair* nor *acte éclairé*, and

  – under Article 108(3) TFEU, read in conjunction with Article 127(1) of the Withdrawal Agreement, by ordering Romania to violate its EU law obligations flowing from the 2014 suspension decision and the 2014 opening decision; and

– order the United Kingdom to pay the costs.

30. The United Kingdom Government, having been duly served the application initiating the proceedings, did not lodge a defence within the prescribed period. When contacted by the Registry of the Court of Justice to acknowledge receipt of the Commission’s application, the United Kingdom Government stated that it did receive the application and that, ‘at that stage’, it did not intend to participate in the proceedings.

31. By letter of 31 October 2022, the Commission asked the Court to give judgment by default pursuant to Article 152 of the Rules of Procedure of the Court of Justice (‘the Rules of Procedure’).

32. Subsequent to a letter from the Court Registry, the Commission informed the Court that it would

not oppose a new time limit being set for the defendant to lodge a defence. However, by letter of 20 April 2023, the United Kingdom Government confirmed that it did not intend to lodge a defence in the present case, despite the new time limit set by the Court.

V. Analysis

33. In the present case, the Commission alleges four distinct breaches of EU law resulting from the contested judgment. Before examining those claims (C), I would like to briefly mention certain procedural aspects that characterise the present proceedings: the jurisdiction of the Court of Justice under Article 258 TFEU, pursuant to the Withdrawal Agreement (A), and certain specificities of the procedure under which the Court gives judgment by default (B).

A. Preliminary remarks I: the jurisdiction of the Court of Justice under Article 258 TFEU, pursuant to the Withdrawal Agreement

34. On 31 January 2020, the United Kingdom withdrew from the European Union and the European Atomic Energy Community. On 1 February 2020, the Withdrawal Agreement entered into force.

35. Article 2(e) and Article 126 of the Withdrawal Agreement established a transition period which started on the date of entry into force of the Withdrawal Agreement and ended on 31 December 2020. Article 127 provided that EU law was applicable to and in the United Kingdom during the transition period, unless the Withdrawal Agreement provided otherwise.

36. That agreement also included some specific provisions on State aid control and related administrative procedures before the Commission, (14) as well as on judicial proceedings before the EU Courts. (15) However, none of those provisions of the agreement laid down any derogation to the principle enshrined in Article 127 thereof with regard to the EU provisions (of both a substantive and a procedural nature) which are relevant in the present proceedings.

37. In particular, Article 87(1) of the Withdrawal Agreement provided that, 'if the European Commission considers that the United Kingdom has failed to fulfil an obligation under the Treaties … before the end of the transition period, the European Commission may, within 4 years after the end of the transition period, bring the matter before the Court of Justice of the European Union in accordance with the requirements laid down in Article 258 TFEU … The Court of Justice of the European Union shall have jurisdiction over such cases'.

38. Two conclusions may be drawn from the above provisions. First, the United Kingdom was, when the alleged breaches took place, bound by the EU provisions which, in the present proceedings, the Commission relies on. Second, the Court has jurisdiction to hear the present case given that: (i) the contested judgment was delivered during the transition period (on 19 February 2020), and (ii) the Commission's action under Article 258 TFEU was lodged within four years after the end of the transition period (on 29 July 2022).

B. Preliminary remarks II: judgments by default

39. In the present proceedings, the United Kingdom did not lodge a defence and the Commission has, thus, asked the Court to deliver a judgment by default.

40. Under Article 152(3) of the Rules of Procedure, in such cases the Court must consider 'whether the application initiating proceedings is admissible, whether the appropriate formalities have been complied with, and whether the applicant's claims appear well founded'.

41. In the present case, the appropriate formalities appear to have been complied with. In particular, as mentioned in points 30 to 32 above, the United Kingdom Government confirmed to the Court Registry that it had received the application. In addition, I see nothing in that application suggesting the existence of some procedural irregularity which could affect the admissibility of the action. The Commission's application meets the requirements of clarity and precision set out in Article 120 of the Rules of Procedure, and the complaints put forward therein appear to correspond to those previously raised in the letter of formal notice and in the reasoned opinion.

42. As regards the assessment of the merits of an action to be adjudicated by default, I would like to develop two brief considerations, which are related.

43. First, it may be worth clarifying the standard of proof that the Court is to apply when assessing an applicant's claims. In that respect, I must again recall the text of Article 152(3) of the Rules of Procedure, according to which, in procedures by default, the Court is required to rule as to whether 'the applicant's claims *appear* well founded'. (16)

44. In my view, that provision makes it clear that, on the one hand, the defendant's failure to participate in the proceedings does not automatically entail the acceptance, by the Court, of the applicant's claims. As Advocate General Mischo stated, in proceedings by default, there is 'no question of allowing the applicant's claims to benefit from a presumption of truth'. (17) In fact, the Court has consistently stated that, in proceedings under Articles 258 to 260 TFEU, 'even if the Member State concerned does not deny a failure to fulfil obligations, it is incumbent upon the Court, in any event, to determine whether or not [the] alleged breach of obligations exists'. (18)

45. Nor can the standard of proof be the one employed by the Court in the context of requests for interim measures under Articles 278 and 279 TFEU. According to settled case-law, in those cases the Court is only to ascertain the existence of *fumus boni iuris*, understood as a claim that is 'prima facie, *not unfounded*'. (19) To my mind, the difference between a claim that 'appears well founded' and one that 'appears not unfounded' is not merely terminological. Something more is thus required under Article 152(3) of the Rules of Procedure.

46. On the other hand, however, the verb 'appear' indicates that the standard of review is one of relative benignity towards the claims of the applicant. The Court is not required to carry out a fully fledged examination of the facts alleged and the legal arguments put forward by the applicant, nor could it be expected to elaborate the arguments of fact and of law that the defendant could have put forward, had it participated in the procedure. By forfeiting its right to appear, the defendant chooses to forgo its ability to, inter alia, adduce evidence which may call into question the accuracy of the facts alleged by the applicant, or raise lines of defence which are in principle for the defendant to adduce and substantiate.

47. Obviously, in assessing the applicant's claims, the Court can consider a fact that is common knowledge or proven by general experience to be established, (20) and the principle *iura novit curia* remains fully valid. (21) However, for the rest, the Court is to base its findings on the information included in the case file.

48. I would say that, in a procedure by default, the applicant bears the burden of proving that its claims are 'prima facie, well founded': if the arguments put forward in support of those claims appear, without an in-depth analysis, reasonable in law and in fact and, where appropriate, sustained by adequate evidence, the Court is to rule in favour of the applicant without further ado. (22)

49. This balanced approach to the Court's standard of proof under Article 152(3) of the Rules of Procedure seems to me the most consistent with the terms of that provision, and with the very logic of the procedure by default. Procedures by default are a legal construct that exist, in various forms, in most jurisdictions. To the best of my knowledge, those procedures are typically of a summary nature and courts are mostly required to rule in favour of the applicants, albeit not uncritically or automatically. (23)

50. After all, if the Court were to carry out a normal, fully fledged analysis of the applicants' claims, both in law and in fact, the possibility for defendants to lodge an application to set aside the judgment by default (24) would largely lose its rationale.

51. This leads me to my next point.

52. While it is not for me to judge the wisdom of a party's choice not to participate in the proceedings, I should nonetheless point out that the exercise by the Court of its judicial task may be rendered more difficult by such a choice. (25) There is an English old saying that 'there are two sides to every story'. (26) If that is so, it is unfortunate that, in certain cases, one of the two sides of the story is not fully aired before the Court; at least not until a *potential* second set of proceedings takes place. The possibility to submit an application to set aside the judgment given by default may provide an opportunity to remedy certain issues that might follow from the first judgment of the Court, but it also leads to a duplication of proceedings, which results in a prolonged situation of legal uncertainty and a suboptimal use of the Court's (and, possibly, the parties') resources.

53. Having dealt with the procedural issues above, I shall now assess the merits of the Commission's four grounds. Although those grounds are strictly related, I will examine each of them separately and include cross references to issues already examined in this Opinion.

C. First ground: infringement of Article 4(3) TEU

1. Arguments of the applicant

54. By its first ground, the Commission claims that the United Kingdom infringed the principle of sincere cooperation owing to the Supreme Court's failure to suspend the proceedings before it while awaiting the judgment of the Court of Justice in the appeal in *European Food*.

55. According to the Commission, it follows from the duty of sincere cooperation enshrined in Article 4(3) TEU that, where a national court is seised of a case that is already the subject matter of a Commission investigation or proceedings before the EU Courts, the duty of sincere cooperation requires that that court stay proceedings, unless there is scarcely any risk of conflict between its anticipated judgment and the likely act of the Commission or decision of the EU Courts.

56. Through the recognition and enforcement proceedings the investors brought in the United Kingdom, the Supreme Court was – the Commission argues – seised of a matter requiring an

interpretation of the same provisions of EU law in relation to the same measures as those that the Commission had already decided upon, and which were subject to proceedings pending before the EU Courts.

57. Despite being aware that its duty of sincere cooperation continued to apply, the Supreme Court decided to give final judgment in the matter, giving rise to a risk of conflict between that judgment and the expected decisions of the Commission and/or the EU Courts on the same matter.

2. Assessment

(a) The principle of sincere cooperation and State aid control

58. Article 4(3) TEU lays down one of the general principles of EU law which constitute the backbone of the legal system created under the EU Treaties: the principle of sincere cooperation. In essence, that principle requires EU institutions and all national authorities, including the judicial authorities of the Member States acting within the scope of their jurisdiction, to cooperate in good faith. (27)

59. In particular, under Article 4(3) TEU, the Member States are required to, on the one hand, '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' and, on the other hand, 'facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives'.

60. One of the key objectives of the European Union – which I hardly need to recall – is to establish an internal market: (28) an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured, (29) and in which competition between undertakings is not distorted, (30) by either the unilateral and multilateral conduct of undertakings (31) or by the granting of aids by national authorities. (32)

61. With regard to State aid measures, Article 108 TFEU established a system of *ex ante* and *ex post* control, in which the Commission is given a central role. The Commission has, inter alia, to 'keep under constant review' all forms of existing aid, and to assess beforehand 'any plans to grant or alter aid' before those are put into effect. In addition, an 'exclusive competence' has been conferred on the Commission to assess the compatibility of aid measures with the internal market, subject to review by the EU Courts. (33)

62. Having said that, the national courts, too, have an important role to play in this area. It is well established that the application of the EU 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 EU Courts on the other, in the context of which each acts within the limits of the role assigned to it by the Treaty. (34) The national courts' role includes, in particular, the requirement to protect parties affected by the distortion of competition caused by the grant of the unlawful aid. (35) Nevertheless, national courts should refrain from taking decisions which conflict with a decision of the Commission, even if it is provisional. (36)

63. Against that background – because of the overlap between the respective competences and powers of the Commission, the EU Courts and the national courts – a risk of conflict with regard to the

interpretation and application of State aid rules in specific cases may arise at times. In particular, that may be the case where the compatibility of some national measure with the EU State aid rules is subject to various administrative and/or judicial procedures, running in parallel at the EU level and the national level.

64. In the light of that, the Court has held that, when the outcome of a dispute before the national court depends on the validity of a Commission decision, it follows from the duty of sincere cooperation that the national court should, in order to avoid reaching a decision that runs counter to that of the Commission, stay its proceedings pending final judgment in the action for annulment before the EU Courts. That national court may, however, refuse a stay if it considers that, in the circumstances of the case, a reference to the Court of Justice for a preliminary ruling on the validity of the Commission decision is warranted, or there is scarcely any risk of conflict between administrative and/or judicial decisions. (37)

65. The principles following from that case-law ('the *Masterfoods* case-law') appear, in my view, to be fully applicable to the present case.

(b) The principle of sincere cooperation in the contested judgment

66. As the Supreme Court acknowledged in paragraph 2 of the contested judgment, the case brought before it was 'the latest chapter in the [investors'] extensive attempts *in a number of different jurisdictions* to enforce their award against Romania and the attempts of the European Commission … to prevent enforcement on the ground that it would infringe EU law prohibiting unlawful State aid.' (38)

67. Indeed, the Supreme Court noted that enforcement proceedings were ongoing in several other Member States: France, Belgium, Luxembourg and Sweden. Furthermore, in one of those States (namely, Belgium), the relevant national court had already referred three questions to the Court of Justice concerning the enforcement of the award and the principle of sincere cooperation. (39) In addition, and more importantly, the proceedings before the Supreme Court were also running in parallel with the proceedings before the EU Courts in which the investors had challenged the validity of the 2015 final decision ('the *European Food* proceedings'). (40)

68. Conscious of the consequences potentially flowing from that complex web of disputes, in paragraph 56 of the contested judgment, the Supreme Court stated that, in the circumstances of the case, (i) it was 'concerned with potentially contradictory decisions on the same subject matter between the same parties'; (ii) it could not conclude that 'there [was] scarcely any risk of conflict' between those decisions; (iii) had the conflict between different judgments materialised, the consequences thereof would have amounted 'to a substantial impediment to the operation of EU law'; and (iv) the existence of a pending appeal before the Court of Justice was, in principle, 'sufficient to trigger the duty of cooperation'.

69. That notwithstanding, the Supreme Court went on to examine the merits of the investors' ground of appeal based on the first paragraph of Article 351 TFEU. It started by recalling the EU case-law on that provision (41) and, subsequently, discussing in general the scope of obligations flowing from prior agreements under that provision. (42) The Supreme Court then turned its attention to the question of whether Article 351 TFEU was applicable to the United Kingdom's relevant obligations under the ICSID Convention, (43) before finally assessing whether its interpretation of the Treaty provision in the

case at hand could give rise to a risk of conflict which requires the imposition of a stay of the national proceedings, pending the outcome of proceedings before the EU Courts. (44)

70. It is that last part of the Supreme Court's reasoning which the Commission takes issue with in its first ground of the present action. In the final passages of the contested judgment, the Supreme Court came to the conclusion that, despite its previous findings concerning the abstract applicability of the principle of sincere cooperation, a stay of proceedings was nonetheless unnecessary for three reasons.

71. First, the Supreme Court held that, as a matter of EU law, questions as to the existence and extent of obligations stemming from prior agreements under the first paragraph of Article 351 TFEU are not reserved to the EU Courts. Such questions are not governed by EU law and – the Supreme Court continued – the Court of Justice was in no better position than a national court to answer them.

72. Second, the Supreme Court stated that the issue raised before it by the investors under Article 351 TFEU was not entirely the same as that raised before the EU Courts. In the *European Food* proceedings, the investors claimed, inter alia, that Article 351 TFEU afforded primacy to Romania's pre-existing international obligations flowing from the BIT and from Article 53 of the ICSID Convention. By contrast, in the UK proceedings the relevant legal issue was the United Kingdom's obligations to implement the ICSID Convention and to recognise and enforce the award under Articles 54 and 69 of the ICSID Convention. (45) The Supreme Court noted that the latter was an issue which, because it was specific to the UK dispute, had not been raised before the EU Courts.

73. Third, the Supreme Court also found that the prospect of the EU Courts addressing the applicability of the first paragraph of Article 351 TFEU to pre-accession obligations under the ICSID Convention in the context of the dispute pending in the United Kingdom was remote. The judgment of the General Court in *European Food* had not dealt with the interpretation of Article 351 TFEU and, as a consequence, the (then pending) appeal before the Court of Justice was limited to the assessment of other issues. Even in case of an annulment of the judgment under appeal, and a *renvoi* to the General Court for a fresh assessment of the case, the EU judiciary would be – in the view of the Supreme Court – unlikely to deal with the specific issue raised in the UK proceedings. The Supreme Court thus concluded that, in those circumstances, there was no need to stay the proceedings.

(c) The stay of proceedings

74. I am of the view that the Commission's criticism with regard to the assessment of the principle of sincere cooperation in the contested judgment appears well founded. I find the arguments given by the Supreme Court to avoid staying proceedings – despite the fact that, as it had itself recognised, the principle of sincere cooperation continued to apply – to be unconvincing.

(1) The Masterfoods case-law

75. In the first place, the fact that questions as to the existence and extent of obligations under prior agreements pursuant to the first paragraph of Article 351 TFEU are not 'reserved to the EU Courts', or that the EU Courts are 'in no better position than a national court to answer them' is immaterial for the purposes of applying the principle of sincere cooperation.

76. The *Masterfoods* case-law is not based on the idea that the interpretation of certain EU provisions should be 'reserved' to the EU Courts. The opposite is true: that case-law is based on the

very premiss that both sets of courts are, save exceptions, competent and capable of addressing questions of interpretation and application of EU law that may arise in proceedings brought before them, including in competition matters. After all, it follows from Article 19 TEU that national courts are meant to be, for citizens seeking protection of the rights they derive from EU law, the EU Courts of ordinary jurisdiction. (46)

77. The rationale of the *Masterfoods* case-law is twofold. On the one hand, it seeks to preserve the executive powers granted to the Commission in competition matters (*in casu*, to establish the existence and compatibility of suspected aid) by avoiding a conflict of (administrative and/or judicial) decisions on legal issues under examination by the Commission, or that have been examined by the Commission and are currently under judicial review before the EU Courts. On the other hand, it is meant to preserve the EU Courts' exclusive jurisdiction to review the validity of legal acts adopted by the EU institutions, by avoiding a situation in which a national court could give a ruling which, in practice, implies the invalidity of one of those acts.

78. In the light of that, it seems to me that the present case falls squarely within the type of case in which the *Masterfoods* case-law was applicable. (47)

79. Both the EU and the UK sets of proceedings concerned, broadly speaking, the same matter (the investors' ability to enforce the award in the European Union), involved the interpretation of the same provisions and general principles of EU law (in particular, Article 351 TFEU, Articles 107 and 108 TFEU, and the principle of sincere cooperation) and affected the validity and/or effectiveness of three State aid decisions adopted by the Commission. (48)

80. It also transpires from the contested judgment that it was abundantly clear to the Supreme Court that if it were to 'give the green light' to the enforcement of the award in the United Kingdom, both the administrative procedure before the Commission concerning alleged State aid and the annulment proceedings before the EU Courts would have largely lost their purpose. (49)

81. If that is so, whether or not a certain legal issue that had been raised by the investors before the United Kingdom Courts was one on which the EU Courts enjoyed reserved jurisdiction, or were best placed to rule, is irrelevant for the applicability of the *Masterfoods* case-law.

82. The risk of conflicting decisions in the two situations would be no different, and the potential prejudice to the correct performance of the tasks entrusted by the drafters of the Treaties to the Commission and the EU Courts would arise in both cases. On the one hand, the contested judgment allowed the investors to enforce the award, thereby bypassing the 'blocking effects' flowing not only from the 2015 final decision, but also from the opening decision and the suspension injunction. On the other hand, the interpretation and application of the first paragraph of Article 351 TFEU by the Supreme Court also diverged from that which had been retained by the Commission in the 2015 final decision. (50) The contested judgment thus implied, de facto, that that decision was unlawful, given that the Commission had failed to comply with a provision of EU primary law. The validity of that decision was, however, still being reviewed by the EU Courts.

(2) Interpretation of prior agreements and of Article 351 TFEU

83. In the second place, it may well be true that establishing the existence and extent of a Member State's obligations under a given agreement, for the purposes of the first paragraph of Article 351

TFEU, is not an issue governed by EU law. In principle, it is indeed not for the Court to interpret international agreements to which the European Union is not party.

84. However, determining the meaning and scope of the first paragraph of Article 351 TFEU – that is, in particular, the conditions in which that provision permits that a rule of EU law may be deprived of effect by a prior agreement – is, quite clearly, a question of interpretation of EU law.

85. It is also a question that had specifically been raised before the Supreme Court (51) and that, logically, precedes any inquiry into the effects of an international agreement vis-à-vis one Member State. Clearly, a court cannot positively establish what follows from a given provision of a prior agreement, unless it has previously determined that that agreement (and/or some provisions thereof) falls within the scope of the first paragraph of Article 351 TFEU.

86. In fact, determining the scope of the first paragraph of Article 351 TFEU was an issue which the Supreme Court had to look into extensively, before beginning to assess the legal consequences flowing from the provisions of the ICSID Convention invoked by the investors. In paragraph 98 of the contested judgment, the Supreme Court correctly stated that, to that end, it was necessary to consider whether the international agreement in question imposed on the Member State concerned obligations the performance of which may still be required by non-member countries which are parties to it. It then went on, in paragraphs 98 to 100 of the judgement, to interpret the expression 'obligations the performance of which may still be required by non-member countries'.

87. That expression – whose precise meaning was a point of contention between the parties – is found in the Court's case-law regarding the first paragraph of Article 351 TFEU, (52) which refers to 'the rights and obligations arising from agreements … between one or more Member States on the one hand, and one or more third countries on the other'.

88. It should be noted, in this context, that the first paragraph of Article 351 TFEU contains no reference to either Member States' laws or international law. It follows that the concepts included therein are autonomous concepts of EU law whose meaning and scope have to be interpreted in a uniform manner throughout the territory of the European Union, taking into account not only the wording of that provision, but also its objective and context. (53) That does not mean, obviously, that the drafters of the EU Treaties intended to disregard the relevant principles of international law on this matter. (54) It only means that the conditions in which, and the limits within which, Member States are allowed (under the EU Treaties) to disapply EU rules to comply with prior agreements are determined by EU law itself. (55)

89. In that regard, it should be borne in mind that, apart from the conditions expressly set out in the first paragraph of Article 351 TFEU, the second paragraph of the same provision introduces a specific obligation to eliminate conflicts for the future and the third paragraph includes a prohibition on granting preferential treatment to third States. In addition, certain limits on the scope of that provision derive from the specific characteristics of the EU legal order. As the Court held in the judgment in *Kadi*, Article 351 TFEU 'may in no circumstances permit any challenge to the principles that form part of the very foundations of the [EU] legal order, one of which is the protection of fundamental rights, including the review by the [EU] judicature of the lawfulness of [EU] measures as regards their consistency with those fundamental rights'. (56)

90. In the case at hand, the key issue the Supreme Court had to rule on was, put simply, under what

circumstances the first paragraph of Article 351 TFEU was applicable when (i) the prior agreement relied on was a multilateral agreement, and (ii) the dispute appeared purely internal to the European Union, since no third State or national of a third State was involved.

91. In the light of the above, in the contested judgment, the Supreme Court did not interpret (and apply) only a prior agreement, but also a provision of EU law. The fact that, in the case at hand, the two sets of provisions were inextricably linked as regards their interpretation cannot call into question the competence of the Court to address the EU-related aspect of the matter.

92. When necessary to solve a dispute which falls within the ambit of its jurisdiction, the Court must be able to incidentally interpret clauses of international agreements, even where those agreements are not part of EU law. That explains why, in direct actions, the Court showed no hesitation to undertake that task, to the extent that was required in order to adjudicate on the dispute. (57)

93. By contrast, in preliminary ruling procedures the Court usually need not interpret the international agreement in question, since that task may be left to the national courts of the Member State concerned. (58) Nevertheless, the Court's incidental jurisdiction to interpret an international agreement to which the European Union is not a party may also arise in the context of a preliminary ruling procedure. (59) That is so where, in order to provide an interpretation of EU law that may be useful to a national court, the Court has to consider the legal context in which one EU rule operates.

94. For example, where, as in the case at hand, the question arises as to whether a given agreement or a clause of an agreement may fall within the scope of the first paragraph of Article 351 TFEU, it cannot be seriously argued that the Court could only provide an interpretation of the EU provision at a high level of abstraction, being unable to take into account the specific characteristics of the agreement or clause in question. (60)

95. Moreover, in the case at hand, there was another reason which could have justified the Court for considering, even if incidentally, the provisions of the ICSID Convention relied on by the investors: the interpretation to be given to those provisions would have had a direct impact on the validity and/or effectiveness of three Commission decisions. (61)

(3) Different legal issues raised in the UK and the EU proceedings

96. In the third place, the statement by the Supreme Court that the issue raised by the investors under Article 351 TFEU before it was not entirely the same as that raised before the EU Courts is, yet again, both of limited significance and to some extent also inaccurate.

97. To begin with, I find it hard to see why it would matter whether, in the various proceedings started before the EU and national courts, the investors relied on Article 53 and/or Article 54 of the ICSID Convention. Both provisions are concerned with the recognition and enforcement of awards. Essentially, those are provisions addressed to different subjects, which lay down different remedies for the enforcement of awards in order to create a symmetrical obligation between States and investors in that regard. (62)

98. The risk of creating a 'substantial impediment to the operation of EU law' (63) existed regardless of the specific legal basis relied on by the investors in the different proceedings. It is the coexistence of several administrative and judicial proceedings within the European Union – which all

concerned the same award and had in common the aim of putting an end to the effects of the Commission's 2015 final decision (by annulling it, at EU level, and by bypassing it, at national level) – which truly mattered for the purposes of Article 4(3) TEU and the *Masterfoods* case-law.

99. In addition, the Supreme Court's finding concerning the difference in the investors' claims is not entirely accurate. The Supreme Court itself recognised that the investors had actually invoked not only Article 53 but also Article 54 of the ICSID Convention in the proceedings before the EU Courts. (64) The same is true with regard to the administrative procedure before the Commission: in fact, the 2015 final decision refers to both provisions. (65)

100. Likewise, the fact that issues relating to the existence and extent of the *United Kingdom*'s obligations under the ICSID Convention were not raised before the EU Courts appears equally immaterial in the case at hand. Obviously, as the United Kingdom was not involved in any way in the State aid proceedings which led to the 2015 final decision, there was no reason to deal with the specific situation of that Member State.

101. Nevertheless, as far as I can see, the United Kingdom's obligations under the ICSID Convention are not dissimilar to those of the other EU Member States which are all, except Poland, also party to that convention. That includes not only Romania (the Member State that granted the alleged aid) but also Belgium, Luxembourg and Sweden (before which parallel proceedings were ongoing). Thus, any findings of the EU Courts with regard to the applicability of the ICSID Convention, by virtue of Article 351 TFEU, in the dispute pending before them (or before national courts) would have been applicable, *mutatis mutandis*, to the UK proceedings.

102. True, the applicability of the first paragraph of Article 351 TFEU was not among the issues which the General Court ruled upon when it annulled the 2015 final decision and, consequently, which had been raised in the appeal then pending before the Court of Justice.

103. However, that did not imply that – as the Supreme Court stated – 'the prospect of [the EU Courts] addressing the applicability of Article 351 TFEU to pre-accession obligations under the ICSID Convention … [was] remote' or, put differently, that 'the possibility that the EU Courts [might] consider [that] issue at some stage in the future [was] both contingent and remote'. (66) The Supreme Court itself had found that the duty of sincere cooperation was, in principle, triggered by the 'existence of a pending appeal to the Court of Justice *with a real prospect of success*'. (67)

104. Had the Commission succeeded in its appeal (which then actually happened (68)), the Court could have either referred the case back to the General Court for a fresh assessment or given final judgment in the matter. In both cases, that would have involved dealing with the investors' grounds of annulment that had not been ruled upon in the judgment set aside by the Court. (69) One of those grounds concerned, precisely, the Commission's alleged failure to apply the first paragraph of Article 351 TFEU properly. (70)

105. By contrast, had the Commission lost the appeal, it would have had to restart its investigation into the alleged aid measure and evaluate the investors' arguments *ex novo*, including those based on the applicability of the first paragraph of Article 351 TFEU and, by virtue of that provision, of the ICSID Convention. (71) Needless to say, any such finding could have been contested by the investors before the EU Courts.

106. Thus, at some stage or other of the EU proceedings, the investors' arguments concerning the applicability of the first paragraph of Article 351 TFEU and of the ICSID Convention were bound to be expressly dealt with by the EU Courts. *Rectius*, given that the investors had expressly put forward such arguments, there was no way a Commission decision unfavourable to them could have become definitive without the EU judiciary examining those arguments.

107. Last but not least, if the Supreme Court were of the view that the specificities of the proceedings before it – concerning the provision of the ICSID Convention relied on by the investors and/or the position of the United Kingdom vis-à-vis the ICSID Convention – raised issues which were both relevant for the solution of the dispute and unlikely to be dealt with by the EU Courts in the *European Food* proceedings, it could have made a reference to the Court under Article 267 TFEU. As explained, those issues were raised in relation to the scope of the first paragraph of Article 351 TFEU, thus falling within the Court's jurisdiction. Notably, Article 86(2) of the Withdrawal Agreement permitted a referral to the Court in those circumstances.

108. In conclusion, the Supreme Court ruled on issues of interpretation of EU law which had been dealt with in a Commission decision whose validity was being reviewed in proceedings then pending before the EU Courts. The arguments raised by the investors in that regard, before both the Supreme Court and the EU Courts, implied necessarily the invalidity of the Commission decision in question. There was a genuine and actual risk of conflicting (administrative and/or judicial) decisions on the same matter within the European Union. Accordingly, by declining to stay proceedings, as required by the *Masterfoods* case-law, the Supreme Court has infringed the duty of sincere cooperation, enshrined in Article 4(3) TEU. The Commission's first ground appears, therefore, to be well founded.

D. Second ground: infringement of the first paragraph of Article 351 TFEU

1. Arguments of the parties

109. By its second ground, the Commission claims that, by finding that EU law did not apply to the enforcement of the award in the United Kingdom, because the United Kingdom owed the obligation to enforce the award under Article 54 of the ICSID Convention to all other ICSID Contracting States, including third countries, the contested judgment gave rise to an infringement of the first paragraph of Article 351 TFEU.

110. The Commission argues that, in the case at hand, the first paragraph of Article 351 TFEU was not applicable and, by finding otherwise, the Supreme Court improperly extended the scope of that provision. That conclusion stems – according to the Commission – from an erroneous interpretation of two expressions included in Article 351 TFEU, which are both autonomous concepts of EU law: 'rights … [of] one or more third countries' and 'affected by the … Treaties'.

111. First, the Commission maintains that no 'rights [of] one or more third countries' were involved in relation to the United Kingdom's obligation to enforce the award pursuant to Article 54 of the ICSID Convention, since the case at hand concerned only EU Member States. Second, the Commission alleges that no obligation of the United Kingdom under the ICSID Convention was 'affected by the Treaties' in so far as the relevant provisions of that Convention could be interpreted so as to avoid any conflict with the relevant rules of the EU Treaties.

2. Assessment

112. For the reasons which will be explained below, it is my view that the Commission's second ground should be rejected.

(a) Can a Member State infringe the first paragraph of Article 351 TFEU?

113. In its reply to the letter of formal notice, the United Kingdom Government objected to the Commission's allegation of an infringement of the first paragraph of Article 351 TFEU, pointing to the wording of that provision, which appears to impose no obligation on the Member States.

114. At the outset, it may be useful to point out that the first paragraph of Article 351 TFEU introduces a rule to govern possible conflicts stemming from the concurrent application of two sets of rules: (72) the EU Treaties, on the one side, and prior agreements, on the other side. That provision reflects long-standing principles of international law concerning the application of successive treaties and the effects of treaties vis-à-vis third States, such as *pacta sunt servanda*, *pacta tertiis nec nocent nec prosunt* and *res inter alios acta*. (73) Those are principles which have been codified in the VCLT, (74) and whose value in the EU legal order has been consistently recognised by the Court. (75)

115. The purpose of the first paragraph of Article 351 TFEU is, therefore, to make clear that, in accordance with the above principles of international law, the application of the EU Treaties does not affect the commitment of the Member States to respect the rights of third countries under prior agreements, and to comply with their obligations arising therefrom. (76) Accordingly, where the relevant conditions are satisfied, Member States are permitted to disapply EU rules, in so far as that is necessary to comply with prior agreements. (77)

116. That said, the Court found that the rule enshrined in the first paragraph of Article 351 TFEU 'would not achieve its purpose if it did not imply a duty on the part of the [EU institutions] not to impede the performance of the obligations of Member States which stem from a prior agreement'. (78) If that is so, it is correct that that provision implies an obligation for the EU institutions.

117. Admittedly, one could construe the first paragraph of Article 351 TFEU as also laying down, albeit implicitly, an obligation for the Member States which could be regarded as the 'mirror image' of that of the EU institutions: not to impede the application of EU law, where the conditions of the first paragraph of Article 351 TFEU are not satisfied. In other words, Member States would be precluded from giving precedence to the provisions of prior agreements over conflicting EU rules in situations which fall outside the scope of that Treaty provision. This 'two-way' reading of the provision could perhaps be justified by the fact that Article 351 TFEU is often regarded as a manifestation, in this area, of the principle of sincere cooperation: (79) a principle that, as stated, requires both the EU institutions and the Member States to act in good faith.

118. However, the significance and, if I may say so, added value of such an obligation appears to be close to *nihil*. Put simply, the obligation set out in the first paragraph of Article 351 TFEU would, for the Member States, simply be to comply with EU law where the exception provided therein is inapplicable: a truism. In fact, there could be no self-standing breach of the first paragraph of Article 351 TFEU; any such breach would derive, automatically and by way of implication, from the breach of some other rule of EU law.

119. More importantly, the Commission's reading can hardly be reconciled with the rationale and text of the first paragraph of Article 351 TFEU. (80) That provision is, fundamentally, a permissive rule,

allowing Member States to disapply EU law in certain circumstances. As such, its function is that of a 'shield', meaning a possible defence that can be raised by a Member State being accused of being in breach of an EU rule. By contrast, unlike the second and third paragraphs of the same provision – which, as explained above, lay down certain specific obligations for the Member States – I fail to see how the first paragraph of Article 351 TFEU could meaningfully be used as a 'sword' in the context of infringement proceedings. (81)

120. In conclusion, I take the view that the first paragraph of Article 351 TFEU cannot form the basis of a claim in a procedure under Article 258 TFEU and, as a consequence, the Commission's second ground should be rejected.

121. However, should the Court disagree with me on the assessment of this preliminary issue, and given the obvious links between the issue raised by the Commission in its second ground and those raised in the other three grounds, I shall, in any event, explain why I am of the view that the Supreme Court erred in its interpretation of the first paragraph of Article 351 TFEU.

(b) The scope of the first paragraph of Article 351 TFEU

122. According to the text of the first paragraph of Article 351 TFEU, two conditions must be satisfied for that provision to apply: (i) the agreement must have been concluded before the entry into force of the then EEC Treaty, or the Member State's accession to the European Union; and (ii) a third country must derive from that agreement rights which it can require the Member State concerned to respect. (82)

123. In the contested judgment, the Supreme Court found those conditions to be satisfied on the ground that: (i) the ICSID Convention is, with respect to the United Kingdom, a 'prior agreement' for the purposes of the first paragraph of Article 351 TFEU; and (ii) the United Kingdom owed the obligations flowing from Article 54 of the ICSID Convention to all other contracting States. It thus concluded that the investors could legitimately rely on the EU provision to request that the United Kingdom Courts enforce the award.

124. I certainly agree with regard to the former condition: the United Kingdom ratified the ICSID Convention in 1966, that is, before its accession to the then Communities in 1973. (83)

125. Conversely, for a number of reasons, I am unconvinced by the Supreme Court's findings with respect to the second condition.

126. To explain why I am of that view, I shall first attempt to provide some clarity with regard to the scope of the first paragraph of Article 351 TFEU, an issue which may, admittedly, not be entirely clear on the basis of the existing case-law. In that regard, I find it reasonable to start the analysis by looking at the objective and the wording of that provision.

(1) The objective and the wording of the first paragraph of Article 351 TFEU

127. The immediate objective of the first paragraph of Article 351 TFEU is to protect the rights of third States (84) by permitting Member States to comply with prior agreements where they conflict with EU rules, (85) without that resulting in a breach of EU law. (86) The overarching aim of that provision is, however, to protect Member States from committing, as a result of obligations subsequently undertaken

under EU law, some wrongful act entailing their international responsibility under the rules of public international law, which could be invoked by third States.

128. In fact, the Court has held that the first paragraph of Article 351 TFEU does not apply when the rights of non-member countries are not involved. (87) Accordingly, that provision cannot be validly invoked in the case of agreements concluded solely between Member States, (88) and in the case of agreements concluded with third States if relied upon in relations between Member States. (89) As emphasised in legal scholarship, the Court has *always* upheld the principle that Article 351 TFEU cannot be applied in intra-Union relations. (90)

129. That is why the Court has made clear, from very early case-law, that the expression 'rights and obligations arising from agreements', in the first paragraph of Article 351 TFEU, must be understood as referring to rights of third States and obligations of the Member States. (91) Member States cannot claim any 'right' flowing from prior agreements. (92)

130. There is an indissoluble link between those two elements. Only if a third State has a right that can be claimed against a Member State does EU law permit (but does not oblige (93)) the latter to discharge the '*corresponding* obligations'. (94) In fact, when a prior agreement allows, but does not require, a Member State to adopt a measure which is contrary to EU law, the first paragraph of Article 351 TFEU does not release that Member State from having to comply with the relevant EU rules. (95) In the same vein, the Court has found that the first paragraph of Article 351 TFEU cannot apply when a third State has expressed the wish for the prior agreement to come to an end. (96) In my view, the same must be true with regard to a third State that has expressly consented to a lack of compliance with the prior agreement or waived its rights. (97)

131. The identification of the *interrelated* third State's right and Member State's obligation is thus crucial to establish the applicability, in a given case, of the first paragraph of Article 351 TFEU.

132. At this juncture, it seems important to draw a distinction between different types of agreements.

133. As far as *bilateral agreements* – that is, agreements between one Member State and one third State – are concerned, establishing whether a specific right of a third State and the corresponding obligation of a Member State exist, within the meaning of the first paragraph of Article 351 TFEU, should normally raise no major problems.

134. By contrast, when it comes to *multilateral agreements* – that is, agreements to which one or more Member States are party alongside one or more third States – the situation may not always be straightforward. It is indeed possible that issues concerning the application of the first paragraph of Article 351 TFEU might arise in intra-EU situations where, as in the case at hand, only two or more Member States are directly involved. (98) In such a case, under which circumstances is the first paragraph of Article 351 TFEU applicable?

135. In that regard, I share the Commission's view that, under the first paragraph of Article 351 TFEU, one must distinguish between multilateral agreements that contain obligations of a *collective* nature, and multilateral agreements which contain obligations of a *bilateral* or reciprocal nature. (99)

136. In the first category of agreements, a contracting party's failure to discharge an obligation under the agreement may affect the enjoyment by the other parties of their rights under the agreement, or

jeopardise the attainment of the agreement's objective. (100) In those cases, the obligations arising are owed to a group of States (*erga omnes partes*) or to the international community as a whole (*erga omnes*). In such cases, the first paragraph of Article 351 TFEU may well be applicable, and thus relied on to contest the validity of an EU act, even in disputes that involve only EU actors. (101) In fact, those situations may be purely intra-EU on a factual level, but they are not so on a legal level.

137. Conversely, in the second category of agreements, the failure by a contracting State to comply with an obligation under the prior agreement will typically affect only one or more specific contracting States: those that are concerned by the situation in question. In those cases, there is no interference with the enjoyment of the rights held by other contracting States under the agreement. (102) If that is so, it follows that, in those cases, when the contracting States affected by a Member State's failure are other Member States, the first paragraph of Article 351 TFEU does not apply. Since there is no right of a third State to come into play, there is no need to discard the application of EU law to avoid a Member State's consequent international responsibility.

138. I would like to add, in this context, that I again agree with the Commission when it argues that the mere *factual interest* (as opposed to a *legal interest*) of the contracting States in ensuring that all other contracting States comply with a multilateral agreement is insufficient to trigger the application of the first paragraph of Article 351 TFEU. (103) The text of that provision refers to 'rights', a term which has also been consistently referred to in the case-law of the Court on this matter. (104)

(2) A provision with far-reaching consequences and a general, but not overly broad, scope

139. As the Supreme Court rightly held, Article 351 TFEU has a *general* scope: it applies to any international agreement, irrespective of subject matter, which is capable of affecting the application of the EU Treaties. (105)

140. Nevertheless, that does not mean that the exception set out in the first paragraph thereof has a *broad* scope. It must be borne in mind that the first paragraph of Article 351 TFEU derogates from the principle of primacy, one of the central pillars on which the EU legal system is built. Where the conditions are fulfilled, save in exceptional circumstances, (106) any provision in a prior agreement may take precedence over any conflicting provision of EU law, including primary law. (107) That is true regardless of the impact that the non-application of those EU rules may have on the rights and interests of the other Member States, and the proper functioning of the European Union itself.

141. Given the potentially far-reaching consequences which stem from the application of that provision, the interpretative principle – according to which exceptions are to be interpreted strictly, so that general rules are not negated – is obviously particularly relevant in this context. (108)

142. In the light of the above considerations, I shall now turn to the relevant passages in the contested judgment.

(c) The first paragraph of Article 351 TFEU in the contested judgment

143. In the case at hand, the crux of the matter was – as the Supreme Court stated (109) – to determine whether the prior agreement in question imposed on the Member State concerned obligations whose performance could still be required by non-member States which were parties to it. In the contested judgment, the Supreme Court carried out that assessment by examining the obligation owed by one

Member State (the United Kingdom) under one international agreement (the ICSID Convention) to enforce the award.

144. I find the approach followed by the Supreme Court in that regard problematic in three respects.

145. First, the Supreme Court's analysis, centred almost exclusively on the United Kingdom's *obligations* under Article 54 of the ICSID Convention, failed to identify any *corresponding right* of non-member States.

146. As explained above, the importance of the link between those two elements, for the purposes of the first paragraph of Article 351 TFEU, can hardly be overstated. Indeed, that provision requires that a third country which is party to the agreement derive, from that agreement, a *right* which it can *require* the Member State concerned to respect.

147. It is, thus, not an issue which can be glossed over. For example, assuming the United Kingdom Courts had refused to enforce the *award in question*, (110) would each and every third State which is party to the ICSID Convention (currently, well over 150) be able to invoke the United Kingdom's international responsibility for that refusal, and to act against that State, through the procedures provided for in international law, (111) in order to obtain cessation of the wrongful act and/or reparation of the injury caused? That question, despite its significance, was not addressed in the contested judgment.

148. Second, it seems to me that the standard applied by the Supreme Court to identify an obligation owed to a third State was quite low. What I mean is that the requirements for an obligation deriving from an international agreement to be regarded as collective (in this case, *erga omnes partes*), and not bilateral or reciprocal, appear easily met under the reasoning applied by the Supreme Court.

149. There is certainly no lack of references to international and academic sources in the contested judgment but, at closer scrutiny, none of those seems specific or conclusive on the matter. With the exception of two statements, (112) all other sources are rather vague on that point and the Supreme Court's findings are derived by implication. (113) I would say that those sources seem, mostly, to point to the existence of an *interest* of a general character by the contracting parties of the ICSID Convention that the agreement is complied with under all circumstances. (114) However, as stated above, that is insufficient to trigger the application of the first paragraph of Article 351 TFEU.

150. Third, although I understand that the main question that was put to the Supreme Court concerned the effects of the ICSID Convention vis-à-vis the United Kingdom (simply put: 'is the United Kingdom required to enforce the award under that agreement?'), that issue could not be examined in 'clinical isolation' from the context of the dispute.

151. The legal and factual situation of the dispute was, in fact, quite complex: it involved three different States (the United Kingdom, Romania and Sweden), and two different international agreements (the BIT and the ICSID Convention).

152. The award granted compensation to the investors on the ground that Romania had, according to the arbitral tribunal, breached the terms of the BIT by failing to ensure fair and equitable treatment, respect the investors' legitimate expectations and act transparently. (115) It was thus the BIT that laid down the *substantive* obligations that Romania had undertaken towards Sweden. It was also under

Article 8(6) of the BIT that Romania owed Sweden the obligation to pay out the compensation awarded to the Swedish nationals in question. (116)

153. In essence, by confining its assessment to a single procedural question arising out of the dispute, and leaving one international agreement out of the equation, the Supreme Court lost sight of the basic legal relationship which gave rise to the dispute: that between Romania on the one side, and Sweden and its nationals on the other.

154. Under the interpretation of the first paragraph of Article 351 TFEU retained by the Supreme Court, some situations which are purely internal to the European Union – given that only Member States and their nationals are involved, not only in fact but also in law – would be governed by the provisions of prior international agreements, despite falling within the field of the EU Treaties and being in conflict with some EU rules. In my view, that would be inconsistent with the wording of the first paragraph of Article 351 TFEU and unnecessary with a view to achieving its objective. It would also not be in line with past case-law which excluded its application in purely intra-EU relations.

155. That broad reading of the first paragraph of Article 351 TFEU would also create, in a number of circumstances, a relatively easy way for individuals to circumvent the binding nature of EU rules. (117) In that respect, it should not be overlooked that Article 351 TFEU is, first and foremost, a provision concerned with inter-State relationships. As the Court has found, that is a neutral provision which cannot have the effect of altering the nature of the rights which may flow from prior agreements. From that, it follows that 'that provision does not have the effect of conferring upon individuals who rely upon [a prior agreement] … rights which the national courts of the Member States must uphold. Nor does it adversely affect the rights which individuals may derive from such an agreement'. (118)

156. Therefore, whether individuals (such as the investors) derive a right under a prior agreement is, mostly, immaterial for the application of the first paragraph of Article 351 TFEU. Individuals can benefit from that provision only *indirectly*, in so far as they can show that some EU provision or measure requires a Member State to infringe an obligation owed to a third State under a prior agreement, which could trigger the international responsibility of that Member State.

157. In conclusion, I take the view that, in the contested judgment, the Supreme Court erred in interpreting and applying the first paragraph of Article 351 TFEU, giving that provision too broad a scope. In particular, it misinterpreted the concept of 'rights and obligations arising from agreements', failing to appreciate correctly how that concept should be examined in the context of multilateral agreements, in particular where no third State or national is involved.

158. That being said, for the reasons explained in points 113 to 120 above, the Commission's second ground should be rejected.

E. Third ground: infringement of Article 267 TFEU

1. Arguments of the parties

159. By its third ground, the Commission contends that the delivery of the contested judgment by the Supreme Court, without seising the Court of Justice for a preliminary ruling, gave rise to an infringement of Article 267 TFEU on two counts.

160. The Commission claims that, by failing to refer a question for a preliminary ruling on the *validity* of the opening decision and of the suspension injunction, the Supreme Court infringed the obligation laid down in the first paragraph, point (b), of Article 267 TFEU. The Commission states that the effect of the contested judgment is that those decisions are rendered inoperative. Thus, by declining to give effect to those decisions – which required that the standstill obligation be complied with, preventing the payment of the aid in question – the Supreme Court acted *as if* those acts were invalid.

161. In addition, the Commission claims that, by failing to refer a question regarding the interpretation of the first paragraph of Article 351 TFEU, the Supreme Court, as a court of last instance, infringed the obligation laid down in the third paragraph of Article 267 TFEU. In the contested judgment, the Supreme Court had to engage in an interpretation of concepts of EU law concerned that were controversial and that had not been sufficiently dealt with in the EU case-law.

2. Assessment

162. I shall start my assessment of the present ground with the second argument put forward by the Commission.

163. At the outset, I hardly need to point out that the Supreme Court is 'a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' within the meaning of Article 267 TFEU. Thus, such court is, in principle, required to make a reference for a preliminary ruling under Article 267 TFEU, when it must resolve a question of interpretation of an EU provision in order to give judgment.

164. However, according to settled case-law, despite the duty to refer set out in Article 267 TFEU, courts of last instance may refrain from doing so in two types of circumstances.

165. First, a reference is not warranted in the so-called *acte clair* type of situation: when the correct application of EU law is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. In that regard, the Court has added that, before concluding that the interpretation of a provision leaves no room for reasonable doubt, the national court of last instance must, however, be convinced that the matter would be equally obvious to the other courts or tribunals of last instance of the Member States and to the Court of Justice. (119)

166. Second, the duty to refer is waived in the so-called *acte éclairé* type of situation: where the question raised is materially identical to a question that has already been the subject of a preliminary ruling in a similar case, or the previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical. (120)

167. More generally, the Court has held that the question whether the possibility of a court of last instance not to refer exists 'must be assessed on the basis of the characteristic features of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the European Union'. (121)

168. Above, I have explained why, in my view, the Supreme Court misinterpreted the first paragraph of Article 351 TFEU in the case at hand. Nevertheless, the mere fact that a court of last instance has erred in its interpretation of a provision of EU law, without referring a question to the Court of Justice under

Article 267 TFEU, does not mean that it has necessarily acted in breach of its duty to refer. That is, at most, one indicator that that may be the case.

169. In the present case, however, various other elements indicate that neither the wording of the provision itself, nor the case-law of the Court, gave an obvious answer to the questions of interpretation the Supreme Court was faced with.

170. First, it is quite clear that the relatively concise wording of the first paragraph of Article 351 TFEU does not provide unambiguous guidance in respect of the questions of interpretation which had been raised before the Supreme Court. As the Commission pointed out, the parties strongly disagreed in respect of those questions. It seems to me that both sides had put forward arguments which, at least at first sight, could not be dismissed as manifestly ill founded.

171. Second, the decisions of the EU Courts concerning the first paragraph of Article 351 TFEU referred to by the parties and considered by the Supreme Court were limited both in number and in relevance. In particular, no such decision had dealt, expressly and directly, with the issues that were crucial in the case at hand. In fact, the statement of reasons in the contested judgment shows that the interpretation retained by the Supreme Court was construed by (if I may say so) putting together 'bits and pieces' from a number of judgments of the Court. Moreover, that statement of reasons also shows that certain 'bits and pieces' of other judgments of the Court may have suggested another reading of the first paragraph of Article 351 TFEU. (122)

172. Third, it is also hard to see how it could be safely concluded that the interpretation of the first paragraph of Article 351 TFEU adopted by the Supreme Court was likely to be 'equally obvious' to the EU Courts and the courts of last instance of the other Member States. The Supreme Court was aware that arguments based on Article 351 TFEU and the ICSID Convention had been raised not only before the EU Courts, but also in the ongoing national proceedings. The very number of those proceedings, and the fact that they were pending before courts of different jurisdictions, should have made, at the very least, the Supreme Court particularly cautious in that respect.

173. Furthermore, the Supreme Court had been informed, by the Commission, that one national court – the Nacka Tingsrätt (District Court, Nacka, Sweden) – had delivered a judgment in which it had rejected the investors' claims based on the first paragraph of Article 351 TFEU, following an interpretation thereof that was at odds with that finally embraced by the Supreme Court. The risk of diverging views on the meaning and scope of the first paragraph of Article 351 TFEU, and thus of conflicting judicial decisions thereon, was thus both real and present.

174. In that connection, I must recall that the Court has consistently held that where a national court of last instance is made aware of the existence of diverging lines of case-law – among the courts of a Member State or between the courts of different Member States – concerning the interpretation of a provision of EU law applicable to the dispute in the main proceedings, that court must be particularly vigilant in its assessment of whether or not there is any reasonable doubt as to the correct interpretation of the provision of EU law at issue and have regard, inter alia, to the objective pursued by the preliminary ruling procedure which is to secure uniform interpretation of EU law. (123)

175. Fourth, the Supreme Court appears to have given no regard to the constitutional significance of the legal issue which it decided to rule upon, or to the possible impact its decision could have on the EU legal order as a whole. As stated, the first paragraph of Article 351 TFEU constitutes a near open-ended

limitation to the operation of the principle of primacy of EU law. In the light of the importance of that principle for the EU legal system, the consequentiality of reading that Treaty provision broadly could not have escaped to the Supreme Court.

176. In addition, I observe that, unlike the Supreme Court, both the High Court and the Court of Appeal had refused to assess the application of the first paragraph of Article 351 TFEU since that was an issue raised in the *European Food* proceedings before the EU Courts, and could thus give rise to a risk of conflicting judgments on the matter. (124)

177. Hence, I am of the view that, by ruling on the merits of the investors' claim based on the first paragraph of Article 351 TFEU, the Supreme Court ignored (i) the 'characteristic features of Union law' and (ii) 'the risk of divergences in judicial decisions within the European Union'. Those are elements which, in line with the above-mentioned case-law, national courts of last instance are required to take into account when assessing whether, in a specific situation, they are under an obligation to refer a question pursuant to the third paragraph of Article 267 TFEU.

178. Fifth, and last, I believe that, given the circumstances of the case, the Supreme Court's failure to make a reference under Article 267 TFEU is a decision that falls outside the margin of manoeuvre which must necessarily be recognised in respect of bodies exercising judicial functions. The elements examined in this Opinion show a legally complex case, compounded by the coexistence of several administrative and judicial proceedings throughout the European Union, in which the central issues concerned the application of various EU rules and principles. In particular, the interpretation of the first paragraph of Article 351 TFEU did not constitute an ancillary or secondary issue – which could have thus suggested the use of judicial economy – but one which 'goes to the heart of the present dispute'. (125)

179. In addition, I do not see any concrete element which may suggest the existence of special reasons why the case should be dealt with urgently. Nor could the Supreme Court's failure to make a reference for a preliminary ruling be regarded as being the result of a minor overlook, as may, for example, be the case where a legal issue has not been raised by, or fully debated between, the parties. Indeed, some of the parties to the proceedings had more than once invited the Supreme Court to refer a question to the Court on the proper interpretation of the first paragraph of Article 351 TFEU.

180. Thus, I take the view that, in the light of the circumstances of the case, the Supreme Court could not have plausibly concluded that, because of its wording and/or the existing EU case-law, (i) the interpretation to be given to the first paragraph of Article 351 TFEU left no scope for reasonable doubt and (ii) the interpretation adopted would have been equally obvious to the EU Courts and to the courts of last instance of the other Member States. Accordingly, by failing to refer questions on the interpretation of the first paragraph of Article 351 TFEU to the Court of Justice, the Supreme Court failed to fulfil its obligation under the third paragraph of Article 267 TFEU.

181. In those circumstances, I am of the view that the third ground appears to be well founded, without there being a need to examine the other form of criticism expressed by the Commission.(126)

F. Fourth ground: infringement of Article 108(3) TFEU

1. Arguments of the parties

182. By its fourth ground, the Commission claims that the United Kingdom infringed Article 108(3) TFEU.

183. The Commission emphasises that, in lifting the stay on enforcement of the award, which had been ordered by the United Kingdom Courts hearing the case at lower instances, that award became enforceable. The Supreme Court's ruling had, thus, the effect of rendering the amounts set out in the award payable. Such an effect is – the Commission argues – in direct contradiction to the standstill obligation provided for by Article 108(3) TFEU.

184. The Commission adds that the Supreme Court also disregarded the well-established case-law according to which the prohibition on granting State aid that has not been duly authorised can be relied upon to prevent the enforcement of final judgments of national courts that would be in direct contradiction to the standstill obligation. (127)

2. Assessment

185. Although the Commission's legal arguments appear, in principle, to be sound, I take the view that this ground should be dismissed.

186. Pursuant to Article 108(3) TFEU, Member States are under an obligation, first, to notify to the Commission any measure intended to grant new aid or to alter existing aid and, second, not to implement such a measure until that institution has taken a final decision on that measure. That dual obligation (notification and standstill) is meant to ensure that a system of aid cannot become operational before the Commission has had a reasonable period to study the proposed measures in detail and, if necessary, to initiate the formal examination procedure. The ultimate aim is, obviously, to prevent the possibility of incompatible aid being granted to the beneficiaries. (128)

187. In the present case, the measure in question (the payment by Romania of the compensation granted to the investors in the award (129)) had already been examined by the Commission and found to constitute incompatible State aid in the 2015 final decision.

188. It is true that the Commission final decision had, when the Supreme Court delivered the contested judgment, been annulled by the General Court. However, an appeal before the Court of Justice against the judgment of the General Court was already pending.

189. In addition, the annulment proceedings before the EU Courts did not concern the lawfulness of the opening decision and/or of the suspension injunction. It may be worth pointing out that the lawfulness of the opening decision had not been challenged by the investors, despite that being possible in principle. (130) In turn, the lawfulness of the suspension injunction had first been challenged by the investors, but their action was later withdrawn. (131)

190. In this context, it must be borne in mind that acts of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality. (132)

191. Furthermore, the judgment of the General Court cannot be read as meaning, even by implication, that the opening decision and the suspension injunction were also unlawful. It is well established that

the annulment of an EU measure does not necessarily affect the preparatory acts, and the procedure for replacing such a measure may, in principle, be resumed at the very point at which the illegality occurred. (133)

192. In the present case, the ground on which the General Court annulled the 2015 final decision was specific to the decision under review. (134) Such an error by the Commission, even if it had been confirmed by the Court on appeal, would not have affected the lawfulness of the Commission decisions adopted at an earlier stage of the procedure. Indeed, the consequence for the Commission would have been that it was required to restart its in-depth investigation into the alleged aid and then adopt a new decision to close the procedure, which had to be consistent with the EU Courts' findings.

193. Consequently, regardless of the status of the 2015 final decision, since the opening decision and the suspension injunction were acts in force and produced legal effects, the standstill obligation for the alleged aid was still in effect. (135)

194. In that connection, I ought to recall that, according to settled case-law, the prohibition on disbursement of planned aid laid down in the last sentence of Article 108(3) TFEU has direct effect and is, therefore, immediately enforceable, (136) including by national courts. (137) Accordingly, a national court cannot, without committing an infringement of Article 108(3) TFEU, order payment of aid which has not been notified to the Commission, whose compatibility with the internal market is under examination by the Commission or, worse, which has already been found to be incompatible with the internal market. Any such request should, in principle, be rejected. (138)

195. Therefore, by lifting the stay on the enforcement of the award, the contested judgment's unavoidable consequence was that Romania became, in principle, required to pay out the alleged aid, in disregard of the standstill obligation. Such a situation appears likely to result in an infringement of Article 108(3) TFEU.

196. It is true that – as the United Kingdom pointed out in its reply to the Commission's letter of formal notice – Article 108(3) TFEU lays down an obligation that is, in principle, incumbent upon the Member State that grants the alleged aid. (139) However, as the Commission rightly observed, under Article 4(3) TEU Member States are required to assist each other in order to facilitate compliance with EU law, and to refrain from adopting measures which could impede or endanger compliance. (140)

197. Consequently, I share the Commission's view that the United Kingdom can itself be considered responsible for an infringement of Article 108(3) TFEU, read in conjunction with Article 4(3) TEU, if it is one of its measures that triggers a breach of the standstill obligation in respect of an alleged aid measure.

198. That said, I must point out that, in the present case, the Commission submitted no information about how and when the enforcement of the award in the United Kingdom, made possible by the contested judgment, led to an actual payment of the sums set out therein.

199. I would recall, in that respect, that in infringement proceedings it is incumbent upon the Commission to prove the infringements alleged, and to place before the Court all the information necessary to that end, without the Commission being able to rely on any presumption. (141) In addition, it is settled case-law that infringement proceedings can only be used against actual infringements of EU law. By contrast, mere allegations of potential future infringements or a risk thereof cannot be

accepted. (142)

200. Thus, although I agree with the Commission that the contested judgment appears capable, in principle, of resulting in an infringement of the standstill obligation set out in Article 108(3) TFEU which could be imputed to the United Kingdom, I see no proof that such an infringement has actually occurred.

201. For that reason, the Commission's fourth ground does not appear, in my view, to be well founded.

VI. Costs

202. Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

203. Accordingly, given that the Commission has applied for the costs and its action was largely successful, the United Kingdom must be ordered to pay the costs.

VII. Conclusion

204. In the light of the foregoing, I suggest that the Court of Justice:

– declare that since, by its judgment of 19 February 2020 in *Micula* v *Romania*, the Supreme Court refused to stay proceedings, and ruled on the interpretation of the first paragraph of Article 351 TFEU, while the same matter had been decided by extant Commission decisions and was awaiting adjudication before the EU Courts, the United Kingdom infringed Article 4(3) TEU, in conjunction with Article 127(1) of the Withdrawal Agreement;

– declare that since the Supreme Court, as a court of last instance, failed to refer a question to the Court of Justice for a preliminary ruling on the interpretation of EU law that was neither *acte clair* nor *acte éclairé*, the United Kingdom of Great Britain and Northern Ireland infringed the third paragraph of Article 267 TFEU, in conjunction with Article 127(1) of the Withdrawal Agreement;

– dismiss the action as to the remainder;

– order the United Kingdom of Great Britain and Northern Ireland to bear the costs of these proceedings.

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1 Original language: English.

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2 Mertens de Wilmars, J. and Verougstraete, I.M., 'Proceedings against Member States for failure to fulfil their obligations', *Common Market Law Review*, Vol. 7, Issue 4, 1970, pp. 389 and 390. Similarly, some years later, Opinion of Advocate General Warner in *Bouchereau* (30/77, EU:C:1977:141, p. 2020).

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3 See, recently, judgment of 28 January 2020, *Commission* v *Italy (Directive combating late payment)*

(C-122/18, EU:C:2020:41, paragraph 55 and the case-law cited).

4 See especially judgments of 12 November 2009, *Commission* v *Spain* (C-154/08, EU:C:2009:695), and of 4 October 2018, *Commission* v *France (Advance payment)* (C-416/17, EU:C:2018:811). See also Opinion 1/09 *(Agreement creating a Unified Patent Litigation System)* of 8 March 2011 (EU:C:2011:123, paragraph 87).

5 A point stressed by the Court on several occasions and with which I entirely agree. See, for example, judgments of 9 December 2003, *Commission* v *Italy* (C-129/00, EU:C:2003:656, paragraph 32), and of 7 June 2007, *Commission* v *Greece* (C-156/04, EU:C:2007:316, paragraph 52).

6 Those international agreements will hereinafter be referred to as 'prior agreements'.

7 'The Withdrawal Agreement' (OJ 2020 L 29, p. 7).

8 T-624/15, T-694/15 and T-704/15, EU:T:2019:423.

9 Judgment in *Commission* v *European Food and Others* (C-638/19 P, EU:C:2022:50).

10 Judgment of 6 March 2018 (C-284/16, EU:C:2018:158). In that judgment, the Court found that an arbitration clause contained in a bilateral investment treaty between the Kingdom of the Netherlands and the Slovak Republic was incompatible with EU law.

11 C-333/19, EU:C:2022:749.

12 [2017] EWHC 31 (Comm).

13 [2018] EWCA 1801.

14 See, in particular, Articles 92 to 95 of the Withdrawal Agreement.

15 See, in particular, Articles 86 to 91 of the Withdrawal Agreement.

16 Emphasis added.

17 Opinion in *Portugal* v *Commission* (C-365/99, EU:C:2001:184, point 16).

18 See inter alia judgment of 28 March 2019, *Commission* v *Ireland (System for collecting and treating waste water)* (C-427/17, EU:C:2019:269, paragraph 43 and the case-law cited).

19 See, for example, order of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277, paragraph 52 and the case-law cited). Emphasis added.

20 See, to that effect, judgments of 20 March 2014, *Commission* v *Poland* (C-639/11, EU:C:2014:173, paragraph 57), and of 20 March 2014, *Commission* v *Lithuania* (C-61/12, EU:C:2014:172, paragraph 62).

21 Regarding that principle, see for example judgment of 20 January 2021, *Commission* v *Printeos* (C-301/19 P, EU:C:2021:39, paragraph 54).

22 See, to that effect, judgments of 21 September 1989, *Commission* v *Greece* (68/88, EU:C:1989:339, paragraph 9), and of 1 October 1998, *Commission* v *Italy* (C-285/96, EU:C:1998:453, paragraph 13).

23 For some comparative and historical background on this procedure: see, for example, Guyomar, G., *Le défaut des parties à un différend devant les juridictions internationales*, Librairie Générale de Droit et de Jurisprudence, Paris, 1960; and U.S. Supreme Court, 30 March 1885, *Thomson and Others v. Wooster*, 114 U.S. 104 (1885).

24 Article 41 of the Statute of the Court of Justice and Article 156(1) of the Rules of Procedure.

25 Similarly, Opinion of Advocate General Mischo in *Portugal* v *Commission* (C-365/99, EU:C:2001:184, point 17).

26 This proverb is said to derive from the fable ‘The Mule’, by Ancient Greek writer Aesop (620 to 564 BCE).

27 See, to that effect, judgment of 22 October 2002, *Roquette Frères* (C-94/00, EU:C:2002:603, paragraph 31 and the case-law cited).

28 First paragraph of Article 3(3) TEU.

29 Article 26(2) TFEU.

30 Protocol (No 27) on the internal market and competition.

31 Articles 101 to 106 TFEU.

32 Articles 107 to 109 TFEU.

33 See, in particular, judgment of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraph 52 and the case-law cited).

34 See, in particular, judgment of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraph 41). See also, to that effect, judgment of 23 January 2019, *Fallimento Traghetti del Mediterraneo* (C-387/17, EU:C:2019:51, paragraph 54 and the case-law cited).

35 See judgment of 21 November 2013, *Deutsche Lufthansa* (C-284/12, EU:C:2013:755, paragraphs 28 to 31 and the case-law cited).

36 Ibid., paragraph 41.

37 See, to that effect, judgments of 25 July 2018, *Georgsmarienhütte and Others* (C-135/16, EU:C:2018:582, paragraph 24), and, by analogy, of 14 December 2000, *Masterfoods and HB* (C-344/98, EU:C:2000:689, paragraph 57).

38 Emphasis added.

39 Paragraph 25 of the contested judgment. For the Court's in decision that case, see order of 21 September 2022, *Romatsa and Others* (C-333/19, EU:C:2022:749).

40 See above, points 21 and 22 of this Opinion.

41 Paragraph 97 of the contested judgment.

42 Paragraphs 98 to 100 of the contested judgment.

43 Paragraphs 101 to 108 of the contested judgment.

44 Paragraphs 109 to 117 of the contested judgment.

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45 As regards Articles 53 and 54 of the ICSID Convention, see points 13 and 14 of this Opinion. Article 69 of that convention merely states that 'each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories'.

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46 Similarly, Opinion of Advocate General Léger in *Köbler* (C-224/01, EU:C:2003:207, point 66).

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47 I understand that that is also what, in the UK proceedings, the High Court and the Court of Appeal had concluded in that regard (see paragraph 42 of the contested judgment).

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48 See especially paragraph 56 of the contested judgment.

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49 See paragraphs 2, 51, 52, 56 and 116 of the contested judgment.

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50 See, in particular, recitals 44 and 126 to 129 of the 2015 final decision. The Commission had also discarded the application of the first paragraph of Article 351 TFEU in the opening decision.

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51 See, in particular, paragraph 100 of the contested judgment.

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52 I would add, in passing, that no similar expression is found in the most relevant international sources, such as the Vienna Convention on the Law of the Treaties ('the VCLT'), and the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ('ARSIWA').

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53 See, to that effect, judgment of 22 June 2021, *Venezuela* v *Council (Whether a third State is affected)* (C-872/19 P, EU:C:2021:507, paragraph 42 and the case-law cited).

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54 See *infra*, point 114 of this Opinion.

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55 I thus do not entirely agree with Advocate General Mischo when, in his Opinion in *Commission* v *Portugal* (C-62/98 and C-84/98, EU:C:1999:509, point 56), he stated that the first paragraph of Article 351 TFEU is 'merely declaratory'.

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56 Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 304). See also, Opinion of Advocate General Poiares Maduro in the same case (EU:C:2008:11, points 30 and 31). See also, more generally,

judgment of 2 September 2021, *Republic of Moldova* (C-741/19, EU:C:2021:655, paragraph 42).

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57 See, inter alia, judgments of 6 April 1995, *RTE and ITP* v *Commission* (C-241/91 P and C-242/91 P, EU:C:1995:98), and of 15 September 2011, *Commission* v *Slovakia* (C-264/09, EU:C:2011:580).

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58 As in the judgments, referred to by the Supreme Court, of 2 August 1993, *Levy* (C-158/91, EU:C:1993:332), and of 28 March 1995, *Evans Medical and Macfarlan Smith* (C-324/93, EU:C:1995:84).

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59 That follows very clearly from the judgment of 18 November 2003, *Budějovický Budvar* (C-216/01, EU:C:2003:618, paragraphs 134 and 143). See also, by analogy, judgment of 27 November 1973, *Vandeweghe and Others* (130/73, EU:C:1973:131, paragraphs 2 and 3).

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60 On this issue, in legal scholarship, Klabbers, J., *Treaty Conflict and the European Union*, Cambridge University Press, 2009, pp. 142 to 148; Manzini, P., 'The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law', *European Journal of International Law,* 2001, pp. 785 to 788; and Schermers, H.G., 'Annotation of Case 812/79 *Attorney General (of Ireland)* v *Burgoa*', *Common Market Law Review*, 1981, pp. 229 and 230.

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61 See above, point 82 of this Opinion, and *infra*, point 193 of this Opinion. Generally, on this matter, see Opinion of Advocate General Capotorti in *Burgoa* (812/79, EU:C:1980:196, p. 2817), and Opinion of Advocate General Lenz in *Evans Medical and Macfarlan Smith* (C-324/93, EU:C:1994:357, point 42).

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62 See, with reference to decisions of relevant international bodies, Alexandrov, S.A., 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention', in Binder C., et al. (eds), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer*, Oxford University Press, 2009, p. 328.

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63 To use the Supreme Court's own expression in paragraph 56 of the contested judgment.

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64 See paragraph 113 of the contested judgment.

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65 See recital 45 of the 2015 final decision.

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66 Respectively, paragraphs 114 and 117 of the contested judgment.

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67 Paragraph 56 of the contested judgment. Emphasis added.

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68 See above, point 22 of this Opinion.

69 As rightly noted in paragraph 114 of the contested judgment.

70 Judgment of 18 June 2019, *European Food and Others* v *Commission* (T-624/15, T-694/15 and T-704/15, EU:T:2019:423, paragraph 58).

71 See, for example, recitals 64 to 66 of the 2015 final decision.

72 Similarly, Opinion of Advocate General Jääskinen in *Commission* v *Slovakia* (C-264/09, EU:C:2011:150, point 48).

73 Similarly, Opinion of Advocate General Lagrange in *Commission* v *Italy* (10/61, not published, EU:C:1961:26, p. 17).

74 See, in that regard, Article 26, Article 30(4)(b) and Articles 34 to 36 of the VCLT.

75 For example, regarding the connection between Article 351 TFEU and Article 30(4)(b) of the VCLT, see judgment of 9 February 2012, *Luksan* (C-277/10, EU:C:2012:65, paragraph 61 and the case-law cited).

76 See, inter alia, judgment of 14 January 1997, *Centro-Com* (C-124/95, EU:C:1997:8, paragraph 56 and the case-law cited).

77 See, to that effect, judgment of 3 February 1994, *Minne* (C-13/93, EU:C:1994:39, paragraph 17).

78 Judgment of 14 October 1980, *Burgoa* (812/79, EU:C:1980:231, paragraph 9).

79 See, to that effect, Opinion of Advocate General Tizzano in *Commission* v *United Kingdom* (C-466/98, EU:C:2002:63, point 38). In legal scholarship, see Koutrakos, P., 'International agreements concluded by Member States prior to their EU accession – *Burgoa*', in Butler, G., Wessel, R. (eds), *EU external relations law*, Hart Publishing, Oxford, 2022, p. 137.

80 See, in more detail, *infra* point 127 et seq. of this Opinion.

81 *Mutatis mutandis*, it would be like considering that a Member State that introduces a measure having an effect equivalent to a quantitative restriction that does not satisfy the conditions to be justified under

Article 36 TFEU would infringe that provision, and not the (general) prohibition of quantitative restrictions set out in Article 34 TFEU.

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82 See, to that effect, judgment of 10 March 1998, *T. Port* (C-364/95 and C-365/95, EU:C:1998:95, paragraph 61).

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83 See, similarly, judgment of 5 November 2002, *Commission* v *United Kingdom* (C-466/98, EU:C:2002:624, paragraph 25).

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84 See, to that effect, judgment of 13 July 1966, *Consten and Grundig* v *Commission* (56/64 and 58/64, EU:C:1966:41, p. 346).

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85 See, to that effect, judgment of 12 February 2009, *Commission* v *Greece* (C-45/07, EU:C:2009:81, paragraph 35).

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86 See, to that effect, inter alia Opinion 2/15 *(EU-Singapore Free Trade Agreement)* of 16 May 2017 (EU:C:2017:376, paragraph 254).

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87 See, for example, judgment of 22 September 1988, *Deserbais* (286/86, EU:C:1988:434, paragraph 18), and Opinion of Advocate General Tesauro in *Levy* (C-158/91, EU:C:1992:411, point 4).

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88 See, inter alia, judgments of 27 February 1962, *Commission* v *Italy* (10/61, EU:C:1962:2, p. 10), and of 27 September 1988, *Matteucci* (235/87, EU:C:1988:460, paragraph 21).

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89 See judgments of 11 March 1986, *Conegate* (121/85, EU:C:1986:114, paragraph 25), and of 2 July 1996, *Commission* v *Luxembourg* (C-473/93, EU:C:1996:263, paragraph 40).

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90 Eeckhout, P., *EU external relations law*, 2nd edition, Oxford University Press, 2011, p. 426.

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91 Judgment of 27 February 1962, *Commission* v *Italy* (10/61, EU:C:1962:2, p. 10).

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92 See judgment of 2 July 1996, *Commission* v *Luxembourg* (C-473/93, EU:C:1996:263, paragraph 40).

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93 See, to that effect, judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864, paragraph 61).

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94 See, inter alia, judgments of 2 August 1993, *Levy* (C-158/91, EU:C:1993:332, paragraph 12), and of 10 March 1998, *T. Port* (C-364/95 and C-365/95, EU:C:1998:95, paragraph 60). Emphasis added.

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95 See judgment of 14 January 1997, *Centro-Com* (C-124/95, EU:C:1997:8, paragraph 60 and the case-law cited).

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96 See, to that effect, Opinion 2/15 *(EU-Singapore Free Trade Agreement)* of 16 May 2017 (EU:C:2017:376, paragraph 254).

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97 See, in that regard, Articles 20 and 45 of the ARSIWA.

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98 Obviously, in the case at hand the situation also involves one third State (the United Kingdom) which, however, at the material time had to be considered, with respect to the relevant provision of EU law, to be in the same position as the Member States.

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99 For the purposes of this Opinion there is no need to delve into this (admittedly complex) area of international law, since the basic distinction used herein is readily accepted in international legal sources. See, inter alia, judgment of the International Court of Justice of 5 February 1970, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports 1970, p. 3, paragraphs 33 and 35, and Article 33 (and point 2 of the commentary thereto), Article 42 (and point 8 of the commentary thereto) and Article 48 (and point 8 of the commentary thereto) of the ARSIWA. For references to this distinction in the EU case-law, see Opinion of Advocate General Warner in *Henn and Darby* (34/79, EU:C:1979:246, p. 3833); Opinion of Advocate General Tesauro in *Levy* (C-158/91, EU:C:1992:411, point 5); Opinion of Advocate General Lenz in *Evans Medical and Macfarlan Smith* (C-324/93, EU:C:1994:357, point 33); and Opinion of Advocate General Szpunar in *Republic of Moldova* (C-741/19, EU:C:2021:164, point 42). Naturally, some agreements may contain clauses of both categories and, in those cases, the interpreter must thus examine the nature of each clause.

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100 Human rights agreements are often cited as an example in point.

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101 Similarly, in legal scholarship, Mastroianni, R., Comment to Article 351 TFEU, in Tizzano, A. (ed.), *Trattati dell'Unione Europea*, 2nd edition, 2014, p. 2545.

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102 Investment protection agreements offer a good example in point.

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103 See, in that regard, Commentaries to Article 42 (especially point 9) and to Article 48 (especially point 2) of the ARSIWA.

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104 See, among many, judgments of 22 September 1988, *Deserbais* (286/86, EU:C:1988:434, paragraph 18); of 6 April 1995, *RTE and ITP* v *Commission* (C-241/91 P and C-242/91 P, EU:C:1995:98, paragraph 84); of 10 March 1998, *T. Port* (C-364/95 and C-365/95, EU:C:1998:95, paragraph 60); and of 18 November 2003, *Budějovický Budvar* (C-216/01, EU:C:2003:618, paragraph 148).

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105 Paragraph 97 of the contested judgment, which refers to the judgment of 2 August 1993, *Levy* (C-158/91, EU:C:1993:332, paragraph 11).

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106 See above, point 89 of this Opinion.

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107 Judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and* ne bis in idem) (C-435/22 PPU, EU:C:2022:852, paragraph 119).

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108 Ibid., paragraphs 120 and 121.

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109 Paragraph 98 of the contested judgment.

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110 As the Supreme Court rightly stated, the dispute at issue was only concerned with the question whether, under the ICSID Convention, the United Kingdom owed the obligation to enforce *the award in question* to non-member States (paragraph 101 of the contested judgment).

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111 For example, by bringing a dispute before the International Court of Justice.

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112 Statements made by the Chairman during the Fifth and Sixth Sessions of the works of the Consultative Meetings of Legal Experts designated by member governments (referred to in paragraph 107 of the contested judgment).

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113 See, especially, those referred to in paragraphs 104 and 105 of the contested judgment.

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114 That seems to me, particularly, to be the case in respect of the investors' arguments on that point, which the Supreme Court appears to endorse in paragraph 106 of the contested judgment.

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115 See, inter alia, paragraph 15 of the contested judgment.

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116 According to that provision, the award is 'final and binding'.

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117 In this context, I note in passing that, following the decisions of the Court in *Achmea*, in *European Food* and in *Romatsa* (see above, points 22 and 23 of this Opinion), the arbitration clause in the BIT should now be considered invalid.

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118 See judgment of 14 October 1980 *Burgoa* (812/79, EU:C:1980:231, paragraph 10).

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119 See, in particular, judgment of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraphs 39 and 40 and the case-law cited).

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120 Ibid., paragraph 36 and the case-law cited.

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121 Ibid., paragraph 41 and the case-law cited.

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122 See, in particular, paragraphs 99 and 102 of the contested judgment.

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123 See, to that effect, judgments of 9 September 2015, *Ferreira da Silva e Brito and Others* (C-160/14, EU:C:2015:565, paragraphs 42 to 44), and of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraph 49).

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124 See paragraphs 29, 32, 91 and 94 of the contested judgment.

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125 As the Supreme Court stated in paragraph 96 of the contested judgment.

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126 See, to that effect, judgment of 4 October 2018, *Commission* v *France (Advance payment)* (C-416/17, EU:C:2018:811, paragraph 113).

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127 The Commission refers, in particular, to the judgment of 18 July 2007, *Lucchini* (C-119/05, EU:C:2007:434, paragraphs 62 and 63).

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128 See, generally and with further references, Opinion of Advocate General Kokott in *Viasat Broadcasting UK* (C-445/19, EU:C:2020:644, points 17 and 18).

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129 See recital 39 of the 2015 final decision.

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130 See, for example, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971).

131 Order of 29 February 2016, *Micula and Others* v *Commission* (T-646/14, not published, EU:T:2016:135).

132 See, inter alia, judgment of 10 September 2019, *HTTS* v *Council* (C-123/18 P, EU:C:2019:694, paragraph 100 and the case-law cited).

133 See, inter alia, judgment of 21 September 2017, *Riva Fire* v *Commission* (C-89/15 P, EU:C:2017:713, paragraph 34).

134 In essence, in its judgment, the General Court had found that compensation awarded to the investors covered, at least in part, a period predating Romania's accession to the European Union. In the General Court's view, the Commission had erred in classifying the entirety of the compensation as aid, without drawing a distinction, among the amounts to be recovered, between those falling within the period predating accession and those falling within the period subsequent to accession.

135 The Supreme Court essentially acknowledged that much in paragraph 51 of the contested judgment. On this issue, see, generally, Opinion of Advocate General Mengozzi in *Deutsche Lufthansa* (C-284/12, EU:C:2013:442, points 27 to 29).

136 See, for example, judgment of 5 March 2019, *Eesti Pagar* (C-349/17, EU:C:2019:172, paragraph 88).

137 Ibid., paragraphs 89 to 91.

138 See, among many, judgment of 12 January 2023, *DOBELES HES* (C-702/20 and C-17/21, EU:C:2023:1, paragraph 121).

139 That provision reads, in the relevant part: 'the Member State *concerned* shall not put its proposed measures into effect until [the State aid] procedure has resulted in a final decision' (emphasis added).

140 See, to that effect, judgment of 27 September 1988, *Matteucci* (235/87, EU:C:1988:460, paragraph 19).

141 See, for example, judgment of 10 November 2020, *Commission* v *Italy (Limit values – PM10)* (C-644/18, EU:C:2020:895, paragraph 83 and the case-law cited).

142 See, to that effect, judgment of 16 October 2012, *Hungary* v *Slovakia* (C-364/10, EU:C:2012:630,

paragraphs 68 to 71).