INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

IOAN MICULA, VIOREL MICULA AND OTHERS

Claimants

and

ROMANIA

Respondent

ICSID Case No. ARB/05/20
Interpretation proceeding

SEPARATE OPINION OF MR. J. CHRISTOPHER THOMAS KC

I. Introduction

1. I agree in the result in the Decision on Romania's Application for Interpretation (the "Decision") reached by my distinguished colleagues, whom I hold in high regard, but I regret to say that I do not agree with certain findings made by them because I believe that they are too exacting. I would therefore dismiss the Application, but for different reasons than those given by the Tribunal.

2. The controlling text for the purposes of considering the present Application is Article 50(1) of the ICSID Convention:

> (1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

3. Like many provisions of the Convention, it is written in simple terms. It does not stipulate requirements that a request for interpretation must meet, nor does it, in contrast to other post-award procedures, contain a time limit as to when a request may be filed.

4. However, even though Article 50 is not expressly time-delimited, the overall structure and context of the ICSID Convention – particularly its provisions on the recognition of awards and the enforcement of their pecuniary obligations – suggests that there can come a point when it is not appropriate for an interpretation to be given. In my view, the present Application is such a case.

II. The basis for my separate opinion

5. Had Romania timeously objected to the Claimants' Motion to convert the currency of the Award to U.S. dollars as of the date of the Award's making, in my view a dispute over the meaning or scope of the Award would have arisen between the Parties and Romania would have had a clear right to seek an interpretation of the Award. I would add that Romania would have had an arguable case that the relief requested by the Claimants was inconsistent with the precise wording of paragraph 1329(d) of the Award.

6. However, the present Application cannot be accepted because it is untimely. This is so because under the scheme created by the ICSID Convention, the proper time for Romania to seek an interpretation of the Award was when the Claimants made their request for currency conversion and the Court thereafter considered that request. It was at that point that Romania was put on notice that a particular form of relief that would increase the amount payable was being sought by the Claimants. If Romania considered that the requested relief to be inconsistent with what the Tribunal ordered, that is when it should have sought an interpretation.

7. As noted above, under Article 50 a tribunal's power to interpret its award is not expressly delimited in temporal terms. But that power must be read having regard to the overall context and structure of the ICSID Convention, specifically the Convention's allocation of responsibilities between tribunals and enforcement courts. In this respect, the unusual combination of international arbitral proceedings with recognition and enforcement proceedings in national courts within a single treaty requires careful consideration of how the former relate to the latter and *vice versa*, particularly where, as here, court proceedings have resulted in a final enforcement order.

8. The negotiating history of the Convention sheds some light on why no time limit was stipulated in Article 50. There was discussion during the Convention's drafting that a time limit for when an interpretation could be sought should be stipulated, as is the case for other post-award procedures. However, due to the possibility that "there could be cases where the award might require a course of conduct which could extend over a long period of time",[1] it was thought that "in that case a party should not be precluded from seeking an interpretation on the execution of the award." [2] It was for this reason that what ended up being Article 50 did not prescribe a time limit for seeking an interpretation. It warrants noting that the relief granted in the Award at issue in the present Application was not executory but rather pecuniary.

9. The Claimants' written and oral submissions repeatedly stressed that the Convention allocates: (i) the conduct of an arbitration and the making of the award to the tribunal; and, (ii) if the award is not complied with, the recognition and enforcement of the award to such court or courts of the Contracting States that may be invoked by the award-creditor. I agree with this as a general proposition.

10. Under the ICSID regime, if the award-creditor presents a copy of the award certified by the ICSID Secretary-General to a court of a Contracting State, the court is obliged to "recognize the award as binding" and to enforce "the pecuniary obligations imposed in that award … as if it were a final judgment of a court in that State."[3] The pecuniary obligations are then transformed into a judgment of the court rendered in accordance with local law, which judgment can then be enforced through the ordinary processes of that local law.

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[1] The Chairman of the Legal Committee and the principal architect of the Convention, Aron Broches, noted that what he had in mind (in not providing for a time limit) was that "if the dispute had been on the interpretation of a long-term contract, and if the award had not provided for payment of a sum of money but for a party to provide certain facilities or to abstain from certain action, then at any time while the award was being executed or being complied with a question could arise on interpretation. That was the reason why it was difficult to provide a time limit." See the comment of the Chairman of the Legal Committee, Aron Broches, on 9 Dec. 1964, SID/LC/18, Summary Proceedings of the Legal Committee Meeting, 4 Jan. 1965. History of the Convention, Volume II, p. 845.

[2] *Id.*

[3] ICSID Convention, Article 54(1).

11. Given this allocation of functions, enforcement action in the courts of a Contracting State can, in my opinion, result in a situation where it is no longer appropriate to request the interpretation of an award. A tribunal's power to interpret its award can be attenuated, especially when a court enters a final order on the enforcement application without objection by the award-debtor.

12. I am not to be taken as saying that as soon as a first step is taken in a court of a Contracting State, a tribunal loses its power to interpret its award. This is not so. To the extent that the Claimants seemed to imply that once enforcement proceedings were initiated in the courts of a Contacting State, a tribunal's role in the ICSID process is finished, I do not agree.[4] Although the term "hermetic seal" was used by Professor Mendelson to describe the Claimants' position (a term not used by the Claimants themselves), to the extent that their submissions implied the existence of such a thing, they would go too far. [5]

13. On my approach, it would have been fully consistent with the Convention for an interpretation to have been sought while proceedings were underway in the United States District Court.

14. The proper time for Romania to seek an interpretation was when it had sight of the Claimants' Motion to convert the currency of the Award to U.S. dollars as of the date of the Award's making. The scheme created by the Convention could easily have accommodated such a request. Given a tribunal's power under Article 50(2) to issue a stay of enforcement pending the resolution of the request and the clear wording of Article 53(2) ("'award' shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52"), at that point in time, the Tribunal's power to interpret its Award and the U.S. court's power to enforce the pecuniary obligations of the Award could have worked harmoniously within the framework of the Convention.

15. An interpretation application could have been considered, even though enforcement proceedings had already been initiated, because under Article 50(2) the Tribunal retained *in personam* jurisdiction over the Parties and could have ordered a stay.

16. However, a stay from the Tribunal might well have been unnecessary because it is reasonable to assume that, properly instructed as to the United States' obligations under the Convention, the United States District Court would have acted consistently with those obligations, *viz*:

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[4] There was some hint of this in the Claimants' Counter-Memorial, at paragraph 33, where it was asserted: "Although it had multiple opportunities to do so, Romania *did not* contest Claimants' request to convert the Award into U.S. dollars as of the Award date or any calculations underlying the proposed U.S. Judgment. To the extent that Romania disagreed with claimants' calculations of the value of the U.S. judgement that was a matter for Romania to contest in the U.S. courts, which it failed to do. Romania also conceded that the D.C. District Court had jurisdiction to enforce the Award." [Underlining added; footnote references omitted.] That is, in my view only partially true. As I explain in paras. 15-19, there was a role for both bodies, the Tribunal and the District Court, to play had the dispute been identified timeously.

[5] Professor Emeritus Maurice Mendelson, KC, 2nd Expert Report on Jurisdiction in Relation to Defining the Meaning and Scope of the Award of 11 Dec. 2013, paras. 15-19.

a. the District Court, informed of the Tribunal's power to interpret its own Award, would have paused the enforcement proceeding, either on application of a Party or on its own motion, pending the outcome of the interpretation proceeding; and

b. hypothetically, had the Tribunal upheld Romania's interpretation of the Award's *dispositif,* the District Court would have given effect to the interpretation, as required by Article 53(2).[6]

17. On this approach, there would be, on the one hand, no "hermetic seal", and, on the other, no potentially disjunctive disordering of international and municipal legal proceedings, such as would have occurred had the present Application succeeded.[7] By this latter phrase, I mean the embarrassment that could result from the District Court's having made a final order, subsequently upheld on appeal, in part based on Romania's non-opposition to the currency conversion which, had it succeeded in the present Application, Romania would presumably then have used to try to overturn the order.[8] This would work an unfairness on the Claimants and indeed on the District Court itself, given that its decision would be challenged on the basis

[6] By operation of Article 53(2), the fact that currency conversion is the "normal practice" of the District of Columbia Circuit would be of no effect if, hypothetically, the Tribunal ruled that currency conversion of the RON-denominated Awarded Amount as of the date of the Award was not consistent with the Award's *dispositif*, because the Award would then "include any decision interpreting" it. Bearing in mind that currency conversion is a form of relief that a party requests, it is to be expected that the District Court, once informed of the effect of Article 53(2), would hold that the normal practice was not available to the Claimants under the terms of the interpreted Award. Such a finding by the Tribunal of course would not preclude the conversion of the amount awarded brought forward to the date of the Court's enforcement order.

[7] In this regard, counsel for Romania was somewhat vague as to the use to which an interpretation, if issued by the Tribunal, would have been put. The Claimants took issue with this: "Consider this: Romania in paragraph 5 of its Reply insists, and I quote, 'Romania has not requested the review of any national court decision or order.' And you heard repeatedly this morning, do not concern yourselves with the ramifications of your interpretation. Yet, in an attempt to satisfy the third criterion under Wena Hotels, Romania is compelled to argue later in the same paragraph that the request 'may bear upon subsequent activity related to enforcement.' 'May bear upon' is just a euphemism. There is no question that Romania intends to use the requested interpretations to attempt to nullify the U.S. Judgments with which it is unhappy. This is an example of the sophistry discussed by Professor Paulsson, and it is disingenuous for Romania to attempt to deny the true aim of its request." Transcript, pp. 136-137.

[8] I note that at para. 102 of the Decision, the Tribunal approaches this point albeit from a somewhat different path.: "There is no issue whether the ICSID framework allows for the filing of an application for interpretation of an award at any time. However, as a matter of experience and pure logic, as more time passes after the issuance of the award, the more difficult it becomes for the party seeking interpretation to establish its concrete need for the interpretation sought, i.e. its interest. A request for general interpretation of the award - without any concretely applicable consequences - would become more and more difficult to admit with the passage of time; presumably, any application for general interpretation of the award would have been filed earlier. In other words, if a party seeks interpretation of an award *in abstracto*, without any concrete interest, a long time after the issuance of the award, the real reasons behind such conduct are required to be clear. In the present case, what has essentially been nine years after the Award was issued is a long period. The Respondent does not show any concrete and actual legal interest in clarifying the Tribunal's findings in the Award other than in connection with the US proceedings."

of arguments that were not put to it at the time that it considered the merits of the requested relief.[9]

18. It is important to note that this is not a case where Romania was unaware of the relief being requested. Romania had knowledge of the Motion and was represented by counsel. No objection was taken. As the District Court observed in its Memorandum Opinion: "Petitioners asked the Court to convert the Award to U.S. Dollars as of the date of the Award. . . . Romania has not objected to that request."[10] When the judgment was appealed, Romania raised other objections to the District Court's decision, but it did not appeal the currency conversion point, and the D.C. Circuit Court of Appeals upheld the lower court's judgment.[11]

19. When presented with unopposed motions, courts around the world tend to grant them. There is nothing objectionable about that unless the motion has been granted on an *ex parte* basis with no avenue for the affected party to later oppose the order or where there is some other significant procedural defect. There is no evidence of any defect in procedure in respect of the Motion at issue in this case.

20. In sum, on the facts of this case I would hold that the Application is inadmissible due to its untimeliness.[12] On my approach it is therefore unnecessary to address Romania's four prayers for relief, but since my colleagues have done so in a manner about which I have reservations, I think it proper to express my concerns.

III. The Tribunal's Decision

21. In their submissions, the Parties devoted considerable attention to the findings of two prior ICSID tribunals that considered requests for the interpretation of awards, the *Wena Hotels Limited v. Arab Republic of Egypt* and *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan* cases. Neither decision is of course binding upon the present Tribunal, but both are deserving of consideration for the tribunals' approach to applying Article 50.

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[9] As the Court observed when Romania sought to challenge the currency conversion after the award had already been converted and confirmed, the question of satisfaction of the judgment was, as a matter of local law, different from whether the Award itself has been satisfied: "once the court entered Judgment in favor of Petitioners, the question became whether Romania has satisfied the Judgment as entered in U.S. dollars." Memorandum Opinion & Order, *Ioan Micula, et al. v. Gov't of Romania*, No. 1:17-cv-02332-APM (D.D.C. 20 Nov. 2020) (No. 159), at p. 8 (CI-006).

[10] Memorandum Opinion, *Ioan Micula, et al. v. Gov't of Romania*, No. 17-cv-02332-APM (D.D.C. 11 Sept. 2019) (No. 86), at 31 n. 12 (CI-005) cited in the Claimants' Counter-Memorial, para. 65, footnote 121.

[11] Judgment, *Ioan Micula, et al. v. Gov't of Romania*, No. 20-7116 (D.C. Cir. 24 June 2022) (*per curiam*) (CI-011).

[12] On this approach there would be no need to find as the Decision does, at para. 106, that "it is not within its mandate, and outside the scope of an interpretation proceeding, to opine on whether the decisions of US courts and their consequences are correct."

22. I agree with the Tribunal's general discussion of the criteria for admissibility of a request for interpretation discussed by the two cases.[13] I have doubts about the mild reservations expressed about the approach taken in the *ATA Construction* case. [14] Having regard to the fact that international law eschews formalism when it comes to determining the existence of a dispute, the *ATA Construction* tribunal's approach is, in my view, unobjectionable.

23. I also found it helpful to consider the circumstances which gave rise to the requests for interpretation in the two cases. The issue in both cases was that one of the disputing parties was said to have taken steps after the issuance of the award that were alleged to be inconsistent with the tribunal's binding orders.

24. In *Wena Hotels*, despite the Award's conclusion that Egypt had expropriated the Nile and Luxor Hotel lease and development agreements from Wena in 1991, legal actions were later commenced by Egypt and its constituent entities against Wena. Wena contended that such actions raised "important questions about the Award's finding that Egypt expropriated Wena's interests in the Luxor Lease."[15]

25. In particular, Wena asserted that the respondent embarked upon a campaign to further discredit it in the marketplace. The Egyptian General Company for Tourism and Hotels ("EGOTH", the successor to the Wena Hotels' lease counterparty, "EHC"), filed suit against Wena in the courts to collect over US$ 7.1 million from Wena. EGOTH alleged in these proceedings that Wena owed the sum of US$ 7.1 million as rent under the Luxor Lease for the period from 15 November 1990, through 31 March2003. After this suit was dismissed, EGOTH filed a second, identical action with the same court, which was also dismissed.[16] Wena asserted that in seeking rent from November 1990 through March 2003, "EGOTH overlooked the Original Tribunal's determination that Egypt had expropriated Wena's interests in the Luxor Hotel on April 1, 1991."[17]

26. In addition, EGOTH served Wena with a request for arbitration under a provision of the Luxor Lease, in which EGOTH claimed a sum of money for rent allegedly due by Wena under the Luxor Lease for the period from 15 November 1990, through 14 August 1997, and an additional sum for costs allegedly due to EGOTH as a result of a domestic arbitration between EHC and Wena conducted in 1990 under the Luxor Lease.

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[13] Decision, paras. 81-95.

[14] Decision, paras. 88-89, 94.

[15] *Wena Hotels Limited v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on the Application by Wena Hotels Ltd. for Interpretation of the Arbitral Award dated December 8,* 2000, 31 Oct. 2005, (RIL-001) ("*Wena Hotels* Decision"), para. 6. The *dispositif* of that award, at para. 135, stated: "…Egypt's actions amounted to an expropriation without prompt, adequate and effective compensation."

[16] *Wena Hotels* Decision, paras. 18-22.

[17] *Wena Hotels* Decision, para. 20.

27. Therefore, Wena requested "… an interpretation of the Tribunal's determination that Egypt expropriated Wena's rights in the Luxor Lease and deprived Wena of its "fundamental rights of ownership". In particular, Wena requested that the interpretation "address whether the expropriation constituted a total, permanent deprivation of Wena's rights in the Luxor Lease, such as to preclude subsequent legal actions by Egypt that presume the contrary."[18]

28. As for the *ATA Construction* case, the tribunal's award provided that an arbitration clause that had been wrongly nullified by court action was enforceable and the *dispositif* ordered that the claimant, ATA Construction, "was entitled to proceed to arbitration in relation to the Dike No. 19 dispute in accordance with the terms of the Arbitration Agreement set forth in the Contract of 2 May 1998."

29. Questions subsequently arose as to whether that arbitration agreement could be invoked by ATA Construction's counterparty as well as by ATA Construction. ATA Construction argued 'no' and the Jordanian counterparty argued 'yes.' Given their disagreement, the respondent reverted to the tribunal for an interpretation, requesting that "the Tribunal clarify that in making its Award, it 'intended to restore the Arbitration Agreement as it stood before its extinguishment pursuant to the last sentence of Article 51 of the Jordan Arbitration Law, with full reciprocal rights for both contractual signatories'."[19]

30. The respondent further clarified its request as follows: "The Government accordingly seeks confirmation that the Tribunal did not intend, in ordering the 'restorative' relief that it contemplated, a one-sided and prejudicial commercial arbitration agreement under which only Claimant has the right to pursue its claims against APC, and APC has no corresponding right to pursue its claims against ATA. The Government submits that the Tribunal instead intended a restoration of the Arbitration Agreement as it stood before extinguishment, with each party thereto having full and equal right and reciprocal obligations thereunder."[20]

31. Bearing in mind the reasons why interpretations were sought in the two cases, a review not only of the two tribunals' statements as to the mandate of an interpretation tribunal, but also of the facts of the two cases, reveals the following points:

    a. Interpretative disputes, by definition, arise after the award's issuance; it is unsurprising that unanticipated questions might arise as to how an award is to be implemented, even if the award on its face appears to be clear. Thus, both tribunals were untroubled by the fact that they were being asked to "seek[] pronouncements from the Tribunal on facts subsequent to the Award", to use my colleagues'

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[18] *Wena Hotels Decision*, para. 33(a).

[19] *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Decision on Interpretation and on the Request for Provisional Measures, 7 Mar. 2011, (RIL-003) ("*ATA Construction* Decision"), para. 8.

[20] *ATA Construction* Decision, para. 25.

phrasing, when they hold that "interpretation cannot extend beyond the text, for which interpretation is sought."[21]

b. The existence of a dispute can be shown either by conflicting statements as to the meaning of an award (*ATA Construction*) or through the acts of one of the parties to the dispute after the award's issuance (*Wena Hotels* and *ATA Construction*).

c. The *Wena Hotels* tribunal had no difficulty in elaborating upon what it had decided by explicitly holding that the intention of the original tribunal was to find a "total and permanent" expropriation. In so doing, the tribunal added words that were not used in the award's discussion of expropriation. In other words, the tribunal elaborated upon its earlier finding.

d. The *ATA Construction* tribunal had no difficulty in interpreting its award even though it considered it to have been clear. The tribunal also had no difficulty in accepting a request to "*confirm* what the Tribunal intended in regard to the restorative relief it ordered…"[22]

e. Both tribunals also had no difficulty in considering the question of *party compliance* with their awards. *ATA Construction* both ordered compliance with sub-paragraphs 4 and 5 of the award's *dispositif*[23] and expressly *confirmed* Jordan's "interpretation of subparagraph 133(4) of the Tribunal's Award…"[24] *Wena Hotels* not only interpreted the meaning of the word "expropriation" as used in the award, but went on to specify the date on which the expropriation took effect and further considered the question "whether Egypt is precluded from taking legal actions that presume the contrary."[25] This latter finding clearly went to the issue of a party's compliance with the award.

32. Both of these cases, in my view, exhibited a less restrictive approach to the process of interpretation than the approach taken by my distinguished colleagues.

33. For example, the majority's concern when rejecting Prayer for Relief (A), that Romania is seeking to add a word that was not contained in the Award – the word "*only*"[26] – was not shared

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[21] Decision, para. 95.

[22] *ATA Construction* Decision, para. 37.

[23] "4. To order that the ongoing Jordanian court proceedings in relation to the Dike No. 19 dispute be immediately and unconditionally terminated, with no possibility to engage further judicial proceedings in Jordan or elsewhere on the substance of the dispute."

[24] *ATA Construction* Decision, para. 50.

[25] *Wena Hotels* Decision, paras. 70, 96, 98, 109, 111, 125, 132, and 136.

[26] Decision, paras. 100 (a) and (b): "…adding 'only' to the Tribunal's findings may result in a tautology, which would *not* assist either in the interpretation of the Award or in establishing the true meaning of its terms" and "if introducing the word 'only' had any substantive meaning, i.e., if it added to her explained the text of the Award, then doing so would result in correcting the findings of the Award. However, this correction is not a relief that the Parties are seeking in this proceeding and rightly so."

by the *Wena Hotels* tribunal, where the tribunal went considerably further in its interpretation decision than it did in its award to explain what it had intended when it found an expropriation.

34. In my respectful view, Romania's use of the word "only" in Prayer for Relief (A) was not intended as a "correction" of the *dispositif*, but rather as a part of Romania's attempt to obtain confirmation of the precise nature of the pecuniary obligations that the Tribunal intended to paragraph 1329 of the Award. In this sense, the Application was similar to Wena Hotel's request that the tribunal confirm that when it found an expropriation, it meant to find a "total and permanent" expropriation. The tribunal obliged and as already noted, added words that were not used in the award's discussion of expropriation. That does not seem objectionable to me, and it does not amount to correction of the Award.

35. Similarly, as noted above in para. 31 above, both tribunals were untroubled by the fact that they were called upon to consider whether what one of the parties had done in post-award activities complied with their awards. In *Wena Hotels*, the actions taken by the respondent could not have been anticipated at the time of the award's making. This was no hurdle to interpreting the award. What is the difference in principle between the Claimants seeking an uplift in the value of the Award when enforcing it – clearly unanticipated by the Award – and the Egyptian entities subsequently suing Wena Hotels for rents supposedly due on properties that had been found to have already been expropriated? Or ATA Construction's taking the position that the benefit of a resuscitated arbitration clause accrued only to it and not to its counterparty? In all three cases, acts were later taken that could not or were not anticipated at the time of the Award's making.

36. On another point, in the present case, Romania's Prayer for Relief (B) requested the Tribunal to interpret whether in order to "abide by and comply with the terms of the Award", Romania was "only required to pay the Awarded Amount to the Claimants (and the Claimants are entitled to nothing more)".[27] The Tribunal found this to be inadmissible because it is based on Articles 53 and 54 of the ICSID Convention "which the Award did not address."[28] I respectfully do not find this persuasive. There was no need for the Tribunal to have adverted to Articles 53 and 54 of the Convention in its Award in order for it to consider whether the Claimants complied with the terms of the Award's *dispositif*. Once again, both the *Wena Hotels* and *ATA Construction* tribunals had no difficulty considering questions of party compliance with what had been decided with binding force.

37. Finally, I turn to the Tribunal's determination that there is nothing in the present case capable of giving rise to a dispute of the meaning or scope of the Award because the wording of paragraph 1329 has not been shown to be unclear.[29] I repeat that on my approach I would not

[27] Decision, para. 105.
[28] Decision, paras. 105-106.
[29] Decision, para. 100.

have reached this question, but I do think that the interpretative question presented for decision now is essentially no different from which could have been presented in 2018.

38. To begin, I agree with the Tribunal that "the Tribunal's mandate is limited to the findings made in the Award with binding force."[30] I believe that Romania's request meets that condition because the central argument turns on the meaning of certain subparagraphs of paragraph 1329 of the Award – the *dispositif* which contains the Tribunal's binding orders.

39. Secondly, I do not take issue with the Tribunal's statement in the Decision that "the Tribunal did not consider whether enforcement would allow or even require the conversion of the awarded RON claim into a different currency, let alone what date such conversion would be performed or what would be the rate of interest on the amount in a different currency (other than RON)."[31] But, with respect, I do not think that is the correct way to conceive of the question.

40. What is indisputably clear is that the Tribunal, when formulating its relief, awarded damages exclusively in one currency and stipulated post-Award interest in the same currency. It did not turn its mind to any other currency. The real question is whether having selected one and only one currency to denominate the damages awarded, the Tribunal's intention was that that currency, and no other, would be used to bring the principal forward to the date of payment. It is not an answer to say that the Tribunal did not consider currency conversion or enforcement issues for that begs the question why it should have done so when it had already settled on a specific currency for both principal and post-Award interest.

41. I note in this respect that the precise wording of the *dispositif* went further than simply specifying: (i) the *amount* of damages awarded (in subparagraph 1329 (c)); and (ii) the *means* for making the Claimants whole if, as what in fact transpired, Romania did not pay promptly (in subparagraph 1329 (d)).

42. The Tribunal then tied the payment of the principal and the stipulated post-Award interest to "full payment" of the Award. In other words, it addressed the legal situation that would result from payment of principal and post-Award interest, namely, the discharge of the Respondent's obligations under the Award.[32]

43. In short, according to paragraph 1329, if Romania paid the principal, brought forward to the date of payment by means of the specified interest rate – all based on Romanian currency – that constituted full payment of the Award. This was decided with binding force.

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[30] Decision, para. 99.
[31] Decision, para. 103.
[32] Award, para. 1329(d): "The Respondent is ordered to pay interest on the amount specified in subparagraph (c) above, at 3-month ROBOR plus 5%, compounded on a quarterly basis, calculated from the following dates until full payment of the Award…"

44. The precise question for interpretation therefore would have been whether the Motion to convert the amount awarded to US dollars as of the date of the Award was consistent with what was ordered with binding force in paragraph 1329(d). The argument would be that from 11 December 2013, the date of the Award, to 28 June 2018, the date of the Motion, the present-day value of the Award was calculable in RON – because that was the only currency to which the Tribunal turned its mind. As of the date of the Motion, that sum could be determined with certainty.

45. The argument, to continue, would be that that sum of post-Award interest would be displaced if the Court were to convert the sum from RON to USD as of the date of the Award, and then bring the USD sum forward to the date of its Order using the Tribunal's stipulated *lei*-based post-Award interest rate. This, it could be argued, was mixing apples (ordered by the *dispositif*) for oranges (a currency not within the Tribunal's contemplation) and the effect, if accepted by the District Court, would be to increase the pecuniary obligations of the Award before or at the time that the Award's pecuniary obligations were being transformed into a judgment of the Court.

46. Obviously, the *dispositif* stated the legal consequence of "full payment" of the Award and according to the Claimants, it was because there was no full payment that they moved for enforcement in the U.S. courts. The effect of that fact on the precise wording and operative effect of the *dispostif* no doubt would have generated submissions from both Parties.

47. In the end, one need not take a final view as to whether Romania would have been right or wrong in order to see that if the Claimants had persisted in seeking conversion as of the date of the Award, there would have been a clear difference of opinion between the Parties as to the restorative relief ordered by the Tribunal. There would have been conflicting statements and inconsistent positions as to whether the post-Award action taken by the Claimants (similar to the post-award actions taken by the claimant in *ATA Construction* and the respondent in *Wena Hotels*) was consistent with what the Tribunal ordered in paragraph 1329(d). There would also have been, to use the *Wena Hotels* tribunal's words (later embraced by *ATA Construction*) satisfaction of the condition that the requested interpretation "must have some practical relevance to the Award's implementation."[33] And finally, in my view, it would have been open to Romania to request the Tribunal to "confirm what the Tribunal intended in regard to the restorative relief it ordered…"[34] Therefore, there would have been a dispute as to the meaning or scope of what the Tribunal decided with binding force.

48. As already found, however, since the dispute was not identified at the proper time and the Tribunal and the Court were not then given the opportunity to interact with each other in a harmonious fashion as described above, whatever may be the merits of the argument against

[33] *ATA Construction* Decision, para. 27.
[34] *ATA Construction* Decision, para. 37.

currency conversion as of the date of the Award's making, to use the words of Judge Mehta, "that ship has long sailed." [35] It is now too late to request an interpretation that might have prevented the Motion from being accepted by the District Court.

Mr. Christopher Thomas KC

Date: 7 December 2023

[35] Memorandum Opinion & Order, *Ioan Micula, et al. v. Gov't of Romania*, No. 1:17-cv-02332-APM (D.D.C. 20 Nov. 2020) (No. 159), at p. 10 (CI-006): "To the extent that Romania is using its Rule 60(b)(5) motion to challenge the court's conversion of the ICSID Award to U.S. dollars, that ship has long sailed. See Resp't's Mem. at 16–17 (arguing that the Award was improperly converted from RON to dollars). As the court previously found, Romania did not contest Petitioners' request to convert the Award to U.S. dollars as of the date of the Award, which is the norm in proceedings under § 1650a, and so the court converted the Judgement into dollars. See Micula II, 404 F. Supp. 3d at 285 n.12 (citing Belize Bank Ltd. v. Gov't of Belize, 191 F. Supp. 3d 26, 39–40 (D.D.C. 2016)). The D.C. Circuit did not disturb that determination. Micula III, 805 F. App'x 1. Romania may not now use a Rule 60(b)(5) motion to 'challenge the legal conclusions' upon which the '[J]udgment . . . rests.' Horne, 557 U.S. at 447."