UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IOAN MICULA, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	**Civil No. 17-cv-02332 (APM)**
	)	
THE GOVERNMENT OF ROMANIA,	)	
	)	
Respondent.	)	
	)	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

The court is compelled once more to revisit the seemingly never-ending saga over an international arbitration award entered against Respondent Government of Romania ("Romania"). In this latest installment, Romania seeks relief under Federal Rule of Civil Procedure 60(b) from three judgments ("the Judgments") entered by this court in favor of Petitioners Ioan Micula, Viorel Micula, and three entities they control (together, "Micula" or "Petitioners"). Taken together, the Judgments (1) confirmed an arbitration award entered against Romania by a tribunal convened under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID" or "the Convention") and (2) imposed sanctions against Romania for its failure to comply with court-ordered, post-judgment discovery.[1] Romania now

[1] The Judgments are contained in the following prior opinions: (1) *Micula v. Government of Romania*, 404 F. Supp. 3d 265 (D.D.C. 2019) (*Micula I*), *aff'd*, 805 F. App'x 1 (D.C. Cir. 2020); (2) *Micula v. Government of Romania*, No. 17-cv-2332-APM, 2020 WL 6822695 (D.D.C. Nov. 20, 2020), *aff'd*, No. 20-7116, 2022 WL 2281645 (D.C. Cir. June 24, 2022) [hereinafter *Micula II*]; and (3) *Micula v. Government of Romania*, No. 17-cv-2332-APM, 2021 WL 5178852 (D.D.C. Nov. 8, 2021), *appeal filed* December 7, 2021, ECF No. 178 [hereinafter *Micula III*]. In *Micula I*, this court confirmed the arbitration award entered against Romania and entered judgment in favor of Petitioners in the sum of $331,557,687. *Micula I*, 404 F. Supp. 3d. at 285–286. In *Micula II*, this court denied Romania's request for relief from judgment and granted Petitioner's request for sanctions. *Micula II*, 2020 WL 6822695 at *7. In *Micula III*,

asks the court to set aside the Judgments based on recent decisions issued by the Grand Chamber of the Court of Justice for the European Union—the highest court of the European Union—that Romania believes vitiates this court's subject matter jurisdiction and thus entitles it to relief from the Judgments. The European Commission, as amicus curiae, supports Romania's motion.

For the reasons that follow, Romania's motion is denied.

II. BACKGROUND

The factual background of this dispute is extensively covered in the court's prior opinions and will not be rehashed here. *See e.g.*, *Micula v. Government of Romania*, 404 F. Supp. 3d 265 (D.D.C. 2019) (*Micula I*), *aff'd*, 805 F. App'x 1 (D.C. Cir. 2020). The court simply recaps the facts relevant to Romania's instant motion.

A. Romania's Investment Incentive and the Sweden-Romania Bilateral Investment Treaty

Following the overthrow of the communist regime of Nicolae Ceausescu in December 1989, Romania adopted a series of measures designed to attract and promote investment, including a measure called Emergency Government Ordinance No. 24/1998 ("EGO 24"). EGO 24 provided certain tax incentives to invest in "disfavored" regions of Romania. *Id.* at 270. Petitioners Viorel and Ioan Micula are Swedish nationals who, in 1998, began investing in Romania in reliance on the incentives offered by the Romanian government in EGO 24. *Id.*

In 2002, Romania entered into a bilateral investment treaty with the Kingdom of Sweden ("Sweden-Romania BIT"), which "granted certain protections to each country's investors who invested in the other country." *Id.* As relevant here, Article 7 of the Sweden-Romania BIT

this court granted Petitioners' motion for judgment on accrued sanctions and denied Romania's motion to stay discovery. *Micula III*, 2021 WL 5178852 at *3–4. *Micula I* and *Micula II* were affirmed on appeal and the appeal of *Micula III* remains pending before the D.C. Circuit. Any reference to "the Judgments" refers to all three decisions, and any reference to "the Judgment" refers only to *Micula I*.

provides that disputes concerning investments are to be settled by international arbitration, before either an ICSID arbitral tribunal or an ad hoc tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law. *See id.*

In August 2004, Romania announced that it would repeal EGO 24. Romania took that action as part of the process of joining the European Union ("EU"), which considered state-sponsored investment incentives, like EGO 24, to be unlawful "state aid." *Id.* Romania's decision caused Petitioners "to suffer cash constraints that prevented them from completing the projects they had planned." *Id.*

B. Arbitration Proceedings and Romania's Accession to the EU

On August 2, 2005, in response to Romania's repeal of EGO 24 and pursuant to the Sweden-Romania BIT, Petitioners initiated arbitration proceedings against Romania before an ICSID tribunal. *Id.* In January 2007, while the arbitration proceedings were pending, Romania formally joined the EU. *Id.* at 271. In December 2013, the ICSID tribunal ruled in favor of Petitioners (the "Final Decision") and awarded them monetary damages plus interest (the "Award"). *Id.* at 270–71. Important for our purposes, Romania formally joined the EU *after* Petitioners invoked their right to arbitration under the Sweden-Romania BIT but *before* the ICSID tribunal ruled in favor of Petitioners. *Id.* at 271.

Shortly after the ICSID tribunal rendered the Final Decision and issued the Award, "the European Commission advised Romania that implementing or executing the Award would constitute impermissible new state aid" and issued a "suspension injunction" that prohibited Romania from fulfilling the award until the European Commission "reached a final decision on whether the Award constituted state aid." *Id.* On March 30, 2015, the European Commission issued a decision finding that the Award constituted state aid in violation of EU law and instructed

Romania to cease payment ("State Aid Decision"). *Id.* Petitioners filed an appeal of the State Aid Decision with the General Court of the Court of Justice of the European Union ("General Court"), which is a constituent court of the EU's highest court, the Court of Justice of the European Union ("CJEU"). *Id.*

C. General Court Decision

On June 18, 2019, the General Court issued a ruling annulling the European Commission's State Aid Decision ("General Court Decision"). *Id.* at 274. The General Court explained "that EU law became applicable to Romania only upon its accession to the EU on January 1, 2007," and thus the European Commission "lacked the 'competence' to declare that the investment incentives—which Romania offered *before* acceding to the EU—violated EU rules on state aid." *Id.* at 275. The General Court further held that "satisfying the Award would not constitute illegal state aid, even though it was entered after accession," because the Award "compensated Petitioners for Romania's pre-EU-accession repeal of the incentives." *Id.* Romania appealed the General Court Decision to the CJEU. *Id.*

D. The Judgments

On September 11, 2019, while Romania's appeal before the CJEU was pending, this court granted Micula's petition to confirm the Award. *Id*. at 285. This court determined that it had the subject matter jurisdiction to hear the case under the arbitration exception to the Foreign Sovereign Immunities Act ("FSIA"). *Id.* at 280. Romania had argued that jurisdiction was improper under the FSIA arbitration exception because the arbitration clause in the Sweden-Romania BIT was invalid. *Id.* at 277. Romania's argument was predicated on the CJEU's decision in *Slovak Republic v. Achmea*, which held that EU law prohibited agreements between Member States "under which an investor from one of those Member States may, in the event of a dispute

concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal." Mem. of L. in Opp. to Pet. to Confirm ICSID Arb. Award and Enter Judg., ECF No. 51, Ex. 3, ECF No. 51-3 [hereinafter *Achmea*] ¶ 60; *Micula I*, 404 F. Supp. 3d at 277. Romania maintained that under *Achmea* the arbitration clause in the Sweden-Romania BIT was void as of Romania's accession to the EU in January 2007, and thus the court could not rely on it for purposes of establishing jurisdiction under the arbitration exception of the FSIA—a view shared by the European Commission, which appeared as amicus curiae. *Micula I*, 404 F. Supp. 3d at 277.

This court considered and rejected Romania's *Achmea*-related arguments for three reasons. *Id.* at 279. First, the court found that the facts of this case were "materially different" than those in *Achmea*. *Id.* In *Achmea* "both the challenged government action occurred, and the arbitration proceeding commenced, *after* the Slovak Republic entered the EU," as opposed to the instant action where "all key events to the parties' dispute occurred *before* Romania acceded to the EU." *Id.* Second, the Final Decision issued by the ICSID tribunal did not "relate to the interpretation or application of EU law in the sense that concerned the court in *Achmea*" because the governing law was the Sweden-Romania BIT's "substantive rules," not EU law. *Id.* at 279–80 (cleaned up); Pet. To Confirm ICSID Arb. Award and Enter Judg., ECF No. 1, Ex. A, ECF No. 1-1–1-4 [hereinafter Final Decision] ¶ 318 ("There is no dispute among the Parties that the primary source of law for this Tribunal is the BIT itself."). Because the substantive rules of the Sweden-Romania BIT controlled, this court reasoned that the ICSID tribunal "did not decide a question of EU law in a way that implicates the core rationale of *Achmea*." *Micula I*, 404 F. Supp. 3d at 280.

Finally, this court found support for its conclusion in the General Court Decision which, as explained above, overturned the State Aid Decision on the grounds that the European

Commission "lacked the competence to review Romania's pre-accession actions and the Award's compatibility with EU state aid law." *Id.* at 280 (citing Final Decision ¶ 86). The General Court determined that the European Commission lacked competence to review the Award because "EU law became applicable in Romania only as from its accession to the European Union on 1 January 2007," and both the "the events giving rise to the Award" and the "infringements committed by Romania" occurred before 2007. *Id.* at 280 (quoting Final Decision ¶ 77). Furthermore, the General Court found that *Achmea* did not affect the Award's validity because, when issuing the Final Decision, the ICSID tribunal "did not tread upon substantive EU law." *Id.* This court determined that the rationale of the General Court Decision supported the conclusion that *Achmea* did not render void the arbitration agreement in the Sweden-Romania BIT. *Id.*

E. CJEU Decisions

The CJEU reversed the General Court Decision on January 25, 2022 ("CJEU Decision"). *See* Gov. of Romania's Mem. of Supp. of its Mot. for Relief from Judg., ECF No. 181 [hereinafter Romania Mot.], Ex. A, ECF No. 181-2 [hereinafter CJEU Decision]. The CJEU Decision reasoned that (1) the European Commission had the "competence" to review measures taken by Romania which might constitute state aid as of January 1, 2007, the date of Romania's accession to the EU; and (2) "in order to determine whether the Commission was competent to adopt the [State Aid Decision] . . . it was necessary to define the date on which" the Award was "granted." *Id.* ¶¶ 112–15. In other words, if the ICSID tribunal "granted" the Award after Romania joined the EU in January 2007, the European Commission had the authority to decide whether Romania's payment of the Award would constitute unlawful state aid. The General Court had concluded that the Award was "granted" in 2005 when Romania repealed the incentives provided in EGO 24, and because this occurred before Romania joined the EU, the European Commission was not

competent to render the State Aid Decision. *Id.* ¶ 126. The CJEU disagreed. It held that the Award "was actually granted after [Romania's] accession [to the EU], by the adoption of the arbitral award" by the ICSID tribunal in 2013. *Id.* ¶ 134. Because the CJEU determined that the Award was "granted" after Romania joined the EU, it reversed the General Court Decision and held that the European Commission was competent to adopt the State Aid Decision. *Id.* ¶ 151. The CJEU "referred back to the General Court" the remaining arguments raised by the parties that the "General Court did not examine." *Id.* ¶¶ 154–55.

The CJEU Decision further stated that the General Court was wrong to find that *Achmea* was "irrelevant" to the instant case. *Id.* ¶ 137. In the CJEU's view, because Petitioners sought damages for injuries suffered after 2007, the parties dispute "cannot be regarded as being confined in all respects to a period during which Romania . . . was not yet bound by" EU law, as the General Court had suggested. *Id.* ¶ 140. Accordingly, *Achmea* had some applicability. The CJEU rejected Micula's argument that *Achmea* was wholly irrelevant because of Romania's consent to arbitrate under the Sweden-Romania BIT, finding that under *Achmea* any consent to arbitration given by Romania from the date of Romania's accession to the EU "lacked any force." *Id.* ¶ 145. The CJEU did not make a final ruling on how *Achmea* should be applied, holding only that the European Commission was competent to issue the State Aid Decision and remanding the case to the General Court for further proceedings. *Id.* ¶ 156.

On September 21, 2022, the CJEU issued a second relevant ruling ("Second CJEU Decision"). Romania's Notice of Supplemental Authority, ECF No. 199, Ex. 2, ECF No. 199-2 [hereinafter Second CJEU Decision]. In the Second CJEU Decision, the court held that, under EU law, the Award could not be enforced in the courts of Member States. *Id.* ¶¶ 42–43. The court so held following a request for a preliminary ruling from the Brussels Court of Appeals. *Id.* ¶¶ 1–

2, 27–28. The CJEU reasoned that Romania's accession to the EU meant that it had withdrawn its consent to resolve matters pertaining to EU law through arbitration under the Sweden-Romania BIT and, because the "dispute before the arbitral tribunal cannot be regarded as being confined in its entirety to" the period before Romania acceded to the EU, the Award—which was determined to constitute state aid by the European Commission—could not be enforced by the court of a Member State. *Id.* ¶¶ 34–43.

III. LEGAL STANDARD

According to Romania, the CJEU Decisions mean "that the agreement to arbitrate in the BIT was void the moment that Romania entered the EU." Romania Mot. at 1. It seeks relief from the Judgments under Rule 60(b).

Rule 60(b) "provides an exception to finality that allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269 (2010) (internal quotations omitted); FED. R. CIV. P. 60(b). The rule requires courts to strike a "delicate balance between the sanctity of final judgments and the incessant command of a court's conscience that justice be done in light of all the facts." *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572, 577 (D.C. Cir. 1980) (cleaned up). District courts are "vested with a large measure of discretion in deciding whether to grant a Rule 60(b) motion." *Twelve John Does v. D.C.*, 841 F.2d 1133, 1138 (D.C. Cir. 1988).

Romania invokes three subsections of Rule 60(b). Rule 60(b)(4) "authorizes the court to relieve a party from a final judgment if 'the judgment is void.'" *Espinosa*, 559 U.S. at 270; FED. R. CIV. P. 60(b)(4). "[A] void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final." *Espinosa*, 559 U.S. at 270. Rule 60(b)(5) is applicable "when the judgment is based on a prior action that has been satisfied,

reversed, or vacated." *Rafii v. Islamic Republic of Iran*, Case No. 01-cv-850-CKK, 2005 WL 8167693, at *5 (D.D.C. Oct. 25, 2005) (citing *NLRB v. Harris Teeter Supermarkets,* 215 F.3d 32, 35 (D.C. Cir. 2000); FED. R. CIV. P. 60(b)(5). Rule 60(b)(6) is a residual provision that "grants federal courts broad authority to relieve a party from a final judgment . . . provided that the motion . . . is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 863 (1988); FED. R. CIV. P. 60(b)(6).

IV. DISCUSSION

A. Rule 60(b)(4)

A party can seek relief under Rule 60(b)(4) for judgments that are "void." *Espinosa*, 559 U.S. at 270. The rule "applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Id.* at 271. Because Romania does not allege any due process violation, the "sole issue" is whether the Judgments entered against Romania "represent[ ] the rare instance of a judgment involving a certain type of jurisdictional error, one signifying the kind of fundamental infirmity that may be raised even after the judgment becomes final." *Lee Mem'l Hosp. v. Becerra*, 10 F.4th 859, 863 (D.C. Cir. 2021) (cleaned up). The Supreme Court has explained that the "list of such infirmities is exceedingly short; otherwise, Rule 60(b)(4)'s exception to finality would swallow the rule." *Espinosa*, 559 U.S. at 270. Importantly, a "judgment is not void simply because it is or may have been erroneous." *Lee Mem'l Hosp.*, 10 F.4th at 863 (ellipsis omitted).

The Applicable Standard. As a threshold matter, the parties disagree on the standard that governs Romania's request for relief under Rule 60(b)(4). Romania acknowledges that courts

generally review Rule 60(b)(4) motions asserting jurisdictional infirmity using an "arguable basis" standard. Romania Mot. at 14. Under that standard, relief under Rule 60(b)(4) is reserved "only for the exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *Espinosa*, 559 U.S. at 271. Romania nevertheless asks the court to conduct a more stringent review. It argues that "*de novo* review is appropriate any time a foreign sovereign contends that jurisdiction under the FSIA is lacking." Romania Mot. at 15. Romania points to the D.C. Circuit's decision in *Bell Helicopter Textron v. Islamic Republic of Iran* as creating an exception to the general rule that courts should review 60(b)(4) motions using the arguable basis standard. *See id.*; 734 F.3d 1175 (D.C. Cir. 2013). Romania argues that, under *Bell Helicopter*, there is a "two-exception approach" to the arguable basis standard, making *de novo* review proper if (1) "jurisdiction was established via default judgment" *or* (2) "the determination of jurisdiction implicates the FSIA." Romania Mot. at 15. The presence of either condition, Romania contends, warrants *de novo* review for purposes of a Rule 60(b)(4) jurisdictional challenge.

Petitioners, not surprisingly, reject Romania's insistence on more exacting review. Petitioners rely on the D.C. Circuit's recent decision in *Lee Memorial Hospital v. Becerra* which, they contend, clarified that *Bell Helicopter* applies only in the "particular context" where "a foreign sovereign . . . decline[s] to enter an appearance in the previous litigation." Pet.'s Mem. of L. in Supp. of Pet.'s Opp'n to Romania's Mot., ECF No. 184 [hereinafter Micula Opp'n] at 22–23 (quoting *Lee Mem'l Hosp.*, 10 F.4th at 864). In other words, according to Petitioners, *de novo* review under *Bell Helicopter* applies only when a court enters a default judgment *and* the judgment is entered against a foreign sovereign. These are not alternative conditions; both must be present. Because Romania "appeared and contested the entry of the Judgment" and "this Court's subject

matter jurisdiction prior to the entry of the Judgment," Micula continues, "Romania has failed to carry its burden to demonstrate why the arguable basis standard should not apply." *Id.* at 23.

This court agrees with Petitioners that the arguable basis standard applies here. In *Lee Memorial Hospital*, the D.C. Circuit described *Bell Helicopter* as "one specific situation" in which the court did not apply the arguable basis standard. *Lee Mem'l Hosp.*, 10 F.4th at 864. The court emphasized that *Bell Helicopter* "involved a default judgment entered against a foreign sovereign who did not appear to defend itself from the suit, but who later moved to vacate the judgment against it under Rule 60(b)(4)" for lack of jurisdiction under the FSIA. *Id.* The court further observed that it had distinguished the circumstances in *Bell Helicopter* from those cases in which "'the objecting party had appeared in the challenged proceeding' or was in privity with a party who had appeared." *Id.* (quoting *Bell Helicopter*, 734 F.3d at 1182). Applying arguable-basis review in *Bell Helicopter*, the court emphasized, would "create a high risk for parties who choose not to appear" based on the belief that the court lacks jurisdiction. *Id.* (quoting *Bell Helicopter*, 734 F.3d at 1181–82).

Lee Memorial Hospital confirms that *de novo* review under *Bell Helicopter* is appropriate only when a foreign sovereign that has not appeared seeks relief from a default judgment. But when a foreign sovereign appears and contests jurisdiction, the "arguable basis" standard applies. That is precisely what occurred here. Romania appeared and had a full and fair opportunity to contest the court's jurisdiction. It did so, arguing that *Achmea* rendered void the Sweden-Romania BIT's arbitration agreement. *See Micula I*, 404 F. Supp. 3d at 276–80. The court rejected that argument. *Id.* Thus, "the considerations that led [the D.C. Circuit] away from the arguable basis standard in the circumstances in *Bell Helicopter* are absent here." *Lee Mem'l Hosp.*, 10 F.4th at 864. Romania's contention that *de novo* review is applicable under Rule 60(b)(4) whenever the

jurisdictional inquiry implicates the FSIA cannot be sustained under *Lee Memorial Hospital*. The court therefore applies the arguable basis test.

Arguable Basis Review. Under the arguable basis standard, a "total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction," and "only in the former situation could it be said that the court that rendered the contested judgment lacked even an arguable basis for jurisdiction." *Id.* (cleaned up). Generally, relief is reserved for "the exceptional case." *Espinosa*, 559 U.S. at 271. Romania argues that there was never an arguable basis for jurisdiction because the "sole basis" for this court's determination that it had subject matter jurisdiction "was its own interpretation and application of EU law"—an interpretation which, in Romania's view, the CJEU Decision refutes. Romania Mot. at 16–17. Because this court "elected to carefully consider *Achmea* and predict how the CJEU would rule with respect to its application to the [Sweden-Romania] BIT"—and was wrong in its prediction—there "was never[] a valid agreement to arbitrate" as required by the FSIA arbitration exception and, accordingly, there was never an "arguable basis for jurisdiction." *Id.*

The court disagrees. Under the FSIA arbitration exception, "the existence of an arbitration agreement, an arbitration award[,] and a treaty governing the award are all jurisdictional facts that must be established." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877 (D.C. Cir. 2021). This court determined that (1) an arbitration agreement existed, specifically Article 7 of the Sweden-Romania BIT; (2) an arbitration award was issued by an ICSID tribunal; and (3) the ICSID Convention was a treaty governing the award. *See Micula I*, 404 F. Supp. 3d at 276–81. Based on those findings, this court determined the FSIA arbitration exception was applicable. *Id.* at 281. The D.C. Circuit affirmed this court's jurisdictional determination. *Micula v. Gov't of*

Romania, 805 F. App'x 1, 1 (D.C. Cir. 2020) (holding that "the district court properly invoked the exception for actions to enforce arbitration awards" under the FSIA).

Romania coyly now says that it "did not reference the Court's subject matter jurisdiction" before the D.C. Circuit. Romania Mot. at 6. In actuality, Romania conceded it. It said in its opening briefing on appeal that "[t]he District Court had subject matter jurisdiction over [Micula's] Petition to Confirm [the] Arbitration Award . . . pursuant to 28 U.S.C. § 1605(a)(6) and 22 U.S.C. § 1650a." Br. of Resp't-Appellant Gov't of Romania, *Micula v. Gov't of Romania*, Case No. 19-7127, Doc. No. 1835247 at 1. Those code provisions, respectively, are the FSIA arbitration exception and Section 3 of the Convention on the Settlement of Investment Disputes Act of 1966, which authorizes federal courts to enforce ICSID arbitration awards. Based on Romania's concession, the D.C. Circuit wrote: "As Romania now agrees, the district court properly invoked the exception for actions to enforce arbitration awards." *Micula*, 805 F. App'x at 1. The court noted the jurisdictional argument raised only by the European Commission as amicus that "Romania's agreement to arbitrate was nullified by its ascension to the European Union," but concluded that, "as the district court carefully explained, Romania did not join the EU until after the underlying events here, so the arbitration agreement applied." *Id.* It cannot be true that this court lacked a "total want of jurisdiction" when Romania itself conceded on appeal that the court's exercise of jurisdiction was proper and the D.C. Circuit disagreed with the jurisdictional argument raised by the European Commission. *Lee Mem'l Hosp.*, 10 F.4th at 864 (citation omitted). Romania's contention that this court had no "arguable basis" to exercise jurisdiction is disingenuous.

The CJEU's recent rulings do not alter that conclusion. The CJEU Decision held that the European Commission possessed the authority to determine whether Romania's satisfaction of an

arbitration award against Romania that issued *after* Romania acceded to the EU would violate the prohibition on state aid. CJEU Decision ¶¶ 123–27. More specifically, the CJEU held that, because the relevant time for assessing the European Commission's competence was at the time of the Award's issuance (which post-dated Romania's accession)—and not, as the General Court held, at the time Romania withdrew the tax incentives (which pre-dated Romania's accession)—the Award was subject to the EU's state aid laws. *Id.* ¶¶ 123–25. As to the arbitration agreement itself, the CJEU Decision says little. It states only that Romania's consent to arbitrate under the Sweden-Romania BIT's arbitration agreement "lacked any force" from the time Romania acceded to the EU onwards. *Id.* ¶ 145.

That ruling does not change the "jurisdictional facts" found by this court: (1) Romania consented to arbitration under the Sweden-Romania BIT in May 2002, (2) Petitioners filed a request for arbitration in July 2005, two years *before* Romania acceded to the European Union (and thus at a time when Romania could, and did, consent to arbitrate), and (3) the ICSID tribunal made its award pursuant to the agreement to arbitrate, which this court is authorized to confirm. *Process & Indus. Devs. Ltd. v. Fed. Republic of Nigeria*, 27 F.4th 771, 776 (D.C. Cir. 2022). The arbitration exception to the FSIA grants federal courts jurisdiction to "confirm an award made pursuant to a[] [valid] agreement to arbitrate." 28 U.S.C. § 1605(a)(6); *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015) (stating that a "valid" agreement to submit to arbitration is required to exercise jurisdiction under § 1605(a)(6)). The CJEU Decision did not invalidate or nullify Romania's consent to arbitrate at the time it entered the treaty with Sweden or when Petitioners filed for arbitration.

The Second CJEU Decision does not compel a contrary result. That ruling held only that, *under EU law*, a court of a Member State could not enforce the Award because the European

Commission had deemed the Award incompatible with the EU's state aid rules. Second CJEU Decision ¶ 46. Specifically, the court held: "EU law . . . must be interpreted as meaning that a court of a Member State seised of the enforcement of the arbitral award which was the subject of [the State Aid Decision] . . . is required to set aside that award and, therefore, may not, in any event, enforce it in order to enable its beneficiaries to obtain payment of the damages which it awards them." *Id.* Again, as in its earlier decision, the CJEU *did not* invalidate or nullify Romania's agreement to arbitrate under the Sweden-Romania BIT *before* it acceded to the EU. *Id.* ¶ 40 (stating that Romania's consent to the arbitration procedure became void "as from Romania's accession to the European Union"). Accordingly, the jurisdictional fact found by the court—that there was a valid agreement to arbitrate before Romania acceded to the EU—remains undisturbed. Neither CJEU ruling therefore upends the arguable basis upon which the court exercised jurisdiction.

For the stated reasons, this court denies Romania's motion for relief under Rule 60(b)(4).

B. Rule 60(b)(5)

Relief under Rule 60(b)(5) is available "when the judgment is based on a prior action that has been satisfied, reversed, or vacated." *Rafii*, 2005 WL 8167693 at *5. Romania does not claim that the Judgment has been satisfied, thus the application of Rule 60(b)(5) is "limited to a judgment that has been reversed or otherwise vacated—based in the sense of res judicata, collateral estoppel, or somehow part of the same proceeding." *Id.*; *see also* Charles Alan Wright & Arthur R. Miller, 11 Fed. Prac. & Proc. Civ. § 2863 (3d ed.) ("This ground is limited to cases in which the present judgment is based on the prior judgment in the sense of claim or issue preclusion."). For a judgment to be "based" on a prior judgment, the "relationship between the present judgment and the prior judgment must be closer than that of a later case relying on the precedent of an earlier

case; rather, the prior judgment must be a necessary element of the decision, giving rise, for example, to the cause of action or a successful defense." *Rafii*, 2005 WL 8167693 at *5 (internal quotation marks and citation omitted). Reliance on "persuasive precedents in support of the Court's position" are insufficient to grant relief under Rule 60(b)(5); there must be a "single case [that provides] a necessary element for the Court's decision." *Id.*; Wright & Miller § 2863 (Rule 60(b)(5) "does not apply merely because a case relied on as precedent by the court in rendering the present judgment has since been reversed").

Romania argues that this court's subject matter jurisdiction finding "depend[s] on the General Court Decision that the [CJEU Decision] overturned." Romania Mot. at 17. Therefore, Romania says, the jurisdictional holding underlying the Judgments was based on a "prior action" (the General Court Decision) that has been reversed (by the CJEU Decision), meriting relief under Rule 60(b)(5). The court is unpersuaded.

At bottom, Romania's arguments are based on a mischaracterization of the role the General Court Decision played in this court's subject matter jurisdiction finding. The court relied on the General Court Decision as the third of three reasons why *Achmea* did not render the arbitration exception inapplicable. *See Micula I*, 404 F. Supp. 3d at 279–80. The court primarily distinguished *Achmea* on the grounds that the facts of that case are "materially different" than this one. *Id.* at 279. It is true, as Romania notes, that this court cited to the General Court Decision to establish the factual differences, *see* Romania Mot. at 17, but the court only used the General Court Decision for expediency to establish historical facts that otherwise were not in dispute. The factual distinctions that the court noted when entering judgment remain true today. Next, the court said that "a close inspection of the Final Decision shows that the dispute before the ICSID arbitral tribunal did not 'relate to the interpretation or application of EU law' in the sense that concerned

the court in *Achmea*." *Micula I*, 404 F. Supp. 3d at 279. For this, the court drew upon a "close inspection" of the arbitration ruling and nowhere cited the General Court Decision. *See id.* at 279–80. The CJEU Decision in no way affects the court's reading of the ICSID tribunal's ruling.

Only after setting forth these two reasons did the court cite the General Court Decision for a legal proposition. Even then, it was only to "confirm[] that the ICSID arbitral tribunal did not tread upon substantive EU law." *Id.* at 280. Again, the CJEU Decision addresses only the authority of the European Commission to determine whether Romania's satisfaction of the Award would constitute state aid. It does not call into question the merits of the Award, which rested primarily on the panel's interpretation of the Sweden-Romania BIT. *See* Final Decision ¶¶ 288 (noting the parties' agreement that the BIT's "substantive rules" supplied the "applicable law"), 318 ("There is no dispute among the Parties that the primary source of law for this Tribunal is the BIT itself."). Ultimately, the fact that this court cited the General Court Decision to buttress its reading of *Achmea* does not mean that the Judgments were based on the General Court Decision, at least not in a way that merits relief under Rule 60(b)(5). Such relief requires the prior decision to be a "necessary element of the decision." *Rafii*, 2005 WL 8167693 at *5 ("[T]he prior judgment must be closer than that of a later case relying on the precedent of an earlier case."). The General Court Decision was not that. Romania's motion for relief under Rule 60(b)(5) is denied.

C. Rule 60(b)(6)

Rule 60(b)(6) permits relief from judgment for "any other reason that justifies relief." FED. R. CIV. P. 60(b). This residual provision "grants federal courts broad authority to relieve a party from a final judgment" as long as relief "is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." *Liljeberg,* 486 U.S. at 863. Because the language of Rule 60(b)(6) is "essentially boundless," *Twelve John Does*, 841 F.2d at 1140, the Supreme

Court has clarified that relief is only appropriate in "extraordinary situation[s]," *Ackermann v. United States*, 340 U.S. 193, 199 (1950), and the D.C. Circuit has cautioned that it "should be only sparingly used," *Good Luck Nursing Home*, 636 F.2d at 577. "Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239 (1997).

Romania acknowledges that "a mere change in law does not usually constitute and [sic] extraordinary circumstance for purposes of 60(b)(6)," but argues that the rule "is not absolute" and that exceptional circumstances exist here because "there has been a change in controlling law **and** in circumstance." Romania Mot. at 20–21 (emphasis in original). Romania maintains "that the CJEU has unequivocally ruled that there was no arbitration agreement between intra-EU investors and Romania," which "merits relief on its own" because it "dramatically altered the landscape of the dispute." *Id.* at 22. The "Judgments rest upon an interpretation of EU law that is inconsistent with, and expressly rejected by[,] Europe's highest court," Romania continues, which "implicates issues of national concern for Romania, jurisdiction and autonomy for the EU, foreign sovereignty in US courts, and the United States' obligations under the ICSID Convention and Enabling Statute." *Id.* at 22–23.

Micula responds that "Romania is not entitled to relief under Rule 60(b)(6) because it has not established a bas[is] for relief under Rule 60(b)(6) that is separate from its basis for seeking relief under Rule 60(b)(4) and 60(b)(5)." Micula Opp'n at 38. Even if Romania did establish a different basis for relief, Micula continues, Romania has failed to identify any extraordinary circumstances that warrant relief under Rule 60(b)(6), "given that all that it can point to is a change in non-binding case law that has no effect on the Judgments." *Id.* at 39.

The court agrees with Micula. "[R]elief under [Rule 60(b)(6)] is not available unless the other clauses, (1) through (5), are inapplicable." *Goland v. CIA*, 607 F.2d 339, 372–73 (D.C. Cir. 1978); *see also Oladokun v. Corr. Treatment Facility*, 309 F.R.D. 94, 101 (D.D.C. 2015) (barring plaintiff "from asserting relief under Rule 60(b)(6) because his argument is premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)"); Wright & Miller § 2864 (describing the Rule 60(b) clauses as "mutually exclusive"). Merely asserting in the conjunctive, as Romania does here, that there has been a change in controlling law *and* circumstances does not open the door to relief under Rule 60(b)(6) that is otherwise foreclosed under Rules 60(b)(4) and 60(b)(5). Relief under Rule 60(b)(6) is denied for that reason alone.

Furthermore, Romania's assertion of "extraordinary circumstances" falls flat. All that has changed since the D.C. Circuit affirmed this court's first two judgments is that the CJEU has ruled (1) that the European Commission had the authority to evaluate the Award under the EU's state aid rules, and (2) because the European Commission has held that Romania's satisfaction of the Award would violate state aid rules, the courts of Member States cannot enforce the Award. Those developments are not "extraordinary": they are the rulings of Europe's high court about matters of EU law that do not change the jurisdictional fact that, at the time Petitioners filed for arbitration, Romania had agreed to arbitrate under the Sweden-Romania BIT. The fact that EU law, as interpreted by the CJEU, bars EU Member State courts from enforcing the Award because payment by Romania would violate the EU's state aid rules is not a ruling that strips a United States federal court of jurisdiction. Importantly, the CJEU has not held that Romania's consent to arbitrate *before* it acceded to the EU is void.

The court also finds that Romania's actions, both before this litigation and during it, undermine its assertion that the court's exercise of jurisdiction is unjust. Before the ICSID

tribunal, Romania had the opportunity to press the jurisdictional arguments it has made here but it did not so do. At the outset of the arbitration, Romania contested the ICSID tribunal's jurisdiction, filing its objections on September 10, 2007, *after* it had acceded to the EU. *See* Pet'rs' Mem. of Law in Response to the Br. of Amicus Curiae the European Commission, ECF No. 62, Ex. 1, ECF No. 62-2, ¶ 15. Romania never argued, however, that the ICSID tribunal lacked jurisdiction because its entry to the EU had rendered void its pre-accession agreement to arbitrate. *See id.* ¶ 58 ("There is no dispute between the Parties as to the jurisdiction of this Tribunal to decide the jurisdictional and admissibility challenges brought by [Romania] pursuant to Article 41 of the ICSID Convention."). It was not until the annulment proceedings, which commenced years later on April 9, 2014, that the issue of the tribunal's jurisdiction arose based on Romania's accession to the EU, and even then it was raised by the European Commission as amicus, not Romania. *See* Petition to Confirm ICSID Arbitration Award and Enter Judgment, ECF No. 1, Ex. B, ECF No. 1-5, ¶¶ 1 (noting date Romania filed for annulment of the Award), 64 (noting that the EU submitted its amicus brief on January 9, 2015), 330–35 (stating that the European Commission argued that Romania's accession to the EU terminated the Sweden-Romania BIT's arbitration agreement). Still, Romania did not adopt the Commission's argument. The ICSID tribunal stated Romania's position on the Commission's jurisdictional argument in one sentence: "The Applicant did not comment on this ground for annulment." *Id.* ¶ 336. It cannot be unjust for this court to find that Romania agreed to arbitrate with Petitioners when Romania did not argue otherwise before the ICSID tribunal. *Cf. Good Luck Nursing Home*, 636 F.2d at 577 (stating that Rule 60(b) cannot "be employed simply to rescue a litigant from strategic choices that later turn out to be improvident").

Romania was only slightly more diligent in contesting jurisdiction in these proceedings. Romania's first filing was an "Opposition" to the petition, in which Romania did not dispute the court's subject matter jurisdiction. *See Micula I*, 404 F. Supp. 3d at 273. Next, in response to Petitioners' motion for entry of judgment, Romania sought to stay the proceedings, but made no mention of the court's jurisdiction. *See id.* 273–74. Only after the European Commission entered an appearance as amicus—over two years after these proceedings commenced—did the argument surface that Romania's accession to the EU nullified the agreement to arbitrate and thereby deprived this court of jurisdiction. *See id.* at 274. Romania then piggy-backed onto the Commission's jurisdictional argument, asserting it for the first time in a reply brief. *See id.* And, as discussed, after the court found it had jurisdiction under the FSIA arbitration exception, Romania did not merely fail to challenge that determination before the D.C. Circuit, it actually *conceded* that this court's jurisdictional ruling was correct. *Micula*, 805 Fed. App'x at 1. It cannot be said that the CJEU's decisions constitute "extraordinary circumstances" to undo the Judgments, when Romania has been less than fully diligent in contesting the jurisdiction of U.S. federal courts.

It also appears that Romania has conceded, through diplomatic channels, that its accession to the EU did not abrogate the Award. On March 11, 2020, Romania and Sweden agreed to terminate the Sweden-Romania BIT (the "Termination Agreement"). Romania Mot., Ex. B, ECF No. 181-3, [hereinafter Ex. B[2]], at 1. On February 7, 2022, *after* the CJEU Decision issued, the Ministry for Foreign Affairs of Sweden issued a Note Verbale[3] to the Government of Romania,

[2] The court uses PDF pagination for all exhibits.

[3] A "Note Verbale" is an un-signed diplomatic message prepared in the third person, similar to a memorandum. *See* Merriam Webster, Note Verbale https://www.merriam-webster.com/dictionary/note%20verbale (last visited Dec. 21, 2022). While it's not clear to the court whether Note Verbales have any binding power per se, it is clear that the two Note Verbales exchanged between the Government of Romania and the Kingdom of Sweden in February 2022 represent Sweden and Romania's interpretation of the Termination Agreement. *See* Romania Mot., Ex. C, ECF No. 181-4 at 1 ("the Note Verbale of the Ministry of Foreign Affairs of Sweden together with this Note Verbale in reply constitutes a Joint Interpretive Declaration regarding the Termination Agreement.").

proposing a "Joint Interpretive Declaration" regarding the Termination Agreement. *Id.* at 1–2. At the start, the Joint Interpretive Declaration acknowledged both that "bilateral investment treaties between Member States of the European Union are contrary to the EU Treaties," as well as the CJEU's decision in *Achmea*. *Id.* at 1. It also recognized that the Sweden-Romania BIT's arbitration agreement "as of 1 January 2007, the date of accession of Romania to the EU . . . cannot serve as legal basis for arbitration proceedings." *Id.* The Note Verbale then stated that, notwithstanding these acknowledgments, "the Government of Romania and the Government of Sweden confirm that the Termination Agreement will not affect concluded arbitration proceedings, which will not be reopened" and that the "Interpretive Declaration covers all investor-State arbitration proceedings based on the [Sweden-Romania BIT]." *Id.* at 1–2. Romania responded positively to the Note Verbale. On February 11, 2022, the Embassy of Romania to the Kingdom of Sweden accepted the proposed Joint Interpretive Declaration of the Termination Agreement and confirmed that "the [February 7, 2022] Note Verbale of the Ministry of Foreign Affairs of Sweden together with this [February 11, 2022] Note Verbale in reply constitutes a Joint Interpretive Declaration regarding the Termination Agreement." Romania Mot., Ex. C, ECF No. 181-4 at 1. Thus, Romania seems to have agreed that *Achmea* does not nullify its consent to arbitrate *before* January 1, 2007; nor does it vitiate arbitrations concluded pursuant to the Sweden-Romania BIT.[4]

The European Commission contends that the Note Verbale excludes the ICSID proceedings that produced the Award. That argument rests on the definition of the term "Concluded Arbitration Proceedings" contained in a multilateral treaty to which Sweden is not even a signatory. Br. Of Amicus Curiae the European Commission in Supp. of Romania Mot.,

[4] The Ministry for Foreign Affairs of Sweden issued a second Note Verbale to the Embassy of Romania on March 15, 2022. This Note specifically referenced the proceedings before this court. Romania Mot., Ex. D, ECF No. 181-5 [hereinafter Ex. D], at 1–2. And it again affirmed that the arbitration agreement between the countries terminated only as of January 1, 2007, the date of Romania's accession to the EU. *See id.*

ECF No. 191 [hereinafter EC Amicus Br.], at 14. As Micula explains, there are multiple reasons to doubt the Commission's reading of the Note Verbale. *See* Pet'rs.' Mem. of Law in Response to EC Amicus Br., ECF No. 195, at 17–18. The court need not resolve the question, however, because what is pertinent for present purposes is that Romania has not disputed Petitioners' reading of the Joint Interpretative Declaration—its reply brief makes no mention of it. If Romania believes that the ICSID proceedings with Petitioners do not qualify as a "concluded arbitration proceeding" under the Joint Interpretative Declaration, as the Commission contends, Romania could have said so. The court's refusal to vacate the Judgments in the face of Romania's silence is not unjust.

V. CONCLUSION AND ORDER

For the foregoing reasons, Respondent Government of Romania's Motion for Relief from Judgment, ECF No. 181, is denied.

Dated: December 22, 2022

Amit P. Mehta
United States District Judge