UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Application of IOAN MICULA, *et al.,* Petitioners, VIOREL MICULA, Intervenor, For Recognition and Enforcement of an Arbitration Award - against - THE GOVERNMENT OF ROMANIA, Respondent.	Case No.1:15-mc-00107-P1

MEMORANDUM OF LAW IN OPPOSITION TO
RESPONDENT'S MOTION FOR ORDER OF SATISFACTION OF JUDGMENT

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Petitioners Ioan Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. and Intervenor Viorel Micula (collectively, "Claimants"), hereby submit this collective opposition to Romania's motion for an order of satisfaction of judgment with regard to the judgment entered in this action on April 28, 2015 (the "Judgment").

INTRODUCTION

Romania has not satisfied the Judgment. It is undisputed that Romania has not paid a single penny toward the Judgment since it was entered, notwithstanding the fact that this Court entered Judgment over nine months ago to recognize the arbitral award issued by the International Centre for the Settlement of Investment Disputes ("ICSID") in Claimants' favor. Romania's only excuse for leaving the Judgment unpaid—and its reason for bringing the present motion—is its argument that it has already satisfied its obligations through legal mechanisms in Romania. But that is not correct. Only a small fraction of this award has actually been satisfied, which amount Romania is *actively trying to reclaim* from Petitioners. The majority of the award remains unpaid, and that has been the case since the ICSID tribunal issued the award over two years ago.

Romania's assertion that it made full payment in satisfaction of the arbitral award in Romania is incorrect for several reasons. *First*, although Romania argues that it partially satisfied the award by imposing a "setoff" of tax debts against one of the five Claimants, this measure was invalidated by one of its own appellate courts. *Second*, Romania's attempt to satisfy the award through special legislation—whereby it transferred funds into a legislatively created Treasury account on behalf of Claimants—did not work because Romania admittedly reclaimed the funds without Claimants ever having access to them. *Finally*, although certain Claimants have received funds through forced executions on the accounts of the Romanian Ministry of Public Finance, these amounts represent only a miniscule portion of what Romania

owes. Thus, to the extent that some enforcement activity has occurred in Romania, these events have not been adequate to fully satisfy the Judgment.

Romania's comity and act of state arguments are premised on the notion that Romanian courts and Romanian law have determined conclusively that, through the tax setoff and the Treasury account transfers, the award has been satisfied. There is no such indication, and the idea that the Court should give deference to Romania's incorrect—and often self-serving—interpretations of its own law is ludicrous. Moreover, weighing heavily against the application of comity and the act of state doctrine in these questionable circumstances is the strong interest of this Court to ensure that a judgment entered in this jurisdiction is properly enforced in accordance with the United States' obligations under the ICSID Convention.

The present motion represents yet another attempt by Romania to avoid payment of the Judgment and, moreover, to delay responding to post-judgment discovery.[1] It is particularly egregious because Romania is essentially recycling arguments it made in its motion to vacate and has no basis to assert that the Judgment has been satisfied. Accordingly, Claimants respectfully request that the Court deny Romania's motion for judgment satisfaction and order Romania to proceed with producing responses to Claimants' post-judgment discovery requests, pursuant to the Court's order granting Claimants' motion to compel discovery.

BACKGROUND

I. The ICSID Award

In July 2005, Claimants initiated an arbitration against Romania at ICSID. Claimants alleged, among other things, that Romania had prematurely revoked certain economic incentives

[1] This Court granted Claimants' motion to compel discovery on December 3, 2015 (ECF No. 92) and Claimants requested that Romania comply with the order and provide discovery by no later than January 4, 2015 (ECF No. 97-1). Rather than complying with the Court's order, Romania petitioned the Court for a further stay of discovery so that it could submit the present motion. ECF Nos. 95-98.

that it had implemented to attract investment in disfavored regions in Romania. After lengthy proceedings in which Romania fully participated, on December 11, 2013, the ICSID Tribunal (the "Tribunal") issued an arbitration award (the "Award") to Claimants in the amount of 376,433,229 Romanian Leu (RON) plus interest at the rate of 3-month Romanian Interbank Offer Rate (ROBOR) plus 5%, compounded on a quarterly basis with respect to certain amounts and periods as specified in the Award. *Ioan Micula et al., v. Romania*, ICSID Case No. ARB/05/20, Award (Dec. 11, 2013) ¶ 1329(d), Declaration of Oana Popa (February 1, 2016) ("Popa Decl.") Ex. A. The value of the Award, including pre-Award interest, was equivalent to RON 800,592,379 ($248,091,843) on the date that it was issued. Popa Decl. Ex. X.

On April 9, 2014, Romania applied to annul the Award. ICSID Case No. ARB/05/20, Application for Annulment (Apr. 9, 2014), Popa Decl. Ex. B. Enforcement of the Award has not been stayed by ICSID. An initial stay granted by ICSID's Secretary-General was revoked as of September 7, 2014, because Romania refused to provide written assurance that it would make full payment of the Award if its application for annulment was denied. Letter from M. Polasek, Secretary of ICSID *ad hoc* Committee regarding ICSID Case No. ARB/05/20 (Sept. 15, 2014), Popa Decl. Ex. D. Thus, Claimants may now seek execution of the Award.

II. Enforcement Proceedings In Romania

A. Romania's Failed Setoff Against One Of The Claimants

On January 16, 2014, prior to the onset of enforcement proceedings in Romania, the Romanian Ministry of Finance, via the National Agency for Fiscal Administration ("NAFA"), attempted to partially satisfy the Award by offsetting a portion of the compensation awarded to Claimants against taxes owed by S.C. European Food S.A., one of the Claimants, to Romania. Affidavit of Attila György dated January 4, 2016 ("György Aff."), Ex. A. On May 11, 2015, the Romania Oradea Court of Appeal ordered the annulment of the setoff imposed by NAFA. Court

Hearing Minute for Dec. No. 81/ca/2015-PI, Case No. 378/35/CA/2014 (Romania Oradea Court of Appeal) (May 11, 2015), Popa Decl. Ex. E; Oradea Court of Appeal Decision, Popa Decl. Ex. F. Specifically, the court held that the attempted setoff was unlawful because (1) the Award constitutes a civil obligation, not a fiscal liability, as required by the setoff provision under Romania's tax code; and (2) the setoff was made only with respect to one of the Claimants, while the Award obligates Romania to pay all of the Claimants. Popa Decl. Ex. F. Romania's appeal of the decision of the Oradea Court of Appeal is currently pending before the High Court of Cassation and Justice. Case No. 378/35/CA/2014.

B. Romania's Failed Attempt To Satisfy The Award By Transferring Funds Into A Treasury Account

On March 9, 2015, pursuant to specially enacted legislation, Law Number 20/2015, the Ministry of Finance transferred RON 472,788,675 (including the RON 6,028,608 for the costs of a court-appointed executor) into a Treasury account in the name of five Claimants and the court-appointed executor, but controlled by Romania. Popa Decl. ¶ 22. None of Claimants ever had access to this account and, consequently, were never compensated through this mechanism. *Id.* at ¶ 23. Romania subsequently withdrew those funds from that account and informed Claimants that these funds had been reclaimed. *See* Letter from S. Vasilica, Romanian Ministry of Public Finance, to S.C European Food S.A., May 12, 2015, Popa Decl. Ex. P. Adding insult to injury, Romania now contends that it is owed interest by Claimants (and other affiliated companies) for the 22 days during which the funds were present in the Ministry of Finance's Treasury account. *See id.*

On December 15, 2015, the Constitutional Court of Romania rejected a constitutional challenge to Law Number 20/2015, the legislatively enacted provision that permitted the transfer and holding of the funds belonging to Claimants into the specially-designated Treasury account

pending investigation of the Award by the European Commission. György Aff. Ex F. The only effect of the decision was to find that the legislatively-created Treasury account did not violate the constitution of Romania. Popa Decl. ¶¶ 28-29. It had no effect on whether Romania paid Claimants what they were owed.

C. Claimants' Enforcement Proceedings In Romania

Claimants began enforcement proceedings in Romania in early 2014. In February and March 2014, the Bucharest Tribunal recognized the Award by *ex parte* petition, on the basis of Article 54 of the ICSID Convention, as ratified in Romania. *Id.* at ¶ 16.

On March 30, 2014, pursuant to the Bucharest Tribunal's order recognizing the Award, a court-authorized executor imposed a 6-month deadline on the Romanian Ministry of Finance to pay Petitioners their share of the Award plus interest and other costs. *Id.* at ¶ 17. On October 31, 2014, after this deadline had passed, the executor issued orders to seize the accounts of the Ministry of Finance and seek execution of Petitioners' share of the Award. *Id.* On January 5, 2015, the executor seized RON 36,484,232 from Romania's Ministry of Finance, transferred RON 34,004,232 in equal parts to three of the four Petitioners and kept the remainder as compensation for execution costs. *Id.* at ¶ 18. From February 5-25, 2015, the executor seized an additional RON 9,197,482 from the Ministry of Finance, of which RON 9,096,459 has been distributed in equal parts to three of the four Petitioners. *Id.*

As a result of the Decision of the European Commission of March 30, 2015 on State Aid SA. 38517 (2014/C) (ex 2014/NN) (ECF No. 52-5), which ordered Romania to identify and recover funds paid to the Claimants as illegal state aid, Romania initiated recovery proceedings against Claimants for the total amount of RON 403,431,334 (RON 383,174,579 as principal and RON 20,356,755 as interest). ECF No. 52-5; Popa Decl. ¶ 20. Pursuant to these efforts,

between June 15, 2015 and July 23, 2015, Romania recovered the amount of RON 3,327,894. Popa Decl. ¶ 20.

Thus, in total, Claimants have only received RON 43,100,691 in partial satisfaction of the Award, or RON 39,772,797 when corrected to account for funds received by Romania from Claimants in separate recovery proceedings. *Id.* at ¶ 21. And as stated in his Declaration, Claimant and Intervenor Mr. Viorel Micula has received no payments in satisfaction of the Award. Declaration of Viorel Micula (January 31, 2016), ¶¶ 9-15.

The Romanian Prime Minister, Victor Ponta, has also expressed that Romania has no intention to pay the Award. Mr. Ponta stated with regard to Claimants' action: "On the one hand, the Romanian state must pay some money, on the other hand, it does not have to pay, under European law, and we try to save that money for Romania." *See* Romanian Government Website, Prime Minister Victor Ponta met with the President of the European Commission, Jean-Claude Juncker, dated 28 April 2015, Popa Decl. Ex. Y.

D. Proceedings In New York

On April 21, 2015, Petitioners applied for recognition of the Award under Article 54 of the ICSID Convention, 22 U.S.C. § 1650a(a), and New York CPLR 54. The Award was recognized and Judgement was entered accordingly. ECF No. 3. On April 27, 2015, Claimant and Intervenor Viorel Micula moved to intervene and amend the April 21, 2015 judgment. ECF No. 9. On April 28, 2015, the Court entered an amended judgment (the Judgment) and order directing Romania to pay Claimants in accordance with the pecuniary obligations entered in the Award. ECF No. 13.

On August 5, 2015, this Court denied Romania's amended motion to vacate the Judgment and/or enter a stay. ECF No. 66. On September 3, 2015, the Court also granted Claimants'

motion for a finding, pursuant to 28 U.S.C. §1610(c), that a "reasonable period of time had elapsed," following the entry of judgment such that Claimants could begin to pursue attachment and execution of Romanian assets located in New York. ECF No. 70. In an order entered September 9, 2015, this Court denied Romania's motion for reconsideration. ECF No. 82.

On October 2, 2015, Romania appealed the Judgment, the decision on the motion to vacate the Judgment, and the decision on Romania's motion for reconsideration. On November 3, 2015, Claimants moved to dismiss the appeal for lack of timeliness. On December 22, 2015, the Second Circuit Court of Appeals granted Claimants' motion in part as to the Judgment, but denied the motion with respect to Romania's appeal of the August 5 and September 9, 2015 decisions.

Romania has not made any payments toward the Judgment since it was entered.

ARGUMENT

I. Legal Standard

The satisfaction of a judgment requires "the *complete* discharge of obligations under a judgment." Black's Law Dictionary 1544 (10th Ed.) (emphasis added). "Generally, the only way a money judgment can be satisfied is by payment in money, unless the parties agree otherwise." 47 Am. Jur. 2d Judgments § 816 (2010). Under New York law,[2] a judgment is satisfied only upon full payment of the judgment. *See Cent. Radiology Servs., P.C. v. Mercury Cas. Co.*, 20 Misc. 3d 132(A), 867 N.Y.S.2d 373 (2d Dep't 2008) ("CPLR 5021 (a) (2) [which governs the entry of satisfaction] does not authorize the courts to deem a money judgment satisfied upon anything other than full payment of the judgment."). Payment of less than the full amount owed

[2] New York law is applicable in this instance under Federal Rule of Civil Procedure 69, which states that "[t]he procedure on execution [of a money judgment]—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located[.]"

under a judgment does not result in satisfaction of the judgment. *See Felix v. Herby Realty Corp.*, 287 A.D.2d 683, 684 (2d Dep't. 2001) (denying defendants' motion for judgment satisfaction where plaintiff demonstrated conclusively that defendants' tendered payment did not satisfy all outstanding interest on the judgment); *Barclay's Bank of New York v. Traina*, 184 Misc. 2d 577, 710 N.Y.S.2d 512 (2d Dep't. 2000) (reversing satisfaction order because a portion of the judgment remained outstanding). In addition, courts will not order an execution of a satisfaction of judgment where a question of fact was presented as to whether the judgment was fully paid. *See Walker Discount Corp. v. Valley Banquet Hall, Inc.,* 35 Misc. 2d 697, 698, 231 N.Y.S.2d 88, 90 (N.Y. Sup. Ct. 1962).

Here, Romania has not met its burden to show that it has satisfied the Judgment. The standard here cannot be clearer: anything less than proof of full payment constitutes a failure to satisfy the Judgment. Accordingly, Romania's motion should be denied.

II. Romania Has Not Satisfied The Judgment

Romania alleges that three separate measures have led to complete satisfaction of the Award and Judgment. First, it alleges that by setting off tax debts against one of the Claimants, Romania satisfied its obligations under the Award to all Claimants. Second, it alleges that by transferring funds into a legislatively-created Treasury account in the name of Claimants, it satisfied the Award, even though Claimants never in fact received or even had access to this money. Finally, Romania points to certain forced executions of the accounts of the Romanian Ministry of Finance, which resulted in the distribution of funds to three of the Claimants and satisfied only a small fraction of the Award. As explained further below, the first two of these measures was invalid and the last measure did not lead to complete satisfaction of the Award or Judgment.

A. The Tax Setoff Against S.C. European Food S.A. Did Not Satisfy The Award

Romania's attempt—through NAFA—to setoff the Award against taxes owed by one of the Claimants, S.C. European Food, S.A., was ineffective and does not constitute payment of the Award.[3] Romania cites to no authority in this jurisdiction in support of its assertion that a setoff of this nature constitutes payment of a judgment and argues instead that, as a matter of Romanian law, the setoff is valid. Rom. Mtn. at 4-7. Noticeably absent from Romania's argument, however, is the fact that on May 11, 2015—more than seven months before Romania filed the present motion—the Romanian Oradea Court of Appeal *struck down* NAFA's attempt to satisfy the Award via a tax setoff.

Indeed, although Romania does not allude to this in its reference to the discussion of the setoff in the ongoing ICSID annulment proceedings, this outcome was *conceded* by Romania's counsel at the proceedings: "Now, the four Claimants involved then appealed this [tax setoff] decision of the issuing authority to their regional appellate court in Romania. *It found in their favour* . . . . The administration has now appealed that decision to the next court, and the decision on that case is pending." Hearing on the Annulment in the Matter for Arbitration of ICSID, Case No. ARB/05/20, Sept. 22, 2015 transcript at 68:25 – 69:5 (attached as Exhibit B to Romania's motion) (emphasis added).

The Oradea Court of Appeal had two grounds for its annulment of the setoff. First, it held that the specific provisions invoked by Romania as the basis for the setoff (the same

[3] Romania relies heavily on the legal opinion of Professor Radu Bufan to support its erroneous arguments that the tax setoff and transfer of payment into a specially created Treasury account satisfy Claimants' Judgment. Professor Bufan's credibility, however, is called into question by his prior involvement with this matter. In 2008, Professor Bufan's consulting firm was hired by S.C. Transylvania General Import Export S.R.L. (TGIE) to provide support to the Claimants in the underlying arbitration in this very matter, ICSID Case No. ARB/05/20. Popa Decl. Ex. V (Contract with Ioan Micula). In 2009, Professor Bufan drafted a legal opinion for TGIE regarding the matter. Popa Decl. Ex. W (Bufan opinion). That Professor Bufan would now submit a legal opinion for Romania, without making any mention of his prior work for the opposing party shows that he is conflicted and seriously undermines his credibility.

provisions cited by Romania here) were inapplicable. Oradea Court Decision, Popa Decl. Ex. F. The court explained that the relevant law provided for setoffs of *fiscal liabilities* to the state budget and taxpayers, but not here, where Romania was attempting to setoff a *civil liability* resulting from an arbitral award. *Id.* Second, the court held the setoff was "illegal" because it was made with respect to only one of the Claimants, while the Award obligates Romania to pay all of the Claimants. *Id.* That court's decision is binding on Romania.

The only mention in any of Romania's papers[4] that the tax setoff was invalidated by a Romanian court is by Professor Radu Bufan in his "legal opinion," in which he states in a conclusory fashion that the May 11, 2015 decision striking down the tax setoff is not binding because it is not a final and irrevocable judgment. *See* Legal Opinion of Professor Radu Bufan at ¶ 45 (ECF No. 100-1). Mr. Bufan's cursory dismissal of the decision as non-binding is incorrect. First, under Romanian law, the rule suspending the enforcement of a judgment on the basis of a pending appeal applies only to decisions that may be subject to forced execution. Popa Decl. ¶ 12. The Romanian court's decision dealt with a recognition of a right—Romania's right to satisfy the Award by offsetting it against taxes owed by one Claimant—and was not a judgment that could lead to a forced execution. *Id.* at ¶ 13. The court's ruling invalidating the setoff stands until and unless it is rejected on appeal.[5] Second, the fact remains that the only court to have heard and decided the issue at this point has ruled in Claimants' favor against the validity of the setoff. Finally, by arguing that Romania's appeal of the adverse tax setoff decision somehow creates uncertainty regarding the status of the tax setoff merely proves Claimants' point: the tax

[4] Notably, the affidavit submitted by Atilla György in support of Romania's motion is void of any reference to the tax setoff decision being struck down by a Romanian appellate court. *See* György Aff. (ECF No. 101).

[5] Indeed, that is how the law of this jurisdiction would treat a decision that is still subject to appeal. *See In re Enron Corp.*, No. 04 CIV. 4494 (BSJ), 2005 WL 887252, at *2 (S.D.N.Y. Apr. 15, 2005) ("As a general principle, an order or judgment in federal court is binding . . . even when an appeal from that judgment is pending.").

setoff decision cannot be relied upon by Romania in these proceedings to argue that the Award has already been satisfied.

Given the Romanian appellate court's rejection of the setoff, it makes no sense for Romania to rely on the setoff as a basis for arguing that it has already satisfied the Award.

B. Romania's Deposit Of Funds Into A Blocked Treasury Account Did Not Satisfy The Award

Romania's argument that the Award has been "satisfied" through the Romanian Ministry of Public Finance's creation of a legislatively authorized Treasury account cannot be taken seriously. Romania argues that, because it previously placed funds into the account for the benefit of Claimants (and the legislation authorizing the deposit of funds into that account (Law Number 20/2015), was found to be constitutional), the Award should be considered "satisfied" as of the date of the funds transfer, *despite the fact that Claimants never received or even had access to these funds*. Rom. Mtn. at 7-9. Indeed, Romania readily admits that it froze access to those funds "[i]mmediately after the transfer" and that the funds were then reclaimed by Romania without ever being made available to Claimants. Rom. Mtn. at 8. Yet Romania states that the transfer "constitutes partial *satisfaction* of the Award, even if Petitioners did not receive the funds." *Id.* (emphasis added). Merely labeling these actions as "satisfaction" does not make it so. Rather than *satisfying* the Award, Romania's actions to date—as set forth in its motion—make it clear that Romania is affirmatively *ignoring* its obligations under the Award.[6]

Romania's argument that a subsequent decision by the Romanian Constitutional Court confirmed the legitimacy of Romania's Treasury account transfers under Law Number 20/2015—such that they constituted a "legal and viable" method of satisfying Romania's

[6] Incredibly, while recognizing that Claimants did not receive any funds as a result of this "transfer," Rom. Mtn. at 8, Romania proceeds to argue that if comity is not given to these actions, Claimants would be allowed to "recover *twice* for the Award," Rom. Mtn. at 10 (emphasis added). Yet Claimants have not even recovered once.

obligations under the Award—is misguided and incorrect. Rom. Mtn. at 7-9. The only effect of the Constitutional Court decision was to reject the challenge to the constitutionality of Law Number 20/2015. Popa Decl. ¶¶ 27-29; *see also* Rom. Mtn. at 8 ("Thus, the March 2015 Transfer was made in a constitutional manner."). Its ruling on the constitutionality of the legislation has no bearing on the separate issue of whether the Award had been satisfied. The Constitutional Court decision therefore carries no weight because that decision did not—and indeed, could not—alter the conclusion that Romania did not actually pay Claimants any portion of the Award through the Treasury account mechanism.

Lending credence to Romania's interpretation of the Constitutional Court decision would require the Court to find that a payment in satisfaction of the Judgment has been made when, in fact, *no payments had been made at all*. Such a finding would violate the requirements for judgment satisfaction. Absent actual payment, a judgment cannot be deemed satisfied. *See MacKenzie v. MacKenzie*, 841 N.Y.S.2d 433, 436 (N.Y. Sup. Ct. 2007) (finding that, where defendants never delivered the amount of judgment to plaintiffs, judgment was not satisfied as "[a] valid tender requires not only readiness and ability to perform, but actual production of the thing to be delivered") (internal citations omitted). Thus, the Court should reject Romania's argument that it satisfied the Award as a result of the Treasury account transfers and the subsequent decision by the Constitutional Court upholding the constitutionality of the legislation enabling the creation and use of the Treasury account.

C. Claimants Have Received Only Limited Payments In Partial Satisfaction Of The Award

Though Romania attempts to minimize this fact, the only events that have led to actual recovery on the Award are the forced executions on the accounts of the Romanian Ministry of Finance, in which a court-appointed executor distributed RON 43,100,691 to certain, but not all,

of the Claimants. That amount represents a tiny fraction of the RON 376,433,229 plus interest granted to Claimants under the Award. Further, these amounts must be reduced by the amounts that *Romania* has received from Claimants as a result of recovery proceedings undertaken pursuant to the March 30, 2015 Decision of the European Commission on State Aid, which ordered Romania to reclaim funds already paid out in satisfaction of the Award. Popa Decl. ¶¶ 20-21; *see also* ECF No. 52-5. Thus, it is abundantly clear that the distributions received by some Claimants are not enough to satisfy the Award.

III. Principles Of Comity Do Not Require Recognition Of The Purported Satisfaction Of The Judgment

Romania contends that notions of comity compel this Court to determine that Romania has satisfied its obligations under the Award primarily based on (i) a setoff against one of the Claimants' tax debts, and (ii) the creation of a legislatively authorized Treasury account. *See* Rom. Mtn. at 9. "International comity is 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience.'" *Royal & Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)). However, "[i]n addition to its imprecise application, even where the doctrine clearly applies it is not an imperative obligation of courts but rather is a *discretionary* rule of practice, convenience, and expediency." *Id.* (internal citation and quotation marks omitted) (emphasis added).

As an initial matter, international comity requires that the foreign proceeding is in fact *parallel* to the pending proceeding. *Royal & Sun Alliance*, 466 F.3d at 94 ("For two actions to be considered parallel [for abstention purposes], the parties in the actions need not be the same, but they must be substantially the same, litigating substantially the same issue in both actions.").

Even if the foreign proceedings are parallel, a court is not required to defer to the foreign proceedings unless the court determines that "exceptional circumstances are present." *See Klonis v. Nat'l Bank of Greece, S.A.*, 487 F. Supp. 2d 351, 355 (S.D.N.Y. 2006) (Castel, J.) (stating that "[t]o date, the Second Circuit has recognized only one context in which exceptional circumstances are generally present: cases in district courts that are parallel to pending foreign bankruptcy proceedings"). To determine whether "exceptional circumstances" justify abstention under comity, the court will consider the "totality of the circumstances," which consists of an evaluation of "various factors, such as the similarity of the parties, the similarity of the issues, the order in which the actions were filed, the adequacy of the alternate forum, the potential prejudice to either party, the convenience of the parties, the connection between the litigation and the United States, and the connection between the litigation and the foreign jurisdiction." *Royal & Sun Alliance*, 466 F.3d at 92, 94; *see also Ace Arts, LLC v. Sony/ATV Music Pub., LLC*, 56 F. Supp. 3d 436, 444-45 (S.D.N.Y. 2014) (Nathan, J.).

Romania bears the burden of proving that comity is appropriate under the circumstances. *See Allstate Life Ins. Co. v. Linter Grp., Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993) (explaining that "since comity is an affirmative defense, the [defendants] carried the burden of proving that comity was appropriate."). Here, Romania has failed to meet its burden because the Romanian tax setoff proceedings have been invalidated *in Romania* and, in any event, consideration of the totality of the circumstances does not provide any "exceptional circumstances" to justify comity, but rather leads to no other conclusion than that Romania has failed to satisfy—and in fact has actively avoided—its obligations under the Award.

A. Consideration Of The Romanian Tax Setoff Proceedings Only Confirms That Romania Has Failed To Satisfy The Award

Noticeably absent from Romania's motion are any allegations that the Romanian tax setoff proceedings are sufficiently parallel to the present proceedings to raise comity concerns—a threshold issue which Romania bears the burden of establishing. *See Klonis*, 487 F. Supp. 2d at 355 ("Defendant has failed to carry its burden under *Royal & Sun Alliance* to demonstrate that either a dismissal or a stay is warranted in favor of the [foreign] action. First, as a threshold matter, it is not clear that the [foreign] action and this action are completely 'parallel proceedings.'").

In any event, even if Romania could show that the tax setoff proceedings are sufficiently parallel to these enforcement proceedings, the setoff proceedings actually support Claimants' position that the purported tax setoff is invalid and cannot be relied upon by Romania to satisfy the Award. Thus, Romania is in effect making an *anti-comity* argument when it asks this Court to ignore the Romania appellate court's decision striking down the tax setoff as an improper attempt to satisfy the Award under Romanian law. Romania's motion fails to address this contradiction because it pretends it does not exist. Indeed, the decision invalidating the tax setoff is completely absent from Romania's motion. Romania, however, is not entitled to its own set of facts, and the facts before this Court make it clear that the purported tax setoff should be given no credibility in determining whether Romania has satisfied the Award.

B. The Creation Of A Treasury Account Under Romanian Law Has No Bearing On Whether Romania Has Satisfied The Award In Fact

Romania fails to allege any "exceptional circumstances" that would require this Court to hold that the Treasury account proceedings somehow satisfy Romania's obligations under the Award. The only exceptional circumstance related to those proceedings is the fact that the Claimants—for whom the account was created—were never given access to those funds. The

weakness of Romania's comity arguments is apparent when considered in light of the *Royal & Sun Alliance* factors.

First, the foreign proceedings identified by Romania are clearly inadequate for Claimants to obtain satisfaction of the Award—Romania *concedes* that Claimants have not and will not receive any of the funds that were previously transferred into the Treasury account to "satisfy" the Award.

Second, the potential prejudice to Claimants is absolute—they will be unable to collect funds from Romania in satisfaction of an award issued by an ICSID Tribunal after an eight-year arbitration proceeding in which Romania was an active participant.

Third, the connection between this litigation and the United States is substantial. Pursuant to the United States' obligations under ICSID, U.S. courts have an independent obligation to ensure the proper recognition and enforcement of ICSID awards in accordance with the laws of this jurisdiction. *See* 22 U.S.C. § 1650a ("The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.").[7] This Court has already recognized that "[a]s a party to the ICSID Convention, the United States has a compelling interest in fulfilling its obligations under Article 54 to recognize and enforce ICSID awards *regardless of the actions of another state*." Opinion and Order, dated Aug. 5, 2015 (ECF No. 66) (emphasis added).

Romania thus has not met its burden of establishing that "exceptional circumstances" exist that require this Court to defer to Romanian proceedings that have clearly left Claimants

[7] This obligation stems directly from Article 54 of the ICSID Convention, to which the United States is a signatory, which states that "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and *enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State*." (emphasis added).

without any chance of realizing satisfaction of the Award.

IV. The Act Of State Doctrine Does Not Require Recognition Of The Satisfaction Of The Judgment

The Supreme Court has made it clear that "Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990). The "act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *Id.* at 410. Indeed, "[a]ct of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *Id.* at 406. Furthermore, the Second Circuit has elaborated that "the function of the court in applying the act of state doctrine is to 'weigh in balance the foreign policy interests that favor or disfavor [its] application.'" *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 452 (2d Cir. 2000) (citing *Republic of the Philippines v. Marcos*, 806 F.2d 344, 359 (2d Cir. 1986)). Importantly, "the act of state doctrine should not be invoked if the policies underlying the doctrine do not justify its application." *Id.* (citing *Kirkpatrick*, 493 U.S. at 706); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 224 (2d Cir. 1985)). Further, "the burden of proof rests on defendants to justify application of the act of state doctrine." *Bigio*, 239 F.3d at 453. Here, Romania has failed to meet its burden of demonstrating that this Court *must decide* the effect of the relevant purported "state acts" by Romania in order to decide the present motion.[8]

[8] Congress has made it clear that under the Federal Arbitration Act ("FAA") the "[e]nforcement of arbitral agreements, confirmation of arbitral awards, and *execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine*." 9 U.S.C. § 15 (emphasis added). Although the current proceedings relate to the confirmation and enforcement of an ICSID award, Congress has recognized that ICSID award confirmation and enforcement proceedings should be subject to *fewer challenges* than similar proceedings under the FAA. *See Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venez.*, No. 14 Civ. 8163, 2015

A. The Purported Tax Setoff Is Not A "State Act"

As discussed in detail above, *see supra* Part III.A, the purported tax setoff upon which Romania heavily relies has been struck down by a Romanian appellate court. Despite the fact that Romania is currently appealing that decision, the current status of the setoff *in Romania* is that it is invalid. Professor Bufan's attempt to argue that under Romanian law the setoff "is currently in full force and effect" because the appellate court decision striking down the setoff "*is not a final and irrevocable judgment*" (Legal Opinion of Professor Radu Bufan at ¶ 45) (emphasis added), merely proves that there is no "final and irrevocable judgment" in Romania. Thus, there is no "state act," the validity of which requires this Court to afford deference under the act of state doctrine. Holding otherwise would constitute "expansion of the act of state doctrine . . . into new and unchartered fields." *Kirkpatrick*, 493 U.S. at 409.

Moreover, Romania fails to put forward any argument as to how the balance of foreign policy interests favor this Court giving deference to a "state act" that has since been invalidated by a Romanian appellate court. Nor could it, as the "policies underlying the [act of state] doctrine do not justify its application" with respect to the purported tax setoff. *Bigio*, 239 F.3d at 452. In considering foreign policy interests, the Supreme Court has stated that "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." *Sabbatino*, 376 U.S. at 428. Romania's motion neither discloses that the tax setoff was invalidated more than eight months ago by a Romanian appellate court nor does it articulate the important foreign relation implications present that require this

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WL 631409, at *22 (S.D.N.Y. Feb. 13, 2015) ("Congress's use of the term 'full faith and credit' in the ICSID enabling statute, and § 1650a's proviso that the FAA's enforcement procedures were *not* to apply to ICSID awards, reveals that it . . . intended that an ICSID award be automatically recognized, not subject to contested litigation.") (emphasis in original).

Court to defer to a tax setoff decision that has been ruled invalid in Romania. As such, the justification for deferring to the Romanian tax setoff is not merely weak, it is nonexistent.

B. The Constitutionality Of The "Treasury Account" Is Not At Issue In This Proceeding

The legislative creation of a Treasury account (and the subsequent finding by the Constitutional Court of Romania that the legislative action was constitutional) may very well be considered "state acts." Those acts, however, are not relevant to this Court's determination of judgment satisfaction because they did not result in the payment of funds to Claimants. *Kirkpatrick*, 493 U.S. at 406 ("Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign.").

In the Romanian Constitutional Court proceedings, the issue with respect to the Treasury account was not whether any monies were paid to the Claimants, but whether the creation of the Treasury account was constitutional under Romanian law. The only issue raised by the present motion is whether Romania has satisfied the Award. Romania readily *admits* that Claimants "did not receive the funds" that were transferred into the Treasury account on March 9, 2015. *See* Rom. Mtn. at 7-8. Indeed, at no point in time were Claimants able to access the funds that were deposited into the Treasury account because the funds were immediately frozen upon transfer and reclaimed by Romania once the European Commission issued a ruling that satisfying the Award would constitute impermissible state aid. *See id.* Thus, Romania's *actual* argument is a non-sequitur: the order by the European Commission to not satisfy the Award has, in fact, satisfied the Award. Romania cannot, in order to avoid fulfilling its obligations under the

Award, hide behind the purported state actions that, by Romania's own admissions, resulted in no payments to Claimants.[9]

Other factors do not support the application of the act of state doctrine. Romania wholly ignores the responsibility of U.S. courts to ensure that the United States fulfills its independent obligation to recognize and enforce ICSID awards. Additionally, Romania has not articulated how this Court "would embarrass or hinder the executive in the realm of foreign relations" if it rejects Romania's argument that the Treasury account transfer—which was never received by Claimants—satisfied Romania's obligations under the Award. *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520-21 (2d Cir. 1985) (citing *Sabbatino*, 376 U.S. at 427-28).

Rather than attempt to demonstrate how actual state actions by Romania weigh in favor of applying the act of state doctrine in these proceedings—which is Romania's burden—Romania instead provides incomplete descriptions of alleged state actions that have resulted in the recovery of no funds by Claimants. Adding insult to injury, Romania then argues that because it has determined that it is not allowed to satisfy the Award, this Court should defer to that determination and find that the Award has been satisfied. Rightly are the obstinate so called. For these reasons, Romania's conclusory act of state arguments should be given no weight.

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[9] Notably, the ad hoc committee considering Romania's annulment application set forth a very straightforward standard for full payment of the Award when it established the conditions for a stay of enforcement (which Romania refused to meet). The Committee required, among other things, for

> *Romania [to] commit[] itself subject to no condition whatsoever (including those related to EC Law or decisions) to effect the full payment of its pecuniary obligation imposed by the Award in ICSID Case No. ARB/05/20—and owed to Claimants—to the extent that the Award is not annulled—following notification of annulment.*

Decision on Applicant's Request for Continued Stay of Enforcement of the Award, ICSID Case No. ARB/05/20 (August 7, 2014), Popa Decl. Ex. C.

CONCLUSION

Romania has not satisfied the Judgment, because it has not in fact paid Claimants what they are owed. Accordingly, Romania's Motion for an Order of Satisfaction of Judgment should be denied.

Dated: New York, New York
February 1, 2016

Respectfully submitted,

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