Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 1 July 2021 [1]

Case C-638/19 P

European Commission
v
European Food SA,
Starmill SRL,
Multipack SRL,
Scandic Distilleries SA,
Ioan Micula,
Viorel Micula,
European Drinks SA,
Rieni Drinks SA,
Transilvania General Import-Export SRL,

West Leasing SRL, formerly West Leasing International SRL

(Appeal – State aid – Arbitration – Aid resulting from the payment of compensation awarded to certain economic operators by an arbitral tribunal – Bilateral investment treaty – Application of European Union law)

I. Introduction

1. The tumultuous encounter between EU law and investment arbitration law has raised numerous questions which the judgment in *Achmea* [2] will not have sufficed to eliminate. The present case, symbolic of that conflictual relationship, therefore provides the Court with a welcome opportunity to clarify further, by recalling the reasoning underlying that judgment, the principles governing the question of the compatibility with EU law of arbitration proceedings based on bilateral investment treaties concluded between two Member States, in the particular context of arbitration proceedings initiated on the basis of a bilateral investment treaty concluded between two Member States before the accession to the European Union of the State party to the arbitration.

[1] Original language: French.

[2] Judgment of 6 March 2018 (C-284/16, EU:C:2018:158, 'the judgment in *Achmea*').

2. Situated at the junction between investment arbitration and the law on State aid, this case is also an opportunity to examine the question of the extent of the European Commission's competence under Articles 107 and 108 TFEU in such a context.

3. By its appeal, the Commission requests the Court to set aside the judgment of the General Court of the European Union of 18 June 2019, *European Food SA and Others* v *Commission* (T-624/15, T-694/15 and T-704/15, 'the judgment under appeal', EU:T:2019:423), whereby the General Court annulled Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award *Micula* v *Romania* of 11 December 2013 (OJ 2015 L 232, p. 43, 'the decision at issue').

II. Legal framework

A. The ICSID Convention

4. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, concluded on 18 March 1965 ('the ICSID Convention'), which entered into force with respect to Romania on 12 October 1975, provides in Article 53(1):

'The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award …'

5. Article 54(1) of the ICSID Convention provides:

'Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State …'

B. The 1995 Agreement

6. The Europe Agreement establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part[3] ('the 1995 Agreement'), which entered into force on 1 February 1995, provided, in Article 64(1) and (2):

'1. The following are incompatible with the proper functioning of this Agreement, in so far as they may affect trade between the Community and Romania:

[…]

(iii) any public aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

2. Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles [101, 102 and 107 TFEU].'

[3] OJ 1994 L 357, p. 2.

7. Under Articles 69 and 71 of the 1995 Agreement, Romania was required to align its national legislation with the *acquis communautaire*.

C. The BIT

8. The bilateral investment treaty concluded on 29 May 2002 between the Swedish Government and the Romanian Government on the Promotion and Reciprocal Protection of Investments ('the BIT') entered into force on 1 July 2003 and provides, in Article 2(3):

'Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair, by means of arbitrary or discriminatory measures, the administration, management, maintenance, use, enjoyment or disposal thereof by those investors.'

9. Article 7 of the BIT provides that any dispute between investors and the Contracting Parties is to be settled, inter alia, by an arbitral tribunal under the auspices of the ICSID Convention.

D. The Accession Treaty and the Act of Accession

10. Under the Treaty on the accession of the Republic of Bulgaria and Romania to the European Union,[4] signed on 25 April 2005, Romania acceded to the European Union with effect from 1 January 2007.

11. Article 2 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded[5] ('the Act of Accession') states:

'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions … before accession shall be binding on … Romania and shall apply in [that State] under the conditions laid down in those Treaties and in this Act.'

12. Chapter 2 of Annex V to the Act of Accession, entitled 'Competition policy', contains the following provisions:

'1. The following aid schemes and individual aid put into effect in a new Member State before the date of accession and still applicable after that date shall be regarded upon accession as existing aid within the meaning of Article [108](1) [TFEU]:

(a) aid measures put into effect before 10 December 1994;

(b) aid measures listed in the Appendix to this Annex;

[4] Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union (OJ 2005 L 157, p. 11).

[5] OJ 2005 L 157, p. 203.

(c) aid measures which prior to the date of accession were assessed by the State aid monitoring authority of the new Member State and found to be compatible with the acquis, and to which the Commission did not raise an objection on the ground of serious doubts as to the compatibility of the measure with the [internal] market, pursuant to the procedure set out in paragraph 2.

All measures still applicable after the date of accession which constitute State aid and which do not fulfil the conditions set out above shall be considered as new aid upon accession for the purpose of the application of Article [108](3) [TFEU].

[…]

5. With regard to Romania, paragraph 1(c) shall only apply to aid measures assessed by the Romanian State aid monitoring authority after such date, decided upon by the Commission on the basis of continuous monitoring of the commitments undertaken by Romania in the context of the accession negotiations, that Romania's State aid enforcement record in the period prior to accession has reached a satisfactory level. Such a satisfactory level shall only be considered to have been reached once Romania has demonstrated the consistent application of full and proper State aid control in relation to all aid measures granted in Romania, including the adoption and the implementation of fully and correctly reasoned decisions by the Romanian State aid monitoring authority containing an accurate assessment of the State aid nature of each measure and a correct application of the compatibility criteria.

The Commission may object, on the ground of serious doubts as to the compatibility with the [internal] market, to any aid measure granted in the pre-accession period between 1 September 2004 and the date fixed in the above Commission decision finding that the enforcement record has reached a satisfactory level. Such a Commission decision to object to a measure shall be regarded as a decision to initiate the formal investigation procedure within the meaning of Regulation (EC) No 659/1999.[6] If such a decision is taken before the date of accession, the decision will only come into effect upon the date of accession.

Where the Commission adopts a negative decision following the initiation of the formal investigation procedure, the Commission shall decide that Romania shall take all necessary measures to effectively recover the aid from the beneficiary. The aid to be recovered shall include interest at an appropriate rate determined in accordance with Regulation (EC) No 794/2004[7] and payable from the same date.'

III. The background to the dispute and the decision at issue

13. The background to the dispute was set out in paragraphs 1 to 42 of the judgment under appeal and, for the purposes of these proceedings, may be summarised as follows.

14. On 2 October 1998, the Romanian authorities adopted Emergency Government Ordinance No 24/98 ('EGO 24'), granting certain investors in disadvantaged zones who had obtained permanent investor certificates a series of incentives, including, inter alia, facilities such as exemption from customs duties and value added tax for machinery, reimbursement of customs duties for raw materials and exemption from the payment of profit tax for as long as the relevant area was considered to be a disadvantaged zone.

[6] Council Regulation of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1)

[7] Commission Regulation of 21 April 2004 implementing Regulation No 659/1999 (OJ 2004 L 140, p. 1).

15. By decision of 25 March 1999, effective from 1 April 1999, the Romanian Government declared the mining area of Ştei-Nucet, Bihor County (Romania), to be a disadvantaged zone for 10 years.

16. In order to comply with its harmonisation obligation under the 1995 Agreement, Romania adopted, in 1999, Law No 143/1999 on State aid, which entered into force on 1 January 2000. That law, which included the same definition of State aid as that contained in Article 64 of the 1995 Agreement and in the present Article 107 TFEU, designated the Consiliul Concurenței (Competition Council, Romania) as the national State aid surveillance authority competent for assessing the compatibility of the State aid granted by Romania to undertakings.

17. On 15 May 2000, the Competition Council adopted Decision No 244/2000, by which it found that several of the incentives offered under EGO 24 had to be regarded as State aid and had to be revoked.

18. On 1 July 2000, Emergency Government Ordinance No 75/2000 amended EGO 24 (together 'the EGO').

19. Before the Curtea de Apel Bucureşti (Court of Appeal, Bucharest, Romania), the Competition Council disputed that, in spite of the adoption of Emergency Government Ordinance No 75/2000, its Decision No 244/2000 had not been implemented. That action was dismissed by decision of 26 January 2001, which decision was confirmed by the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) by decision of 19 February 2002.

20. Mr Ioan Micula and Mr Viorel Micula, plaintiffs at first instance, are Swedish citizens residing in Romania and the majority shareholders of the European Food and Drinks Group, whose activities include the production of food and drink in the region of Ştei-Nucet, Bihor County (Romania). European Food SA, Starmill SRL, Multipack SRL, Scandic Distilleries SA, European Drinks SA, Rieni Drinks SA, Transilvania General Import-Export SRL and West Leasing SRL (formerly West Leasing International SRL), which were themselves plaintiffs at first instance, belong to European Food and Drinks Group.

21. On the basis of the permanent investor certificates, obtained on 1 June 2000 by European Food and on 17 May 2002 by Starmill and Multipack, those companies made investments in the mining area Ştei-Nucet.

22. In February 2000, Romania began accession talks with the European Union. In those negotiations, the European Union, in the common position of 21 November 2001, noted that there were in Romania 'a number of existing as well as new incompatible aid schemes which [had] not been brought into line with the *acquis*', including the 'facilities provided under [the EGO]'.

23. On 26 August 2004, stating that 'in order to meet the criteria in the Community rules on State aid, and also to complete the negotiations under Chapter No 6 – Competition Policy, it [was] necessary to eliminate all forms of State aid in national legislation incompatible with the *acquis communautaire* in this area', Romania repealed all the incentives provided under the EGO, except the profit tax facility. That revocation took effect on 22 February 2005.

24. On 1 January 2007, Romania acceded to the European Union.

25. On 28 July 2005, five of the applicants at first instance, namely Mr Ioan Macula, Mr Viorel Micula, European Food, Starmill and Multipack ('the arbitration applicants'), requested the establishment of an arbitral tribunal pursuant to Article 7 of the BIT, in order to obtain compensation for the damage resulting from the revocation of the EGO incentives.

26. By the arbitral award of 11 December 2013 ('the arbitral award'), the arbitral tribunal concluded that, by repealing the EGO incentives, Romania failed to ensure fair and equitable treatment of the investments and awarded the arbitration applicants compensation payable by Romania in the amount of Romanian lei (RON) 791 882 452 (approximately EUR 178 million).

27. On 31 January 2014, the Commission services informed the Romanian authorities that any implementation or execution of the arbitral award would constitute new aid and would have to be notified to the Commission.

28. On 20 February 2014, the Romanian authorities informed the Commission services that they had paid part of the compensation that the arbitral tribunal had awarded the arbitration applicants by offsetting against taxes owed to the Romanian authorities by European Food.

29. On 26 May 2014, the Commission adopted Decision C(2014) 3192, obliging Romania, pursuant to Article 11(1) of Regulation No 659/1999, immediately to suspend any action that might lead to the implementation or execution of the arbitral award, on the ground that such action appeared to constitute unlawful State aid, until the Commission had taken a final decision on the compatibility of that State aid with the internal market.

30. By letter dated 1 October 2014, the Commission informed Romania that it had decided to initiate the formal investigation procedure laid down in Article 108(2) TFEU in respect of the partial implementation of the arbitral award by Romania in early 2014 as well as in respect of any further implementation or execution of the arbitral award.

31. According to the Romanian authorities, the arbitral award has been fully implemented.

32. On 30 March 2015, the Commission adopted the decision at issue, in which it considered that the payment of the compensation awarded by the arbitral tribunal to the single economic unit comprising Mr Ioan Micula, Mr Viorel Micula, European Food, Starmill, Multipack, Scandic Distilleries, European Drinks, Rieni Drinks, Transilvania General Import-Export and West Leasing constituted State aid within the meaning of Article 107(1) TFEU and had to be recovered.

IV. The procedure before the General Court and the judgment under appeal

33. By applications lodged at the Registry of the General Court on 6, 30 and 28 November 2015 respectively, European Food, Starmill, Multipack and Scandic Distilleries, in Case T-624/15, Mr Ioan Micula, in Case T-694/15, and Mr Viorel Micula, and also European Drinks, Rieni Drinks, Transilvania General Import-Export and West Leasing, in Case T-704/15, each brought an action for annulment of the decision at issue. The Kingdom of Spain and Hungary were granted leave by the General Court to intervene in support of the form of order sought by the Commission. In application of Article 68 of its Rules of Procedure, the General Court joined the three cases for the purposes of the decision closing the proceedings.

34. In support of each of the actions at first instance, the applicants put forward eight pleas in law, some of which were divided into several parts.

35. By the judgment under appeal, the General Court upheld the first part of the second plea put forward in Cases T-624/15 and T-694/15, and the first part of the first plea put forward in Case T-704/15, all alleging lack of competence on the part of the Commission and inapplicability of EU law to a situation predating Romania's accession to the European Union. In that regard, the General Court held, in paragraphs 59 to 93 of that judgment, that, by adopting the decision at issue, the Commission had retroactively applied the powers which it held under Article 108 TFEU and Regulation No 659/1999 to events predating Romania's accession and that the Commission could not therefore classify the measure at issue as 'State aid' within the meaning of Article 107(1) TFEU.

36. The General Court also upheld the second part of the second plea put forward in Cases T-624/15 and T-694/15 and the first part of the second plea put forward in Case T-704/15, alleging an error in the classification of the arbitral award as an 'advantage' and 'aid' within the meaning of Article 107 TFEU. In that regard, the General Court held, in paragraphs 94 to 111 of the judgment under appeal, that the decision at issue was unlawful in so far as it classified as an 'advantage' and 'aid', within the meaning of that provision, the award by the arbitral tribunal of compensation intended to make good the damage resulting from the withdrawal of the tax incentives, at least in respect of the period predating the entry into force of EU law in Romania.

37. Consequently, the General Court annulled the decision at issue in its entirety, without examining the other parts of those pleas or the other pleas.

V. The procedure before the Court of Justice and the forms of order sought

38. By its appeal, the Commission, supported by the Republic of Poland, claims that the Court should:

– set aside the judgment under appeal;

– reject the first part of the first plea and the first part of the second plea put forward in Case T-704/15, and the first and second parts of the second plea put forward in Cases T-624/15 and T-694/15;

– refer Joined Cases T-624/15, T-694/15 and T-704/15 back to the General Court; and

– reserve the decision as to costs.

39. The Kingdom of Spain, in its response, claims that the Court should:

– allow the appeal, set aside the judgment under appeal and dismiss the action at first instance as inadmissible; and

– in the alternative, allow the appeal, set aside the judgment under appeal and dismiss the action at first instance as unfounded.

40. European Food, Starmill, Multipack and Scandic Distilleries, and also Mr Ioan Micula ('European Food and Others') contend that the Court should:

– dismiss the appeal;

– in the alternative, annul the decision at issue;

– further in the alternative, refer the cases back to the General Court; and

– order the Commission and the interveners to bear their own costs and to pay those incurred by European Food and Others in respect of the proceedings at first instance and those on appeal.

41. Mr Viorel Micula, European Drinks, Rieni Drinks, Transilvania General Import-Export and West Leasing ('Viorel Micula and Others') contend that the Court should:

– dismiss the appeal;

– in the alternative, uphold the second plea at first instance put forward in Case T-704/15 and, accordingly, annul the decision at issue;

– further in the alternative, refer the cases back to the General Court;

– order the Commission to bear its own costs and to pay those incurred by Viorel Micula and Others in respect of the proceedings at first instance and those on appeal; and

– order Hungary and the Kingdom of Spain to bear their own costs in respect of the proceedings at first instance and those on appeal.

42. By its cross-appeal, the Kingdom of Spain, supported by the Republic of Poland, claims that Court should:

– set aside the judgment under appeal;

– dismiss the action at first instance as inadmissible; and

– order European Food and Others and Viorel Micula and Others to pay the costs.

43. The Commission submits that the cross-appeal should be allowed.

44. European Food and Others and Viorel Micula and Others contend that the cross-appeal should be dismissed and that the Kingdom of Spain, the Commission and the interveners should be ordered to bear their own costs in respect of the cross-appeal and that the Kingdom of Spain should be ordered to pay the costs incurred by European Food and Others and by Viorel Micula and Others in the context of the cross-appeal.

45. The Commission, the Kingdom of Spain, the Republic of Poland, European Food and Others and Viorel Micula and Others submitted written observations to the Court concerning the appeal and the cross-appeal.

46. At the hearing on 20 April 2021, oral observations were submitted on behalf of the Commission, the Federal Republic of Germany, the Kingdom of Spain, the Republic of Latvia, the Republic of Poland, European Food and Others and Viorel Micula and Others.

VI. Analysis

47. I shall begin my analysis by examining the cross-appeal relating to the compatibility with EU law of arbitration proceedings based on an intra-EU BIT, which, should it be upheld, would render the action at first instance inadmissible. As I am of the view that the pleas put forward in support of the cross-appeal should be rejected, I shall continue my analysis by examining the main appeal, which deals with the question of the Commission's competence in the law on State aid in the context of the accession of a State to the European Union.

A. The cross-appeal

48. By its cross appeal, the Kingdom of Spain, supported in that respect by the Commission and the Republic of Poland in their written observations, claims that the arbitration proceedings at issue and the ensuing arbitral award breach the principle of mutual trust and the autonomy of EU law, according to principles established by the Court in the judgment in *Achmea*. In its submission, it follows that the applicants at first interest had no legitimate interest in bringing an action, since they seek to have the decision at issue annulled in order to have an arbitral award enforced, contrary to Article 19 TEU and Articles 267 and 344 TFEU.

1. The admissibility of the cross-appeal

49. European Food and Others and Viorel Micula and Others contend that the cross-appeal lodged by the Kingdom of Spain is inadmissible.

50. In the first place, they submit that the Kingdom of Spain does not have standing to participate in the procedure as a respondent to the appeal, within the meaning of Article 172 of the Court's Rules of Procedure, and could not therefore participate as a cross-appellant.

51. In that regard, I observe that European Food and Others and Viorel Micula and Others have already asked the Court, by letters of 17 March 2020, to exclude the Kingdom of Spain from the present procedure as a party, on the ground that it does not have an interest in the appeal being allowed or dismissed, within the meaning of Article 172 of the Rules of Procedure. By letter of 29 March 2020, the Court Registry, following the decision taken by the President of the Court of Justice, after hearing the Judge-Rapporteur and the Advocate General, informed the parties that their request had been rejected, on the ground, in essence, that, having been authorised, as a Member State, to intervene at first instance, under Article 40 of the Statute of the Court of Justice, the Kingdom of Spain automatically had an interest in the appeal being allowed or dismissed.

52. It follows from the Court's case-law that rejection by the General Court of the form of order presented to it suffices, for the party in question, to justify an interest in the appeal being allowed or dismissed.[8] Since the Kingdom of Spain claimed, before the General Court, that the action brought by the applicants at first instance should be dismissed, it necessarily has an interest in the appeal being allowed or dismissed, within the meaning of Article 172 of the Rules of Procedure.

53. Furthermore, in any event, the first paragraph of Article 40 and the third paragraph of Article 56 of the Statute of the Court of Justice confer on Member States the status of 'privileged applicants', relieving them of the need to show interest in order to bring an appeal – and therefore, a fortiori, a cross-appeal – before the courts of the European Union.[9]

54. In the second place, the parties concerned submit that, according to Article 178(3) of the Rules of Procedure, the cross-appeal is inadmissible in that (i) it merely repeats the same arguments as those set out by the Kingdom of Spain in the response to the main appeal or refers to reasoning developed in the context of that appeal and (ii) it seeks at the same time to extend the subject matter of the dispute.

55. It is true that the arguments set out by the Kingdom of Spain in the cross-appeal and in the response to the appeal are similar. I must emphasise, however, that, by the cross-appeal, the Kingdom of Spain is challenging the admissibility of the action brought before the General Court. According to the case-law of the Court of Justice, however, the Court of Justice is required, if need be of its own motion, to adjudicate on the pleas alleging that the action at first instance was inadmissible.[10]

56. Therefore, even on the assumption that there were some overlap between the Kingdom of Spain's response and the cross-appeal, the Court would be required to examine of its own motion the question of admissibility, since that question may be discussed if the argument put forward by that Member State, supported in that respect by the Commission, the Federal Republic of Germany, the Republic of Latvia and the Republic of Poland were to be upheld.

57. In those circumstances, I am of the view that it is necessary, in all the circumstances, to analyse the different arguments put forward in the context of the cross-appeal whereby the Kingdom of Spain seeks to demonstrate that the action at first instance was inadmissible.

2. The substance of the cross-appeal

58. The Kingdom of Spain puts forward three arguments in support of the ground of appeal alleging that the arbitration proceedings at issue are incompatible with EU law, which means that the action for annulment before the General Court was inadmissible.

[8] See judgment of 14 June 2018, *Makhlouf* v *Council* (C-458/17 P, not published, EU:C:2018:441, paragraph 32).

[9] Judgment of 21 December 2011, *France* v *Peoples' Mojahedin Organization of Iran* (C-27/09 P, EU:C:2011:853, paragraph 45). See also Wathelet, M., and Wildemeersch, J., *Contentieux européen*, Larcier, 2014, p. 488.

[10] See judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission* (C-654/17 P, EU:C:2019:634, paragraph 44).

59. I admit to having some doubts as to the impact of the incompatibility of the arbitration proceedings at issue on the interest of European Food and Others and Viorel Micula and Others in bringing an action and on the admissibility of the action before the General Court.[11] However, as I shall demonstrate, the argument alleging that the arbitral award is incompatible with EU law must be rejected, and there is thus no need to examine the question of its impact on the applicants' situation.

60. I shall begin the analysis of the cross-appeal by examining the first two arguments raised by the Kingdom of Spain, claiming, in essence, that the principles established by the Court in the judgment in *Achmea* should be applied to the arbitration proceedings at issue, their application having been made possible by Romania's accession to the European Union.

61. I shall continue that analysis by examining the last argument in the first ground of appeal in the cross-appeal, which sets aside the problem of intra-EU BITs and relates to the question of the compatibility with the EU legal order of a mechanism for the settlement of disputes between Member States and third States.

(a) The scope of the judgment in Achmea *in the case of arbitration proceedings initiated on the basis of a BIT concluded between two Member States before the accession to the European Union of the State party to the arbitration and pending at the time of its accession*

62. The Kingdom of Spain, the Commission, the Federal Republic of Germany, the Republic of Latvia and the Republic of Poland maintain that, in the light of the principles established by the Court in the judgment in *Achmea*, the arbitration proceedings at issue are incompatible with EU law.

63. In the first place, those parties maintain that the arbitration proceedings at issue must be regarded, as from the date of Romania's accession to the European Union, as an 'intra-EU' arbitration.

64. In the second place, the arbitral tribunal constituted on the basis of the BIT between the Kingdom of Sweden and Romania is required to interpret and apply EU law, and more particularly the 1995 Agreement. It follows from the judgment in *Achmea* that EU law precludes a dispute resolution mechanism provided for by a BIT concluded between two Member States and implying that an arbitral tribunal, which is outside the judicial system of the Union and not subject to review by a court of a Member State, be capable of interpreting and applying EU law.

65. In those parties' submission, the arbitration proceedings at issue therefore infringe, with effect from the date of Romania's accession to the European Union, Articles 267 and 344 TFEU.

[11] In particular, it is apparent from the decision at issue and from the judgment under appeal that the arbitral award was implemented and that the aid measure referred to in the decision at issue was paid to European Food and Others and to Viorel Micula and Others. In so far as the incompatibility of the arbitral award that has already been implemented does not seem to me to have, of itself, the effect of placing an obligation on the applicants to repay the compensation, the annulment of the decision at issue would necessarily have an impact on their situation, since that decision determines whether they may keep the payments made by Romania.

(1) The applicability ratione temporis *of the* Achmea *case-law*

66. I readily support the position of the Kingdom of Spain and of the Commission that EU law and, accordingly, the *Achmea* case-law have applied in Romania from the time of its accession. [12]

(i) The application of EU law with effect from accession

67. The fact that EU law has applied from the time of Romania's accession has, in my view, one definite consequence. Any arbitration proceedings initiated on the basis of a BIT between Romania and another Member State *after* Romania's accession to the European Union are incompatible with EU law. It follows from the principle of primacy of EU law that, with effect from that accession, the competence of an arbitral tribunal established on the basis of a BIT concluded between Romania and another Member State cannot be established and no arbitration proceedings can any longer be initiated on the basis of an intra-EU BIT. [13]

68. Such a solution seems to me to be debatable, however, in the case of arbitration proceedings initiated *before* Romania's accession to the European Union and still pending at the time of that accession; it is therefore necessary to analyse the extent to which the principles arising from the judgment in *Achmea* apply to those situations.

(ii) The immediate applicability of the principles established in the judgment in Achmea *to the future effects of a situation that arose before accession to the European Union*

69. In order to justify the application of the *Achmea* case-law to such situations, the Kingdom of Spain and the Commission rely on the principle of the immediate applicability of EU law to the future effects of a situation that arose before accession to the European Union. [14]

70. Such a principle cannot be called into question. [15] It is quite clear from the case-law that 'according to a generally accepted principle a law amending a legislative provision applies, save as otherwise provided, to the future effects of situations which arose under the previous law', [16] from which it also follows that EU law 'must be regarded as being immediately applicable and binding on [the Member State] from the date of its accession, with the result that it applies to the future effects of situations arising prior to that new Member State's accession'. [17]

71. In addition, it is true that the Court gives a broad interpretation to the concept of 'future effects of a situation which arose under a previous law'. [18] It has referred on several occasions to 'situations which arose before the new rules came into force but which are still subject to

[12] Article 2 of the Act of Accession. See also, on that point, Malferrari, L., 'Protection des investissements intra-UE post *Achmea* et post avis CETA: entre (faux) mythes et (dures) réalités', in Berramdane, A., and Trochu, M., *Union européenne et protection des investissements*, Bruylant, 2021, p. 63.

[13] See, on that point, my Opinion in *Komstroy* (C-741/19, EU:C:2021:164, point 69).

[14] See, in that regard, Kaleda, S.L., *Przejęcie prawa wspólnotowego przez nowe państwo członkowskie. Zagadnienia przejściowe i międzyczasowe*, Warsaw, 2003, pp. 127 to 192.

[15] See, on the relevance of the principle of the immediate applicability of EU law as interpreted by the Court of Justice, Blatière, L., *L'applicabilité temporelle du droit de l'Union européenne*, CREAM, 2018, pp. 152 to 167.

[16] Judgments of 15 February 1978, *Bauche and Delquignies* (96/77, EU:C:1978:26, paragraph 48), and of 7 February 2002, *Kauer* (C-28/00, EU:C:2002:82, paragraph 20). See also judgment of 26 March 2020, *Hungeod and Others* (C-496/18 and C-497/18, EU:C:2020:240, paragraph 94).

[17] Judgment of 2 October 1997, *Saldanha and MTS* (C-122/96, EU:C:1997:458, paragraph 14).

[18] For a detailed study of the broad concept of the situations pending before the Court, see Blatière, L., ibid., pp. 148 to 152.

change',[19] demonstrating a non-restrictive acceptance of what is covered by the words 'future effects'. The Court has also clearly accepted the immediate applicability of EU law to the question of the compatibility with EU law of compensation for harm caused before the accession of the Member State to the European Union, paid following accession, and intended to remedy the consequences of the harm for the rest of the victim's life.[20]

72. In the light of that case-law, and contrary to the position defended by European Food and Others and Viorel Micula and Others, the continuation after accession of the arbitration proceedings at issue, initiated following a contentious act adopted by Romania before accession, is sufficient, in my view, to establish the existence of future effects of a situation that arose before accession.[21]

73. I am therefore of the view that EU law and, consequently, the *Achmea* case-law apply, *ratione temporis*, to the arbitration proceedings at issue, initiated on the basis of a BIT between Romania and another Member State before accession and still in force at the time of accession.

74. However, I believe that the principle of the immediate applicability of EU law to the future effects of a situation that arose before accession does not per se provide an answer to the question of the compatibility with EU law of arbitration proceedings initiated on the basis of an intra-EU BIT before the accession to the European Union of the State party to the arbitration.

75. In fact, appearances are sometimes misleading, and it cannot be concluded that the principles arising from the judgment in *Achmea* will apply to such situations on that basis alone, without having first analysed the logic underlying the reasoning in that judgment.

(2) The application ratione materiae *of the* Achmea *case-law*

76. The application, from the time of accession, of EU law to arbitration proceedings initiated on the basis of an intra-EU BIT before the accession to the European Union of the State party to the arbitration cannot cause those proceedings, initiated validly at that time, relating to a dispute that preceded accession, to lose their distinctive nature.

77. Those characteristics seem to me to have a definite impact, no longer *ratione temporis* but *ratione materiae*, on the possibility of applying the *Achmea* case-law to arbitration proceedings such as those at issue. In other words, although that case-law, like EU law as a whole, is, from a strictly temporal viewpoint, applicable to the arbitration proceedings in question, the position is otherwise from a substantive aspect, in various respects.

[19] Judgments of 17 July 1997, *Affish* (C-183/95, EU:C:1997:373, paragraph 57), and of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416, paragraph 148).

[20] Judgment of 3 September 2014, *X* (C-318/13, EU:C:2014:2133, paragraphs 21 to 24). See also, to the same effect, judgment of 14 June 2007, *Telefónica O2 Czech Republic* (C-64/06, EU:C:2007:348, paragraph 21).

[21] See, on that point, Kaleda, S.L., op. cit., p. 183: 'The provisions [of EU law] governing the effects of certain acts are immediately applicable, at the time when they enter into force, to subsequent effects – they apply, for example, to offences which, although they result from past events, are still continuing on the date of entry into force'. (Original Polish version: 'przepisy [prawa Unii] regulujące skutki pewnych czynności są natychmiast stosowane w stosunku do skutków trwających w momencie ich wejścia w życie – np. przechwytują naruszenie nadal trwające w dniu wejścia w życie, chociaż wynikające ze zdarzeń dawnych'.)

(i) The lack of an adverse effect on the autonomy of EU law

78. I observe that the solution which the Court reached in the judgment in *Achmea* is based on the adverse effect on EU law consisting in recourse to arbitration proceedings based on an intra-EU BIT, in the course of which EU law might be interpreted or applied.

– *The principle of the autonomy of EU law*

79. The Court has made clear that the autonomy of EU law is guaranteed by the establishment, by the Treaties, of a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. [22] The preliminary ruling procedure constitutes the cornerstone of that judicial system by establishing a dialogue between courts – between the Court and the courts and tribunals of the Member States – with the aim of ensuring a uniform interpretation of EU law. [23]

80. Recourse to arbitration proceedings initiated on the basis of a BIT concluded between two Member States is likely to remove from the judicial system the resolution of a dispute that might involve the application or interpretation of EU law and thus adversely affects the principle of the autonomy of EU law reflected in Articles 267 and 344 TFEU.

81. In other words, the solution reached in the judgment in *Achmea* is, in particular, based on the fact that it is impossible, in view of the principle of the autonomy of EU law, to deprive the courts of the Member States of their jurisdiction in relation to the interpretation and application of EU law and the Court of its jurisdiction to reply, by preliminary ruling, to questions referred by those courts concerning the interpretation or application of EU law. [24]

82. However, I am of the view that, in the case of arbitration proceedings initiated on the basis of a BIT concluded between two Member States *before* the accession to the European Union of the State party to the arbitration, no dispute capable of concerning the interpretation or the application of EU law is removed from the judicial system of the European Union.

83. In that regard, I must state that it is immaterial, from that aspect, to determine whether such a dispute involves, in a definite way, the interpretation or the application of EU law by the arbitral tribunal. To my mind, the mere fact that there is a risk that that may be the case is sufficient to characterise an adverse effect on the autonomy of EU law, provided that the dispute in which such a risk arises does in fact come within the judicial system of the European Union. [25] I note, moreover, that that risk seems to me to be present in all intra-EU BITs. I therefore do not consider it necessary to ascertain in the present case whether the arbitral tribunal did indeed interpret or apply EU law, or could have done so. I understand the judgment in *Achmea* to mean that the Court established as a criterion of compatibility with the principle of the autonomy of EU law in arbitration proceedings based on an intra-EU BIT the point whether such proceedings have the effect of depriving the national courts of their jurisdiction in relation to the interpretation and application of EU law, and the Court of its jurisdiction to reply, by preliminary ruling, to their questions.

[22] See judgment in *Achmea*, paragraph 35 and the case-law cited. See also Malferrari, L., op. cit., pp. 48 and 50.

[23] Opinion 2/13 of 18 December 2014 (EU:C:2014:2454, paragraph 176).

[24] Opinion 1/09 of 8 March 2011 (EU:C:2011:123, paragraph 89).

[25] See, to that effect, judgment in *Achmea*, paragraphs 39 and 56.

– *The jurisdiction of the Romanian courts to make a reference to the Court for a preliminary ruling*

84. A dispute arising from the alleged breach by a State of a provision of a BIT, before the accession of that State to the European Union, where the dispute settlement procedure specified in that BIT was initiated before that State's accession, does not necessarily come within the judicial system of the European Union. The fact that the dispute is settled by an arbitral tribunal constituted on the basis of a BIT concluded between two Member States before the accession to the European Union of the State party to the arbitration is not capable of depriving the courts of the Member States of their jurisdiction in relation to the interpretation and application of EU law or the Court of its jurisdiction to reply, by preliminary ruling, to the questions referred by those courts concerning the interpretation or the application of EU law.

85. I invite the Court to envisage a situation in which a Romanian court, instead of an arbitral tribunal, was dealing with a dispute relating to an alleged breach by that State of the provisions of the BIT. In my view, that court would have been unable to make a reference to the Court for a preliminary ruling if a question of the interpretation or application of EU law had arisen.

86. In the first place, a Romanian court dealing with a potential breach by that Member State of the provisions of the BIT would clearly have been unable, *before* Romania's accession to the European Union, to make a reference to the Court for a reference for a preliminary ruling, as that court was not at that time a court or tribunal of a Member State within the meaning of Article 267 TFEU. In addition, the 1995 Agreement made no provision for the Romanian courts to make a reference to the Court for a preliminary ruling.

87. In the second place, the same solution must apply in the case of the possibility for the Romanian court, seised of a dispute before Romania's accession to the European Union, to make a reference to the Court for a preliminary ruling *after* Romania's accession. It is clear from the Court's case-law that the Court does not have jurisdiction to rule on the interpretation of EU law in a dispute concerning a situation that arose before accession. [26]

88. That was precisely the case in the dispute that gave rise to the arbitration proceedings at issue. The alleged breach of the BIT by Romania, forming the subject matter of the dispute, predated the accession of that State to the European Union and the arbitration proceedings at issue had been initiated before accession. All the material facts had therefore taken place before Romania's accession and had produced all their effects. A Romanian court dealing with such a dispute would have been unable to make a reference to the Court concerning the interpretation or the application of EU law in the context of that dispute.

89. Such a solution is not called into question either by the principle of the immediate applicability of EU law to the future effects of a situation which arose before accession or by the case-law resulting from the judgment in *Kremikovtzi*, [27] on which the Commission relies, in which the Court recognised that it had jurisdiction to interpret the provisions of the Europe Agreement

[26] Judgments of 10 January 2006, *Ynos* (C-302/04, EU:C:2006:9, paragraphs 36 and 37), and of 30 April 2020, *EUROVIA* (C-258/19, EU:C:2020:345, paragraphs 42 and 43), and order of 1 October 2020, *Slovenský plynárenský priemysel* (C-113/20, not published, EU:C:2020:772, paragraphs 28 and 31). For a critical study of the Court's case-law on its jurisdiction to answer questions for a preliminary ruling in the context of the accession to the Union of new Member States, see Półtorak, N., 'Ratione Temporis Application of the Preliminary Rulings Procedure', *Common Market Law Review*, No 45, 2008, pp. 1357 to 1381.

[27] Judgment of 29 November 2012 (C-262/11, EU:C:2012:760).

between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part,[28] in the context of a dispute relating to facts that occurred before Bulgaria's accession to the European Union.

90. As regards the principle of the immediate applicability of EU law to the future effects of a situation which arose before accession, it must be emphasised that such a principle cannot apply in the case of a dispute relating to Romania's alleged breach of the provisions of the BIT. As stated in point 88 of this Opinion, the facts giving rise to the dispute before the Romanian court are the withdrawal by Romania of the EGO scheme, entailing a possible breach by that Member State of its obligations under the BIT. The situation giving rise to the dispute had therefore arisen before accession and was clearly located in the past.[29]

91. Nor does the judgment in *Kremikovtzi*[30] seem to me to be capable of calling into question the assertion that the Court lacks jurisdiction, for the same reasons. Although the facts of the dispute at issue in the main proceedings in that judgment had their origin in the payment of aid before accession, the subject matter of the dispute related to the procedure for the recovery of that aid and, in particular, to the legal basis on which such a procedure should be founded, a procedure which certainly post-dated accession. In other words, the subject matter of the questions for a preliminary ruling did indeed concern the effects of aid, which took the form of the adoption of an act and of a specific event which took place *after* the accession of a Member State, which meant that the Court had jurisdiction to answer the questions for a preliminary ruling.

92. On the contrary, the dispute which might, in the present case, have been brought before a Romanian court related to a situation – the alleged breach of the BIT by Romania – that definitively arose before accession. Unlike in *Kremikovtzi*, no fact or act post-dating accession was therefore the subject matter of the dispute before the arbitral tribunal.[31]

93. In those circumstances, I am therefore of the view that, since the Court does not have jurisdiction to answer a question for a preliminary ruling referred by a Romanian court if that court had been dealing with the dispute giving rise to the arbitration proceedings, that dispute cannot come within the legal order of the European Union, either before or after Romania's accession to the European Union.

94. It follows that arbitration proceedings, such as those at issue in the present case, initiated on the basis of a BIT concluded between two Member States before the accession to the European Union of the State party to the arbitration, are not in my view capable of adversely affecting the

[28] Agreement concluded and approved on behalf of the Community by Decision 94/908/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 358, p. 1).

[29] Such a situation is to be distinguished from the situation that gave rise to the judgment of 3 September 2014, *X* (C-318/13, EU:C:2014:2133), where the Court recognised that it had jurisdiction under the principle of the immediate applicability of EU law to the future effects of a situation that arose before accession. In *X*, the referring court had been seised, *after* Finland's accession to the European Union, of a dispute concerning the amount of the compensation which had also been awarded *after* accession, following harm sustained before accession. The subject matter of the dispute therefore did indeed relate to facts that occurred after accession, although they were the future effects of a situation that arose beforehand, and was intended to resolve a situation for the future. The dispute before the arbitral tribunal in the present case related not to the amount of the compensation awarded but to the very existence of a breach of the BIT by Romania and therefore related to a situation that arose *before* accession.

[30] Judgment of 29 November 2012 (C-262/11, EU:C:2012:760).

[31] In the interest of completeness and for the purposes of academic curiosity, I note that a Romanian court could not ask the Court about the future effects of its decision on the infringement by Romania of the BIT in the light of the rules of the law on State aid. First, such a question would be purely hypothetical since, at the time when the proceedings are pending, it is not possible to determine with certainty what the outcome of the dispute will be. Second, it would not come strictly within the subject matter of the dispute before the national court, which concerns only whether or not Romania breached its obligation under the BIT, and the Court's answer would therefore not be necessary in order to settle the dispute.

autonomy of EU law, even after accession; therefore, unlike the situation with regard to the arbitration proceedings at issue in the case that gave rise to the judgment in *Achmea*, it cannot be concluded that there has been an infringement of Articles 267 and 344 TFEU.

95. Additional factors testify to the compatibility of the arbitration proceedings at issue with EU law, in relation to the question of an adverse effect on the principle of mutual trust, which in my view does not exist.

(ii) The question of the existence of an adverse effect on the principle of mutual trust

96. The Kingdom of Spain claims that, from the time of Romania's accession to the European Union, the arbitral tribunal involved in the present case ought to have declined jurisdiction in favour of the Romanian courts, which were thus in a position to guarantee the protection of investors' rights.

97. The solution adopted by the Court in the judgment in *Achmea* is based on the adverse effect on the principle of mutual trust that might result from recourse to arbitration proceedings initiate on the basis of an intra-EU BIT in the context of a dispute that might concern the interpretation or application of EU law.

98. The Court observed, in the judgment in *Achmea*,[32] that EU law is based on the fundamental principle that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the European Union that implements them will be respected.[33]

99. In fact, as I explained in my Opinion in *Komstroy*,[34] Member States are required to consider, save in exceptional circumstances, that all the other Member States respect EU law, including fundamental rights, in particular the right to an effective remedy before an independent tribunal, set out in Article 47 of the Charter of Fundamental Rights of the European Union. The particular role of the institutions of the Union, including, at their head, the Commission, entrusted with ensuring respect for those values testifies to their importance.[35]

100. In addition, it is precisely because the relationships which the European Union establishes with third States are not based on the mutual trust that exists within the Union that the Contracting Parties to an international agreement between a Member State and a third State decide to agree on a neutral dispute settlement mechanism, since neither of the Contracting Parties necessarily fully trusts the judicial system of the other party to ensure that the rules contained in the agreement are observed.[36]

[32] Paragraph 34.

[33] Judgment in *Achmea*, paragraph 34. See also Opinion 2/13 of 18 December 2014 (EU:C:2014:2454, paragraphs 168 and 173 and the case-law cited).

[34] C-741/19, EU:C:2021:164, point 64.

[35] See my Opinion in *Komstroy* (C-741/19, EU:C:2021:164, point 65 and the case-law cited).

[36] See Opinion of Advocate General Bot in Opinion 1/17 (*CET Agreement EU-Canada*, EU:C:2019:72, point 82).

101. From that aspect, I note that the conclusion of BITs between Member States and the States of central and eastern Europe was encouraged by the Commission as instruments necessary to prepare for their accession to the European Union. [37] Article 74 of the 1995 Agreement, entitled 'Investment promotion and protection', moreover, promotes the conclusion by the Member States and Romania of agreements for the promotion and protection of investments. The Kingdom of Sweden and Romania therefore proceeded in accordance with that encouragement by concluding the BIT at issue.

102. In that particular context, the dispute settlement clause contained in the BIT should be understood as compensating for the absence of mutual trust between the Kingdom of Sweden and Romania. It was then a matter of ensuring the protection of the investors of the Member States in Romania, by ensuring, in particular, in the absence of sufficient confidence in the respect by that State, before accession, of the right of investors to an effective remedy, the possibility of having recourse to a dispute settlement system outside the judicial system of that State. [38]

103. In those circumstances, it seems lawful to me that the arbitrators, validly seised on the basis of a BIT the conclusion of which, between a Member State and the State party to the arbitration before the latter's accession, was encouraged by the European Union itself, do not relinquish their jurisdiction upon accession, since the arbitration proceedings made it possible before accession, on the same basis as the principle of mutual trust after accession, to ensure the protection of investors' rights.

104. I am therefore of the view that, unlike in the situation at issue in the case that gave rise to the judgment in *Achmea*, the principle of mutual trust cannot justify the interruption of the arbitration proceedings at issue, which originally made it possible to remedy the lack of trust in Romania's respect for the requirements relating to effective judicial protection before it acceded to the European Union.

105. At the hearing, European Food and Others and Viorel Micula and Others also claimed that Romania's accession to the European Union had not made it possible to establish mutual trust between that Member State and the other Member States, since its accession had been made conditional on the implementation of a mechanism for cooperation and verification of progress in that Member State to address specific benchmarks in the areas of judicial reform and the fight against corruption. [39]

106. Such an argument fails to convince. The MCV decision alone does not have the consequence that the principle of mutual trust in relationships between Romania and the other Member States does not apply. A general distrust in a Member State on the sole basis of the implementation of a mechanism such as that contained in the MCV decision at the time of its accession cannot exist

[37] Opinion of Advocate General Wathelet in *Achmea* (C-284/16, EU:C:2017:699, point 40). See also Kochenov, D., Lavranos, N., 'Achmea Versus the Rule of Law: CJEU's Dogmatic Dismissal of Investors' Rights in Backsliding Member States of the European Union', *Hague Journal on the Rule of Law*, 2021.

[38] On the contribution of arbitral tribunals in investment law to respect for the rule of law, see Sadowski, W., 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?', *Common Market Law Review*, No 55, 2018, p. 1025 à 1060, and Kochenov, D., Lavranos, N., ibid.

[39] Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56, 'the MCV decision').

within the EU legal order. Trust in the Romanian courts can be limited only on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the Member State. [40]

(3) Conclusion on the application of the Achmea *case-law*

107. It follows from all of the foregoing that, in my view, the principles resulting from the judgment in *Achmea* cannot be applied in arbitration proceedings, such as those at issue in the present case, initiated on the basis of a BIT concluded between two Member States before the accession to the European Union of the State party to the arbitration and still pending at the time of that accession. [41]

108. It cannot be concluded, in my view, that there has been a breach of the principles of autonomy of EU law and of mutual trust or an infringement of Articles 267 and 344 TFEU.

(b) The compatibility of the BIT with EU law at the time of its conclusion

109. The Kingdom of Spain, supported in that respect by the Commission, claims that the BIT is contrary to EU law from its conclusion, in that the arbitral tribunal constituted on the basis of the BIT is capable of compromising the democratic-making process in the State parties since it deprives a Romanian law of the desired economic effect, and of having an adverse effect on the State aid legislation in Sweden and Romania, and that the BIT therefore affects the functioning of the institutions of the European Union in accordance with its constitutional framework.

110. First, and generally, I have doubts as to the probative force of such an argument in the light of the context in which BITs were concluded between Member States and Romania, as the Member States had been encouraged by the European Union to enter into such agreements by the 1995 Agreement. Such a solution would amount, moreover, to accepting retroactively the incompatibility of a BIT concluded by a Member State with a third State and to doubt, more generally, without another form of examination and in the abstract, the compatibility of all BITs concluded between a Member State and a third State.

111. Second, as regards more particularly the arbitration proceedings at issue, I am of the view that they do not have the effect, in any event, of either rendering ineffective the rules of the law on State aid or, consequently, depriving a Romanian law of the desired economic effect, in so far as, for the reasons which I shall develop when examining the main appeal, I am of the view that the rules of the law on State aid are applicable in the present case.

112. In those circumstances, the BIT cannot be regarded as incompatible with EU law from the time of its conclusion.

[40] See, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the judicial system)* (C-216/18 PPU, EU:C:2018:586, paragraph 61).

[41] I note, moreover, that such a solution has the advantage of presenting a certain consistency with the practice of arbitration tribunals, as regards their jurisdiction *ratione temporis*. In that regard, see Matringe, J., 'La compétence ratione temporis et l'applicabilité du traité dans le temps', in Leben, C. (dir), *La procédure arbitrale relative aux investissements internationaux*, L.G.D.J., 2010, pp. 78 and 79.

3. Conclusion on the cross-appeal

113. It follows from all of the foregoing that the first ground of appeal in the cross-appeal should be rejected. As the second ground of appeal in the cross-appeal depends on the first ground of appeal being upheld, I am of the view that the cross-appeal should be dismissed in its entirety.

B. The main appeal

114. The Commission, supported in that respect by the Kingdom of Spain, puts forward three grounds of appeal. It claims that the General Court, in the first place, made an error of law and an erroneous legal qualification of the facts by concluding that the Commission was not competent to adopt the contested decision; in the second place, made an error of law by holding that EU law did not apply to the compensation awarded; and, in the third place, made an error of law by concluding that the contested decision had erroneously classified the award of compensation by the arbitral tribunal as an advantage.

115. I shall begin my analysis by examining the first two grounds of appeal, which seek to determine the time when State aid must be considered to have been granted by the Member State, in order to establish whether the law on State aid was applicable at that time, and whether the Commission was competent to adopt the decision at issue.

1. The first two grounds of appeal: determination of the time when aid is granted

116. The General Court observed, in paragraph 66 et seq. of the judgment under appeal, that EU law became applicable in Romania only as from the date of its accession to the European Union and that it follows that it was only on that date that the Commission acquired the competence enabling it to review Romania's actions pursuant to Article 108 TFEU. It correctly inferred that in order to determine whether the Commission was competent to adopt the decision at issue, it is necessary to define the date on which the alleged aid was granted.

117. According to the General Court, 'the … right [of the applicants at first instance] to receive the compensation at issue arose and began to take effect at the time when Romania repealed EGO 24, that is to say, before Romania's accession to the European Union … and therefore … the time that that right was conferred on the applicants … predated accession'. [42]

118. The Commission maintains that European Food and Others and Viorel Micula and Others obtained a right to the compensation granted only when the award was transformed into an enforceable title under national law, since previously the right to receive the compensation was uncertain. The measure granting the alleged aid is therefore not the repeal of the EGOs by Romania but the implementation of the award by that Member State. As that measure was adopted after Romania's accession to the European Union, EU law was applicable and the Commission was competent to examine it in the light of Articles 107 and 108 TFEU and the General Court therefore erred in law when it held that the aid measure had been granted before accession and that the Commission was therefore not competent.

[42] Paragraph 78 of the judgment under appeal.

119. I would state briefly, in that regard, that, contrary to the argument put forward by European Food and Others and Viorel Micula and Others, the question of the time when aid was granted does indeed constitute a point of law amenable to appeal when it falls to be determined whether compensation granted by an arbitral award owing to the State's repeal of a tax incentive scheme must be considered to have been granted at the time of that repeal, before accession, or, rather, at the time of actual payment of the compensation in implementation of the award, after accession.

120. In addition, the argument put forward by European Food and Others and by Viorel Micula and Others, that the Commission is seeking to amend the decision at issue by claiming that the aid in question no longer results from payment of the compensation, but from the adoption of the award, cannot be followed, since the grounds of appeal put forward by the Commission in its appeal arise from the judgment under appeal itself and seek to challenge its merits. [43]

121. As the General Court observed, this Court established, in the judgment in *Magdeburger Mühlenwerke*, [44] that 'aid must be considered to be granted at the time that the right to receive it is conferred on the beneficiary under the applicable national rules'.

122. Such a choice of words seems to indicate, as European Food and Others and Viorel Micula and Others maintain, that the time when aid is granted does not necessarily coincide with the time when it is actually paid.

123. While that is frequently the case, the fact nonetheless remains that, contrary to the Commission's contention, aid may be considered to have been granted even if it has not yet actually been paid. [45] Likewise, it has been held, with respect to aid paid under an aid scheme, that the aid may be considered to have been awarded only when it was actually implemented, even though the aid scheme already existed. [46]

124. In other words, the actual payment of the aid does not in my view constitute the criterion that makes it possible to determine the time when the aid measure must be considered to have been granted. The mere fact that payment of the compensation at issue took place after accession cannot therefore suffice to establish that it was actually granted at that time, with the consequence that EU law would have been applicable and the Commission would have been competent.

125. To my mind it clearly follows from the principle stated in the judgment in *Magdeburger Mühlenwerke* [47] that the decisive factor for the purpose of establishing the time when alleged aid was granted is the acquisition, by the recipient of the aid measure at issue, of a definitive right to receive it, and the corresponding commitment, by the State, to grant the aid. Such a criterion seems logical in the light of the objective of the law on State aid, which is to comprehend State action, since the mere commitment by the State to act in support of a beneficiary undertaking may also, in itself, entail a distortion of competition on the market, even before the support is actually implemented.

[43] Judgment of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission* (C-176/06 P, not published, EU:C:2007:730, paragraph 17).

[44] Judgment of 21 March 2013 (C-129/12, EU:C:2013:200, paragraph 40).

[45] Judgment of 19 December 2019, *Arriva Italia and Others* (C-385/18, EU:C:2019:1121, paragraphs 37 and 41).

[46] Judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania* (C-74/16, EU:C:2017:496, paragraph 88), and order of 7 December 2017, *Ireland* v *Commission* (C-369/16 P, not published, EU:C:2017:955, paragraph 29).

[47] Judgment of 21 March 2013 (C-129/12, EU:C:2013:200).

126. According to the General Court, the right of European Food and Others and Viorel Micula and Others to receive the alleged aid consisting in the compensation granted by the arbitral award arose at the time when Romania violated the provisions of the BIT. I do not subscribe to that analysis.

127. It is clear that the compensation awarded by the arbitral tribunal, the alleged aid, has its origin in that violation. In addition, it is true, as the General Court observed in paragraph 78 of the judgment under appeal, that according to the logic of the law on liability, the arbitral award and the payments made by Romania constitute, for European Food and Others and Viorel Micula and Others, recognition of a right to receive compensation for harm sustained as a result of Romania's action and the enforcement of that right. In that sense, the arbitral award and its enforcement merely establish, retroactively, the existence of a right which already existed. [48]

128. However, although, under the law on liability, the right to compensation arises on the day on which the harm was sustained, that reading cannot mean that, in the law on State aid, the right to receive the aid also arises at that time. Since the arbitral award establishes, *retroactively*, the existence of a right to compensation, it does so because before that award such a right to be compensated did not definitively exist.

129. During the arbitration proceedings, the existence of a violation of the provisions of the BIT by Romania and, therefore, of damage sustained by European Food and Others and Viorel Micula and Others, was discussed, Romania disputing the very fact of being required to pay compensation. It was only after the dispute was settled that Romania was required to award the compensation at issue and that the right to receive it was conferred, for the purposes of the law on State aid and in the sense of the case-law cited above, on European Food and Others and on Viorel Micula and Others. It is immaterial, in that regard, that under the law on liability, the arbitral award establishes for the past the existence of a right to obtain compensation for damage.

130. Since the law on State aid covers the conduct of Member States and their commitment to grant certain measures, it cannot be considered that Romania was required to compensate European Food and Others and Viorel Micula and Others at a time when it specifically disputed the existence of such an obligation.

131. Such an interpretation is definitely consistent with the case-law on the grant of aid by a decision of a national court, which in my view allows an analogy to be drawn with the circumstances of the present case. Thus, it has been held that aid results from a decision of a national court where it is that decision that recognises the recipient's right to obtain the aid and fixes its definitive amount. [49] In addition, the Court has considered that the decision of a judge making an order for interim measures who reinstates an aid measure, after finding that that measure had been abolished in breach of a contract, must be regarded as itself granting new aid. [50]

132. In those circumstances, I am of the view that the General Court made an error of law and an erroneous legal classification of the facts in deciding that the aid at issue had been granted at the time of Romania's violation of the BIT.

[48] Paragraph 84 of the judgment under appeal.

[49] Judgment of 29 November 2018, *ARFEA* v *Commission* (T-720/16, not published, EU:T:2018:853, paragraph 185).

[50] Judgment of 26 October 2016, *DEI and Commission* v *Alouminion tis Ellados* (C-590/14 P, EU:C:2016:797, paragraph 59).

133. That is a fortiori the case because, in this instance, the damage sustained by European Food and Others and Viorel Micula and Others is the result of the repeal, by Romania, of the EGO, with the aim of conforming to the rules of the law on State aid. In other words, according to the General Court, the repeal of an aid measure within the meaning of the 1995 Agreement, which refers to Article 107 TFEU, the existence of which was established by the Romanian Competition Council, constitutes in itself the aid measure. The Romanian Competition Council, which was then competent at the time of the repeal, ought therefore, according to that logic, at the same time as it requested Romania to repeal the EGO, to have considered that such repeal also constituted State aid and to have again examined that measure in the light of the rules on State aid in the 1995 Agreement.

134. More generally, as the Commission observes, the solution adopted by the General Court would entail accepting that State aid might be automatically granted by the repeal of State aid. That fact seems to me to reveal a lack of consistency in the solution adopted in the judgment under appeal.

135. I am therefore of the view that the alleged aid measure was granted not at the time of the violation of the BIT but at the time when the right of European Food and Others and of Viorel Micula and Others to receive compensation was recognised and when, accordingly, Romania was required to pay that compensation, or after the adoption of the arbitral award, at the time of its implementation by Romania. However, that time post-dated Romania's accession to the European Union. It follows that EU law was indeed applicable to that measure and that the Commission was competent under Article 108 TFEU to examine the compensation in question in the light of the law on State aid.

136. I must make it clear, in that regard, in the interest of consistency, that the Commission's competence to examine a measure resulting from compensation granted by means of an award made by an arbitral tribunal in the light of the law on State aid is a separate issue from that of the jurisdiction of the Romanian courts to make a reference to the Court for a preliminary ruling in the context of the dispute that led to the award of compensation. The fact that those courts lacked jurisdiction to do so does not in any way prejudge the Commission's competence to assess the compensation granted after accession in the light of the law on State aid. As the Commission correctly observes, that competence is determined solely by the event giving rise to the aid, which takes place at the time when the right to receive the compensation is definitively recognised.

137. In my view, the first two grounds of appeal should therefore be upheld. [51]

138. Since that analysis makes it possible to establish that the Commission was competent to examine the compensation at issue under Article 108 TFEU, the first part of the first plea in law put forward at first instance in the action for annulment in Case T-704/15 and the first part of the second plea put forward in Cases T-624/15 and T-694/15 should therefore be rejected.

[51] The line of argument developed by the Commission in the second ground of appeal is based essentially on the premiss that, even though the measure must be considered to have been granted before accession, EU law was nonetheless applicable, since payment of the compensation constitutes the future effect of a situation which has arisen beforehand. I am of the view that the General Court wrongly fixed the time of the grant of the aid before accession, since the grant of the aid really took place with the adoption of the arbitral award and its implementation by Romania. There is no need to determine whether the General Court erred in law in holding that payment of the compensation did not constitute the future effect of an earlier situation and that EU law was therefore not applicable.

2. The third ground of appeal: the existence of an advantage within the meaning of Article 107 TFEU

139. By its third ground of appeal, the Commission maintains that the General Court erred in law by misinterpreting the concept of 'advantage' and by failing to address all the arguments presented in the contested decision to establish the existence of such an advantage.

140. The General Court observed, in paragraph 103 of the judgment under appeal, that, according to the case-law resulting from the judgment in *Asteris and Others*,[52] compensation for damage cannot be regarded as aid for the purposes of Article 107 TFEU unless it has the effect of compensating for the withdrawal of unlawful or incompatible aid.[53] According to the General Court, that was not the position.

141. First, the General Court held, in paragraphs 104 and 105 of the judgment under appeal, that, since it follows from the first plea in law that EU law was inapplicable to the compensation in question and that the Commission was not competent to examine it, that compensation cannot be regarded as compensation for the withdrawal of aid which is unlawful or incompatible.

142. Second, the General Court stated, in paragraphs 106 to 108 of the judgment under appeal, that the compensation at issue covered a period predating accession, during which EU law was not applicable, and that the applicants could, for that period, therefore rely on the *Asteris and Others*[54] case-law. However, in the decision at issue the Commission did not draw a distinction between the periods before and after accession. It follows that the decision at issue is vitiated by illegality, in that the award of compensation is classified in that decision as an 'advantage', at least with respect to the period predating accession.

143. I note in that regard a certain contradiction in the grounds of the judgment under appeal, with respect to whether the Commission had correctly established the existence of an advantage within the meaning of Article 107 TFEU with respect to European Food and Others and Viorel Micula and Others. The Court stated, on the one hand, that there was no advantage because EU law was inapplicable to the compensation at issue, while accepting, on the other hand, that EU law was in fact applicable in that the compensation covered the withdrawal of the EGOs for the period post-dating accession. I am therefore unable to see clearly the basis of the General Court's reasoning that led it to uphold that plea.

144. In addition, each of those two pleas seems to me to be vitiated by an error of law.

145. In the first place, in that it was held that the Commission could not validly conclude that there was an advantage within the meaning of Article 107 TFEU in so far as it was not competent to examine the compensation in the light of the law on State aid, it must be stated that that reasoning is based exclusively on a false premiss. As I have shown in the context of the examination of the first two grounds of appeal, EU law was applicable and the Commission was competent, as regards the compensation at issue, as that compensation was awarded after Romania acceded to the European Union.

[52] Judgment of 27 September 1988 (106/87 to 120/87, EU:C:1988:457).

[53] Judgment of 27 September 1988, *Asteris and Others* (106/87 to 120/87, EU:C:1988:457, paragraphs 23 and 24). See also Opinion of Advocate General Ruiz-Jarabo Colomer in the Joined Cases *Atzeni and Others* (C-346/03 and C-529/03, EU:C:2005:256, paragraph 198).

[54] Judgment of 27 September 1988 (106/87 to 120/87, EU:C:1988:457).

146. The General Court could not therefore, without making an error of law, find on that basis alone that the compensation at issue could not be regarded as compensation for the withdrawal of aid that was unlawful or incompatible.

147. In the second place, as regards the argument that the part of the compensation corresponding to the period before accession was covered by the *Asteris and Others*[55] case-law, it seems to me that such a factor is relevant in the analysis of the existence of an advantage. I understand the General Court's reasoning as stating that the compensation at issue could not be regarded as the reinstatement of unlawful aid since, before accession, the existence of State aid within the meaning of Article 107 TFEU could not be established, since EU law was not yet applicable.

148. While it is clear that, in order to determine the time when the aid measure was granted, all that counts is the time when the right to receive the compensation was conferred, at the stage of the classification of the aid measure as State aid within the meaning of Article 107 TFEU, the particular nature of that aid measure, consisting in the compensation paid by Romania following an arbitral award, may have an impact, in particular as regards the application of the *Asteris and Others*[56] case-law.

149. However, as the Commission claims, the application of that case-law in the circumstances of the present case does not depend solely on whether the compensation leads to the reinstatement of a measure that could or could not be classified as State aid within the meaning of Article 107 TFEU before accession. In fact, in the decision at issue the Commission excluded the application of that case-law to arbitration proceedings, outside the general national rules on civil liability of the Member States,[57] and also relied on the fact that the incentives given under the EGO had been classified as 'aid' on the basis of the 1995 Agreement by the Romanian Competition Council.[58]

150. Irrespective of whether those two elements were well founded, I observe that the General Court assessed the legality of only one of the grounds that led the Commission to reject the *Asteris and Others*[59] case-law and concluded that that case-law was in fact applicable.

151. In doing so, the General Court could not, in my view, without making an error of law, conclude that the Commission's decision was vitiated by illegality with respect to the classification of an 'advantage' without at the same time ascertaining that the Commission had wrongly excluded the application of the *Asteris and Others*[60] case-law because of (i) the basis on which the compensation was awarded and (ii) the fact that the EGO had been classified as 'State aid' on the basis of the 1995 Agreement by the Romanian Competition Council.

152. It follows from all of the foregoing that the third ground of appeal must, in my view, be upheld.

55 Judgment of 27 September 1988 (106/87 to 120/87, EU:C:1988:457).

56 Judgment of 27 September 1988 (106/87 to 120/87, EU:C:1988:457).

57 Recitals 101 and 102 of the decision at issue.

58 Recitals 105 to 107 of the decision at issue.

59 Judgment of 27 September 1988 (106/87 to 120/87, EU:C:1988:457).

60 Judgment of 27 September 1988 (106/87 to 120/87, EU:C:1988:457).

153. In the light of all of those considerations, I am of the view that the judgment under appeal should be set aside, the first part of the first plea in Case T-704/15 and the first part of the second plea in Cases T-624/15 and T-694/15 should be rejected and Joined Cases T-624/15, T-694/15 and T-704/15 should be referred back to the General Court for a decision on the remaining pleas.

VII. Conclusion

154. In the light of the foregoing considerations, I propose that the Court should:

– dismiss the cross-appeal;

– set aside the judgment of the General Court of the European Union of 18 June 2019, *European Food SA and Others* v *Commission* (T-624/15, T-694/15 and T-704/15, EU:T:2019:423);

– reject the first part of the second plea in law in Cases T-624/15 and T-694/15 and the first part of the first plea in law in Case T-704/15;

– refer Joined Cases T-624/15, T-694/15 and T-704/15 back to the General Court for a decision on the remaining pleas in law.