

**No. 116 /2022
of 14/07/2022
CAS number 2021-00061 of the register**

**Public hearing of the Court of Cassation of the Grand Duchy of Luxembourg of
Thursday, fourteenth July two thousand and twenty-two.**

Composition:

Roger LINDEN, Presiding Judge of the Court,
Christiane JUNCK, Councillor at the Court of Cassation,
Jean ENGELS, First Councillor at the Court of Appeal,
Michèle HORNICK, Councillor at the Court of Appeal,
Joëlle DIEDERICH, Councillor at the Court of Appeal,
Serge WAGNER, First Advocate General,
Daniel SCHROEDER, Court Clerk.

Between:

the STATE OF ROMANIA, represented by the representative body in justice, with
address RO-050741 Bucharest, 17 Apolodor Street, sector 5,

applicant in cassation,

appearing before the Court through Mr. Donald VENKATAPEN, lawyer at
the Court, in whose office address is elected, assisted by Mr. Shiva MIR
MOTAHARI, lawyer at the Court,

and:

1) M),

defendant in cassation,

appearing by the limited partnership BONN STEICHEN & PARTNERS, registered
in the list V of the Bar Association of Luxembourg, with an address for service,
represented for the purposes of the present proceedings by Fabio TREVISAN, lawyer at
the Court,

2) the EUROPEAN COMMISSION, established and having its seat at B-1049 Brussels,
200, rue de la Loi, represented by Agents Paul-John Loewenthal and Tim Maxian Rusche,
voluntary intervener in accordance with Article 483 of the New Code of Civil Procedure,
in conjunction with Article 29(2) of Council Regulation (EU) 2015/1589 of 13 July 2015,
laying down detailed rules for the application of Article 108 of the Treaty on the
Functioning of the European Union

defendant in cassation,

appearing before the Court through Maître Michel SCHWARTZ, lawyer at the Court, in whose office domicile is elected.

Having regard to the contested judgment, number 15/21-VIII-Exequatur, delivered on 11 February 2021 under number 43054 of the roll by the Court of Appeal of the Grand Duchy of Luxembourg, Eighth Chamber, sitting in civil and exequatur matters;

Having regard to the statement of cassation served on 9 June 2021 by the STATE OF ROMANIA on M) and the EUROPEAN COMMISSION, filed on 11 June 2021 at the Registry of the Superior Court of Justice;

Having regard to the statement of defence served on 3 August 2021 by M) on the STATE OF ROMANIA and the EUROPEAN COMMISSION, filed on 6 August 2021 at the Court Registry;

Having regard to the statement of defence served on 5 August 2021 by the EUROPEAN COMMISSION on M) and the STATE OF ROMANIA, filed on 6 August 2021 at the Court Registry;

On the submissions of Deputy State Prosecutor John PETRY, filed at the Court Registry on 8 February 2022;

Having regard to the pleadings of the STATE OF ROMANIA and M) filed on 22 and 23 March 2022 at the Court Registry.

On the facts

[1] By order of 8 May 2015 rectified on 22 May 2015, the Presiding Judge of the Luxembourg District Court had declared enforceable in the Grand Duchy of Luxembourg the arbitral award no. ARB/05/20 of 11 December 2013 issued by the International Centre for Settlement of Investment Disputes (hereinafter "*ICSID*"). The Court of Appeal confirmed this order.

On the first ground of appeal

Statement of the grounds of appeal

[2] *"From the violation of the law, in specie from the violation of the provisions of the New Code of Civil Procedure relating to the exequatur, more specifically from the violation of articles 1244 et seq., 1250 and 1251 of the New Code of Civil Procedure;*

In that the Court of Appeal dismissed Romania's appeal seeking the annulment, if not the revocation, if not the reformation of the exequatur order 45/2015 of 8 May 2015 and the rectification order 51/2015 of 22 May 2015 by stating, that: "It follows that certain developments of the STATE OF ROMANIA,..., which could, if any, be of interest at the level of the enforceability of the Award, will not be examined due to their lack of relevance at the level of the exequatur procedure, in particular the issues :

- (...) the primacy of EU law over the BIT since Romania's accession to the EU, - the conflict between the BIT and EU law, - the conflict of norms between EU law and the Washington Convention, - (...), - the argument that EU law provides for a system of investment dispute settlement based on Article 19 TEU and Articles 267 and 344 TFEU, - the conflict between a decision of the European Commission and a final national judgment, the conflict between a final national judgment (an ICSID award being assimilated to such a judgment) and an obligation arising from a Commission decision on State aid, - the fact that Luxembourg joined the European Union before acceding to the Washington Convention in 1970, - the duty of loyal cooperation of national authorities with the European Union, - the principle of effectiveness of European Union law, - the effect of the decision of the Court of First Instance of the European Union of 18 June 2019 on the decisions of the Commission of 26 May 2014 and 1 October 2014, - the primacy of Union law with regard to facts that occurred before Romania's accession, - the European Commission's subsidiary plea that, in the event of the application of the Washington Convention, the Award is to be treated as a judgement of the national legal order, which has to take precedence over the contrary Community law - the judgment of the Court of Appeal of 21 March 2018, sitting as a referee appeal, which ordered the release of the garnishments carried out on 28 and 29 July 2015 by M) on the basis of the contravention of the Award with Community and therefore Luxembourg public policy, the preliminary references requested by the European Commission, in particular the one formulated in the conclusions notified on 18 June 2020, which are not relevant." ,

*declaring the appeal unfounded and ordering the Romanian State to pay the costs of the appeal proceedings, thus confirming the enforcement orders, while postponing the analysis of the arguments raised by the appellant, the current applicant in cassation, concerning the assessment of the illegalities vitiating the Award, and consequently the enforcement orders, in particular the illegalities arising from the violation of the principle of the primacy of European Union law in the context of the exequatur procedure of the said Award, at a later stage, more precisely at the time of the examination of the validity of the individual acts of execution which would come to be posed on the basis of the exequatur Orders, in short, by declaring itself incompetent *ratione temporis*, to appreciate the existence and the nature of the illegalities vitiating the Award and by the same token, the exequatur Orders, the Court of Appeal violated the aforementioned legal provisions of the New Code of Civil Procedure;*

Whereas if the enforcement is illegal, the affixing of the enforcement formula by the Luxembourg judge is a fortiori illegal, and by proceeding only belatedly to analyze

the illegalities vitiating the Award and the Orders of exequatur, the Court of Appeal misunderstood the procedural rules governing the exequatur, whereas Luxembourg could not assist in the enforcement of an illegal award - in this case one made in disregard of European Union law, although, in the end, the nature of the illegality is of little importance, given the time at which the illegality is to be analyzed - the disturbance resulting precisely from the granting of enforceability on the territory of the Grand Duchy of Luxembourg, that on pages 11 and 12 of the appeal, the appellant, who is now the plaintiff in cassation, invoked the illegality of the award and the enforcement orders, at the stage of the exequatur itself of the Award and before the exequatur judge, asking him to proceed to the analysis of the said illegality, before attributing recognition and enforceability to the Award on the territory of the Grand Duchy, in the following terms: "Article 2 of the European Commission (EU) Decision 2015/1470 states that an enforcement of the Award would constitute a clear violation of Union law by Romania. In this regard, it should be noted that according to the case law of the Court of Justice of the European Union (hereinafter "CJEU"), the public policy of a Member State also includes the ius cogens derived from Union law. Thus, the CJEU has confirmed that the rules of competition law, which include state aid rules, and of consumer protection law are part of national public policy by virtue of the general Union law principles of effectiveness and equivalence.", that this statement of reasons constituted the necessary support for the operative part of the appeal document, seeking the annulment, if not the revocation, if not the reformation of the Exequatur Orders, that the plaintiff in cassation recalling the said principle on pages 18 and 20 to 23 of the summary submissions of 15 November 2019, in particular as follows: "(...) It is clear from the foregoing that it is therefore the primacy of European Union law as well as the modification of the applicable law by the accession of a State to the European Union and the absence of acquired law on the basis of a prior convention or treaty that should be considered in this case. Thus, the Washington Convention, invoked by Mr M) to have his application for exequatur automatically confirmed, must in fact take a back seat to the primacy of European Union law and to the absence of acquired rights on the basis of a previous convention or treaty. It is therefore wrong for Mr M to argue that an international treaty takes precedence over European Union law. (...). This judgment presents a particularly interesting reasoning when it also affirms the primacy of European Union law. (...) However, to allow a title to be subject to an exequatur and to have the enforcement formula applied to it is precisely contrary to the Decision of 30 March 2015 and would be tantamount to calling into question the primacy of European Union law. (...) the arbitration decision is based on a bilateral treaty between Sweden and Romania dated 29 May 2002, which is erroneously cited in the operative part of the exequatur order. However, this bilateral treaty was implicitly abrogated when Romania joined the European Union and cannot serve as a basis for the recognition of an arbitral award...", so that, as to the question of whether the Court of Appeal should have analyzed the existence and nature of the illegalities raised by the appellant, the current plaintiff in cassation, at the very stage of the exequatur procedure and prior to the attribution of any recognition and enforceability

to the Award, pronouncing the annulment, if not the revocation, if not the reformation of the Exequatur Orders, to be contrary to the public policy of the Member States, i.e. to the European public policy, because of their violation of the principle of the primacy of the law of the European Union, the answer is yes, so that the Court of Appeal should have recognized its jurisdiction, ratione temporis, to examine the existence and nature of the illegalities vitiating the Award and the Exequatur Orders.

The Court's response

[3] It is clear from the discussion of the plea that the plaintiff in cassation invokes the violation of Article 1251 of the New Code of Civil Procedure, which states: "*Subject to the provisions of international conventions, the judge shall refuse exequatur : ... 2° if the award or its enforcement is contrary to public policy or if the dispute was not capable of being settled by arbitration*".

[4] The judges of appeal held that Article 1251 of the New Code of Civil Procedure applies only subject to the provisions of international conventions, and that the Washington Convention (hereinafter "*the Convention*") constitutes such a convention, which, apart from the condition that an arbitral award must exist, does not provide any grounds for refusing recognition, no ground for refusal of recognition, which may be invoked, on the basis of Article 54(3) of the Convention, only at the stage of enforcement of the arbitral award, which is to be distinguished from the stage, applicable in the present case, of the enforcement of the award.

[5] The refusal of the judges of appeal to examine the conformity of the arbitration award with EU law is therefore based on Article 54(3) of the Convention, and not on Article 1251 of the New Code of Civil Procedure, which merely refers to the provisions of international conventions.

[6] The complaint is therefore unrelated to the articles referred to in the plea.

[7] It follows that the plea is inadmissible.

On the second, third, fourth, fifth and sixth grounds of appeal combined

Statement of grounds

[8] **two**, "*Based on the violation of the law, in specie on the violation of the general principle of constitutional law relating to the primacy of European Union law;*

In that the Court of Appeal dismissed Romania's appeal seeking the annulment, if not the revocation, if not the reformation of the exequatur order 45/2015 of 8 May 2015 and the rectification order 51/2015 of 22 May 2015, having stated that: "It follows that certain developments of the STATE of ROMANIA,..., which could, if necessary, be of interest at the level of the

enforceability of the Award, will not be examined because of their lack of relevance to the exequatur procedure, in particular the questions :

- (...) the primacy of EU law over the BIT since Romania's accession to the EU, - the conflict between the BIT and EU law, - the conflict of norms between EU law and the Washington Convention, - (...), - the argument that EU law provides for a system of investment dispute settlement based on Article 19 TEU and Articles 267 and 344 TFEU, - the conflict between a decision of the European Commission and a final national judgment, the conflict between a final national judgment (an ICSID award being assimilated to such a judgment) and an obligation arising from a Commission decision on State aid, - the fact that Luxembourg joined the European Union before acceding to the Washington Convention in 1970, - the duty of loyal cooperation of national authorities with the European Union, - the principle of effectiveness of European Union law, - the effect of the decision of the Court of First Instance of the European Union of 18 June 2019 on the decisions of the Commission of 26 May 2014 and 1 October 2014, - the primacy of Union law with regard to facts that occurred before Romania's accession, - the European Commission's subsidiary plea that, in the event of the application of the Washington Convention, the Award is to be treated as a judgement of the national legal order, which has to take precedence over the contrary Community law - the judgment of the Court of Appeal of 21 March 2018, sitting as a referee appeal, which ordered the release of the garnishments carried out on 28 and 29 July 2015 by M) on the basis of the Award's conflict with Community and therefore Luxembourg public policy, the preliminary references requested by the European Commission, in particular the one formulated in the conclusions notified on 18 June 2020, which are not relevant." The Court of First Instance of the European Communities has not been able to rule on the question of whether the European Commission's request for a preliminary ruling is relevant to the case in question. Thus, the judges of the Court of Appeal did not rule on the arguments raised repeatedly by the appellant, thus declaring the appeal unfounded and ordering the Romanian State to pay the costs of the appeal proceedings and confirming the exequatur orders, The appellate judges did not rule on the pleas raised repeatedly by the appellant, the current applicant in cassation, concerning the pre-eminence of European Union law, postponing the analysis of these pleas to a later stage, when the validity of the individual enforcement acts that will be issued on the basis of the exequatur orders is examined;

Whereas Article 49 bis of the Constitution provides that: "The exercise of powers reserved by the Constitution to the legislative, executive and judicial powers may be temporarily devolved by treaty to institutions of international law.", enshrining the principle of the pre-eminence of European Union law in the national legal order, a principle reaffirmed by case law in the following terms: "...the treaties which established Community law established a new legal order for the benefit of which the Member States limited the exercise of their sovereign powers in the areas determined by those treaties. This rule is particularly relevant where there is a conflict between a national law rule and a Community law rule, since the treaties which have

established a new legal order for the benefit of which the Member States have limited the exercise of their sovereign powers in the areas determined by those treaties.” The Court of Justice of the European Communities, in its judgement of 11 December 2002, stated that the principle of the right to a fair trial was "a principle of constitutional law": “Article 2 of the European Commission (EU) Decision 2015/1470 states that an enforcement of the arbitral award would constitute a clear violation of Union law by Romania. In this regard, it should be noted that according to the case law of the Court of Justice of the European Union (hereinafter "CJEU"), the public policy of a Member State also includes the ius cogens derived from Union law. Thus, the CJEU has confirmed that the rules of competition law, which include state aid rules, and of consumer protection law are part of national public policy by virtue of the general Union law principles of effectiveness and equivalence.”, that this statement of reasons constituted the necessary support for the operative part of the appeal document, seeking the annulment, if not the revocation, if not the reformation of the Exequatur Orders, that the plaintiff in cassation recalling the said principle on pages 18 and 20 to 23 of the summary submissions of 15 November 2019, in particular as follows: “(...) It is therefore clear from the foregoing that it is therefore the primacy of European Union law as well as the modification of the applicable law by the accession of a State to the European Union and the absence of acquired law on the basis of a prior convention or treaty that should be considered in this case. Thus, the Washington Convention, put forward by Mr M) to have his application for exequatur automatically confirmed, must in fact take a back seat to the primacy of European Union law and to the absence of acquired rights on the basis of a previous convention or treaty. It is therefore wrong for Mr M to argue that an international treaty takes precedence over European Union law. (...). This judgment presents a particularly interesting reasoning when it also affirms the primacy of European Union law. () However, to allow a title to be subject to an exequatur and to have the enforcement formula applied to it is precisely contrary to the Decision of 30 March 2015 and would amount to calling into question the primacy of European Union law. (...) the arbitration decision is based on a bilateral treaty between Sweden and Romania dated 29 May 2002, which is erroneously cited in the operative part of the exequatur order. This bilateral treaty was implicitly abrogated when Romania joined the European Union and cannot serve as a basis for the recognition of an arbitral award...” so that, as to the question of whether the Exequatur Orders should have been annulled, if not revoked, if not reformed, for being contrary to the public policy of the Member States, i.e. to European public policy, because of their violation of the principle of the primacy of European Union law, the judges of appeal should have answered in the affirmative, whereas even supposing that the Award was to be considered enforceable under the Washington Convention, it must be noted that by postponing the examination of the illegality of the Exequatur Orders to a later stage, i.e. to the moment when each individual act of enforcement is made ("at the level of the executability of the Award"), the Court of Appeal contravenes the principle of the primacy of the law of the European Union, and deprives the said principle of effectiveness, and that by refusing to answer, at the stage of the procedure of exequatur of the Award, to the pleas of the plaintiff in cassation, raised both on pages 11 and 12 of its appeal document,

and on pages 11, 18 and 20 to 23 of its summary conclusions, relating to the primacy of European Union law, the judges of appeal did not apply the general principle of constitutional law relating to the primacy of European Union law, thus tainting the judgment a quo with the substantive defect that constitutes the violation of the rule of law."

three, *"Derived from the violation of the law, in specie from the violation of the provisions of Article 351 of the Treaty on the Functioning of the European Union (hereinafter "TFEU"), enshrining the principle of the primacy of European Union law;*

In that the Court of Appeal dismissed Romania's appeal seeking the annulment, if not the revocation, if not the reversal of the exequatur order 45/2015 of 8 May 2015 and the rectification order 51/2015 of 22 May 2015 in that it stated, that: "It follows that certain developments of the STATE OF ROMANIA,..., which could, if applicable, be of interest at the level of the enforceability of the Award, will not be examined due to their lack of relevance at the level of the exequatur procedure, in particular the issues :

- (...) the primacy of EU law over the BIT since Romania's accession to the EU, - the conflict between the BIT and EU law, - the conflict of norms between EU law and the Washington Convention, - (...), - the argument that EU law provides for a system of investment dispute settlement based on Article 19 TEU and Articles 267 and 344 TFEU, - the conflict between a decision of the European Commission and a final national judgment, the conflict between a final national judgment (an ICSID award being assimilated to such a judgment) and an obligation arising from a Commission decision on State aid, - the fact that Luxembourg joined the European Union before acceding to the Washington Convention in 1970, - the duty of loyal cooperation of national authorities with the European Union, - the principle of effectiveness of European Union law, - the effect of the decision of the Court of First Instance of the European Union of 18 June 2019 on the decisions of the Commission of 26 May 2014 and 1 October 2014, - the primacy of Union law with regard to facts that occurred before Romania's accession, - the European Commission's subsidiary plea that, in the event of the application of the Washington Convention, the Award is to be treated as a judgement of the national legal order, which has to take precedence over the contrary Community law - the judgment of the Court of Appeal of 21 March 2018, sitting as a referee appeal, which ordered the release of the garnishments carried out on 28 and 29 July 2015 by M) on the basis of the Award's conflict with Community and therefore Luxembourg public policy, the preliminary references requested by the European Commission, in particular the one formulated in the conclusions notified on 18 June 2020, which are not relevant." The Court of First Instance of the European Communities, in recognizing the Award and granting it enforceability, in disregard of the inviolable principle of the primacy of European Union law, in particular in matters of "State aid declared incompatible by the European Commission", thus declaring the appeal to be inadmissible, and the Romanian State was ordered to pay the costs of the appeal proceedings, thus confirming the exequatur orders, but the appeal judges did not rule on the pleas raised repeatedly by the

appellant, the current plaintiff in cassation, relating to the pre-eminence of the law of the European Union, postponing the analysis of the said means to a later stage, at the time of the examination of the validity of the individual acts of execution which will come to be posed on the basis of the Orders of exequatur;

Whereas Article 351 TFEU provides that: “the rights and obligations arising from conventions concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States, on the one hand, and one or more non-member States, on the other, shall not be affected by the provisions of the Treaties”, that on pages 16 to 18 of the summary submissions of 15 November 2019, the appellant, the current claimant in cassation, invoked this principle in the following terms: “1. As to Article 351 TFEU: Party M) refers to the appeal against Decision 2015/1470 and the relationship between EU law, the BIT and the Washington Convention. Party M) then cites the text of the pleadings filed in a case between Slovakia and the European Commission (C264/09) and considers it to be case law, whereas it is only the pleadings in that case and not the final judgment. It erroneously concludes that any agreements concluded prior to accession to the European Union take precedence. Thus, according to paragraph 44 of the judgment, which is taken from the conclusions cited by party M): "It should be recalled that, in the case which gave rise to the judgment of 4 July 2000 in Case C-62/98 Commission v Portugal [2000] ECR I-5171, paragraph 49), the Court stated that, while, under Article 307 EC, Member States have a choice as to the measures to be adopted in order to eliminate incompatibilities between a pre-Community agreement and the EC Treaty, where a Member State encounters difficulties which make it impossible to amend an agreement, it cannot be ruled out that it is incumbent on it to denounce that agreement. Part M) refers to Article 351 TFEU, according to which the rights and obligations resulting from agreements prior to the accession of the State of Romania would remain acquired, without explaining the international context. It is clear from the wording of Article 351 TFEU that the BIT is not applicable in this case, as the BIT is a treaty between two EU Member States, namely Sweden and Romania, and not a treaty "between one or more Member States, on the one hand, and one or more third States, on the other hand". The same applies to the Washington Convention, which in an intracommunity dispute will no longer be applicable. Indeed, according to Decision 2015/1470, points 130 to 132..., Therefore it must be found that Article 351 TFEU does not apply to the present case and that party M) will have to comply with European law which also affects the relations between the State of Romania and Sweden. The concluding party agrees with the position of the European Union that - it is irrelevant whether Romania was a member of the European Union at the time of the ratification of the BIT; - there is primacy of EU law as soon as the State joins the European Union, both for the BIT and the Washington Convention; - The applicable law may be modified by the accession of a State to the European Union and there is therefore no acquired right on the basis of a previous convention or treaty; The arbitral tribunal exceeded its powers and competences...”, that this statement of reasons constituted the necessary support for the operative part of the appeal document, seeking the annulment, if not the revocation, if not the reformation of the exequatur Orders, that the plaintiff in cassation, recalling the said principle on

pages 11, 18 and 20 to 23 of the summary conclusions of 15 November 2019, in particular as follows: “Part M) thus - deliberately - fails to explain what impact the European Union has on the Convention. Indeed, Article 344 of the Treaty on the Functioning of the European Union (hereinafter the "TFEU") cannot be overlooked (...) It is therefore clear from the above that it is the primacy of European Union law as well as the change in the applicable law by the accession of a State to the European Union and the absence of acquired law on the basis of a previous convention or treaty that should be considered in this case. Thus, the Washington Convention, put forward by Mr M) to have his application for exequatur automatically confirmed, must in fact take a back seat to the primacy of European Union law and to the absence of acquired rights on the basis of a previous convention or treaty. It is therefore wrong for Mr M to argue that an international treaty takes precedence over European Union law. (...). This judgment presents a particularly interesting reasoning when it also affirms the primacy of European Union law. () However, to allow a title to be subject to an exequatur and to have the enforcement formula applied to it is precisely contrary to the Decision of 30 March 2015 and would be tantamount to calling into question the primacy of European Union law. (...) the arbitration decision is based on a bilateral treaty between Sweden and Romania dated 29 May 2002, which is erroneously cited in the operative part of the exequatur order. This bilateral treaty was implicitly abrogated when Romania joined the European Union and cannot serve as a basis for the recognition of an arbitral award...” so that, as to the question of whether the Exequatur Orders should have been annulled, if not revoked, if not reformed, for being contrary to the public policy of the Member States, i.e. to European public policy, because of their violation of the principle of the primacy of European Union law, the judges of appeal should have answered in the affirmative, whereas even supposing that the Award was to be considered enforceable under the Washington Convention, it must be noted that by postponing the examination of the illegality of the Exequatur Orders to a later stage, i.e. to the moment when each individual act of enforcement is made (“at the level of the enforceability of the Award”), the Court of Appeal against), the Court of Appeal contravenes the provisions of Article 351 TFEU, enshrining the principle of the primacy of European Union law, and deprives the said principle of effectiveness, whereas the conflict rule set out in Article 351 TFEU establishes the principle of primacy of Union law, which yields to another bilateral (or multilateral) agreement concluded by a Member State only in the cases and under the cumulative conditions advocated by the same legal provision, i.e. when the following two cumulative conditions are met the bilateral (or multilateral) convention concluded by the Member State must have been concluded prior to its accession, on the one hand, and the bilateral (or multilateral) convention must have been concluded between the Member State and a third State, on the other hand, that this rule of conflict of norms therefore gives precedence in this case to Union law over the Washington Convention, so that by giving precedence to the applicability of Articles 53 and 54 of the Washington Convention over that of European Union law, the Court of Appeal violated Article 351 TFEU, thus tainting the judgment a quo with the substantive defect of a violation of the rule of law.”,

four, "Based on the violation of the law, in specie of the violation of the provisions of article 288 of the Treaty on the Functioning of the European Union

(hereinafter “TFEU”), enshrining the principle of the primacy of European Union law;

In that the Court of Appeal dismissed Romania's appeal seeking the annulment, if not the revocation, if not the reversal of the exequatur order 45/2015 of 8 May 2015 and the rectification order 51/2015 of 22 May 2015 in that it stated, that: “It follows that certain developments of the STATE OF ROMANIA,..., which could, if applicable, be of interest at the level of the enforceability of the Award, will not be examined due to their lack of relevance at the level of the exequatur procedure, in particular the issues :

- (...) the primacy of EU law over the BIT since Romania's accession to the EU, - the conflict between the BIT and EU law, - the conflict of norms between EU law and the Washington Convention, - (...), - the argument that EU law provides for a system of investment dispute settlement based on Article 19 TEU and Articles 267 and 344 TFEU, - the conflict between a decision of the European Commission and a final national judgment, the conflict between a final national judgment (an ICSID award being assimilated to such a judgment) and an obligation arising from a Commission decision on State aid, - the fact that Luxembourg joined the European Union before acceding to the Washington Convention in 1970, - the duty of loyal cooperation of national authorities with the European Union, - the principle of effectiveness of European Union law, - the effect of the decision of the Court of First Instance of the European Union of 18 June 2019 on the decisions of the Commission of 26 May 2014 and 1 October 2014, - the primacy of Union law with regard to facts that occurred before Romania's accession, - the European Commission's subsidiary plea that, in the event of the application of the Washington Convention, the Award is to be treated as a judgement of the national legal order, which has to take precedence over the contrary Community law - the judgment of the Court of Appeal of 21 March 2018, sitting as a referee appeal, which ordered the release of the garnishments carried out on 28 and 29 July 2015 by M) on the basis of the Award's conflict with Community and therefore Luxembourg public policy, the preliminary references requested by the European Commission, in particular the one formulated in the conclusions notified on 18 June 2020, which are not relevant.” The Court of First Instance of the European Communities has not been able to rule on the question of whether the European Commission's request for a preliminary ruling is relevant to the case in question. Thus, the judges of the Court of Appeal did not rule on the arguments raised repeatedly by the appellant, thus declaring the appeal unfounded and ordering the Romanian State to pay the costs of the appeal proceedings and confirming the exequatur orders, The appellate judges did not rule on the pleas raised repeatedly by the appellant, the current applicant in cassation, concerning the pre-eminence of European Union law, postponing the analysis of these pleas to a later stage, when the validity of the individual enforcement acts that will be issued on the basis of the exequatur orders is examined;

Whereas Article 288 TFEU provides that: “To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions,

recommendations and opinions. (...) The decision is in its entirety. Where it names addressees, it is binding only on them. (...)”, that on pages 11 and 12 of the notice of appeal, the appellant, the current plaintiff in cassation, invoked this principle in the following terms: “Article 2 of the European Commission (EU) Decision 2015/1470 provides that an enforcement of the arbitral award would constitute a clear violation of Union law by Romania. In this regard, it should be noted that according to the case law of the Court of Justice of the European Union (hereinafter “CJEU”), the public policy of a Member State also includes the ius cogens derived from Union law. Thus, the CJEU has confirmed that the rules of competition law, which include state aid rules, and of consumer protection law are part of national public policy by virtue of the general Union law principles of effectiveness and equivalence.”, that this statement of reasons constituted the necessary support for the operative part of the appeal document, seeking the annulment, if not the revocation, if not the reformation of the Exequatur Orders, that the plaintiff in cassation recalling the said principle on pages 11, 18 and 20 to 23 of the summary submissions of 15 November 2019, in particular as follows: “Party M) thus omits - deliberately - to explain what impact the European Union has on the Convention. Indeed, Article 344 of the Treaty on the Functioning of the European Union (hereinafter the “TFEU”) cannot be overlooked (...) It is therefore clear from the above that it is the primacy of European Union law as well as the change in the applicable law by the accession of a State to the European Union and the absence of acquired law on the basis of a previous convention or treaty that should be considered in this case. Thus, the Washington Convention, put forward by Mr M) to have his application for exequatur automatically confirmed, must in fact take a back seat to the primacy of European Union law and to the absence of acquired rights on the basis of a previous convention or treaty. It is therefore wrong for Mr M to argue that an international treaty takes precedence over European Union law. (...). This judgment presents a particularly interesting reasoning when it also affirms the primacy of European Union law. (...) However, to allow a title to be subject to an exequatur and to have the enforcement formula applied to it is precisely contrary to the Decision of 30 March 2015 and would amount to calling into question the primacy of European Union law. (...) the arbitration decision is based on a bilateral treaty between Sweden and Romania dated 29 May 2002, which is erroneously cited in the operative part of the exequatur order. However, this bilateral treaty was implicitly abrogated upon Romania's accession to the European Union and cannot serve as a basis for the recognition of an arbitral award...”, that the said principle was again recalled, by the appellant, the current plaintiff in cassation, in its conclusions no. 3 of 10 May 2017 (at page 3), in the following terms: “Article 288 TFEU makes any decision of the Commission binding...” , respectively in its submissions No. 4 of 18 October 2017 (at page 4), as follows: “It is recalled that the Decision of 30 March 2015 is binding and enforceable by virtue of Articles 288 TFEU and 299 TFEU and that this has the effect of making it binding.” and in its Opinion No. 6 of 14 August 2018 (at page 6), in the following terms: “that the Decision of 30 March 2015 is binding in all these respects and in all Member States by virtue of Article 288 TFEU, and this irrespective of the appeal against it, which is not suspensive”, so that, as to the question whether the Exequatur Orders should have

been annulled, if not revoked, if not reformed, for being contrary to the public policy of the Member States, i.e. to European public policy, because of their violation of the principle of the primacy of European Union law, the appeal judges should have answered in the affirmative, even if the Award were to be considered enforceable under the Washington Convention, it must be noted that by postponing the examination of the illegality of the Exequatur Orders to a later stage, i.e. to the moment when each individual act of enforcement is made ("at the level of the enforceability of the Award"), the Court of Appeal contravenes the provisions of Article 288 TFEU, enshrining the principle of the primacy of European Union law, and deprives the said principle of effectiveness, whereas in the presence of the Commission Decision of March 30, 2015 (no. 2015/1470), prohibiting Romania from proceeding with any enforcement of the Arbitral Award on the grounds that such enforcement of the Award would constitute a clear violation of EU law by Romania, the Court of Appeal should have ruled on the aforementioned pleas of the plaintiff in cassation, relating to the primacy of EU law, and that by refusing to answer, at the stage of the exequatur procedure of the Award to the pleas of the plaintiff in cassation, raised on pages 11 and 12 of its appeal, as well as on pages 11, 18 and 20 to 23 of its summary submissions, and on page 3 of its submissions no. 3, respectively on page 4 of its submissions no. 4 and on page 6 of its submissions no. 6 the Court of Appeal did not apply the principle of European public policy relating to the primacy of European Union law, set out in Article 288 of the Treaty on the Functioning of the European Union, thus tainting the judgment a quo with the substantive defect of violation of the rule of law."

five, *"Based on the violation of the law, in particular the violation of the provisions of Article 344 of the Treaty on the Functioning of the European Union, enshrining the principle of the primacy of European Union law;*

In that the Court of Appeal dismissed Romania's appeal seeking the annulment, if not the revocation, if not the reversal of the exequatur order 45/2015 of 8 May 2015 and the rectification order 51/2015 of 22 May 2015 in that it stated, that: "It follows that certain developments of the STATE OF ROMANIA,..., which could, if applicable, be of interest at the level of the enforceability of the Award, will not be examined due to their lack of relevance at the level of the exequatur procedure, in particular the issues :

- (...) the primacy of EU law over the BIT since Romania's accession to the EU, - the conflict between the BIT and EU law, - the conflict of norms between EU law and the Washington Convention, - (...), - the argument that EU law provides for a system of investment dispute settlement based on Article 19 TEU and Articles 267 and 344 TFEU, - the conflict between a decision of the European Commission and a final national judgment, the conflict between a final national judgment (an ICSID award being assimilated to such a judgment) and an obligation arising from a Commission decision on state aid, - the fact that Luxembourg joined the European Union before acceding to the Washington Convention in 1970 - the duty of loyal cooperation of national authorities with the European Union -

the principle of effectiveness of European Union law, - the effect of the decision of the European Court of First Instance of 18 June 2019 on the Commission decisions of 26 May 2014 and 1 October 2014, - the primacy of European Union law in relation to facts that occurred before Romania's accession, - the European Commission's subsidiary plea that, in the event of application of the Washington Convention, the Award is to be treated as a judgment of the national legal order, which must give way to the contrary Community law, the judgment of the Court of Appeal of 21 March 2018, sitting as a referee appeal, which ordered the release of the garnishments effected on 28 and 29 July 2015 by ___M) on the basis that the Award was contrary to Community and therefore Luxembourg public policy, the references for preliminary rulings requested by the European Commission, in particular the one formulated in the conclusions notified on 18 June 2020, which are irrelevant.” The Court of First Instance of the European Communities has not been able to rule on the question of whether the European Commission's request for a preliminary ruling is relevant to the case in question. Thus, the judges of the Court of Appeal did not rule on the arguments raised repeatedly by the appellant, thus declaring the appeal unfounded and ordering the Romanian State to pay the costs of the appeal proceedings and confirming the exequatur orders, The appellate judges did not rule on the pleas raised repeatedly by the appellant, the current applicant in cassation, concerning the pre-eminence of European Union law, postponing the analysis of these pleas to a later stage, when the validity of the individual enforcement acts that will be issued on the basis of the exequatur orders is examined;

Whereas according to the provisions of Article 344 TFEU: “Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.” In order to guarantee the autonomy of the legal order of the Union, the European treaties have established a specific jurisdictional system, composed of national courts on the one hand and the Court of Justice of the European Union on the other. An international agreement cannot therefore undermine the jurisdictional monopoly thus created by the European treaties or the autonomy of the legal system of the Union, enshrined in Article 344 of the Treaty on the Functioning of the European Union (TFEU), which prohibits Member States from submitting a dispute relating to the interpretation and application of Union law to a method of settlement other than that provided for in the Treaties, that on pages 11 and 12 of the appeal, the appellant, the current plaintiff in cassation, invoked this principle in the following terms: “Article 2 of the European Commission (EU) Decision 2015/1470 provides that an enforcement of the arbitral award would constitute a clear violation of Union law by Romania. In this regard, it should be noted that according to the case law of the Court of Justice of the European Union (hereinafter "CJEU"), the public policy of a Member State also includes the ius cogens derived from Union law. Thus, the CJEU has confirmed that the rules of competition law, which include state aid rules, and of consumer protection law are part of national public policy by virtue of the general Union law principles of effectiveness and equivalence.”, that this statement of reasons constituted the necessary support for the operative part of the appeal document, seeking the annulment, if not the revocation, if not the reformation of the exequatur Orders, that the plaintiff in cassation recalling the said principle on

pages 11, 18 and 20 to 23 of the summary conclusions of 15 November 2019, in particular as follows: "Part M) thus - deliberately - fails to explain what impact the European Union has on the Convention. Indeed, Article 344 of the Treaty on the Functioning of the European Union (hereinafter the "TFEU") cannot be overlooked (...) It is therefore clear from the above that it is the primacy of European Union law as well as the change in the applicable law by the accession of a State to the European Union and the absence of acquired law on the basis of a previous convention or treaty that should be considered in this case. Thus, the Washington Convention, put forward by Mr M) to have his application for exequatur automatically confirmed, must in fact take a back seat to the primacy of European Union law and to the absence of acquired rights on the basis of a previous convention or treaty. It is therefore wrong for Mr M to argue that an international treaty takes precedence over European Union law. (...). This judgment presents a particularly interesting reasoning when it also affirms the primacy of European Union law. (...) However, to allow a title to be subject to an exequatur and to have the enforcement formula applied to it is precisely contrary to the Decision of 30 March 2015 and would amount to calling into question the primacy of European Union law. (...) the arbitration decision is based on a bilateral treaty between Sweden and Romania dated 29 May 2002, which is erroneously cited in the operative part of the exequatur order. This bilateral treaty was implicitly abrogated when Romania joined the European Union and cannot serve as a basis for the recognition of an arbitral award..." so that, as to the question of whether the Exequatur Orders should have been annulled, if not revoked, if not reformed, for being contrary to the public policy of the Member States, i.e. to European public policy, because of their violation of the principle of the primacy of European Union law, the judges of appeal should have answered in the affirmative, whereas even supposing that the Award was to be considered enforceable under the Washington Convention, it must be noted that by postponing the examination of the illegality of the Exequatur Orders to a later stage, i.e. to the moment when each individual act of enforcement is made ("at the level of the enforceability of the Award"), the Court of Appeal contravenes the provisions of Article 344 TFEU enshrining the principle of the primacy of European Union law, and deprives the said principle of effectiveness, whereas by virtue of the principle of the autonomy of the European judicial system, the Court of Appeal should have annulled, if not revoked, then reformed the Exequatur Orders, and by refusing to respond, at the stage of the exequatur proceedings, to the arguments of the plaintiff in cassation, and that by refusing to respond, at the stage of the exequatur procedure of the Award, to the pleas of the plaintiff in cassation, raised both on pages 11 and 12 of its appeal, and on pages 11, 18 and 20 to 23 of its summary conclusions, relating to the primacy of European Union law, the Court of Appeal did not apply the principle of European public policy relating to the primacy of European Union law, set out in Article 344 of the Treaty on the Functioning of the European Union, thus tainting the judgment a quo with the substantive defect of violation of the rule of law. "

and

six, *"Based on the violation of the law, in particular the violation of the provisions of article 108 of the Treaty on the Functioning of the European Union*

(hereinafter “TFEU”), enshrining the principle of the primacy of European Union law;

In that the Court of Appeal dismissed Romania's appeal seeking the annulment, if not the revocation, if not the reversal of the exequatur order 45/2015 of 8 May 2015 and the rectification order 51/2015 of 22 May 2015 in that it stated, that: “It follows that certain developments of the STATE OF ROMANIA,..., which could, if applicable, be of interest at the level of the enforceability of the Award, will not be examined due to their lack of relevance at the level of the exequatur procedure, in particular the issues :

- (...) the primacy of EU law over the BIT since Romania's accession to the EU, - the conflict between the BIT and EU law, - the conflict of norms between EU law and the Washington Convention, - (...), - the argument that EU law provides for a system of investment dispute settlement based on Article 19 TEU and Articles 267 and 344 TFEU, - the conflict between a decision of the European Commission and a final national judgment, the conflict between a final national judgment (an ICSID award being assimilated to such a judgment) and an obligation arising from a Commission decision on State aid, - the fact that Luxembourg joined the European Union before acceding to the Washington Convention in 1970, - the duty of loyal cooperation of national authorities with the European Union, - the principle of effectiveness of European Union law, - the effect of the decision of the Court of First Instance of the European Union of 18 June 2019 on the decisions of the Commission of 26 May 2014 and 1 October 2014, - the primacy of Union law with regard to facts that occurred before Romania's accession, - the European Commission's subsidiary plea that, in the event of the application of the Washington Convention, the Award is to be treated as a judgement of the national legal order, which has to take precedence over the contrary Community law - the judgment of the Court of Appeal of 21 March 2018, sitting as a referee appeal, which ordered the release of the garnishments carried out on 28 and 29 July 2015 by M) on the basis of the Award's conflict with Community and therefore Luxembourg public policy, the preliminary references requested by the European Commission, in particular the one formulated in the conclusions notified on 18 June 2020, which are not relevant.” The Court of First Instance of the European Communities has not been able to rule on the question of whether the European Commission's request for a preliminary ruling is relevant to the case in question. Thus, the judges of the Court of Appeal did not rule on the arguments raised repeatedly by the appellant, thus declaring the appeal unfounded and ordering the Romanian State to pay the costs of the appeal proceedings and confirming the exequatur orders, The appellate judges did not rule on the pleas raised repeatedly by the appellant, the current applicant in cassation, concerning the pre-eminence of European Union law, postponing the analysis of these pleas to a later stage, when the validity of the individual enforcement acts that will be issued on the basis of the exequatur orders is examined;

Whereas on pages 11 and 12 of the appeal document, the appellant, the current plaintiff in cassation, invoked this principle in the following terms

“Article 2 of the European Commission (EU) Decision 2015/1470 states that an enforcement of the arbitral award would constitute a clear violation of Union law by Romania. In this regard, it should be noted that according to the case law of the Court of Justice of the European Union (hereinafter “CJEU”), the public policy of a Member State also includes the ius cogens derived from Union law. Thus, the CJEU has confirmed that the rules of competition law, which include state aid rules, and of consumer protection law are part of national public policy by virtue of the general Union law principles of effectiveness and equivalence.”, that this statement of reasons constituted the necessary support for the operative part of the appeal document, seeking the annulment, if not the revocation, if not the reformation of the Exequatur Orders, that the plaintiff in cassation recalling the said principle on pages 22 to 26 of the summary submissions of 15 November 2019, in particular as follows: “The KLAUSNER judgment of 11 November 2015, in which the CJEU ruled that the principle of effectiveness precludes a national rule which prevents the national court from drawing all the consequences of the infringement of Article 108 TFEU on account of the res judicata effect of a national court decision given in respect of a dispute unrelated to the control of state aid, ...However, allowing a title to be the subject of an exequatur and to bear the executory formula is precisely contrary to the Decision of 30 March 2015 and would amount to calling into question the primacy of European Union law ... It should be borne in mind that the judgment of 18 June 2019 annulled only the Decision of 30 March 2015, but that all the other binding acts adopted by the Commission remain in force. In particular, there are two binding acts that remain at present, namely: 1. The suspension injunction notified to Romania on 26 May 2014 (hereinafter “the Suspension Injunction”)... Notwithstanding the annulment of the Decision of 30 March 2015, this Suspension Injunction therefore still exists and will remain until the investigation of the procedure initiated under Article 108(2) and (3) TFEU, of which the Decision of 30 March 2015 was intended to be the epilogue, leads to a final decision... The Commission’s decision, notified to Romania on 1 October 2014, to initiate proceedings under Article 108(2) and (3) TFEU, a procedure to rule on whether or not the payment of damages to which the Arbitral Award had condemned Romania was to be equated with unlawful state aid prohibited by Article 107 TFEU. The Decision to initiate the investigation procedure has, in a similar way to the suspension order, the automatic effect of imposing the suspension of any measure which would result in the distribution of the state aid in question until the Commission has issued a final decision on the legality of the measure suspected of constituting prohibited state aid. This suspension is expressly provided for in Article 108(3) TFEU . . . The CJEU has had occasion to confirm that the initiation of proceedings by the Commission under Article 108(2) and (3) TFEU obliges not only the State concerned, but also the courts of any other Member State, not to take any action which may result in the distribution of the State aid considered by the Commission to be unlawful (or at least suspected of being unlawful during the investigation phase of the proceedings)... the useful effect of Article 108(3) TFEU

would be undermined ... the national courts would have disregarded their obligation, imposed by Articles 108(3) TFEU... Pending such a final decision, both Article 108(3) TFEU and the Suspension Order preclude any enforcement of the Arbitral Award.” The Court of Appeal should have answered the question of whether the Exequatur Orders should have been annulled, if not revoked, if not reformed, for being contrary to European public policy, and thus contrary to the public policy of the Member States, because of their violation of the principle of the primacy of European Union law, the judges of appeal should have answered in the affirmative, whereas even supposing that the Award was to be considered enforceable under the Washington Convention, it must be noted that by postponing the examination of the illegality of the Exequatur Orders to a later stage, i.e. to the moment when each individual act of enforcement is made (“at the level of the enforceability of the Award”), the Court of Appeal against), the Court of Appeal contravenes the provisions of Article 108 TFEU enshrining the principle of the primacy of European Union law, and deprives the said principle of effectiveness, whereas, on the one hand, in the presence of the Commission Decision of 30 March 2015 (no. 2015/1470), prohibiting Romania from proceeding with any enforcement of the Arbitral Award, on the grounds that such an enforcement of the Arbitral Award would constitute a clear violation of Union law by Romania, that, on the other hand, in the presence of the suspension injunction notified to Romania on 26 May 2014 and of the Decision to open the examination procedure, notified to Romania on 1 October 2014, aimed at ruling on the question whether the payment of damages to which the Arbitral Award had condemned Romania The Court of Appeal should have ruled on the aforementioned pleas of the plaintiff in cassation, relating to the primacy of European Union law, and that by refusing to respond, at the stage of the exequatur procedure of the Award, to the pleas of the plaintiff in cassation, raised both on pages 11 and 12 of its appeal document, and on pages 22 to 26 of its summary conclusions, relating to the primacy of European Union law, the Court of Appeal did not apply the principle of European public policy relating to the primacy of European Union law, set out in Article 108 of the Treaty on the Functioning of the European Union, thus vitiating the judgment a quo with the substantive defect of violation of the rule of law.”.

The Court's response

[9] Under Article 10(2) of the amended Act of 18 February 1885 on appeals and cassation proceedings, a plea or part of a plea must, on pain of inadmissibility, involve only one case of opening.

[10] The applicant for cassation invokes in each plea, not subdivided into branches, on the one hand, the substantive defect based on the violation of the principle of the primacy of European Union law, linked respectively to article 49bis of the Constitution and articles 351, 288, 344 and 108 TFEU and, on the other hand, the formal defect based on the failure to reply to the submissions in which it had developed that the recognition of the arbitration award would disregard this principle on the basis of the said provisions, hence two distinct cases of opening.

[11] It follows that the pleas are inadmissible.

On the seventh and eighth pleas in law of cassation combined

Statement of grounds

[12]

seven, "Based on the violation of Article 89 of the Constitution;

In that the Court of Appeal dismissed Romania's appeal seeking the annulment, if not the revocation, if not the reversal of the exequatur order 45/2015 of 8 May 2015 and the rectification order 51/2015 of 22 May 2015 in that it stated, that "It follows that certain developments by the STATE OF ROMANIA ... which could, if any, be of interest at the level of the enforceability of the Award, will not be examined because of their lack of relevance to the exequatur procedure, in particular the issues :

- (...) the primacy of EU law over the BIT since Romania's accession to the EU, - the conflict between the BIT and EU law, - the conflict of norms between EU law and the Washington Convention, - (...), - the argument that EU law provides for a system of investment dispute settlement based on Article 19 TEU and Articles 267 and 344 TFEU, - the conflict between a decision of the European Commission and a final national judgment, the conflict between a final national judgment (an ICSID award being assimilated to such a judgment) and an obligation arising from a Commission decision on State aid, - the fact that Luxembourg joined the European Union before acceding to the Washington Convention in 1970, - the duty of loyal cooperation of national authorities with the European Union, - the principle of effectiveness of European Union law, - the effect of the decision of the Court of First Instance of the European Union of 18 June 2019 on the decisions of the Commission of 26 May 2014 and 1 October 2014, - the primacy of Union law with regard to facts that occurred before Romania's accession, - the European Commission's subsidiary plea that, in the event of the application of the Washington Convention, the Award is to be treated as a judgement of the national legal order, which has to take precedence over the contrary Community law - the judgment of the Court of Appeal of 21 March 2018, sitting in appeal proceedings, which ordered the release of the seizures made on 28 and 29 July 2015 by M) on the basis that the Award was contrary to Community and therefore Luxembourg public policy, the preliminary references requested by the European Commission, in particular the one formulated in the conclusions notified on 18 June 2020, which are not relevant." In recognizing the Award and granting it enforceability, in disregard of the inviolable principle of the primacy of European Union law, in particular in matters of "State aid declared incompatible by the European Commission", thus declaring the appeal unfounded thus declaring the appeal unfounded, and ordering the Romanian State to pay the costs of the appeal proceedings, thus confirming the exequatur orders, the appeal judges did not rule on the plea raised repeatedly by the appellant, the current plaintiff in cassation, concerning the primacy of European Union law;

*Whereas under the terms of Article 89 of the Constitution, “All judgments shall be reasoned. It shall be delivered in open court.”, that “the judges of the court of first instance are obliged to explain themselves on all the grounds put to them, whatever their merit” and that Article 49 bis of the Constitution provides that: “The exercise of powers reserved by the Constitution to the legislative, executive and judicial powers may be temporarily devolved by treaty to institutions of international law”, enshrining the principle of the pre-eminence of European Union law, in the national legal order, that on pages 11 and 12 of the appeal deed of ten November 2015, the appellant, the current plaintiff in cassation, invoked this principle in the following terms: “Article 2 of the European Commission (EU) Decision 2015/1470 states that an enforcement of the arbitral award would constitute a clear violation of Union law by Romania. In this regard, it should be noted that according to the case law of the Court of Justice of the European Union (hereinafter “CJEU”), the public policy of a Member State also includes the *ius cogens* derived from Union law. Thus, the CJEU has confirmed that the rules of competition law, which include state aid rules, and of consumer protection law are part of national public policy by virtue of the general Union law principles of effectiveness and equivalence. (...) the arbitration decision is based on a bilateral treaty between Sweden and Romania dated 29 May 2002, which was erroneously cited in the operative part of the exequatur order. This bilateral treaty was implicitly abrogated upon Romania’s accession to the European Union and cannot serve as a basis for the recognition of an arbitral award...” This statement was the necessary basis for the operative part of the appeal, seeking the annulment, if not the revocation, if not the reformation of the Exequatur Orders, and the plaintiff in cassation recalled the said principle on pages 18 and 20 to 23 of the summary conclusions of 15 November 2019, in particular as follows: “(...) It is therefore clear from the foregoing that it is the primacy of European Union law as well as the modification of the applicable law by the accession of a State to the European Union and the absence of acquired law on the basis of a prior convention or treaty that should be considered in this case. Thus, the Washington Convention, put forward by Mr M) to have his application for exequatur automatically confirmed, must in fact take a back seat to the primacy of European Union law and to the absence of acquired rights on the basis of a previous convention or treaty. Mr M is therefore wrong to argue that an international treaty takes precedence over EU law. (...) This judgment presents a particularly interesting reasoning when it also affirms the primacy of European Union law. (...) However, to allow a title to be the subject of an exequatur and to bear the executory formula is precisely contrary to the Decision of 30 March 2015 and would amount to calling into question the primacy of European Union law.”, so that, as to the question of whether the Exequatur Orders of the Award should have been annulled, if not revoked, if not reformed, for being contrary to public policy, because of their violation of the principle of primacy of European Union Law, the Appeal Judges should have answered in the affirmative, whereas “...the treaties which established Community law have created a new legal order for the benefit of which the Member States have limited the exercise of their sovereign powers in the areas determined by those treaties. This rule is particularly relevant where the conflict is between a national law rule and a Community law rule, since the treaties establishing Community law have created*

a new legal order for the benefit of which the Member States have limited the exercise of their sovereign powers in the areas determined by these treaties.” In refusing to respond to the plea of the plaintiff in cassation, relating to the primacy of European Union law, they did not give sufficient reasons for the judgment reported, thus violating Article 89 of the Constitution.

and

eight, "Based on the violation of Article 89 of the Constitution;

In that the Court of Appeal dismissed Romania's appeal seeking the annulment, if not the revocation, if not the reversal of the exequatur order 45/2015 of 8 May 2015 and the rectification order 51/2015 of 22 May 2015 in that it stated, that: “It follows that certain developments of the STATE OF ROMANIA ... which could, if applicable, be of interest at the level of the enforceability of the Award, will not be examined due to their lack of relevance at the level of the exequatur procedure, in particular the questions:

- (...) the primacy of EU law over the BIT since Romania's accession to the EU, - the conflict between the BIT and EU law, - the conflict of norms between EU law and the Washington Convention, - (...), - the argument that EU law provides for a system of investment dispute settlement based on Article 19 TEU and Articles 267 and 344 TFEU, - the conflict between a decision of the European Commission and a final national judgment, the conflict between a final national judgment (an ICSID award being assimilated to such a judgment) and an obligation arising from a Commission decision on State aid, - the fact that Luxembourg joined the European Union before acceding to the Washington Convention in 1970, - the duty of loyal cooperation of national authorities with the European Union, - the principle of effectiveness of European Union law, - the effect of the decision of the Court of First Instance of the European Union of 18 June 2019 on the decisions of the Commission of 26 May 2014 and 1 October 2014, - the primacy of Union law with regard to facts that occurred before Romania's accession, - the European Commission's subsidiary plea that, in the event of the application of the Washington Convention, the Award is to be treated as a judgement of the national legal order, which has to take precedence over the contrary Community law - the judgment of the Court of Appeal of 21 March 2018, sitting as a referee appeal, which ordered the release of the garnishments carried out on 28 and 29 July 2015 by M) on the basis of the Award's conflict with Community and therefore Luxembourg public policy, the preliminary references requested by the European Commission, in particular the one formulated in the conclusions notified on 18 June 2020, which are not relevant.” The Court of First Instance of the European Communities, in recognizing the Award and granting it enforceability, in disregard of the inviolable principle of the primacy of European Union law, in particular in matters of “State aid declared incompatible by the European Commission”, thus declaring the appeal to be inadmissible, and ordering the Romanian State to pay the costs of the appeal proceedings, thus confirming the exequatur orders, the judges of appeal did not rule on the plea raised repeatedly by the appellant, the current plaintiff in cassation, concerning the pre-eminence of European Union law;

raised repeatedly by the appellant, the current plaintiff in cassation, concerning the pre-eminence of European Union law;

Whereas under the terms of Article 89 of the Constitution, “All judgments shall be reasoned. It shall be delivered in open court.”, that “the judges of the court of first instance are obliged to explain themselves on all the grounds put to them, whatever their merit” and that Article 49 bis of the Constitution provides that: “The exercise of powers reserved by the Constitution to the legislative, executive and judicial powers may be temporarily devolved by treaty to institutions of international law.” The appellant, the current plaintiff in cassation, invoked this principle on pages 11 and 12 of the appeal document in the following terms: “Article 2 of the European Commission (EU) Decision 2015/1470 states that the execution of the arbitration award would constitute a clear violation of EU law by Romania. In this regard, it should be noted that according to the case law of the Court of Justice of the European Union (hereinafter “CJEU”), the public policy of a Member State also includes the ius cogens derived from Union law. Thus, the CJEU has confirmed that the rules of competition law, which include state aid rules, and of consumer protection law are part of national public policy by virtue of the general Union law principles of effectiveness and equivalence.”, that this statement of reasons constituted the necessary support for the operative part of the appeal, seeking the annulment, if not the revocation, if not the reformation of the Exequatur Orders, that the plaintiff in cassation recalling the said principle on pages 18 and 20 to 23 of the summary submissions of 15 November 2019, notably as follows: “(...) It is therefore clear from the foregoing that it is the primacy of European Union law as well as the modification of the applicable law by the accession of a State to the European Union and the absence of acquired law on the basis of a prior convention or treaty that should be considered in this case. Thus, the Washington Convention, put forward by Mr M) to have his application for exequatur automatically confirmed, must in fact take a back seat to the primacy of European Union law and to the absence of acquired rights on the basis of a previous convention or treaty. Mr M is therefore wrong to argue that an international treaty takes precedence over EU law. (...) This judgment presents a particularly interesting reasoning when it also affirms the primacy of European Union law. (...) However, to allow a title to be subject to an exequatur and to have the enforcement formula applied to it is precisely contrary to the Decision of 30 March 2015 and would amount to calling into question the primacy of European Union law. (...) the arbitration decision is based on a bilateral treaty between Sweden and Romania dated 29 May 2002, which is erroneously cited in the operative part of the exequatur order. However, this bilateral treaty was implicitly abrogated when Romania joined the European Union and cannot serve as a basis for the recognition of an arbitral award...” In other words, by refusing to examine the pleas of the plaintiff in cassation, in particular the plea relating to the primacy of European Union law, the legal consequence of which would be the annulment, if not the revocation, of the exequatur orders of the Award, the recognition and enforcement of which would be contrary to European Union law, and therefore to the public policy of a Member State of the European Union, the Appeal Judges did not respond to the

argument raised by the plaintiff in cassation, both on pages 11 and 12 of its appeal, and on pages 18 and 20 to 23 of its summary conclusions, and by refusing to respond to the argument of the plaintiff in cassation, relating to the primacy of European Union law, the appeal judges did not respond to the conclusions of the latter, which constitutes the formal defect of failure to respond to conclusions, and therefore they did not give sufficient reasons for the judgment reported, thus violating Article 89 of the Constitution".

The Court's response

[13] Insofar as it is based on the violation of Article 89 of the Constitution, the plea is aimed at the failure to reply to submissions, which is a form of the failure to state reasons, which is a formal defect.

[14] A decision is reasoned if it contains an express or implied statement of reasons on the point in question.

[15] Holding as follows:

"It follows from Articles 53 and 54 of the Washington Convention that the only condition for obtaining the exequatur of an arbitral award is the existence of an ICSID award, a copy of which, certified by the Secretary General, must be submitted to the exequatur judge. Apart from this condition, the Washington Convention does not provide any grounds for refusing to enforce an ICSID award.

If the ROMANIAN STATE maintains that article 54.-3) of the Washington Convention ("Enforcement shall be governed by the law relating to the enforcement of judgments in force in the State in whose territory it is sought to be enforced") refers to Luxembourg national law, this only applies to the enforcement of judgments. As indicated above, the exequatur does not in itself constitute an act of enforcement.

It follows that certain developments of the STATE OF ROMANIA and of the European Commission, which could, if necessary, be of interest at the level of the enforceability of the Award, will not be examined because of their lack of relevance to the exequatur procedure, i.e., in particular, the questions regarding: ...

- *the primacy of Union law over the BIT since Romania's accession to the European Union,*
- *the conflict between the BIT and EU law,*
- *the conflict of norms between EU law and the Washington Convention [...]"*,

the judges of appeal have responded to the conclusions of the plaintiff in cassation.

[16] It follows that the pleas in law are unfounded.

On the ninth and tenth grounds of cassation combined

Statement of grounds

[17]

nine, *"Based on the violation of Article 89 of the Constitution ;*

In that the Court of Appeal dismissed Romania's appeal seeking the annulment, if not the revocation, if not the reformation of the exequatur order 45/2015 of 8 May 2015 and the rectification order 51/2015 of 22 May 2015 in that having noted, on page 13, the penultimate paragraph of the reported judgment, that "In the present case, the Award was rendered under the auspices of ICSID (hereinafter "the Award"), pursuant to the Washington Convention, to which both Romania and Luxembourg, the State in which enforcement is pursued, are parties." These findings necessarily imply a broad understanding of the exequatur, in that it constitutes not only an act of recognition, but also a first step in the enforcement procedure, with the immediate and logical legal consequence that, in accordance with the provisions of article 54.-3) of the Washington Convention, there is applicability of national law, in particular Articles 1244 et seq., 1250 and 1251 of the New Code of Civil Procedure, to the procedure for the exequatur of the Award, in particular as regards the assessment of the grounds for refusing the exequatur, the appeal judges hold, a few lines above and then a few lines below, that "...the exequatur does not constitute, in itself, an act of enforcement...", thus affirming one thing and its opposite, to deduce that "... If the State of Romania maintains that article 54.-3) of the Washington Convention (...) refers to Luxembourg national law, this only applies to the enforcement of judgments. As indicated above, the exequatur does not in itself constitute an act of enforcement.", rejecting the plea of the Appellant, the present Appellant in cassation, relating to the applicability of the provisions of Luxembourg law to the procedure for the enforcement of the Award, in particular as regards the assessment of the grounds for refusing to enforce the Award, in accordance with the provisions of Article 54 (3) of the Washington Convention, a plea expressed repeatedly, both in its appeal document of 10 November 2015, on pages 8, 9, 11 and 12, in the following terms: "Article 1250 of the NCPC, which deals with the exequatur of an arbitral award made abroad, refers to the rules governing the enforcement of foreign judgments subject to a treaty or a Community act (Articles 679 NCPC et seq.). Under Article 682 of the NCPC, the party against whom enforcement is sought may lodge an appeal with the Superior Court of Justice, sitting in appeal proceedings. In the present case, the appellant formally appeals against the exequatur decision even though these exequatur orders were not issued in accordance with Article 1250 NCPC et seq.(...) 1) Violation of Article 1251 (1) NCPC: Assuming that the exequatur orders should not already be reformed for failure to comply with the formalism imposed by Article 1250 NCPC, it is established that the exequatur judge should not have granted such recognition of the foreign arbitral award. As mentioned above, Article 1251 NCPC provides that the exequatur must be refused: 1° if the award can still be challenged before arbitrators and if the arbitrators have not ordered its provisional enforcement notwithstanding an appeal. However, the arbitral award was the subject of an appeal for annulment dated 9 April 2014...As a result, the arbitral award does not have the authority of res judicata

allowing to obtain its exequatur while the arbitral award is subject to an appeal for annulment. (...) Article 1251 NCPC further provides that the exequatur must be refused: 2° if the award or its enforcement is contrary to public policy or if the dispute was not capable of being settled by arbitration; If Your Court were to find that the decision is not subject to appeal and/or is enforceable, it must still be noted that the arbitral decision is contrary to international public policy.”, that in its summary submissions of 15 November 2019, in particular at pages 8 and 13, in the following terms: “Secondly, Article 54 (3) of the Washington Convention refers for the rest to national law: 'Enforcement shall be governed by the law concerning the enforcement of judgments in force in the State in whose territory it is sought to be carried out.’, and “Article 54 (3) of the Washington Convention clearly refers to national law: 'Enforcement shall be governed by the law concerning the enforcement of judgments in force in the State in whose territory it is sought to be carried out. "Articles 1250 NCPC et seq. complete these rules, including Article 1251 NCPC, which provides grounds for refusal of exequatur.” In this way, the Court refused the applicability of national law, in particular the above-mentioned provisions of the New Code of Civil Procedure, to the procedure for the enforcement of the Award, especially as regards the grounds for refusing enforcement of the Award, which applicability nevertheless follows unequivocally from the provisions of Article 54.-3 of the Washington Convention, to reject the request for annulment, if not for reformation, if not for revocation of the Exequatur Orders, and to declare the appeal unfounded, and to order the State of Romania to pay the costs and expenses of the appeal proceedings, thus confirming the Exequatur Orders;

Whereas under the terms of Article 89 of the Constitution, "All judgments shall be reasoned. It shall be pronounced in open court.”, that "two contradictory reasons destroy and annihilate each other, none of them being able to be retained as a basis for the decision”, so that, as to the question of whether, in accordance with the provisions of Article 54.-(3) of the Washington Convention, Luxembourg national law applies to the enforcement of a foreign arbitration award, in particular articles 1244 et seq., 1250 and 1251 of the New Code of Civil Procedure, the Court of Appeal should have answered in the affirmative, even though the judges of appeal held, in the same judgment, that by instituting enforcement proceedings in Luxembourg, M) had “continued (e)” in reality “enforcement” of the Award, thus assimilating exequatur to enforcement, and therefore the judgment under consideration is to be declared as not being reasoned, within the meaning of the provisions of Article 89 of the Constitution, and therefore is to be annulled for contravention of the abovementioned constitutional provisions."

and

ten, *"Based on the violation of Article 89 of the Constitution;*

In that the Court of Appeal dismissed Romania's appeal seeking the annulment, if not the revocation, if not the reformation of Exequatur Order 45/2015 of 8 May 2015 and Rectification Order 51/2015 of 22 May 2015 in that, having noted, on page 13, the penultimate paragraph of the reported judgment, that “In the present case, the Award was rendered under the auspices of ICSID (hereinafter "the Award"), pursuant to the Washington Convention, to which both

Romania and Luxembourg, the State in which enforcement is pursued, are parties.”, findings which necessarily entail a broad understanding of the exequatur, in that it constitutes not only an act of recognition, but also a first stage of the enforcement procedure, leading to the immediate and logical legal consequences that the exequatur falls within the domain of the immunity of States from jurisdiction, as well as that of their immunity from enforcement, the appeal judges state, a few lines above and then a few lines below, that “...the exequatur does not constitute, in itself, an act of execution...”, thus affirming one thing and its opposite, to deduce that “...the exequatur...not of such a nature as to cause the immunity of the State concerned from execution...”, to declare the plea relating to the nullity if not the reversal if not the revocation of the Orders, for contravening public policy and contravening the immunity from jurisdiction and execution of the State of Romania, unfounded, rejecting the plea of the appellant, the current plaintiff in cassation, raised on the one hand in its appeal document of 10 November 2015, under the heading "II.C.2) immunity from jurisdiction”, in the following terms: “The Arbitral Award is still contrary to public policy in that the State of Romania enjoys immunity from jurisdiction and execution, unless that State has expressly waived it. In the present case, however, Romania has never expressly waived its immunity, so that enforcement of the Award would violate public policy.”, raised on the other hand at page 20 of its summary submissions of 15 November 2019, in the following terms: “First, the BIT was implicitly set aside by Romania's accession to the European Union. Secondly and alternatively Article 7 (5) cited by party M) makes such immunity subject to the condition that consent has been provided pursuant to paragraph 2 of the same article. It is for party M) to provide evidence that the conditions of paragraph 2 have been met.”, thus declaring the appeal unfounded, and ordering the State of Romania to pay the costs of the appeal proceedings, thus confirming the Exequatur Orders;

Whereas under the terms of Article 89 of the Constitution, "All judgments shall be reasoned. It shall be pronounced in open court.”, that “two contradictory reasons destroy and annihilate each other, none of them being able to be retained as a basis for the decision”, so that, as to the question whether the State of Romania could validly rely on the so that, as to the question of whether the State of Romania could validly rely on its immunity from execution to raise the nullity, if not the reformation, if not the revocation of the Orders, for being contrary to public policy, the Court of Appeal should have answered in the affirmative, even though the judges of appeal held, in the same judgment, that by instituting exequatur proceedings in Luxembourg, M) had “pursued (e)” in reality “the execution” of the Award, thus assimilating the exequatur to the execution, and therefore the judgment undertaken is to be declared as not being reasoned, within the meaning of the provisions of Article 89 of the Constitution, and therefore is to be annulled for contravention of the abovementioned constitutional provisions."

The Court's response

[18]

The plaintiff in cassation complains that the appeal judges gave contradictory reasons for their decision, on the one hand, by holding that the exequatur does not constitute an act of execution and, on the other hand, that the execution of the arbitration award was being pursued in Luxembourg.

[19] The complaint based on contradictory reasons, equivalent to a lack of reasons, can only be upheld if the reasons in question are contradictory to such an extent that they destroy and annihilate each other, and none of them can be retained as the basis for the decision.

[20] The judges of appeal initially rejected the ground of immunity of execution of the STATE OF ROMANIA on the grounds that "*the procedure of exequatur concerns the field of the immunity of jurisdiction and not the field of the immunity of execution. Indeed, the exequatur does not constitute, in itself, an act of execution likely to cause the immunity of execution of the State considered*".

[21] They then rejected the objection based on the violation of the public policy of the requested State on the grounds that "*in the case of the application of an international convention, such as the Washington Convention, the provisions of Article 1251 do not apply and the judge only takes into account the provisions of the convention*". They noted that "*the Award was rendered under the auspices of ICSID, pursuant to the Washington Convention, to which both Romania and Luxembourg, the State in which enforcement is sought, are parties. These two countries have never denounced this Convention, which is therefore still in force.*

and held:

"It follows from Articles 53 and 54 of the Washington Convention that the only condition for obtaining the exequatur of an arbitral award is the existence of an ICSID award, a copy of which certified by the Secretary General must be submitted to the exequatur judge. Apart from this condition, the Washington Convention does not provide any grounds for refusing to enforce an ICSID award.

If the ROMANIAN STATE argues that article 54.-3) of the Washington Convention ("Enforcement shall be governed by the law relating to the enforcement of judgments in force in the State in whose territory it is sought to be enforced") refers to Luxembourg national law, this only applies to the enforcement of judgments. As indicated above, the exequatur does not in itself constitute an act of enforcement.

[22] The developments in which the appeal judges held that the Washington Convention is binding "*both on Romania and on Luxembourg, the State in which enforcement is pursued...*" were intended solely to ascertain whether this Convention continues to bind the two countries, so that the contested addition that "*The statement that "enforcement is pursued in Luxembourg", which is superfluous, does not constitute the necessary support for the decision of the judges of appeal to reject the plea of immunity from execution invoked by the plaintiff in cassation, a rejection based on the ground, recalled after the passage criticized, that "the exequatur does not constitute, in itself, an act of enforcement of such a nature as to give rise to the immunity from execution of the State in question.*

[23] The appeal judges did not contradict themselves.

[24] It follows that the pleas in law are unfounded.

On the plea of public policy ex officio

[25] *"The Court of Appeal, hearing the appeal against an order granting a request for recognition on the basis of Article 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted on 18 March 1965 in Washington (the 'ICSID Convention'), found that the arbitration award No ARB/05/20, made on 11 December 2013 by the International Centre for Settlement of Investment Disputes in a dispute between, on the one hand, various investors, including M), and, on the other hand, a number of other investors, including M of Arbitral Award No. ARB/05/20, rendered on 11 December 2013 by the International Centre for Settlement of Disputes in a dispute between, on the one hand, various investors, including M), and, on the other hand, Romania, pursuant to the arbitration clause provided for in Article 7(5) of the bilateral investment treaty, concluded on 29 May 2002, between the Governments of Sweden and Romania ("the BIT"), dismissed the objection of immunity from jurisdiction raised by Romania on the grounds that "In light of the arbitration clause under Article 7(5) of the BIT to which the STATE OF ROMANIA has consented, it is to be considered as having expressly waived its immunity from jurisdiction", while having been seized of the questions "of the primacy of Union law over the BIT since Romania's accession to the European Union" and "of the conflict between the BIT and European Union law", whereas, **firstly**, as the Court of Justice of the European Union ruled in its Achmea judgment of 6 March 2018 (C- 284/16, ECLI:EU:C:2018:158), Articles 267 and 344 TFEU preclude a provision contained in an international agreement concluded between Member States under which an investor of one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal, whose jurisdiction that Member State has undertaken to accept, and that, as the Court of Justice of the European Union found in its judgment in Commission v European Food et al., the Court of Justice of the European Union has ruled that the provision does not preclude the application of Articles 267 and 344 TFEU of 25 January 2022 (C-638/19 P, ECLI:EU:C:2022:50), Romania's consent to the possibility of a dispute with investors being brought against it under the arbitration clause in Article 7(5) of the BIT is, as of Romania's accession to the European Union on 1 January 2007, "(paragraph 145 of the judgment) because it is contrary to Articles 267 and 344 TFEU, so that those articles preclude the inference from Article 7(5) of the BIT of a waiver of immunity from jurisdiction, and that, in making this deduction, the Court of Appeal disregarded these articles, and that, **secondly**, in deducing Romania's waiver of its immunity from jurisdiction from its consent to Article 7(5) of the BIT, even though, in light of the abovementioned judgments of the Court of Justice of the European Union, that consent is contrary to Articles 267 and 344 TFEU and, as from Romania's accession to the European Union on 1 January 2007, 'devoid of any purpose' (paragraph 145 of the above-mentioned judgment in Commission v European Food et al., of 25 January 2022), the Court of Appeal disregarded the principle of public international law of the immunity of foreign states from jurisdiction.*

The Court's response

[26] Having regard to Articles 267 and 344 of the TFEU and the principle of immunity of foreign States from jurisdiction.

[27] It follows from the judgment under appeal that the STATE OF ROMANIA had invoked before the judges of appeal as defences to the request for recognition of the arbitration award both its immunity from jurisdiction and the infringement of European Union law of the arbitration clause provided for in Article 7(5) of the bilateral investment treaty (hereinafter "*the BIT*") between the Kingdom of Sweden and the State of Romania

[28] The infringement of Articles 267 and 344 TFEU of an arbitration clause contained in an international agreement binding two EU Member States was held by the CJEU in the *Slowakische Republik-Achmea* (hereinafter "*Achmea*") judgment of 6 March 2018 (C-284/16, ECLI:C:2018:158.), i.e. prior to the time when the judges of appeal ruled.

[29] In *Achmea*, the CJEU ruled that "*Articles 267 and 344 TFEU must be interpreted as precluding a provision contained in an international agreement concluded between the Member States [of the European Union] [...] under which an investor of one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal, the jurisdiction of which the latter Member State has undertaken to accept.*"

[30] In *Commission v European Food, Victor M) et al.* of 25 January 2022 (C-638/19 P, ECLI:EU:C:2022:50), the CJEU ruled that the solution in *Achmea* applies to the arbitration clause in Article 7(5) of the BIT (paragraphs 137 and 138).

[31] It recalled that:

"by concluding such an agreement, the Member States which are parties to it agree to remove from the jurisdiction of their own courts and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by Union law, disputes which may relate to the application or interpretation of that law. Such an agreement is therefore liable to lead to a situation in which those disputes would not be decided in a manner which would guarantee the full effectiveness of that law (judgment of 26 October 2021, PL Holdings, C-109/20, EU:C:2021:875, paragraph 45 and the case-law cited),

[32] on the grounds that "*on the one hand, [that] this arbitral tribunal does not constitute a "court of one of the Member States", within the meaning of Article 267 TFEU, and, secondly, [that] the arbitral award made by the latter is not subject, in accordance with Articles 53 and 54 of the ICSID Convention, to any review by a court of the Member State as to its conformity with Union law.*" (paragraphs 139 and 142).

[33] The CJEU concluded that *"since, from the date of Romania's accession to the Union, the system of judicial remedies provided for by the EU and TFEU Treaties has replaced that arbitration procedure, the consent given by that State to that effect is [...] devoid of purpose."* (paragraph 145).

[34] The judges of appeal dismissed the claim for immunity from jurisdiction of the ROMANIAN STATE against the request for recognition of the arbitral award on the ground that the claimant in cassation had waived its right to invoke immunity from jurisdiction because of its agreement to have the dispute settled under the arbitration clause contained in Article 7(5) of the BIT.

[35] Since, however, as of 1 January 2007, the date of Romania's accession to the European Union, the system of judicial remedies specific to the European Union replaced the arbitration procedure of the BIT between the Kingdom of Sweden and the State of Romania, and since the consent of the plaintiff in cassation to have the dispute settled in application of the arbitration clause contained therein is devoid of any purpose, the judges of appeal, by ruling as they did, violated both Articles 267 and 344 TFEU and the principle of public international law of the immunity of the STATE OF ROMANIA from jurisdiction.

[36] It follows that the judgment is subject to cassation.

[37] There is no reason to refer the case to the Court of Appeal, since the immunity of the STATE OF ROMANIA from jurisdiction paralyses the exercise of the jurisdictional power which results from the international competence of the Luxembourg courts.

[38] The fact that the STATE OF ROMANIA enjoys immunity from jurisdiction in the present case certainly deprives the defendant in cassation (M), as he argues in his pleadings, of the possibility of having the disputed arbitration award recognized in Luxembourg.

[39] Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms does not, however, preclude a limitation on the right of access to a court, arising from foreign State immunity, provided that such a limitation is enshrined in international law and does not go beyond the generally recognized rules of international law on State immunity.

[40] There is no reason, as the defendant in cassation still argues, to stay the proceedings until the CJEU has ruled on the merits of a question referred to it by the Brussels Court of Appeal in the dispute between the same parties, since the answer to the question referred to it is not likely to affect the outcome of the present dispute.

On the claims for procedural damages

[41] In view of the costs, M's application for an award of procedural damages must be dismissed.

[42] It is not unfair to leave the entirety of the costs incurred by the EUROPEAN COMMISSION which are not included in the costs of the proceedings, and therefore claim for an award of procedural damages must be rejected.

FOR THESE REASONS,

the Court of Cassation:

[43] quashes and annuls, without referral, judgment number 15/21-VIII-Exequatur, delivered on 11 February 2021 under number 43054 of the roll by the Court of Appeal of the Grand Duchy of Luxembourg, Eighth Chamber, sitting in civil and exequatur matters;

 rejects the claims for procedural damages;

 orders the defendant in cassation M) to pay the costs of the cassation proceedings;

 orders that, at the request of the State Prosecutor, the present judgment be transcribed in the register of the Court of Appeal of the Grand Duchy of Luxembourg and that a note referring to the transcription of the judgment be recorded in the margin of the original of the annulled judgment.

 This judgment was read out at the above-mentioned public hearing by Presiding Judge LINDEN in the presence of First Advocate General Serge WAGNER and Court Clerk Daniel SCHROEDER.