

Withdrawing Tax Incentives and Pillar II: Micula *Versus* Romania Reconsidered

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Abstract

To avoid the ultimate parent company jurisdiction of large multinationals from collecting a top-up Global Minimum Tax under Pillar II, many states will effectively eliminate their domestic tax incentive regimes by means of a Qualifying Domestic Minimum Top-Up Tax (QDMTT). As noted by scholars and practitioners, such a measure may raise international legal issues under investment treaties. This article reconsiders the Micula v Romania case, a rare investment award on the merits where the host state cancelling its tax incentives was the primary issue, to assess when a QDMTT could constitute a breach of fair and equitable treatment under investment treaties.

Keywords: arbitration, domestic top-up tax, fair and equitable treatment, Global minimum tax, ICSID, investment treaty, Micula v Romania, OECD, tax holiday, tax incentive.

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1. The Context: Withdrawing Tax Incentives and the Global Minimum Tax

In 2021, the Organization for Economic Cooperation and Development (OECD) published the Global Anti-Base Erosion Model Rules (GloBE rules),² a multilaterally coordinated effort led by the G20 and the OECD, involving the Inclusive Framework³ as part of the so-called Pillar II, which is sometimes referred to as the

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² OECD, *Tax Challenges Arising from Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS*, (OECD Publishing, Paris, 2021), <https://doi.org/10.1787/782bac33-en>. For an overview see N. Bammens and D. Bettens. 2023. „The Potential Impact of Pillar Two on Tax Incentives”, 51 *Intertax*: 155-169, <https://doi.org/10.54648/taxi2023018>; G. Perez-Navarro. 2023. What Does Pillar Two’s Global Minimum Tax Mean for Tax Incentives?, 51 *Intertax*: 100-104, <https://doi.org/10.54648/taxi2023017>.

³ The Inclusive Framework on Base Erosion and Profit Shifting was created by the OECD and the G20 to bring together interested countries and jurisdictions in the OECD Committee on Fiscal Affairs. It comprises more than 140 countries and jurisdictions. The list of member jurisdictions is available here: <<https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/beps/inclusive-framework-on-beps-composition.pdf>> accessed 25 November 25 2024.

‘Global Minimum Tax’. The GloBE Model Rules create ‘a common approach’, where states introduce municipal laws to impose Top-up Taxes on certain ultimate parent entities (UPE) of a multinational group in connection with low taxed income derived by the group’s subsidiaries anywhere in the world. The GloBE Model Rules apply only to multinational groups that generate a turnover of 750 million euros in annual consolidated revenue.⁴ The mechanics of the Top-up Tax is based on several interlocking charging rules but simply put any income taxed below 15% somewhere in the multinational group is topped up to 15% by the group’s home state.

Clearly, states that offer tax incentives do not want these simply taken away by another state. The GloBE Model Rules acknowledge this and provide that no Top-up Tax will be implemented by the jurisdiction of the UPE (with exceptions) if the jurisdiction of the subsidiary has already topped up the tax to 15%.⁵ In other words, the state of the subsidiary can create its own domestic top-up system to ensure that it levies taxes up to the required 15%, called a Qualifying Domestic Minimum Top-up Tax (QDMTT).

By introducing such a QDMTT into their domestic law, states effectively and transparently abrogate any tax exemptions or reductions previously granted to taxpayers below the 15% threshold, provided these taxpayers fall within the personal scope of the GloBE rules (i.e. the 750 million euros annual consolidated turnover). QDMTTs are typically triggered to the extent that existing income taxes result in an effective tax rate below 15%.⁶

The OECD recognizes that the effective abrogation of tax incentives in the context of Pillar II’s Global Minimum Tax raises legal questions, including the impact on tax stabilization clauses in contracts with investors⁷. The OECD also explicitly identifies possible challenges for states that effectively withdraw tax incentives, particularly under the standards of protection outlined in bilateral investment treaties: *In addition to contractual constraints on the updating of tax policies, many jurisdictions may have investment treaties that could potentially affect tax policy outcomes. [...] They offer investors a range of protections, including provisions requiring ‘fair and equitable treatment’ and compensation for ‘direct’ or ‘indirect expropriation’. Many investment treaties also contain umbrella clauses obliging States to honour commitments they have*

⁴ GloBE Model Rules (n 2) art 1.1.1 (provides that the threshold is set at a consolidated revenue of at least 750 million euros in the last two of the four preceding fiscal years).

⁵ GloBE Model Rules (n 2) art 10.1.1; see also OECD, *Tax Challenges Arising from the Digitalisation of the Economy – Consolidated Commentary to the Global Anti-Base Erosion Model Rules* (OECD Publishing, Paris, 2023), 318 (OECD Consolidated Commentary), <https://doi.org/10.1787/b849f926-en>; A. P. Dourado. 2022. „The Pillar Two Top-Up Taxes: Interplay, Characterization, and Tax Treaties”, 50 *Intertax*: 388-395, <https://doi.org/10.54648/taxi2022045>.

⁶ ATAF, *Suggested Approaches to Drafting Domestic Minimum Top-Up Tax Legislation* (ATAF, 2023); See also Noam N. 2022. Designing Domestic Minimum Taxes in Response to the Global Minimum Tax, 50 *Intertax*: 678, <https://doi.org/10.54648/taxi2022068>.

⁷ The OECD identifies tax stabilization clauses in investment contracts or in other instruments as an important obstacle in this regard. This subject is beyond the scope of this article; OECD. 2022. *Tax Incentives and the Global Minimum Corporate Tax: Reconsidering Tax Incentives after the GloBE Rules*, OECD Publishing, para 20, <https://doi.org/10.1787/25d30b96-en>.

*undertaken with regard to the investment. These provisions allow for noncontractual claims; fair and equitable treatment clauses have also been interpreted in a range of cases to include some stabilisation content. Most investment treaties, particularly older treaties, do not mention tax and thus apply to tax measures as they do to all government action. This means that tax measures may potentially be challenged as breaching treaty commitments.*⁸

The Commentary on the GloBE Model Rules also acknowledges the possibility that investors might challenge a state based on stabilization agreements or investment treaty protection. In such cases, for the UPE initiating such a challenge, the disputed amount will not be considered as credit for the GloBE Top-up Tax until it is effectively paid.⁹

The United Nations Conference on Trade and Development (UNCTAD) concludes in a brief online note that ‘it is unlikely that the introduction of the global minimum tax will cause a wave of investor–State dispute settlement (ISDS) cases under [investment treaties]’, but also admits that ‘much depends on the particular circumstances of individual investors’.¹⁰

Literature on the subject has thus far mostly pointed out that a QDMTT might indeed be challenged by an investor under investment treaties, as a last resort, but the outcome will largely depend on actual circumstances. For example, (without wishing to be exhaustive) Catherine Brown and Elizabeth Whitsitt conclude that ‘arbitral jurisprudence considering a host state’s fair and equitable treatment (FET) obligation in the tax context indicates that a foreign investor may be able to successfully assert an FET violation where tax measures create instability or violate the investor’s legitimate expectations’.¹¹ Similarly, Professor Błażej Kuźniacki concludes that a QDMTT may, depending on the circumstances, constitute a breach of FET. He further notes that the OECD might have international (shared) liability, although he admits that the OECD’s immunity would have to be waived for it to be held accountable.¹² Rubinstein, Friedman, and Parzen argue that a QDMTT might constitute a violation of several protection standards in investment treaties and briefly discuss the operation of fair and equitable treatment and national treatment in tax matters. The authors regard arbitration as a last resort, preferring the possibility of negotiation as provided under the GloBE rules.¹³ Professor Reuven Avi-Yonah also points out that many MNE’s may not want to

⁸ Ibid para 21.

⁹ OECD Consolidated Commentary (n 5) para 20.1, 149.

¹⁰ UNCTAD, ‘Facts on Investor–State Arbitrations in 2021: With a Special Focus on Tax-Related ISDS Cases’, (July 2022) IIA Issues Note 4, 1 available at <<https://unctad.org/publication/global-minimum-tax-and-investment-treaties-exploring-policy-options>> accessed 25 November 2024.

¹¹ Catherine Brown and Elizabeth Whitsitt. 2023. ‘Implementing Pillar Two: Potential Conflicts with Investment Treaties’, *Canadian Tax Journal*, vol. 71, no. 1: 189-207, <https://doi.org/10.32721/ctj.2023.71.1.sym.brown>.

¹² Błażej Kuźniacki. 2023. ‘Pillar 2 and International Investment Agreements: ‘QDMTT Payable’ Seals an Internationally Wrongful Act’, (9 October 2023) Tax Notes, <<https://www.taxnotes.com/special-reports/oecd-pillar-2-global-minimum-tax/pillar-2-and-international-investment-agreements-qdmtt-payable-seals-internationally-wrongful-act/2023/10/06/Thdg1>> accessed 25 November 2024.

¹³ J. Rubinstein, L. Friedman, and T. Parzen. 2024. ‘Using Investment Treaties to Prevent Pillar 2’s

challenge the withdrawal of tax incentives in one of their group entities because the GloBE Top-Up Tax will, in any event, be imposed at the UPE level, which might make such a challenge ineffectual. Similarly, Vincent Beyer advocates for improving investment treaties to address uncertainty. He suggests that the international treaty for Pillar I would clarify the relationship with the GloBE rules (of Pillar II).¹⁴ Herzfeld noted that the adoption of a domestic minimum tax that eliminates the benefit of promised tax incentives fits squarely within a BIT's requirement that a country cannot engage in undertakings that extinguish investors' legitimate expectations.¹⁵ Professors Chand, Turina, and Romanovska highlight the tensions between Pillar II and the existing tax treaties, but also recall that the override of tax treaties may be actionable under investment treaties.¹⁶

It is true that a significant number of investment claims are (in part) based on the cancellation of tax incentives, but the majority involve renewable energy investors challenging the gradual withdrawal of various legal, regulatory, and tax incentives by Spain and Italy.¹⁷ These claims are based on the Energy Charter Treaty, which excludes tax matters from FET.¹⁸ Accordingly, as expropriation was not claimed in these cases,¹⁹ the tribunals did not decide on the merits of the tax incentive issues.

The 2013 International Convention for the Settlement of Investment Disputes (ICSID) decision in *Micula v Romania* was notable for its unique context.²⁰ This case is a rare example of an international investment award addressing whether the withdrawal of an investor's tax incentives by a state might constitute a violation of the

Revocation of Promised Tax Incentives' (19 February 2024) *Tax Notes International*, 963.

¹⁴ Vincent Beyer. 2024. 'International Investment Agreements and the Global Minimum Tax: Of Treaty Troubles and Investment Incentives', *Journal of International Economic Law*, Vol. 27, Issue 2, June: 241–258, <https://doi.org/10.1093/jiel/jgae010>; See also Irma Johanna Mosquera Valderrama. 2020. 'Regulatory Framework for Tax Incentives in Developing Countries after BEPS Action 5', *Intertax*, Vol. 48, Issue 4: 446–459, p. 453, <https://doi.org/10.54648/taxi2020039> (observing on the issue of stabilization agreements and Pillar II from the perspective of developing countries).

¹⁵ M. Herzfeld. 2023. 'Could Bilateral Investment Treaties Kill Pillar 2?' (26 June 2023) *Tax Notes Int'l*, at 1701 <<https://www.taxnotes.com/tax-notes-today-international/harmonization/could-bilateral-investment-treaties-kill-pillar-2/2023/06/26/7gw8j>> accessed 25 November 2024.

¹⁶ Vikram Chand, Alessandro Turina, Kinga Romanovska. 2022, 'Tax Treaty Obstacles in Implementing the Pillar Two Global Minimum Tax Rules and a Possible Solution for Eliminating the Various Challenges', *World Tax Journal*, Vol. 14, No. 1: 3–50, <https://doi.org/10.59403/33wxjhc>.

¹⁷ UNCTAD, (n 10) (providing a 'List of IIA-based ISDS cases related to tax matters, 1987–2021); Sebastián Green Martínez. 2019, 'Taxation Measures under the Energy Charter treaty after the Yukos Awards Articles 21(1) and 21(5) Revisited', *ICSID Review - Foreign Investment Law Journal*, Vol. 34, Issue 1, Winter: 85–106, <https://doi.org/10.1093/icsidreview/siz002>; Uğur Erman Özgür. 2015. *Taxation of Foreign Investments under International Law: Article 21 of the Energy Charter Treaty in Context*, Energy Charter Secretariat, p. 39–49, https://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Taxation_of_Foreign_Investments_2015_en.pdf.

¹⁸ Energy Charter Treaty (of 17 December 1994, in force 16 April 1998) art 21.

¹⁹ In some instances, the claimant alleged that the measures had resulted in an expropriation, but this was rejected because there was no substantial loss of the investment. See for example *Charanne B.V. and Construction Investments S.a.r.l. v Spain* (SCC Case No. 062/2012), Final Award (21 January 2016).

²⁰ *Ioan Micula, Viorel Micula and others v Romania*, ICSID Case No. ARB/05/20, Award (11 December 2013) (*Micula v Romania*).

fair and equitable treatment standard. An earlier ICSID decision, *Goetz v Burundi*, concerning the cancellation of tax incentives for a mining company, is also notable. However, the claim in that case was based on expropriation rather than a violation of FET.²¹

This article contributes to the discussion of the investment treaty aspects of Pillar II by exploring the *Micula v Romania* investment award in some detail. After this introduction to the issue's context, Section 2 briefly explains the facts about the dispute. Section 3 discusses the umbrella clause in this case, and its application to tax incentives without an investment contract. Section 4 analyzes the decisions of the tribunal with respect to the breach of FET. The Section 5 looks into the noteworthy separate opinion by Professor Abi-Saab. Section 6 explores lessons learned from *Micula v Romania* in determining whether a QDMTT may constitute a breach of fair and equitable treatment under investment treaties. Finally, Section 7 provides concluding remarks on *Micula v Romania*'s relevance to the QDMTT debate.

This article does not focus on situations in which the state has agreed to formal, explicit tax stabilization with an investor through a contractual arrangement, nor will it discuss the enforcement aspects of *Micula v Romania* under EU law.

2. The Facts of *Micula v Romania* in a Nutshell

The facts regarding *Micula v Romania* are relatively straightforward. Two twin brothers left their home country of Romania in the late 1980's for Sweden, where they obtained Swedish nationality in 1992. As part of their naturalization, they renounced their Romanian nationality. However, their contacts to and knowledge of the Romanian market proved advantageous as they began investing in the beverage and food industries in 1990, well before Romania's accession to the European Union in 2007.

They gradually expanded the scope and volume of their investments in the beverage and food industries. They established several Romanian-registered entities that the Tribunal, during the jurisdictional phase, determined to be Swedish-invested entities for the purpose of arbitration.²² The initial investment concerned non-alcoholic beverages such as fruits and carbonated soft drinks. They appear to have been successful, as reports suggest that the brothers acquired a 55% share of this market segment. Over the years, other product lines, such as distillery and food businesses were added, including the construction of a brewery in 2001.²³

All or most of these investments, the brothers argue, were made in reliance on tax incentives offered by Romania for a particularly disfavoured region called Ștei-Nucet-Drăgănești (the Region) in northwestern Romania. These tax incentives were based on several laws passed by Romania in 1991 and 1996, which provided the legal

²¹ *Antoine Goetz et al v Republic of Burundi*, ICSID Case ARB/95/3, Decision (2 September 1998) (and the settlement reached between the parties after this decision) was published in French in the *ICSID Rev.-F.I.L.J.* 458-527.

²² *Ioan Micula, Viorel Micula and others v Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008).

²³ *Micula v Romania* (n 20) para 171.

framework for investment incentives and was meant to attract investments to this and other disadvantaged regions. These incentives included customs duty exemptions on machinery and raw materials (claimed by the investor to be crucial for the business model), VAT exemptions, and corporate income tax holidays for up to 10 years.²⁴

The legal framework for tax incentives in the region was meant to last for 10 years, was apparent from a government decision had designated that Ștei-Nucet-Drăgănești as a ‘disfavoured region’ eligible for tax incentives for a period of 10 years.²⁵ Additionally, a slightly amended regulation on tax incentives issued in 1999 stated that there would be “an exemption from payment of profit tax during the existence of the disfavoured region”.²⁶

Although it was initially unclear whether this was legally required under EU law, a question this article will not discuss in detail, Romania, for the most part, cancelled the customs duty and VAT incentives in question as of 22 February 2005, citing the need to comply with EU rules on state aid.²⁷

In essence, the claimant’s position was that this withdrawal of tax incentives constituted a violation of the Bilateral Investment Treaty between Romania and Sweden, particularly the fair and equitable treatment protection standard, which provides the following: *Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, as well as the acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures.*²⁸

3. Whether Romania’s Withdrawal of Tax Incentives Violated the Umbrella Clause

An umbrella clause in a bilateral investment treaty provides that when a host state violates its obligations to an investor in connection with the investment, it is regarded as a violation of the treaty. This clause is most often used to elevate violations of an investment contract to the level of a treaty violation, allowing for the investor to pursue the international arbitration mechanism. Thus a ‘contract claim’ becomes a ‘treaty claim’.

In *Micula v Romania*, the Claimants argued they had both a treaty claim and a contract claim. In any event, the BIT provides an umbrella clause, so the claimant’s contract claim is elevated to the treaty claim level by its operation. The umbrella clause is expressed as follows.

²⁴ *Micula v Romania* (n 20) para 344.

²⁵ Government Decision 194/1999, dated 25 March 1999, referred in *Micula v Romania* (n 20) para 152.

²⁶ Annex 2 of GD 194/1999 (n 25) which lists the incentives provided under Article 6(1) of Emergency Government Ordinance No. 24/1998.

²⁷ *Micula v Romania* (n 20) para 132.

²⁸ Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments (dated 29 May 2002, in force 1 April 2003, terminated on 11 March 2020) (the BIT), art 2 (3).

Each Contracting Party shall observe any obligation it has entered into with an investor of the other Contracting Party with regard to his or her investment.²⁹

The interpretation of the umbrella clause and its application to tax incentives by the Tribunal in *Micula v Romania* are noteworthy. In this case, there is no formal contract between the investor and the state pertaining to the project or providing a tax stabilization clause. Instead, the investor relies on Romanian law, regulations, and documents issued by the Romanian authorities in relation to the investment project to confirm that it qualifies for the investment incentives in question.

The umbrella clause may be invoked, depending on its language, to obligations expressed in the laws or regulations of a State has been established before, as Claimants also raised, for example in *LG&E v Argentina*.³⁰ In this case, Argentina was deemed to have made specific commitments through its laws, regulations, and memoranda to investors in the context of investments in privatized state enterprises. Argentina's commitments in this case concerned foreign currency values and remittances, intended to induce foreign investors in that privatization exercise and of specific application to the investor's investment.³¹ The brothers Micula argue that the same applies to Romania's tax incentive laws and regulations, taken together with the 'permanent investor certificate' (PIC).

The Romanian tax incentive scheme did not appear to be substantially different from many similar schemes worldwide.³² Internationally, it is common for governments to target sectors, geographic areas, or both that need or are worth incentivizing. Before confirming eligibility, investors typically submit a project plan and usually required to comply with the investment and activities in that plan to some degree. It is also typical for authorities to issue a written confirmation (in this case, PIC) that the benefits can indeed be used by the investor, along with any continuing conditions that apply to the project. In many countries, such confirmation can be used to show tax and customs authorities that investors are eligible for various exemptions.

The Claimants particularly relied on the fact that the government decision declaring the Region to be 'disfavoured' in the context of the incentive legislation applied for a fixed period of 10 years, and no less.³³ The Claimant also presented testimony from government policymakers confirming that there was a firm intention to maintain the incentives for the full 10-year period, until 1 April 2009.³⁴

Romania's position is considerably different. Romania argues that 'an undertaking' is not the same as 'entering into an obligation' within the context of the BIT's umbrella clause. Romania refers to another investment dispute involving

²⁹ Ibid art 2(4).

³⁰ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) (*LG&E v Argentina*) para 175.

³¹ Ibid para 174.

³² See for example Alexander J. Easson. 2004. *Tax Incentives for Foreign Direct Investment*, Kluwer Law International, 175-198 (on various tax-free zones).

³³ GD 194/1999 art 3 quoted in *Micula v Romania* (n 20) para 365.

³⁴ *Micula v Romania* (n 20) paras 366 and 367.

Argentina, notably *Continental Casualty Company v Argentine Republic*.³⁵ In this case, which was decided later than in *LG&E v Argentina*, the Tribunal reached a different conclusion regarding the umbrella clause. Notably, the Tribunal in *Continental Casualty Company v Argentina* held that the new Argentinian laws on foreign exchange issues were not specifically linked to investment companies. Instead, the provisions of the legislative regime that were changed were addressed either to the general Argentina public or to a wide range of depositors and subscribers to a number of financial instruments.³⁶ In *LG&E v Argentina*, the foreign exchange terms of the Gas Law were deemed specifically linked because ‘they were the basis on which the original investors relied to make investments in the gas sector’.³⁷ The fact that an umbrella clause did not apply to the host state’s general laws and regulations was also confirmed by the annulment of *CMS v Argentina*,³⁸ a point Romania also highlighted.³⁹

Romania’s core argument is that it was under no obligation to provide tax incentives for the full 10 year, as originally foreseen when the region was designated as disfavoured. To argue this, Romania recalls that the only legal basis for tax exemption, the law itself, did not specify any 10-year period, and that the decrees and regulations which did were allegedly not permitted as per the Romanian hierarchy of laws to add such a term.⁴⁰

In other words, according to Romania, investors had some entitlement to tax incentives, but only as amended from time to time by Romania or even cancelled. Romania has not been prevented from revising or withdrawing its tax incentives.⁴¹

The Tribunal commenced its consideration by enquiring whether Romania had an obligation under municipal law towards Micula for tax incentives, and whether that obligation was specific to the investment project.⁴² In both cases, the Tribunal concluded that it was true. As the Tribunal sees it, the general incentive scheme is ‘perfected’ through the PIC which, allows the specific application of the incentives to the project. These incentives were to last for 10 years until 2009,⁴³ as the regulation stated that ‘the facilities listed in Annex 2 “shall be granted” during the existence of the disfavoured region’.⁴⁴

Remarkably, the Tribunal offers two possible interpretations for proceeding under the umbrella clause: In the first interpretation, the claimant must prove that it has a vested right to claim incentives under municipal law. This evidence, the Tribunal concluded, was not provided by the claimant. This interpretation represents the view of

³⁵ *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008) (*Continental Casualty v Argentina*) paras 300 and 302.

³⁶ *Ibid* para 302.

³⁷ *LG&E v Argentina* (n 30) para 175; *Continental Casualty Company v Argentina* (n 35) para 301.

³⁸ *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/8), Decision on Annulment (25 September 2007), (*CMS v Argentina Annulment*) para 95a.

³⁹ *Micula v Romania* (n 20) para 386.

⁴⁰ *Ibid* para 394.

⁴¹ *Ibid* para 408.

⁴² *Ibid* para 418.

⁴³ *Ibid* para 432.

⁴⁴ GD 194/1999 (n 33) art 4.

the majority, and, as a result, the umbrella clause claim was dismissed by the tribunal.

However, the Tribunal further explain what would happen in the second interpretation, notably if no evidence of a vested right was required. In the second interpretation, the Tribunal states that a ‘firm commitment’ by Romania suffices for the umbrella clause. This is established by the fact that incentives are offered through regulations.⁴⁵ In this case, Romania’s key argument, namely that the investor only has an entitlement to the tax incentives as available from time to time, subject to change, is addressed by the Tribunal as follows: *The question is thus whether Romania’s commitment to provide the incentives contained an element of stabilization in the event of an amendment of the laws governing the EGO 24 framework. The commitment to maintain the incentives for a certain specific time period induced investors to take advantage of the offer. Therefore, Romania cannot in good faith ignore the fact that such a commitment would necessarily be understood as including a promise of stabilization; that is, that the incentives would be maintained for the specified period. Stated differently, because Romania promised certified investors that it would maintain the incentives through a certain date, that promise could not be understood otherwise than as including the undertaking that the incentives would not be withdrawn earlier. Thus, while Romania did not make a commitment not to amend its laws as a general matter, certified investors understood that they would benefit from the incentives through 1 April 2009.*

4. Whether Romania’s Withdrawal of the Tax Incentives Violated the Fair and Equitable Treatment Standard of the BIT

The Claimants argue that, as part of the fair and equitable treatment standard of the BIT, Romania is obliged to provide a stable and predictable legal framework for the investment and to not violate the claimants’ legitimate expectations in connection therewith.⁴⁶ There is significant support for the requirement of a ‘stable and predictable legal framework’, although its application to the facts may vary considerably.⁴⁷

The Claimant takes the view that it had legitimate expectations based on the laws, regulations, and conduct of Romania that tax incentives would be in place for the full 10-year period,⁴⁸ and that the host state wrongfully reversed those assurances. The brothers admit that Romania does not have to completely freeze its tax regulations pertaining to investment, but argue that Romania has accepted certain restraints in this regard—not to abandon the entire scheme, but rather to, for example, provide gradual phasing out for investors instead of just abruptly cutting off the incentive from one day

⁴⁵ *Micula v Romania* (n 20) paras 454-457.

⁴⁶ *Micula v Romania* (n 20) para 470.

⁴⁷ *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000); (*Metalclad v Mexico*) *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003); *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey*, ICSID Case No ARB/02/5, Award (19 January 2007); *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No ARB/01/8), Award (12 May 2005).

⁴⁸ *Micula v Romania* (n 20) para 474.

to the next.⁴⁹ Romania did so with a corporate income tax holiday, which was only gradually phased out for existing investors.

Regarding fair and equitable treatment, Romania essentially reiterates its position from the umbrella clause debate, notably that Romania is free to amend its tax incentives. Accordingly, there was no legitimate expectation on the part of the investor that the tax incentive would remain in place.⁵⁰ Romania argues that an expectation of regulatory stability must be ‘based on some sort of promise or at the very least, a proper representation made to the investor, on the part of the state’. Romania pointed out that it did not have any commitment to keep its regulatory framework frozen. Ordinarily, Romania argues, ‘an investor must take into account that the legislation will change’,⁵¹ particularly in the context of Romania’s EU accession.⁵²

The Tribunal, again by majority, finds that the investor legitimately expected tax incentives to last for the full 10 years. One of the factors that the Tribunal considers is that “Romania’s conduct had included an element of inducement that required Romania to stand by its statements and its conduct”.⁵³ *In other words, Romania created the appearance of a ten year tax holiday for investors who decided to invest in the disadvantaged area (and this appearance conformed to what Romania did in fact wish to enact). [...] In the Tribunal’s view, Romania thereby made a representation that gave rise to the PIC holders’ legitimate expectation that during this tax holiday they would receive substantially the same benefits they were offered when they committed their investments.*⁵⁴

The Tribunal also noted that the regime required a quid pro quo from investors (notably, primarily to actually carry out the investment)⁵⁵ and that Romanian officials had implied in public statements that compensation would apply.⁵⁶ The Tribunal felt it was significant that the government did not just amend the scheme but virtually eliminated all advantages, while keeping the investor’s obligations in place (which the Tribunal decided was ‘unreasonable’.⁵⁷ The Tribunal also considered that the withdrawal of tax incentives was initially uncertain under EU law, including to the Romanian Government.⁵⁸ Nevertheless, the Tribunal had no doubt that the government was under pressure to terminate the tax incentive regime and that this constituted the main motivation for doing so.⁵⁹ However, the Tribunal concluded that Romania violated its obligation to act transparently by failing to inform investors earlier. The government was aware, since 2003, that tax incentives would have to be eliminated but did not inform affected investors. Investors were only informed in 2005, when incentives were

⁴⁹ Ibid para 475.

⁵⁰ Ibid para 488.

⁵¹ Ibid para 635.

⁵² Ibid para 636.

⁵³ Ibid para 686.

⁵⁴ Ibid para 686.

⁵⁵ Ibid para 679.

⁵⁶ Ibid para 689.

⁵⁷ Ibid paras 682 and 826.

⁵⁸ Ibid para 768.

⁵⁹ Ibid para 796.

withdrawn. According to the Tribunal (unanimously) Romania should have informed investors as soon as possible, relying on the decision of *Metalclad v Mexico*.⁶⁰

In summary, the majority of the tribunal agreed that Romania violated the claimants' legitimate expectations that most tax incentives would stay in place for 10 years. However, the Tribunal was unanimous in its decision that Romania also failed to act transparently by failing to inform the claimants in a timely manner. Accordingly, the overall decision by the Tribunal is that Romania failed to ensure FET of the investments under the BIT.

On 11 December 2013, the Tribunal thus found in favour of the Micula brothers and awarded damages equivalent to nearly 120 million euros.⁶¹ This was not the end of the matter. The EU Commission has prevented enforcement of the award, taking the view that its payment would constitute state aid in violation of EU law. Various legal proceedings were triggered in connection with enforcement and EU law, both in the EU and around the world, which are outside of the scope of this article.⁶²

5. The Separate Opinion by Professor Abi-Saab

It is worth noting some of the points made by Professor Abi-Saab in his separate opinion in this case, while keeping in mind that, ultimately, the Tribunal did agree unanimously that there had indeed been a violation of FET in connection with the withdrawal of tax incentives by Romania.⁶³

One of his key disagreements is the finding of a breach in investors' legitimate expectations. As explained above, the majority of the Tribunal found that the combination of Romania's laws, decisions, and the PIC meant that the investor legitimately expected that the 10-year tax incentive for imports would indeed be maintained for 10 years. Professor Abi-Saab agrees that this was indeed the case, but he does not see any commitment from Romania to stabilize the tax incentive for this period. In other words, following Romania's argument, the investor is entitled to a tax holiday of 10 years, unless it is shorter than 10 years.

Furthermore, Professor Abi-Saab does not agree with the reasoning in the

⁶⁰ *Metalclad v Mexico* (n 47) para 76.

⁶¹ An annulment request by Romania was rejected: *Ioan Micula, Viorel Micula and Others v Romania*, ICSID Case No. ARB/05/20, Decision on annulment (26 February 2016).

⁶² EU Commission Decision 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award *Micula v Romania* of 11 December 2013, OJ L 232, 04/09/2015, p. 43–70; T-624/15, T-694/15 and T-704/15 *European Food and Others v Commission* EU:T:2019:423; C-638/19 P *European Commission v European Food SA and Others* EU:C:2022:50; C-516/22 *European Commission v United Kingdom of Great Britain and Northern Ireland* (2024) EU:C:2024:231; Lindsey, A. 2019. 'District Court Rejects Achmea Objection in Micula Ruling, Leaving Its Viability in Question', *Columbia Journal of Transnational Law*, blog notes 9 November 2019 <<https://www.jtl.columbia.edu/bulletin-blog/district-court-rejects-achmea-objection-in-micula-ruling-leaving-its-viability-in-question>> accessed 25 November 2024.

⁶³ *Ioan Micula, Viorel Micula and Others v Romania*, ICSID Case No. ARB/05/20, Separate Opinion George Abi-Saab (5 December 2013), available at <<https://www.italaw.com/sites/default/files/case-documents/italaw3037.pdf>> accessed 25 November 2024 (the Separate Opinion).

decision, which accepts that Romania acted in good faith and reasonably, and nevertheless decides that there is liability attached to the frustration of the legitimate expectations of the investor.⁶⁴

Finally, Professor Abi-Saab agrees that Romania's 'slackness' does result in some liability, although he suggests that this liability should be limited. Nevertheless, he somewhat reluctantly agrees with the calculation of speculative damages including a slightly justified *lucrum cessans* component (already severely cut by the Tribunal), apparently because counsel for the Respondent had accepted the principle.⁶⁵

6. Some Reflections on *Micula v. Romania* with Respect to a QDMTT

Micula v. Romania involves a number of interesting questions from the perspective of a state removing tax incentives through QDMTT in the context of Pillar II.

6.1. Whether Every Domestic Tax Incentive Regime Creates an Obligation in the Context of the Umbrella Clause

Ultimately, the Tribunal decided by majority on the umbrella question that the Micula brothers failed to prove that they had a vested right to tax incentives under Romanian law. However, it appears that the Tribunal based this decision primarily on the testimony of the claimant's expert witness to Romanian law, which was considered insufficient. The Tribunal rejected the host state's argument that tax incentives could not constitute an obligation in the context of the umbrella clause. The Tribunal unanimously agreed that it is possible for a host state to commit itself to tax stability without a typical contract signed between the state and the investor but simply through the operation of the state's own tax incentive law, regulation, conduct, and related paperwork. The foundation for this interpretation was already adopted in *LG&E v Argentina* (in relation to foreign currency aspects, not tax incentives), but in that case, Argentinian foreign currency regulation was, in fact, part of the agreement with the investor for the privatization of a state-owned enterprise. It can be concluded that the Tribunal in *Micula v Romania* was prepared to go beyond what was held in *LG&E v Argentina*.⁶⁶

Legally the central question is whether the tax incentive is 'an obligation entered into with regard to the investment' (or whatever the language in the applicable umbrella clause) rather than a legal obligation that generally applies to the investment.⁶⁷

⁶⁴ Ibid para 11.

⁶⁵ Ibid para 16.

⁶⁶ *Micula v Romania* (n 20) paras 446-459.

⁶⁷ *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) para 121: '[T]he host State must have assumed a legal obligation, and it must have been assumed vis-à-vis the specific investment-not as a matter of the application of some legal obligation of a general character. This is very far from elevating to the international level all the 'municipal legislative or administrative or other unilateral measures of a

Generally, a tax regime merely applies to an investment and a tax rule that is beneficial to the investor is no different from one that is not. For example, a tax rule that exempts capital gains on shares from income tax applies to an investor in a general manner, as it no doubt does to many taxpayers. Although such a rule binds the host state as a domestic statute, it cannot be said that it constitutes an obligation entered into with regard to the investment. Should a state adopt a general rule that raw materials for the beverage industry can be imported free from VAT and customs duty, this too would not by itself constitute an obligation entered into with regard to the investment. However, in the reasoning of the Tribunal, it is possible that such an exemption is somehow *rendered specific* or as the Tribunal puts it, ‘perfected’ in connection with the investment, and that is what the Tribunal believes happened in *Micula v Romania*.⁶⁸

As a principle this is not controversial as any general rule can at least in theory become a specific obligation with regard to the investment. For example, an investment fund might ask and obtain a specific undertaking from the host state with respect to the above mentioned capital gains tax exemption, thereby making the tax provision both a general rule of domestic law and an obligation which is potentially within the scope of the umbrella clause.

The factual basis the Tribunal accepts for the incentive to be rendered specific to the investment, and the central role played by the PIC in that regard, is another matter. The PIC is a brief document that simply reads as follows: *[Company name] is the beneficiary of the facilities under Government Decision no. ... of 1999, in accordance with the provisions of Emergency Government Ordinance no. 24/1998, republished and subsequently amended, and in accordance with the provisions of Government Decision no. 728/2001 on the approval of the methodological norms for the application of Emergency Government Ordinance no. 24/1998 on the disfavoured regions regime. The present certificate is valid until 01.04.2009*⁶⁹.

It should be noted that globally it is quite common for the regulator to issue some kind of a formal letter or certificate to the qualifying investor that at least confirms that the investor has qualified for the regime. In many cases, tax incentive regimes include various options and conditions that may be set out in such a certificate. Different incentive regimes apply to different activities and projects. A bank receives different incentives from a manufacturer. In nearly all cases, there is an explicit or implicit requirement that to qualify for incentives, the investor must implement the project substantially as planned, and funds must be brought into the country within a certain timeframe. Changes to investment plans often need to be preapproved by regulators. These aspects emphasize the transactional nature of state-granted tax incentives.

The PIC (and other certificates like it around the world) could be seen as merely confirming general entitlement for the tax holiday, as Romania proposed and the Tribunal rejected. With respect to the effect of unilateral documents issued by the state under an umbrella clause, it is crucial to determine the source in law of its normative

Contracting Party.’

⁶⁸ *Micula v Romania* (n 20) para 422.

⁶⁹ *Micula v Romania* (n 20) paras 174-176.

content. The question must be asked if the rules referred to in the document bind the state just because they are domestic laws or regulations, or because in addition, the state assumes them as obligations with regard to the investment. To illustrate, if the investment fund in the example above writes a letter to the tax authority of the host state to ask if it qualifies for the capital gains tax exemption, an affirmative response may be a matter of general tax administration, a mere confirmation of the application of its domestic laws. In case something goes wrong, such reply may or may not have legal consequences under municipal administrative laws, but it is not in and of itself within the scope of the umbrella clause. But nothing prevents that state, with its consent (as can be derived from a wide range of circumstances, including its conduct), from making this tax exemption the subject of a specific obligation that relates to the investment.

This raises the additional question whether a government undertaking with respect to a tax incentive could fall within the scope of an umbrella clause if it is not enforceable under domestic law. In *Micula v Romania* the Tribunal accepts the contention by Romania (remarkably without objection by the Micula Brothers)⁷⁰ that an obligation must be enforceable as per domestic law, and the lack of sufficient proof in that regard was in fact the reason it was ultimately held that the umbrella clause was not breached.⁷¹ This approach may be confined to this particular decision as it is not easily brought in line with the general principle of international law that a state may not rely on its provisions of internal law as justification for failure to comply with its obligations.⁷²

6.2. Whether Every Tax Incentive with a Time Period Requires Stabilization, Even Without an Investment Contract

The Tribunal emphasized on the combination of the mention of a validity period in the PIC, along with the government's decision to designate the region as having a disfavoured status for 10 years. This raises the question of whether every tax incentive measure that mentions a period might create an obligation for the state to stabilize it, with or without an investment contract explicitly providing this.

Globally, many tax incentive regimes indicate the duration, in principle, incentives are valid. For instance, it is common to refer to a '10 year tax holiday'. This is one of the main differences with tax rules that happen to benefit investors but which were not conceived as investment incentives, such as a general exemption of foreign income or capital gains. Most regimes also include provisions stating that incentives may be cancelled or curtailed in certain circumstances, most commonly when the investor fails to proceed with the implementation of the investment in a timely manner, fails to comply with reporting and monitoring requirements, or violates the laws of the host state.

⁷⁰ Ibid para 416.

⁷¹ Ibid para 459.

⁷² International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, appended to GA Res. 56/83, 12 December 2001 and with Commentary in ILC Ybk 2001 vol. II, Part Two, as corrected (ARISWA) art 32.

This issue lies at the core of the matter, notably whether the investor may reasonably assume (and legitimately expect) that, when the regulator denominates and structures an incentive as ‘a 10 year tax holiday’, the state is legally bound to honour the full 10-year period. Indeed, the Tribunal in *Micula v Romania* indicated that this may be the case.

There is a risk that one might rely too much on formalities rather than substance in such cases. If one relies heavily on the mention of the 10-year period of the certificate created by the state, these forms can always be amended by the state. Does it change the substance of the matter if Romania had added some ‘fine print’ on its PICs stating that the period is ‘subject to change as per law’? To be clear, the Tribunal not only refers to the PIC but also considers the laws and government decisions with respect to the region, which also set out the same 10-year term.

Whether a state has committed to a certain tax holiday period and whether an investor relies on it remains a question that is difficult to answer in the abstract. Mostly, a domestic law, regulation, or piece of paper from the host state effectively says what it says. If a 10-year tax holiday period is provided, it goes a long way towards holding the state for that 10-year period. This approach appears to be the better view. The interpretation that a state can offer a 10-year tax holiday without honouring the full 10 years would render investment protection under an umbrella clause meaningless, and without ‘effect utile’ (*ut res magis valeat quam pereat*).⁷³

6.3. Whether It Matters that Tax Incentives Are Withdrawn in the Context of Pillar II

Romania referred to the state aid rules in EU law as the reason why tax incentives for the region had to be abolished, although it was not always clear between the EU and the Romanian Government whether this was unavoidable from the outset. The Tribunal noted that Romania might have applied for an exception or extension, but it did not address this issue in terms of potential liability.⁷⁴ Instead, the Tribunal in *Micula v Romania* is primarily interested in the EU aspect as an enquiry to see if the policy was ‘reasonable’ as part of the FET in the BIT.

It is not for an investment tribunal to decide what is a good or a bad fiscal policy. However, in the context of FET there is room for tribunals to question bad faith, and the Tribunal found no bad faith in this case.⁷⁵

⁷³ C. Braumann and A. Reinisch. 2019. ‘Effet Utile’ in J. Klinger, Y. Parkhomenko and C. Saloniadis (eds) *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law*, Kluwer Law International, 47-72 at 48. The specified duration of gambling permits was held an undertaking not to change the tax regime of gambling in such radical a manner that it becomes economically unviable in an effort to hasten the exit of the industry from Poland: *Horthel Systems v Poland*, PCA Case No. 2014-31, Award (16 February 2017) para 254; Filip Balcerzak. 2023. ‘Horthel v Poland: Fair and Equitable Treatment Embodies the Rule of Law, Whereas Tax is not Always a Tax’, *ICSID Review - Foreign Investment Law Journal*, Volume 38, Issue 1, Winter: 25–38, <https://doi.org/10.1093/icsidreview/siac024>.

⁷⁴ *Micula v Romania* (n 20) paras 864-871.

⁷⁵ *Micula v Romania* (n 20) para 836.

The question arises as to whether the context of Pillar II is relevant for determining whether a QDMTT might constitute a violation of FET. Unlike Pillar I, the GLoBE rules are coordinated multilaterally rather than being legislated by a multilateral treaty. However, it is unclear whether this makes any difference. Although there are certainly some justified criticisms of Pillar II, the fact that the states are coming together on the broad multilateral platform of the Inclusive Framework in a coordinated effort to reduce harmful tax competition between them, seems to be reasonable and rational policy on its face. However, again, a state does not need a transnational context to justify withdrawing tax incentives, as long as the policy is not arbitrary, dishonest, or unreasonable.

Professor Abi-Saab raises an interesting question in this regard, also in the context of the QDMTT, notably, whether the state could rely on the rule of necessity to revoke tax incentives. *In casu, the reduction, and particularly the early termination of the Raw Materials Facility, was motivated by the imperious necessity for Romania to join the European Union, which was an overriding national interest. I realize, however, that the Respondent has not invoked “necessity”, as a ground for precluding wrongfulness [...]*⁷⁶

In the BIT, the expropriation article references an emergency situation,⁷⁷ while other BITs often contain a more general provision.⁷⁸ In any event, it may be challenging for a state to invoke necessity to abrogate the tax incentives it had earlier granted through the QDMTT under Pillar II. In a case of necessity, a state essentially decides to breach an international obligation to maintain a tax incentive, in this case most likely FET or the umbrella clause, to protect its other interests, presumably to go see a tax incentive be taken away by another state through a global Top-Up Tax.⁷⁹

A landmark case on a state invoking necessity is the already mentioned *LG&E v. Argentina* case, where the host state was facing a severe economic crisis and civil unrest, which, according to the Tribunal, ‘triggered the protections afforded under Article XI of the Treaty to maintain order and control the civil unrest’.⁸⁰ However, as Judge Tomka observed, arbitration tribunals have not been consistent in their interpretation and application of this rule.⁸¹ The threshold for necessity in the

⁷⁶ Separate Opinion (n 63) para 10.

⁷⁷ BIT (n 28) art 4 (4): ‘Investors of either Contracting Party who suffer losses of their investments in the territory of the other Contracting Party due to war or other armed conflict, a state of national emergency, revolt, insurrection or riot shall be accorded, with respect of restitution, indemnification, compensation or other settlement, a treatment which is no less favourable than that accorded to its own investors or to investors of any third State’.

⁷⁸ For example, as was the case in *LG&E v Argentina* Decision (n 30): ‘This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.’

⁷⁹ Crawford, J. 2014, *State Responsibility: The General Part*, Cambridge Univ. Press, p. 307.

⁸⁰ *LG&E v Argentina* (n 30) par 237.

⁸¹ P. Tomka. 2015. ‘Chapter 34: Defences Based on Necessity Under Customary International Law and on Emergency Clauses in Bilateral Investment Treaties’, in Meg Kinnear et al. (eds) *Building International Investment Law: The First 50 Years of ICSID*, Kluwer Law International, 477-494.

international law of state responsibility is indeed high, as Article 25 ARISWA requires, among other things, safeguarding an essential interest against ‘a grave and imminent peril’. More importantly, Article 25(2) ARISWA provides that a state cannot invoke necessity if ‘the state has contributed to the situation of necessity’. Although an economic crisis might conceivably qualify as an act of necessity,⁸² it may be extreme to assume that a state is in grave and imminent peril due to its tax holidays. Additionally, it could be argued that the state did ‘contribute to the situation’ under Article 25(2) ARISWA, as the tax incentives that allegedly cause the problems were previously voluntarily granted by the state in the first place.

6.4. Whether It Matters How Transparent States Are in Relation to Their QDMTT Policy

If *Micula v Romania* is any indication, it is indeed important how transparent authorities are with respect to their policy to withdraw or abrogate tax incentives in the context of Pillar II. Notably, the Tribunal unanimously agreed that Romania would not have remained silent for nearly two years. Indeed, the region’s import tax exemption for raw materials, which was deemed crucial to the investor’s business plan, would have to be eliminated. Professor Abi-Saab is milder in his judgement of Romania’s ‘slackness’ and contradictions between different departments, but he also agrees that Romania incurs liability in this respect.

In accordance with the rule of transparency in investment treaties, the earlier and clearer the authorities are, the better. Duplicitous, even if meant to calm investors, will not work in the long run. In addition, it is not uncommon for investment tribunals to refer to public statements by officials and politicians. Vagueness, diplomacy, and mixed messages will not be helpful in this regard. If no advance clarity is provided on the QDMTT, including possible compensation measures that the government might implement, the risk to the host state increases.⁸³

7. Conclusions

It is difficult to predict whether QDMTTs will be the source of a new wave of investment claims, similar to what was seen in the Energy Charter Treaty cases following the withdrawal of certain renewable energy incentives by Italy and Spain. Apparently, the prospect is real enough for the EU Commission to include a new provision in its post-Lisbon investment protection agreements with Canada, Singapore

⁸² Robert D. Sloane. 2012. ‘On the Use and Abuse of Necessity in the Law of State Responsibility’, *American Journal of International Law* vol. 106, no. 3 (2012): 447–508. <https://doi.org/10.5305/amerjintlaw.106.3.0447>.

⁸³ See for example M.A. Sullivan. 2024. ‘Vietnam Pillar 2 Revenue to Be Funnelled into New FDI Incentives’, (27 May 2024) Tax Notes Int’l, at 1325 <<https://www.taxnotes.com/tax-notes-today-federal/corporate-taxation/vietnam-pillar-2-revenue-be-funneled-new-fdi-incentives/2024/05/28/7k75c>> accessed 25 November 2024.

and Vietnam clarifying that withdrawing ‘a subsidy’ (which includes a tax incentive)⁸⁴ cannot in most practical circumstances result in liability under investment protection standards.⁸⁵ As Rubinstein, Friedman, and Parzen advise, negotiations provide a less complex way forward than litigation.⁸⁶ Even if investors were successful in challenging the removal of the tax incentives by the QDMTT in an arbitration proceeding, due to the GloBE Top-up Tax, they would not actually benefit from prevailing. However, some investors may want to hold the government accountable to its obligations in principle, and if the state is on the losing side this often has consequences for the liability of costs.⁸⁷

However, whether used as leverage for negotiations or in the context of an arbitration claim, both scenarios are informed by the legal validity of the claims of the parties. In this regard, although there are also some circumstances that reduce the strength of *Micula v Romania* as a precedent (e.g. the fact that the claimant failed to provide evidence that the tax incentive was vested under Romanian law and the remarkable situation on damages), it undoubtedly makes some interesting points.

Firstly, if the Tribunal’s view is followed that a certificate issued by a state to an investor in connection with tax incentives may be sufficient to fall within the scope of an umbrella clause, this leads to the surprising outcome that a very large portion of the world’s tax incentive regimes may receive investment protection for them, even without an investment contract explicitly providing it. Just because the outcome is surprising does not necessarily mean the view is incorrect,⁸⁸ but as this article has argued, a distinction must be made between a state confirming the application of a tax holiday as a matter of domestic tax administration (possibly creating rights under domestic law) and a state consenting to, in addition, making the tax holiday a part of its obligations towards the investor with regard to the investment (potentially resulting in rights under the umbrella clause of an investment treaty). With much of Pillar II’s attention in this debate going to situations with contractual tax stabilization arrangements, states should note that, when introducing a QDMTT at least under the interpretation adopted in *Micula v Romania*, the larger group of investors without such

⁸⁴ WTO Subsidies and Countervailing Measures Agreement (dated 15 April 1994, in force 1 January 1995) 1869 U.N.T.S. 14 art 1.1. (a) (1).

⁸⁵ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (dated 30 October 2016, provisionally in force from 21 September 2017); Investment Protection Agreement between the European Union and Its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part (dated 30 June 2019, not yet in force) art 2.2.3. and 2.2.4.; Investment Protection Agreement between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part (dated 15 October 2018 not yet in force) art 2.2.3. and 2.2.4.

⁸⁶ J. Rubinstein, L. Friedman, and T. Parzen, *op. cit.* (2024), p. 957-959.

⁸⁷ C. Schreuer, et al. 2009. *The ICSID Convention: A Commentary*, Cambridge University Press 2nd, art 61, paras 16 and 17.

⁸⁸ The EU Commission has made it clear that in its view the *Micula v Romania* decision is ‘incorrect’: European Commission, ‘Concept Paper Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court’, published on 5 May 2015 <<https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/84f1ee41-1c66-4bd2-adda-47f074336110/details>> accessed 25 November 2024.

agreements may find themselves in a legal position not substantially different from the much smaller group with contractual tax stabilization.

Secondly, the Tribunal's unanimous decision indicates that a host state could be deemed in violation of FET for not being sufficiently transparent about its QDMTT policy. In *Micula v Romania*, the Tribunal ruled that an investor should be given clarity about the tax treatment of his investment as soon as possible and should not be confronted with abrupt change or confusing, contradictory information. In the context of the global implementation of Pillar II, this standard is likely to be challenging for states. Many are still in the process of drafting their QDMTT just before the enforcement of the Global Minimum Tax. In addition, there is generally little progress or reliable information on possible domestic general compensation measures for QDMTT.

Finally, *Micula v Romania* rejected (by majority) that it should always be assumed that a state might change or even cancel its tax incentives, and therefore that tax incentives cannot create legitimate expectations. The majority accepted that if a state entices investors with a tax holiday for a certain period, it must honour that period. In other words, a 10-year tax incentive constitutes its own stabilization.

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