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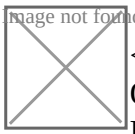
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Publisher:<!--BEGIN-OF-PUBLISHER-->Incisive Media<!--END-OF-PUBLISHER--><!--END-OF-FILE-LIST--> Romania has recently seen a surge in the number of cases brought against it by foreign investors, acting under bilateral investment treaties (BITs) — as has been the case in many of the neighbouring Central and Eastern European countries. Several disputes ended spectacularly, with multi-million euro awards against the host state of the investment, such as the case between CME and the Czech Republic, which has been ordered to pay approximately $350m (£176m) or, more recently, another case lost by the Czech Republic, which will have to pay damages of E225.4m (£17.3m) to a company based in the Netherlands.

So far, the Romanian Government has fared much better than some of its unluckier neighbours. Two BIT claims put forward by foreign investors have already been finalised. One of them, brought under the BIT concluded with Poland, was settled in 2004. The main terms of the settlement have become available to the public, because the government ordinance approving the deal has been published, and was favourable to Romania, which successfully avoided the payment of any damages to the Polish investor (which had sought approximately $10m (£5m), essentially for alleged expropriation actions carried out by organs of the Romanian state).

We shall deal, however, more extensively with the second case, which was an even bigger success for Romania. The dispute arose against the background of the BIT concluded in 1992 between Romania and the US, and that took effect from 15 January, 1994, the claim being put forward by Noble Ventures, a company registered in Maryland, US. The initial claim made against Romania was of $20m (£10m), but later estimates of the damage allegedly sustained by the investor varied between $143m and $447m (£71.9m and £224.6m).

The investor concluded in June 2000 an agreement with the State Ownership Fund (SOF), which was at that time a legal entity whose essential function was to privatise state assets, whereby the majority stock of shares in one of the major Romanian steel companies, Combinatul Siderurgic Resita (CSR), have been transferred to Noble Ventures. CSR boasted a glorious past: it had been founded in 1771, steel manufactured at the plant was supposedly used for building the Eiffel Tower and during the inter-war period the football team supported by CSR won the Romanian championship. However, in 2000 CSR needed to adjust to a more competitive economic environment and was burdened with debt to banks, the fiscal authorities and state-owned utility suppliers. In addition, with several thousand jobs and a strong union, CSR was the most important employer in a region where unemployment was on an upward spiral.

These problems have only been partly addressed in the share sale purchase agreement: SOF accepted a relatively lower price for the shares, whereas the claimant undertook to make investments in CSR in amounts that should have been in the region of $10m. Concurrently, SOF promised to give assistance to Noble Ventures in order to facilitate debt restructuring for the payments due to the fiscal bodies and utility suppliers.

However, the agreement was plagued by uncertainty as to the financing sources that were available to Noble Ventures and the different understanding the parties had about the extent of the assistance that was supposed to be given by SOF in respect of the debt rescheduling: whereas Noble Ventures essentially claimed that SOF’s actions should have secured, in any event, the debt restructuring, this view contrasted with SOF’s position, which maintained that its obligation was purely one of efforts, since the final decision of rescheduling the debt remained with other authorities. These ‘childhood diseases’ of the deal eventually doomed the privatisation of CSR. No investment in CSR was made, workers went on strike and the company became bankrupt. In August 2001, Noble Ventures brought its claim before the International Centre for Settlement of Investment Disputes (ICSID) in Washington DC and, even though at a later stage the Government agreed to the debt rescheduling, no effective steps have been taken for its implementation. In January 2003, the privatisation agreement was terminated by SOF (which in early 2001 changed its name to APAPS) and, as settlement attempts failed, the investor pursued its claim at ICSID.

Noble Ventures claimed Romania had violated articles 11 (2) and III of the BIT with the US by failing to honour its obligations undertaken in the

privatisation agreement and allegedly prevented Noble Ventures from real-ising the benefits of its investment. In particular, the claimant maintained that Romania expropri-ated its investment, with no market value compensation, failed to accord it fair and equitable treatment and engaged in arbitrary and discriminatory treatment by violating its alleged contractual obligation to reschedule certain CSR debts; misrepresenting the true legal condition of key assets of CSR; falling to provide Noble Ventures' personnel and property full protection and secu-rity; and initiating judicial reorganisation proceedings that temporarily suspended the claimant's full enjoyment of his ownership rights at CSR.

Before reviewing the particular facts of the case, the arbitral tribunal needed to give an answer to two points of law. First, there was the issue of interpretation of the so-called 'umbrella clause' —in other words, the provision included in article II(2)(c) of the Romania-US BIT, where each party undertook to observe "any obligation it may have entered with regard to investments". In that respect, the tribunal contrasted the arguments of the parties and relevant analyses and findings in other important ICSID cases that interpreted the scope of similar umbrella clauses in other bilateral investment treaties (including SGS Societe Generale de Surveillance v Islamic Republic of Pakistan; SGS Societe Generale de Surveillance v Republic of Philippines and Salini Costruttori v The Hashemite Kingdom of Jordan). Noting the specific language of the umbrella clause in the Romania-US BIT, the tribunal concluded that the intention of the drafters of the BIT had been to equate contractual obligations governed by municipal law (as was the case with the CSR privatisation agreement) to international treaty obligations as established in the BIT.

On a different plane, the tribunal, after commenting on various provisions of Romanian municipal law, embraced the position that the conduct of SOF/APAPS is attributable to Romania, because they were entitled by law to represent Romania and did so in all of their actions as well as omissions.

Noble Ventures' central claim in the arbitration was that Romania breached alleged obligations under the share purchase agreement to provide CSR certain debt restructuring and that this breach caused the insolvency and failure of its investment. The tribunal qualified the obligation undertaken by SOF as one of diligence, not of result. Even if the tribunal noted that SOF had not exerted itself vigorously to secure implementation of a prime minister's decision of September 2000, approving in principle the restructuring of CSR's budgetary debts, the arbitrators were still not persuaded that the debt restructuring would have been achieved or that the claimant and CSR would have been able to find a financier willing to loan money to CSR, not only because CSR was in a problematic legal and financial position, but also as the claimant defaulted on certain of its material obligations, which were included in the privatisation agreement or were related to the workforce of the CSR.

Another accusation by the claimant was that SOF misrepresented the legal situation of a key asset of CSR, affected by a long-term agreement with a third party, which allegedly prevented the investor from operating the asset profitably. The tribunal rejected this for two reasons: first, the claimant should have been aware of at least a potential problem related to the asset and a due diligence investigation would have revealed the existence of an agreement; and second, the warranties given by SOF were qualified, since they were issued according to the CSR's management declaration.

The tribunal also rejected Noble Ventures' other assertions that Romania did not afford it full protection and security, as required by article II(2)(a) of the BIT, because it did not sufficiently respond to certain acts of alleged violence by CSR employees direct against claimant's officers. Noble Ventures also complained that Romania had improperly initiated judicial reorganisation proceedings against CSR in a concealed attempt to take over the management of the company from Noble Ventures, a claim that was also dismissed because the claimant had been treated in the same manner as other similarly situ-ated investors throughout the proceedings and that, considering the circumstances of this case (where approximately 4,000 employees depended on the economic viability of CSR) the judicial reorganisation was neither unfair nor inequitable.

The dismissal of Noble Ventures' claims in late 2005 was like a breath of fresh air in a country where people at the time still lacked confidence in the state's institutions and their capacity to deal fairly with investors. Things are, however, changing: Romania has now an impressive growth rate and is a member of the European Union which, despite recent political instability, is supposed to give it greater honorability and earned it more trust from potential investors. However, Romania will again be facing claims for investors acting under BITs. There are currently four pending cases against Romania at ICSID. Interestingly, two of the cases are being brought by investors who are ultimately of Romanian origin. While the outcome of these cases will not be known for some time, it is clear that dissatisfied investors enjoy a solid procedural remedy to complain against actions of the Romanian officials and that the Romanian Government lives up to

its obligations, by accepting to submit such disputes to international forums.

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