

ICSID CASES IN WHICH ROMANIA HAS BEEN INVOLVED

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Abstract: *The present paper aims to make a short presentation of the relation between Romania and the International Centre for Settlement of Investment Disputes – ICSID, with special focus on the damages that Romania was ordered to pay to the claimants, by the ICSID Tribunal. ICSID was founded by the World Bank as a special organism to protect the foreign investors and their properties in the host state. After the recognition of ICSID by the states, the foreign investment flow grew and the number of disputes starts growing as well. Romania ratified the ICSID Convention in 1975. If one party is in breach of the Bilateral Investment Treaty or some other legal provision stated in international law, it will have to pay damages to the other party. The first arbitration request filed against Romania at ICSID was registered in November 2001 by Noble Ventures and the last one registered until now is in August 2018 by Alverley Investments Limited and German Properties Ltd. Until now, there were 15 cases registered at ICSID, in which Romania is the respondent. Ten of them were concluded and five are still pending. Until now, the proportion is in Romania favour, only in 30% of the cases Romania was ordered to pay damages, in 70% of the cases the claims were dismissed or the proceedings discontinued. The 3 cases where Romania had to pay damages were about some commitments that Romania undertook when the investments were made and then did not succeed to keep the commitments. In one of the cases, Romania granted some incentives for disfavoured areas and insured the investors that will maintain those incentives for a period of 10 years, but revoked prematurely them. In other case Romania made an agreement for 49-years concession over a land but, again, prematurely revoked the agreement. And, in the last case where Romania was ordered to pay damages, Romania promised to restructure the debts of Socomet, but failed to do so. The present paper is briefly describing those cases in which Romania was the Respondent.*

Keywords: *ICSID; damages; foreign direct investment; international disputes.*

JEL Classification: *F51; F37; K22.*

1. Generally Introduction

The International Centre for Settlement of Investment Disputes Convention entered in force in October 1966, after being ratified by the first 20 states. In present it is ratified by 154 states. For Romania, ICSID Convention entered into force in October 1975. The scope of this Convention was to assure protection for the foreign investors and their properties in the host state. After the recognition of ICSID by the states, the

foreign investment flow grew and the number of disputes start growing as well. This was the subject of a previous paper published by one of the authors in November 2017

Nowadays, Romania has 5 cases pending at ICSID and 10 cases already concluded, as can be seen in the table below.

Table 1: ICSID Cases in which Romania was the Respondent

Case No.	Claimant(s)	Respondent(s)	Status
ARB/18/30	Alverley Investments Limited and Germen Properties Ltd	Romania	Pending
ARB/18/19	LSG Building Solutions GmbH and others	Romania	Pending
ARB/16/19	Nova Group Investments, B.V.	Romania	Pending
ARB/15/31	Gabriel Resources Ltd. and Gabriel Resources (Jersey)	Romania	Pending
ARB/14/29	I. M*****, V. M***** and others	Romania	Pending
ARB/14/28	Alpiq AG	Romania	Concluded
ARB/12/25	Marco Gavazzi and Stefano Gavazzi	Romania	Concluded
ARB/10/22	Ömer Dede and Serdar Elhüseyni	Romania	Concluded
ARB/10/13	Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation	Romania	Concluded
ARB/01/11	Noble Ventures, Inc.	Romania	Concluded
ARB/07/13	S&T Oil Equipment & Machinery Ltd.	Romania	Concluded
ARB/06/3	The Rompetrol Group N.V.	Romania	Concluded
ARB/06/1	Spyridon Roussalis	Romania	Concluded
ARB/05/20	I. M*****, V. M***** and others	Romania	Concluded
ARB/05/13	EDF (Services) Limited	Romania	Concluded

Source: <https://icsid.worldbank.org> date: 25.03.2019.

Each of these cases will be subject of a further discussion in the next paragraphs.

2. Cases Presentation

The ICSID cases in which Romania had been the Respondent can be split in two categories: concluded and still pending. The pending cases in this moment are in number of 5, but any day, there can be a new arbitration request registered at ICSID. As regarding the concluded cases, there were 3 cases out of 10, in which Romania was ordered by the ICSID Tribunal to pay damages, after they concluded that Romania breached a provision from the Bilateral Investment Treaty (BIT). There was

a case, out of the 7 cases in which Romania did not had to pay damages, which was discontinued from lack of payments, and in this case the Tribunal did not gave an opinion whether Romania was or not in breach of any legal provision.

The methodology used requires comparative study of relevant documents for the analysis of the cases background and Tribunal findings, methods of analysis and synthesis, deduction and analogy.

2.1. Cases that are Still Pending

We will make a briefly discussion of the pending cases, since there is no conclusion presented by the ICSID Tribunal yet.

First case, from the list of pending cases, is filled by Ioan and Viorel Micula and their companies, in November 2014, based on an investment agreement signed in 2002. They are requesting 2.3 billion euro. The second case is filled by Gabriel Resources for losing the mining contract from Rosia Montana, requesting 4.4 billion dollars. Nova Group Investments, a financial and insurance company from Netherlands, ask for 330 million euro from the Romanian Government. LSG Building Solutions, a Renewable energy generation enterprise filled an arbitration request against Romania in June 2018 and also in August 2018, Alverley Investments Limited and Germen Properties, requested arbitration against Romania in a commercial real estate development dispute.

2.2. Cases Concluded

The concluded cases are split in two categories: one in which Romania had to pay damages and another one in which the tribunal concluded that Romania did not breach any legal provision.

2.2.1. Cases Concluded in which Romania did not Breach any Legal Provision and/or did not had to pay Damages to the Foreign Investor

EDF_v_Romania:

At 14 June 2005, EDF registered the arbitration request against Romania, in a dispute regarding the duty-free services rendered by EDF in a joint venture, in the Constanta International Airport and Timisoara International Airport.

At 5 September 2002, Romania passed the Government Emergency Ordonance No 104 that revoked the duty-free licence and this led to the discontinuance of EDF activities.

EDF considered that Romania breached the protection assured to the foreign investors by signing the BIT. Romania denied any such violations. The ICSID Tribunal, after analysing the facts presented by the parties had concluded that Romania did not breach any legal provision and dismissed the Claimant requests. Moreover, the Claimant was ordered to pay to the Respondent 6 million USD for legal fees and other costs.

Spyridon Roussalis_v_Romania:

Spyridon Roussalis, a Greek citizen, owned 100% the Romanian legal entity called SC Continent SRL. In 1998 there was an invitation for tender for the shares owned in Malimp SA by AVAS - 70% of Malimp. Continent won the tender process with an offer of 32,591 ROL per share and a proposed capital contribution of 1.4 million USD in the next 2 years, and the name of Malimp was changed to SC Continent Marine

Enterprise Import Export SA. SC Continent SA issued new shares in favour of SC Continent SRL, considering that they complied with their obligation of capital increasing. The Claimant consider that Romanian Government's acts drove to an indirect expropriation or at least to a substantial impairment of its investment. Romania denies such accusations, arguing the post-acquisition investment made by SC Continental SA. The ICSID Tribunal dismissed the Claimant's requests and ordered him to pay to the Respondent 60% of the legal fees and expenses, in amount of 6 million EURO and 217,290 USD.

Rompetrol_v_Romania:

In 20 December 2005, ICSID received an arbitration request against Romania, registered by Rompetrol for extraordinary and unreasonable investigation against the company and its management and discriminatory and arbitrary treatment of the company. The Claimant purchased the shares of Rompetrol Rafinare SA, a privatised Romanian company which owns and operates an oil refinery and petrochemical complex. The ICSID Tribunal rejected the claims for moral damages and did not order the Respondent to pay any damages even if it found that the Respondent's acts of arresting one of management member of Rompetrol was in breach of the Article 3 of the BIT, but the Tribunal could not identify the damage produced by that act. In its final decision the Tribunal concluded that each party should bear its own costs of arbitration and no damages were awarded.

Omer Dede and Serdar Elhuseyni_v_Romania:

The dispute concerned SC IMUM SA, a Romanian agricultural equipment company, owned by the Claimant who claims that the AVAS and the Romanian Government have taken over their shares in the company. Romania had requested a bifurcation of the process, then the Claimants informed that they will not continue the arbitration against AVAS but only against the Government. The ICSID Tribunal concluded that it lacks jurisdictions to hear those claims so the case was dismissed. Each party should bear its own costs.

S&T Oil Equipment & Machinery Ltd._v_Romania:

This case was discontinued at 16 July 2010 for non-payment of the required advances.

Noble Venture_v_Romania:

Noble Ventures, an American company specialized in business consultancy for steel industry brought Combinatul Siderurgic Resita from the Romanian State Ownership Fund (SOF) during the privatization process in June 2000. Combinatul Siderurgic Resita was in big debt to other Government agencies and also needed high investments in order to continue its operations. SOF did not had the authority to restructure those debts and it only could promise Noble Ventures to assist them in this process. After the regime change in Romania politics, SOF was dissolved. Noble Ventures were not able to obtain the restructure for their debts and they did not make the investment needed so the Combinatul Siderurgic Resita had to close down. In this situation, Noble Ventures considered that Romania had breached the BIT, did not give them fair and equitable treatment, protection and they even considered that Romania had expropriated them. The ICSID Tribunal, after analysing all the documents and the facts presented by the parties concluded that Romania did not

breach any legal provision, so no damages were awarded and each party had to bear its own costs.

Alpiq AG_v_Romania:

Alpiq AG, a swiss company owning SPEEH Hidroelectrica SA, requested arbitration at ICSID against Romania for not respecting their rights during the insolvency procedure of SPEEH Hidroelectrica SA. Alpiq was requesting 450 million USD as damages. The ICSID Tribunal concluded that Romania was not in breach so no damages were awarded.

2.2.2. Cases Concluded in which Romania Breached at least one Legal Provision and was Ordered to pay Damages to the Foreign Investor

*I. and V. M*****_v_Romania:*

The present dispute arose in the context of Romania offering incentives for investment in disfavour areas and then redrawing those incentives. The Claimants had made substantial investments in one disfavour area of Romania in reliance on those incentives and the fact that they will remain for 10 years. The Claimants claimed that Romania, in breach of the BIT, prematurely revoked those incentives. The ICSID Tribunal found that Romania did breach the BIT provisions so they ordered the Respondent to pay to the Claimants 376 million RON and interest at 3-month ROBOR plus 5%, compounded on a quarterly basis.

Hassan Awdi_v_Romania:

Hassan Awdi brought Rodipet, a Romanian press distribution company during the privatisation process. In this agreement both parties undertook commitments. Romania would extinguish tax liabilities and other debt owed to it by Rodipet and grant to Rodipet a maximum of a 49-year concession over land housing press distribution points. The dispute arose when Romania revoked the law granting the land concession to Rodipet and took control over Claimants' indirect shareholding in the company. The ICSID Tribunal found that Romania did breach the BIT provisions so they ordered the Respondent to pay to the Claimants 7.5 million EURO and interest at EURIBOR plus 2%, compounded on a semi-annually basis.

Marco Gavazzi and Stefano Gavazzi_v_Romania:

Marco and Stefano Gavazzi brought 70% from shares of Socomet SA, a Romanian steel company during the privatisation process. In this agreement both parties undertook commitments. Romania would reschedule or forgive the debts of Socomet and the investors would make some new investments. The Claimants alleged that Socomet's debt was not restructured and that its bank accounts were frozen to cover the debt. The ICSID Tribunal found that Romania did breach the BIT provisions so they ordered the Respondent to pay to the Claimants 1.9 million USD.

3. In Conclusion

The foreign investments' flow was directly influenced by the ICSID settlement, offering protection for investors and their properties. Romania ratified the ICSID Convention in 1975. From the total number of cases against Romania, 10 were already concluded, out of which in 3 cases Romania was ordered to pay damages to the investors, and in 7 cases the claims of the investors about damages were

dismissed. The 3 cases where Romania had to pay damages were about some commitments that Romania undertook when the investments were made and then did not succeed to keep the commitments: one was about incentives granted for disfavoured areas, one was an agreement for 49-years concession over a land and one about restructuring debts. As a conclusion of the facts presented in the present paper, we can say that the states should properly consider all the aspects implied before making any commitments to foreign investors because the commitments will bind them and create obligation to pay damages if they are not completed.

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