



School of International Arbitration

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International Arbitration Case Law

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THE ROMPETROL GROUP N.V.

V.

ROMANIA

(ICSID CASE NO. ARB/06/3)

AWARD

Case Report by Cristina Viteri Torres**

Edited by Ignacio Torterola***

In its Award issued on May 6, 2013, the Tribunal dismissed numerous claims made by a Dutch company againsts Romania for breach of its obligations under Articles 3(1) and 3(5) of the Agreement on Encouragement and Reciprocal Protection of Investments concluded between the Kingdom of The Netherlands and Romania. The Tribunal found a breach of the fair and equitable treatment standard but no damages were awarded since Claimant failed to show that Romania's breach of the BIT guarantee had caused an actual economic loss or moral damage.

Main Issues: Jurisdiction – admissibility, denial of justice, exhaustion of local remedies, local law, burden on standard of proof; Merits - fair and equitable treatment, full protection and security and non-impairment, BIT area of protection, failure to prove damages.

Tribunal: Sir Franklin Berman, KCMG, QC, Mr Donald Francis Donovan, Hon Marc Lalonde PC, OC, QC

Claimant's counsel: Mr Barton Legum, Ms Ioana Petculescu, Dentons, Paris; and Mr George Burn Dentons, London

Defendant's Counsel: Mr Michael E. Schneider, Dr Veijo Heiskanen, Mr Matthias Scherer, Lalive, Geneva; and
Dr Victor Tanasescu, Ms Carina Tanasescu, Tanasescu & Asociatii, Bucharest; and
Dr Crenguta Leaua, Mr Marius Grigorescu Leaua & Asociatii, Bucharest

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Digest

1. Facts of the Case

Following the fall of Nicolae Ceausescu's communist regime in 1989, Romania engaged in a privatization process. In 1993, Rompetrol S.A (the second-largest State owned company in Romania) was privatized and in 1998, two Romanian nationals, Mr Patriciu and Mr Sorin, purchased its controlling stake.¹

Rompetrol S.A. suffered a series of structure and ownership changes.² In 2005, the Rompetrol Holding became the only owner of The Rompetrol Group B.V. ("TRG B.V."), which changed its legal form from a private limited liability company (B.V.) to a public limited liability company (N.V.), The Rompetrol Group N.V. ("TRG").³

In 2000, TRG concluded a Share Sale and Purchase Contract with the Romanian privatization authority ("the State Ownership Fund"), and acquired a controlling stake in S.C. Petromidia Rafinare S.A., a petroleum sector company that owned one of the largest oil refineries in Romania.⁴ Since late 2003, Petromidia was known as Rompetrol Rafinare S.A. ("RRC") and produced about 30% of Romania's refined product needs.⁵

In May 2004, the National Anti-Corruption Office of Romania ("PNA") began an investigation in relation to the privatisation of Petromidia. The investigation was transferred to the General Prosecutor's Office ("GPO"), entity with jurisdiction to investigate economic crimes. In May 2005, Mr Patriciu was detained as part of the investigation (¶ 38).

Claimant alleged that TRG's considerable contributions to RRC and subsequent growth "*turned Rompetrol into a target of State-orchestrated harassment*". The conduct of the State that was subject of complaint was grouped in four headings: 1) "The Talpes Report", prepared by the head of the National Security Department of the Presidential Administration, allegedly contained criminal accusations and information obtained by the tax controls that was leaked to the press on purpose, according to Claimant, in order

¹ Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility ¶¶ 33, 34, 35, 36

² In 1999, Mr Patriciu incorporated a private limited liability company in The Netherlands called Waverton B.V. ("Waverton"), a 100% owned by a Luxembourg company called ROGI, which was itself owned by a foreign fund created to make direct investments in private and privatizing companies in Romania, called the Romania and Moldova Direct Fund LP ("RMDF"). Waverton and ROGI became part of the group of companies owning Rompetrol S.A. and Grupul de Societati Rompetrol. In fact, Waverton changed its name to The Rompetrol Group B.V. ("TRG B.V.") and became the 84.6% owner of Rompetrol S.A. and Grupul de Societati Rompetrol. Mr Marin and Mr Patriciu each became 37% owners of ROGI; and RMDF remained a minority interest shareholder (25%) in ROGI. In May 31st, 2000, Mr Marin and Mr Patriciu owned 74% of ROGI, which owned 100% of TRG B.V., which in turn owned 84.6% of Rompetrol S.A. and Grupul de Societati Rompetrol. In May 28, 2002, TRG B.V. changed its legal form from a private limited liability company (B.V.) to a public limited liability company (N.V.), The Rompetrol Group N.V. ("TRG"). By September 2002, ROGI became 100% owned by Rompetrol Holding, a Swiss holding company incorporated by Mr Patriciu in or about December 1998 ("Rompetrol Holding"). Mr Marin was bought out and replaced by Mr Patriciu and Mr Stephenson. Mr Patriciu then owned 80% and Mr Stephenson 20% of the shares in Rompetrol Holding. (Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility ¶¶37, 39- 41)

³ Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility ¶42

⁴ TRG also indirectly owned an additional 27.41% holding in Petromidia through four Romanian subsidiaries in which it was the majority shareholder. Ibid. ¶45

⁵ Ibid. ¶47

to harm TRG, due to Mr Patricius's denial to merge RRC with RAFO Onesti.⁶; 2) the "Misconduct of the PNA", when it started preliminary activities to a criminal investigation related to Petromidia's privatisation, that turned into a general criminal investigation (*in rem* investigations); 3) the "Misconduct of the GPO" when it pursued specific investigations (*in personam* investigations) against three members of the RRC management, in connection with Petromidia's privatisation. Claimant asserted a link of the events with Ms Adriana Cristescu, the prosecutor that conducted the *in rem* and the *in personam* investigations. She was transferred from PNA to GPO, and; 4) the "Collusion between the GPO Prosecutor and the RAFO Group" based on a confidential document prepared by Ms Adriana Cristescu that appeared as an annex in a lawsuit filed against TRG, which sought the cancellation of the Petromidia privatisation (§§ 45 - 46)

In addition, Claimant stressed out three events considered to be "*egregious instances of heightened harassment and persecution of TRG, Rompetrol and their executives*", 1) the illegal interception of Mr Patriciu's personal and business telephone calls; 2) the GPO's attempts to have Mr Patriciu and Mr Stephenson arrested, and; 3) the GPO's ordinance imposing an attachment on RRC shares held by TRG, causing losses to the company. Claimant asserted that these events breached the standards of treatment that TRG was entitled under the Dutch-Romanian BIT, the Energy Charter Treaty (via the most-favoured-nation clause), and international law. (§§ 47, 50).

Respondent stated that the investigations were part of the implementation of the National Anti-Corruption Strategy, introduced in 2001 to move Romania towards becoming a member of the European Union. They were legitimate and reasonable, with the observance of the international community and particularly under the safeguards provided by the European Convention on Human Rights. Moreover, Respondent argued that the Government's anti-corruption campaign involved several commercial actors besides TRG, who was not the sole target. In addition, Adriana Cristescu's transfer from PNA to GPO was executed with the sole purpose of ensuring continuity of the investigations (§§ 70 - 73, 79, a)).

The justice system, including the prosecutors, was subject to profound changes for Romania's accession to the European Union. Consequently, there was no "*orchestrated State persecution*", but investigations to eradicate corruption in Romania after the downfall of the Ceausescu Regime (§79, b)). Apparently, numerous post-Ceausescu period privatisations "*were considered seriously flawed*" as a result of a corruption legacy. Thus, the State intensified efforts to fight corruption, tax evasion and economic crime as part of the process that led Romania to the European Union's (EU) accession in 2007. Under this logic, the investigations that were subject of complaint were justified by Respondent under the view that 1) Petromidia's privatisation was performed after the fall of the Ceausescu regime; 2) RRC was suspected of tax evasion; 3) The sale of RRC shares on the Bucharest Stock Exchange was suspected to have occurred by means of a

⁶ A competing Romanian refinery that went to bankruptcy (§90)

market manipulation, and; 4) RRC's failure to pay US\$85 million to the Romanian Government in relation to an oil and gas project in Libya⁷ (¶¶ 69-80).

2. *Legal Issues Discussed in the Award*

(i) Preliminary Issues

The Tribunal dismissed the admissibility objection while asserting that it was not persuaded by Respondent's contention that Claimant's claims were equivalent to claims for denial of justice and therefore obliged to exhaust local remedies. It also dismissed the arguments made in relation to local remedies and local law, since both were targeted over the actions that allegedly injured Mr Patriciu or Mr Stephenson, instead of TRG. The Tribunal repeatedly emphasized having jurisdiction over TRG's claims only. As to the burden and standard of proof, the Tribunal decided it was entitled to draw whatever inferences it considered appropriate as regards the cooperation and evidence produced pursuant to paragraph (2) of Rule 34.⁸ Concerning the Tribunal's application of Rule 34(3)⁹ ("formally to take note"), given a degree of partial compliance, the Tribunal considered that the circumstances did not call for the drawing of an adverse inference (¶¶ 156, 157, 161, 163-167, 172, 177, 181, 186).

(ii) Merits

The Tribunal made a factual analysis to address the interpretation of the relevant provisions of the BIT. It asserted that the main substantive provision for the merits phase was Article 3(1)¹⁰ which has three limbs: 1) Fair and Equitable Treatment, 2) Protection and Security and, 3) Unreasonable or Discriminatory Measures. (¶ 53, 191, 193)

Talpes Report.- The Tribunal found that the allegations made by the Claimant's witness (Mr Stanescu), regarding Mr Talpes and Mr Traian Basescu's (President of Romania) involvement in the criminal investigations against RRC did not constitute reliable evidence. As to the legality of the report, the Tribunal noted that it was only a request of information of a topic that was a matter of public attention and concern, for the President of Romania. Given that Mr Talpes was the head of the entire Presidential Administration, it was within its powers to make such a request of information. The Tribunal stated that Claimant failed to demonstrate inobservance of the applicable law

⁷ The 'Libyan receivable' refers to an exploration and production sharing agreement concluded in the 80s by Rompetrol S.A. (then still a Stateowned company) with the Libyan National Oil Company. Rompetrol's rights under which were later assigned to Repsol. The assignment required the approval of the Romanian State, which was conveyed subject to the condition that the payments due would accrue to the State and would be passed on accordingly by Rompetrol as and when received. The initial payments were indeed remitted to the State. After the privatisation of Rompetrol and its passing into the ownership of TRG no further payments were accrued. (¶¶207-208)

⁸ "[t]he tribunal shall take formal note of the failure of a party to comply with its obligations under [that] paragraph and of any reasons given for such failure,"

⁹ "shall take formal note of"

¹⁰ Article 3(1).- Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors. Each Contracting Party shall accord to such investments full physical security and protection.

in the issuance of the report (¶¶ 214, 222-224, 229-230).

The alleged procedural irregularities in the criminal investigations.- The Tribunal held that Claimant's allegations regarding the investigations conducted by PNA and GPO rested on the coincidence in time between the Talpes Report and the opening of the *in rem* and *in personam* investigations of Mr Patriciu, Mr Stephenson and Mr Stanescu, and even though it seemed to be a link between the Talpes Report and the PNA investigation, that could not be considered a breach of the protection guaranteed under Article 3(1) of the BIT. Additionally, the Tribunal concluded that there was no evidence to prove that the initiation of the criminal investigation and indictment¹¹ breached the aforementioned provision of the BIT. Furthermore, it asserted that it was "*not for an investment tribunal to set itself up as a court of final review over the criminal justice systems of host States*" (¶¶ 232, 237, 238).

The GPO prosecutors.- The Tribunal concluded that no evidence was found regarding the animus and hostility towards Mr Patriciu during the investigations, neither an attitude of the Romanian Court when considering the challenges to the prosecutorial actions. The Tribunal stressed out that Claimant did not implement the formal complaint avenues available under domestic instances against the prosecutorial actions. Such complaints would have constituted the material part of the overall assessment of the prosecutorial conduct to determine the existence of a treaty breach (¶¶ 240, 245).

The attachment of RRC shares.- The attachment order issued by the GPO prosecutor - over 5.4 million shares in RRC owned by TRG- was discharged by way of a decision of the Bucharest Court of Appeals. The discharge was based in the unlawful attachment of third parties' shares and the delays caused by the failure of the GPO officers to appear at the court. The Tribunal considered these facts as evidence of prosecutorial animus against Claimant (¶¶ 247-248).

The arrest and attempted imprisonment of Messrs Patriciu and Stephenson.- The Tribunal considered Mr Patriciu's detention to be lawful under the applicable provisions, given that the prosecutor was empowered to apply to the court to authorize pre-trial detentions, although the evidence reflected a lack of credit on the GPO's prosecutors and Ms Cristescu in particular (¶ 251).

The PNA and GPO press releases.- The Tribunal concluded that the Claimant did not establish that the press releases raised any issue in respect of Claimant's protection under the BIT (¶ 254).

The interception of Mr Patriciu's and/or RRC's telephone conversations.- The Tribunal upheld the decision rendered by the Romanian High Court of Cassation (in which the first instance court decision that awarded Mr Patriciu moral damages of RON 50,000 plus costs for invasion of his privacy was confirmed) and stated that such episode was

¹¹ The GPO investigation – specifically by its Department for the Investigation of Organised Crime and Terrorism (DIICOT) – led to a formal indictment dated 7 September 2006. The indictment preferred charges against Mr Patriciu involving primarily embezzlement (the Libyan receivable), money laundering, share market manipulation (the re-listing of Rompetrol shares on the Bucharest stock exchange), and conspiracy, together with various apparently lesser charges associated with the above.

not under the protection of the BIT since Mr Patriciu's business activities were not affected (¶¶ 256, 261).

The requests for information from banks.- The Tribunal held that there was no evidence to prove that the requests were irregular or abusive. Accordingly, the Tribunal did not regard this matter as evidence of a pattern of serious irregularities on the part of the prosecutors, capable of raising the protection of Article 3(1) of the BIT (¶ 265).

The tax controls.- The Tribunal found that Claimant did not endure a burden such as to establish that the conduct of the tax authorities towards RRC was oppressive, either absolutely or by comparison to the treatment granted to its competitors. The tax controls did not implicate the protections afforded by Article 3(1) of the BIT (¶ 269).

(iii) Decision

The Tribunal, following a previous decision in the *RosinvestCo UK Ltd. v. The Russian Federation*¹² case, concluded that the cumulative effect of a succession of impugned actions by the Host State “would not surmount the threshold for a Treaty breach”, unless “the actions in question disclosed some link of underlying pattern or purpose between them”. Accordingly, “a mere scattered collection of disjointed harms would not be enough” to find a breach of the fair and equitable treatment standard. Additionally, it concluded that the evidence mustered by the Claimant fell well short of what was required to demonstrate that the “woes that befell Mr Patriciu and RRC were linked together and part of a co-ordinated campaign of harassment by the Romanian State” (¶¶271, 276).

As to the procedural irregularities during the criminal investigations, the Tribunal decided that Respondent was in breach of the fair and equitable treatment guarantee, accorded to the Claimant by Article 3(1) of the BIT as so far as to the conduct of the prosecutors, the attachment of RRC’s shares, and the arrest and attempted imprisonment of Messrs Patriciu and Stephenson (¶ 279).

Nonetheless, the Tribunal held that there was no sufficient causal nexus between the claimed illegality and the asserted loss for the quantification of economic damages. Likewise, the Tribunal did not award ‘declaratory relief’ since Claimant’s breach allegations were dismissed, neither were ‘moral damages’, given that Claimant failed to present reliably concrete evidence of actual losses suffered by TRG (¶ 286, 288, 293).

¹² *RosinvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, ¶ 599