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The Rompetrol Group NV v Romania – treaty protections triggered by maltreatment of company officers

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The recent *Rompetrol Group NV v Romania* award provides rare guidance as to the requirements to be satisfied for a successful treaty claim arising from State conduct against individual company officers rather than the claimant investor itself. The investor claimed, inter alia, that the arrest, detention, criminal investigations and wire-tapping of its directors constituted State-sponsored harassment that breached BIT guarantees enjoyed by its investment. The Tribunal held that the State conduct directed against the company officers had to have a sufficiently close link to the investment or investor to fall within the zone of the treaty's protection. The requisite connection was found in relation to certain elements of Romania's conduct which amounted to a "pattern of disregard" for the rights of Rompetrol's employees and constituted a breach of Rompetrol's right to fair and equitable treatment. Rompetrol, however, failed to prove damages.

The award raises interesting questions regarding the balance between a State's legitimate interests in tackling crime and the investor's treaty rights. It also notes future tribunals' likely sensitivity to allegations that the arbitration itself is being brought to deter a State from legitimate pursuit of criminal investigations.

Background

Rompetrol claimed that Romania had breached its obligations under Article 3(1) and 3(5) of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of The Netherlands and Romania (the "BIT") to provide its investment in Rompetrol Rafinare SA ("RRC") fair and equitable treatment, full protection and security and non-impairment. The claims arose from measures taken by Romanian anti-corruption and criminal prosecution authorities against two individuals, Mr Patriciu and Mr Stephenson, who directed the affairs of RRC, a company born through the privatisation of the State oil-refining industry after the fall of Ceausescu in 1989. Rompetrol alleged that the investigations, which included the arrest, detention, travel-ban and wire-tapping of Mr Patriciu, were politically and commercially motivated and breached the guarantees in the BIT. Romania's response was that the investigations were a legitimate part of its implementation of the National Anti-Corruption Strategy that it had pursued in order to gain access to the European Union.

A requisite link between State conduct against individuals and the investor

The Tribunal emphasised the "special character" of this case given that the claims arose from

measures directed against individuals linked to the investor rather than against the investor itself, noting that these cases were rare amongst reported awards. The individuals were not claimants under the BIT and their rights were personal and distinct from those of Rompetrol. As such, even if the alleged State-sponsored harassment of the individuals through an unlawful criminal investigation had breached the individuals' personal rights, Rompetrol had to show that there was a connection between the State's conduct against the individuals and State conduct against the investment itself in order for that conduct to qualify as a violation of the BIT protections. Rompetrol's case would "[stand or fall] by whether it is able to make out its claim that the criminal investigations have breached the rights of [Rompetrol] itself" [para 151].

The Tribunal concluded that three kinds of actions could fall within the area of protection under the BIT: "(a) actions against the investor itself (or its investment); (b) action against the investor's executives for their activity on behalf of the investor; and (c) action against the executives personally but with the intent to harm the investor" [para 200].

No co-ordinated campaign of harassment

The Tribunal recognised that its role was not "to pronounce on the rightness or wrongness of the pending criminal charges..." [para 174] but to determine whether the authorities' conduct constituted a breach of the BIT guarantees. In so doing, the Tribunal examined whether the requisite link to the investment was present. The Tribunal did find that there had been "animus and hostility" towards Mr Patriciu on behalf of the prosecutorial officials and that this may have affected the authorities' tactical approach [para 245 and 248]. As regards the detention and attempted imprisonment, the Tribunal accepted that there had been procedural irregularities but that it could not find "anything wrongful" in the prosecutor's execution of its rights to apply for pre-trial detention [para 251].

In perhaps the clearest example of conduct that lacked sufficient connection to the investment, the Tribunal found that whilst the wire-tapping by the Romanian Intelligence Service had been devoid of the necessary threat to national security and that Mr Patriciu's personal rights of privacy had been affected, there had been no harm to his business activities [para 260 – 261]. Overall there had been no co-ordinated campaign of harassment [para 276].

A legitimate expectation during criminal proceedings

Nevertheless, the Tribunal recognised that "a State may incur international responsibility for breaching its obligations under an investment treaty to accord fair and equitable treatment to a protected investor by a pattern of wrongful conduct during the course of a criminal investigation or prosecution, even where the investigation and prosecution are not themselves wrongful." It asserted further provisos: (1) the pattern must be sufficiently serious and persistent that the interests of the investor must be affected; and (2) there must be a failure by the State to pay adequate regard to how those interests ought to be duly protected. In the Tribunal's view, the legitimate expectations of a protected investor include the expectation that the State authorities will seek means to avoid unnecessary damage or at least to minimise or mitigate the adverse effects on the investment if the investor's interests become entangled in the criminal process directly or indirectly [para 278].

It was on this point that Rompetrol obtained partial success. The Tribunal found that there had been a "pattern of disregard by the [prosecutorial and investigation agencies] for the procedural

rights of [Rompetro] executives, and in particular for the likely and foreseeable effects on the interests of [Rompetro] itself as a protected foreign investor”, as demonstrated by, inter alia, the procedural irregularities during the criminal investigation, the conduct of the prosecutors, and the arrest and attempted imprisonment of the executives.

A crucial element in establishing the State’s failure to pay adequate regard to the investment was the documentary evidence showing that the authorities “knew that the interests of [Rompetro] stood directly or indirectly in the line of fire.” Indeed the prosecution’s request for Mr Patriciu’s detention referred directly to the investment arbitration and “the Dutch investor” i.e. Rompetrol.

Rompetro however failed to show that Romania’s breach of the BIT guarantees had caused any actual economic loss and failed on in its claim for moral damages.

Conclusion

This award provides useful guidance on the treatment of a company’s officers that will likely be influential in other treaty cases. As noted by the Tribunal, “association with the management of a foreign investor or a foreign investment cannot serve to immunize individuals from the normal operation of the criminal law” [para 152]. However, in situations where political and commercial motives may be at play, investors would be wise to ensure that the State authorities are on notice regarding the investment and their duty to mitigate the adverse effects that might result from their enforcement activities.

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