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Micula v. *Romania*

ICSID Case No. ARB/05/20
Final Award
Date of Award 11 December 2013

Introduction

The award in the International Centre for Settlement of Investment Disputes (ICSID) case *Micula* v. *Romania* was released to the parties at the very end of 2013.[1] It is in 2014, however, that the case gained notoriety as the European Commission (EC) started actions to fight against the enforcement of the award.

Facts

The dispute relates to investments made at the end of the nineties by two Swedish nationals and three of their companies in the development of a food and drinks production business in a disadvantaged region of Romania. To pursue these activities, the investors relied on a broad investment incentive program (the 'EGO 24') which – according to them – was adopted for ten years (from 1999 to 2009).[2]

At the same time it offered this incentive to the investors, Romania initiated negotiations to join the EU. The process began in 2000 and culminated in 2007 with Romania's accession to the Union. As a part of this process, Romania was requested by the EC to align its incentive programs with EU competition law. In 2005, Romania had to terminate all but one of the incentives granted to the investors.

The investors turned to ICSID in 2005 challenging the termination under the Sweden–Romania bilateral investment treaty ('BIT'). The claimant alleged that the premature loss of these incentives were in breach of several of the BIT's protections, including the umbrella clause and the fair and equitable treatment standard ('FET').

Main Findings

On the merits,[3] the tribunal's majority upheld only the investors' claim on FET and ordered Romania to pay the claimants approximately 250 million euros in damages.[4]

1 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L.* v. *Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013 (hereinafter '*Micula* – Award').

2 *Micula* – Award, paras. 145–151, 173–177. Romania challenged this allegation, arguing that it did not make a binding promise that the EGO 24 scheme would remain unchanged for this period of ten years. *Micula* – Award, para. 270.

3 The proceedings were bifurcated and the tribunal first issued a decision on jurisdiction in which it dismissed all the objections raised by Romania. See, *Micula* v. *Romania*, Decision on Jurisdiction and Admissibility, 24 September 2008.

4 G. Abi-Saab (the State appointed arbitrator) wrote a separate opinion in which he explained that while concurring with the award's conclusions, he would have used another legal ground. In his view, Romania's behavior

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Umbrella Clause

The tribunal ruled that Romania had not entered into a specific obligation with the claimants with regards their investments and dismissed the umbrella clause claim.[5] The tribunal recalled that for an umbrella clause to apply, there must be a legal obligation, which qualifies as such under its governing law. The tribunal found that the burden of proof regarding the content of Romanian law, i.e. the law applicable to the EGO 24 program, lay with the claimants. As they did not meet that burden, the tribunal concluded that it lacked sufficient evidence to ascertain whether the EGO 24 could qualify as an obligation.[6]

FET

The tribunal found that Romania had acted in breach of the investors' legitimate expectations when it prematurely revoked the investment incentives in 2005.

Importantly, the tribunal did not sanction the revocation *per se*. The tribunal took into account the fact that Romania was in the process of acceding to the EU to reach this preliminary conclusion. It relied notably on its previous findings on applicable law and the role of EU law where it accepted that the 'context of EU accession in general and pertinent provisions of EU law in particular' were relevant to 'determine that Romania's actions were reasonable in light of all the circumstances'.[7]

The tribunal however ruled that 'the manner in which Romania carried out that termination' was 'not sufficiently transparent to meet the fair and equitable treatment standard'.[8] According to the tribunal, Romania acted in an unreasonable manner when it maintained as a whole the investors' obligations under the EGO 24 program while at the same time eliminating their benefits,[9] and when it failed to inform the claimant in due course that the incentives would have to be cancelled.[10]

EC Intervention as Amicus Curiae

In an *amicus curiae* intervention, the EC warned that payment of compensation by Romania to the claimants for loss of key incentives would constitute illegal state aid under EU law, thus rendering the award unenforceable within the EU.

In a two-paragraph 'analysis', the tribunal decided not to address this warning because it was not 'desirable' to try speculating on 'the possible conduct of various persons and authorities after the Award has been rendered, especially but not exclusively when it comes to enforcement matters'.[11] Instead, it quoted the full text of ICSID Articles 53 and 54, explaining that these two provisions should apply 'in any event' to the Award.[12]

towards the investor during the accession process did not amount to lack of transparency but to 'slackness in due diligence'. See, *Micula* v. *Romania*, Separate Opinion of Georges Abi-Saab, 5 December 2013, para. 13.

5 *Micula* – Award, para. 410.
6 Ibid., paras. 457–459.
7 Ibid., para. 328.
8 Ibid., para. 864.
9 *Micula* – Award, paras. 825–227.
10 *Micula* – Award, paras. 864–872.
11 Ibid., para. 340.
12 Ibid., para. 341.

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Post-Award Developments

Several actions were initiated during 2014. The Micula brothers initiated enforcement procedures in the US and in Romania, and on the other side, Romania requested annulment of the award pursuant to ICSID Article 52, while offering the investors partial compensation by way of a set-off against tax liabilities.[13]

On its part, the EC issued in May 2014 a suspension injunction pursuant to the Regulation (CE) No. 659/1999 to bar Romania from paying the ICSID award until it finalized a formal investigation on the its compatibility with EU State aid law.[14] In a press release published in March 2015, the EC announced that the result of this investigation was that Romania's compensation to the investors breached EU State aid rules and that Romania should recover the amounts already paid.[15]

As a response, the Micula brothers initiated an action before the European Court of Justice (ECJ) to annul the EC decision. Relying of Treaty on European Union and the Treaty (TFEU) Article 351(1) and TUE Article 4(3), the investors argue that the EC lacks competence to decide the matter because Romania is obliged by international law to execute the award and that these international obligations take primacy over EU law. Subsidiarily, they contended that the execution of the ICSID award does not constitute a State aid measure because the award 'neither gives an economic advantage to the applicants, nor does it constitute a selective measure, nor a voluntary measure … imputable to Romania, nor does it distort or threaten to distort competition'. [16]

The case before the ECJ is still pending and no further information on the developments of the proceedings has been made available since the application.

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13 See C. Trevino, 'As Tribunal is Finalized for Second *Micula* v. *Romania* ICSID Arbitration, New Developments Come in Relation to Earlier Award', *Investment Arbitration Reporter*, 1 May 2015.

14 EC, *State Aid* SA.38517(2014/c) – Romania Implementation of Arbitral Award, Brussels, 01.10.2014 C (2014) 6848, http://ec.europa.eu/competition/state_aid/cases/254586/254586_1595781_31_11.pdf (accessed 4 May 2014).

15 EC – Press Release, 'State Aid: Commission Orders Romania to Recover Incompatible State Aid Granted in Compensation for Abolished Investment Aid Scheme', 30 March 2015, http://europa.eu/rapid/press-release_IP-15-4725_en.htm (accessed 4 May 2015).

16 Action brought on 2 September 2014 – *Micula a.o.* v. *Commission* (Case T-646/14), OJ C 439/29, 8.12.2014.

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