ÇETİNEL

NOTE

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I. INTRODUCTION

It has recently been a hot topic to follow the developments in several European Union countries with regards to their investment protection legislations including the international public law liabilities they commit to. Romania is one of the most peculiar ones being a heavily invested country by other European countries. Accordingly, we will provide a summarized overview of the investment climate in Romania and then elaborate the current international public law mechanisms available for investors intending to carry out commercial activities in Romania.

Romania is an attractive market to foreign investors, offering approximately 21 million consumers and a workforce of 9 million[1] people. The country is a promising business hub due to its position between Balkan Peninsula, Central Europe and the Black Sea. Romania has become a member of the European Union as of 1 January 2007. Consequential to its accession to the Union, Romania attempted to redesign its legislative framework, implemented various institutional reforms in terms of transparency, in order to attract foreign investment into the country.

Despite all these changes, the judicial system in general is considered "*to be unpredictable"* and the legal framework has *"negative effects on the foreign investment"*.[2] Those seeking remedy within the domestic judicial bodies usually may suffer from the excessive workload and the lack of expertise among the judges. Hence alternative remedies protecting foreign investments are also usually seeked for and preferred.

[1] CIA The World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/ro.html
[2] Chapter 6 "*Investment Arbitration in Romania*" Crina Baltag, p.352.

II. LOCAL LEGISLATION

2.1. Romanian Legal Framework on Foreign Investment

Law No 35/1991 defines the general framework on investment regime and in itself is an example of legislative instability[3]. After being repealed in 1997, the legal framework adopted priory has been re-legislated and has been subject to amendment multiple times, namely in 1994, 1997, 2001 and 2002. It contains broad provisions on expropriation[4], incentives and transfer of profits and other assets.

Law No 35/1991 as being the general law on foreign investment provides the definition of foreign investment along with the general guarantees and encouragements. The law defines foreign investment as follows:

a. setting up new companies, subsidiaries or branches, wholly owned or in partnership with Romanian natural or legal persons;
b. participating in the increase of capital of an existing company or the acquisition of shares, bonds, or other securities of such companies;
c. acquiring concessions, leases or agreements to manage economic activities, public services or production units of companies or state-owned companies;
d. acquiring ownership rights over movable or immovable assets, except for ownership rights over land properties;
e. acquiring industrial and intellectual property rights;
f. acquiring claims to money or claims to performance associated to an investment;
g. acquiring property rights over production units or other buildings, except for residential buildings when not related to the investment;
h. concluding exploration, exploitation and distribution agreements for natural resources.

The Law does not impose a limit on foreign participation in commercial enterprises, since foreign investors may set up wholly owned companies or in joint-venture with other national investors. Foreign investor participation can be made in the form of:

(i) foreign capital in free convertible currency;
(ii) equipment, means of transport, spare parts, and other goods;
(iii) services, intellectual and industrial property rights, know-how and management expertise;

[3] Ibid, p. 353.
[4] *Further information on expropriation can be found in the following paragraphs.*

(iv) proceeds and profits from other businesses carried out in Romania and other assets, after the payment of taxes according to law.

Pursuant to Law No. 35/1991, foreign investments may be made in any area of industry, exploration and exploitation of natural resources, agriculture, infrastructure and communications, civil and industrial constructions, scientific research and technological development, commerce, transport, tourism, banking and insurance, as long as they comply with the following requirements:

a) they must not breach environmental protection regulations;
b) they must not breach the interests of national security and defence of Romania;
c) they must not breach public policy, health and ethics interests and regulations.[5]

Apart from the Law 35/1991, Government enacted Government Emergency Ordinance no. 85/2008 ("**GEO 85/2008**") for a convenient and transparent framework to support the investments. It involves provisions which eliminate discriminatory treatment between Romanian and foreign investors. The purpose of the GEO 85/2008 is to activate the investments in needed areas of Romania such as the heat and electricity, the renewable energy sources, the protection and improvement of the environment and water supply.[6]

In line with the Romanian Constitution, Government Emergency Ordinance no. GEO 92/1997 ("**GEO 92/1997**"), which is published in the Official Gazette on 30 December 1997, provides the equality of treatment between Romanian and foreign investors, regarding the investments made in Romania. Hence, foreign investors benefit from the same rights as Romanian nationals in respect of their investments on Romanian territory.[7] The facilities and guarantees regulated under GEO 92/1997 in the area of foreign investments are stated as below:

1. The measures with similar effects, fiscal and customs facilities;
2. Possibility to carry out investments in any area and in any forms provided by the law;
3. Fair, equitable and non-discriminatory treatment between foreign and domestic investors, residents and non-residents;
4. Guarantees against: nationalization, expropriation or other measures having the same effect;
5. Fiscal and customs facilitation;
6. The right to choose the courts or arbitral tribunals competent to resolve subsequent disputes;
7. The right to transfer returns.[8]

[5] Translation of the relevant provisions (1,2 and 3) of Law No. 35/1991 was adopted from "*Investment Arbitration in Romania"* Crina Baltag.
[6] "The Romanian Digest" http://www.hr.ro/digest/200809/digest.htm
[7] "*Doing Business in Romania*" Muşat & Asociaţii http://www.musat.ro/wp-content/uploads/2015/04/03-Investments.pdf
[8] "Investment Arbitration in Romania" Crina Baltag, p.357

2.2. Expropriation and Available Remedies under Romanian Law

To elaborate on the issue of nationalization and expropriation, investments may only be subject to expropriation when such measure is taken in pursuit of public interest. These measures shall not be taken on a discriminatory basis. They shall be made in accordance with the provisions of the applicable domestic law. If taking of such measure is of absolute necessity, they shall be accompanied by the payment *in prior, adequate and effective compensation amounting to the fair market value* of the expropriated investment at the time immediately before the expropriation or before the expropriation became known in a manner which affected the value of investment.[9]

When it comes to seeking of these remedies, foreign investors may choose to submit the resolution of disputes against the State regarding the rights and obligations arising out of the provisions concerning the facilities and guarantees granted to investors to one of the following mechanisms.

1. The venues provided for under the Romanian law concerning the settlement of administrative disputes and the private international law relations;
2. Under the ICSID Convention;
3. Through Arbitration under UNCITRAL Rules[10].

To conclude so far, when an investment is subject to expropriation under Romanian law, the law offers a compensation amounting to the fair market value of the investment. Such compensation can be sought at one of the judicial bodies listed above in accordance with investor's choice. However a dispute related to amount of the compensation shall arise as a precondition.

It is important to state that Romania has ratified International Centre for Settlement of Investment Disputes ("**ICSID**"), Energy Charter Treaty ("**ECT**") and New York Convention. However Romania is not a member state of the Vienna Convention on the Law of Treaties ("**VCLT**").

When a State is not a signatory of the VCLT, this convention cannot be directly applied to it. However, VCLT constitutes the codification of customary international law which is applicable to

[9] Article 8 of GEO 92/1997

[10] Article 11 of GEO 92/1997. Under the first option, the provision refers to Law No. 29/1990 *concerning the settlement of administrative disputes* and Law No. 105/1992 *on private international law relations*. Law No. 29/1990 was repealed and replaced by Law No. 554/2004 published in the Official Gazette of Romania, Part I, No. 1154 of 7 Dec. 2004. Law No. 105/1992 was repealed by Law No. 76/2012 published in the Official Gazette of Romania, Part I, No. 365 of 30 May 2012 and replaced by the provisions of the NCC and NCPC. Under the second option, the provisions stress that a Romanian company in which foreign investors have a controlling position according to Romanian law shall be considered as having the nationality of such foreign investors for the purpose of Art. 25(2)(b) of the ICSID Convention.

the interpretation of treaties[11] thus they are also, binding on the Romanian State as a customary source of Public International Law.[12]

III. STATUS OF INTRA-EU BITS

Article 207 (1)[13] of Treaty on the Functioning of the European Union ("**TFEU**") is the fundamental provision regarding the EU's competence in the field of the Common Commercial Policy ("**CCP**"). It expressly states various aspects of the CCP adding foreign direct investment ("**FDI**") matters to the treaty making power.

When it comes to determination of foreign policies regarding foreign investment, the member states of the European Union cannot exercise their powers arising from their sovereignty in an independent manner. EU has the competence in respect of FDIs. During the period following the accession of new member States in 2004, European Commission ("**EC**") have concerns regarding the bilateral investment treaties signed by its member states and EC argued that those treaties between EU member states (intra-EU BIT) are in conflict with EU law, and not compatible with the EU single market, so needed to be terminated. The underlying idea of EC is that intra-EU BITs discriminate between EU investors from different member states since, by BITs, some have right to sue member states at international level but others not. Also another concern of the EC is that an award in an investor-state arbitration is binding however not subject to a review of the European Court of Justice ("**ECJ**")[14]. Also, in the written observation presented in the case *Achmea* (at that time Eureko) *vs. Slovakia*, the EC maintained its position and stated that "*Intra-EU BITs amount to an anomaly within the EU internal market*"… "*Eventually all intra-EU BITs will have to be terminated*".[15]

On 8 September 2016, the President of Romania agreed to submit to the Romanian Parliament draft legislation approving termination of 22 intra-EU BITs. The explanatory note which takes part in the draft legislation states the European Commission's view, according to which, intra-EU BITs are incompatible with EU law. Also, the note explains that the Romanian Government has decided to

[11] Article 31 and Article 32 of VCLT.
[12] "Investment Arbitration in Romania" Crina Baltag, p.362.
[13] Article 207(1) of TFEU states that "*The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."*
[14] "*A test for European solidarity: The case of inta-EU Biletaral Investment Treaties*", Cecilia Olivet January 2013
[15] Eureko B.V. vs the Slovak Republic (PCA Case No. 2008-13), Award on Jurisdiction, 26 October 2010 http://italaw.com/documents/ EurekovSlovakRepublicAwardonJurisdiction.pdf [4/12/2012]

proceed with terminating all of its intra-EU BITs, since EU Member States didn't accept to terminate by consent. As a result of the termination of the intra-EU BITs, foreign investors of those countries in Romania will be directly affected by this policy change at the EU level, since the promotion and protection provided under BIT will end.

Nevertheless, investors must also be aware that most BITs contain a so-called "survival clause" under which investments made within the period of existence of the BIT remain protected for a defined period. Since most of the BITs in question contain a "survival clause", also known as "sunset clause" that maintain the investor protection for a considerable length of time after the termination, the number of BIT disputes cannot be decreased just by imposing BIT-termination on the Member States. For example, in 2010, during the *Achmea vs Slovakia* case, the Dutch Government claimed that Slovakia can terminate the treaty unilaterally, but the protection for investors would remain valid for 15 years as stipulated in the so call "survival clause" under the treaty.[16]

Regarding the disputes between the contracting parties, generally, ICSID option and *ad hoc* arbitration under the UNCITRAL Rules are provided in the BITs. Romania has been involved in several ICSID based arbitrations. Compared to commercial arbitration, investor-state arbitration has gained an important place in the Romanian legal framework. The privatization process is one of the reasons of most of the arbitrations brought against Romania by foreign investors, allegedly violate their rights protected by bilateral treaties and other legal instruments. Even if the EU and the Member States may consider the intra-EU BITs terminated, arbitration practice supports that there is no implied termination of these agreements. At international law level, arbitrators have supported investors and upheld the validity of the intra-EU BITs.[17]

In the *Eastern Sugar*[18], the government claimed that the arbitral tribunal did not have jurisdiction, because of the invalidity of the BIT with the Netherlands and had been superseded by EU Law and argued that the case should be decided by the European Court of Justice ("**ECJ**"). However, this argumentation was rejected by the arbitration tribunal who ruled in favour of Eastern Sugar.[19] Pursuant to Article 59 of VCLT, tribunal rejected the argument that the alleged incompatibility between BITs and EU law would have led to an automatic treaty termination, by asserting that the BIT between the Czech Republic and the Netherlands and EU law did "not cover the same precise

[16] "A test for European solidarity: The case of inta-EU Biletaral Investment Treaties", pg 5.
[17] Chapter 6 "*Investment Arbitration in Romania*" Crina Baltag, pg.366, 371.
[18] Eastern Sugar v. Czech Republic, Eastern Sugar BV v. Czech Republic, 27 March 2007, SCC Case No 088/2004
[19] "A test for European solidarity: The case of inta-EU Biletaral Investment Treaties", pg 6.

subject matter".[20] Similarly, in the case *Eureko v. Slovakia*, the Tribunal dismissed the "intra-EU jurisdictional objection", holding that the BIT provisions have "not been displaced by EU law" as a result of Article 59 of VCLT nor have they been "*disapplied by EU law*" as a result of Article 30 VCLT.[21]

It seems that eventually all intra-EU BITs will be either terminated by the member states or declared incompatible with EU law, therefore any substantive investment protection according to the BITs, such as fair and equitable treatment, non-discrimination etc. will no longer be available for new investments.

IV. WHAT IS AVAILABLE FOR A EU CITIZEN AS AN INVESTOR IN ANOTHER EU COUNTRY?

Since enlargement of the EU, such "extra" reassurances, such as BIT protection, should not be necessary, as all Member States are subject to the same EU rules in the single market, including those on cross-border investments (in particular the freedom of establishment and the free movement of capital). All EU investors also benefit from the same protection thanks to EU rules (*e.g.* non-discrimination on grounds of nationality). By contrast, intra-EU BITs confer rights on a bilateral basis to investors from some Member States only: in accordance with consistent case law from the ECJ, such discrimination based on nationality is incompatible with EU law.[22]

Four EU legal instruments address the deprivation of private property.

TFEU, along with court decisions, delineates EU jurisdiction to regulate expropriation. The Charter of Fundamental Rights of the European Union and the ECHR establish conditions for legal expropriation. The TFEU addresses EU jurisdiction over property law in member states. Because Article 345 of TFEU provides that, "[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". Therefore, some have argued that the EU has no authority to regulate property expropriation. However, the ECJ has found that the EU may impose some standards on expropriation, such as the ruling of non-discrimination.

Likewise, the *Court of Justice of the European Free Trade Association* ("**EFTA Court**") has held that expropriation must comply with "the requirements of suitability and necessity under the

[20] "*The EU on the Investment Path – Quo Vadis Europe? The Future of EU BITs and other Investment Agreements*" August Reinisch, pg.30.
[21] ibid.
[22] European Commission - Press release
Commission asks Member States to terminate their intra-EU bilateral investment treaties
Brussels, 18 June 2015. This part has been adopted by the press release mentioned above as a whole

principle of proportionality." Hence, States may determine "*whether and when expropriation occurs,*" but the conditions for the expropriation may be regulated by EU. However, the EFTA Court has jurisdiction with regard to EFTA States which are parties to the European Economic Area ("**EEA**") Agreement. At present, the parties are Iceland, Liechtenstein and Norway. The Court is competent to deal with infringement actions brought by the EFTA Surveillance Authority against an EFTA State about the implementation or interpretation of the rules of EEA law, for providing advisory opinions to courts in EFTA States and also carried out an appeal mechanism regarding the decisions taken by the EFTA Surveillance Authority.[23]

EU Charter of Fundamental Rights ("**The Charter**") protects property from expropriation with some exceptions.[24]

The ECHR have similar provisions as the Charter, Article 1 provides that "*[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to conditions provided for by law and by the general principles of international law."* ECHR favors a liberal interpretation of this provision, explaining that states, "should enjoy a wide margin of appreciation" in their exercise of expropriation power. Although the ECHR does not mention compensation, the Court has held that "*the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under [the ECHR*]."[25]

Therefore it may be fair to conclude that due to single market policy of the EU there is no need for granting an extra protection, to a foreign investor (who is an EU Citizen) within the EU. The applicable instrument of public international law to a prospective dispute is the EU Law.

IV. PRACTICAL CONSIDERATIONS

The President of Romania agreed to submit to the Romanian Parliament draft legislation approving termination of 22 intra-EU BITs. Even though the BITs have involved a survival clause which have provided the protection for investments for a defined period, some of those defined periods may have passed. As a result of these developments, promotion and protection provided for those foreign investors under BIT will end.

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[23] http://www.eftacourt.int/the-court/jurisdiction-organisation/introduction

[24] Article 17 the Charter states that "*except in the public interest and in cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest*."

[25] Expropriation in Europe, available on: http://www.mreza-mira.net/wp-content/uploads/Expropriation-in-Europe-Jan-2013.pdf

Even though arbitration practice have supported in some of the cases, access to international investment arbitration, which is provided for in all intra-EU BITs will not be available after the termination of the BIT and by the end of the sunset clause. Therefore, European investors whose investments have been negatively affected by a host state's measures will have only choice to turn to domestic courts of the Member States to annul those measures or obtain compensation for the infringement. Consequently, European investors, who are damaged by irresponsible governments, will have to rely on the judiciary in the same countries by expecting no link between the judiciary and executive branch and no political pressure on courts.[26] Thus, one of the most important elements of investment protection will not be possible for European investors; they will therefore have to rely on the EU Rules as mentioned above.

The use of mediation is an alternative dispute resolution mechanism proposed by EC, however drawbacks of mediation are crucial compared to the arbitration. For example, mediation is voluntary alternative and not a binding procedure so cannot be enforced by the foreign investor against the host state. The risk is that it may be abused by the host state, procedure can be delayed and the cost may be increased.[27]

A further body where the investor can seek remedy is the European Court of Human Rights ("**ECtHR**"), considering that expropriation is a violation of the property right. An expropriation made disregarding the procedure or the essence provided under the law is an illegal action violating European Covenant on Human Rights, therefore it can be sued on the level of ECtHR. The corporations are also entitled to sue states on such platform.[28]

An interesting alternative method for enjoying international foreign investment protection may be through setting up a shell company in another country having a valid BIT with Romania may be suggested, and in this way an efficient foreign investment protection may be continued.[29] For example, there is a BIT between Romania and Turkey which has entered into force on July 08, 2010, within this respect, a EU company whose BIT with Romania was terminated, may be converted to a Turkish company to continue enjoying investment treaty protection in Romania.

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[26] "*The European Commission Has Delivered the Kiss of Death for Investors*" Global Investment Protection Georg Hotar. Hotar claims that "*a foreign investor who challenges the state before its own courts will simply not get a fair trial. And even if an investor would get a fair trial, the amount of compensation for damages, which can be obtained on the basis of national laws is substantially lower than the amounts international arbitral tribunals usually award*."

[27] İbid 2.

[28] "*MGN Limited vs UK* "is just one of the many examples.

[29] "A test for European solidarity: The case of inta-EU Biletaral Investment Treaties", pg 6.