Economics, trade and finance — Investment protection — Fair and equitable treatment — Sweden–Romania Bilateral Investment Treaty, 2002 — Article 2(3) — Whether Romania breaching fair and equitable treatment protection under Treaty — Whether Romania breaching investors' legitimate expectations — Whether Romania acting reasonably with respect to investors' investment — Whether Romania affording investors adequate levels of transparency — Article 2(4) — Umbrella clause — Whether Romania breaching umbrella clause protection under Treaty

Arbitration — Jurisdiction — Investment protection — ICSID Convention, Article 25 — Distinction between objection to jurisdiction and objection to admissibility — Factual findings — Burden of proof — Jurisdiction *ratione personae* — Jurisdiction *ratione materiae* — Jurisdiction *ratione temporis* — Temporal application of bilateral investment treaty — Whether applicable to acts occurring before entry into force if dispute arose after entry into force

Arbitration — Remedies — Standard for bringing a claim for lost profits — Sufficient certainty — Whether investors would have made profits but for the international wrong — Whether trend among investment tribunals to award compound rather than simple interest — Whether a tribunal having power to issue definitive injunctive relief — *Res judicata* effect

Arbitration — Enforceability of Award — Whether appropriate for Tribunal to base its decisions on matters of EU law applying after Award rendered — ICSID Convention, 1965, Articles 53 and 54

Nationality — Individuals — Claimants renouncing nationality of respondent State and acquiring new nationality — Whether new nationality purely a matter for national law — Whether role for international law — Whether new nationality opposable to State of former nationality — Whether "genuine link" with State of new nationality required — Standing to being investment claim under bilateral investment treaty

Treaties — Interpretation — Sweden–Romania Bilateral Investment Treaty, 2002 — Treaties established under European Union law to which Romania and Sweden parties — Whether conflict of treaties — Whether EU law having role in interpretation of BIT — Whether EU law applying after Award rendered relevant to Tribunal's decision making — ICSID Convention, 1965, Articles 53 and 54

Micula and Others *v.* Romania[1]

(ICSID Case No ARB/05/20)

ICSID Arbitration Tribunal

Decision on Jurisdiction and Admissibility. 24 *September* 2008

(Lévy, *President*; Alexandrov and Ehlermann, *Members*)

Award. 11 *December* 2013

(Lévy, *President*; Alexandrov and Abi-Saab,[2] *Members*)

Summary:[3] *The facts*:—Messrs Viorel and Ioan Micula were born in Romania. They were subsequently granted Swedish nationality and renounced their Romanian citizenship. They invested in three companies (the Messrs Micula and the three corporations are together referred to as "the claimants") incorporated in Romania ("the respondent"). Starting in the late 1990s and early 2000s, the claimants had made substantial investments in the Romanian food and beverage industry in the Ştei-Nucet-Drăgăneşti, in Bihor County in northwestern Romania, in reliance on certain tax exemptions and incentives provided by the Romanian Government and in reliance on the expectation that those incentives would be maintained for a ten-year period.

Romania became a party to the Europe Agreement 1995, by which it agreed gradually to harmonize its laws with those of the European Communities.[4] In August 2004, Romania announced that, as part of the process of the State becoming a member of the European Union ("EU"),[5] it would repeal the tax incentives it had offered the claimants. Romania took the decision to repeal the tax incentives based on advice it had received from the EU Commission stating that such schemes were contrary to EU State aid rules. Romania's decision to repeal the incentives detrimentally affected the claimants' investment, in breach of the respondent's obligations under the Sweden–Romania Treaty on the

[1] The representation of the parties underwent several changes: see the Decision on Jurisdiction, paras. 22-3 and the Award, paras. 6-7, 9, 20, 26, 35 and 78-9.

The ICSID ad hoc Committee's Decision on Annulment of 26 February 2016 can be found at p. 493. For related proceedings, see pp. 629 and 678.

[2] Dr Ehlermann resigned on 25 May 2009. On 16 July 2009 the respondent appointed Professor Abi-Saab to replace him.

[3] Prepared by Mr D. Regan.

[4] Romania signed the Europe Agreement with the European Community and its Member States on 1 February 1993; it entered into force on 1 February 1995. For further details on the Europe Agreement, see paras. 179-83 of the Award.

[5] The European Communities had by then become the European Union.

Promotion and Reciprocal Protection of Investments, 2002 ("the BIT"),[6] which had entered into force on 1 April 2003.

Consequently, on 2 August 2005, the claimants filed a request for arbitration under the BIT and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 ("ICSID Convention"). The claimants alleged that they had invested in Romania on the basis of the tax incentives offered by the State and the revocation of those incentives had caused them significant financial losses for which the respondent was liable.

Decision on Jurisdiction and Admissibility

The respondent contested the jurisdiction of the arbitral tribunal on the grounds that (1) the Messrs Micula had failed to establish that they held Swedish nationality and even if they had Swedish nationality, that nationality was not opposable to Romania as they had no effective or genuine link with Sweden; (2) no claim could be advanced on behalf of the three companies as they were Romanian corporations; (3) there had been no qualifying investment in Romania and no compensable harm; (4) the Tribunal lacked jurisdiction *ratione temporis* as the acts of which the claimants complained had occurred before the entry into force of the BIT; and (5) the claim for restitution of the prior legal regime was inadmissible.

Held (unanimously):—The respondent's objections were dismissed. The Tribunal had jurisdiction and the claims were admissible.

(1) The jurisdiction of the Tribunal was determined by Article 25(1) of the ICSID Convention[7] and Article 7 of the BIT.[8] Article 25(1) of the ICSID Convention required that (i) the dispute was between a Contracting State and a national of another Contracting State; (ii) the parties to the dispute had expressed in writing their consent to ICSID arbitration; (iii) the dispute must be a legal one; and (iv) it must arise directly out of an investment. In addition, the terms of Article 7 of the BIT had to be satisfied and the investor and investment must fall within the definitions in Article 1 of the BIT.

(a) When an objection related to a requirement contained in the text on which consent was based, it was a jurisdictional objection. If it succeeded, the Tribunal could not hear the case. By contrast, an objection of inadmissibility was capable of being removed (paras. 61-5).

[6] The Agreement between the Government of the Kingdom of Sweden and the Government of Romania on the Promotion and Reciprocal Protection of Investments (the Sweden–Romania Bilateral Investment Treaty) was signed on 29 May 2002.

[7] For the text of Article 25(1) of the ICSID Convention, see para. 55 of the Decision on Jurisdiction and Admissibility.

[8] For the text of Article 7 of the BIT, see para. 57 of the Decision on Jurisdiction and Admissibility.

(b) At the jurisdictional stage, it was normally necessary for a claimant to prove the facts on which its case on the merits depended but only to show that, if those facts were established, they were capable of constituting violations of the provisions on which the claimant relied. However, when a jurisdictional issue hinged on a factual determination that might also relate to the merits, a tribunal must proceed to a determination of the facts to the extent necessary for jurisdictional purposes (paras. 66-7).

(2) The Messrs Micula were Swedish nationals and the Tribunal had jurisdiction *ratione personae* over their claims.

(a) For the Tribunal to have jurisdiction *ratione personae*, the Messrs Micula must have been nationals of Sweden, and not possessed the nationality of Romania at the time of the Request for Arbitration. That requirement was satisfied. While it was for the national law of the State concerned to determine who was a national of that State, when nationality was invoked for international purposes, there was also a role for international law. The Swedish authorities had granted nationality to the two individual claimants and the Tribunal would disregard that decision only if there was evidence of fraud or material error. The respondent had failed to provide evidence sufficient to establish that the grant of Swedish nationality was vitiated in this way (paras. 85-97).

(b) The Swedish nationality of the Messrs Micula was opposable to Romania. It was not disputed that they had renounced their Romanian nationality and that this renunciation had been accepted by Romania. It was doubtful whether the test of a "genuine link" between a claimant and the State of nationality was applicable to individuals or under the BIT. Moreover, Romania itself had accepted that they were no longer Romanian citizens and they both had significant links with Sweden even if they presently resided in Romania (paras. 98-105).

(3) The three corporations, though Romanian, were controlled by the Messrs Micula. In accordance with Article 25(2)(b) of the ICSID Convention[9] and Articles 1(2)[10] and 7(3)[11] of the BIT, since the Messrs Micula were Swedish nationals, the companies were to be treated as investors of a State other than Romania and the Tribunal had jurisdiction *ratione personae* over their claims (paras. 107-16).

(4) The Tribunal possessed jurisdiction *ratione materiae*.

(a) The claimants had investments in Romania within the meaning of Article 1 of the BIT[12] (paras. 122-8).

[9] For the text of Article 25(2) of the ICSID Convention, see para. 108 of the Decision on Jurisdiction and Admissibility.

[10] For the text of Article 1(2) of the BIT, see para. 109 of the Decision on Jurisdiction and Admissibility.

[11] For the text of Article 7(3) of the BIT, see para. 110 of the Decision on Jurisdiction and Admissibility.

[12] For the text of Article 1 of the BIT, see para. 126 of the Decision on Jurisdiction and Admissibility.

(b) The dispute was not merely hypothetical since the revocation of the incentives was capable of having caused, or causing in the future, harm to the claimants. The extent or existence of harm did not need to be established at the jurisdictional stage (paras. 135-41).

(5) The Tribunal had jurisdiction *ratione temporis*. Under Article 9 of the BIT,[13] the BIT applied to investments made before it entered into force but not to disputes which arose before that date. The present dispute arose after the BIT had entered into force. That, not the date on which the relevant acts occurred, was the critical date for the purposes of jurisdiction. While the substantive provisions of the BIT did not apply to such acts, the Tribunal had jurisdiction to apply customary international law with regard to them (paras. 150-7).

(6) The Tribunal had the power to order restitution. Whether that was an appropriate remedy was for a later phase of the proceedings (paras. 166-8).

Award on the Merits

The case proceeded to a hearing on the merits. On 2 April 2009, the European Community ("EC") requested that it be allowed to file a written submission as a non-disputing party in the arbitration. The Tribunal allowed the EC request to participate in the arbitration as a non-disputing party on the basis that the EC submission might bring a factual or legal perspective to the dispute that could assist the Tribunal in the adjudication of the parties' rights.

Held (Professor Abi-Saab dissenting as to the reasoning):—The respondent had violated Article 2(3) of the BIT by failing to ensure fair and equitable treatment of the claimants' investments.[14] The claim that the respondent had violated Article 2(4) of the BIT by failing to observe obligations entered into with the claimants with regard to their investments was dismissed.[15]

(1) It was undisputed that the primary source of law was the BIT. As to the role of other rules of international law, particularly those arising from treaties established under European Union law, to which Romania and Sweden were parties, only the Europe Agreement, which entered into force on 1 February 1995, and the BIT were relevant. In the relevant time period, Romania had

[13] For the text of Article 9 of the BIT, see para. 153 of the Decision on Jurisdiction and Admissibility.

[14] Article 2(3) of the BIT provided that: "Each Contracting Party shall at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shall not impair the management, maintenance, use, enjoyment or disposal thereof, as well as the acquisition of goods and services or the sale of their production, through unreasonable or discriminatory measures."

[15] Article 2(4) of the BIT provided in relevant part: ". . . Each Contracting Party shall observe any obligation it has entered into with an investor of the other Contracting Party with regard to his or her investment."

not acceded to the European Union and thus EU law was not directly applicable to Romania. Romania was only subject to its international obligations under the Europe Agreement itself. Factually, however, the general context of EU law had to be taken into account when interpreting the BIT. In particular, the overall circumstances of EU accession might play a role in determining whether the respondent had breached some of its obligations under the BIT (paras. 318-29).

(2) As to whether any payment of compensation arising out of the award constituted illegal State aid under EU law, thus rendering the Award unenforceable within the EU, it was undesirable to predict the conduct of persons and authorities after the Award had been rendered, especially in enforcement matters. It was thus inappropriate to base decisions in this case on matters of EU law that might apply after the Award. In any event, Articles 53 and 54 of the ICSID Convention applied to the award (paras. 330-41).

(3) The claims for breach of the so-called umbrella clause under the BIT were dismissed. Revocation of the incentives offered to the claimants did not constitute a breach of Article 2(4) of the BIT.

(a) The term "any obligations" in Article 2(4) of the BIT had a broad meaning, encompassing not only obligations of a certain type, but any and all obligations a State entered into with respect to investments of investors (para. 415).

(b) The purpose of the umbrella clause was to cover or elevate to the protection of the BIT an obligation of the State that was separate from, and additional to, the treaty obligations that it had assumed under the BIT (para. 417).

(c) To be afforded the protections of the BIT, the obligation in question had to qualify as such under its proper governing law before being elevated under the BIT. The governing law of the obligation (to provide incentives to the claimant) was Romanian law. The existence and content of that purported obligation depended on Romanian law (para. 418).

(d) The claimants had not provided sufficient evidence and legal arguments on the content of Romanian law for the Tribunal to find the existence of an obligation protected by the umbrella clause (para. 495).

(4) The respondent had failed to ensure the fair and equitable treatment of the claimants' investment under Article 2(3) of the BIT as it had violated the claimants' legitimate expectations that the tax incentives would be available for a certain duration.

(a) The respondent's conduct did not need to be egregious to violate the claimants' right to fair and equitable treatment (para. 508).

(b) The claimants' right to fair and equitable treatment was to be interpreted in light of the BIT's goal of intensifying economic co-operation between the respondent and the claimants' home State (para. 515).

(c) The fair and equitable treatment obligation was not an unqualified guarantee that regulations would never change. Investors had to expect that a State's regulatory framework would change from time to time, unless there was a stabilization clause or other specific assurances giving rise to a legitimate

expectation of stabilization. The BIT's protection of the stability of the legal and business environment could not be interpreted as the equivalent of a stabilization clause. Nonetheless, the State had an obligation to act with substantive and procedural propriety (para. 529).

(d) In order to establish a breach of the fair and equitable treatment obligation based on an allegation that Romania had undermined the claimants' legitimate expectations, the claimants had to establish that (i) Romania had made a promise or assurance, (ii) the claimants had relied on that promise or assurance as a matter of fact, and (iii) such reliance (and expectation) had been reasonable. The crucial point was whether the State, through statements or conduct, had contributed to the creation of a reasonable expectation, in this case, a representation of regulatory stability. It was sufficient that the State had acted in a manner that would reasonably be understood to create such an appearance. The element of reasonableness could not be separated from the promise, assurance or representation, in particular if the promise was not contained in a contract or was otherwise stated explicitly. Whether a State had created a legitimate expectation in an investor was thus a factual assessment which must have been undertaken in consideration of all the surrounding circumstances. The promise, assurance or representation made by the State might have been issued generally or specifically, but it must have created a specific and reasonable expectation in the investor. That subjective expectation must also have been objectively reasonable. The respondent had created a specific entitlement for the claimants, according to which they were entitled to receive the incentives for a ten-year period (paras. 668-74).

(e) It had been reasonable for the claimants to believe that the incentives were compatible with EU law. The respondent itself had appeared to believe that, at the time the incentives had been adopted they were compatible with EU State aid requirements. The investor should not be held to a higher standard than the State (paras. 690-707).

(f) The fact that the legislative and judicial organs of the respondent had endorsed the legitimacy of the incentives implicitly confirmed the legality of the incentives under Romanian law. Therefore, the claimants' reliance on the incentives had also been reasonable as a matter of domestic law (paras. 708-17).

(g) A significant part of the claimants' investments had been made in reliance on the incentives. The existence of the incentives had been one of the reasons for the scale and manner of the claimants' investments. The BIT only protected investments made prior to the revocation of the incentives. The revocation of the incentives had destroyed any further legitimate expectations on the part of the claimants (paras. 718-26).

(5) The respondent had failed to ensure fair and equitable treatment of the claimants' investment when it failed to act reasonably in repealing certain incentives previously afforded to the claimants, while maintaining all of the claimants' obligations under the same scheme, including the obligation to maintain their investments for twice the period they received the incentives. It was not reasonable for the respondent to maintain as a whole the investors'

obligations, while at the same time eliminating virtually all of their benefits (paras. 813-26).

(6) The manner in which the respondent had terminated the claimants' incentives was not sufficiently transparent to meet the fair and equitable treatment standard. The respondent's argument that it had been bound by confidentiality requirements imposed by the EU was not borne out in the evidence. The respondent should have informed the claimants reasonably soon after it became clear that the incentives in question would be abolished. The respondent breached its fair and equitable treatment obligation to the claimants by failing to inform them in a timely manner that certain incentives would be terminated prior to their anticipated expiry date (paras. 864-71).

(7) As a result of the respondent's breach of the BIT, the respondent was to pay RON 376,433,229 as damages (RON 85,100,000 for increased costs of sugar; RON 17,500,000 for increased costs of other raw materials; RON 18,133,229 for the lost opportunity to stockpile sugar; and RON 255,700,000 for lost profits on sales of finished goods). Compound interest was to be paid on the amount awarded until full payment of the Award.

(a) The claimants' request for lost profits had to be assessed according to the standard of sufficient certainty. The claimants had to prove with sufficient certainty that they would have made profits but for the international wrong committed by the respondent. There was a sufficient causal link between certain damage asserted, in particular the loss of opportunity to stockpile raw materials, and the revocation of the incentives. However, the claimants had failed to prove with sufficient certainty that they would have implemented certain investments that formed the basis of their lost profits claims (paras. 984-1118).

(b) The Tribunal had the power to award damages for losses suffered by non-claimant companies that formed part of the claimants' broader corporate group (para. 1245).

(c) The claimants were entitled to compound interest on the damages award as the overwhelming trend among investment tribunals was to award compound rather than simple interest (para. 1266).

(8) The claimants were not entitled to additional definitive injunctive relief with respect to the Romanian Tax Authorities. Although the Tribunal had the power to grant injunctive relief in a final award, this relief had to be definitive, not provisional. As the Tribunal would become *functus officio* upon the rendering of the Award, the injunctive relief granted could not later be reconsidered or lifted by the Tribunal, as would have been the case with provisional relief. Such definitive injunctive relief would have a *res judicata* effect. Under the circumstances, such additional relief was not warranted (paras. 1320-1).

Separate Opinion of Professor Abi-Saab: Although the pecuniary outcome of the Award was correct, it should have been reached on other legal grounds.

(1) To be considered "legitimate," the claimants' expectations ought to have been based on a legal commitment.

(a) A breach of legitimate expectations was dependent on the existence of an identifiable legal commitment towards the specific investors. Such a commitment on the part of the State did not arise from general political statements encouraging investments but from real legal assurances and commitments (para. 4).

(b) A State's commitment did not need to take the form of a formal or explicit agreement but could arise from behaviour or conduct. However, such conduct had to be sufficiently concrete and specifically directed to the particular investor in order to constitute an objective representation of a legal commitment that could have been objectively seen as having generated legitimate expectations. The subjective perception of the investor was not sufficient to trigger legitimate expectations (para. 5).

(c) The tax incentive scheme offered by the respondent did not constitute, by itself, a legal commitment by the State. An exchange of legal considerations whereby the incentives offered by the State also imposed certain legal obligations on the investors was required to establish legal commitments on both sides (para. 6).

(d) The tax incentive scheme offered by the respondent did not constitute a stabilization clause guaranteeing the freezing of its tax concessions regime throughout the period stipulated in the incentives. The tax incentive scheme enabled the investors to benefit from whatever incentives were available at a given time. The content of the tax incentives scheme was subject to change; this variability was recognized by the investors, who had not contested earlier changes, whether in their favour or to their detriment. Thus, the respondent did not violate any commitment to the investors (para. 7).

(e) With respect to the withdrawal of certain incentives, in particular the abolition of a raw materials facility four years prior to the expiry of its term, the legal relationship between parties became severely imbalanced. Such a severe imbalance could have given rise to a measure of liability on the part of the respondent (para. 8).

(2) Such a severe imbalance could have given rise to a claim for the revision or the termination of the contract to eliminate the imbalance between the parties and could have given rise to a measure of compensation.

(a) The State's decision to repeal the tax incentives was motivated by its imperious necessity to join the EU which was an overriding national interest. The respondent had not, however, invoked necessity as a ground for precluding wrongfulness as it argued that it had acted rationally and reasonably and therefore had not committed a wrongful act requiring exoneration by a plea of necessity (para. 10).

(b) The respondent's actions did not lack transparency. The respondent did not intend to hide information from the claimants. Diplomatic negotiations were, by their very nature, confidential. The respondent had failed to communicate or coordinate between different parts of government and this could have amounted to slackness in due diligence or negligence. However, the measure of liability arising from such negligence in the pursuit of legitimate overriding national interests was limited to actual ascertained loss. The

dismissal of claimed lost profits as speculative was to be accepted given the thorough calculation undertaken in the Award (paras. 12-17).

The text of the Award and the Opinion of Professor Abi-Saab commence at pages 57 and 489 respectively. The following is the text of the Decision on Jurisdiction and Admissibility:

DECISION ON JURISDICTION AND ADMISSIBILITY

TABLE OF CONTENTS