ASSET RECOVERY VS. SOVEREIGN STATES: A RORSCHACH TEST?

CASE STUDY

Tuesday, 9 February 2021

Fictional state overview

Fictional State is an African nation, with a GDP of 100 billion. The country's main export is oil, followed by minerals (gold, diamonds, copper, cobalt, bauxite), wood, coffee and cocoa. The export industries are managed by wholly owned state-owned companies, namely National Oil Company ('NOC'), National Minerals and Metals Company ('NMMC'), National Agricultural Company ('NAC'), among others.

The government initiated a development strategy, Vision Fiction State 2030, which aims to encourage large scale investments focused on public sector projects, such as the construction of a railroad and an oil pipeline. The program has already attracted investment opportunities from companies in France, UK, US, China and Brazil; as well as multilateral institutions such as the World Bank and the African Development Bank. Due to a negligible domestic production capacity, most of the infrastructure and equipment for these projects will be imported.

Fictional State is a supporter of China's 'One China Policy'. As well as occupying a strategic geographic position, the Fictional State has seen a substantial increase in foreign investment in recent years from China, particularly infrastructure projects.

NOC dominates the country's commercial oil trade. Most of the petroleum products are sold through an overseas wholly-owned subsidiary that operates in European and South American markets. NOC also maintains a close business relationship with international technical and infrastructure suppliers. One example is Global Electric, with which the Company signed a contract in 2018 for the supply of turbines and other equipment worth USD 2 billion with first deliveries planned for 2021/2022. The relationship with Global Electric is primarily managed out of the US (New York), London and Paris.

The Fictional State's Ministry of Water and Sanitation runs a program to improve public drinking water production and distribution service. In 2018 it signed a 10-year contract with WATER4THEWORLD as a technical partner to oversee the program. The contract guarantees the supply of drinking water to an initial population of eight million people. The program is overseen by WATER4THEWORLD and the Fictional State's Social Development Fund. It is managed through a Special Purpose Vehicle in the US (New York).

As part of its 2030 vision plan, the government invested heavily in its national carrier and airport infrastructure. Given its safe, strategic and central location in Africa, the government wants to position Fictional State as a new flight hub. Several airlines fly into the capital, including British

Airways, American Airlines and Emirates. The national carrier airline – a direct subsidiary of the Ministry of Transport – owns a modern fleet of 20 aircraft which fly regularly into European hubs (UK, France, Spain, Germany and Switzerland) as well as US (New York and Miami). There are three more aircraft on the way; an Airbus A330-900neo and two Boeing 737 MAXs, partially paid for by a fund set up by the Ministry and due for delivery in 2022.

The Fictional State issued a sovereign bond for USD 1 billion to support the state budget and debt management. The note is due in 2030 and has a coupon of 10.5%. Interest payments are payable semi-annually on 19 March and 19 September in each year. The Note will be repaid in three instalments of US$333,333,333.00 each, on 19 September 2028, 19 September 2029 and 19 September 2030. The Fiscal Agent, Paying Agent and Transfer Agent is Deutsche Bank AG, London Branch and Deutsche Bank Trust Company Americas. The note is guaranteed by the International Development Association, a member of the World Bank.

The State recently set up a Sovereign Wealth Fund ('FS-SWF'), which is run by the government and made up of USD 1.5 billion. FS-SWF is managed by JP Morgan in New York and London. It is likely that the FS–SWF will be used to invest overseas in order to diversify income streams and accumulate savings. Assets will most likely take the form of stocks, bonds, real estate, private equity and hedge funds.

In 2018, the Fictional State underwent a change in government. Previous government was in power for over 20 years and largely accused of pillaging the economy. They were also involved in a wave of expropriations which resulted in arbitrations filed against the State and NOC across several jurisdictions and tribunals, including ICSID and ICC. As part of the previous government's stronghold, the is a strong community of exiled nationals across the USA and Europe; as well as an active anti-corruption civil society movement insight and outside Fictional State.

The new government set up a Task Force and is in the midst of an effort to recover tens of millions which were laundered by corrupt government officials from into Europe, South America and the US. The State is being assisted by the US Department of Justice.

Fictional award and context of award

The USD 150 million award arose from a private arbitration, seated in Dubai, and has developed significant interest (at an 8% rate). The underlying contract's arbitration clause did not include any explicit clause as to a sovereign's waiver of immunity from enforcement.

The award was purportedly set-aside by courts in the Fictional State on the basis of fraud. The alleged fraud includes tax evasion, money laundering (under a reporting law which was passed after the time of the arbitral award), and facilitation payments to government officials.

There are at least three other creditors against the sovereign and NOC, with awards in the range of USD 800 million (an ICSID award) to $90 million. The Fictional State has settled two awards (USD 15 million and USD 75 million) in the last couple of years but continues to challenge the above three and possibly other awards not made public to date. The Fictional State is itself a creditor in two arbitrations awarded in its favour totalling USD 25 million.

Yesterday, the New York Times published an article disclosing several confidential aspects of the arbitration and the source of the information remains unclear.