

ICSID—attribution of the acts of a state-owned private limited company to the state (Staur Eiendom v Latvia)

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Arbitration analysis: Sam Winter-Barker, associate, at Fietta LLP examines the recent award in an International Centre for Settlement of Investment Disputes (ICSID) arbitration brought by three Norwegian claimants against the Republic of Latvia under the Norway-Latvia Bilateral Investment Treaty (the BIT), in relation to the claimants' investments in a development project adjacent to Riga International Airport. The arbitral tribunal found that the conduct of a Latvian state-owned company was not attributable to the state and that the state's own conduct did not amount to a breach of the BIT.

Staur Eiendom AS, Ebo Invest AS and Rox Holding As v Republic of Latvia (ICSID Case No. ARB/16/3)—award dated 28 February [2020](#)

What was the background?

On 3 November 2006, SIA Rixport (Rixport)—a wholly-owned Latvian subsidiary of three Norwegian companies: EBO Invest AS; Staur Eindo AS; and Rox Holding AS (together, the claimants)—entered into four land lease agreements (the land lease agreements) with SJSC International Airport Riga (SJSC Airport), a Latvian state-owned company and the owner of Riga International Airport.

The land lease agreements provided for the development by Rixport of four parcels of land adjacent to the airport. The parties envisaged that the development would consist of, among other things, three hotels, conference and exhibition facilities and a business park.

In the arbitration, the claimants alleged that they made substantial financial investments in connection with the land lease agreements, including loans to Rixport totaling €10.5m. The claimants alleged that Latvia frustrated those investments in breach of the Norway-Latvia BIT by, *inter alia*, constantly changing SJSC Airport's development plan for the airport. This, in turn, prevented Rixport from fulfilling its planning and construction obligations under the land lease agreements, which in turn frustrated the entire proposed development. The claimants claimed €41.9m as compensation for the cost of its investment and lost profits.

The claimants alleged that Latvia had failed to provide 'equitable and reasonable treatment' (which the tribunal used interchangeably with the 'fair and equitable treatment' standard in the award as there was considered to be no material difference between the two phrases), due to Latvia's purported failure to provide a legal and stable business framework. The claimants also claimed a 'creeping' unlawful expropriation of its investment, which crystallised on 18 December 2017, when the land lease agreements were cancelled by the Latvian courts. Finally, the claimants claimed a denial of justice in relation to proceedings it brought against SJSC Airport before the Latvian courts. Although some of the claimants' claims were based on actions of the state, including the courts and other administrative organs, the majority of the claimants' claims arose out of alleged misconduct by a Latvian company (SJSC Airport's conduct).

Latvia contested the tribunal's jurisdiction on the basis that—(i) the claims were of a purely contractual nature and were therefore not treaty claims; (ii) the claims were concerned with acts not attributable to the state, on the basis that SJSC Airport is a corporate legal entity, separate from the state, and that there is a 'very high threshold' for equating a legally separate corporation to a state organ, which was not met in these circumstances; and (iii) two of the claimants had made their investments *after* some of the alleged misconduct that was the subject of the dispute.

On the merits, Latvia argued, *inter alia*, that: (i) no investor is entitled to expect that general legislative measures will remain static; (ii) it did not create any legitimate expectations that it could have frustrated; and (iii) the claimants' claims in relation to the decisions of the Latvian courts did not meet the 'high threshold for denial of justice claims under international customary law.' Latvia's position was, in that case, 'that neither the state nor SJSC Airport prevented the claimants from proceeding with the development of the leased land.'

What did the tribunal decide?

Although the tribunal found that it had jurisdiction, it rejected the claims on the merits.

The tribunal first ruled that Latvia's jurisdictional objections were issues of liability and more appropriately addressed together with other issues relevant to the merits of the case. The tribunal determined that the question of attribution exceptionally could be considered as a jurisdictional hurdle, when 'it is manifest that the entity involved has no link whatsoever with the State'. That was not the case here. The tribunal rejected all other objections to jurisdiction.

With respect to the merits, the tribunal first determined that SJSC Airport's conduct was not attributable to Latvia on the basis that: (i) the claimants had not provided sufficient evidence to demonstrate that Latvia had 'direct control' of SJSC Airport for it to be deemed a *de facto* State organ under Article 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission Articles (ILC Articles); (ii) there had been no delegation of governmental authority to SJSC Airport pursuant to Article 5 of the ILC Articles; and (iii) it could not be considered that SJSC Airport had acted under Latvia's 'directions or control' with the meaning of Article 8 of the ILC Articles.

Given that SJSC Airport's conduct was deemed not attributable to Latvia, the potential treaty breaches were significantly narrowed. The tribunal determined that Latvia's conduct did not amount to a treaty breach and therefore rejected the claim on the merits. The tribunal ordered the claimants to pay Latvia's (i) partial legal costs and expenses in the amount of €2,612,937.42, and (ii) costs advanced to the ICSID in the amount of US\$ 329,497,21.

What are the practical implications of this case?

Tribunals in the past have considered questions of attribution in the liability phase and not as a question of jurisdiction. This tribunal followed the conventional approach and accepted that, in principle, attribution should be determined along with other questions related to liability. In exceptional circumstances, the question of attribution could be considered as a jurisdictional hurdle when 'it is manifest that the entity has no link whatsoever to the State.' (*para* [303], citing *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010.)

On the facts, the tribunal considered that it was 'not faced [...] with a situation where it is readily evident that the State is not involved at all' (*para* [305], citing *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*). The tribunal also recognised that certain of the alleged breaches arose due to Latvia's conduct, therefore 'while the extent of the State's involvement is unclear, it is not contested that some acts are attributable to [the State].' (*para* [305], citing *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*). Accordingly, the tribunal considered that, in the circumstances, it would be appropriate to decide the issue of attribution together with other issues relevant to the merits of the dispute.

The tribunal determined that there was insufficient evidence to show that the state had 'played any role or took any decisions in respect of the Land Lease Agreements that are the subject of [the] arbitration'. The tribunal further stated that the state conducted itself at all times on the basis that the land lease agreements were ' "private law contract[s]" between "private law entities"' and at no stage 'assumed responsibility for the actions of [SJSC Airport], either expressly or impliedly.' On that basis, the tribunal found that SJSC Airport was not under the direction or control of the Latvian State.

The award is largely consistent with the investor-state arbitration jurisprudence on questions of attribution. It provides further guidance on how investor-state tribunals apply rules of public international law when considering whether conduct of a state-owned private company is attributable to the state.

Any views expressed in this summary are strictly those of the author and should not be attributed in any way to Fietta LLP.

Case details

- Arbitral institution: ICSID
- Arbitrators: Mr Eric Schwartz (President), Professor Kaj Hobér, and Mr Toby Landau QC
- Date of award: 28 February 2020

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