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Investor-State Arbitration and the Hundreds of Latvian Arbitration Tribunals

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1. Introduction

Latvian arbitration history has a page where there were a couple of hundred tribunals registered. This page has now turned, but has left an impact beyond the national system alone.

The contemporary arbitration history starts after regaining independence in 1991, when Latvia consciously strived towards creating a welcoming environment for foreign investment. Since then it has become member of most prominent trade-oriented international organizations, including the European Union in 2004 and the OECD in 2016. Latvia is a contracting state to the New York Convention as of 13 July 1992, with no declarations or notifications.[1] It is also a party to the most prominent multilateral conventions.[2] Latvia has signed bilateral investment treaties with 46 countries. The mechanism for settlement disputes varies greatly, between ad hoc with or without UNCITRAL rules of procedure, ICSID, and even courts of arbitration in third-party states. It is also a party to 76 Intra-EU treaties with investment provisions on the basis of EU membership.

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[1] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968). In particular, avoiding the reservations offered by Article 1 paragraph 3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, thus allowing the widest interpretation of the Convention's applicability.

[2] For example, the European Convention on International Commercial Arbitration, (Geneva, 21 April 1961) in force from 20 March 2003, the Convention on Conciliation and Arbitration within the CSCE (Stockholm, 15 December 1992), in force from 25 September 1997; and the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (Washington, 14 October 1966) in force from 8 September 1997.

Although the path of Latvia's achievements prima facie denotes a thorough vertical integration of international arbitration standards, domestic practice is considerably displaced from the mean. While most nations have less than ten arbitration courts, Latvia has had over two hundred at once. Concurrently, several core norms of the UNCITRAL Model Law on Commercial Arbitration (Model Law) are ignored.[3] Courts lack a role in constituting arbitral tribunals, the setting aside procedure, as well as any ability to set interim measures during the process.[4] The domestic arbitration system has sustained protracted reproach from foreign experts and academia alike, calling for "radical changes".[5] Even the Constitutional Court of Latvia pointed to the doubts of "significant lack of independence and objectivity" in the arbitration system.[6]

The government has attempted rectification through multiple major legal reforms in the past two decades, but criticism continues.[7] This contribution aims to understand the causes of the divergence between Latvian and international arbitration. Several perspectives of analysis will be engaged to cognize the development of the law. First, a teleological examination will be conducted by tracing the historical evolution of the law. Second, Latvia's seminal investor-state arbitration experiences are examined for any identifiable spillovers of domestic legal tradition. Lastly, current trends are examined to assess the direction of the current trajectory.

2. Historical Background

The justification behind the diverging of norms from international standards finds roots in Latvian history. Under Soviet occupation, arbitration was limited between state-owned com-

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3 U.N. Doc. A/40/17, Annex I, adopted by the United Nations Commission on International Trade law on 21 June 1985, and <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>

4 Setting interim measures was introduced to the Model Law in 2006

5 „Kvantitāte diemžēl nenodrošina kvalitāti",Torgāns Kalvis, Valstiskā uzraudzība pār šķīrējtiesas spriedumu tiesiskumu, Jurista Vārds, 34 (629), 2010, Torgāns Kalvis, Šķīrējtiesas Latvijā: vajadzīgas radikālas pārmaiņas. Jurista Vārds. 2005. 11. janvāris, Nr. 1, 1. – 3. lpp.; „sabiedrībā valda uzskats, ka šķīrējtiesas ir kaut kas slikts un nevēlams", Lapsa Jānis, Šķīrējtiesu darbības pārmaiņas gaidot, Jurista Vārds, 51(504), 2007; „šobrīd vērojama šķīrējtiesu sistēmas krīze un diemžēl sabiedrībai ir zudusi uzticība šķīrējtiesu institūtam", Broka Baiba, Šķīrējtiesu reglamentācija jaunajā likumprojektā, 51 (504), 2007; Žukova Gaļina. Šķīrējtiesu regulējums Latvijā : Atsevišķi problēmjautājumi / Gaļina Žukova // Civilprocesa aktuālie jautājumi: 2007. gada zinātniskās konferences materiālu krājums. - Rīga : Tiesu namu aģentūra, 2008;

6 Constitutional Court of Latvia case No. 2004-10-01 „On the Compliance of Section 132 (Item 3 of the First Part) and Section 223 (Item 6) of the Civil Procedure Law with Article 92 of the Republic of Latvia Satversme (Constitution)."

7 Šķīrējtiesu institūts un uzņēmēju vajadzības Latvijā <http://www.juristavards.lv/doc/270062-kirejtiesu-instituts-un-uznemeju-vajadzibas-latvija/>

panies and entities, far removed from public access.[8] With the breakup of the Soviet Union, Latvia entered into a free market economy and saw an enormous boom in business activity and investment. This was followed by a rising demand for dispute resolution, which the courts of general jurisdiction were unable to meet. Latvia adopted the New York Convention in 1992 and began exercising arbitration at full speed – it became a primary instrument for resolving the hundreds of private disputes that came along with Latvian independence.

It soon became apparent that there was a vacuum in Latvian arbitration practice. Both domestic and foreign arbitration was still governed by the provisions of the Latvian Civil Procedure Code of 1938.[9] The law was deemed lacking important structural pillars present in other legal systems – the law was cited as being "non-functioning [and] unable to operate properly" by Latvian parliamentarians in 1997.[10] A working group began drafting a new arbitration law, with 1985 UNCITRAL Model Law as the basis.[11] It differed in several aspects, for example, by having provisions on confidentiality and the aforementioned lack of interim measure rights and setting aside provisions.[12] The rationale behind this can be inferred from the overall gist of the time. The justice system was undergoing substantial change and there was certain distrust in the 'old guard' still remaining in its rows. Therefore, insulating arbitration from state court system seemed like a good idea. Practitioners welcomed it from both sides: the clogged courts were not in need of more work and businesses needed quicker dispute resolution. In addition, there was very limited knowledge about arbitration in general. The very term "arbitration" in Latvian appears like a denomination of another element in the regular court system and seems comfortingly "local", translating to a "court-of-dispute-settlement". The proposal entered parliament for readings in 1998 and was not widely debated.[13] Though there were discussions of mandating that at least the presiding arbitrator of a three-person tribunal should have a legal education, the amendments were not received positively due to the burden they would place on an already stretched system of lawyers.[14] The system was considered fair on the exact basis of the limited scope of powers of an arbitration system.[15] The new law

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[8] Ward, Katherine T. () "Arbitration with the Soviets: The Importance of Forum Selection in Dispute Resolution Clauses in NonMaritime Joint Enterprise Agreements," University of Chicago Legal Forum: Vol. 1990: Iss. 1, Article 23. Available at: http://chicagounbound.uchicago.edu/uclf/vol1990/iss1/23

[9] Latvian Code of Civil Procedure (1938)

[10] 7 Latvijas Republikas Saeimas 1997.gada 28.augusta ārkārtas sesijas sēdes Stenogramma. Saeima.

[11] Latvijas Republikas Saeima darba grupā. (1997, 08 06). Latvijas Republikas Civilprocesa likums 4.daļa (Šķīrējtiesa). Latvijas Vēstnesis, 912(197).

[12] UNICTRAL Model Law on International Commercial Arbitration (1985) Art.34

[13] See Latvijas Republikas Saeimas 1997.gada 28.augusta ārkārtas sesijas sēdi Stenogramma. Saeima. And Latvijas Republikas Saeimas 10. un 11.jūnija sēdi Stenogramma.

[14] Ibid

[15] Ibid

was approved in the third reading in 1999.[16] It set arbitration law as part of the Latvian Civil Procedure Law (CPL), thus qualifying investor-state arbitrations (ISAs) as civil law disputes. There was no separation between domestic and international arbitration, even if Latvia is the seat of arbitration.

Shortly after adopting the law, it was established that there was an uncontrollable growth of arbitral institutions stemming from the lack of establishment requirements.[17] Concurrently, arbitrations aimed to name themselves as closely to state courts as possible, thus blurring the easily confused lines intentionally.[18] The first instance court of the city of Liepāja is called "Liepājas tiesa" [Court of Liepāja], while several arbitral institutions took on variants of "Liepājas šķīrējtiesa" [Arbitration Court of Liepaja]. An inexperienced party could thus easily be deceived into signing their dispute rights into arbitration instead of state courts. Even more alarmingly, an arbitration signed into could be under the influence of one of the parties, losing objectivity. A perfect storm combining a legally inexperienced populace, the novelty of a free market economy, and a growing need for dispute resolution led towards the interpretation of arbitration as a commercial service-provider, rather than an alternative to court mechanisms. This state of near anarchy lasted for more than a decade. Parties who had signed agreements with arbitration clauses were denied state protection even if they were disputing the very existence of the agreement, e.g. because of alleged forgery of signature or substantial procedural flaws, even to the extent of not being able to locate the institution mentioned, either because it no longer existed or appeared unreachable.

The national court system visibly enumerated these concerns, though in a selective way. In a 2005 decision, the Constitutional Court posited the significant issues arising from the arbitration process, obiter dicta.[19] The Court found flaws in the fundaments of the arbitration process. The writ of execution under the law was "worrying" due to the short appeal deadline, the prohibition to appeal the granting of the writ, and the lack of state court participation in this process.[20] By referring to practice of the European Court of Human Rights, the Constitutional Court also asserted the preponderance of doubt weighing on arbitration system, in particular from the perspective of its organization structure and conflicts of interest

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16 Latvijas Republikas Saeima. (1998, 12 03). Civilprocesa likums. Latvijas Vestnesis(23).

17 Latvian Code of Civil Procedure (1999) was updated to include provisions on establishment of arbitration courts in 2004 in Part D of the CCP, Chapter 61, Art.486

18 Uznemumu Registrs . (2014, 09 4). No parstavigo skirejtiesu registra ir izslegtas 88 skirejtiesas. Jurista Vards

19 Constitutional Court of Latvia case No. 2004-10-01 „On the Compliance of Section 132 (Item 3 of the First Part) and Section 223 (Item 6) of the Civil Procedure Law with Article 92 of the Republic of Latvia Satversme (Constitution)."

20 Ibid

with parties to the arbitration. [21] In other words, the Constitutional Court accused the legal framework behind the system of not offering fair access to due process, and allowing arbitral tribunals to foster relationships with parties whom they arbitrate, especially via sophisticated ownership structures. This line of argument gave birth to the nomenclature of "pocket arbitrations" in Latvia. By fostering the creation of one's own arbitration, they could secure its favor, and turn it against unsuspecting parties at will. "Pocket arbitrations" had become good business, frequently omitting observance of the very core principles of arbitration, including impartiality or party agreement.

To combat the practice, the Parliament proposed further amendments in 2005.[22] All institutes would be mandated to register in a registry maintained by the Registrar of Enterprises of Latvia.[23] The Registrar was also tasked with making sure the names of state courts were clearly distinguishable from each other. The changes to the law, however, were not enough to shift the arbitration paradigm. By 2007, there were more than a hundred arbitral institutions registered, and growing steadily.[24] The Ministry of Justice began development of a separate law on arbitration, as it became clear that shifting the current articles in the Civil Procedural Law would not have sufficient impact. The urgency of the matter was evidenced by the presentation of the initial project to Parliament in the same year.[25]

To combat conflicts of interests and the rotation of "pocket arbitrators" through different "pocket arbitrations", the project introduced the idea of mandatory arbitrator lists for each arbitral institution.[26] Each institution would have at least six arbitrators on the list, and provide their contact information and specialization. Information was to be further supplemented with the amount of arbitrators, their qualification, and the procedure for their challenge.[27] While the law attempted to close the migration of arbitrators between institutions, it also complicated the process of immigrating new arbitrators into an ongoing case. If a party wished to introduce its own arbitrator, the person would have to be added to the arbitral institution list.[28] Additionally, any change to a list would have to be registered in the Registrar,

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21 Ibid via Delcourt v. Belgium [1970] ECHR 1, para. 31; Piersack v. Belgium [1982] ECHR 6, para. 30

22 Press release prepared by the Ministry of Justice Press Secretary Sabajevs, S. (2005, 01 25). Šķīrējtiesām vajadzīgs likums. Jurista Vārds, 358(3)

23 Latvijas Vestnesis. (2005, 04 12). Šķīrējtiesām jāreģistrējas.

24 Ibid

25 Jurista Vārds. (2014, 06 3). Septiņi gadi ceļā uz Šķīrējtiesu likumu: projekts Saeimā, domas joprojām dalas.

26 2007 Law project Article 8(1)

27 2007 Latvian Arbitration Law Project, Art. 12

28 2007 Latvian Arbitration Law Project, Art. 8(3)

making the process twice as inefficient.[29] The legal community found the clauses leading to a potentially pathological inoperability.[30] As it is difficult to introduce new arbitrators, the list would stagnate and increase the possibility of conflict of interest, eventually minimizing the amount of arbitrators that could participate in any domestic arbitration. The international community echoed the reproach of the locals, further claiming that only a few key reforms were necessary, instead of overhauling the system.[31] The amended proposal did not reach parliament, and was put on hold after lengthy discussions.

The Ministry of Justice came back in full force with a new proposal in 2012. The new reform would mandate a requirement for requiring arbitrators to have received higher education, have impeccable reputation and to have taken specialized courses on arbitration provided by the state.[32] These courses would grant renewable five-year long licenses, potentially effectively barring any foreign arbitrators. The annotations of the project aimed explicitly at the high number of arbitrations in Latvia as their *raison d'être*. Their aim was to completely "shut down the possibility of creating artificial arbitrations". Arbitral institutions were proposed to be established by legal entities that fulfill various formal criteria, like a minimal net turnover of EUR 70 million.[33] The project went significantly beyond any requirements of the Model Law, to the disdain of parliament, which dropped turnover from future discussion, abandoning the project.

In 2014, the amount of arbitration institutions had reached 213, foreshadowing the creation and adoption of the Arbitration Act in 2015, which significantly changed the arbitration landscape in Latvia. Higher establishment criteria for permanent arbitral institutions, legal education and state certification requirements for arbitrators decreased the amount of permanent arbitration institutions to just over 80. While the new law has been effective in slowing the growth of "pocket tribunals", many concerns remain in the sphere of investor-state arbitration (ISA). For example, arbitration institutions in Latvia are prohibited from arbitrating disputes concerning the interests of any state or municipal entities.[34] Thus, any

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29 Ibid

30 See Kacevska, 2007, Žukova, G. (2007, 12 18). Likumprojekta noteikumi: iebildes un priekšlikumi. Jurista Vārds, 504(51).

31 Born, G. (2008, 12 16). Vai nacionālais regulējums atbilst starptautiskajiem principiem.,

32 Article 15 of Latvian Arbitration Law 2012 project provided the following requirements: "1) And Arbitral Institution arbitrator candidate may be eligible if a legally capable natural person, with an acquired higher professional or academic education; 2) maintain a good reputation; 3) after hearing a training course for arbitrators. [...] 4) The Authority, which will organize the Arbitral Institutions, arbitrator training, and develop an arbitrator qualification exam, and which will set the cost of training and the procedure by which candidates may be certified as an arbitrator, shall be determined by the Cabinet of Ministers." (authors translation)

33 Article 2(2) of the Latvian Arbitration Law project (2012)

34 Latvian Arbitration Law Article 5(1)

investment dispute embodying the state and a party seated in Latvia will be taken directly to judicial proceedings. The legislation also continues to suffer from the same differences from UNCITRAL model rules as the prior norms. Practitioners and scholars have taken a stance on the new law, as it has not made enough changes to decrease the disparity in confidence between state courts and arbitration.

While there are no statistics maintained on the time efficiency of state courts in comparison to arbitral tribunals in investment cases, the latter hold several advantages over the former. Arbitral tribunals enjoy significant autonomy, as the courts of general jurisdiction do not assist or participate in the arbitral proceedings for any reason, including evidence gathering or requesting information. State courts can be engaged prior to initiating proceedings to request interim measures, which arbitral tribunals do not have the power to impart. Upon receipt, the court will render a decision within 24 hours. It must be noted that the current court praxis manifests in interim relief very rarely, in situations when the potential damage is sufficiently imminent and tangible.

Arbitral decisions are also not subject to appeal, with the exception of an examination of procedural issues by a state court before issuing a writ of appeal. A Prosecutor General or Chairman of the Supreme Court may submit a protest in any court adjudication and writ of execution if there is a breach of substantive or procedural norms of law. The Supreme Court will not reexamine the merits of the arbitral award, instead sending them back to the first instance court for re-adjudication.

In case of opposition to recognition and enforcement of a foreign arbitral award, an ancillary complaint (appeal) may be submitted to the court within 10 days of the issued decision. The court then decides whether to dismiss the complaint, set aside the decision in full or in part and decide on its merits, or submit the case to re-adjudication. A decision on the ancillary complaint cannot be appealed and enters force upon issuance. Issues on the violation of the principle of fair and equitable treatment are examined in conformity with part 1 of the New York Convention, except for the setting aside procedure.

3. The national case-law examples

The Latvian ISA disputes have been a distinct reflection of the state of affairs of the time. The early cases took place only a few years after Latvia had regained independence from over half a century of Soviet occupation in 1991. At the time, the country was in a state of flux; a planned market economy was being overhauled in favor of a free market, an authoritarian regime in favor of democracy, and the international fora were being discovered anew. Two formative arbitration disputes were in the center of the storm, as both consequences and drivers of the national transformation.

4. Swembalt AB, Sweden v. The Republic of Latvia

A case that has earned the greatest reputation both at home and abroad is the Swembalt AB, Sweden v. The Republic of Latvia,[35] concerning a compensation claim for the loss of vessel SJFW/SwedeBalt, registered in Sweden and leased to SwemBalt's Latvian subsidiary SwedeBalt SIA. Arbitration was initiated in 1999 under Article 7 of the Investment Agreement between Latvia and Sweden, on the basis of UNCITRAL rules. A publically available decision by the Court of Arbitration was made on 23 October 2000.

The Claimant had intended to moor the vessel in the port of Riga, to use it as Swedish trade center and chamber of commerce. On 21 April 1993, the ship was towed from Sweden to the Riga shipyard for renovations. Concurrently, the Riga Port Authority signed an agreement to moor the ship in the Riga port. On 17 November 1993, the ship was towed to a suitable location in Riga. An agreement was signed between the subsidiary company of Claimant, SwedeBalt SIA, and the Kurzeme district of Riga for the lease of a berth and 11,200 m2 area of land. The agreement was to remain in force from 1 December 1993 to 30 June 1998. The agreement reflected the use of the ship as a 'floating commercial center'.

On 28 March 1994, the ship was moved by the Riga Port Authority without permission of the owner to a location approximately two nautical miles from the leased berth, secured to mooring posts offshore. SwemBalt and lessees were prohibited from carrying out any further business activities on the ship, and the rental contracts were consequently annulled. On 18 April 1994, the Mayor of Riga informed SwemBalt that a law adopted in August of the same year, which applied retrospectively, invalidated the land lease, and that SwemBalt was in breach of several domestic laws, negating access to the ship. The Claimant attempted to arrive at a solution by turning to the Swedish Embassy, which did not resolve the situation. On 3 May 1996, the Latvian authorities decided that the position of the ship was a danger to navigation – a public auction was advertised for the ship, in which it was described as a wreck. In July 1996, the ship was auctioned for US 150,000 as scrap metal.

The Claimant submitted an application for arbitration under the Investment Treaty between Latvia and Sweden, claiming a breach of Article 2 (Promotion and Protection of Investments and Expropriation and Compensation) of the agreement. Compensation was sought for the loss of the vessel, equipment and furnishings, for income from 1994 to 1998, and interest on the sums, as well as all expenses and costs of the arbitration. The Latvian government did not respond to the original arbitration notice or attend oral hearings, instead submitting a late presentation denying all of SwemBalt's claims.

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[35] Swembalt AB, Sweden v. The Republic of Latvia UNCITRAL (Decision by the Court of Arbitration) (23 October 2000)

The tribunal found several grounds of contention between the parties. First, the Respondent argued that SwemBalt did not own the ship, and is thus not capable of claiming losses for it. In lieu of documentation establishing a chain of title, the tribunal highlighted that the behavior of the Riga port authorities in their actions toward the ship alluded to an understanding of SwemBalt's ownership of the vessel. In particular, the Riga port authorities had made use of the name of the ship as it was listed in the Swedish ship registry while it was still SwemBalt's property, even after Swedebalt SIA had requested and received a new name and nationality certificate from the Swedish authorities.

Second, the Respondent claimed that no investment had been made, as no written lease agreement was submitted to the tribunal. Yet, they found investment to have taken place on the basis of its purpose as a floating trade center, and the renting activity taking place on the vessel. Third, the Respondent claimed that investment was made before registering as a company and was thus illegal. The tribunal responded by pointing out that at no point had key State institutions warned of the illegality six months prior to its removal from the harbor, when discussions were still taking place. Furthermore, Latvia could not show any laws that were breached before the retrospectively active norms.

Lastly, the Respondent claimed that the towing and lease of land agreements were invalid and could thus not be grounds for an arbitration dispute. The tribunal found that the invalid agreements were nonetheless a result of state activity in a regulated market. Regardless of the subdivisions and levels, it was a state competence to sign lease and land agreements – failing to meet these norms at a municipal level is an extension of the government arm. Therefore, arbitration was in order between the Claimant and Latvia as the Respondent. The tribunal thus concluded that by removing Swembalt's ship, stopping them from using it, auctioning it, and allowing its scrapping was a breach of their Investment Agreement, and ordered the payment of damages.

The Respondent requested recovery of loss of indirect damages, such as the tenants depending on the boat not being able to utilize it. Following, the Claimant imparted a request for an interest rate on the payment from the state. Given that no customary law existed on the matter, the Tribunal used the rates of the seat of arbitration.

The courts enforced the investor-state award pursuant to the New York Convention. However, public upheaval took place in search of the culprit. After unsuccessfully attempting to appeal the decision, Latvia agreed to pay the damages. The case developed some notoriety in Latvian arbitration and investment discourse. It was the first case of its kind to enter the public domain, and its detrimental public opinion remains to this day.

Its public nature was illustrated by the amount of weight granted to it by the state mechanism. The Ministers of Foreign Affairs and Economics at the time made statements that the

case "would not prevent Latvia's membership in the EU"[36] at the time, and nearly a decade later, that Latvia is still "searching for a remedy against painful investment disputes".[37] The case had strong direct and indirect ripples. The general public remains convinced that the investors at least in this case were "scammers who dumped a wreck",[38] despite the court deciding that it did not conform with the definition of a wreck but was a ship despite lacking essential elements of a seaworthy vessel. Various officials representing the state were found incompetent and indeed received criminal penalties for their incompetence in three instances.[39] Journalists were further taken to administrative courts against the Ministry of Economics for non-disclosure of the arbitration award, where they lost. The confidence of the people in arbitration as a mechanism was significantly decreased, propelling future law making against a liberal arbitral market.

In the year when Latvia finally settled the award, with a delay, there was a definite assigning of one institution responsible for investment claims and disputes. In 2004, the State Chancellery received a mandate to deal with the investment claims "receiving 2–3 claims per year"[40] claiming "an increase in claims and commenced processes in 2013–2014" requiring increasing the mandate and settling for a hybrid model of representation with State Chancellery as the responsible institution.

5. Nykomb Synergetics Technology Holding AB v. The Republic of Latvia

Nykomb Synergetics Technology Holding AB ("Claimant") v. The Republic of Latvia, SCC ("Respondent") was the second public case, alleging discriminatory treatment of a Swedish

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[36] Sagrieztā zviedru kuģa lieta nevar kavēt Latvijas virzību uz ES, 13th June 2001. Available at <http://www.tvnet.lv/zinas/latvija/185724-sagriezta_zviedru_kuga_lieta_nevar_kavet_latvijas_virzibu_uz_es> In reaction to Swedish and the EU officials reported as assumingly claiming that ir may prevent Latvia's entry, Zviedru avīze kritizē Latvijas rīcību sagrieztā kuģa lietā, Diena, 2006. Septebris 2001, https://www.diena.lv/raksts/pasaule/krievija/zviedru-avize-kritize-latvijas-ricibu-sagriezta-kuga-lieta-11137281

[37] Meklē zāles sāpīgajiem investīciju strīdiem, Elīna Pankovska, 2014. gada 21. janvāris <http://vecs.db.lv/laikraksta-arhivs/lauksaimnieciba/mekle-zales-sapigajiem-investiciju-stridiem-408526>

[38] A. Krauzes intervija Panorāmā ar Sandru Veinbergu "Mūsu cilvēks" https://sandraveinberga.com/raksti-par-medijiem/intervija-panorama-ar-a-krauzi/

[39] Lejnieks M., Medin L. SwemBalt AB pret Latvijas Republiku (Sagrieztā kuģa lieta).
Likums un Tiesības, Nr. 12, 2000, 375. lpp.
270 Rīgas apgabaltiesas Krimināllietu tiesas kolēģijas 2004. gada 4 .oktobra lēmums lietā nr. KA 04-220/04-17Nr.12812007800 (nav publiski pieejams).
271 LR AT Senāta Krimināllietu departamenta 2006. gada 20. februāra lēmums SKK 01-0002/06. Nr.12812007800 (nav publiski pieejams).

[40] Informatīvais ziņojums par valsts interešu pārstāvību starptautiskajos investīciju strīdos, 06.11.2015. 041115_infoZin20151022151102201511041437 26.docx (61193

company in the electricity industry, via a Latvian owned company. The decision was made publically available once awarded in 2003. The case was vital to the state shifting away from transparency in ISA.

The investor-owned company named SIA Windau ("Windau") agreed to provide electricity generation services by signing a contract in early 1997 with AS" Latvenergo" ("Latvenergo"), a Latvian state-owned enterprise. Windau undertook the construction of a cogeneration plant, from which Latvenergo would purchase electric power. The contract between the parties stated that the "relevant laws" would be used to decide on the tariffs. The investor was under the impression that – according to the contract – Windau was ensured a multiplier of two of the general tariff for the sales price set by regulatory authorities. Communication with the Public Utilities Commission in Latvia, a constituent of the state, before signing strongly acknowledged such an understanding. More importantly, the government had enumerated a push for renewable energy with two legal incentives. One law provided that energy produced by combined heat and power cogeneration facilities in particular would benefit from double tariffs for eight years from "the beginning of [their] operation".[41] The other, that if changes in Latvian legislature cause detriment to foreign investors, the foreign investor is granted a 10-year period of the norms in force "at the time of investment".[42] With these subsidies, the government aimed to increase energy self-sufficiency and move away from dependence on Russia.

Upon construction and operation of the facility more than a year later, Latvenergo posited that the correct multiplier was 0.75 of the tariff, and never paid the double tariff for the purchased electricity. The government of Latvia, aware of Latvenergo's refusal to pay the double tariff, tried to alleviate the situation. The Cabinet of Ministers issued a Regulation obliging the Privatization Agency, which owned the state share in Latvenergo, to order the payment of a double tariff to Windau in 1999.

However, the Resolution was immediately challenged by several Latvian parliamentarians, which brought it to the Constitutional Court of Latvia on the grounds of competence. The Court found that the Cabinet of Ministers was interpreting their executive rights too broadly, challenging the constitutional balance between governmental branches. The judges extended that Windau was not subject to the statutory right to double tariffs in accordance with the "understanding" of law signed at the time. The contract was signed on 26 March 1997, during which a short-lived regulation of the Cabinet of Ministers was in force, cancelling the double tariff regime. The aforementioned resolution was annulled on 7 May 1997, but only from the

41 Concerning the Regulation of Business in the Energy Industry

42 Concerning Foreign Investment in the Republic of Latvia

moment of the decision. A further series of legislative changes followed the decision, altering the mechanism by which tariffs were assessed and implemented.[43]

Upon receipt of the decision, Nykomb initiated arbitral proceedings against Latvia in accordance with the Energy Charter Treaty, alleging that non-payment of the double tariff violated the obligation of fair and equitable treatment. After Windau held that the contract granted a statutory and contractual right to the double tariff during the first eight years of production, and that the right was unfairly retracted by changes in successive legislative acts. The Respondent conceded that Windau had a contractually established right to the double tariff, but claimed that the change in statute made the contract term moot.

The tribunal began its investigation by finding that the double tariff was legislatively repealed in favor of a 0.75 multiplier by October 1998. Their focus then shifted to eight similar agreements entered into by Latvenergo with Windau and others, concerning purchase prices for electric energy between 1995 and 2001. Apart from specifying the precise tariff to be paid in a current year, all contracts were found to refer to laws and regulations for determining the price paid for energy. In a case concerning one such contract, the Latvian Constitutional Court interpreted the clause to allude not to regulations at any time, but to fixing the price to the tariff in force at time of signing.[44] The tribunal acceded to this conclusion, finding that the clauses would be superfluous for any other purpose.

The tribunal concluded that there was both a statutory and contractual right to the double tariff. The tribunal found the Republic of Latvia directly responsible for the changes in legislation and the removal of the right to double tariffs in future legislation. The reasoning behind non-payment by Latvenergo was that the relevant tariff was decided by state authorities. However, the judgment of 30 June 1999 of the Latvian Supreme Court in a case with similar facts positing the obligation of Latvenergo to pay the multiplier in force at the time of signing in the case of Latvian cogeneration facilities, and the ordering of the Cabinet of Ministers via a later invalidated resolution to pay the double tariff, evidences full awareness of failure to pay the double tariff. The arbitral tribunal found this series of actions to be a breach of the obligation to provide fair and equitable treatment under the ECT.

It was further pointed out to two local companies with similarly dated agreements and cogeneration facilities benefiting from the double tariff. A lack of criteria, methodology, or criteria for fixing the multiplier or how Latvenergo is authorized to apply the multiplier upon purchasing energy positioned the tribunal to assert that Windau has been subject to a discriminatory measure in violation of Article 10(1) ECT. The award was enforced without

43 Energy Law of 3 September 1998; Regulation No. 425 of 31 October 1998; Amendment of 1 June 2001 to Article 41 of the Energy Law

44 Latelektro-Gulbene case

objection, and the parties agreed that instead of damages Latvia would pay the double tariff for an extended amount of years.

Similarly to the above described case of the “cut Swedish ship”, the Windau case also gained publicity. The overall bill was 2.5 million lats, a substantial sum, and there were calls to find the guilty parties responsible, initially by the Minister of Justice and later at the level of the Prime Minister. The public dissent was minimized by a promise that the losses will be covered by Latvenergo and not taxpayers. However, there was no appeal. In 2015, the State Chancellery informed the Cabinet of Ministers that they have concluded “an agreement that envisages legally and financially considerably more beneficial conditions than the ones in the award”[45]. The image of the ISA process was marred as suspicion of involvement of a local oligarch was thought to be present.

6. Conclusions

The ISA process cannot be detached from the overall state and arbitration development in Latvia. This article gave a very brief insight into two of the most notorious initial cases, yet there are at least a dozen, most of which are settled before formal proceedings[46]. The claims in the early investor-state arbitration cases against Latvia are directly intertwined with factors stemming from the state’s nascence in the 90s. Swembalt was the result of a lack of experience and the tumult of the Latvian status quo of the time. Nykomb Synergetics connoted a lack of clarity in the role of the executive branch of government, and paved the way to proper calibration. The conversion from a closed to open market economy was guided by various international parties, but Swembalt granted an understanding of how the international arena responds to breaches of international agreements, as well as the standards of governance expected by the Western world.

[45] 1.pielikums Informatīvajam ziņojumam par valsts interešu pārstāvību starptautiskajos investīciju strīdos, Valsts kancelejas vestās lietas (2004. – 2015.)

[46] Ibid.