

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**STAUR EIENDOM AS, EBO INVEST AS & ROX HOLDING AS**

Claimants

and

**REPUBLIC OF LATVIA**

Respondent

**ICSID Case No. ARB/16/38**

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**AWARD**

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***Members of the Tribunal***

Mr. Eric Schwartz, President  
Professor Kaj Hobér, Arbitrator  
Mr. Toby Landau QC, Arbitrator

***Secretary of the Tribunal***

Mr. Francisco Abriani

*Date of dispatch to the Parties: 28 February 2020*

## REPRESENTATION OF THE PARTIES

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**TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS**

2003 Detailed Plan	Detailed Plan prepared by SJSC Airport for the northeastern sector of the Airport and approved by the Mārupe Municipal Council in 2003
2007 Amendments	7 November 2007 amendments to the Land Lease Agreements
2010 Agreement	5 November 2010 amendments to the Land Lease Agreements
2011 Business Plan	Business plan dated 22 September 2011, prepared by SIA Ernst & Young Baltic and approved by SJSC Airport
2013 Detailed Plan	Detail planning approved by the Mārupe Municipality on 3 July 2013
2013 Spatial Plan	Mārupe Municipality Spatial Plan issued on 18 June 2013 for the period 2014-2026
Airport	Riga International Airport
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BIT	Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Latvia on the Mutual Promotion and Protection of Investments, signed on 16 June 1992 and entered into force on 1 December 1992
C-[#]	Claimants' Exhibit
CEPEJ	European Commission for the Efficiency of Justice
Cl. Mem.	Claimants' Memorial on the Merits dated 6 November 2017
Cl. Reply	Claimants' Reply on the Merits dated 13 August 2018
CL-[#]	Claimants' Legal Authority
EBO	EBO Invest AS
ECHR	European Convention on Human Rights
FAD	SIA FAD Holding
Hearing	Hearing on the Merits held from 4 March through 14 March 2019

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC Articles	Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission
Investment Memorandum	Equity Investment Memorandum – Joint Venture Business Plan prepared by Jones Lange in April 2008
Jones Lang	Jones Lang LaSalle Hotels
Land Lease Agreements	Four Land Lease Agreements that were each entered into between Rixport and SJSC Airport on 3 November 2006, with respect to four parcels of land adjacent to the Airport referred to in the Land Lease Agreements as Draws 1-4
Land Plots	Subdivisions of Draws 1-3
MEPRD	Ministry of Environmental Protection and Regional Development
NCC	NCC Konstrukcija
Notice about removal of encumbrances	Notice by which the Lessor informs in writing, pursuant to clause 2.8.2 of the 2010 Agreement, about removal of encumbrances and about plans of development of passenger terminals
OECD Report	2015 OECD review of the corporate governance of State-owned enterprises in Latvia
PPL	Polish Airports State Enterprise
PPP	Public-Private Partnership
R-[#]	Respondent's Exhibit
Request	Claimants' Request for Arbitration dated 4 November 2016
Resp. Counter-Mem.	Respondent's Counter-Memorial on the Merits dated 6 March 2018
Resp. Rejoinder	Respondent's Rejoinder on the Merits dated 13 December 2018
Rixport	SIA Rixport
Rixport Office	SIA Rixport Office, a wholly-owned special purpose vehicle which entered into a

	development agreement with SJSC Airport on 8 October 2008
RLA-[#]	Respondent's Legal Authority
Rox	Rox Holding AS
SJSC Airport	SJSC International Airport Riga, a Latvian State-owned company
SOEs	State-owned enterprises
SOE Law	Law on Governance of Capital Shares and Capital Companies
Staur	Staur Eiendom AS
Staur Building	SIA Staur Building
Technical Business Proposal	Technical Business Proposal annexed to the Land Lease Agreements
Tender Application	Rixport's Tender Application submitted on 18 August 2006 and approved by the Supervisory Council of SJSC Airport on 2 October 2006
TR, Day [#], p. [#]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 13 April 2017

## **I. INTRODUCTION AND PARTIES**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Latvia on the Mutual Promotion and Protection of Investments, which was signed on 16 June 1992 and entered into force on 1 December 1992 (the “**BIT**”),<sup>1</sup> and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The Claimants in this case are Staur Eiendom AS (“**Staur**”), EBO Invest AS (“**EBO**”) and Rox Holding AS (“**Rox**”), which are all private limited liability companies incorporated under the laws of Norway (collectively referred to as the “**Claimants**”). Staur, EBO and Rox own 18%, 72% and 10%, respectively, of (SIA) Rixport, a limited liability company incorporated under the laws of Latvia (“**Rixport**”).<sup>2</sup>
3. The Respondent in this case is the Republic of Latvia (“**Latvia**” or the “**Respondent**”).
4. The Claimants and the Respondent are collectively referred to as the “**Parties**.” The Parties’ representatives and their addresses are listed above on page (i).
5. As discussed further below, the arbitration concerns a dispute arising out of a project for the development of Riga International Airport in Latvia (the “**Airport**”) and, more specifically, a number of Land Lease Agreements that Rixport entered into in November 2006 with a Latvian State-owned company, SJSC International Airport Riga (“**SJSC Airport**”). The Land Lease Agreements, which were the subject of subsequent amendments, provided for the development of four parcels of land adjacent to the Airport.
6. The Claimants initiated the arbitration on the basis that they made substantial investments through Rixport in connection with the Land Lease Agreements, but that the Respondent has through its actions effectively frustrated those investments and, in doing so, breached its obligations under Articles III and VI of the BIT on equitable and reasonable treatment and unlawful expropriation, respectively, as well as the umbrella

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<sup>1</sup> Ex. C-1.

<sup>2</sup> Cl. Mem. ¶12.



clause that they contend has been incorporated in the BIT by virtue of the BIT's Most Favoured Nation (“**MFN**”) clause.<sup>3</sup>

7. In addition to declaratory and other relief, the Claimants seek an order that the Respondent pay to the Claimants full reparation in accordance with the BIT and customary international law, in an amount that was initially quantified as “up to EUR 26 million,”<sup>4</sup> but that evolved during the course of the arbitration, with the amount of EUR 41.9 million ultimately being claimed as compensation for the Claimants’ alleged loss.<sup>5</sup>

## **II. PROCEDURAL HISTORY**

8. On 4 November 2016, ICSID received a Request for Arbitration, dated 4 November 2016, from the Claimants (the “**Request**”).
9. On 6 December 2016, the Secretary-General of ICSID registered the Request under the ICSID Convention. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “**Arbitration Rules**”).
10. By the Claimants’ letter, dated 1 March 2017, and the Respondent’s communication of 2 March 2017, the Parties agreed that the arbitral tribunal would consist of three arbitrators, with one arbitrator appointed by the Claimants and the Respondent, respectively, and the third, the President, to be appointed by agreement of the Parties.
11. On 1 March 2017, the Claimants appointed Professor Kaj Hobér, a national of Sweden, and the Respondent appointed Mr. Toby Landau QC, a national of the United Kingdom, as arbitrators in this case, and Professor Hobér and Mr. Landau accepted their appointments.
12. On 13 April 2017, the Parties agreed, via a ballot procedure, to appoint Mr. Eric Schwartz, a national of France and the United States, as President of the arbitral tribunal, and Mr. Schwartz accepted his appointment on the same date after having

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<sup>3</sup> In addition, the Claimants initially claimed an entitlement to relief based on the Respondent’s alleged breaches of customary international law (*see, e.g.*, Cl. Mem., Request for Relief ¶16(II)). However, that claim was not subsequently pursued and was, thus, dropped from the Claimants’ subsequent iteration of their claims in their Reply.

<sup>4</sup> Request for Arbitration ¶264(II).

<sup>5</sup> TR, Day 1, p. 134; TR, Day 8, pp. 89-91.

been so informed on behalf of the ICSID Secretary-General by Mr. Francisco Abriani, Legal Counsel at ICSID.

13. By letter, dated 13 April 2017, the Secretary-General of ICSID notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date in accordance with Article 6(1) of the Arbitration Rules. Mr. Abriani was designated to serve as Secretary of the Tribunal.
14. On 12 June 2017, in accordance with Arbitration Rule 13(1), the Tribunal held a first session by teleconference with the Parties.
15. On 6 July 2017, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters, as confirmed during the first session, and the Tribunal's decisions on disputed issues, including, in particular, whether, as requested by the Respondent, the proceedings should be bifurcated, with a first phase devoted to jurisdiction and liability and a second phase concerning quantum. As stated in Procedural Order No. 1, the Tribunal determined that bifurcation would not be appropriate in the specific circumstances of this case, given that: (i) the Respondent acknowledged that it would be difficult for the Tribunal to rule on its jurisdictional objections separately from considering issues of liability; (ii) the Respondent also appeared to concede that the resolution in its favor of its jurisdictional objections would not fully dispose of all of the Claimants' claims; and (iii) the claims, and in particular the issues of quantum, did not appear to be of such a degree of complexity that bifurcation could be expected to generate a level of savings substantial enough, if the Respondent's case on jurisdiction and/or liability were successful, to outweigh the risks of delay and additional costs if the Respondent were unsuccessful.
16. In addition to recording that the proceedings would not be bifurcated, Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006; the procedural language would be English; and the place of proceeding would be Paris, France. Procedural Order No. 1 also set out a timetable (the "**Procedural Timetable**") for the proceedings culminating in a hearing (the "**Hearing**"), for which two weeks were reserved from 4-15 March 2019.
17. In accordance with the Procedural Timetable, the Claimants filed their Memorial on 6 November 2017. Accompanying the Memorial were the witness statements of Messrs. Petter Lundeby and Bernt Østhus; an expert report on quantum of Mr. Michael Pilgrim of FTI Consulting; factual exhibits (C-1 to C-161); and legal authorities (CL-1 to CL-89). Following the submission of the Claimants' Memorial, the Respondent objected that it contained various deficiencies, in relation, in particular, to certain of the exhibits

submitted. The Respondent's objections were subsequently resolved, to the Respondent's satisfaction, with, *inter alia*, certain exhibits (C-74, C-75 and C-83) being stricken from the record, with the Claimants' agreement.<sup>6</sup>

18. On 6 March 2018, the Respondent submitted its Counter-Memorial together with the witness statements of Mr. Artūrs Saveljevs, Ms. Aida Skalberga and Ms. Džineta Innusa; an expert report on quantum of Mr. Andrew Grantham of AlixPartners, with exhibits; 129 additional factual exhibits (R-1 to R-129); and 71 legal authorities (RLA-1 to RLA-71).
19. Document production requests, in the form of Redfern schedules, were subsequently exchanged by the Parties on 27 March 2018 and were followed by the submission by the Respondent on 10 April 2018 of objections to certain of the Claimants' requests. The Claimants made no objections to any of the Respondent's requests and voluntarily produced on 24 April 2018 a number of documents in response to those requests.
20. On 24 April 2018, the Claimants applied to the Tribunal for an order directing the Respondent to produce requested documents that the latter would not produce voluntarily or claimed not to have in its possession, control or custody.
21. By its Procedural Order No. 2, dated 4 May 2018, the Tribunal decided upon the Claimants' application and directed the production of certain documents by the Respondent to the Claimants by 29 May 2018, without prejudging the Tribunal's ultimate position as to the evidentiary value and relevance of the documents being ordered to be produced.
22. On 14 June 2018, the Claimants wrote to the Tribunal to complain that the Respondent had failed to produce certain of the documents that it was directed to produce in Procedural Order No. 2 and that other documents had been, or, according to the Respondent, would be, produced late, thus requiring the Claimants to request a one-month extension of the deadline for the submission of their Reply to the Respondent's Counter-Memorial from 6 August 2018 to 6 September 2018.
23. After considering the Respondent's reply, dated 18 June 2018, the Tribunal issued Procedural Order No. 3 on 25 June 2018, in which, based on the Respondent's affirmation that it had carried out a diligent search, but had not found any responsive documents, the Tribunal declined to order any further production in respect of the documents that were the subject of the Claimants' application and that the Respondent

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<sup>6</sup> Letter, dated 20 March 2018, from Mr. Abriani to the Parties.

had not produced or otherwise undertaken to produce. With respect to the Claimants' request for an extension of time, the Tribunal granted the Claimants a one-week extension, until 13 August 2018, for the submission of their Reply. In so deciding, the Tribunal indicated that it did not consider that the Respondent's delay in the production of documents warranted a one-month extension for the submission of the Reply, as requested by the Claimants, in circumstances where the Claimants had been in possession of the Respondent's Counter-Memorial since 6 March 2018 and only a small number of documents had been produced late. The Tribunal directed other consequential adjustments to the Procedural Timetable.

24. In accordance with the amended Procedural Timetable, the Claimants submitted their Reply on 13 August 2018, together with a witness statement from Mr. Morton Lilleberg; a second witness statement from Mr. Lundeby; a second expert report of Mr. Pilgrem; additional factual exhibits (C-162 to C-375); and additional legal authorities (CL-90 to CL-118).
25. The Respondent then submitted its Rejoinder, as directed, on 13 December 2018, together with a witness statement of Mr. Juris Kanels; second witness statements of Mr. Saveljevs and Ms. Innusa; a second expert report of Mr. Grantham; additional factual exhibits (R-130 to R-198); and additional legal authorities (RLA-72 to RLA-87).
26. On 7 January 2019, in accordance with the amended Procedural Timetable, each of the Parties informed the other and the Tribunal that they intended to call all of the other side's witnesses, and each other's quantum expert, for cross-examination at the Hearing.
27. On 21 January 2019, after having had the opportunity to consult and comment on a draft agenda, the Parties participated in a telephone conference with the Tribunal to discuss the organization of the Hearing. Following the telephone conference, on 22 January 2019, the Tribunal issued Procedural Order No. 4 in which it confirmed, *inter alia*, that the Hearing would be conducted at the World Bank in Paris, France from 4-12 March 2019, for opening oral statements and the examination of the witnesses and experts, and on 14 March 2019, for oral closing submissions, which were to be made in place of written post-hearing briefs. It was decided that the total hearing time would be 52 hours, with 24 hours available to each Party on a chess-clock basis and the remaining 4 hours allocated to housekeeping matters and Tribunal questions. The Secretary of the Tribunal would keep the time used by each Party and the Tribunal. It was further confirmed that arrangements were being made for real-time transcription

of the hearing, in addition to audio recording and simultaneous interpretation for witnesses giving their evidence in Latvian.

28. The Parties were directed to agree on a hearing schedule, taking into account that Ms. Innusa, as the Respondent's party representative, would be allowed to remain in the hearing room before giving her oral evidence (unlike the other fact witnesses) and that the Parties' fact witnesses would be examined before the Parties' experts. Procedural Order No. 4 further confirmed the rules that would apply to the scope and manner of witness examination; the use and distribution of visual aids, including demonstrative exhibits and PowerPoint presentations during the Hearing; and the submission of new evidence during the hearing, which was to be prohibited, except in exceptional circumstances with the prior approval of the Tribunal. The Parties were also directed to prepare a joint consolidated set of hearing bundles and to try to develop an agreed factual chronology.
29. On 4 February 2019, the Parties confirmed their agreement on an indicative timetable for the hearing on the understanding that the Parties would each be permitted to use their allocated time as they saw fit.
30. In accordance with Procedural Order No. 4, the Claimants submitted observations on 5 February 2019 on three documents included as exhibits to the Respondent's Rejoinder on 13 December 2018.<sup>7</sup> The Respondent responded to the Claimants' observations on 19 February 2019.
31. An agreed Joint Factual Chronology was submitted by the Parties on 25 February 2019.
32. On 2 March 2019, the Claimants submitted two documents that it intended to use during its oral opening statement at the Hearing as demonstrative exhibits, as permitted by Procedural Order No. 4. The Respondent objected, however, to the submission of one of the two documents on the basis that it did not identify the exhibits from which the information in the document had been derived, and it requested that it be resubmitted with the relevant exhibits identified and any new evidence removed. The Tribunal, thus, informed the Parties that it would disregard the document in these circumstances, subject to the Claimants having the right to make an application to the Tribunal for its inclusion in the record. Ultimately, the document was revised by the Claimants to include all required exhibit references and was used during the Claimants' oral closing statement. For its part, the Respondents submitted demonstrative exhibits RD-1 to

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<sup>7</sup> Exs. R-142, R-182 and R-183.

RD-6 on 3 March 2019 and introduced additional demonstrative exhibits (RD-7 to RD-15) during the course of the Hearing.

33. The Hearing was held in Paris, France over 8 working days from 4 to 14 March 2019. The following persons were present at the Hearing, in addition to all of the factual witnesses and experts, who were subject to examination:

Tribunal:

Mr. Eric Schwartz	President
Professor Kaj Hobér	Co-arbitrator
Mr. Toby Landau QC	Co-arbitrator

ICSID Secretariat:

Mr. Francisco Abriani	Secretary of the Tribunal
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For the Claimants:

Mr. Trond Sollund	Advokatfirmaet Schjødt AS
Mr. Vidar Strømme	Advokatfirmaet Schjødt AS
Professor Freya Baetens	Professor of Public International Law and Member of the Brussels Bar
Mr. Bernt Østhus (Party representative)	Shareholder, board member and CEO of Staur Holding AS; Member of the board of EBO and Staur Eiendom AS
Mr. Rune Olsøe	Partner in Staur Management
Ms. Agnese Medne	Glimstedt Lawfirm

For the Respondent:

Dr. Veijo Heiskanen	LALIVE
Mr. Joachim Knoll	LALIVE
Ms. Laura Halonen	LALIVE
Ms. China Irwin	LALIVE
Mr. Augustin Barrier	LALIVE
Ms. Courtney Furner	LALIVE
Ms. Tania Single	LALIVE
Ms. Sabīne Plūme	Legal Department, Ministry of Transport, Republic of Latvia
Ms. Inguna Strautmane	Legal Department, Ministry of Transport, Republic of Latvia
Ms. Džineta Innusa (Party representative)	Ministry of Transport, Republic of Latvia

Representative of SJSC Airport:

Mr. Uģis Zeltiņš

COBALT Legal

Court Reporter:

Mr. Trevor McGowan

Interpreters:

Mr. Dens Dimins

Mr. Marcis Gobins

34. A written transcript (“**TR**”) and audio recording were made of the Hearing.
35. An updated version of the agreed Joint Factual Chronology was submitted by the Claimants on behalf of the Parties on 5 April 2019.
36. On 26 April 2019, the Parties exchanged submissions on costs in support of their respective claims for the costs of the proceedings. Reply costs submissions were submitted, respectively, by the Claimants and the Respondent on 6 and 7 May 2019.
37. On 1 August 2019, with the Tribunal’s permission, the Respondent entered into the record of the arbitration a copy of a decision of the Kurzeme Regional Court, dated 5 July 2019, together with an English translation. This decision was issued in civil proceedings in Latvia that were originally initiated by Rixport against SJSC Airport in March 2013, as further discussed in Section III below. On 16 August 2019, the Respondent informed the Tribunal, as the Claimants also confirmed on 19 August 2019, that the Kurzeme Court’s decision had not been appealed and had therefore become final, thus bringing to an end the corresponding litigation proceedings in Latvia which had been running in parallel with this arbitration.
38. By letter, dated 4 November 2019, the Tribunal declared the arbitration proceedings closed in accordance with Rule 38(1) of the Arbitration Rules.

### **III. FACTUAL BACKGROUND**

38. Before considering the Claimants’ claims, it is helpful to set out the Tribunal’s findings on the principal facts that serve as the basis for those claims.
39. Although it has reviewed in detail all of the Parties’ factual allegations and the evidence that has been submitted in support of them, the Tribunal has only undertaken in this Section of the Award to provide a summary of those facts (and its assessment of the

same) that provide context for the claims. To the extent necessary, the relevant facts are addressed in more detail in Sections V and VI below.

40. As mentioned above, this arbitration concerns investments said to have been made by the Claimants through Rixport in a project for the development of land adjacent to the Airport. The project was, as also stated above, the subject of four Land Lease Agreements (the “**Land Lease Agreements**”) that were each entered into on 3 November 2006 between Rixport (then called SIA EBO International, but for convenience referred to herein as Rixport both before and after it changed its name to Rixport<sup>8</sup>) and SJSC Airport, respectively with respect to four parcels of land adjacent to the Airport referred to in the Land Lease Agreements as Draws 1-4.<sup>9</sup>
41. The Land Lease Agreements were subsequently amended on 7 November 2007 (the “**2007 Amendments**”)<sup>10</sup> and 5 November 2010 (the “**2010 Agreement**”).<sup>11</sup>
42. The Land Lease Agreements were awarded pursuant to a public tender process that was launched by SJSC Airport in June 2006 after an earlier tender that had been announced in November 2005 was discontinued in March 2006. The tenders were issued for the purpose of procuring one or more agreements for the development of land adjacent to the Airport in accordance with a so-called “Detailed Plan” prepared by SJSC Airport for the northeastern sector of the Airport and approved by the Mārupe Municipal Council in 2003 (the “**2003 Detailed Plan**”).<sup>12</sup>
43. The Airport is located within the territory of the Mārupe Municipality and is therefore subject to its zoning regulations, as set forth in the Municipality’s Spatial Plan.<sup>13</sup> The Construction Board of the Mārupe Municipality is also the organ in charge of reviewing applications for construction permits and deciding whether to grant them on the basis of the applicable legislation and zoning regulations, as well as the Municipality’s overall strategy.<sup>14</sup>
44. It is common ground that the Airport is owned and operated by SJSC Airport, which also owns the surrounding parcels of land that are the subject of the dispute in this

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<sup>8</sup> EBO International was renamed Rixport on 5 May 2008. Joint Factual Chronology, fn. 1.

<sup>9</sup> Ex. C-38.

<sup>10</sup> Exs. C-45 to C-49.

<sup>11</sup> Ex. C-86.

<sup>12</sup> Resp. Counter-Mem. ¶¶ 348-357; Ex. R-15.

<sup>13</sup> Resp. Counter-Mem. ¶¶ 79 and 342-347.

<sup>14</sup> Id. at ¶80.



arbitration. SJSC Airport was originally a State-owned company created under the laws of the USSR and was taken over by the Latvian Government upon Latvia's independence. On 21 April 1997, it became a joint stock company, although it remained wholly State-owned, with the Ministry of Transport holding all of its capital shares on behalf of the State. During the periods relevant to this arbitration, it was managed by a Management Board and, until June 2009, a Supervisory Council. As from June 2009, its Supervisory Council was eliminated and some of the Supervisory Council's functions were taken over by the shareholder.<sup>15</sup> The extent to which actions taken by SJSC Airport are to be attributed to the Latvian State is, as discussed below, one of the principal issues in this arbitration.

45. A new tender for the land adjacent to the Airport was announced on 16 June 2006, and SJSC Airport issued tender documents including a Tender Regulation, a draft Tender Land Lease Agreement, City Construction Regulations and a map of the north-eastern sector of SJSC Airport's territory.
46. Rixport submitted its Tender Application (the "**Tender Application**") on 18 August 2006, and it was announced on 4 October 2006 that it had won the tender.<sup>16</sup> After a period of negotiations, the Land Lease Agreements were entered into on 3 November 2006 for each of the four Draws. As discussed further below, each of the agreements was concluded for a period of 25 years, subject to possible extension. Under the Technical Business Proposal annexed to the Land Lease Agreements, Rixport undertook to use the land for the construction of hotels, conference and exhibition facilities, a business park and greenery and recreational areas (the "**Technical Business Proposal**").<sup>17</sup>
47. In the event, however, nothing was constructed by Rixport. The construction of an office building on part of Draw 2 was commenced, but not completed, by one of its affiliates. Under the 2010 Agreement, Rixport returned Draw 4 to the Airport as of 1 January 2011. In May 2013, Rixport purported to cancel the Land Lease Agreements for Draws 2 and 3, and in March 2014 it purported to cancel the Land Lease Agreement for Draw 1. In parallel, Rixport initiated proceedings in March 2013 before the Riga Regional Court (which were transferred to the Kurzeme Regional Court) in which it requested the court to cancel the Land Lease Agreements for Draws 1-3 and award

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<sup>15</sup> Id. at ¶¶37-57.

<sup>16</sup> Ex. C-36.

<sup>17</sup> Ex. C-247.

compensation to Rixport in an amount in excess of EUR 24 million.<sup>18</sup> The court (and subsequent court decisions culminating in the judgment of 5 July 2019 mentioned above) rejected Rixport's claims.

48. The Claimants have taken the position in this arbitration, as Rixport did before the Latvian courts, that Rixport's development plans were thwarted by "constant changes to the SJSC Airport's development and master plans and the public detailed plan, thus postponing any planning or construction into an unforeseeable future," while Rixport was meanwhile obligated to pay rent on the leased land and incur other expenses that exhausted all of the capital from the Claimants' investments.<sup>19</sup>
49. The Respondent has, in turn, disputed that SJSC Airport prevented Rixport from proceeding with the development of the leased land and has attributed Rixport's failure to progress the project to the deterioration of the Latvian economy following the global financial crisis in 2008, which made Rixport's project unrealistic and unprofitable "in the foreseeable future."<sup>20</sup> In the circumstances, according to the Respondent, "Rixport sought to buy time . . . ."<sup>21</sup> Thus, the Respondent notes that "Rixport did not secure financing for the project, did not apply for construction permits, and never began construction."<sup>22</sup>
50. After a period of "unsuccessful settlement discussions" in 2013, 2014 and 2015, the Respondent notes that SJSC Airport notified Rixport by letter, dated 18 May 2015, of the cancellation of the Land Lease Agreements for Draws 1-3 as a result of Rixport's defaults, in particular its failure to pay rent and penalties owed as of 30 April 2015.<sup>23</sup> On 16 December 2016, SJSC Airport commenced proceedings against Rixport before the Riga District Court to request that the Land Lease Agreements be cancelled on the basis of Rixport's non-payment, and, by a judgment issued on 18 December 2017, the court granted SJSC Airport's request.<sup>24</sup>

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<sup>18</sup> Ex. R-78.

<sup>19</sup> Cl. Mem. ¶7.

<sup>20</sup> Resp. Counter-Mem. ¶4.

<sup>21</sup> Id. at ¶5.

<sup>22</sup> Id.

<sup>23</sup> Resp. Counter-Mem. ¶294; Ex. R-88.

<sup>24</sup> Ex. R-77.

51. As this judgment was not appealed, there does not appear to be any dispute between the Parties that the Land Lease Agreements were cancelled by no later than that date.
52. The facts relevant to the present arbitration are now considered in more detail.

#### **A. The Claimants' Investments in Rixport**

53. Rixport was incorporated as a Latvian company, with EBO as its sole shareholder, on 15 March 2006 for the purpose of tendering for the Land Lease Agreements.<sup>25</sup> EBO was, in turn, then wholly owned by EBO Eiendom AS, a Norwegian company, which was jointly owned by two Norwegian companies, EBO Gruppen AS (owned by Mr. Roger Eide) and Staur Holding AS (which was owned by members of the Østhus family, including Mr. Bernt Østhus).<sup>26</sup> The EBO and Staur groups, according to Mr. Østhus, “had long experience from developing real estate projects,” although they had no previous experience developing real estate in Latvia, and the Airport project was “substantially larger” than any project they had developed before.<sup>27</sup> It appears from the evidence that at some point during 2008, Staur acquired the EBO group’s interest in EBO Eiendom AS.<sup>28</sup>
54. EBO’s initial equity investment in Rixport was LVL 2,000, which, as at 1 January 2005, was the equivalent of EUR 2,846, for 20 shares in an amount of LVL 100 each.<sup>29</sup>
55. On or around 12 May 2006 (or 22 August 2006), EBO entered into a Shareholders Agreement with Vitrium AS, a Latvian company owned by Mr. Petter Lundeby, which provided for the issuance of 13,580 additional Rixport shares in an amount of LVL 100 per share, with EBO to subscribe to 6,780 additional shares and Vitrium AS to subscribe to 6,800 shares, with the result that EBO and Vitrium would each hold 50% (6,800) of Rixport’s shares.<sup>30</sup> In the event, Mr. Lundeby made his investment through two Norwegian companies, Vitrium International AS and Vitrium Development AS, and, as at 29 December 2006, EBO and the Vitrium companies respectively owned 7,028 Rixport shares, which they had each purchased for LVL 702,800, or the equivalent in each case, as at 1 January 2005, of EUR 1 million. As at that date,

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<sup>25</sup> Request, Ex. C-3.

<sup>26</sup> Ex. C-33, p. 8. Mr. Østhus has described Staur Holding AS as being “himself” (TR, Day 2, p. 15).

<sup>27</sup> Østhus witness statement ¶17.

<sup>28</sup> Grantham first expert report ¶4.2.43.

<sup>29</sup> Grantham first expert report ¶4.2.3.

<sup>30</sup> Shareholders’ Agreement, dated 12 May and 22 August 2016, Ex. MP1-1.

Rixport's share capital, thus, totaled LVL 1,405,600, i.e., the equivalent of EUR 2 million.<sup>31</sup> No explanation has been provided by the Parties concerning the increase in the number of Rixport's issued shares, as compared to the number described in the Shareholders Agreement.

56. Subsequently, on or around 19 January 2007, Rox purchased 10% (1,406) of Rixport's then outstanding shares from EBO and the Vitrium companies, with EBO and the Vitrium companies each selling Rox 5% of Rixport's shares. The total amount paid by Rox was NOK 70 million, or the equivalent of EUR 8.4 million (although EBO and the Vitrium companies had only paid the equivalent of EUR 200,000 to Rixport for those shares when they were initially issued).<sup>32</sup>
57. The following year, on or around 17 April 2008, Staur, in turn, acquired an 18% interest in Rixport by purchasing 2,530 shares from one or both of the Vitrium companies.<sup>33</sup> There is no evidence concerning the amount paid by Staur for those shares.<sup>34</sup> Pursuant to an agreement dated 7 July 2008, EBO acquired the Vitrium companies' remaining 27% interest in Rixport (apparently held at that point by Vitrium International AS) for a price of EUR 18.9 million by providing Vitrium International AS with a "debt certificate" in a corresponding amount.<sup>35</sup> At or around the same time, Vitrium International AS acquired a 37.5% shareholding in EBO from EBO Eiendom AS.<sup>36</sup>
58. As a result of these transactions, the Vitrium companies ceased to be direct shareholders in Rixport (although Vitrium International AS apparently continued to hold an indirect interest through EBO),<sup>37</sup> and the Claimants in this proceeding, EBO, Staur and Rox, respectively held 72%, 18% and 10% of Rixport's shares.
59. Although the Rixport share registry does not record the transfer of shares in Rixport from Vitrium International AS to EBO before 26 January 2011,<sup>38</sup> the corresponding

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<sup>31</sup> Request, Ex. C-3; Grantham first expert report ¶4.2.7.

<sup>32</sup> Grantham first expert report ¶¶4.2.12-13.

<sup>33</sup> *Id.* at ¶4.2.20.

<sup>34</sup> Pilgrim first expert report ¶5.2.

<sup>35</sup> *Id.* at ¶4.2.28.

<sup>36</sup> *Id.* at ¶4.2.35.

<sup>37</sup> It appears that Vitrium International's interest in EBO was subsequently transferred in 2012 to a UK company called Votros Invest Limited, which has since been dissolved (Grantham first expert report ¶¶4.2.46-49). During the hearing, Mr. Lundeby testified that he is now the owner of the corresponding shares (TR, Day 3, p. 21).

<sup>38</sup> Request, Ex. C-3.

increase in EBO's shareholding nevertheless appears to have occurred in 2008, according to EBO's annual report for that year.<sup>39</sup>

60. It has not been disputed that the Claimants' respective shareholdings in Rixport have not subsequently changed.
61. Based on Rixport's accounts, it appears that EBO, Staur and Rox also made loans to Rixport that, as of 31 December 2016, totaled EUR 8.9, 1.1 and 0.5 million, respectively.<sup>40</sup> Money also appears to have been advanced by EBO Eiendom AS, although it is not a Claimant in this proceeding.
62. It is undisputed that the funds contributed by the Claimants to Rixport were subsequently used by it to make payments to SJSC Airport under the Land Lease Agreements and for other expenses incurred in connection with the development project.<sup>41</sup>

#### **B. The Procurement of the Land Lease Agreements**

63. As mentioned above, SJSC Airport organized a tender for the development of land adjacent to the airport in November 2005. That tender envisaged the development of a hotel and conference center, but it was discontinued in March 2006, according to the Respondent "due to changes to the development plans for the Airport, namely the introduction of [a] finger pier building and expansion of the landside terminal (known as stages 5 and 6 of the development, respectively)."<sup>42</sup> As discussed further below, it was replaced by a broader tender in June 2006, which was the basis for the Land Lease Agreements that were ultimately concluded between Rixport and SJSC Airport.
64. The Airport's development plans were developed by SJSC Airport and, according to the Respondent, were the subject of "frequent ... review and discussion, taking into account a number of elements and factors, such as flights, passenger numbers, cargo volumes, required infrastructure capacity, or the funds available for infrastructure development."<sup>43</sup> During the course of 2006, SJSC Airport was anticipating, in the context of the economic conditions prevailing at the time, that there would be a need

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<sup>39</sup> Ex. AG1-33.

<sup>40</sup> Grantham PowerPoint Presentation, dated 12 March 2019, slide 4.

<sup>41</sup> Pilgrim first expert report ¶1.12.

<sup>42</sup> Resp. Counter-Mem. ¶88.

<sup>43</sup> Saveljevs first witness statement ¶45.

to develop the infrastructure of the Airport to accommodate increased use and a growing volume of passengers. It appears that, at the time, SJSC Airport considered that the Airport would need to be able to accommodate up to about 7.5 million passengers in the near to medium term,<sup>44</sup> although in 2006 only 2.5 million passengers used the Airport (a nearly 150% increase since 2004).<sup>45</sup>

65. There is a dispute between the Parties, which is considered further below, as to whether the development plans for the Airport at the time of the June 2006 tender (and thereafter) were the product only of SJSC Airport's internal deliberations or whether they were dictated or otherwise influenced by the Ministry of Transport. It is the Claimants' position that the Latvian Government played a "key role" in the Airport's development and effectively directed the related actions of SJSC Airport,<sup>46</sup> which the Claimants have more generally characterized as being a *de facto* organ of the Latvian State.<sup>47</sup>
66. In this regard, the Claimants have argued that SJSC Airport is effectively controlled by its sole shareholder, the Ministry of Transport. In support of their position, the Claimants have referred, *inter alia*, to the laws governing the operation of SJSC Airport and to various decisions and policy making acts of the Government, including, with regard to the June 2006 tender, an Ordinance of the Cabinet of Ministers dated 6 July 2006, approving the "Operational Strategy 2007-2009 of the Ministry of Transport,"<sup>48</sup> and the 12 July 2006 Order of the Cabinet of Ministers "to expand the Airport and transform it into a business area."<sup>49</sup>
67. The Operational Strategy states that it is a "policy planning document ensuring medium-term planning of the ministry's activities in the transport and communication industry on the basis of approved policy documents."<sup>50</sup> It "defines the goals to be attained and results of the policy in the industry until 2009" and other matters until 2013 in order, *inter alia*, "to improve the middle term budget planning process."<sup>51</sup> With respect to the Airport specifically, the Operational Strategy includes among the "main tasks" referred to therein the Airport's "territorial development," including "finish[ing]

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<sup>44</sup> Letter, dated 22 May 2006, from SJSC Airport to Rixport, Ex. C-27.

<sup>45</sup> Ex. R-150.

<sup>46</sup> See, e.g., TR, Day 1, pp. 9 et seq.

<sup>47</sup> Cl. Mem. ¶¶331-348.

<sup>48</sup> Ex. C-256.

<sup>49</sup> Ex. C-20.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

construction of the airport's business park by 2010.”<sup>52</sup> In addition, and among other documents relevant to the June 2006 tender, the Claimants have referred to the Ministry of Transport's National Transport Development Programme (2000-2006), as updated in 2002, which envisages the reconstruction of the Airport's passenger terminal and the development of the infrastructure of the Airport's “territory”;<sup>53</sup> the Ministry's Transport Development Guidelines 2007-2013;<sup>54</sup> and the Ministry's Operational Programme “Infrastructure and Services 2007;”<sup>55</sup> all of which, according to the Claimants, “defined the tasks to be implemented at the . . . Airport under the instruction and management of the Ministry.”<sup>56</sup>

68. Whether or not these government planning and policy documents and decisions have any bearing on the Claimants' claims, which the Respondent disputes,<sup>57</sup> it is common ground that the June 2006 tender took into account SJSC Airport's then Airport terminal expansion plans and envisaged the development of a business park in addition to hotels, a conference center, exhibition facilities and a recreational area.

69. As stated above, the June 2006 tender concerned four separate plots of land (referred to as Draws 1, 2, 3 and 4). The Draws were intended for different development purposes, and applicants could tender for one or more Draws, provided that they all had to bid for Draw 1. The Tender Documents included a Tender Regulation;<sup>58</sup> a draft Tender Land Lease Agreement;<sup>59</sup> a map of the north-eastern sector of the Airport's territory, including the four Draws;<sup>60</sup> and a document referred to as “City Construction Regulations;”<sup>61</sup> in addition to a form for the tender security; a form for the financial proposal; and maps showing the utilities located on the Draws. The Tender Regulation provided, *inter alia*, that:<sup>62</sup>

*13.1. The winner of the Tender shall be obliged to develop the leased territory in accordance with its plan of development, on the basis of the requirements of the Tender regulation and the conception of the detailed planning of the NE sector of the Airport. The winner of the Tender shall coordinate its plan of development with the Airport and if necessary, the*

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<sup>52</sup> Id.

<sup>53</sup> Ex. C-289.

<sup>54</sup> Ex. C-21.

<sup>55</sup> Ex. C-257.

<sup>56</sup> Cl. Reply ¶54.

<sup>57</sup> Resp. Rejoinder ¶¶44-49.

<sup>58</sup> Ex. C-29.

<sup>59</sup> Ex. C-30.

<sup>60</sup> Ex. C-31.

<sup>61</sup> Ex. C-32. This is an extract from a plan prepared for SJSC Airport by a Latvian architectural firm, Arhis.

<sup>62</sup> Ex. C-29.

*amendments of the detailed planning shall be carried out in the order determined in the legislation.*

*13.2. The potential tenants shall take into account that the purpose for using the land, constructing or using the buildings or constructions in Mixed Business Territory (JD-1 and JD-2) is business, commerce and/or services, administration, culture, education, science, medical establishments. In the Mixed Business Territory (JD-1) in addition to the above mentioned, also operations of a light industry enterprise are permitted.*

*13.3. The potential tenant, on submission of the proposal for the land plot indicated as draw No 1, shall foresee construction of a 3, 3+ or 4 star hotel, as well as attraction of an operator for running the hotel.*

*13.4. Construction of all construction units and development of land shall be carried out in accordance with the law "On building", General Building Regulations and other requirements of the Laws and Regulations, as well as construction conditions of the detailed planning of the NE sector of the Airport and requirements of this regulation.*

*13.5. The Airport shall ensure centralized construction of infrastructure (streets, the main parking lot of the business park, pavements, street lighting, electrical power cables, water – pipes, sewerage) in accordance with the location scheme of the engineer utilities located on the land plot and on the adjacent areas, which is attached to the regulations as appendix No 6. The Airport shall provide maintenance of the infrastructure up to the connection places, as well as provide a possibility to connect to the above-mentioned communication mains, except for the cases when connection to a main (gas, telephone, IT) is offered by a concrete service provider. Each potential tenant is entitled to turn to the Airport for explanations for volume and quality of the infrastructure services determined under this chapter. If the potential tenant requires construction of additional power or such an infrastructure, which is not provided by the Airport, the winner of the Tender shall turn to the Airport in order to agree upon volume, term and expenses for construction of such additional infrastructure. If the respective service is provided by a concrete service provider, the tenderer shall turn directly to it.*

*13.6. Property rights of the parcels of land are registered in Riga district Land Register department.*

70. According to the Claimants, the project was brought to the attention of Staur by Mr. Lundeby in late 2005, soon after the announcement of the first tender in November of that year.<sup>63</sup> Mr. Lundeby had been engaged in business operations in Latvia since 1997, and when he learned of the Airport project, he approached Staur, apparently with a view to partnering with Staur or a Staur entity in bidding for the project. As already noted, Rixport was created in March 2006 as a vehicle for the bid.

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<sup>63</sup> Lundeby first witness statement ¶5.



71. According to Mr. Lundeby, following the new public tender announced in June 2006, he worked “intensively through the summer of 2006 preparing the tender application” together with Staur.<sup>64</sup> He testified that drawings were prepared by an architectural firm engaged for this purpose (Griff architects), based on the “conceptual project produced by SJSC Airport,” and that a detailed project schedule was prepared together with a technical business plan.<sup>65</sup> The work of Mr. Lundeby and Staur culminated in the submission of a Tender Application by Rixport for all four of the Draws on 18 August 2006.<sup>66</sup>

72. In its Tender Application, Rixport stated:<sup>67</sup>

*EBO is convinced about prospects of developing the Riga International Airport into a leading Northern European business centre.*

*EBO has an intention to participate in development of the Riga International Airport into a leading European destination and hub for air traffic between East and West Europe, as well as into a leading destination for international conferences, trade fairs, exhibitions (“expo”) and business venues in the Northern Europe. Opportunity to expand business, to participate in conferences and to enjoy entertainment events and shows with easy and fast access by low cost and convenient air transport and to choose accommodation based on budgets and preferences represent a strong business case.*

*EBO is confident in its ability to create synergies between various business functions to be represented in the airport area in a way which will be unique among airport areas in Europe. The design and functional description of the business park in this proposal will facilitate attraction of business and leisure travelers from all of Europe and beyond it.*

*To achieve the described vision EBO believes that a holistic approach must be applied for the development of the total area connected to the existing airport, i.e. the future business activities shall me [sic] merged with the new airport to create optimal synergies between both components.*

73. Rixport further specified that the volume of construction contemplated would amount to approximately 300,000 square meters, with a total financial investment by Rixport of slightly more than EUR 400 million, broken down as follows:

- EUR 200 million for the development of Draw 1, which would be developed in a first stage within 36 months and comprise a combination of three hotels (a

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<sup>64</sup> Id. at ¶7.

<sup>65</sup> Id.

<sup>66</sup> Ex. C-33.

<sup>67</sup> Id. at p. 2.

4+ star, a 4 star and a budget hotel) and conference/convention, exhibition (“expo”), office and parking facilities;

- EUR 140 million for the development of Draw 2 as a leading regional office park within 36-60 months;
- EUR 60 million for the development of Draw 3 for major landmark international or local head offices in office towers, with parking, within 36-60 months; and
- EUR 1-20 million for the development of Draw 4 as either (i) a landscaped area with recreational zones or (ii) such an area incorporating additional expo space, within 36-60 months.

74. Rixport, thus, undertook that the total time for planning and construction of all Draws would not be longer than 60 months, but that Draw 1 would be completed within a shorter term of no longer than 36 months. It added that if it was awarded all Draws, the time for implementation of Draws 2-4 could be adjusted according to the Tender Regulations. A more detailed breakdown of Rixport’s “progress plan” was set forth in Rixport’s accompanying Technical Business Proposal in the form of a Gantt Chart for each of the Draws.<sup>68</sup>

75. Rixport also undertook that financing of the development would consist of a combination of equity and bank loans, with EBO Gruppen AS and Staur Holding AS guaranteeing that they would provide Rixport with a “total financial investment in the amount of up to 200 million Euros.”<sup>69</sup> In addition, the Technical Business Proposal included letters from Rezidor SAS, Ryanair and Choice Hotels Scandinavia expressing interest in operating the three hotels that Rixport proposed to construct on Draw 1, Rixport’s proposal being that the “main” airport hotel (to be operated by Rezidor) would be connected to the airport “under roof cover,” with direct access to exhibition and business centres.<sup>70</sup> The other two hotels are described in the proposal as a “business hotel” to be operated by Choice International and a “budget hotel” to be operated by Ryanair.

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<sup>68</sup> Ex. C-247, pp. 202 and 222; Ex. MP1-20, pp. 29-32.

<sup>69</sup> Ex. C-33, p. 9; Ex. C-247, p. 106.

<sup>70</sup> Technical Business Proposal, Ex. C-247, p. 187.

76. Notwithstanding the size of the financial commitment undertaken in the Tender Application, there is little evidence before the Tribunal that the project was the subject of substantial, if any, meaningful due diligence. In his evidence, Staur's Mr. Østhus stated that "the project had a strong commercial rationale."<sup>71</sup> However, he acknowledged that, prior to submitting the Tender Application, neither Rixport nor its investors engaged any outside consultants to value or perform any due diligence on the project.<sup>72</sup> Rather, he testified that a "form of ... spreadsheet" was prepared internally, with input provided by Mr. Rune Enge, the CFO of Linstow, a Norwegian real estate developer active in Latvia and with whom Mr. Østhus had a close relationship.<sup>73</sup> The spreadsheet has not been produced in the arbitration, however, because, according to Mr. Østhus, it was lost as the result of a computer server crash before the arbitration commenced.<sup>74</sup> Nor have the Claimants produced any other documents evidencing the due diligence, if any, that Rixport or its investors carried out internally in advance of bidding for the project. During the hearing, Mr. Lundeby was examined at some length about other kinds of due diligence that might have been performed (*e.g.*, with respect to such matters as the existing legal and regulatory framework applicable to the development work to be carried out). However, he had no personal involvement in any such due diligence or specific knowledge about how it might have been carried out.<sup>75</sup>
77. Despite the apparent lack of significant due diligence, Mr. Østhus testified that he was confident in the "strong commercial" rationale of the project.<sup>76</sup> This appears, from his evidence, to have stemmed from the robust state of the Latvian real estate market at the time. Mr. Østhus stated at the Hearing: "... the Latvian real estate market had grown for quite some while and at a high pace. There were no clouds on the horizon at the time."<sup>77</sup> He further noted that: "Latvia, or Riga more specifically, was the most popular target for the pension funds and for the other real estate investors in Europe [in 2006 and 2007]. So we had a perfect timing coming in at that point."<sup>78</sup>
78. Mr. Østhus' confidence was also evidently buoyed by the success of his past real estate development activities, which he explained had prospered based on a business model under which tenants for the buildings to be constructed were procured in advance of

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<sup>71</sup> Østhus witness statement ¶10.

<sup>72</sup> TR, Day 2, pp. 31-33.

<sup>73</sup> TR, Day 2, pp. 7 and 32-42.

<sup>74</sup> TR, Day 2, pp. 43-44.

<sup>75</sup> TR, Day 3, pp. 27-38.

<sup>76</sup> TR, Day 2, p. 30.

<sup>77</sup> *Id.*

<sup>78</sup> TR, Day 2, p. 31.

construction and the buildings were then sold to investors prior to construction based on the future cash flows that could be expected to be generated by the tenants that had been procured.<sup>79</sup>

79. According to Mr. Østhus, Rixport's decision to proceed with the project was also founded on the assumption that "the plan for the expansion of the airport was done and budgeted for, and ready to implement," i.e., that there would be no changes to the Airport's development plans that would interfere with or alter the key assumptions underlying Rixport's Technical Business Proposal.<sup>80</sup>

80. In this regard, both Mr. Østhus and Mr. Lundeby contended in their evidence that, as stated by Mr. Lundeby: (i) the "main driver for the economy of the project was to build a hotel with direct access to the terminal;" and (ii) "the hotel close to the terminal had to be built first" because the "other buildings had little or no stand-alone value without the hotel connecting it to the airport terminal."<sup>81</sup>

81. According to Mr. Østhus:<sup>82</sup>

*The working hypothesis was that early construction of the first airport hotel in Latvia - also the only one with direct access to the airport - and the revenue from parking substantially would reduce the financial risk related to the project. The risk mitigation would take several forms: a) The first hotel would in itself generate an immediate valuation boost, and help reduce equity needs, as it was highly attractive as an acquisition target for long term real estate investors, b) revenue from parking this close to the airport had the potential to cover operational cost, and hence reduce the risk related to potential delays and c) on a different level, it would pave the ground for the next development steps. The construction of the hotel and the parking facilities first was also crucial for the subsequent development; it had to commence first, to avoid that access to other facilities was through a construction site.*

82. Although Mr. Østhus acknowledged that the Tender Regulation contained no representation that the Airport's then development plan might not change<sup>83</sup> – to the contrary, it expressly contemplated "possible amendments" to the 2003 Detailed Plan and required the winner of the tender to "coordinate its plan of development with the

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<sup>79</sup> TR, Day 2, pp. 78-91.

<sup>80</sup> TR, Day 2, pp. 48-50.

<sup>81</sup> Lundeby first witness statement ¶8.

<sup>82</sup> Østhus witness statement ¶10.

<sup>83</sup> TR, Day 2, p. 50.

Airport” and any such amendments<sup>84</sup> – it is the Claimants’ case, based on the evidence of Mr. Østhus, that, in July 2006, prior to the Tender Application being submitted, he was given “the impression” that the Airport’s development plan was not subject to change. He claims that this was suggested to him at a meeting convened at Mr. Østhus’ request with the then-Minister of Transportation, Mr. Krišjānis Peters, and Mr. Ainārs Šlesers, who Mr. Østhus described as a prominent figure in Latvian politics.<sup>85</sup> Although he was not then serving in the Latvian Government, Mr. Šlesers was a previous Deputy Prime Minister of Latvia, former Minister of Transportation and Deputy Mayor of Riga who, according to Mr. Østhus, continued to wield influence within the Latvian Government and was “clearly understood” to be the Minister of Transportation’s “boss.”<sup>86</sup> Mr. Šlesers subsequently replaced Mr. Peters as the Minister of Transportation in November 2006, and Mr. Peters was then appointed Chairman of SJSC Airport’s Supervisory Council in January 2007 and later that month Chairman of its Management Board.<sup>87</sup> Mr. Šlesers would subsequently remain in his position until March 2009, when the first of several successive Ministers took his place.<sup>88</sup> Mr. Peters, meanwhile, would remain Chairman of SJSC’s Management Board until December 2010, when the entire Management Board was replaced.<sup>89</sup>

83. According to Mr. Østhus, Mr. Šlesers explained his vision for the Airport at the July 2006 meeting, including the need for a four-star hotel to be connected to the Airport. He also allegedly “confirmed that there was a deadline to develop the business park by 2010” and that “the finance was secured in terms of budgets to do this.”<sup>90</sup> There is, however, no written record of this meeting or of the alleged assurances orally given to Mr. Østhus by Mr. Šlesers in the presence of the then-Minister of Transport.

84. It is nevertheless Mr. Østhus’ evidence that he gave the “green light” for Rixport to submit the Tender Application on 18 August 2006 after he received Mr. Šlesers’ assurances and “promise of support.”<sup>91</sup>

85. Thereafter, in September 2006, Rixport received requests for further information concerning its proposals from SJSC Airport’s Tender Commission, to which Rixport

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<sup>84</sup> Ex. C-29, ¶13.1.

<sup>85</sup> TR, Day 2, pp. 9-11 and 49-53.

<sup>86</sup> Østhus witness statement ¶10; TR, Day 2, pp. 9-10.

<sup>87</sup> TR, Day 1, p. 35.

<sup>88</sup> Cl. Reply ¶217; see also Claimants’ Closing Demonstrative Exhibit.

<sup>89</sup> Id. at ¶311.

<sup>90</sup> TR, Day 2, pp. 10-11 and 51-52.

<sup>91</sup> Østhus witness statement ¶¶12-13.

replied on 13 and 21 September 2006.<sup>92</sup> In its letter, dated 21 September 2006, Rixport provided further details, *inter alia*, concerning the buildings that it proposed to construct, its investment plan and available finance, with annual investment in the project progressively increasing from EUR 20 million in 2007 to EUR 140 million in 2011. Rixport noted: “[The] exact financing scheme, including required equity volume and arrangement with the bank objectively depends on [a] number of circumstances, like the size of the project finally granted under the tender, particular development stage, as well as on type of the project (facilities). Taking into account the size, expected lengths and complexity of the project, the financing scheme and gearing may differ and be changed as may be required from time to time. The final sourcing and lending will depend on tenant demand and market circumstances.”

86. On 28 September 2006, the Management Board of SJSC Airport voted to accept Rixport’s bids for all four Draws, subject to certain conditions.<sup>93</sup> The decision of the Management Board was then approved by the Supervisory Council of SJSC Airport on 2 October 2006,<sup>94</sup> and Rixport was announced as the winner of the tender on 4 October 2006,<sup>95</sup> following which Rixport and the Airport entered into negotiations to finalize the terms of the Land Lease Agreements.
87. Rixport has contended that the Ministry of Transport was also involved in the negotiation of the Land Lease Agreements,<sup>96</sup> although the only example of such involvement to which it has referred is a meeting that was held on 20 October 2006 among Rixport, representatives of SJSC Airport’s Supervisory Board and then-Minister Peters.<sup>97</sup> It is common ground that the meeting was requested by Rixport in order to obtain the Minister’s support for the inclusion in the leases of an “investment protection clause” in the event of their termination or expiration.<sup>98</sup> Mr. Østhus, who attended the meeting together with Mr. Lundeby for Rixport, testified that, during the meeting, the Minister “gave his support to” the change requested by Rixport and that Rixport was “advised to take this to the airport with this recommendation, and it was implemented.”<sup>99</sup> The only written record of the meeting, however, is contained in two

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<sup>92</sup> Exs. C-192 and C-34.

<sup>93</sup> Ex. R-44.

<sup>94</sup> Ex. R-54.

<sup>95</sup> Ex. C-36.

<sup>96</sup> Cl. Mem. ¶¶61-63 and Cl. Reply ¶¶71-76.

<sup>97</sup> *Id.*

<sup>98</sup> Letters, dated 23 and 24 October 2006, from Rixport to SJSC Airport, Exs. R-57 and C-37.

<sup>99</sup> TR, Day 2, p. 12.

letters, dated 23 and 24 October 2006, from Rixport to Mr. Dzintars Pomers, the then-Chairman of SJSC Airport's Management Board.

88. In the first, Rixport recorded:<sup>100</sup>

*During the meeting, [Rixport] presented its land development project to the participants of the meeting, as well as expressed concerns on observation of investment protection terms in the proposed lease agreements as required in order to have sound economical basis for successful completion of the project.*

*During the meeting we got [the] impression that it is policy of the Riga international Airport as well as its sole shareholder to ensure economically grounded investment protection terms in accordance with Latvian legislation and internationally accepted standards.*

*We were advised to submit the draft agreements with adjusted investment protection terms to you directly. Therefore please find enclosed adjusted text of the agreements in Latvian and English languages, which contain the relevant investment protection principle . . . and which at the same time fully correspond to Latvian laws and internationally accepted standards.*

*We kindly ask you to review the enclosed drafts and accept for signing at the Management Board as well as to obtain the required opinion of the Supervisory Board.*

89. In the second, Rixport stated:<sup>101</sup>

*Pursuant to today's telephone conversations of our legal counsel . . . , we hereby submit the draft lease agreements with additional proposal for clause 8.5, ensuring interests of Riga Airport. This investment protection clause is based on our discussion in the meeting of October 20, 2006 with . . . the Minister of Transportation, and . . . the Chairman of the Supervisory Board of the Riga International Airport, and with Mr. Andulis Židkovs, the Member of the Supervisory Board of the Riga International Airport.*

*Therefore please find enclosed adjusted text of the agreements in Latvian and English languages, which contain the relevant investment protection principle together with terms protecting interests of Riga Airport . . . . At the same time, the clause fully corresponds to Latvian laws and internationally accepted standards.*

*We kindly ask you to review the enclosed drafts and accept for signing at the Management Board as well as to obtain the required opinion of the Supervisory Board.*

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<sup>100</sup> Ex. R-57.

<sup>101</sup> Ex. C-37.

90. The adjusted text proposed by Rixport has not been produced by the Claimants, however, and it is therefore not possible for the Tribunal to determine the extent to which, if at all, Rixport’s proposed language for Clause 8.5 was adopted. The Tribunal does have before it, however, an earlier exchange of letters on this subject between Rixport and SJSC Airport, dated 17 and 19 October 2006, respectively, concerning amendments to Clause 8.5 proposed by Rixport, with the proposed amended text that was then being requested by Rixport set out.<sup>102</sup> The language then proposed by Rixport was rejected by SJSC Airport, and it is apparent from a comparison with Clause 8.5, as agreed, that none of the language then proposed found its way into the Land Lease Agreements. In its letter, dated 17 October 2006, Rixport indicated that the amendments being proposed were intended “to reflect application” of the “investment protection terms” set forth in the BIT, given that, according to Rixport, “when applying for the tender, . . . [it had] at great extent relied on . . . [those] investment protection terms,” which it believed SJSC Airport “being the state owned company observes and accepts.”<sup>103</sup> SJSC Airport responded, however, that Rixport could not properly refer to the BIT, given that “the agreement on the lease of land . . . is a private law contract and the aforementioned provisions of an intergovernmental agreement [do] not apply to land lease relations between private law entities.”<sup>104</sup>
91. As the Respondent has correctly noted, it is, in any event, not possible to determine from the evidence if Minister Peters had specific input in respect of, or influence over, any provision of the Land Lease Agreements.<sup>105</sup>
92. It is, moreover, not disputed that SJSC Airport was not required, at least as a formal matter, to obtain the approval of the Latvian Government, as the shareholder, before entering into the Land Lease Agreements. The agreements were approved by SJSC’s Management Board on 1 November 2006<sup>106</sup> and by its Supervisory Council on 2 November 2006.<sup>107</sup> The Land Lease Agreements were then executed and entered into force on 3 November 2006.<sup>108</sup>

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<sup>102</sup> Exs. R-55 and R-56.

<sup>103</sup> Ex. R-55.

<sup>104</sup> Ex. R-56.

<sup>105</sup> Resp. Counter-Mem. ¶112.

<sup>106</sup> Ex. R-45.

<sup>107</sup> Ex. R-47.

<sup>108</sup> Ex. C-38.



### C. The Land Lease Agreements

93. The four Land Lease Agreements are nearly identical, save that they have different provisions concerning the intended uses and development timelines for each of the Draws.<sup>109</sup>
94. Each of the agreements includes six annexes, including the Technical Business Proposal that formed part of Rixport's Tender Application, the Tender Regulation and a document referred to as "Construction provisions of the detailed planning of the NE Sector of the Airport."<sup>110</sup> As the Respondent has noted, this was an extract from a document prepared for SJSC Airport by Arhis, a Latvian architectural firm, and is distinct from, and not to be confused with, the 2003 Detailed Plan approved by the Mārupe Municipal Council.<sup>111</sup>
95. The agreements also each provide for a term of 25 years, subject to possible extension for an additional 25 years (Clauses 5.1 and 5.2).
96. Except in the case of Draw 4, which consisted of only one plot, each of the Draws was subdivided into a number of parcels ("**Land Plots**"). SJSC Airport undertook to transfer the Land Plots to Rixport, and Rixport undertook to develop them in accordance with its Technical Business Proposal, the terms of the agreements, the 2003 Detailed Plan, the Latvian Law on Construction, the Law on Aviation, the General Construction Regulations and requirements of other legal acts and the Tender Regulations as well as the "Construction provisions of the detailed planning of the NE Sector of the Airport," as annexed to the agreements.<sup>112</sup>
97. Under the lease for Draw 1, Rixport undertook to "ensure construction of 3, 3+ or 4 star hotels" and to "attract an hotel operator," in addition to constructing on the part of the land not reserved for the hotel(s), "a business park, which includes the construction, creation and use of the institutions of transaction, shopping and/or services, governing,

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<sup>109</sup> Ex. C-38.

<sup>110</sup> Ex. R-59.

<sup>111</sup> Although the Claimants have contended that "it would clearly be reasonable to assume" that the "Construction provisions" in question "were part of the 2003 Detailed Plan" (Cl. Reply ¶84), it has failed to explain why any such assumption should reasonably have been made, and this does not appear consistent with the evidentiary record before the Tribunal.

<sup>112</sup> Ex. C-38, Section 4 of each the Land Lease Agreements.

culture, education, science and medicine.”<sup>113</sup> Rixport was also to ensure “the management and economic activity of the buildings included in the business park.”<sup>114</sup>

98. The Draw was to be developed to 50% of its maximum permissible construction density within three years,<sup>115</sup> provided, however, that the period for the development of one of the Land Plots (B-18) was subject to being extended due to possible changes in SJSC Airport’s development plans for the Airport.<sup>116</sup> This is a matter that was discussed between Rixport and SJSC Airport prior to the conclusion of the Land Lease Agreements. On 12 October 2006, Rixport informed SJSC Airport that, given that the latter was reserving its right to postpone the development of parcel B-18, which was intended to be used by Rixport for the main airport hotel, it was not “clear . . . when it will be feasible to construct the connection of the 4+ star hotel with the airport (under one roof).”<sup>117</sup> Rixport therefore indicated that it wished “to retain the right to use other parcels for construction of hotels provided it is necessary” and proposed that the “exact description of the hotels in clause 2.1 of the Land Lease Agreement . . . be . . . replaced with a general reference to construction of hotels and other buildings,”<sup>118</sup> as, in fact, occurred in the Land Lease Agreement, as finalized.
99. In the case of Draw 2, Rixport undertook to “ensure construction of office buildings.”<sup>119</sup> Construction was to commence within 24 months and to be developed to 50% of the Draw’s maximum permissible construction density within five years.<sup>120</sup>
100. The Land Lease Agreement for Draw 3, meanwhile, provided that Rixport would “ensure construction of office buildings (towers)” and a parking lot.<sup>121</sup> No deadline was specified for the commencement of construction. However, as in the case of Draw 2, Draw 3 was to be developed to 50% of its maximum permissible construction density within five years.<sup>122</sup>

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<sup>113</sup> Ex. C-38, Land Lease Agreement for Draw 1, Clause 2.1.

<sup>114</sup> *Id.*

<sup>115</sup> Ex. C-38, Land Lease Agreement for Draw 1, Clause 4.10.

<sup>116</sup> *Id.* at Clause 1.1.

<sup>117</sup> Ex. C-35.

<sup>118</sup> *Id.*

<sup>119</sup> Ex. C-38, Land Lease Agreement for Draw 2, Clause 2.1.

<sup>120</sup> *Id.* at Clause 4.9.

<sup>121</sup> Ex. C-38, Land Lease Agreement for Draw 3, Clause 2.1.

<sup>122</sup> *Id.* at Clause 4.9.

101. The land that was the subject of Draw 4 was also to be developed within five years, with no deadline specified for the commencement of development.<sup>123</sup> Rixport undertook to “ensure development of a park and greenery zone.”<sup>124</sup>
102. In each case, if Rixport’s development works were delayed for more than three months following the deadline for completion, Rixport was obliged to pay SJSC Airport a penalty of EUR 1,000 per week of additional delay.<sup>125</sup>
103. The Land Lease Agreements provided for annual rental payments by Rixport in the following amounts: (i) EUR 12 per m<sup>2</sup> for Draw 1; (ii) EUR 7 per m<sup>2</sup> for Draw 2; (iii) EUR 16 per m<sup>2</sup> for Draw 3; and (iv) EUR 1 per m<sup>2</sup> for Draw 4,<sup>126</sup> with discounted rates during the first two years “to facilitate possibilities of the LESSEE to ensure faster development.”<sup>127</sup> The agreements also each required Rixport to make a one-time non-refundable payment for the development and maintenance of infrastructure by SJSC Airport for the Draws in an amount of EUR 150,000 per hectare of land.<sup>128</sup>
104. Rixport was also responsible for the payment of real estate taxes for the leased land.<sup>129</sup>
105. In addition, penalties were payable by Rixport in the event that it was late in paying the amounts due to SJSC Airport under the agreements.<sup>130</sup> If Rixport failed to pay the applicable real estate tax, then it would be paid by SJSC Airport, and Rixport would be required to reimburse it together with a penalty.<sup>131</sup>
106. The Claimants have noted that a “key obligation” for SJSC Airport in each agreement was “not to worsen the rights of the LESSEE provided in the Agreement for the whole or a part of the leased LAND, not to lease and give permission to use or hold the whole or any part of the leased LAND to this [*sic*] persons or in some other manner encumber the LAND without a written consent of the LESSOR.”<sup>132</sup>

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<sup>123</sup> Ex. C-38, Land Lease Agreement for Draw 4, Clause 4.7.

<sup>124</sup> *Id.* at Clause 2.1.

<sup>125</sup> Ex. C-38, Land Lease Agreements, Section 4.

<sup>126</sup> Ex. C-38, Clause 3.1 of each Land Lease Agreement.

<sup>127</sup> *Id.* at Clause 3.6.

<sup>128</sup> *Id.* at Clause 3.9.

<sup>129</sup> *Id.* at Clause 3.11.

<sup>130</sup> *Id.* at Clause 3.14.

<sup>131</sup> *Id.* at Clause 3.15.

<sup>132</sup> Cl. Mem. ¶70; Ex. C-38, Land Lease Agreements, Clause 6.7.1.

107. Under Clause 8.5 of each lease (i.e., the provision that the Claimants say was adjusted following Rixport's meeting with Minister Peters on 20 October 2006), Rixport was entitled to "get compensation for the market value of the Buildings" if an agreement was either (i) terminated by SJSC Airport before its expiration or (ii) not prolonged for an additional period of 25 years.<sup>133</sup>
108. Each of the leases further provided that disputes that could not be resolved amicably were to be referred to the Latvian courts,<sup>134</sup> although the Claimants, contrary to the Respondent, have taken the position that the relevant provision was not an "exclusive" forum selection clause. According to the Claimants, "it merely provides that the local courts would be competent to decide on the claim," without obligating Rixport to refer claims to the domestic courts.<sup>135</sup>
109. There are also a certain number of matters for which the Land Lease Agreements, as concluded in November 2006, made no express provision:
110. First, as the Respondent has correctly observed, they did not provide for the expansion of the Airport terminal in accordance with any particular technical plan or timeline.<sup>136</sup> To be sure, Rixport was required to take account of SJSC Airport's detailed planning, as incorporated in the agreements. However, the agreements did not impose any specific obligations on SJSC Airport in this regard.
111. Nor was the development of Draws 2-4 tied in any way, or made contingent upon, the development of Draw 1.<sup>137</sup> Although the Claimants have argued that Draw 1 was required to be developed first,<sup>138</sup> each of the Land Lease Agreements was a stand-alone agreement, and Rixport's obligations under the agreements for Draws 2-4 did not depend on the progress of Draw 1's development, even if, as the Claimants have contended, Draw 1 was intended to be developed by Rixport before the other Draws. Nor was the development of Draw 1 stated to be dependent upon parcel B-18 being delivered first.

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<sup>133</sup> Cl. Reply ¶ 75.

<sup>134</sup> Ex. C-38, Land Lease Agreements, Clause 11.

<sup>135</sup> TR, Day 8, p. 72.

<sup>136</sup> Resp. Rejoinder ¶¶62-67.

<sup>137</sup> Id. at ¶¶66-72.

<sup>138</sup> Cl. Reply ¶¶ 81, 112 and 148.

112. In addition, as the Respondent has argued,<sup>139</sup> the Land Lease Agreement for Draw 1 did not require that Rixport be provided with any specific type of access between any of the buildings to be constructed and the Airport terminal, other than, arguably, as stated in Rixport's Technical Business Proposal, that the "main" airport hotel would be "connected" to the Airport "under roof cover," which could have taken the form of a tunnel, a covered bridge or walkway.

#### **D. Amendments to the Land Lease Agreements**

113. After the Land Lease Agreements were signed, it is the Claimants' position that Rixport commenced its work, including planning construction work and initiating commercial negotiations with tenants and operators of hotels. According to the Claimants, the first hotel was designed in early 2007 and Rixport "was ready to commence construction . . . shortly after having entered into the Land Lease Agreements."<sup>140</sup> It is nevertheless apparent from the evidence that: (i) relatively little work was carried out; (ii) Rixport had not applied for any construction permits, let alone commenced any construction; and (iii) Rixport had by April 2007 fallen several months behind the high-level work programme that it had submitted together with its Tender Application.
114. As the Respondent has noted, without this being contested: "By April 2007 the Claimants had not yet concluded a contract [with a consultant] for [the] planning and permitting process . . . . They had not registered the leased land in the Lease Registry . . . . And they only engaged a contractor for the geological survey of the leased land on 15<sup>th</sup> June 2007."<sup>141</sup> The Respondent further observes that there is no evidence "of any attempts to pre-sell" any office buildings by April 2007, in accordance with the Claimants' alleged business model.<sup>142</sup>
115. The Claimants have argued that, insofar as there were any delays, this was the fault of SJSC Airport and the Latvian Government because, almost immediately after the Land Lease Agreements were signed, Rixport was informed that changes would be made to the plans for the Airport's development that could affect the land leased by Rixport.

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<sup>139</sup> Resp. Rejoinder ¶¶73-77.

<sup>140</sup> Cl. Mem. ¶76. See also Cl. Reply ¶¶ 111-130.

<sup>141</sup> TR, Day 1, p. 251.

<sup>142</sup> Id.

116. According to Mr. Lundeby, who was then Rixport’s CEO, Rixport was told by SJSC Airport that the development plans would be changed “[s]hortly after we had signed the Land Lease Agreements” and that, as early as December 2006, Rixport knew that Mr. Šlesers, the newly-appointed Minister of Transport, had “bigger plans” for the Airport.<sup>143</sup> The Claimants have also referred to reports in the Latvian media in January 2007 that the new Minister had established as a goal for the Airport “reaching 30 million serviced passengers in the future.”<sup>144</sup> These reports are consistent with a “Declaration” of the Latvian Cabinet of Ministers, dated 7 November 2006, that the Cabinet would “encourage the construction of an essentially new international Riga airport with the goal of reaching 30 million serviced passengers in the future” (without any timeframe being specified, however).<sup>145</sup> The Claimants assert that the “Respondent’s target of reaching 30 million passengers a year had a significant impact on the Claimants’ project,”<sup>146</sup> and it is Mr. Lundeby’s evidence that this “explains why Rixport did not apply for any construction permits shortly after having signed the Land Lease Agreements.”<sup>147</sup>
117. The Claimants have failed to establish, however, that the allegedly new passenger target of the new Minister was unknown to Rixport when it entered into the Land Lease Agreements in November 2006. To the contrary, as the Respondent has noted, the Claimants’ position is inconsistent with the Claimants’ own evidence and assertions several years later that the Claimants’ bid was based on the expectation that the Airport terminal would be expanded “over the long term” to be able to accommodate 30 million passengers per year.<sup>148</sup> Moreover, in commencing this arbitration, the Claimants themselves contended that “[d]uring the negotiations regarding Rixport’s tender proposal, the Latvian Minister of Transport at that time made clear that the basis for the development plans was that the airport would serve up to 30 million passengers on an annual basis.”<sup>149</sup>
118. Thus, the announcement of this supposedly new goal in December 2006 should not, as Mr. Lundeby has testified, have had any effect on the Claimants’ development plans during the months immediately following the signature of the Land Lease Agreements.

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<sup>143</sup> Lundeby second witness statement ¶4.

<sup>144</sup> Cl. Reply ¶¶ 88-90.

<sup>145</sup> Ex. C-368.

<sup>146</sup> Cl. Reply ¶ 92.

<sup>147</sup> Lundeby second witness statement ¶4.

<sup>148</sup> TR, Day 1, pp. 253-254; Letter from Mr. Østhus to SJSC Airport, dated 11 November 2013, Ex. C-129.

<sup>149</sup> Request ¶60.

The Tribunal notes in this connection that, while Rixport indicated in a PowerPoint presentation dated 11 December 2006, that SJSC Airport's terminal expansion plans would "cater for" passenger growth to "20-30 million in the long term future," nothing is stated in the presentation about this "long term" goal affecting Rixport's development plans for Draws 1-4 or the agreements entered into with SJSC Airport.<sup>150</sup>

119. In any event, it does not appear that the aspirations expressed by the Cabinet of Ministers on 7 November 2006 were, in fact, subsequently acted upon by SJSC Airport. When discussed by SJSC Airport's Supervisory Council in January 2007, they were greeted with skepticism, and it was resolved that a work group should be established "to assess the airport development by involving experts and specialists of the aviation sector."<sup>151</sup> In this regard, the uncontradicted evidence of Mr. Saveljevs, the Director of SJSC Airport's Commercial Department since September 2007, was that SJSC Airport had its "own operational plans, which were based on the forecasts of passengers, which were prepared by the consultants in the industry, such as NACO," and that SJSC Airport did not adopt plans "proposed by any politician."<sup>152</sup>
120. It is nevertheless common ground between the Parties that changes were made to SJSC Airport's terminal expansion plans in 2007, and it is apparent from the evidence that those plans were discussed with and approved by the Ministry of Transport at a meeting on 21 May 2007.<sup>153</sup> However, the plan then adopted appears to have differed from the expansion plan that Minister Šlesers may originally have had in mind, presumably in view of the input of the work group that the Supervisory Council had decided to establish in January 2007.
121. Thus, while SJSC Airport decided in May 2007 to revise its terminal expansion project, the plan then adopted was intended to enable the Airport to accommodate 15 to 20 million passengers per year and not 30 million, as Minister Šlesers may have hoped in November 2006. As Mr. Saveljevs explained, the revised plan maintained the same 5<sup>th</sup> and 6<sup>th</sup> stages of development already envisaged, but contemplated that they would proceed simultaneously, rather than sequentially, thus requiring a temporary terminal to be constructed pending the work to be carried out.<sup>154</sup> Mr. Saveljevs testified that

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<sup>150</sup> Ex. MP1-19.

<sup>151</sup> See, e.g., Minutes of the Supervisory Council meeting of 11 January 2007, Ex. R-182.

<sup>152</sup> TR, Day 5, pp. 38-39.

<sup>153</sup> Ex. R-142.

<sup>154</sup> Saveljevs first witness statement ¶27.

there was also a “long-term” plan for a 7<sup>th</sup> stage of development.<sup>155</sup> However, there is no evidence that this corresponded to Minister Šlesers’ thinking in November 2006.

122. As SJSC Airport’s new plans were being developed, it informed Rixport, by letter, dated 27 April 2007, that:<sup>156</sup>

*At the moment, based on the proposal of the Ministry of Transport and pursuant to assignment of the airport the specialists of the design office “Arhis” together with the consultants of the office “Aviaplan” (Norway) are reviewing the possible options for extension of the passenger terminal with the aim to ensure service to 15 to 20 million passengers per year in perspective.*

*Reviewing of the developed options by participation of representatives of the Ministry of Transport, analysis of the options and taking of the final decision is planned in week 20, 21 of 2007.*

*After taking of the respective decisions, we will immediately provide information to you regarding the possible changes in the planning of territory.*

123. SJSC Airport’s April 2007 letter was followed by a further letter, dated 21 June 2007, in which SJSC Airport advised Rixport that, based on the new plans developed for SJSC Airport by Arhis, and accepted by the Ministry of Transport on 21 May 2007, Land Plots B-18 and B-16 in Draw 1 would be “necessary for further development of the Airport.” SJSC Airport therefore proposed that amendments be made to the Land Lease Agreements according to which those plots would be removed from the agreements, while an “analogue land plot in [the] business park of Airport – parcels No. F-1, F-3 and B-3” would be added in their place.<sup>157</sup>

124. Neither letter stated that the new development plan was intended to ensure the servicing of 30 million passengers per year.

125. The Respondent has submitted that when SJSC Airport sent these letters to Rixport, it considered that it “was still possible to negotiate an agreement, amending the boundaries of the Draws . . . as Rixport had taken no steps to develop the land.”<sup>158</sup> The Claimants dispute this, although they do not deny that no corresponding

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<sup>155</sup> Id. at ¶28.

<sup>156</sup> Ex. C-39.

<sup>157</sup> Ex. C-40.

<sup>158</sup> Resp. Counter-Mem. ¶141.



construction permits had been applied for and that no construction work had begun. Rixport also did not raise any objections to SJSC Airport's proposal.

126. Instead, Rixport responded to SJSC Airport by letter, dated the same day, in which it indicated that it was willing to return the parcels in question, provided, however, that the Land Lease Agreements would be amended to take into account, *inter alia*, the value of the land plots being returned (which were foreseen to have direct access to the Airport terminal), the fact that Rixport had been paying rent for areas that could no longer be developed and that it had also "halted lease negotiations with large tenants because of the uncertainty caused by changes to the terminal extension."<sup>159</sup> The Claimants argue that Rixport had no other option but to accept SJSC Airport's proposal and that "[t]his situation was a direct consequence of decisions regarding development of the Airport by the Ministry of Transport."<sup>160</sup> However, it does not appear from the evidence before the Tribunal that Rixport was coerced into agreeing to amend the Land Lease Agreements, irrespective of the possible impact of any Ministry of Transport decisions.
127. During the several months that followed, Rixport and SJSC Airport negotiated a series of amendments to each of the Land Lease Agreements. The amended agreements were executed on 7 November 2007.<sup>161</sup> During the course of the negotiations, Rixport took the initiative of proposing (and obtaining) a number of amendments that differed from or were supplemental to SJSC Airport's initial proposals.
128. Thus, for example, while SJSC Airport initially requested only that Land Plots B-18 and B-16 in Draw 1 be returned in exchange for new Land Plots F-1, F-3 and B-3 (which covered an area of approximately the same size), Rixport proposed to return Land Plot B-14 and part of Land Plot B-12 (in addition to Land Plots B-18 and B-16) in exchange for two additional areas of land in Draw 1 (referred to as Land 2 and Land 3), which, together with the remainder of Draw 1 (referred to as Land 1), covered a much larger area than the original surface area of Draw 1. Land 2 of Draw 1 was situated in front of the existing terminal building and was to be used for the construction of hotels, including in particular, what has been referred to as the "main" airport hotel, which was to be connected to or have direct access to the terminal, together with parking facilities, while Land 3 of Draw 1 was to be used for possible additional

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<sup>159</sup> Ex. C-41.

<sup>160</sup> Cl. Reply ¶133.

<sup>161</sup> Exs. C-45 – C-49.

parking facilities, a hotel above the parking, conference halls and office premises. In addition, Rixport obtained the right to lease additional land in Draw 2 (Land Plots A-18, A-16, D-15 and D-13), with the result that Rixport would, and ultimately did, receive a much larger area of land under the amended leases for Draws 1 and 2.<sup>162</sup>

129. The main additional terms of the amended leases were as follows:
130. First, the precise borders and total areas of Draw 1 were to be fixed later, with Land 2 and Land 3 to be transferred to Rixport after the development of SJSC Airport's "Technical project."<sup>163</sup> The total area was to be specified by no later than 30 June 2008, and, in the case of Land 2, the land was to be made available for construction work by 1 January 2009.<sup>164</sup> No specific date was established for the delivery of Land 3, although its specific area was, as in the case of Land 2, to be identified by 30 June 2008.<sup>165</sup> In addition, all of Land 1, except Land Plots B-2 and B-4, was required to be used by SJSC Airport during work on the extension of the Airport terminal, which was stated to be planned for completion by September 2011. Thus, only two parcels of land were available for development in Draw 1 as of the date of the amendments: Land Plots B-2 and B-4 of Land 1.<sup>166</sup>
131. In these circumstances, Rixport was granted significant rent holidays until it would be placed in the position of being able to start development of the land that was not yet available to it, in addition to rent discounts thereafter.<sup>167</sup>
132. Second, although in the case of Draws 2, 3 and 4, Rixport could carry out development without restriction as from the date of the amendments, the deadlines for the development of those Draws were extended to 1 August 2013 (in the case of Draws 2 and 3) and 1 September 2014 in the case of Draw 4.<sup>168</sup>
133. Third, the amended agreement for Draw 1 provided Rixport with "exclusive rights to operate short term parking for the airport terminal."<sup>169</sup> When the amendment was entered into, SJSC Airport was operating a short-term parking facility on Land 2 of

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<sup>162</sup> Exs. C-41, C-45 and C-46.

<sup>163</sup> Ex. C-45, Section 1.

<sup>164</sup> Id.

<sup>165</sup> Id.

<sup>166</sup> Id. at Section 10.

<sup>167</sup> Id. at Section 11.

<sup>168</sup> Exs. C-46 – C-49.

<sup>169</sup> Ex. C-45, Section 15.

Draw 1, which, as already mentioned, it undertook to vacate by 1 January 2009. Rixport, meanwhile, was given the right under the amendment to construct a multi-storey parking facility on Land 2 and was required to pay to SJSC Airport 10% of the monthly turnover of that facility.<sup>170</sup> A dispute subsequently arose, as discussed further below, concerning the nature of the “exclusive rights” accorded to Rixport under the amended agreement and whether, as Rixport subsequently contended, they applied to the parking facilities being operated by SJSC Airport on Land 2 prior to the construction of Rixport’s own parking facilities.

134. Although, as just stated, the agreements, as amended, permitted Rixport to proceed immediately with the development of Draws 2, 3 and 4 (and Rixport was not otherwise prevented from doing so), Rixport failed to undertake any construction work, except with respect to a single office building on Draw 2. After commencing work on the site in May 2008 and obtaining a construction permit on 3 July 2008,<sup>171</sup> Rixport obtained SJSC Airport’s agreement to allow the building to be developed by a wholly-owned special purpose vehicle, SIA Rixport Office (“**Rixport Office**”), which then entered into a Land Lease Agreement with SJSC Airport for the lease and development of the land on 8 October 2008.<sup>172</sup> The lease provided for the completion of the office building by 1 August 2013, consistent with the development deadline in Rixport’s amended Land Lease Agreement for Draw 2.
135. Although no other construction work was undertaken by Rixport on any of the Draws, Rixport nevertheless claims to have continued to invest substantial resources, during the first part of 2008, in “develop[ing] the architecture of the business park” through Griff, its architect for the project.<sup>173</sup> It also engaged Jones Lang LaSalle Hotels (“**Jones Lang**”) to act as its advisor in securing an occupational lease or hotel operator for “an upscale business hotel”<sup>174</sup> and to prepare a “Business Plan/Equity Investment Memorandum” (the “**Investment Memorandum**”) to “serve as the basis for negotiating a joint venture agreement between [the] existing shareholders of Rixport ... and a strategic equity partner” for the project.<sup>175</sup>
136. The Investment Memorandum was issued in April 2008 and describes how Rixport then planned to carry out the project. Although it can be seen from the Investment

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<sup>170</sup> Id. at Sections 1 and 15.

<sup>171</sup> Ex. C-333.

<sup>172</sup> Ex. R-61.

<sup>173</sup> Cl. Mem. ¶107.

<sup>174</sup> Id. at ¶108; Ex. C-53.

<sup>175</sup> Equity Investment Memorandum/Joint Venture Business Plan, dated April 2008, Ex. C-54.

Memorandum that Rixport still planned to develop all four of the Draws in a manner that was broadly consistent with the Technical Business Proposal that was submitted together with its Tender Application in 2006, the total anticipated development costs appear to have increased by approximately 50% from EUR 400 million to EUR 600 million, and the planned development period had also more than doubled from 5 years to 10-15 years from the date of the Investment Memorandum, with the result that Rixport had decided to divide the project into two phases.<sup>176</sup> The first phase, for which Rixport was seeking additional investment, was to be completed by the end of 2013, at a projected cost of approximately EUR 430 million, and was to include: (i) the construction of seven office buildings, with construction commencing in stages between 2008 and 2012; (ii) the construction of two hotels, with the construction of a budget hotel to commence first in 2009 and the construction of a 4-star hotel connected to the Airport terminal (the “main” Airport hotel) to commence in 2010; and (iii) the development of Airport terminal parking between 2010 and 2013. Excluded from the first phase were convention and exhibition facilities, a third hotel, more than half of the contemplated office building space and the greenery area to be developed on Draw 4.<sup>177</sup>

137. Under examination, the Claimants’ Mr. Østhus stated that Rixport received “indicative interest” in the project from “several of the large investment banks.”<sup>178</sup> However, no actual investment partners ever appear to have been found, and the Investment Memorandum was “pulled”, according to Mr. Østhus, around the time of Lehman Brothers’ collapse in September 2008 and the worldwide financial crisis that ensued.<sup>179</sup> There is, moreover, no evidence, that Rixport had by that time secured any binding commitments from any hotel operators for the planned hotels, including the budget hotel, which, according to the Investment Memorandum, was still of interest to Ryanair.<sup>180</sup>

138. It is common ground that the financial crisis had a severe, detrimental effect on the Latvian commercial real estate market,<sup>181</sup> as well as on the economies of Latvia and the neighboring countries in the Baltic region, which also affected the expected passenger growth of the Airport, at least in the near to medium term.

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<sup>176</sup> Ex. C-54, p. 4.

<sup>177</sup> Ex. C-54.

<sup>178</sup> TR, Day 2, p. 208.

<sup>179</sup> Id.

<sup>180</sup> Ex. C-54, p. 17.

<sup>181</sup> See, e.g., TR, Day 3, p. 157.

139. The deterioration of the economic climate in Latvia also appears to have had an impact on the completion of the office building that Rixport Office had already begun to construct on Draw 2. Construction was suspended in or around late 2008. According to the Claimants' Mr. Lundeby, "prices for construction had dropped substantially," and Rixport Office wished to renegotiate the construction contract with its contractor, NCC Konstrukcija ("NCC"), which it was unable to do.<sup>182</sup> As a result, Mr. Lundeby testified that the project was "put on hold."<sup>183</sup> (Ultimately, as discussed below, the building was never completed.)
140. Moreover, Rixport did not subsequently undertake to construct any of the other office buildings that it had indicated in the Investment Memorandum that it planned to construct between 2009 and 2013. In a letter to SJSC Airport, dated 2 October 2009, Rixport acknowledged that: "The progress of the Rixport office project has been affected by the escalating global financial crisis since last fall and the deteriorating medium term macroeconomic outlook for Latvia continuing into this year, in that the Riga office market has substantially changed in terms of demand and rent levels relative to the prevailing conditions when the project was commenced earlier in 2008."<sup>184</sup>
141. The Claimants have nevertheless contended in this arbitration that Rixport did not proceed with the development of the office park and other facilities on Draws 2, 3 and 4 following the November 2007 amendments to the Land Lease Agreements because they "were to be developed after the development of Draw 1 Land 2" (where the "main" airport hotel was to be constructed).<sup>185</sup> According to the Claimants: "the undisputed first step of the Claimants' development project was to construct the Airport hotel" on Draw 1, and the required Land Plots were not being made available by SJSC Airport.<sup>186</sup>
142. The Tribunal notes, however, that this contention is in tension with Rixport's own development plans, as set forth in the Investment Memorandum, which provided that work on the business park would proceed first, with construction of the "main" airport hotel not contemplated to commence until 2010. Rixport's position is, moreover, not supported by the terms of the Land Lease Agreements themselves, as amended in November 2007, which did not make the development of Draws 2, 3 and 4 contingent

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<sup>182</sup> Lundeby second witness statement ¶21.

<sup>183</sup> *Id.*

<sup>184</sup> Ex. R-1.

<sup>185</sup> Cl. Reply ¶148.

<sup>186</sup> *Id.*

on the prior delivery of any part of Draw 1 and, in fact, did not contemplate, as already indicated, that Land 2 of Draw 1 would be made available for construction before 1 January 2009.

143. The Claimants nevertheless have complained that the technical project for the Airport was “constantly changing” in 2008.<sup>187</sup> While this is not disputed by the Respondent, it is unclear what, if any impact, these changes had on Rixport’s development plans, given that (i) construction of the “main” Airport hotel was not scheduled to commence until 2010; (ii) Rixport had not yet secured an operator for that hotel; and (iii) the changes in question did not prevent Rixport from commencing the development of the business park (which it did in 2008, but later suspended for reasons having nothing to do with SJSC Airport’s evolving development plans). It is, moreover, unclear how viable the project remained in late 2008, after the start of the financial crisis and Rixport’s apparent failure to attract an equity investment partner or otherwise to raise the capital that would have been needed for it to complete the development work that it had contracted to perform.<sup>188</sup>
144. In June 2008, and again on 25 November 2008, SJSC Airport informed Rixport that “there are several technical projects ongoing in the Airport in relation to ensuring the future development plans of the Airport’s terminals.”<sup>189</sup> As a result, SJSC Airport advised Rixport that, contrary to the amendment of the Land Lease Agreement executed in November 2007 (at least in the case of Land 2 of Draw 1), Land 2 and Land 3 of Draw 1 would not be available until 1 January 2010.<sup>190</sup> In the meantime, SJSC Airport indicated that Rixport would not be charged rent and would instead be asked to pay a smaller land reservation fee. No impacts were envisaged in respect of Draws 2, 3 or 4.
145. By letter, dated 3 December 2008, Rixport requested that, in these circumstances, it: (i) should be released from making infrastructure payments for Land 2 and Land 3 of Draw 1 until 1 March 2010; and (ii) should be granted a rent discount for Land Plots B-2 and B-4 of Land 1 of Draw 1 until one year before the opening of the new Airport terminal.<sup>191</sup> Rixport proposed to draft corresponding amendments to the Land Lease

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<sup>187</sup> Cl. Mem. ¶114.

<sup>188</sup> With respect to this, see the expert reports of Andrew Grantham.

<sup>189</sup> Letter, dated 25 November 2008, Ex. C-61.

<sup>190</sup> *Id.*

<sup>191</sup> Ex. C-62.

Agreement for Draw 1.<sup>192</sup> Rixport reiterated this request by letter, dated 5 January 2009.<sup>193</sup> It had also apparently lost interest by that time in developing Draw 4 and, thus, proposed that the Land Lease Agreement for Draw 4 be terminated, with Rixport to receive a rent holiday until the lease's termination in addition to receiving back all infrastructure payments already made by Rixport in respect of the Draw 4 land.<sup>194</sup>

146. Although SJSC Airport was prepared to make certain related concessions to Rixport, Rixport and SJSC Airport continued to engage in discussions throughout 2009 and into 2010 concerning additional potential amendments to the Land Lease Agreements occasioned by, *inter alia*:

- a draft “masterplan” for the Airport issued by the German construction company, Hochtief, in April 2009, which Rixport considered would affect its rights under the Land Lease Agreements for all of the Draws by, among other things, moving the position of the Airport terminal to a new location, running a railway through land leased to Rixport and requiring Rixport's concept for the business park to be changed;<sup>195</sup>
- the aborted negotiation and/or award of a public-private partnership (“PPP”) contract in 2009 to TAV Airports Holding, a Turkish company, and SIA Skonto Būve Consortium for the construction of a new Airport terminal and other facilities;<sup>196</sup>
- a project developed during 2009 for the possible construction of a new Airport terminal building for airBaltic, which Rixport also considered would negatively affect its rights;<sup>197</sup> and
- the opening of the 2003 Detailed Plan for changes by the Mārupe Municipal Council in order to take account of the airBaltic terminal plan.<sup>198</sup>

147. Although the Hochtief “masterplan,” the PPP contract and the plan for a new airBaltic terminal were never implemented, it is nevertheless the Claimants' position that these

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<sup>192</sup> Id.

<sup>193</sup> Ex. R-65.

<sup>194</sup> Letters, dated 25 November 2008 and 5 January 2009, Ex. R-66.

<sup>195</sup> Cl. Mem. ¶¶134-139; Cl. Reply ¶¶208-216; Exs. C-68, C-69 and C-71.

<sup>196</sup> Cl. Mem. ¶¶115-117; Cl. Reply ¶¶168-179, 200-207 and 241-250.

<sup>197</sup> Cl. Mem. ¶¶145-146; Cl. Reply ¶¶251-267.

<sup>198</sup> Cl. Reply ¶¶268-278.

plans, for as long as they were outstanding, had significant implications for, and interfered with the progress of, Rixport's own development plans. Moreover, disputes had also arisen between Rixport and SJSC Airport concerning unpaid rental and infrastructure payments, which Rixport considered that it should not have to make in the circumstances, and Rixport's contention, which SJSC Airport rejected, that Rixport had the right under the November 2007 amendment of the Land Lease Agreement for Draw 1 to operate the existing parking facilities that SJSC Airport was operating on Land 2 of Draw 1.<sup>199</sup>

148. Against this contentious background, Rixport and SJSC Airport engaged in a prolonged period of negotiations that culminated in the signature of an agreement on 5 November 2010 further amending each of the Land Lease Agreements (defined in ¶41 above as the "2010 Agreement").<sup>200</sup> The 2010 Agreement was followed by a subsequent agreement, dated 30 December 2010, which formally terminated the Land Lease Agreement for Draw 4 as of 1 January 2011, thus leaving only Draws 1, 2 and 3 to be developed by Rixport.<sup>201</sup>

149. The principal terms of the 2010 Agreement were as follows:

150. First, it was agreed that Rixport's indebtedness to SJSC Airport in respect of unpaid invoices for rent and infrastructure charges was to be reduced from EUR 3,040,306.80 to EUR 144,658.20, which Rixport undertook to pay in two equal parts on 15 December 2010 and 1 July 2011 (Clause 1.12). This reduction appears to have been the product of Rixport being granted: (i) a 100% rent holiday in respect of all four Draws for the period between 24 March 2010 and 18 August 2010, when the 2003 Detailed Plan was opened for changes; (ii) a rent holiday on account of "encumbrances" (a possible railway) for the period from 1 July 2009 until 31 December 2009 in respect of Land Plots B-2 and B-4 of Draw 1 and for Draw 3; (iii) the release of Rixport from rent payments for parts of Land 1 of Draw 1 until the removal of the encumbrance to those parts; and (iv) credits in respect of Draw 4, which Rixport would be returning.<sup>202</sup> In addition, it was agreed that Rixport would make infrastructure payments only in respect of the land fully available for development and transferred to the possession of Rixport at the date of signature of the agreement, which, according to the agreement, included

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<sup>199</sup> See, e.g. Østhus witness statement ¶¶28 and 31.

<sup>200</sup> Ex. C-86.

<sup>201</sup> Ex. R-76.

<sup>202</sup> Ex. C-86, Clauses 1.2 – 1.5 and 2.6.



Land 1 and Land 2 of Draw 2, Draw 3 and Draw No. 4 (although, as already stated, Rixport was to receive credits in respect of Draw 4, which was to be returned).<sup>203</sup> Infrastructure payments for the remaining land were to be made later.<sup>204</sup>

151. Second, Rixport was granted a number of rent holidays and discounts as from the date of the agreement in respect of Draws 1, 2 and 3.<sup>205</sup>
152. Third, the deadlines for Rixport's development of the leased land were postponed until 30 November 2015 in the case of Draws 2 and 3.<sup>206</sup> In the case of Draw 1, the deadline for the development of Land 1 was postponed until three years after SJSC Airport informed Rixport "about removal of encumbrances and . . . about plans of development of passenger terminals" relating "to the rights of" Rixport and approved by SJSC Airport's Board (the "**Notice about removal of encumbrances**").<sup>207</sup> Special provisions, as described below, pertained to Land 2 and Land 3 of Draw 1.
153. In the case of Land 2 of Draw 1, where Rixport's "main" Airport hotel and terminal parking facilities were to be developed, the 2010 Agreement catered for the possibility that SJSC Airport might decide to construct a new terminal in addition to the existing terminal (as was still being considered for airBaltic). The 2010 Agreement, thus, specified that if SJSC Airport "decides to construct a new passenger terminal separately from the existing passenger terminal of the airport and not to extend the existing airport terminal, or to construct a new passenger terminal and to extend the existing terminal," Rixport "has [the] right to construct the Hotel foreseen in the Lease Agreement . . . [for Draw 1] with direct access to the main flow of people between passenger terminals of the airport," in which case Rixport and SJSC Airport would sign an agreement for the lease of the land plot concerned and amend the lease for Draw 1 to exclude Rixport's right "to construct the Hotel in the Land 2 of Draw 1."<sup>208</sup> In addition, the party developing the new terminal would have no right to develop or operate a hotel connected to the terminal.
154. In the event, however, that SJSC Airport decided to extend the existing terminal and not to construct a new passenger terminal, then Rixport would retain its right to develop

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<sup>203</sup> Ex. C-86, Clause 1.16.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at Clauses 1.5 – 1.8 and 1.14-1.15.

<sup>206</sup> *Id.* at Clause 2.8.1.

<sup>207</sup> *Id.* at Clause 2.8.2.

<sup>208</sup> *Id.* at Clause 2.1.

the hotel and parking facilities on Land 2 of Draw 1 as provided in the Land Lease Agreement for Draw 1, as amended on 7 November 2007.<sup>209</sup> In such case, Land 2 of Draw 1 was to be developed “by constructing the hotel and parking, by commissioning it and starting operations of the hotel simultaneously with commissioning of the extended part of the terminal.”<sup>210</sup> The agreement nevertheless at the same time changed the borders of Land 1 of Draw 2.<sup>211</sup>

155. Although the 2010 Agreement did not state when a decision might be made concerning the possible construction of a new terminal or when, in the alternative, an extended terminal could be expected to be completed, it nevertheless provided that Rixport had the “right to take over . . . Land 2 of Draw 1 and [the] long term parking which is located on it, including rent of fixed assets of the Lessor . . . with a written request to the Lessor 3 (three) months in advance, by concluding the respective agreement to the Lease Agreement . . . [for Draw 1], including rent of the fixed assets.”<sup>212</sup> In such case, Rixport was to “pay rent . . . in the amount of 10% . . . from the turnover of [the] parking operations . . . plus applicable VAT, and . . . rent for sq. m. of the Land 2 of Draw 1 in the amount as determined in cl. 3.1 of the Lease Agreement for Draw 1 . . .”<sup>213</sup> This provision was intended to address the dispute over Rixport’s right to exploit SJSC’s parking facilities. However, the 2010 Agreement further provided that if Rixport proceeded to develop its own multi-storey parking facility on Land 2 of Draw 1, it would be required to remove SJSC Airport’s existing parking facilities at its own expense.<sup>214</sup> In addition, SJSC Airport retained the right to operate short-term parking facilities of its own at the Airport.<sup>215</sup>

156. As for Land 3 of Draw 1, Rixport confirmed that it was ready to transfer that land back to SJSC Airport if requested by SJSC Airport to do so by 31 December 2012.<sup>216</sup> In the event that SJSC Airport did not request the return of that land, the deadline for its development remained undefined.<sup>217</sup>

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<sup>209</sup> Id. at Clause 2.2.

<sup>210</sup> Id. at Clause 2.8.3.

<sup>211</sup> Id. at Clause 2.4; Ex. C-226.

<sup>212</sup> Ex. C-86, Clause 2.3.

<sup>213</sup> Id.

<sup>214</sup> Id. at Clause 2.2.

<sup>215</sup> Id. at Clause 2.1.

<sup>216</sup> Id. at Clause 2.5.

<sup>217</sup> Id. at Clause 2.8.4.

157. Fourth, Rixport was to “be involved and take part in working groups of the Lessor which are discussing future development plans of the land plots in the area of the airport, if it might concern” Rixport.<sup>218</sup>
158. Finally, Rixport and SJSC Airport agreed that the 2010 Agreement would operate to extinguish all past, present and future claims of Rixport and SJSC Airport against each other “in relation to fulfillment of mutual obligations arising out of the Lease Agreements for the period before signing of this Agreement, including, after payment of the remaining debt indicated in cl. 1.12 of the Agreement . . . .”<sup>219</sup>
159. The 2010 Agreement therefore had the effect, according to the Respondent, of “wip[ing] the slate clean” by establishing a new baseline for the relationship between Rixport and SJSC Airport.<sup>220</sup>
160. Rixport has noted that “[n]o specific changes were made to the provisions in the 2007 Agreement that SJSC Airport was planning to complete the extension works of the new airport terminal” by September 2011.<sup>221</sup> However, neither the 2007 Amendments nor the 2010 Agreement obliged SJSC Airport to do so. To the contrary, the November 2007 amendment of the Land Lease Agreement for Draw 1 expressly envisaged the possibility that the extension works would not be completed by September 2011 and provided that, if development of the Airport terminal(s) was delayed, the terms for commencement and completion of development of Draw 1 by Rixport would be “extended for the period equal to the respective delay upon request of” Rixport.<sup>222</sup>
161. The Claimants have argued that Rixport was “forced into accepting the 2010 Agreement.”<sup>223</sup> However, there is no evidence that this was the case. Under examination, Mr. Østhus acknowledged that Rixport and its investors had the option of “walking away, bagging our losses” and/or “litigating” insofar as they considered that they had been damaged by SJSC Airport’s (and, in their view, the Latvian Government’s) conduct.<sup>224</sup> But ultimately, it was Mr. Østhus’ belief that entering into the 2010 Agreement and settling all past claims was the better option because “we were

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<sup>218</sup> Id. at Clause 3.1.

<sup>219</sup> Id. at Clause 3.3.

<sup>220</sup> Resp. Rejoinder ¶127.

<sup>221</sup> Cl. Reply ¶303.

<sup>222</sup> Ex. C-45, Section 20.

<sup>223</sup> Cl. Reply ¶749.

<sup>224</sup> TR, Day 2, p. 196.

of the opinion that we would make money; not only recover, recoup what we had lost, but also make a profit,” given that “the financial crisis was getting to an end” and Rixport anticipated that it would be able “to reap the benefits . . . of being able to contract construction in a low market and basically take our time developing this area.”<sup>225</sup>

#### **E. Events following the 2010 Agreement**

162. Notwithstanding the agreement reached in November 2010, Rixport did not subsequently undertake any construction work on any of the Draws.
163. Nor was construction work ever recommenced on the office building that Rixport Office had started to construct on Draw 2 in 2008, but, as already noted, decided to suspend in 2009 in the wake of the 2008 financial crisis.
164. Ultimately, Rixport Office was declared insolvent in May 2010 by the Riga District Court,<sup>226</sup> and in April 2011 the unfinished building was purchased at an auction by a Latvian affiliate of Staur, SIA Staur Building (“**Staur Building**”).<sup>227</sup> A year later, on 29 June 2012, Staur Building entered into a Land Lease Agreement with SJSC Airport for a term extending until 2 November 2031, with a possible 25-year extension.<sup>228</sup> Like the earlier lease with Rixport Office, the lease provided that Staur Building would complete the construction of the building by 1 August 2013, but Staur Building failed to do so.
165. As Rixport Office had allowed the construction permit that it had obtained for the building to expire, Staur Building was required to obtain a new construction permit, but, for reasons that have not been explained, it did not contact the Mārupe Construction Board until 20 February 2013 to inquire about the reissuance of the earlier construction permit.<sup>229</sup> By letter, dated 14 March 2013, the Construction Board informed Staur Building that it should either apply for a new permit or re-register the earlier permit.<sup>230</sup> Staur Building then waited until 4 July 2013, *i.e.*, less than a month

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<sup>225</sup> *Id.* at p. 197.

<sup>226</sup> Ex. R-175.

<sup>227</sup> Ex. R-64, recital (d).

<sup>228</sup> Ex. R-64.

<sup>229</sup> Ex. R-174.

<sup>230</sup> Resp. Rejoinder ¶172.

before construction was to be completed, to apply for a new permit,<sup>231</sup> which was issued on 1 August 2013 for a period of two years.<sup>232</sup>

166. An issue then arose concerning the terms of the construction permit issued because the new permit, in accordance with the requirements of the applicable legislation, limited the maximum height of the building to 44.5 meters (*i.e.*, 40 meters above the height of the runway), as compared to 49 meters, for which Rixport had obtained approval from the Latvian Civil Aviation Agency in 2007.<sup>233</sup> After being petitioned by Rixport, in 2014, the Latvian Civil Aviation Agency would not authorize construction of the building to a height above 44.5 meters.<sup>234</sup> The Respondent has explained that the agency's new position was in accord with legislation adopted on 5 January 2008, after the agency's permission had first been obtained, that limited the height of buildings near airport runways to 40 meters above the height of the runway, and that Staur Building should have been aware of this legislation when it purchased the building in 2011.<sup>235</sup> It has not been contended that the lower authorized height prevented the completion of the building, although the Claimants have complained that the building had to be redesigned,<sup>236</sup> and the Respondent has acknowledged that there "may have been a cost involved with adjusting the original plans."<sup>237</sup>
167. It then took Staur Building until 19 March 2014 to submit a sketch design of the building to SJSC Airport for its approval,<sup>238</sup> which SJSC Airport required to be revised.<sup>239</sup> In addition, Staur Building was required to pay amounts claimed to be due to SJSC Airport before the design would be approved.<sup>240</sup>
168. It is unclear from the record what happened thereafter. The Respondent says that, when the issues raised in March 2014 were resolved, it approved Staur Building's design in February 2015.<sup>241</sup> However, Staur Building was complaining to SJSC Airport in January 2015 that approval of its design was wrongly being delayed by SJSC Airport's insistence that Staur Building first pay delay penalties, which Staur Building did not

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<sup>231</sup> Ex. R-176.

<sup>232</sup> Ex. R-177.

<sup>233</sup> Lundeby second witness statement ¶21; Ex. C-336.

<sup>234</sup> Ex. C-345.

<sup>235</sup> Resp. Rejoinder ¶¶176-178.

<sup>236</sup> Cl. Reply ¶165.

<sup>237</sup> Resp. Rejoinder ¶179.

<sup>238</sup> Letter, dated 10 April 2014, Ex. R-159.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Resp. Rejoinder ¶180.

consider to be due.<sup>242</sup> Whether or not, as contended by the Respondent, the design was ultimately approved in February 2015, it is common ground that Staur Building did not subsequently proceed with any construction work. Instead, it pressed SJSC Airport for amendments to the lease and the cancellation of invoices for rent. In the face of SJSC Airport's refusal to agree, Staur Building then purported, by letter dated 9 September 2015, to revoke the lease and also demanded repayment by SJSC Airport of all amounts paid by Staur Building under the lease since its conclusion in June 2012.<sup>243</sup> The Claimants contend that Staur Building took this action because it "realized that SJSC Airport had no intention of cooperating."<sup>244</sup>

169. On 28 June 2016, SJSC Airport commenced proceedings before the Riga District Court to request the lease's cancellation because of Staur Building's failure to pay rent, and in October 2017 Staur Building filed a counterclaim for cancellation of the lease and the damages that Staur Building claimed to have incurred.<sup>245</sup> On 12 April 2018, the Riga District Court issued a judgment cancelling the lease agreement and dismissing Staur Building's counterclaim.<sup>246</sup> The judgment was not appealed.

170. The Claimants have also argued that Rixport was prevented from undertaking construction work on all of the Draws that were the subject of the Land Lease Agreements subsequent to the 2010 Agreement. They have attributed Rixport's failure to begin developing the leased land "to the never ending changes initiated by SJSC Airport and the Latvian Government" in relation to the Airport's development during the period following the 2010 Agreement,<sup>247</sup> as well as SJSC Airport's allegedly repeated refusal to provide Rixport with information concerning the details of the development plans for the Airport.<sup>248</sup>

171. The Claimants have referred specifically to the following:

- First, they have noted that the airBaltic terminal project was terminated in May 2011<sup>249</sup> (although Rixport was not made aware of this at the time).<sup>250</sup>

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<sup>242</sup> Letter, dated 19 January 2015, Ex. R-160.

<sup>243</sup> Ex. C-353.

<sup>244</sup> Cl. Reply ¶167.

<sup>245</sup> Resp. Counter-Mem. ¶296; Exs. R-90 and R-91.

<sup>246</sup> Ex. C-373.

<sup>247</sup> Cl. Mem. ¶227.

<sup>248</sup> Cl. Mem. ¶228.

<sup>249</sup> Cl. Reply ¶¶306-318.

<sup>250</sup> Lundebj second witness statement ¶14.

According to the Claimants: "... termination of the agreement with airBaltic meant that approx. 18 months had been wasted on a potential development project involving construction of a new airBaltic terminal. It also meant that the status of the Airport terminal expansion project was again totally unknown."<sup>251</sup>

- Second, they have pointed to the application that SJSC Airport made on 26 April 2011 to the Construction Board of the Mārupe Municipality to reopen the 2003 Detailed Plan for the purpose of developing a new, amended Detailed Plan.<sup>252</sup> The application to reopen the Plan was approved by the Construction Board on 25 May 2011<sup>253</sup> and, after two years of development, a new Detailed Plan (the "**2013 Detailed Plan**") was approved by the Mārupe Municipality on 3 July 2013<sup>254</sup> and published in the Official Journal of Latvia on 10 July 2013.<sup>255</sup> It is undisputed that SJSC Airport requested changes to the 2003 Detailed Plan in order to permit SJSC Airport to carry out infrastructure projects at the Airport being financed by the European Union ("**EU**") Cohesion Fund. Those infrastructure projects comprised the renovation, reconstruction and construction of runways, aprons, taxiways and lighting and drainage systems, in addition to certain other facilities.<sup>256</sup> The Claimants contend that the work on a new Detailed Plan between May 2011 and July 2013 put Rixport "in a deadlock-situation" because it could not obtain construction permits while the new plan was being prepared, and it was also kept in the dark about the details of the plan being developed until February 2013, when it "learned about SJSC Airport's draft detailed plan via other channels."<sup>257</sup> It is also the Claimants' position that the 2013 Detailed Plan adversely affected Rixport's rights by: (i) imposing restrictions on building heights and density that did not apply previously; (ii) providing for the possible division of a land parcel (D5) upon which Rixport had intended to build the main Airport hotel; (iii) indicating railway routes across the leased land; (iv) changing open ground level parking facilities to a multilevel parking facility; and (v) moving the main

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<sup>251</sup> Cl. Reply ¶316.

<sup>252</sup> Id. at ¶¶319-327 and 407-443; Ex. R-5.

<sup>253</sup> Ex. C-94.

<sup>254</sup> Ex. R-129.

<sup>255</sup> Cl. Mem. ¶190. As discussed below, however, the effectiveness of the 2013 Detailed Plan was suspended as from 9 August 2013 as a consequence of applications filed by Rixport and Staur Building before the Latvian administrative courts for its annulment or amendment.

<sup>256</sup> Ex. R-6.

<sup>257</sup> Cl. Mem. ¶¶178 and 181.

Airport hotel away from the terminal behind the parking facilities.<sup>258</sup>

- Third, the Claimants have referred to a new Business Plan, dated 22 September 2011, for the Airport, which was prepared by SIA Ernst & Young Baltic (the “**2011 Business Plan**”) and approved by SJSC Airport before the end of that month (but not shared with Rixport or the Claimants at the time).<sup>259</sup> The Business Plan stated that: “The most significant investment activity that the Airport is planning to implement after 2020, is the 2<sup>nd</sup> stage of expansion of the existing terminal.”<sup>260</sup> According to the Claimants, it follows from this statement that “expansion of the Airport terminal (2<sup>nd</sup> stage) would not be initiated within the next ten years (or more).”<sup>261</sup> The Claimants argue that, as a consequence, “the Airport hotel could not be constructed and operations started” for another decade, given that, under the 2010 Agreement, the hotel was to be commissioned “simultaneously with commissioning of the expanded terminal.”<sup>262</sup> For the Claimants, this explains SJSC Airport’s disinterest in releasing Land 2 of Draw 1 to Rixport<sup>263</sup> (although Rixport did not, in fact, formally request the transfer of that parcel to Rixport until 25 October 2013).<sup>264</sup>
- Fourth, the Claimants have referred to a sketch design of the terminal that Rixport received from SJSC Airport on 25 March 2013.<sup>265</sup> According to the Claimants: “The sketch envisaged a completely different arrangement of the area compared to what SJSC Airport and Rixport had agreed to in 2006. To Rixport’s astonishment, the sketch depicted a multilevel parking-facility in front of the terminal, instead of the hotel SJSC Airport and Rixport had agreed Rixport would construct,” with the hotel placed behind the parking facility “contrary to Rixport’s right to construct a hotel directly connected to the terminal.”<sup>266</sup> In addition, rail tracks separated the hotel from the terminal.<sup>267</sup>

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<sup>258</sup> Id. at ¶204.

<sup>259</sup> Cl. Reply ¶¶328-339; Ex. C-228.

<sup>260</sup> Ex. C-228.

<sup>261</sup> Cl. Reply ¶331.

<sup>262</sup> Id. at ¶336.

<sup>263</sup> Id. at ¶337.

<sup>264</sup> Ex. C-126.

<sup>265</sup> Ex. C-98.

<sup>266</sup> Cl. Mem. ¶184.

<sup>267</sup> Cl. Reply ¶380.



- Fifth, the Claimants have complained that a new Municipal Spatial Plan was issued by the Mārupe Municipality on 18 June 2013 for the period 2014-2026 (the “**2013 Spatial Plan**”) that adversely affected Rixport’s rights because, like the 2013 Detailed Plan, it provided, *inter alia*, for possible rail tracks crossing the leased land.<sup>268</sup> The 2013 Spatial Plan was required to be issued because the plan in place when the Land Lease Agreements were entered into was expiring in 2014. The Respondent has explained that a Municipal Spatial Plan divides the land of a municipality into zones in which certain land uses are permitted or prohibited, in accordance with the Municipality’s planning strategy for a period of 12 years. The type of zone determines whether a planning permission for a particular development can be granted. It differs from a Detailed Plan, which is usually prepared by the landowner, subject to the Municipality’s approval.<sup>269</sup> Rixport challenged the 2013 Spatial Plan before the Ministry of Environmental Protection and Regional Development (“**MEPRD**”), but the MEPRD rejected the challenge concerning the possible railway on the basis that the railway remained subject to further studies and specifications and that its location was only potential. For the Claimants, the MEPRD “did not in any way recognize the fundamental fact that a railway crossing Rixport’s land would have paramount impact on Rixport’s plans . . . [and] Rixport’s need for predictability with respect to what the land Rixport had been leasing since 2006 was to be used for.”<sup>270</sup> In this regard, the Claimants have noted that the technical study for the railway line was not expected by the MEPRD to be completed until 2015, which, thus, placed Rixport “in a situation where it could not act” until that time.<sup>271</sup>

172. Because of the continuing delay in the finalization of the development plans for the Airport, and Rixport’s alleged inability to progress with its own development work in the circumstances, Rixport requested SJSC Airport to agree to further amendments to the Land Lease Agreements in addition to various rent and infrastructure payment discounts and holidays.

173. The first possible amendments appear to have been discussed between Rixport and SJSC Airport at meetings in February 2012 concerning the development of the “main

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<sup>268</sup> Cl. Mem. ¶¶220-226.

<sup>269</sup> Resp. Counter-Mem. ¶¶344 and 347.

<sup>270</sup> Cl Mem. ¶226.

<sup>271</sup> Id.

airport hotel directly connected to the terminal” and the long-term parking on Land 2 and Land 3 of Draw 1. Rixport proposed returning Land 2 and Land 3 of Draw 1 to SJSC Airport “to operate . . . as an integrated airport parking facility” and, accordingly, that the infrastructure payments for those land plots be deducted from future lease and infrastructure payments.<sup>272</sup> The proposed amendments were rejected, but SJSC Airport indicated that the “Airport is ready to return to discussion of the . . . proposals . . . when the further development . . . will be specified.”<sup>273</sup>

174. Then, on 5 July 2012, Rixport complained to SJSC Airport about the uncertainties surrounding the Airport’s development and the consequences for Rixport. It wrote:<sup>274</sup>

. . .

*In April 2010 the airport informed Rixport that the new detail plan will be completed in the summer of 2011. However, the detail plan has not been completed until this moment and plans of the airport are not clear. Until now Rixport has not been informed and invited to any meeting with the airport in connection to development of the territory surrounding the terminal which has been leased to Rixport, despite the obligation of the airport pursuant to cl.3.1 of the Agreement of November 5, 2010 to involve Rixport in working groups of airport, when discussing future development plans of the land plots. Pursuant to information available to us through press, the development of airport is delayed and could be started only in 2015/2016.*

*On May 25, 2011, the Municipality of Mārupe Region has adopted decision No. 11 “On development of detail plan for the Eastern part of the . . . “International airport “Rīga””. All areas leased to Rixport are included into the respective detail plan territory. . . . [T]he Chief of the Construction Authority of Mārupe Regional Municipality – Ms. Aida Lismane, has informed Rixport that starting planning and construction in the territory of the detail planning would not be permitted and reasonable until clarification of development plans of the airport, because the borders of red lines and access of transport to the terminal (including a possible railway connection) have not been determined yet. Since the detail planning of airport has not been opened for adjustment, the Construction Authority is not able to issue to Rixport any Planning and Architecture Tasks for construction . . . . It means that Rixport is not able to draft and approve any technical projects for construction in all land plots rented from airport until the new detail planning will enter into force . . . .*

*Taking into account the above-mentioned, Rixport is in the opinion that discount should be applied to rent for Draw 2 and Draw 3 in full amount of rent from May 25, 2011 until entrance into force of the new detail plan. Besides, discounts for development stage for the first two years after entrance into force of the new detail plan and development terms of land and deadlines for the payment of infrastructure fees should be prolonged.*

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<sup>272</sup> Letter, dated 29 February 2012, Ex. C-88.

<sup>273</sup> Letter, dated 26 March 2012, Ex. C-89.

<sup>274</sup> Ex. C-90.

175. Rixport added, with respect to the land plots adjacent to the terminal that:

*The main airport hotel, which is connected to the terminal, and operation of the short term parking are the substantial rights of Rixport, arising out of the valid Land Lease Agreements. If the airport proposed changes in the respective rights of Rixport, a fair compensation has to be provided to Rixport.*

176. Rixport thus requested SJSC Airport to: (i) provide “detailed information about the development plans of the airport terminal;” (ii) provide “other development plans of the airport which could influence land plots leased to Rixport;” (iii) confirm that Rixport “will be involved in working groups” of the airport in accordance with the 2010 Agreement; and (iv) confirm “the readiness of airport to reach the agreement with Rixport about rent holidays and amendments in other main terms of the Land Lease Agreements during the period when the detail plan is open for changes and Rixport is not able to use the land for the purpose indicated in the Land Lease Agreements.”

177. By letter, dated 21 August 2012, SJSC Airport responded to Rixport that it was “ready to involve Rixport in the working groups of [SJSC] Airport regarding development plans of the terminal of airport and other development plans of the Airport, which concern the land plots rented to Rixport.”<sup>275</sup> It further indicated that it was “ready to evaluate the issue about granting of rent discounts and amending other material terms of the Land Lease Agreements,” given that “the detail plan of the NE sector of the Airport was opened for adjustments”, but only as from the time “when Rixport submitted the request for architectural and planning” approval to the Construction Board of the Mārupe Municipality, which it understood from Rixport’s letter to be 18 April 2012. It further indicated its willingness to take over Land 3 of Draw 1 in accordance with the 2010 Agreement, “with a precondition that the Airport will not have any restrictions regarding further usage of the land plot.” It also proposed to review “other terms of the Land Lease Agreements based on mutually beneficial conditions.”

178. Discussions between Rixport and SJSC Airport ensued. However, no agreements were reached in respect of any amendments to the Land Lease Agreements.<sup>276</sup> Nor did SJSC Airport ultimately agree to grant Rixport any rent discounts or other relief on account of the opening of the 2003 Detailed Plan in May 2011 (or for any other reason) or to

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<sup>275</sup> Ex. C-91.

<sup>276</sup> Saveljevs first witness statement ¶99.

take over Land 3 of Draw No. 1, which SJSC Airport confirmed that it would not do, by letter, dated 20 December 2012.<sup>277</sup>

179. SJSC Airport, thus, continued to invoice Rixport for rent and infrastructure payments through 2012, although Rixport stopped paying those invoices in or around August 2012.<sup>278</sup> In December 2012, the Board of SJSC Airport then resolved to suspend the issuance of invoices to Rixport as from 3 December 2012 until the date of entering into an agreement with Rixport.<sup>279</sup> However, in the absence of any agreement having been reached, that resolution was revoked on 9 September 2013.<sup>280</sup>
180. By the time of the 9 September 2013 resolution, the relationship between SJSC Airport and Rixport had deteriorated to the point that the two of them were in litigation with each other in respect of the Land Lease Agreements before the Latvian civil courts. As already mentioned, on 6 March 2013, Rixport commenced a civil action against SJSC Airport before the Riga Regional Court.<sup>281</sup> Subsequently, the case was transferred to the Kurzeme Regional Court, where it continued until a judgment was rendered on 13 February 2015,<sup>282</sup> which was followed by an appellate judgment of 13 April 2016,<sup>283</sup> a Supreme Court judgment of 8 November 2018 remanding the case to the Kurzeme Regional Court for reconsideration<sup>284</sup> and finally the Kurzeme Regional Court's judgment of 5 July 2019.<sup>285</sup>
181. As originally filed on 6 March 2013, Rixport's claim was for a judgment: (i) ordering SJSC Airport to repay to Rixport all lease and other payments made by Rixport to SJSC Airport since 25 May 2011; (ii) declaring that Rixport had no obligation to pay any invoices issued since that date and, accordingly, ordering SJSC Airport to issue credit invoices to Rixport in respect of outstanding invoices; (iii) postponing the deadline for the making of infrastructure payments in respect of Land 2 and Land 3 of Draw 1 and Land 2 of Draw 2; and (iv) ordering SJSC airport to issue a credit invoice for an infrastructure payment invoice, dated 28 November 2007, in respect of Land 2 of Draw 1. Rixport amended its claim on 14 June 2013 to request an order terminating the Land

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<sup>277</sup> Ex. R-198.

<sup>278</sup> Exs. C-92 and C-93.

<sup>279</sup> Ex. C-297.

<sup>280</sup> Ex. C-299.

<sup>281</sup> Ex. R-78.

<sup>282</sup> Ex. C-138.

<sup>283</sup> Ex. C-139.

<sup>284</sup> Ex. R-181.

<sup>285</sup> Email, dated 1 August 2019, from Ms. Irwin of Lalive.

Lease Agreements for Draws 2 and 3,<sup>286</sup> and on 28 May 2014, it requested the court to terminate the Land Lease Agreement for Draw 1 as well.<sup>287</sup> In addition, it requested an order invalidating the 2010 Agreement, the equivalent of approximately EUR 25 million in reimbursements for payments made under the Land Lease Agreements, for expenses allegedly incurred in connection with the development of the business park, lost profits and interest.<sup>288</sup>

182. Rixport took the position before the Kurzeme Regional Court that the Land Lease Agreements should be terminated because, as a result of the changes to SJSC Airport's development plan and the 2003 Detailed Plan, SJSC Airport had effectively failed to transfer the leased land to it for its use and Rixport no longer had an interest in developing it. According to Rixport, the "essence" of its argument was that:<sup>289</sup>

*The claimant has lost the interest to use the land because if development of draw 1 by constructing a hotel and a parking, which should be opened simultaneously with the terminal as it is foreseen in the Agreement of November 5, 2010 will happen only in year 2020, the construction of draw 2 and draw 3 will be finished not earlier than in year 2022, it is only in the 16<sup>th</sup> year of lease and 9 years before the end of the term of lease agreement. Thus, the claimant would have only 11 years to profit, because the term of the lease agreement is November 3, 2031.*

183. In addition, Rixport asked the court to invalidate the 2010 Agreement on the basis that SJSC Airport had not informed Rixport at the time of the signature of that agreement that the terminal expansion project would not be completed until 2020.<sup>290</sup>
184. SJSC Airport disputed all of Rixport's claims and submitted a counterclaim for unpaid rent invoiced under the Land Lease Agreements (in an amount of EUR 3,228,830.98 as of 30 June 2014) plus contractual penalties in an amount of EUR 476,138.09 and interest.<sup>291</sup> In SJSC Airport's view, Rixport had failed to establish that SJSC Airport had delayed the transfer of any of the Draws, that Rixport had lost its interest in the leased land or that SJSC Airport had deceived Rixport when it entered into the 2010 Agreement.<sup>292</sup>

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<sup>286</sup> Ex. R-80.

<sup>287</sup> Id.

<sup>288</sup> Ex. C-138.

<sup>289</sup> Cl. Mem. ¶258.

<sup>290</sup> Ex. C-138.

<sup>291</sup> Id.

<sup>292</sup> Id.

185. While SJSC Airport acknowledged that there had been changes to the boundaries of the leased land and the Airport's development plans since the Land Lease Agreements were entered into, it submitted that "the boundaries were changed by mutual agreement, and, furthermore, all issues had been settled in the 2010 Agreement, in which Rixport had confirmed that it did not have and would not have any claims against SJSC Airport for the time period up to the signature of the Agreement."<sup>293</sup>
186. As regards the changes to the 2003 Detailed Plan, SJSC Airport denied that this had a negative impact on Rixport's development rights. It also submitted that, in any event, Rixport could have continued to carry out construction under that plan until the 2013 Detailed Plan was issued and subsequently upon its suspension as a consequence of actions filed before the Latvian administrative courts by Rixport and Staur Building for its nullification or amendment. For SJSC Airport, the "leased land remained unused at Rixport's choice."<sup>294</sup>
187. In this arbitration, the Respondent has also developed a number of arguments that echo those made by SJSC Airport before the Latvian courts.
188. Among others, it has emphasized that Draws 2 and 3 were not encumbered, and that Rixport was not prevented by any of the circumstances of which the Claimants have complained from developing those Draws. The Respondent has noted, with respect to the reopening and changes of the 2003 Detailed Plan, in particular, that:
- the only part of the planned new works that might have affected the leased land were drainage works on Draws 1 and 2, which Rixport had approved, and which did not interfere with Rixport's own planned development;<sup>295</sup>
  - contrary to Rixport's assertions, Rixport was not prevented from applying for and obtaining construction permits while the new Detailed Plan was being prepared, given that the 2003 Detailed Plan remained in effect during that period and the Construction Board of the Mārupe Municipality continued to issue construction permits to other parties during that time;<sup>296</sup> and

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<sup>293</sup> Resp. Counter-Mem. ¶254.

<sup>294</sup> Id. at ¶¶ 255-256.

<sup>295</sup> Resp. Counter-Mem. ¶225; Exs. R-9 – R-11.

<sup>296</sup> Resp. Counter-Mem. ¶¶376-399.

- the 2013 Detailed Plan did not contain any changes, in any event, that prevented the development of any part of the leased land or that were not otherwise foreshadowed by the 2003 Detailed Plan and existing legislation.<sup>297</sup>

189. It is also the Respondent's position, as already noted, that, irrespective of any encumbrances on Draw 1 (which were addressed in the 2010 Agreement), Draw 1 was not required to be developed in advance of the other Draws. Nor was it necessary, in the Respondent's view, for the Claimants to develop the main Airport hotel and parking facilities on Draw 1 before developing the business park on the other Draws. To the contrary, the Respondent argues that "Rixport was obligated to develop an entire business park, not only an airport hotel."<sup>298</sup> It is, moreover, the Respondent's position that, while Rixport may have wished to wait until SJSC Airport's development plans were permanently fixed before proceeding with the business park development, this was not "reasonable," given that an airport's development plans are continually evolving.<sup>299</sup> Because Rixport took no steps to develop the business park, SJSC Airport appears to have formed the view by the time of the proceedings initiated against it by Rixport in the Latvian courts that Rixport's only interest was in developing the main Airport hotel and parking facilities on Draw 1.<sup>300</sup>

190. The Respondent has argued, further, that Rixport was also not prevented by the delay in the finalization of the plans for the terminal expansion from proceeding with the development of an Airport hotel on Land 2 of Draw 1. Although it does not dispute that the 2010 Agreement provides, as the Claimants have argued, that the hotel and parking facilities on Land 2 of Draw 1 were to be commissioned "simultaneously with commissioning of the extended part of the terminal"<sup>301</sup> and has acknowledged, during the arbitration, that expansion of the main terminal building was delayed and is currently not expected to be completed until 2022,<sup>302</sup> it has nevertheless taken the position that the commissioning date stated in the 2010 Agreement was merely intended to ensure that the hotel was built "no later than the airport terminal."<sup>303</sup>

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<sup>297</sup> Id. at ¶¶415-434; Resp. Rejoinder ¶¶323-329.

<sup>298</sup> Resp. Rejoinder ¶216.

<sup>299</sup> Id. at ¶216.

<sup>300</sup> Saveljevs first witness statement ¶102.

<sup>301</sup> Ex. C-86.

<sup>302</sup> Resp. Counter-Mem. ¶338.

<sup>303</sup> Examination of Mr. Saveljevs, TR, Day 5, p. 176.

According to the Respondent, the 2010 Agreement did not preclude it from being built earlier.<sup>304</sup>

191. In this regard, the Respondent has also submitted: “Rixport held the lease for the land closest to the airport terminal; any hotel constructed on this land would have been within walking distance of the terminal, no matter the technical details of terminal expansion.”<sup>305</sup> SJSC Airport’s Mr. Saveljevs has testified that he provided Rixport with the development sketch (about which Rixport has complained, as mentioned above) on 25 March 2013 in order to “reassure” Rixport that it could develop an airport hotel with a “direct connection” to the terminal on Land 2 of Draw 1.<sup>306</sup> Notwithstanding the Claimants’ complaint that the sketch indicated that there would be a parking facility and a railway between the hotel and the terminal, for Mr. Saveljevs, this did not pose a problem as the “distances are not that far”<sup>307</sup> and a “passage” could be provided.<sup>308</sup>
192. He has further noted that Rixport did not make a request for SJSC Airport to vacate Land 2 of Draw 1 until its letter, dated 25 October 2013, in which Rixport requested that that parcel be vacated by 1 April 2014.<sup>309</sup> However, by that time, the Latvian court proceedings had already been initiated by Rixport, and it is Mr. Saveljevs’ evidence that SJSC regarded the request as a mere “negotiating tactic,” given that the request “was not backed by any evidence of . . . [Rixport’s] development plans (*e.g.*, construction permit, sketch design, *etc.*).”<sup>310</sup> During the hearing, he added that “we decided that we cannot risk the parking of an airport and transfer the land to Rixport, knowing that we are already in a court and Rixport is not fulfilling its contract obligations by paying the rent payments.”<sup>311</sup>
193. It is undisputed that Land 2 of Draw 1 was not subsequently made available to Rixport, but it is also the case that Rixport purported to terminate the Land Lease Agreement for Draw 1 by letter dated 21 March 2014<sup>312</sup> (*i.e.*, before 1 April 2014) and, as noted

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<sup>304</sup> TR, Day 8, p. 199.

<sup>305</sup> Resp. Rejoinder ¶215. See also examination of Mr. Saveljevs, TR, Day 5, pp. 174-178.

<sup>306</sup> Saveljevs first witness statement ¶55. See also TR, Day 5, p. 136.

<sup>307</sup> TR, Day 5, p. 179.

<sup>308</sup> *Id.* at p. 184.

<sup>309</sup> Saveljevs first witness statement at ¶88; Ex. C-126.

<sup>310</sup> Saveljevs first witness statement ¶88.

<sup>311</sup> TR, Day 5, p. 138.

<sup>312</sup> Ex. C-134.



above, amended its claim before the Kurzeme Regional Court on 28 May 2014 to request that lease's cancellation.

194. In parallel with the litigation initiated by it in the Latvian courts, Rixport (and Staur Building, in the case of the Detailed Plan) took action in August 2013 to challenge both the 2013 Detailed Plan and 2013 Spatial Plan before the Riga Administrative District Court and the MERP, respectively.<sup>313</sup> The Administrative District Court judgment rejecting the challenge of the 2013 Detailed Plan was issued on 16 May 2014,<sup>314</sup> and the MERP decision dismissing the challenge of the 2013 Spatial Plan was delivered by letter, dated 16 September 2013.<sup>315</sup> In the arbitration, Rixport has noted that, in its decision, the Administrative District Court referred to the Airport “as an object of national interest” and that the public’s interests in respect of the Airport, thus, “should be evaluated higher than the impairment of . . . [Rixport’s] rights and legal interests.”<sup>316</sup> The Respondent has observed, in this connection, that the Airport’s territory was granted this status on 2 July 2013 because of its ability to receive NATO military aircraft.<sup>317</sup> Although Rixport did not appeal the Administrative District Court’s judgment in respect of the 2013 Detailed Plan, the judgment was appealed to the Supreme Court by Staur Building, as a result of which (as at the date of the Hearing in this arbitration), the 2013 Detailed Plan has remained suspended since 9 August 2013.<sup>318</sup>

195. Rixport also challenged, first before the Mārupe Municipality and, then before the Administrative District Court, a large number of construction permits issued to third parties by the Municipality’s Construction Board during the period when the 2013 Detailed Plan was being developed.<sup>319</sup> Rixport took the position that those permits were not valid and that they infringed its rights in respect of the leased land. Rixport’s challenges were repeatedly dismissed by the Administrative District Court and, upon appeal, by the Supreme Court as unfounded (although as at the time of the Parties’ submissions in this arbitration some Supreme Court cases remained pending).<sup>320</sup> In at least one of those cases, the court expressly dismissed Rixport’s contention, which it

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<sup>313</sup> Exs. C-111 and C-113.

<sup>314</sup> Ex. C-111.

<sup>315</sup> Ex. C-118.

<sup>316</sup> Cl. Mem. ¶417.

<sup>317</sup> Resp. Counter-Mem. ¶408.

<sup>318</sup> Id. at ¶383; TR, Day 1, p. 226.

<sup>319</sup> Ex. R-105.

<sup>320</sup> Resp. Counter-Mem. ¶¶411-412.

has also advanced in this arbitration, that construction permits could not be granted during the preparation of the 2013 Detailed Plan.<sup>321</sup>

196. During the latter part of 2013 and in 2014, Rixport and SJSC Airport conducted settlement negotiations and engaged in a mediation in order to attempt to resolve the issues dividing them, but to no avail.<sup>322</sup> During this period, on 11 September 2013, SJSC Airport informed Rixport, in accordance with the 2010 Agreement, that encumbrances on Land 1 of Draw 1 had been removed.<sup>323</sup> But Rixport did not undertake to commence any development work on that Draw.
197. During the discussions between Rixport and SJSC Airport, there came a time when Rixport sought to involve representatives of the Latvian Government. As early as December 2012, Rixport had written to the Minister of Transport of Latvia to request his assistance in resolving the issues that were then “open” between Rixport and SJSC Airport “regarding ... future cooperation.”<sup>324</sup> The Minister of Transport refused to become involved on the basis that the management of SJSC Airport’s affairs was “not within the competence of the Ministry of Transport” and that, pursuant to Section 301 of the Commercial Law, SJSC Airport’s Board of Directors, as the “executive institution” of the company, was responsible for, among other things, “entering into civil transactions and resolving issues arising out of the transactions.”<sup>325</sup>
198. Subsequently, in September 2013, the Norwegian Chamber of Commerce in Latvia sent a letter to the Minister of Transport on Rixport’s behalf inviting him “to facilitate reaching of an agreement” between SJSC Airport and Rixport.<sup>326</sup> The Minister of Transport once again responded that it was not within the Ministry’s competence to become involved, and it merely undertook to forward the letter to SJSC Airport’s Board “for further resolution of the issue.”<sup>327</sup> This prompted two further letters, dated 17 October 2013 and 30 October 2013, to the Minister of Economics and Minister of Transport respectively, requesting that they agree to meet with Mr. Østhus.<sup>328</sup>

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<sup>321</sup> Ex. R-101.

<sup>322</sup> Saveļjevs first witness statement ¶¶104-108.

<sup>323</sup> Ex. R-4.

<sup>324</sup> Ex. C-5.

<sup>325</sup> Letter, dated 15 February 2013, Ex. C-119.

<sup>326</sup> Ex. C-123.

<sup>327</sup> Letter, dated 7 October 2013, Ex. C-124.

<sup>328</sup> Exs. C-125 and C-127.

199. A meeting was subsequently arranged on 7 November 2013 between Mr. Østhus, the Minister of Transport and Ms. Džineta Innusa, a Deputy State Secretary at the Ministry of Transport.<sup>329</sup> No written record of the meeting has been produced in the arbitration. However, according to Ms. Innusa, the meeting was brief and Mr. Østhus was again advised to take up the matter with SJSC Airport directly because this was a “commercial matter” that was not within the Ministry’s competence.<sup>330</sup>
200. On the same day, Mr. Østhus met with the Chairman of SJSC Airport’s Board. The meeting was followed by a letter dated 11 November 2013 to the Chairman in which Mr. Østhus proposed a possible new agreement in accordance with the following principles:<sup>331</sup>
- The parties would agree on a location for the Airport hotel directly connected to the terminal building, with roof covered access. The plot would be surveyed within one year of the agreement, and no other hotel would be permitted to be established in front of the terminal by other parties.
  - Rent levels for Draw 1 would be reduced and rent would become due only when the hotel and parking were ready for development.
  - Land 3 of Draw 1 would be returned by Rixport, without any financial penalty, if Rixport did not start to develop it within five years of the agreement.
  - The parties would waive all payment claims against each other in respect of Draw 1 as of the date of the agreement.
  - Rixport would have the exclusive right to operate short term parking at the Airport on Land 2 of Draw 1 and would be able to operate long term parking on any other part of Draw 1.
  - The term of the lease for Draw 1 would be extended for 10 years.
  - The lease agreements for Draws 2 and 3 would be “put on hold” for five years, with Rixport only liable to pay a reservation fee during those years. It would begin to pay rent, however, on any parts of those Draws that it decided to

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<sup>329</sup> Ex. C-129.

<sup>330</sup> Innusa first witness statement ¶58.

<sup>331</sup> Ex. C-129.

develop during those years. In the absence of any development, the leases would terminate, with all of the parties' payment claims in respect of the Draws being waived.

- All claims before the courts would be withdrawn, including in respect of construction permits and the 2013 Detailed Plan.

201. These principles were stated in the letter to follow from the fact that the plans for the Airport's development, as at the time of the signing of the Land Lease Agreements in 2006, had been scaled back, which Mr. Østhus claimed that the Minister had recognized in their separate meeting.
202. Meetings were subsequently held between representatives of Rixport and SJSC Airport to discuss Mr. Østhus' proposals on 19, 20 and 25 November 2013, but without any agreement being achieved.<sup>332</sup> Although, according to the minutes, he does not appear to have attended any of these meetings, Mr. Østhus wrote to the Minister of Transport on 24 November 2013 in order to complain that Rixport was getting nowhere with SJSC Airport's "bureaucrats," who had "tangled the situation" and considered the Ministry's "signals" to be "irrelevant for the assessment of the situation." Mr. Østhus, thus, requested that Ms. Innusa participate in the negotiations.<sup>333</sup> There is no record, however, that she subsequently did, although she recalls in her evidence that she participated in a further meeting with Rixport in 2014, together with other Ministry officials, at which no substantive negotiations took place.<sup>334</sup>
203. Notwithstanding the lack of progress that had been made in concluding a new agreement in 2013, further discussions were held between Rixport and SJSC Airport in early 2014, but with no greater success.<sup>335</sup>
204. Messrs. Østhus and Lundeby have both stated in their evidence that they were told by Mr. Saveljevs, who, as already indicated, was the Director of the Commercial Department of SJSC Airport and one of Rixport's principal counterparts in the negotiations, that it would be difficult for SJSC Airport to continue the project with Rixport "due to political reasons."<sup>336</sup> Mr. Saveljevs has no recollection of "ever saying

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<sup>332</sup> Exs. C-8, C-9 and C-10.

<sup>333</sup> Ex. C-130.

<sup>334</sup> Innusa first witness statement ¶58.

<sup>335</sup> Cl. Mem. ¶ 245.

<sup>336</sup> Lundeby first witness statement ¶43; Østhus witness statement ¶35.

anything like this,” and claims that SJSC Airport “very much wanted Rixport . . . to move forward with its development of the leased land.”<sup>337</sup>

205. Mr. Østhus has also claimed that he was introduced by Mr. Saveljevs to a company that wished to build a hotel in front of the Airport and that when Rixport maintained that it “would construct the hotel according to [its] agreement with the Airport without partners, the attitude from the Airports [sic] side got very aggressive.”<sup>338</sup> This also does not accord with the evidence of Mr. Saveljevs, who has testified:<sup>339</sup>

*. . . SJSC Airport informed Rixport that we had received an enquiry from a company called SIA FAD Holding (“FAD”) interested in developing an entertainment park and hotel at the Airport. We later received a letter from Rixport, claiming that we had violated the Land Lease Agreements by promising land leased to Rixport to another company. This was not the case. As we explained to Rixport at the time, we had told FAD that the plot of land in which they were interested was already leased to Rixport, and that they would have to negotiate with Rixport for the use of the land. As Rixport was apparently unwilling to negotiate with FAD, they moved on. SJSC Airport did not look for alternative tenants on its own initiative, and still wanted Rixport to develop the leased land.*

206. Mr. Lundeby has suggested that SJSC Airport terminated settlement negotiations with Rixport in February 2014 because of Rixport’s unwillingness to negotiate with FAD.<sup>340</sup> However, he acknowledged during the Hearing that he was no longer personally involved in any such negotiations at the time,<sup>341</sup> and, according to Mr. Østhus, settlement negotiations continued until the first quarter of 2016, when they came to an end because “the distance between the parties were [sic] too substantial to bridge.”<sup>342</sup>

207. Meanwhile, on 5 February 2014, Staur wrote to the Investment and Development Agency of Latvia to seek its assistance in resolving Rixport’s dispute with SJSC Airport and threatened to commence an international arbitration against Latvia if an agreement could not be reached.<sup>343</sup> This, in turn, prompted the Investment and Development Agency to write to the Prime Minister of Latvia on the subject on 27 February 2014.<sup>344</sup> He then directed the Minister of Transport to examine the matter

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<sup>337</sup> Saveljevs first witness statement ¶ 107.

<sup>338</sup> Østhus witness statement ¶35.

<sup>339</sup> Saveljevs first witness statement ¶ 109.

<sup>340</sup> Lundeby first witness statement ¶44.

<sup>341</sup> TR, Day 3, pp. 137-138.

<sup>342</sup> Østhus witness statement ¶52.

<sup>343</sup> Ex. C-131.

<sup>344</sup> Ex. C-132.

by requesting information from SJSC Airport, which the Minister of Transport did on 12 March 2014.<sup>345</sup>

208. As of that date, SJSC Airport had written to Rixport listing the outstanding invoices under the Land Lease Agreements and noting that the total amount exceeded the trigger for insolvency proceedings under Latvian law.<sup>346</sup> SJSC Airport warned Rixport that, if the debt remained unpaid, insolvency proceedings would be commenced against Rixport. However, there was never any follow up.
209. On 21 March 2014, Rixport notified SJSC Airport that it was cancelling the Land Lease Agreement for Draw 1,<sup>347</sup> and on 28 May 2014, as already noted, it amended its claim before the Kurzeme Regional Court, in order to request an order cancelling that agreement and additional related relief.<sup>348</sup>
210. This was followed on 30 June 2014 by the Claimants sending a notice of breach of the BIT to the Cabinet of Ministers of the Republic of Latvia.<sup>349</sup> The Claimants took the position that Latvia had breached its obligations to accord their investment in Rixport equitable and reasonable treatment and to subject it to measures having an effect similar to expropriation.
211. Meetings and negotiations followed with representatives of the Ministry of Transport and SJSC Airport, but without an agreement being reached.<sup>350</sup>
212. On 13 February 2015, the Kurzeme Regional Court issued its judgment in the case initiated against SJSC Airport by Rixport.<sup>351</sup> The court dismissed all of Rixport's claims and granted SJSC Airport's counterclaim in full. Rixport considered the judgment to be flawed for a number of reasons, including the court's failure, according to the Claimants, to recognize that Rixport had been prevented by SJSC Airport from

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<sup>345</sup> Ex. C-375.

<sup>346</sup> Letter, dated 3 March 2014, Ex. C-137.

<sup>347</sup> Ex. C-134.

<sup>348</sup> Ex. R-80.

<sup>349</sup> Ex. C-11.

<sup>350</sup> Cl. Mem. ¶¶252-253.

<sup>351</sup> Ex. C-138.

developing the leased land in accordance with the terms of the Land Lease Agreements.<sup>352</sup> Rixport thus appealed the judgment on 17 April 2015.<sup>353</sup>

213. A month later, SJSC Airport notified Rixport by letter dated 18 May 2015 that it was canceling the Land Lease Agreements for Draws 1-3 as a result of Rixport's defaults, in particular its failure to pay rent and penalties owed as of 30 April 2015.<sup>354</sup> Rixport objected to the notice of cancellation by letter dated 17 June 2015.<sup>355</sup>
214. An appellate judgment was then rendered on 13 April 2016 by the Kurzeme Regional Court, acting as an appellate body as permitted by Latvian law.<sup>356</sup> The appellate judgment was rendered by a panel of three of the court's fourteen judges, unlike the first instance judgment, which was rendered by a single (and different) judge.<sup>357</sup> In its appellate judgment, the Kurzeme Regional Court upheld the court's first instance judgment in its entirety. Although the Claimants have contended that they "had little faith in a reasonable outcome of the judicial process in Latvia,"<sup>358</sup> and have made a claim in this proceeding, as discussed further in Section VI below, for denial of justice, the appellate judgment was, in turn, appealed by Rixport to the Latvian Supreme Court on 10 May 2016.<sup>359</sup>
215. While that appeal was still pending, the Claimants initiated this arbitration, as already mentioned, on 4 November 2016.
216. On 16 December 2016, SJSC Airport then commenced its own proceedings against Rixport before the Riga District Court to request that the Land Lease Agreements be cancelled, in accordance with Clause 5 of each of the agreements, on the basis of Rixport's non-payment of amounts owed thereunder.<sup>360</sup> By a judgment issued on 18 December 2017, after hearing both SJSC Airport and Rixport, the court granted SJSC

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<sup>352</sup> Cl. Mem. ¶¶265-266.

<sup>353</sup> Id. at ¶268.

<sup>354</sup> Resp. Counter-Mem. ¶294; Ex. R-88.

<sup>355</sup> Ex. R-89.

<sup>356</sup> Ex. C-139.

<sup>357</sup> Resp. Counter-Mem. ¶642.

<sup>358</sup> Cl. Mem. ¶154.

<sup>359</sup> Id. at ¶163.

<sup>360</sup> Resp. Counter-Mem. ¶297.

Airport's request.<sup>361</sup> The judgment was not appealed, with the consequence that the Land Lease Agreements were cancelled as of 16 December 2016.

217. Subsequently, however, by a judgment of 8 November 2018, the Latvian Supreme Court revoked the appellate judgment of the Kurzeme Regional Court rendered in respect of Rixport's claims and SJSC Airport's counterclaims on 13 April 2016 and remanded the case to the Kurzeme Regional Court for review.<sup>362</sup> As the Respondent has indicated, the "principal reason for the remand of the case" was the Supreme Court's finding that the appellate judgment had not addressed events occurring after the 2010 Agreement and, in particular, whether Rixport "was able to exercise its rights under the 2010 Agreement subsequent to the signature of that Agreement."<sup>363</sup>
218. In remanding the case, the Supreme Court, thus, specified that the Kurzeme Regional Court should consider "(i) how realistic it was for Rixport to carry out construction while the 2013 Detailed Plan was being developed and (ii) whether this possibility to construct corresponded to Rixport's 'plans and rights' in the context of the Land Lease Agreements."<sup>364</sup>
219. By a judgment of 5 July 2019, a new three-judge panel of the Kurzeme Regional Court once again dismissed Rixport's claims and accepted SJSC Airport's counterclaims, but unlike the earlier judgments, accepted SJSC Airport's counterclaims only in part.<sup>365</sup> The reconstituted panel decided, unlike its predecessor panel and the first instance judge, to dismiss the part of SJSC Airport's counterclaims that was for penalties totaling EUR 476,138.09, while finding that SJSC Airport was entitled to rent in an amount of EUR 3,228,830.98 plus interest and costs.
220. By emails, dated 6 and 19 August 2019, the Parties' representatives confirmed that the judgment was not appealed to the Supreme Court and has, thus, become final. The Claimants' counsel stated: "After more than six years of litigation in Latvia, the Claimants have concluded that this process is futile."

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<sup>361</sup> Ex. R-77.

<sup>362</sup> Ex. R-181.

<sup>363</sup> Resp. Rejoinder ¶¶188-189.

<sup>364</sup> Id. at ¶190.

<sup>365</sup> Attachment to email, dated 1 August 2019, from Ms. Irwin.



#### IV. SUMMARY OF CLAIMANTS' CLAIMS

221. Against the above factual background, the Claimants have advanced the following claims against the Respondent in this arbitration:

222. First, they contend that the Respondent has failed to accord equitable and reasonable treatment and protection to their investment, in breach of Article III of the BIT, which provides that:<sup>366</sup>

*Each Contracting Party shall promote and encourage in its territory investments of investors of the other contracting party and accept such investments in accordance with its laws and regulations and accord them equitable and reasonable treatment and protection. Such investments shall be subject to the laws and regulations of the contracting party in the territory of which the investments are made.*

223. It is the Claimants' position that the Respondent has breached Article III by: (i) failing to provide a transparent, consistent and stable business framework; (ii) violating the Claimants' legitimate expectations; and (iii) denying the Claimants' justice by failing to provide administrative and judicial due process.<sup>367</sup>

224. These breaches are claimed to have been the product of a series of acts and omissions of SJSC Airport, the Mārupe Municipality, the Ministry of Transport, the Ministry of Justice, the Latvian Parliament and the Latvian courts, all acting as organs of the Latvian State, within the meaning of Article 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts of the International Law Commission (the "ILC Articles") or, alternatively, that are attributable to the State, in the case of SJSC Airport, on the basis of the principles set forth in Articles 5 or 8 of the ILC Articles.<sup>368</sup>

225. In addition, the Claimants assert that the Respondent has unlawfully expropriated the Claimants' investment, in breach of Article VI(1) of the BIT, which provides:<sup>369</sup>

*Investments made by investors of one contracting party in the territory of the other contracting party cannot be expropriated, nationalized or subjected to other measures having a similar effect (all such measures hereinafter referred to as "expropriation") except when the following conditions are fulfilled:*

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<sup>366</sup> Ex. C-1.

<sup>367</sup> Cl. Mem. ¶¶456-534.

<sup>368</sup> Id. at ¶¶319-453.

<sup>369</sup> Ex. C-1.

- (I) *The expropriation shall be done for public interest and under domestic legal procedures;*
- (II) *It shall not be discriminatory;*
- (III) *It shall be done only against prompt, adequate and effective compensation.*

226. According to the Claimants, the Respondent has expropriated their investments through a series of actions and omissions amounting to a creeping *de facto* expropriation, which became a *de iure* expropriation on 18 December 2017 when the Land Lease Agreements were declared cancelled by the Riga District Court.<sup>370</sup> The Claimants contend that the Respondent's actions and omissions have led to "the virtual annihilation of the investment, through the effective neutralisation of the Claimants' rights."<sup>371</sup>

227. The Claimants also submit that Latvia has breached the umbrella clause contained in Article 2(2) of the UK-Latvia BIT (and/or other BITs), which they say should be considered to have been imported into the BIT by virtue of the BIT's MFN clause (Article IV).<sup>372</sup> Article IV(1) provides:

*Investments made by investors of one contracting party in the territory of the other contracting party shall be accorded treatment no less favourable than that accorded to investments made by investors of any third state.*

228. Article 2(2) of the UK-Latvia BIT in turn provides that:<sup>373</sup>

*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.*

229. The Claimants have referred to similar provisions in several other Latvian BITs, all of which, according to the Claimants, have the effect, via the BIT's MFN clause, of making the Respondent liable to the Claimants under the BIT for SJSC Airport's alleged breaches of the Land Lease Agreements. In this regard, it is the Claimants' position, that, although the Land Lease Agreements were entered into by Rixport and

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<sup>370</sup> Cl. Reply ¶845.

<sup>371</sup> Id. at ¶844.

<sup>372</sup> Cl. Mem. Section 8.4; Cl. Reply ¶¶870-947.

<sup>373</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Latvia for the Promotion and Protection of Investments, Ex. CL-5 ("UK-Latvia BIT").

SJSC Airport, the contractual obligations “are those of the Respondent by attribution, and the contractual rights are those of the Claimants, and not just Rixport.”<sup>374</sup>

230. The Claimants therefore request an award: (i) declaring that the Respondent has breached the BIT in all of the above respects; and (ii) ordering the Respondents to pay full reparation in an amount that, as already mentioned, they have most recently quantified as EUR 41.9 million, together with interest and costs.<sup>375</sup>

231. Given that the Respondents have raised jurisdictional objections in respect of most of the Claimants’ claims, those objections are addressed first below, followed by an analysis of the claims on their merits.

## V. JURISDICTION

232. The Claimants have commenced this arbitration pursuant to Article IX of the BIT, which provides in the following terms for the settlement of “legal disputes” between an investor of one Contracting Party and the other Contracting Party “in relation to an investment of the former in the territory of the latter”:

*If any dispute between an investor of one Contracting Party and the other Contracting Party continues to exist after a period of three months, the investor shall be entitled to submit the case either to:*

*(C) The International Centre for Settlement of Investment Disputes having regard to the applicable provisions of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States opened for signature in Washington, D.C. on 18 March 1965, or in case both Contracting Parties have not become parties to this Convention,*

*(D) An arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law. The Parties to the dispute may agree in writing to modify these rules. The arbitral awards shall be final and binding on both parties to the dispute.*

233. Under Article I(1) of the BIT, an “investment” is defined to mean:

*[E]very kind of asset invested in the territory of one Contracting Party in accordance with its laws and regulations by an investor of the other contracting party and shall mean in particular, though not exclusively:*

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<sup>374</sup> Cl. Reply ¶946.

<sup>375</sup> An additional claim for a tax gross up was dropped at the hearing. Claimants’ Closing Statements, slide 67.

- (I) *Movable and immovable property and any other property rights such as mortgages, liens, pledges and similar rights;*
- (II) *shares, debentures or any other forms of participation in companies;*
- (III) *claims to money which has been used to create an economic value or claims to any performance under contract having an economic value;*
- (IV) *industrial and intellectual property rights, such as technology, know-how, trade-marks and goodwill;*
- (V) *business concessions conferred by law or under contract including concessions to search for, cultivate, extract and exloit [sic] antural [sic] resources;” . . .*

234. In addition, under Article I(3) of the BIT, the term “investor” includes, *inter alia*: “Any legal person such as any corporation, company, firm, enterprise, organization or association incorporated or constituted under the law in force in the territory of that contracting party.”

235. Pursuant to Article II of the BIT, the treaty applies to investments made after 1 January 1987 “in the territory of a Contracting Party in accordance with its laws and regulations.”

236. The arbitration has, thus, been initiated under Article IX of the BIT on the basis that the investments at issue were all made after 1 January 1987 and that the present arbitration concerns a “legal dispute” in respect of investments that were legally made and that constitute “investments” by “investors” within the meaning of the BIT.

237. In addition, the Claimants contend that the arbitration satisfies the jurisdictional requirements of Article 25 of the ICSID Convention, to which both Norway and Latvia are Contracting States and according to which ICSID has jurisdiction over “any legal dispute arising directly out of an investment” between a Contracting State and a national of another Contracting State.

238. The Claimants further note that, by invoking Article IX of the BIT in combination with Article 25 of the ICSID Convention when submitting their Request, they have expressed their consent in writing to submit the present dispute to ICSID.

239. With the exception of the denial of justice claims, the Respondent has raised three objections to the Tribunal’s jurisdiction in respect of all of the Claimants’ claims, which the Respondent has set out in the following terms:<sup>376</sup>

- (i) the Claimants’ claims, except the denial of justice claims, are contract claims rather than treaty claims, given that they are fundamentally concerned with the performance of the Land Lease Agreements, and disputes arising under those agreements were to be submitted to the Latvian courts, as they have been;
- (ii) the claims are primarily concerned with the acts and omissions of SJSC Airport, a corporate entity whose acts and omissions are not attributable to the Latvian State; and
- (iii) the Tribunal has no jurisdiction over claims of Rox and Staur that are based on events before they became shareholders of Rixport, *i.e.*, on 19 January 2007 and 17 April 2008, respectively.

240. The Respondent has described the last of these as a “pure” jurisdictional objection, while submitting that the first two objections can be “conceptualised in several different ways,” *i.e.*, as pertaining to jurisdiction, the admissibility of the claims or as objections that defeat the claims on their merits.<sup>377</sup> It nevertheless has argued that its objections should be considered to have a jurisdictional character as it would follow, if they are accepted, that there would be no dispute between the Parties within the meaning of Article IX of the BIT.<sup>378</sup>

241. The Parties’ positions with respect to each of these objections are briefly summarized below, followed by the Tribunal’s analysis and decision on its jurisdiction.

#### **A. The Contract Claim Objection**

242. It is the Respondent’s position that, with the exception of the denial of justice claims, the claims do not fall under the dispute resolution clause in Article IX of the BIT because they are contract claims dressed up as treaty claims and “have no autonomous existence as potential treaty breaches.”<sup>379</sup>

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<sup>376</sup> Resp. Counter-Mem. ¶¶ 469-562; Resp. Rejoinder ¶¶ 356-530; TR, Day 1, pp. 154-156 and 166-200; TR, Day 8, pp. 121-138.

<sup>377</sup> TR, Day 1, p. 166.

<sup>378</sup> *Id.*

<sup>379</sup> Resp. Rejoinder ¶ 519.

243. According to the Respondent, the Claimants are, in effect, undertaking to relitigate claims that they brought unsuccessfully before the Latvian courts under the Land Lease Agreements, which the Claimants describe as the “normative source of the Claimants’ claims.”<sup>380</sup> In this regard, the Respondent argues that, while the Claimants “make some complaints about the actions of the Mārupe Council, with the exception of the Claimants’ allegations relating to the alleged hindrance by the Mārupe Council of Rixport’s exercise of its contractual rights under the Land Lease Agreements, all of these actions are irrelevant to the Claimants’ case.”<sup>381</sup>
244. In addition, the Respondent contends that the actions of the Ministry of Transport about which the Claimants complain cannot provide an independent basis for jurisdiction because it is claimed that the actions of the Ministry had an impact on SJSC Airport, “which consequently failed to respect Rixport’s contractual rights under the Land Lease Agreements.”<sup>382</sup> For the Respondent, the actions of the Ministry of Transport “are but background,” and only the conduct of SJSC Airport is relevant.<sup>383</sup>
245. Relying, *inter alia*, upon the cases of *Impregilo v. Pakistan*, *Toto v. Lebanon*, *Malicorp v. Egypt*, *Hamester v. Ghana*, *BIVAC v. Paraguay* and *Pantehniki v. Albania*,<sup>384</sup> the Respondent argues that for an alleged breach of a contract to amount to a treaty breach, either “(i) the State must at least have gone beyond what a contractual party could do, **using its *puissance publique* to interfere with contractual rights in a manner that amounts to an international wrong**” or “(ii) the **contractual forum must be unavailable** to hear the claims for reasons not attributable to the claimant itself” (emphasis in the original).<sup>385</sup>
246. In the present case, it is the Respondent’s position that neither requirement has been satisfied. The Respondent argues that the actions that SJSC Airport took with respect to Rixport “were all actions that it took in its role as the counterparty to the Land Lease Agreements,” and Rixport has had the opportunity to pursue claims before the

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<sup>380</sup> Resp. Counter-Mem. ¶544.

<sup>381</sup> *Id.*

<sup>382</sup> Resp. Rejoinder ¶527.

<sup>383</sup> *Id.*

<sup>384</sup> *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, Ex. CL-71; *Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Award, 7 June 2012, Ex. RLA-25; *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, Ex. RLA-17 (“*Malicorp v. Egypt*”); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, Ex. CL-41 (“*Hamester v. Ghana*”); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012, Ex. RLA-19; and *Pantehniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, Ex. RLA-18.

<sup>385</sup> Resp. Counter-Mem. ¶¶547-557; Resp. Rejoinder ¶523.

contractually chosen forum, the Latvian courts, that are “fundamentally the very same claims” that the Claimants are now undertaking to assert under the BIT.<sup>386</sup>

247. Although the Respondent appears to accept that the “conceptual framework is slightly different in the context of umbrella clauses,”<sup>387</sup> it does not consider that there is any applicable umbrella clause in this case or, in any event, a contract between the Claimants and the Latvian State to which it might apply.<sup>388</sup> This is discussed further in Section VI below.
248. The Claimants dispute the Respondents’ contention that their claims are contract claims and argue, to the contrary, that they are claims for treaty breaches in respect of their investments in Latvia, based on the BIT.
249. The Claimants have, thus, undertaken to establish that their claims are different from the claims brought before the Latvian courts and that their normative source is the BIT.<sup>389</sup> In this regard, the Claimants submit that: (i) “the claims do not relate to the Land Lease Agreements *per se*, but rather to the regulatory, executive and judicial conduct of the Respondent which made the investment project impossible to conduct”; and (ii) “to the extent that some claims do concern the egregious violation of the Land Lease Agreements . . . the Latvian State’s *‘behaviour went beyond that which an ordinary contracting party could adopt’* and as such it forms a breach of the . . . BIT” (emphasis in original).<sup>390</sup>
250. As examples of acts that only a State could adopt, the Claimants refer to the expropriation of the exercise of their contractual rights and the repeated amendments of the plans for the Airport’s development.<sup>391</sup>
251. According to the Claimants, the State “did not merely fail in its obligations under the contract[s], but also incessantly interfered, by way of governmental action, making the execution of the contract[s] impossible.”<sup>392</sup> Relying on the Award in *Alpha v. Ukraine*, the Claimants make the argument that it was the State that caused SJSC Airport to

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<sup>386</sup> Resp. Counter-Mem. ¶¶559-561.

<sup>387</sup> TR, Day 1, p. 191.

<sup>388</sup> Resp. Counter-Mem. ¶¶673-689; Resp. Rejoinder ¶¶586-602.

<sup>389</sup> Cl. Reply ¶¶543-568.

<sup>390</sup> Id. at ¶555.

<sup>391</sup> Id. at ¶556.

<sup>392</sup> Id. at ¶557.

breach its contractual obligations. They further submit that “the means of pressure and interference the government exerted went beyond the bounds of the legal procedures applicable to the SJSC Airport.”<sup>393</sup>

252. In addition, it is the Claimants’ position that their claims could not be settled by the Latvian court system because, as already stated above, they do not relate to the Land Lease Agreements themselves, but are treaty claims beyond the competence of those courts. They further argue that, in any event, the Land Lease Agreements do not confer exclusive jurisdiction on the Latvian courts, a contention that the Respondent contests,<sup>394</sup> and that “the Latvian court system has shown itself incapable of dispensing justice.”<sup>395</sup>

### **B. The Non-Attribution Objection**

253. The Respondent acknowledges that the acts or omissions of organs of the Latvian State, such as the Ministry of Transport, the Mārupe Council, the courts and the Ministry of Justice, are attributable to Latvia. However, it argues that “the vast majority of the acts” upon which the Claimants have based their claims are acts of SJSC Airport and that those claims fall outside the Tribunal’s jurisdiction because the acts of SJSC Airport are not attributable to Latvia under international law,<sup>396</sup> with the effect that, for this reason, there also cannot properly be said to be a dispute between the Parties under Article IX of the BIT.

254. The Respondent submits that the acts of SJSC Airport are not attributable to Latvia because:

(a) SJSC Airport is a corporate legal entity under Latvian law that is separate from the State and is therefore not a State organ within the meaning of Article 4 of the ILC Articles;

(b) SJSC Airport does not exercise elements of governmental authority within the meaning of Article 5 of the ILC Articles; and

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<sup>393</sup> Id. at ¶559.

<sup>394</sup> TR, Day 8, pp. 138-139.

<sup>395</sup> CI Reply ¶¶561-568.

<sup>396</sup> Resp. Counter-Mem. ¶¶480-542; Resp. Rejoinder ¶¶365-518.



(c) SJSC Airport does not and did not act in relation to any of the alleged breaches, under the direction or control of the State of Latvia within the meaning of Article 8 of the ILC Articles.<sup>397</sup>

255. Unlike the Respondent, the Claimants do not consider that the issue of attribution pertains to the Tribunal’s jurisdiction, but rather that it is an issue relevant to the merits of its claims.<sup>398</sup>

256. With respect to attribution, it is the Claimants’ position, also contrary to that of the Respondent, that the acts of SJSC Airport are attributable to the Respondent because:

(a) SJSC Airport, while legally separate from the State, is a *de facto* State organ under international law;

(b) alternatively, SJSC Airport exercises elements of governmental authority associated with the management, in the public interest, of the Airport, which is a “strategic State asset” and “object of national interest”; or

(c) alternatively, SJSC Airport’s conduct is “instructed, directed or controlled by the State.”<sup>399</sup>

257. The Claimants and the Respondent have made detailed and lengthy written and oral submissions in support of their respective positions on attribution. The Tribunal has carefully considered all of those submissions, but sees no need to describe them comprehensively here. For present purposes, the following brief description suffices:

258. It is, as already noted, the Claimants’ view that SJSC Airport is an instrument of the Latvian State, with no real autonomy of its own, notwithstanding its separate legal personality. In this regard, the Claimants have relied heavily on the role allegedly played by the Ministry of Transport in the control of SJSC Airport’s decision-making and operations.

259. They have argued, first, that the Airport is “governed by its own specific legal framework aimed at ensuring essential public interests”<sup>400</sup> and have referred the

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<sup>397</sup> Id.

<sup>398</sup> TR, Day 8, p. 56.

<sup>399</sup> Cl. Mem. ¶¶319-453; Cl. Reply ¶¶569-738.

<sup>400</sup> TR, Day 1, p. 89; Cl. Reply ¶¶606-611.

Tribunal to various provisions of the Latvian Law on State and Local Government Capital Shares and Capital Companies and its successor legislation, the Law On Governance of Capital Shares and Capital Companies (the “**SOE Law**”)<sup>401</sup> in addition to other statutes such as the Law on the Prevention and Squandering of Financial Resources and Properties of a Public Person.<sup>402</sup> The Claimants also note that the Cabinet of Ministers of Latvia has classified the Airport as an “object of national interest, necessary to ensure essential public interests,” as recognized by the Riga Administrative District Court.<sup>403</sup>

260. Second, the Claimants submit that SJSC Airport does not have an “independent” Board and operates under the “close control” of the Ministry of Transport.<sup>404</sup> They contend, *inter alia*, that SJSC Airport’s lack of independence from the State is confirmed by a 2015 OECD review of the corporate governance of State-owned enterprises (“**SOEs**”) in Latvia (the “**OECD Report**”),<sup>405</sup> according to which SOEs are commonly used by the Latvian Government “as a vehicle for sectorial policies” without there being any “clear distinction between the state’s ownership function from other state functions that could influence conditions for Latvian SOEs.”<sup>406</sup> They further note that, as from June 2009, when the Supervisory Council was abolished as a corporate governance body of SOEs by an amendment to the SOE Law, State Secretaries representing the Government shareholder “*de facto* [have] act[ed] as the board of directors for some of the country’s largest enterprises and are individually responsible for the corporate governance and management of all SOEs in their ministry’s portfolio,” according to the OECD Report.<sup>407</sup>

261. The Claimants further submit that the findings and conclusions of the OECD Report are supported by other documents, such as a “Position Paper on Competitiveness of State-Owned Enterprises” prepared by the Foreign Investors Council in Latvia,<sup>408</sup> a presentation, entitled “Policy for Effective Management of State-owned Enterprises in Latvia,” made by Mr. Juris Puce, the then-State Secretary of the Ministry of Economics, on 5-6 September 2011,<sup>409</sup> an Order No. 246 of the Cabinet of Ministers regarding “the

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<sup>401</sup> Exs. C-148 and C-149.

<sup>402</sup> Ex. C-356.

<sup>403</sup> TR, Day 1, pp. 90-91; Ex. C-111.

<sup>404</sup> TR, Day 1, p. 91; Cl. Reply ¶¶588-605.

<sup>405</sup> Ex. C-163.

<sup>406</sup> *Id.* at p. 15.

<sup>407</sup> *Id.* at p. 45.

<sup>408</sup> Ex. C-169.

<sup>409</sup> Ex. C-168.

Governance Concept of State Capital Shares”<sup>410</sup> and two papers prepared by academics at Riga Technical University, according to which SOEs in Latvia routinely act as vehicles for the exercise of political influence and control in Latvia.<sup>411</sup> The Claimants have drawn attention, in particular, to the affirmation of Mr. Puce in his September 2011 presentation that: “Government is **extensively involved in SOE governing** including significant political influence over operational decisions” (emphasis in original).<sup>412</sup>

262. Third, the Claimants argue that SJSC Airport’s Board members are “politically appointed and refer to themselves as state officials.”<sup>413</sup> According to the Claimants, “such ‘significant political influence’ has been very much present with respect to SJSC Airport,” given the “extremely tight links to the Ministry of Transport (and other Ministries)” of members of its Supervisory Council (until it was eliminated in 2009) and its Management Board.<sup>414</sup> These “tight links” are evidenced, according to the Claimants, in particular by a number of press reports to which they have referred the Tribunal.<sup>415</sup> The Claimants have drawn attention, in particular, to the allegedly “inappropriate[] close relationship between Krisjanis Peters, who was appointed as chairman of the Management Board in 2007, and the man who appointed him, namely Mr. Šlesers, the Minister of Transport.”<sup>416</sup>
263. Fourth, as already mentioned, the Claimants also rely heavily on SJSC Airport’s alleged financial dependence on the State.<sup>417</sup> According to the Claimants, the Government “decides all important financial matters, from the approval of the fees to the use of the profits and the immovable assets.”<sup>418</sup> The Claimants further argue that SJSC Airport cannot take “any significant financial decisions itself,” given that all of its purchases above EUR 143,000 (or previously the equivalent in lats) are required to be approved by the Ministry of Transport.<sup>419</sup>

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<sup>410</sup> Ex. C-305.

<sup>411</sup> Exs. C-165 and C-173.

<sup>412</sup> Cl. Reply ¶¶600-601.

<sup>413</sup> TR, Day 1, p. 96; Cl. Reply ¶¶612-638.

<sup>414</sup> Cl. Reply ¶617.

<sup>415</sup> Id. at ¶¶619-638.

<sup>416</sup> TR, Day 1, p. 98.

<sup>417</sup> Id. at p. 100; Cl. Reply ¶¶639-646.

<sup>418</sup> TR, Day 1, pp. 99-100.

<sup>419</sup> Id.

264. Fifth, the Claimants contend that the Ministry of Transport is “heavily involved” in “nearly all decisions by [SJSC] Airport.”<sup>420</sup> In this regard, the Claimants have submitted, *inter alia*, that business plans of SJSC Airport were submitted for review to the Cabinet of Ministers, the Ministry of Transport was involved in “discussions” regarding the Land Lease Agreements, and decision-making, more generally, was required to be approved by the Ministry of Transport.<sup>421</sup> In addition, the Claimants have referred to the 2018 report of a Latvian Parliamentary Investigation Commission in relation to the airBaltic project, in which it was found, according to the Claimants, that Mr. Šlesers, when Minister of Transport, “(1) . . . saw the airport as his personal project, taking decisions for his personal benefit; (2) . . . had a habit of negotiating the details of Airport-related contracts in person . . . ; (3) . . . ; (4) . . . planned the development of Riga Airport and the surrounding territory in detail; and (5) . . . took pride in forcing out international investors.”<sup>422</sup>
265. Relying upon the judgments of the International Court of Justice in the *Bosnian Genocide* and *Nicaragua* cases,<sup>423</sup> the decision on jurisdiction in *Maffezini v. Spain*<sup>424</sup> and, in particular, the more recent UNCITRAL Award in *Flemingo v. Poland*,<sup>425</sup> which the Claimants describe as being “highly similar” to the present case,<sup>426</sup> the Claimants argue that the functions performed by SJSC Airport and the level of control exercised over it by the State require that it be regarded as a *de facto* organ of the State under Article 4 of the ILC Articles.
266. With respect to *Flemingo v. Poland*, the Claimants observe that that case, like this one, concerned the termination of lease agreements that had been entered into by a local investment vehicle of the investors with a State-owned enterprise (in that case, Polish Airports State Enterprise, or “PPL”) that was established for the purpose of developing and operating airports (in that case, in Poland).

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<sup>420</sup> Id. at pp. 100-101; Cl. Reply ¶¶647-669.

<sup>421</sup> Cl. Reply ¶¶647-669.

<sup>422</sup> Id. at ¶673.

<sup>423</sup> Cl. Mem. ¶¶332-334; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment ICJ Rep. 2007, Ex. CL-10; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgment ICJ Rep. 1986, Ex. CL-11.

<sup>424</sup> Cl. Mem. ¶¶335-336; *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, Ex. CL-12.

<sup>425</sup> Cl. Mem. ¶¶338-345; Cl. Reply ¶¶676-678; *Flemingo Duty Free Shop Private Limited v. the Republic of Poland*, UNCITRAL Award, 12 August 2016, Ex. CL-13 (“*Flemingo v. Poland*”).

<sup>426</sup> Cl. Mem. ¶338. *See also* Cl. Reply ¶¶676-683.

267. In the *Flemingo v. Poland* case, the Claimants note that the tribunal “started from the fact that ... PPL was owned and controlled by Poland,” as “demonstrated by the fact that the State Treasury showed a level of control ‘by requiring PPL to obtain: (i) approval of the Lease Agreements; (ii) approval of certain amendments thereto; and (iii) approval of a temporary rent reduction.’”<sup>427</sup> Similarly, the Claimants argue that in the present case, SJSC Airport had to obtain (i) approval of the Lease Agreements from the Ministry of Transport; (ii) approval for any amendments thereto; and (iii) approval for the temporary rent reduction included in the 2010 Agreement.<sup>428</sup>
268. The Claimants further observe that, while the tribunal in *Flemingo v. Poland* noted that PPL is “an independent ... self-financing organizational unit” under Polish law, with its own legal personality, and conducts “its business operations independently, based on its own plans,” such “expressions of quasi-independence and quasi-autonomy” were not considered sufficient to “tip the scales” in circumstances where, as in the case of SJSC Airport, according to the Claimants, PPL’s actions were guided by “the objectives of the national socio-economic development plan” and were subject to “many restrictions and forms of government control and interference.”<sup>429</sup>
269. The Claimants have drawn attention, in particular, to the *Flemingo v. Poland* tribunal’s findings that:<sup>430</sup>

*... the operation and management of an international airport is an activity which is not usually carried out by private business, although a State may delegate, through well-defined concessions, part of this management and operation to private business. In the case at hand, however, the management and operation was not delegated to private business but to a State-owned entity . . . .*

and:

*For its assessment of whether PPL may be considered to be a de facto State organ whose acts and omissions are attributable to Poland, the Flemingo tribunal has attached much importance to the declaration from Mr. Zbigniew Rynasiewicz, the Secretary of State in the Ministry of Transport, who stated before the Polish Parliament in 2011 that “[PPL] is an enterprise which is functioning within the structure of the Ministry of [Transport]”. He moreover confirmed in 2013 that the Ministry of Transport was participating in the modernisation of the Chopin Airport by saying: “[w]hen it comes to questions on investments [...] the supervision over PPL’s action is exercised by the minister responsible for*

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<sup>427</sup> Cl. Mem. ¶338.

<sup>428</sup> Id. at ¶339.

<sup>429</sup> Id. at ¶¶344-345.

<sup>430</sup> Id. at ¶¶340 and 346.

*transport and in a way we are also responsible for all issues connected with the functioning of the enterprise [PPL] – at the Chopin Airport in Warsaw”. That the Secretary of State is not a legislator does not alter the fact that the highest Polish authorities confirmed before the Polish Parliament that PPL functioned within the structure of the Ministry of Transport, which itself – through PPL – was participating in the modernisation of the Chopin Airport.*

270. Similarly, according to the Claimants, “in the present case, SJSC Airport is an enterprise which is functioning within the structure of the Ministry of Transport – the ministry as the holder of the state capital shares ensures implementation of the politics in SJSC Airport and supervises its operation.”<sup>431</sup>
271. Alternatively, should the Tribunal not accept that SJSC Airport is a *de facto* State organ under Article 4 of the ILC Articles, the Claimants submit, as already indicated, that it is empowered by the law of Latvia to exercise elements of government authority within the meaning of Article 5 of the ILC Articles and/or has acted for relevant purposes on the instructions of, or under the direction or control of, the State, within the meaning of Article 8 of the ILC Articles.
272. For the purposes of Article 5, the Claimants argue that the “empowering law” is the SOE Law, as supplemented by the Aviation Law. They observe that the SOE Law “set[s] out the procedure according to which” SOEs “are to be founded, operated and liquidated, as well as the procedure for managing capital shares, setting goals and assessing operations.”<sup>432</sup> Under the Aviation Law, they note further that SJSC Airport “has been endowed with governmental authority to ensure sanitary, quarantine, customs and border (passport) and other control of aircraft, crews and passengers.”<sup>433</sup>
273. In order to assess whether an entity exercises powers of governmental authority in accordance with Article 5, the Claimants submit that it is necessary to consider whether it could exercise such powers without governmental authorization, *i.e.*, whether they could be performed by “private actors.”<sup>434</sup> In this regard, the Claimants note that SJSC Airport has been “charged with several regulatory tasks that are clearly governmental in nature,” including those just mentioned in the Aviation Law, in addition to

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<sup>431</sup> Id. at ¶347.

<sup>432</sup> Id. at ¶¶357-358.

<sup>433</sup> Id. at ¶367 referring to Section 27 part three of the Aviation Law, Ex. C-147.

<sup>434</sup> Id. at ¶¶364-365.

“regulatory matters such as civil aviation safety and emergency measure performance, airport security and investigation,” in accordance with its Articles of Association.<sup>435</sup>

274. More generally, the Claimants affirm that the “management of such a strategic State asset as an international airport could not possibly take place without the exercise of governmental authority, sanctioned by State authorization.”<sup>436</sup> According to the Claimants, this includes, in particular, the management of lands granted to SJSC Airport by the State and which could not be leased “without the explicit permission of the State through the shareholder meeting.”<sup>437</sup>
275. The Claimants further argue that SJSC Airport’s powers have been bestowed upon it in order to advance “classically sovereign objectives,” given that it was established to operate “in the public interest” and is “publicly accountable” for the exercise of those powers.<sup>438</sup>
276. They also refer to the requirement in the Land Lease Agreements that Rixport had to pay EUR 150,000 per hectare of leased land in respect of non-refundable infrastructure payments. According to the Claimants, “[t]his infrastructure was not intended for commercial use only, nor was its usage intended to be restricted to Rixport or to the Airport,” thus demonstrating its partially public purpose.<sup>439</sup>
277. With respect to Article 8 of the ILC Articles, it is the Claimants’ position that SJSC Airport committed multiple acts upon the instructions, or under the direction or control, of the State, including, *inter alia*, its decision to suspend or alter its development plans, its dealings with airBaltic in respect of a possible new terminal, its application to the Mārupe Construction Board to amend the 2003 Detailed Plan and the alleged postponement of terminal expansion until after 2020.<sup>440</sup>
278. In response, the Respondent disputes that any of SJSC Airport’s conduct can properly be attributed to Latvia, whether under any of Articles 4, 5 or 8 of the ILC Articles.

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<sup>435</sup> Id. at ¶367.

<sup>436</sup> Id. at ¶369.

<sup>437</sup> Id. .

<sup>438</sup> Id. at ¶¶374-387.

<sup>439</sup> TR, Day 1, p. 106.

<sup>440</sup> Claimants’ Closing Statement slides, pp. 42-45.

279. With regard to Article 4, the Respondent submits, first, that in order for that provision to apply, SJSC Airport must have the status of a State organ “in accordance with the internal law” of Latvia and that there is no such thing as a “*de facto* State organ” under Article 4.<sup>441</sup> In this regard, the Respondent notes that it is undisputed that SJSC Airport is not a State organ under Latvian law.
280. The Respondent nevertheless acknowledges that “international courts and tribunals have considered that, in certain circumstances an entity may act ‘*de facto*’ as a State organ,” but argues that “such findings have always been findings of fact that have only been found to exist in ‘exceptional circumstances, since ultimately international law looks to substance rather than form.’”<sup>442</sup> According to the Respondent, such findings have only been made in the “rarest of cases, such as in relation to the acts of armed groups that exercise State authority without being *prima facie* part of the structure of the State,” as in the *Nicaragua* and *Bosnian Genocide* cases referred to by the Claimants.<sup>443</sup> Under international law, the Respondent further argues, “the acts of commercial companies, even when State-owned [such as SJSC Airport], are not attributable to the State. They are structurally separate from the State and are engaged in a commercial activity, and their conduct is therefore governed by private law.”<sup>444</sup> The Respondent relies on the Commentary on the ILC Articles<sup>445</sup> in addition to academic writings and a number of investment treaty cases in support of its position, including, most recently, the Awards of the tribunals in the cases of *Almås v. Poland*<sup>446</sup> and *Unión Fenosa Gas v. Egypt*,<sup>447</sup> in the latter of which the tribunal affirmed that: “[C]ircumstances sufficient to connote the status of an organ of the State to a separate legal person must be extraordinary, involving functions and powers considered to be quintessentially powers of Statehood, such as those exercised by police authorities.”
281. The Respondent considers the Award of the Tribunal in *Flemingo v. Poland*, upon which the Claimants heavily rely, to be “dubious authority” for failing to follow the “heightened test prescribed by Article 4 of the ILC Articles to determine whether the company managing the Chopin airport was a State organ.”<sup>448</sup> The Respondent

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<sup>441</sup> Resp. Counter-Mem. ¶¶483-485.

<sup>442</sup> Id. at ¶487, referring to J. Crawford, *State Responsibility-General Part* (Cambridge 2013), 1<sup>st</sup> Ed., Ex. CL-14, p. 125.

<sup>443</sup> Resp. Counter-Mem. ¶487.

<sup>444</sup> Id. at ¶489.

<sup>445</sup> *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Ex. CL-9.

<sup>446</sup> *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016, Ex. RLA-8 (“*Almås v. Poland*”).

<sup>447</sup> *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, Ex. RLA-78, ¶9.96.

<sup>448</sup> Resp. Counter-Mem. ¶487; Resp. Rejoinder ¶396.



considers that, in any event, the *Flemingo v. Poland* case is distinguishable from the present one, given that, according to the Respondent: (i) SJSC Airport's Management Board is independent from the State; (ii) SJSC Airport is financially independent from the State; and (iii) the Ministry of Transport did not interfere with the operation of SJSC Airport.<sup>449</sup>

282. The Respondent notes, in support of its position, that in the *Flemingo v. Poland* case the tribunal relied heavily on the repeated representation of the Secretary of State of the Polish Ministry of Transport that the airport in that case was “functioning within the structure of the Ministry” while there has never been any representation to that effect here nor is that in any event the case of SJSC Airport.<sup>450</sup> On the contrary, the Respondent argues, “the Latvian State as Shareholder of SJSC Airport, represented by the Ministry of Transport, consistently made it clear that, in accordance with Latvian law, it could not interfere with the operation of the company.”<sup>451</sup>

283. For the Respondent, it is immaterial that the State has the ability to appoint and remove all of the members of SJSC Airport's Management Board under the SOE Law. It does not follow from this, in the Respondent's view, consistent with the finding of the tribunal in *Unión Fenosa Gas*, that the company lacks autonomy. In arguing that SJSC Airport is financially independent of the State, the Respondent also notes that SJSC Airport is a profit-making company and, moreover, that Latvia is prevented from financing SJSC Airport's economic activity by EU law on State aid.<sup>452</sup> As regards the need for the Ministry to approve expenses of SJSC Airport above EUR 143,000, the Respondent explains that “this measure was put in place in 2009 in the context of the financial crisis to ensure that companies controlled by the State paid increased attention to their spending and was revoked in 2017.”<sup>453</sup> According to the Respondent, the Ministry could not “opine” on whether such expenses were “appropriate,” but merely ensured that the projected expenses were “included in the company's budget, that an appropriate tender process ha[d] been followed and that they compl[ied] with the company's articles of association.”<sup>454</sup> The Respondent further emphasizes that the

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<sup>449</sup> Resp. Rejoinder ¶¶404-442.

<sup>450</sup> Id. at ¶¶397-401.

<sup>451</sup> Id. at ¶400.

<sup>452</sup> Id. at ¶¶422 and 430.

<sup>453</sup> Id. at ¶434.

<sup>454</sup> Id.

Ministry of Transport has had no involvement in the preparation of SJSC Airport's business plans.<sup>455</sup>

284. In reliance, *inter alia*, on the evidence of Ms. Innusa and Messrs. Kanels and Saveljevs, the Respondent further argues that, unlike in the *Flemingo v. Poland* case: (i) the State was not involved in the negotiation of the leases at issue and was not required to approve them or the amendments thereto; (ii) the State did not monitor SJSC Airport in accordance with a law dealing specifically with its supervision; (iii) SJSC Airport was not required to report "intensively and directly to the Minister," and the Minister could not "direct it to perform certain tasks and evaluate its finances and staff salaries"; (iv) there was no agreement entered into between SJSC Airport and the Ministry of Transport formalizing the latter's supervision over the modernization of the Airport; and (v) the Minister of Transport did not acknowledge that he was "controlling every action of the airport company."<sup>456</sup>
285. It is, thus, the Respondent's position that the "very high" threshold for equating a legally separate public corporation to a State organ is not met in the present case.
286. Nor, in the Respondent's view, have the Claimants established that SJSC Airport was empowered to exercise governmental authority within the meaning of Article 5 of the ILC Articles.
287. The Respondent argues, first, that a "key requirement for governmental authority to be exercised in accordance with Article 5 . . . [is that] governmental authority must be conferred 'by the law of that State.'"<sup>457</sup> It is the Respondent's position that there is no such Latvian law in this case. Although the Claimants have referred to the SOE Law, the Respondent considers that that law is irrelevant because it merely provides for the creation and management of SJSC Airport and is, thus, not a sufficient basis for the attribution of SJSC Airport's conduct to Latvia; nor are any laws under which SJSC Airport may have received land from the State.<sup>458</sup> The Respondent has referred in this regard to a letter dated 16 July 2012<sup>459</sup> from SJSC Airport to the Ministry of Transport

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<sup>455</sup> Id. at ¶433.

<sup>456</sup> Resp. Counter-Mem. ¶500.

<sup>457</sup> Resp. Rejoinder ¶443, referring to the ILC Articles.

<sup>458</sup> Id. at ¶448.

<sup>459</sup> Ex. R-141.

in which the former expressly confirms that it “has not been delegated tasks of state administration” and the related supporting evidence of Ms. Innusa.<sup>460</sup>

288. The Respondent submits, further, that the Claimants’ argument that SJSC Airport has been characterized as an “object of national interest” is “both wrong and contradictory.”<sup>461</sup> According to the Respondent, this status was not granted to SJSC Airport, but to parts of the Airport’s territory because the Airport is “of strategic importance for landing aircrafts which have been intercepted by NATO aviation.”<sup>462</sup> The Respondent notes that, in any event, “the Claimants fail to identify any governmental prerogative conferred on SJSC Airport by the characterisation of parts of its territory as an ‘object of national interest.’”<sup>463</sup>
289. It is, moreover, the Respondent’s position that a “particular act of an entity involves the exercise of governmental authority only if it involves the use of force or compulsive State power, that is *puissance publique*,” and “[t]he mere exercise of public functions, or acting in the public interest, does not meet this test.”<sup>464</sup>
290. The Respondent disputes that, as contended by the Claimants, SJSC Airport has been endowed with any governmental authority under the Aviation Law for the purpose of ensur[ing] sanitary, quarantine, customs and border (passport) and other control of aircraft, crews and passengers,” and argues that, irrespective of that, the capacity in which SJSC Airport interacted with Rixport concerned the leasing of land, which, as recently confirmed in the case of *Almås v. Poland*, does not involve the exercise of governmental authority.<sup>465</sup> Rather, for the Respondent, the Land Lease Agreements are “purely commercial agreements motivated by a purely commercial interest” and cannot properly be characterized as a “governmental project.”<sup>466</sup> More specifically, the Respondent rejects the Claimants’ attempt to distinguish between the land leased in the *Almås v. Poland* case (agricultural land) and the land at issue in the present case and also rejects the Claimants’ contention that the Land Lease Agreements “went above and beyond commercial purposes.”<sup>467</sup>

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<sup>460</sup> Resp. Rejoinder ¶¶450-453.

<sup>461</sup> Id. at ¶455.

<sup>462</sup> Id. at ¶¶457-458.

<sup>463</sup> Id. at ¶463.

<sup>464</sup> Resp. Counter Mem. ¶507; Resp. Rejoinder ¶464.

<sup>465</sup> Resp. Counter-Mem. ¶¶509-512; Resp. Rejoinder ¶¶469-470.

<sup>466</sup> Resp. Counter-Mem. ¶¶517-519.

<sup>467</sup> Resp. Rejoinder ¶¶472-475.

291. The Respondent further notes that, while the Claimants “have dedicated large parts of their Reply to the argument that SJSC Airport had been endowed with governmental authority,” they have been unable “to explain how the acts that they consider as breaches of the BIT may have been carried out in the exercise of such governmental authority.”<sup>468</sup> In this regard, the Respondent refers to the following passage in the ILC Commentary on Article 5 (emphasis in original):<sup>469</sup>

*If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must . . . concern governmental activity and **not** other private or commercial activity in which the entity may engage. Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets or the purchase of rolling stock).*

292. It is equally the Respondent’s position that, in invoking Article 8 of the ILC Articles in the alternative, the Claimants have failed to identify any instance where SJSC Airport’s allegedly wrongful conduct was carried out “on the instruction of, or under the direction or control of” Latvia.<sup>470</sup> According to the Respondent, the so-called instructions upon which the Claimants rely are merely “high-level policy documents” setting out the general objectives of the Government, “without specifying instructions as to their implementation.”<sup>471</sup> The Respondent submits that SJSC Airport “was free to determine its own strategy in line with these broad objectives.”<sup>472</sup> The Respondent argues that the Claimants have, in any event, failed to establish that any actions that SJSC Airport may have taken, allegedly as a result of a decision of the Ministry of Transport, would have caused the Claimants any harm<sup>473</sup> or were otherwise intended to achieve any “State purpose”, as opposed to actions intended to further SJSC Airport’s “perceived commercial best interests.”<sup>474</sup>

### **C. The Rox and Staur Objection**

293. It is not disputed, as already mentioned, that each of the Claimants invested in Rixport at different times. EBO was initially Rixport’s sole shareholder when it was established

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<sup>468</sup> Id. at ¶476.

<sup>469</sup> Id. at ¶477.

<sup>470</sup> Id. at ¶480.

<sup>471</sup> Id. at ¶489.

<sup>472</sup> Id.

<sup>473</sup> Id. at ¶¶502-509.

<sup>474</sup> Id. at ¶¶510-518.

in March 2006. Rox became a shareholder on or about 19 January 2007 and Staur on or about 17 April 2008.

294. According to the Respondent, the timing of the Claimants' respective shareholdings in Rixport affects the Claimants' claims in this arbitration in the following three different ways: (i) only EBO can bring a claim for alleged breaches preceding January 2007, and EBO and Staur for events preceding April 2008; (ii) legitimate expectations of the Claimants can only arise at the time the investment of an investor is in fact made; and (iii) any returns the investor has already made from its investment must be deducted from its damages to avoid double recovery.<sup>475</sup>
295. The Claimants accept that Rox and Staur did not make their investments in Rixport before January 2007 and April 2008 respectively, but argue that none of the foregoing "three effects affects the Claimants' argumentation" in the present case.<sup>476</sup> The Claimants argue, first, that Rox, Staur and EBO each enjoy standing as "qualifying investors" to bring the Claimants' claims as they "jointly sustained the damages which materialized over a significant period of time, while they were all owners of the investment."<sup>477</sup> In this regard, the Claimants submit that the Claimants' investment was the subject of a "creeping expropriation" that, as discussed in Section VI below, was completed on 21 March 2014, "at which point all three Claimants had had effective control over the investment varying from 6 to 8 years."<sup>478</sup> For the Claimants, it is immaterial whether the "very first act of the Respondent leading to this creeping expropriation (being the Minister of Transport's change of plans for the Airport in November 2006) happened before" either Rox or Staur had become shareholders.<sup>479</sup>
296. Second, while the Claimants accept that legitimate expectations must be formed at the time when the investment is made, it is their position that the "overall expectations that EBO had legitimately formed" in July 2006 "were still legitimate when Rox became a shareholder in January 2007 and Staur in April 2008," although they concede that "when Staur acquired its shares in 2008, some additional uncertainty had already arisen

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<sup>475</sup> Resp. Counter-Mem. ¶479.

<sup>476</sup> Cl. Reply ¶534.

<sup>477</sup> Id. at ¶535.

<sup>478</sup> Id. at ¶536.

<sup>479</sup> Id. at ¶538.

due to the changed plans regarding the expansion of the terminal reflected in the 2007 Amendment.”<sup>480</sup>

297. Third, as none of the Claimants has, according to the Claimants, “made any returns which could be deducted” from an award of damages, the Claimants argue that “the fact that each Claimant became a shareholder at a different point in time . . . has no or very limited effect on the damages of the case.”<sup>481</sup>

#### **D. The Tribunal’s Analysis and Decision**

298. It is undisputed that all of the Claimants made investments in Latvia within the meaning of the BIT and the ICSID Convention and that those investments were made subsequent to the entry into force of the BIT. There is also no dispute that the Claimants are Norwegian entities within the meaning of the BIT and that they are advancing claims in this arbitration for the breach of specific provisions of the BIT by Latvia subsequent to their investments. Nor is it disputed that the Parties have consented to the arbitration of claims for such breaches under the Arbitration Rules.

299. The Tribunal therefore has little difficulty in deciding that it has jurisdiction *ratione personae*, *ratione temporis* and *ratione materiae* over the claims being advanced in this arbitration by the Claimants. In the view of the Tribunal, the Respondent’s “jurisdictional” objections do not actually concern the Tribunal’s jurisdiction in respect of the claims, as made by the Claimants, but concern instead the merits of those claims.

300. Although the Respondent has argued that the disputes that are the subject of the Claimants’ claims, except the denial of justice claims, do not fall under the dispute resolution clause in Article IX of the BIT because they are allegedly contract claims dressed up as treaty claims and, thus, “have no autonomous existence as potential treaty breaches,”<sup>482</sup> the Tribunal does not consider that, for the purpose of determining whether it has jurisdiction over the Claimants’ claims, it is for the Tribunal to undertake to determine whether the Claimants’ claims should be recharacterized as contract claims where, as here, they have been expressly advanced by the Claimants as claims for specific breaches of the BIT.

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<sup>480</sup> Id. at ¶539.

<sup>481</sup> Id. at ¶541.

<sup>482</sup> Resp. Rejoinder ¶519.

301. As ICSID and other international tribunals have repeatedly found, the task of a tribunal such as this one in considering whether it has jurisdiction over the claims before it is to determine whether the claims, “in the way in which” they have been “stated,” fall within the jurisdictional framework of the relevant arbitration clause and not whether they are well-founded.<sup>483</sup> As the tribunal observed in the case of *Panamerican Energy v. Argentina*:<sup>484</sup> “. . . the claims made in the present case must be taken as they are by the Tribunal at this stage of the proceedings, whose only task it is, in the present phase of the proceedings, to determine whether, *as formulated*, they fit into the jurisdictional parameters set out by the relevant treaty instrument or instruments” (emphasis added).
302. Although the Tribunal accepts, as acknowledged by the tribunal in the case of *Malicorp v. Egypt*,<sup>485</sup> upon which the Respondent relies,<sup>486</sup> that, in considering its jurisdiction, there may be scope for it to question whether a claiming party has improperly undertaken to label as a treaty claim a claim that falls outside the purview of the relevant treaty, the Tribunal does not consider that it should do so unless the claim manifestly falls outside the boundaries of the Tribunal’s jurisdiction.
303. This is consistent with the approach adopted by the tribunals in the cases of *Jan de Nul v. Egypt*<sup>487</sup> and *Hamester v. Ghana*,<sup>488</sup> upon which the Respondent also relies,<sup>489</sup> in considering whether the issue of attribution should be examined at the jurisdictional or the merits stage. While the *Hamester v. Ghana* tribunal was of the view that the question of whether the issue of attribution is, in a given case, one of jurisdiction or one of merits is not “susceptible of a clear-cut answer,” it nevertheless referred approvingly, as in *Jan de Nul v. Egypt*, to the application of a “*prima facie*” test at the jurisdictional stage, *i.e.*: “[I]t is not for the Tribunal at the jurisdictional stage to examine whether the case is in effect brought against the State and involves the latter’s responsibility. An exception is made in the event that it is manifest that the entity involved has no link whatsoever with the State.”<sup>490</sup>

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<sup>483</sup> See, e.g., *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, Ex. RLA-20, ¶45.

<sup>484</sup> *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, Ex. RLA-20, ¶51.

<sup>485</sup> *Malicorp v. Egypt*, Ex. RLA-17.

<sup>486</sup> Resp. Counter-Mem. ¶547.

<sup>487</sup> *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, Ex. CL-15.

<sup>488</sup> *Hamester v. Ghana*, Ex. CL-41.

<sup>489</sup> Resp. Counter-Mem. ¶¶ 526 and 551.

<sup>490</sup> *Hamester v. Ghana*, Ex. CL-41, ¶144.

304. Similarly, the Tribunal considers that unless it is manifest that the claims being advanced by the Claimants could only be contract claims and could not conceivably be characterized as treaty claims, it is not appropriate for the Tribunal to decline jurisdiction on the basis that they are not treaty claims. This is particularly so where, as here, the claims as presented are not stated to be for the breach of the Land Lease Agreements and have been made in respect of the conduct of numerous actors who were not themselves parties to those agreements, including, notably, the Ministry of Transport, the Mārupe Municipality and the Latvian courts.
305. For the same reasons, and consistent with the approach taken by the tribunals in both *Jan de Nul v. Egypt* and *Hamester v. Ghana*, as well as the more recent Award in the case of *Almås v. Poland*,<sup>491</sup> the Tribunal rejects the Respondent’s objection to jurisdiction based on its contention that the conduct of SJSC Airport is not attributable to Latvia. The Tribunal notes that the claims being advanced have been made against the State rather than SJSC Airport, and, as in *Hamester v. Ghana*, “the Tribunal is not faced ... with a situation where it is readily evident that the State is not involved at all, or where the issue is capable of an answer based upon a limited enquiry (akin to other jurisdictional issues).”<sup>492</sup> As the *Hamester v. Ghana* tribunal stated: “On the contrary, the evidential record . . . is more complex. In fact, the Respondent itself recognises that some acts are attributable to the . . . Government, while denying that they amount to international illegal behaviour. In other words, while the extent of the State’s involvement is unclear, it is not contested that some acts are attributable to [the State].”<sup>493</sup> The same is equally true here.
306. Further, the Tribunal does not consider that the issues pertaining to the time when Rox and Staur made their investments are of a jurisdictional character. Rather, in circumstances where, as here, it is alleged that the treaty breaches continued over a period of years, including the period after Rox and Staur became shareholders of Rixport, they concern the possible extent of the Respondent’s liability, if any, to Rox and Staur, respectively, and therefore relate to the merits of the claims.
307. For the foregoing reasons, the Tribunal holds that it has jurisdiction over the claims advanced by the Claimants under the BIT.

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<sup>491</sup> *Almås v. Poland*, Ex. RLA-8.

<sup>492</sup> *Hamester v. Ghana*, Ex. CL-41, ¶145.

<sup>493</sup> *Id.*



## **VI. THE MERITS**

308. Before addressing the Claimants' specific claims on their merits, it is appropriate to begin this Section by considering certain of the issues that arise in respect of the Claimants' contention that the conduct of SJSC Airport is to be attributed to the Respondent. Although, as already stated, the Claimants' claims are only partially founded on the conduct of SJSC Airport, a determination of the extent of the Respondent's responsibility for the behavior of SJSC Airport, if any, may potentially narrow the issues that need to be considered in respect of the Claimants' claims. In particular, it is useful to address at the outset (i) whether SJSC Airport is to be treated as an organ of the Latvian State and (ii) if not, whether it is empowered to exercise elements of governmental authority sufficient to attribute its acts to the State. Whether or not, in the absence of such a finding, any acts of SJSC Airport may be said to have been violative of Latvia's obligations under the BIT because they were performed at the direction, or on the instruction or under the control, of the Respondent is a matter that may be more usefully considered when addressing the Claimants' specific claims.
309. The Tribunal, thus, considers, first, in Section VI.A below the Claimants' contentions that SJSC Airport (i) is a *de facto* organ of the Latvian State or (ii) alternatively, exercises elements of governmental authority sufficient to attribute its acts to the State.
310. The Tribunal then considers the merits of the Claimants' breach claims in Sections VI.B to VI.D below, including the question of whether specific conduct of SJSC Airport can otherwise be attributed to Latvia.
311. The Parties agree that the possible attribution of SJSC Airport's conduct to Latvia is to be decided with reference to the rules on attribution that are set forth in the ILC Articles and, in particular, Articles 4, 5 and 8.

### **A. Attribution**

#### **1. ILC Article 4 – Is SJSC Airport a State Organ?**

312. It is common ground that under Article 4, the conduct of a State organ acting as such is attributable to the State. It is also common ground that, as stated in Article 4(2): "An organ includes any person or entity which has that status in accordance with the internal law of the State." There is no dispute in the present case that SJSC Airport is not considered under Latvian law to be an organ of the State and that, to the contrary, it has been established, as already mentioned, as a corporate entity, with its own, separate legal personality. It is therefore not a State organ *de jure*.

313. It has nevertheless been recognized in the Commentary to the ILC Articles, other doctrinal writings and in the jurisprudence of international tribunals that a person or entity may be characterized as an organ of the State as a matter of international law even if it does not possess that character under the State's internal law. As stated by the tribunal in *Almås v. Poland*: “[I]nternal status does not necessarily imply that an entity is not a State organ if other factors, such as the performance of core governmental functions, direct day-to-day subordination to central government, or lack of all operational autonomy, point the other way.”<sup>494</sup>
314. The question that therefore arises is whether such “other factors” exist in the present case such as to warrant treating SJSC Airport, which is not a State organ in the Latvian legal order, as a *de facto* State organ for present purposes.
315. As noted in Section V.B above, the Claimants have argued that SJSC Airport should be treated as a *de facto* State organ for the following five reasons: (i) the Airport is governed by its own specific legal framework aimed at ensuring essential public interests; (ii) SJSC Airport does not have an “independent” Board and operates under the “close control” of the Ministry of Transport; (iii) SJSC Airport’s Board members are “politically appointed” and “refer to themselves as ‘state officials’;” (iv) SJSC Airport is financially dependent on the State; and (v) the Ministry of Transport is “heavily involved” in “nearly all decisions by SJSC Airport.” In these circumstances, it is the Claimants’ position that the governance and activities of SJSC Airport are so “intermingled” with those of the State in general and the Ministry of Transport in particular that SJSC Airport should be regarded as part of the government structure.<sup>495</sup>
316. Of the authorities upon which the Claimants rely in urging the Tribunal to disregard SJSC Airport’s separate corporate structure (as mentioned in ¶265 above), the only one that presents any similarities to the circumstances in the present case is the Award in *Flemingo v. Poland*. The case of *Maffezini v. Spain* is not of any particular assistance as, in that case, the acts at issue were found to be attributable to the State in accordance with Article 5 of the ILC Articles and not Article 4. Moreover, neither the *Bosnian Genocide* nor the *Nicaragua* case is apposite as each of those cases concerned actions carried out by para-military forces exercising the kinds of police powers that are generally considered to be quintessential powers of Statehood.

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<sup>494</sup> *Almås v. Poland*, Ex. RLA-8, ¶207.

<sup>495</sup> Cl. Reply ¶679.

317. The conduct that is at issue in this arbitration is of a far different character. We are here concerned with conduct relating to the leasing of land, which as noted in the case of *Almås v. Poland*, is not generally viewed as “an executive government function,” even if the land belongs to the State and the lease is entered into with a State entity.<sup>496</sup> Nevertheless, the Claimants have pointed to the *Flemingo v. Poland* decision as authority for the proposition that conduct in respect of leases entered into by an SOE charged with the management of an airport, as in the present case, may be attributed to the State where the SOE effectively operates, as stated in that decision, “within the structure of the Ministry of Transport” and, thus, according to that decision, as a *de facto* State organ.<sup>497</sup>
318. As already noted, the Respondent has been critical of the *Flemingo v. Poland* decision, which it considers to be inconsistent with a long line of cases respecting the legal separation between an SOE and the State, including, in particular, the cases of *Unión Fenosa v. Egypt*, *Jan de Nul v. Egypt*, *Bayindir v. Pakistan*, *EDF v. Romania*, *Hamester v. Ghana*, *Tulip v. Turkey* and *Almås v. Poland*.<sup>498</sup>
319. As the Respondent has noted, in none of those cases was the fact of State ownership and the exercise of various elements of State control, such as the appointment and replacement of Board members, oversight in relation to the SOE’s decisions or conduct or other links with the State considered sufficient to overcome the SOE’s presumed separateness from the State, provided that the SOE conserved at least some degree of autonomy. Thus, for example, the Respondent points out that the tribunal in *Jan de Nul v. Egypt* found that the “public authority” in that case (the Suez Canal Authority) was not an organ of the State even though: (i) its chairman, Board members, managing directors and general manager were all appointed by the State; (ii) it had to report to the Prime Minister, who was in charge of approving all decisions of its Board of Directors before they became effective; (iii) the revenues from its activity were automatically transferred to the State’s treasury; (iv) its employees had the status of State officials; (v) it was subject to public procurement law provisions applicable to the State; and (vi) its acts were subject to judicial review only by administrative courts in charge of adjudicating disputes with the government. Nevertheless, the Suez Canal Authority was considered to be distinct from the State, given that it had its own legal personality and was a commercial entity with its own budget.

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<sup>496</sup> *Almås v. Poland*, Ex. RLA-8, ¶212.

<sup>497</sup> *Flemingo v. Poland*, Ex. CL-13, ¶356

<sup>498</sup> Resp. Rejoinder ¶¶385-396.

320. Similarly, as already noted, the Respondent argues that in this case too the activities of SJSC Airport are essentially commercial, and it operates under its own budget. Moreover, it is the Respondent's position that SJSC Airport enjoys far more autonomy than the Suez Canal Authority. For the Respondent, neither the fact that SJSC Airport has been established under an SOE Law, nor the fact that Board members may be "politically appointed" suffices to deprive SJSC Airport of its legal separateness. Moreover, the Respondent disputes the Claimants' attempt to portray SJSC Airport as an entity operating, like PPL in the *Flemingo v. Poland* case, "within the structure of the Ministry of Transport." The Respondent does not accept, in particular, that: (i) SJSC Airport does not have an independent Board; (ii) SJSC Airport is financially dependent on the State; and (iii) the Ministry of Transport is "heavily involved" in "nearly all decisions by SJSC Airport," as contended by the Claimants.
321. In support of its position that SJSC Airport operates in its own commercial interest and autonomously from the State, the Respondent has relied heavily on the witness evidence of Mr. Saveljevs and Ms. Innusa, who, as a Deputy State Secretary at the Ministry of Transport since April 2010, has represented the Ministry's State Secretary as the holder of SJSC Airport's shares, including in Shareholders' Meetings, since that time.
322. According to Mr. Saveljevs, *inter alia*: (i) the Ministry of Transport is not involved in SJSC Airport's business operations and avoided getting involved in its dealings with Rixport;<sup>499</sup> (ii) SJSC Airport's management takes decisions based on the commercial interests of the Airport;<sup>500</sup> (iii) while SJSC Airport has to take the "overall objectives" of the Ministry of Transport into account, "such strategic plans do not translate directly into . . . [SJSC] Airport's concrete development plans or day-to-day operations,"<sup>501</sup> which Mr. Saveljevs insisted are based on SJSC Airport's "own operational plans," as informed by passenger forecasts prepared by industry consultants;<sup>502</sup> (iv) government planning documents are "guidelines," but "it is up to SJSC Airport's management to take specific decisions and actions;"<sup>503</sup> and (v) SJSC Airport's operations are financed by the Airport's income and not by funds from the State budget, except for the purpose

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<sup>499</sup> Saveljevs first witness statement ¶11; see also TR, Day 5, p. 23: "I have no experience with the ministry interfering . . . with the airport's operational matters...."

<sup>500</sup> Saveljevs second witness statement ¶5.

<sup>501</sup> Saveljevs first witness statement ¶61.

<sup>502</sup> TR, Day 5, pp. 38-39.

<sup>503</sup> Saveljevs second witness statement ¶16.

of supporting safety and security, as permitted under the regulations concerning State aid to airports and airlines.<sup>504</sup>

323. In her evidence, Ms. Innusa has also confirmed that: (i) SJSC Airport is financially independent from the State;<sup>505</sup> (ii) policy documents issued by the Ministry of Transport do not constitute “instructions” to SJSC Airport;<sup>506</sup> and (iii) SJSC Airport is responsible for the preparation of its own business plans, although they are subject to review by the State shareholder to ensure their commercial reasonableness.<sup>507</sup>
324. She has further testified that: (i) to the best of her knowledge, the Land Lease Agreements were neither communicated to nor approved by the Ministry of Transport in its capacity as SJSC Airport’s shareholder;<sup>508</sup> (ii) after her appointment, she did not interfere with the management of SJSC Airport by providing directions or any other guidance;<sup>509</sup> (iii) she had no involvement in the negotiation of the 2010 Agreement, which she only learned about “through informal discussions” with members of the Management Board after it was entered into;<sup>510</sup> (iv) the 2010 Agreement was not required to be, and was not, approved by the Ministry of Transport as SJSC Airport’s shareholder;<sup>511</sup> (v) while Rixport and its shareholders requested on several occasions that the Ministry of Transport intervene in their negotiations with SJSC Airport, the Ministry of Transport regularly informed them “of the legal separation of competence between the Management Board and the holder of capital shares, which prevents the Ministry from intervening in SJSC Airport’s commercial activities;”<sup>512</sup> (vi) Latvian SOEs such as SJSC Airport, which are created to perform commercial activities, must operate “on the basis of commercial principles” and are primarily regulated by Latvian commercial law;<sup>513</sup> and (vii) the competence of the Management Board is “very broad,” with the State shareholder having limited authority to approve only certain matters.
325. In this regard, Ms. Innusa has noted that when the Land Lease Agreements were entered into in 2006, the Management Board operated under the supervision of a Supervisory

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<sup>504</sup> Id. at ¶¶9-10.

<sup>505</sup> Innusa second witness statement ¶¶4-23.

<sup>506</sup> Id. at ¶¶24-28.

<sup>507</sup> Id. at ¶¶29-32.

<sup>508</sup> Innusa first witness statement ¶48.

<sup>509</sup> Id. at ¶49.

<sup>510</sup> Id. at ¶50.

<sup>511</sup> Id.

<sup>512</sup> Id. at ¶56.

<sup>513</sup> Id. at ¶¶11-12.

Council, and the State shareholder was only responsible for the “approval of the annual accounts, the decisions on the use of profits from the previous year, the appointment of the members of the Supervisory Council and the auditor, the approval of the articles of association, decisions on increasing or decreasing share capital, reorganising the company, approval of decisions regarding the acquisition of or increase in shareholding in another company, acquisition or disposal of a business and abandoning existing activities and initiating new activities, and decisions relating to the winding up of the company.”<sup>514</sup>

326. As already indicated, the Supervisory Council was eliminated as a corporate body in June 2009 (until June 2016 when it was reinstated). According to Ms. Innusa, during the period when SJSC Airport had no Supervisory Council, the State shareholder “took over certain competences previously allocated to the Supervisory Council, such as the appointment and removal of members of the Management Board, the approval of certain transactions, like the alienation or encumbrance of real estate or the approval of mid-term strategies” and matters outside SJSC Airport’s “usual commercial activity.”<sup>515</sup> It is her position that the removal of the Supervisory Council “resulted in an increased autonomy of the Management Board” as the State shareholder did not “replace the Supervisory Council in terms of supervising the activity of SJSC Airport.”<sup>516</sup>

327. While Ms. Innusa has acknowledged, as the Claimants have noted, that approval by the State’s shareholder representative of SJSC Airport’s expenses above a certain amount (LVL 100,000/EUR 143,000) was required as from April 2009 until 2017 (when this requirement was revoked following the reinstatement of the Supervisory Council), this was, according to her, a measure that had its origins in the financial crisis in order to “ensure that companies controlled by the State paid increased attention to their spending in particularly difficult times for the Latvian economy.”<sup>517</sup> According to her, all corresponding applications of SJSC Airport were approved, without the appropriateness of any of SJSC Airport’s expenses being questioned.<sup>518</sup>

328. During the Hearing, the Claimants undertook to challenge Mr. Saveļjevs’ and Ms. Innusa’s portrayal of SJSC Airport’s alleged operational autonomy from the State by

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<sup>514</sup> Id. at ¶18.

<sup>515</sup> Id. at ¶21; TR, Day 4, pp. 25 and 81-84.

<sup>516</sup> Innusa first witness statement ¶23.

<sup>517</sup> Innusa second witness statement ¶¶17-18.

<sup>518</sup> Id. at ¶¶20-21. See also TR, Day 4, pp. 87-92.

arguing that, in fact, this is not a case where the Government merely “gives incidental instructions.”<sup>519</sup> Rather, according to the Claimants, the “Government is in charge of the airport, taking all decisions that matter, and being kept informed on a continuous and detailed level.”<sup>520</sup> As mentioned above (see ¶¶260-261), the Claimants have placed heavy reliance in support of their position on the OECD Report, a 2012 Cabinet of Ministers Order on the Governance Concept of State Capital Shares, a 2011 presentation of Mr. Puce (then the State Secretary of the Ministry of Economics), and other publications concerning the governance and management of Latvian SOEs generally. They have also emphasized the role played by the State in appointing or replacing Supervisory Council (and between 2009 and 2016, Management Board) members, the extent to which Mr. Šlesers allegedly implicated himself in Airport governance matters while he was Minister (*i.e.*, until March 2009) and the inconceivability of SJSC Airport “somehow go[ing] against what is decided at the top of the Ministry.”<sup>521</sup>

329. The Tribunal has seen no evidence, however, that the Ministry of Transport played any role or took any decisions in respect of the Land Lease Agreements that are the subject of this arbitration or that, contrary to the Claimants’ assertion, “day-to-day governance decisions” of SJSC Airport were directed by the Ministry.<sup>522</sup> Much of the evidence upon which the Claimants rely, including, in particular, the OECD Report, the 2012 Cabinet of Ministers Order and the 2011 presentation of Mr. Puce, is of a generic nature and does not address specifically or in any detail the management of SJSC Airport, let alone SJSC Airport’s award and administration of the Land Lease Agreements. In the Tribunal’s view, the Claimants’ evidence does not call into question or otherwise undermine the evidence of either Mr. Saveļjevs or Ms. Innusa, both of whom the Tribunal found to be credible witnesses, and, in particular, Ms. Innusa’s testimony that, for as long as she was working for the Ministry of Transport, neither she nor any of her colleagues “interfered with the business dealings or transactions of” SJSC Airport.<sup>523</sup>
330. Moreover, there is no evidence that the Ministry of Transport had any material involvement in the preparation of the tender for the Land Lease Agreements or their subsequent negotiation or award to the Claimants or their later amendment and termination. Although Rixport and its representatives approached the Ministry on

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<sup>519</sup> TR, Day 8, p. 54.

<sup>520</sup> *Id.* at pp. 54-55.

<sup>521</sup> TR, Day 8, p. 53.

<sup>522</sup> *Id.* at p. 52.

<sup>523</sup> TR, Day 4, p. 113.

various occasions, both before and after the leases were awarded and, in seeking to obtain the modification of a provision in the leases, sought the Ministry's intervention during their negotiation in October 2006, the Claimants have failed to establish that the Ministry had any influence on the terms of the Land Lease Agreements. To the contrary, the evidence shows that Rixport was expressly advised by SJSC Airport, prior to the conclusion of the Land Lease Agreements, that SJSC Airport was of the view that the agreements were "private law contract[s]" between "private law entities."<sup>524</sup> There is no evidence that the Ministry of Transport, or the Latvian State, more generally, was of a different view or conducted itself as if that were not the case.

331. It is also apparent from the evidence that the Ministry of Transport was reluctant to become involved in the relations between Rixport and SJSC Airport when requested to do so by Rixport, its representatives or others.<sup>525</sup>
332. Although it has not been disputed that the Ministry of Transport appointed the members of SJSC Airport's Supervisory Council (when it had one) and its Management Board (when there was no Supervisory Council), exercised oversight over SJSC Airport's conduct and developed policy objectives that SJSC Airport was required to take into account, the role played by the Ministry was not unlike that ordinarily played by the shareholder of any private company, and such conduct is not sufficient, in the Tribunal's view, for SJSC Airport's separate legal personality to be disregarded and for SJSC Airport to be treated as an organ of the State.
333. Unlike in the case of *Flemingo v. Poland*, upon which the Claimants have relied, this is not a case in which the State ever assumed responsibility for the actions of the SOE concerned, either expressly or impliedly.
334. While the Claimants have attributed considerable importance to the role allegedly played, and statements made, by Mr. Šlesers while he served as Minister of Transport (and prior to his assuming that position), they have nevertheless failed to show that anything that he did or said materially deprived SJSC Airport of its autonomy in respect of the Land Lease Agreements, in particular, or more generally.
335. Nor in the Tribunal's view, consistent with the position followed in the cases of *Almås v. Poland*, *Jan de Nul v. Egypt* and *Hamester v. Ghana*, is an SOE required to be treated

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<sup>524</sup> Letter, dated 17 October 2006, Ex. R-56.

<sup>525</sup> See, e.g., letter, dated 7 October 2013, to the Norwegian Chamber of Commerce, Ex. C-124.



as a State organ merely because certain of its activities may be regarded as important to the national interest,<sup>526</sup> particularly where, as here, the SOE's activities are primarily of a commercial nature and, as recognized by the OECD Report upon which the Claimants themselves rely, is "expected to finance [its] operations through commercial activities."<sup>527</sup> What matters is the degree to which an SOE's actions are directly controlled by the State.

336. In the present case, there is insufficient evidence of such direct control for SJSC Airport to be treated as a *de facto* organ of the Latvian State notwithstanding its distinct legal personality, separate budget and management structure.

**2. ILC Article 5 – Is SJSC Airport Empowered to Exercise Elements of Governmental Authority?**

337. Under Article 5, "[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided that the person or entity is acting in that capacity in that particular instance."<sup>528</sup>
338. It is undisputed that two conditions must be satisfied in order for Article 5 to apply: (i) the entity in question must be "empowered by the law of the State to exercise elements of . . . governmental authority;" and (ii) that entity must be acting in that capacity in the matter at issue.
339. The Parties do not agree with respect to the satisfaction of either of these conditions. As noted above, the Claimants are of the view that both conditions have been met, while the Respondent does not consider that either condition has been satisfied.
340. With respect to the first condition, the Claimants have argued, as already indicated, that the "empowering law" is the SOE Law, as supplemented by the Aviation Law, under which, according to the Claimants, SJSC Airport has been endowed with governmental authority to "ensure sanitary, quarantine, customs and border (passport) and other control of aircraft, crews and passengers."<sup>529</sup> The Claimants submit more generally that SJSC Airport has implicitly been endowed with governmental authority, given that

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<sup>526</sup> See, e.g., *Almås v. Poland*, Ex. RLA-8, ¶210.

<sup>527</sup> OECD Report, Ex. C-163, p. 16.

<sup>528</sup> *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Ex. CL-9.

<sup>529</sup> Cl. Mem. ¶367.

the Airport is a “strategic State asset,” the management of which “could not possibly take place without the exercise of governmental authority.”<sup>530</sup> As also noted above, the Claimants further argue that SJSC Airport’s powers have been bestowed upon it in order to advance “classically sovereign purposes,” given that it was established to operate “in the public interest” and is “publicly accountable” for the exercise of those powers.<sup>531</sup>

341. The Respondent counters that SJSC Airport has not been delegated with any tasks of State administration, as SJSC Airport confirmed in a letter to the Ministry of Transport dated 16 July 2012,<sup>532</sup> and as stated by Ms. Innusa in her evidence.<sup>533</sup> For the Respondent, the SOE Law is irrelevant for the reasons already mentioned above (see ¶287). Moreover, the Respondent observes that the matters referred to in the Aviation Law have not been delegated to SJSC Airport to perform. Rather, these are functions performed at the Airport by the Latvian State through civil servants having no affiliation with SJSC Airport.<sup>534</sup> Equally groundless, according to the Respondent, is the Claimants’ attempt to argue that governmental authority has implicitly been conferred on SJSC Airport by virtue of the Airport’s strategic importance, given that, under Latvian law, governmental authority can only be delegated through (i) an “external regulatory enactment” or regulation adopted by the Government; or (ii) a specific agreement between the State and the entity receiving the delegation.<sup>535</sup> The Respondents note that there has been no such delegation in the present case.

342. Having considered the Parties’ competing arguments and the relevant exhibits and authorities, the Tribunal is not persuaded that there has been any delegation of governmental authority to SJSC Airport under Latvian law. The Tribunal agrees with the Respondent that the SOE Law does not delegate any governmental authority to SJSC Airport, but merely provides for its establishment and governance. Nor do the provisions of the Aviation Law upon which the Claimants rely, or any other enactment or instrument, delegate the performance of any specific governmental tasks to SJSC Airport. Although the Claimants have contended that SJSC Airport’s powers have been bestowed upon it in order to advance “classically sovereign purposes,” they have failed to demonstrate that SJSC Airport itself enjoys or is entitled to exercise any sovereign powers at all, such as acts of a regulatory nature or otherwise involving the

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<sup>530</sup> Id. at ¶369.

<sup>531</sup> Id. at ¶¶374-387.

<sup>532</sup> Ex. R-141.

<sup>533</sup> Innusa second witness statement ¶66; TR, Day 4, pp. 17-18.

<sup>534</sup> Resp. Rejoinder ¶469.

<sup>535</sup> Id. at ¶449.

use of the State's public prerogatives or *imperium*, i.e., acts of "*puissance publique*." In this regard, the Tribunal agrees with the Respondent that it does not follow simply from the Airport's classification as an "object of national interest" that SJSC Airport has been empowered to exercise elements of governmental authority, in the absence of any showing that specific elements of governmental authority have, in fact, been conferred upon SJSC Airport.

343. This having been said, even if it were to be accepted that SJSC Airport has been empowered by the law of Latvia to exercise elements of governmental authority, the Tribunal does not consider that the conduct of SJSC Airport that is at issue in this arbitration can properly be said to implicate the exercise of governmental authority. Rather, as in *Almås v. Poland*, *Jan de Nul v. Egypt*, *Hamester v. Ghana* and other cases to which the Respondent has referred in its submissions, the conduct of SJSC Airport with which this dispute is concerned is of a quintessentially commercial character, i.e., the management of its relationship with private investors in relation to the development of real estate in accordance with contracts concluded for that purpose on commercial terms and governed by Latvian private law. As the Respondent has correctly argued, ordinary contractual acts, without more, are not generally considered to constitute acts of governmental authority. Moreover, the land at issue was not intended to be used for a public purpose, but was to be developed for commercial use in the form of hotels, office buildings, convention, parking and other facilities, all of which were to be privately owned and operated. As held by the tribunal in *Almås v. Poland*, the commercial character of a lease transaction is not altered by the fact that, as here, the land concerned is owned by the State or leased by a State-owned entity.

344. In arguing that SJSC Airport was exercising governmental authority in its dealings with Rixport, the Claimants have acknowledged that "[t]he mere lease of land belonging to the State may indeed not be an exercise of governmental authority as such."<sup>536</sup> However, they submit that the exercise of governmental authority was implicated in this case because:<sup>537</sup>

- (i) *SJSC Airport was fully dependent on the Ministry of Transport for the negotiation, execution and performance of the Land Lease Agreements.*

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<sup>536</sup> Cl. Reply ¶696.

<sup>537</sup> Id.

- (ii) . . . *the powers of the Ministry to appoint and remove members of SJSC Airport’s Management Board and Supervisory Council were far greater than those of Poland in the Almås case.*
- (iii) . . . *Almås concerned the lease of land for agricultural purposes; whereas the lands here are being leased for the development of public infrastructure, namely Latvia’s sole international Airport. Any private landowner could lease out land for agricultural purposes (zoning laws permitting), but private landowners could never decide upon the creation and development of an international airport and lease out land for that purpose.*

345. Moreover, the Claimants observe that their “complaints in the present case relate to far more than the mere lease of land: the focus of their claims is centered on the repeated changes to the development plans, which have made the implementation of their investment impossible.”<sup>538</sup>

346. The Claimants further dispute that the Land Lease Agreements are purely commercial agreements, given that their objectives allegedly “went above and beyond commercial purposes” insofar as it was the Ministry of Transport’s plan, as evidenced, *e.g.*, by the 12 July 2006 Order of the Cabinet of Ministers (see ¶66 above), “to expand the Airport and transform it into a business area.”<sup>539</sup> The Claimants also refer to the requirement in the Land Lease Agreements that Rixport had to pay EUR 150,000 per hectare of leased land in respect of non-refundable infrastructure payments. According to the Claimants, “[t]his infrastructure was not intended for commercial use only, nor was its usage intended to be restricted to Rixport and SJSC Airport,” thus demonstrating its partially public purpose.<sup>540</sup>

347. The Tribunal does not find any of these arguments convincing.

348. First, as already discussed, the Claimants have failed to establish that SJSC Airport was “fully dependent on the Ministry of Transport for the negotiation, execution and performance of the Land Lease Agreements.” To the contrary, there is no evidence of any material involvement by the Ministry of Transport at all. Notably, the leases were not required to be, and were not, approved by the Ministry; nor were any of the leases’ subsequent amendments. Rixport’s counterparts in the negotiation and performance of the leases have, to the contrary, been shown to be representatives of SJSC Airport and not the Ministry, which resisted being drawn into discussions with Rixport and its

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<sup>538</sup> Id. at ¶697.

<sup>539</sup> Id. at ¶698.

<sup>540</sup> Cl. Mem. ¶378; TR, Day 1, p. 106.

representatives when solicited. Further, there is no evidence that the Ministry had any involvement in the decision of SJSC Airport to terminate the leases which, as in *Almås v. Poland*, was effected on the basis of the leases' terms.

349. Second, the powers of the Ministry as a shareholder, to appoint and remove members of SJSC Airport's Management Board and Supervisory Council, have no bearing on whether SJSC Airport was exercising elements of governmental authority in its relationship with Rixport. As the Respondent has correctly noted, in reliance upon the ILC Commentary on Article 5, "[c]ontrol on the part of the State within its competence as a shareholder has nothing to do with the exercise of governmental authority."<sup>541</sup> This is consistent with the position followed by the tribunal in *Biwater Gauff v. Tanzania*, where acts of governmental authority were considered to refer to acts "which exceed the normal course of conduct of a State shareholder."<sup>542</sup> There has been no showing in the present case that the Ministry acted as anything other than a shareholder, leaving the day-to-day management of SJSC Airport's affairs with Rixport to SJSC Airport.

350. Third, the Tribunal does not accept the distinction that the Claimants have drawn between the agricultural lands at issue in *Almås v. Poland* and the real estate that is the subject of this case. Although, as already discussed, the Claimants have undertaken to ascribe a "strategic" character to the land that was the subject of the leases in this case, based on the Airport being characterized as an object of "national interest," the subject of the Land Lease Agreements was not part of the Airport facility *per se* (*i.e.*, its terminal, runways or other areas and facilities needed for the Airport's core operations), but concerned land adjacent to the Airport that, as already stated, was to be used for the development of privately-operated hotels, parking facilities and a business park. The Tribunal sees nothing inherently governmental in the development of commercial facilities of this kind and does not consider that such activity is to be regarded as an exercise of governmental authority simply because the Ministry of Transport may have considered the development of such facilities to be desirable. Nor is the Tribunal persuaded that the EUR150,000 per hectare infrastructure payments provided for in the Land Lease Agreements altered their commercial, as opposed to governmental, character. It is undisputed that infrastructure needed to be constructed to provide access to the land plots that Rixport had undertaken to develop, and Rixport's agreement to

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<sup>541</sup> Resp. Rejoinder ¶471.

<sup>542</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, Ex. CL-85, ¶ 460.

contribute to the construction of such infrastructure was not an unusual commercial term of the leases in those circumstances.

351. Fourth, the Claimants have failed to show that the development and modification of SJSC Airport’s development plans constituted any more of an exercise of governmental authority than the leasing of the land that is the subject of this arbitration. As Mr. Saveljevs has explained in his evidence, SJSC Airport develops internal business development plans “like most businesses.”<sup>543</sup> These plans are not binding upon anyone and are not required to be approved by the State. Even if they are prepared with the objectives of the State for the Airport in mind, it does not follow that they are themselves acts of governmental authority.

352. The Claimants have also contended that a report issued by a Latvian Parliamentary Commission in January 2018 concerning alleged corruption by Minister Šlesers during his time in office, particularly in respect of dealings with airBaltic,<sup>544</sup> “shows that the Airport was governed by ‘State power’, as illustrated for example in the appointment and firing process of State officials.”<sup>545</sup> However, as the Respondent has observed, the report “had nothing to do with the Land Lease Agreements, let alone with Rixport, or any action allegedly taken against it.”<sup>546</sup> The Tribunal therefore does not consider that this report bears on whether the conduct of SJSC Airport that is the subject of this proceeding involved the exercise by SJSC Airport of governmental authority.

353. The Tribunal finds, on the basis of the evidence before it, that it did not.

354. As already noted, whether or not SJSC Airport can be considered to have acted under the directions or control of the Latvian State, within the meaning of Article 8 of the ILC Articles, is a matter that is considered below in the analysis of the Claimants’ specific treaty breach claims.

## **B. Equitable and Reasonable Treatment and Protection Claim**

### **1. Claimants’ Position**

355. As stated above, it is the Claimants’ position that the Respondent has failed to accord the Claimants’ investments equitable and reasonable treatment and protection, in

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<sup>543</sup> Saveljevs first witness statement ¶45.

<sup>544</sup> Excerpt of Final Report of the Parliamentary Investigation Commission about the Signs of State Capture and Pre-Litigation Investigation Quality in Criminal Proceedings adopted on 18 January 2018, Ex. C-194.

<sup>545</sup> Cl. Reply ¶703.

<sup>546</sup> Resp. Rejoinder ¶475.

breach of Article III of the BIT, by: (i) failing to provide a transparent, consistent and stable business framework; (ii) violating the Claimants' legitimate expectations; and (iii) denying the Claimants justice by failing to provide administrative and judicial due process. It is common ground that the "equitable and reasonable treatment and protection" standard in Article III does not differ materially from the "fair and equitable treatment" ("FET") standard referred to in other BITs.<sup>547</sup> The two standards are accordingly referred to interchangeably hereafter.

356. With respect to the first of the above alleged violations (the failure to provide a transparent, consistent and stable business framework), the Claimants found their claim on the proposition that "the Latvian State, and in particular the Ministry of Transport and SJSC Airport, enacted . . . a rollercoaster of regulatory change affecting the entire functioning of the airport, subjecting the Claimants to incessant alteration in the conditions governing the Land Lease Agreements and their implementation."<sup>548</sup> Insofar as, as already found, acts of SJSC Airport are not attributable to the State under Articles 4 or 5 of the ILC Articles, then it is the Claimants' position that they are attributable to Latvia under Article 8, given that they allegedly flowed from instructions, or otherwise were carried out under the direction and control, of the Ministry of Transport.
357. The Claimants further contend that "[t]he process of adopting amendments to the legal framework was fully non-transparent and stakeholders, such as Claimants, were not allowed to present their views, in spite of repeated requests."<sup>549</sup> According to the Claimants, the Respondent has also "failed to communicate in an *'unbiased, even-handed, transparent and consistent way'* regarding these continuous changes to the regulatory and contractual framework."<sup>550</sup>
358. The alleged changes about which the Claimants complain include the following:
- (i) changes in the development plans prepared for the Airport by SJSC Airport, allegedly upon the direction of the Ministry of Transport, in 2006 and 2007;<sup>551</sup>

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<sup>547</sup> Cl. Mem. ¶¶455; Resp. Counter-Mem. ¶564.

<sup>548</sup> Cl. Mem. ¶464.

<sup>549</sup> Id. at ¶465.

<sup>550</sup> Id. at ¶467.

<sup>551</sup> Cl. Reply ¶¶88-106; TR, Day 8, pp. 42-43. See also ¶¶115-121 above.

- (ii) the adoption of a Government Action Plan by the Cabinet of Ministers in February 2008 requiring the Ministry of Transport to monitor the construction of a new terminal at the Airport;<sup>552</sup>
- (iii) the issuance of a tender by SJSC Airport in May 2008 for a PPP concerning the development of the Airport's infrastructure, including the construction of a new terminal, parking and hotel facilities (although the tender was aborted in or around September 2009 and the Respondent disputes that the project included parking and hotel facilities);<sup>553</sup>
- (iv) a draft "masterplan" for the Airport prepared for SJSC Airport by Hochtief in April 2009 (although it was never adopted);<sup>554</sup>
- (v) a project, allegedly initiated by the Ministry of Transport in 2009 for the construction of a new Airport terminal building for airBaltic;<sup>555</sup>
- (vi) SJSC Airport's application on 26 April 2011 to the Construction Board of the Mārupe Municipality to reopen the 2003 Detailed Plan for the purpose of developing a new, amended Detailed Plan in order to permit SJSC Airport to carry out infrastructure projects being financed by the EU Cohesion Fund;<sup>556</sup>
- (vii) the cancellation of the airBaltic project in May 2011 and the preparation of the September 2011 Business Plan for SJSC Airport by SIA Ernst & Young Baltic, which, according to the Claimants (but which the Respondent disputes) postponed the completion of the Airport terminal's expansion until after 2020;<sup>557</sup>
- (viii) the adoption of a Government Action Plan by the Cabinet of Ministers in February 2012 postponing the deadline for the terminal expansion project until 31 December 2014;<sup>558</sup>

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<sup>552</sup> Cl. Mem. ¶¶103-106; Cl. Reply ¶¶168-169; TR, Day 8, p. 44.

<sup>553</sup> Cl. Reply ¶¶168-179, 200-207 and 241-250; TR, Day 8, p. 43. See also ¶¶146-147 above.

<sup>554</sup> Cl. Reply ¶¶208-216; TR, Day 8, pp. 44-45. See also ¶¶146-147 above.

<sup>555</sup> Cl. Reply ¶¶251-267 and 306-318; TR, Day 8, p. 45. See also ¶¶146-147 above.

<sup>556</sup> Cl. Reply ¶¶319-327; TR, Day 8, p. 46. See also ¶¶171 and 188 above.

<sup>557</sup> Cl. Reply ¶¶328-339; TR, Day 8, pp. 46-47; Resp. Rejoinder ¶272. See also ¶¶146-147 and 171 above.

<sup>558</sup> TR, Day 8, p. 47, referring to Ex. C-367.



- (ix) SJSC Airport’s development of an updated business plan in 2013 about which no information was allegedly made available to Rixport or its representatives;<sup>559</sup>
- (x) the issuance by the Mārupe Construction Board of advice to Rixport in April 2012 that it could not obtain construction permits for projects on the leased land following the reopening of the 2003 Detailed Plan;<sup>560</sup>
- (xi) the approval by the Mārupe Municipality of the 2013 Detailed Plan in July 2013 and the issuance by the Municipality of the 2013 Spatial Plan in June 2013;<sup>561</sup> and
- (xii) a letter dated 16 September 2013 from the MEPRD confirming that, in accordance with the 2013 Spatial Plan, a railway line might be built on the land leased by Rixport and dismissing Rixport’s related objection.<sup>562</sup>

359. As already noted, these acts are alleged by the Claimants to have prevented them from profitably developing the land that was the subject of the Land Lease Agreements.

360. The Claimants rely upon the cases of *CMS v. Argentina*,<sup>563</sup> *Occidental v. Ecuador*<sup>564</sup> and *PSEG Global v. Turkey*<sup>565</sup> in support of the propositions that: (i) a stable legal and business environment is an essential element of fair and equitable treatment, irrespective of an investor’s expectations; and (ii) accordingly, that the “roller-coaster effect” of continuing “regulatory change” for which the State is responsible suffices to place the State in breach of its FET obligations under Article III of the BIT.<sup>566</sup> According to the Claimants: “[a]lthough closely related to the rationale of legitimate expectations, the requirements of stability and legal certainty differ in that they are not

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<sup>559</sup> Cl. Reply ¶¶376; TR, Day 8, p. 47-48.

<sup>560</sup> Cl. Reply ¶¶421-423; TR, Day 8, p. 48.

<sup>561</sup> Cl. Mem. ¶¶204 and 220-226; TR, Day 8, p. 48. See also ¶171 above.

<sup>562</sup> TR, Day 8, p.48, referring to Ex. C-118.

<sup>563</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, Ex. CL-29.

<sup>564</sup> *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL, Final Award, 1 July 2004, Ex. CL-86.

<sup>565</sup> *PSEG Global, Inc., The North American Coal Corporation and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, Ex. CL-30.

<sup>566</sup> Cl. Mem. ¶¶461-468; Cl. Reply ¶¶740-743.

based on the investor's perspective but they are broader, demanding an overall degree of substantive tranquility and coherence."<sup>567</sup>

361. While the Claimants acknowledge that "a host State has the sovereign right to change its regulatory framework, including development plans and detail plans for the purpose of long term infrastructure projects in the public interest,"<sup>568</sup> they argue that in this case, the State "continuously disrupted the regulatory framework applicable to the investments for no developmental benefits, and merely in response to the individual preferences of whoever happened to be heading the Ministry of Transport."<sup>569</sup>
362. They further argue that "such changes must be fair and equitable in light of the investor's legitimate expectations."<sup>570</sup>
363. In the present case, the Claimants contend that the Latvian State created the legitimate expectation that the "applicable regulatory and contractual framework in Latvia at the time of the investment" would not be altered and, accordingly, that Rixport's development project would be able to commence soon after the signing of the Land Lease Agreements on 3 November 2006 and generate "investment-critical revenues" by the end of 2009 and for at least 22 consecutive years thereafter.<sup>571</sup> The Claimants submit, in particular, that they had the legitimate expectation of a "shovel ready" project in which they would be in a position to proceed immediately with the construction of the "first phase" of a "phased-development,"<sup>572</sup> the "first phase", as already mentioned, consisting, according to the Claimants, in the construction and operation of an Airport hotel, with a connection to the Airport terminal.<sup>573</sup> This, the Claimants contend, was the "pre-condition for their investment and the condition sine qua non for its profitability."<sup>574</sup>
364. The Claimants submit that their corresponding expectation was created by "explicit representations by Latvia vis-à-vis the Claimants" as well as by "implicit representations."<sup>575</sup>

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<sup>567</sup> TR, Day 1, p. 116; Cl. Mem. ¶461.

<sup>568</sup> Cl. Mem. ¶470.

<sup>569</sup> TR, Day 1, p. 117.

<sup>570</sup> Cl. Mem. ¶470.

<sup>571</sup> Id. at ¶¶475-476.

<sup>572</sup> Id. at ¶487.

<sup>573</sup> Id. at ¶491.

<sup>574</sup> Id.

<sup>575</sup> Cl. Reply ¶755.

365. The explicit representations are stated by the Claimants to have been made by the Minister of Transport: (i) at a meeting in July 2006 among then-Minister Peters, Mr. Šlesers and Messrs. Østhus and Lundeby; (ii) at a further meeting of Messrs. Østhus and Lundeby with then-Minister Peters in October 2006 “to sort out important clauses regarding the protection of the investment in case of early termination of the Land Lease Agreements”; and (iii) at a meeting that Mr. Lilleberg says he is “aware” was held with “the authorities” prior to the Land Lease Agreements being signed “to get assurances that the project garnered support at the highest level.”<sup>576</sup>

366. In addition, the Claimants rely on:

- the Ordinance of the Cabinet of Ministers dated 6 July 2006, approving the Operational Strategy 2007-2009 of the Ministry of Transport, which includes among its “main tasks” the approval by 2007 and start of “further passenger terminal extension projects” and completion of construction of the Airport’s “business park by 2010;”<sup>577</sup>
- the 2003 Detailed Plan and “plans prepared for the development of the Airport based on the strategy and plans set out by the Ministry of Transport;”<sup>578</sup>
- specific terms of the Land Lease Agreements, including the tender documents, the 2007 Amendments and the 2010 Agreement;<sup>579</sup> and
- the Claimants’ “legitimate” expectation that changes would not be made that would have “entirely unreasonable and disproportionate” consequences for the Claimants’ investment.<sup>580</sup>

367. According to the Claimants, the “most serious transgressions which have frustrated the Claimants’ legitimate expectations” are: (i) the Ministry of Transport’s “repeated, significant, unforeseen and belatedly communicated changes” to the development plans of the Airport, with the result that “the land assigned to Rixport was never specified and it was never possible to commence construction;” (ii) the “repeated and significant changes to the number of passengers the airport facilities were expected to cater for;”

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<sup>576</sup> Id. at ¶757; Østhus witness statement ¶¶12-14; Lilleberg witness statement ¶12.

<sup>577</sup> Cl. Reply ¶757; Ex. C-256.

<sup>578</sup> Id. at ¶758.

<sup>579</sup> Id. at ¶¶759 and 767.

<sup>580</sup> Id. at ¶¶782-785.

(iii) the “requirement to pay land lease for areas that cannot be utilized;” (iv) the “unilateral postponement of transfer of Draw 1, land 2 and 3;” (v) SJSC Airport’s failure to specify the new land plot for the Airport hotel under the 2007 Amendments by 30 May 2008; (vi) SJSC Airport’s failure to make available the land in front of the existing terminal for construction by Rixport; and (vii) the “failure to observe Claimants’ right to be included as a stakeholder in the ongoing development process.”<sup>581</sup>

368. The Claimants further insist that “[f]rom 2006 to this very day, it has been impossible for Claimants to start any construction, and in particular on the land which they explicitly stated they needed to develop first.”<sup>582</sup>

369. Insofar as the Respondent argues that the Claimants’ complaints merely call into question SJSC Airport’s compliance with its contractual obligations under the Land Lease Agreements, the 2007 Amendments or the 2010 Agreement and do not amount to a failure by the Respondent to accord FET treatment, it is the Claimants’ position that a breach of contractual terms can form a breach of an FET standard and does where, as in this case, the State interferes with a contract between an investor and a State entity in such a manner as to “substantially depriv[e] the investment of its value and frustrat[e] its economic purpose.”<sup>583</sup>

370. The Claimants also contend that the “regulatory changes in the present case were made without any explanation as to Latvia’s long-term intentions in a consistent and non-arbitrary manner or with any form of transparency.”<sup>584</sup> In support of their position, they allege that the Respondent refused to respond to their concerns, answer numerous letters, share with them the Airport’s development plans or include them in working groups. They contend, in particular, that Latvia’s “own Environmental Monitoring State Bureau has, with regard to the changes to SJSC Airport’s Development Plan in 2013, established that the Respondent acted in breach of transparency requirements of the Environmental Impact Assessment Law and the principle of good administration, the UN Economic Commission for Europe Convention on Access to Information

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<sup>581</sup> Cl. Mem. ¶478.

<sup>582</sup> Id. at ¶497.

<sup>583</sup> Cl. Reply ¶¶790-797, relying upon *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, Ex. CL-65 (“*Alpha v. Ukraine*”).

<sup>584</sup> Cl. Mem. ¶495.

(Aarhus Convention), Cabinet Regulation 157[,] Article 18 and Article 20 as well as of the EU Charter of Human Rights Article 41.”<sup>585</sup>

371. The development plan at issue is a draft of a development plan prepared by SJSC Airport for 2012-2036.<sup>586</sup> The Claimants accuse SJSC Airport of failing to inform the Claimants and the public of a meeting convened to discuss the environmental impact assessment of the draft plan or inviting them to attend, in breach of “two legally binding Orders of . . . [the Respondent’s] . . . Environmental Monitoring State Bureau” of 2 August and 28 October 2013.<sup>587</sup>
372. In addition, the Claimants accuse the Respondent of generating confusion and “lack of clarity” concerning Rixport’s right to obtain construction permits and carry out construction work following the opening of the 2003 Detailed Plan.<sup>588</sup>
373. Lastly, as already mentioned, the Claimants contend that Latvia’s conduct “amounts to a denial of justice and a failure to provide due process.”<sup>589</sup> More specifically, it is the Claimants’ position that the Respondent has (i) failed to comply with administrative due process standards and (ii) violated judicial due process standards that oblige it to provide a fair trial and to administer justice adequately in the civil case initiated in March 2013 by Rixport against SJSC Airport in respect of the Land Lease Agreements. As discussed above (see ¶¶180-186 and 212-220), the civil case resulted in a series of judgments, the last of which was issued by the Kurzeme Regional Court on 5 July 2019, but which has not been appealed to the Supreme Court.
374. The Claimants’ claim concerning the violation of administrative due process standards concerns: (i) the failure of SJSC Airport and/or the Mārupe Construction Board to invite the Claimants to meetings concerning the 2013 Detailed Plan while it was being prepared; (ii) SJSC Airport’s alleged failure to cause a public meeting to be held in respect of the environmental impact assessment relating to SJSC Airport’s 2013 development plan for 2012-2036; and (iii) an insolvency notice that SJSC Airport sent to Rixport on 3 March 2014 in respect of claims for outstanding rent and liquidated damages under the Land Lease Agreements, although the claims were disputed by

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<sup>585</sup> Id. at ¶502.

<sup>586</sup> Ex. C-112.

<sup>587</sup> Cl. Mem. ¶504.

<sup>588</sup> Id. at ¶¶505-512.

<sup>589</sup> Id. at ¶¶513-534; Cl. Reply ¶¶798-820.

Rixport, which, according to the Claimants, precluded SJSC Airport from sending such a notice under Latvian law.<sup>590</sup>

375. Although the Claimants have not elaborated upon the standard that is required to be satisfied in order to succeed on a claim for the denial of administrative due process, they have nevertheless referred in their submissions to the requirement set forth in the judgment of the International Court of Justice (“**ICJ**”) in the *ELSI* case, according to which the actions complained of should “surprise a sense of judicial propriety.”<sup>591</sup>
376. In the case of the judicial due process claim, the Claimants argue that “three elements in particular . . . entail separate and cumulative breaches of the [FET] standard in Article III of the . . . BIT.”<sup>592</sup>
377. The first is the fact that, due to a reform of the appeals mechanism in Latvia, the Kurzeme Regional Court acted as both a first instance and appellate court in the litigation between Rixport and SJSC Airport. Although different judges ruled upon the case at the first instance and appellate stages, the Claimants nevertheless submit that “[h]aving the same court adjudicate the same dispute in the first and second instance is . . . incompatible with the core objective of an appeal procedure,”<sup>593</sup> particularly where the judges know each other well and work together on a daily basis. The Claimants further note that the process by which the case was transferred from the Riga Regional Court, where it was originally filed, to the Kurzeme Regional Court (formally to ensure faster review of the case) was not transparent. In this regard, they cite a 2018 Report on the Latvian judicial system of the European Commission for the Efficiency of Justice (“**CEPEJ**”) of the Council of Europe that found that such transfers “might raise questions as regards the full respect of the requirements of a ‘tribunal established by law’ as well as the principle of legal certainty.”<sup>594</sup>
378. Second, the Claimants contend that the first judgment of the Kurzeme Regional Court of 13 February 2015 was delivered in an electronic Word document created by Ms. Dace Kalniņa, who worked as a lawyer for the Ministry of Justice at the time of the hearing on 13 February 2015 and when the judgment was emailed to the parties on 1 April 2015. According to the Claimants, the “mere fact that the document was created

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<sup>590</sup> Cl. Mem. ¶¶517-518; Cl. Reply ¶¶798-801.

<sup>591</sup> Cl. Mem. ¶517; Ex. CL-35, *Elettronica Sicula S.p.A., United States of America v. Italy*, ICJ Rep. 1980.

<sup>592</sup> Cl. Mem. ¶520.

<sup>593</sup> *Id.* at ¶522.

<sup>594</sup> Cl. Reply ¶808; Ex. C-370.

by a servant of the Ministry of Justice may . . . ‘prompt objectively held misgivings as to impartiality from the point of view of the external observer’” and implies that the Latvian executive branch may have “colluded” with the Court.<sup>595</sup>

379. Third, the Claimants complain that in order to have Rixport’s case heard by the courts, they were obliged to pay court fees for each instance in an amount of EUR 8,715 plus 0.6% of the amount claimed in excess of EUR 711,435. They submit that court fees of this magnitude constitute “an illegitimate barrier to access justice.”<sup>596</sup> They note that the CEPEJ has stated in its 2018 report that the court fees in Latvia for claims in excess of EUR 500,000 “are much higher . . . than in other countries, and there is a risk of violation of Article 6§1 of the European Convention on Human Rights.”<sup>597</sup>
380. According to the Claimants, in considering whether they have been denied judicial due process, the Tribunal should construe and apply the Respondent’s obligations “in accordance with the Respondent’s international human rights obligations [in particular, the European Convention on Human Rights (‘ECHR’), to which Norway and Latvia are parties], which highlight their investment has not been accorded treatment in accordance with the international standards in both investment and human rights law that the host state has explicitly agreed to honour.”<sup>598</sup>
381. The Claimants further submit that the Respondent’s contention, as described below, that the Claimants cannot properly maintain their denial of justice claim without having exhausted local remedies is incorrect in circumstances where, as here, according to the Claimants, further recourse within the Latvian judicial system would be futile.<sup>599</sup>
382. In their closing submissions at the Hearing, the Claimants also referred to the judgment issued by the Riga Administrative District Court on 16 May 2014 in respect of Rixport’s (and Staur Building’s) challenge of the 2013 Detailed Plan<sup>600</sup> and made the argument that the court found that the interests of the Airport, as an “object of national interest” prevailed over the interests of Rixport (and in so finding effectively disregarded Rixport’s contractual rights).<sup>601</sup> It was suggested at the Hearing that this judgment constituted a violation of the Respondent’s obligations under Article III of

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<sup>595</sup> Cl. Mem. ¶¶527-530.

<sup>596</sup> Id. at ¶531.

<sup>597</sup> Cl. Reply ¶815; Ex. C-370, p. 82.

<sup>598</sup> Cl. Mem. ¶534.

<sup>599</sup> Cl. Reply ¶804.

<sup>600</sup> Ex. C-111.

<sup>601</sup> TR, Day 8, p. 49.

the BIT. However, the Claimants have not specifically asserted that there was any related denial of justice.

## 2. Respondent's Position

383. The Respondent disputes that the Claimants have been denied equitable and reasonable treatment and protection, in breach of the BIT.

384. It denies, first of all, that the FET standard includes a “stand-alone obligation on the host State to stabilise its regulatory and legislative system, divorced from the investor’s legitimate expectations.”<sup>602</sup> According to the Respondent, “[n]o investor is entitled to expect that a general legislative measure will remain static, or that any regulatory change that adversely affects its economic position creates a cause of action under international law,” in the absence of specific undertakings of the State to the contrary.<sup>603</sup> The Respondent relies in this regard on the Awards in *El Paso v. Argentina* and a number of other subsequent cases<sup>604</sup> and distinguishes the situation in *PSEG v. Turkey*, upon which the Claimants rely, given that, in that case, unlike in the present case, the host State (Turkey) was changing the laws governing the investment and the investor’s business.

385. In the present case, the Respondent denies that that there were any material changes to the “regulatory framework governing the Claimants’ investment in Latvia.”<sup>605</sup>

386. The Respondent observes that the Claimants complain principally about changes in policies, projections and SJSC Airport’s business development plans. However, according to the Respondent, these were not “State plans,” were not binding on Rixport and “could not have overridden Rixport’s contractual rights.”<sup>606</sup> For the Respondent, moreover, there was “nothing wrong” with SJSC Airport, in the event of such changes, seeking Rixport’s agreement to amend the Land Lease Agreements.<sup>607</sup> In this regard, the Respondent notes, in reliance on the evidence of Mr. Saveljevs: “It is perfectly

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<sup>602</sup> Resp. Counter-Mem. ¶604.

<sup>603</sup> Id. at ¶¶604-606.

<sup>604</sup> Id. at ¶605; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, Ex. CL-36; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, Ex. CL-88; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, Ex. CL-44; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, Ex. CL-40; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, Ex. CL-84; *EDF (Services) Ltd v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, Ex. CL-19.

<sup>605</sup> Resp. Counter-Mem. ¶614.

<sup>606</sup> Id. at ¶616; Resp. Rejoinder ¶558.

<sup>607</sup> Resp. Rejoinder ¶558.



normal, and indeed necessary, for an airport to continuously assess the need of the market and to consider possible changes, including extensions or expansions.”<sup>608</sup> It further observes that the principal plans about which the Claimants complain (*i.e.*, the contemplated PPP project, the Hochtief masterplan and the separate airBaltic terminal) were never adopted.

387. Although the Respondent accepts that the 2003 Detailed Plan was reopened by the Mārupe Municipality, it notes that it remains in force and that the subsequent 2013 Detailed Plan was in effect for only one month (10 July – 9 August 2013) due to legal proceedings initiated against it by the Claimants’ subsidiaries.<sup>609</sup> Detailed Plans do not, in any event, form part of the “regulatory framework,” according to the Respondent.<sup>610</sup>
388. The Respondent further observes that there were only two changes to legislation or regulations that “are even conceivably relevant to Rixport’s business park project” during the period at issue.<sup>611</sup>
389. The first was a “change in legislation [in January 2008] with respect to permissible building heights [40 metres] adjacent to airport runways,”<sup>612</sup> although the Respondent submits that this “could not have come as a surprise because the rule that buildings could not exceed a height of 40 metres has always been clear, and did in fact not change.”<sup>613</sup> In fact, according to the Respondent, while “it was maybe interpreted a bit loosely earlier, on which basis Rixport did obtain a building permit to build an office building,” the “40-metre rule was already set out in that exact 2003 Detailed Plan” and “also set out and confirmed in Annex 5 to the Land Lease Agreements.”<sup>614</sup>
390. The second was Cabinet Regulation No. 711 regarding Local Government Spatial Development Planning Documents, which came into force on 16 October 2012.

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<sup>608</sup> TR, Day 1, p. 224.

<sup>609</sup> *Id.* at p. 225.

<sup>610</sup> Resp. Rejoinder ¶559.

<sup>611</sup> TR, Day 1, p. 221.

<sup>612</sup> *Id.*; Cabinet Regulation No. 2 on Procedures for Requesting and Receipt of a Permit of the Civil Aviation Agency to Construct, Install and Place Potentially Hazardous Objects to the Safety of Civil Aviation Flights, Ex. R-179.

<sup>613</sup> TR, Day 1, p. 221.

<sup>614</sup> *Id.* See also Resp. Counter-Mem. ¶353, where the Respondent clarifies that this was explained in the explanatory memorandum that was part of the 2003 Detailed Plan.

According to the Respondent, this change did not adversely affect Rixport or have any adverse impact on Rixport's ability to develop the project.<sup>615</sup>

391. For the Respondent, this is “hardly a ‘rollercoaster of regulatory change.’”<sup>616</sup>
392. Nor does the Respondent accept that Latvia ever created any “legitimate expectations” that it would have frustrated. It is the Respondent’s position in this regard that legitimate expectations can only be created by “specific representations made by State officials,” and there were no such representations in this case.<sup>617</sup> In particular, the Respondent argues that there were no representations that the development of SJSC Airport would effectively be frozen and that no development plans or changes to the 2003 Detailed Plan might subsequently be made.
393. According to the Respondent, the Claimants improperly attempt to “expand the concept [of legitimate expectations] to include implicit representations, which would make the concept . . . inadmissibly uncertain and broad.”<sup>618</sup> The Respondent notes that the Claimants rely on three types of representations: first, “political statements made mainly during the tender phase;” second, “statements made during the negotiations of the Land Lease Agreements;” and third, regulations.<sup>619</sup> The Respondent observes that the statements upon which the Claimants rely were of an aspirational nature (*e.g.*, concerning Latvia’s intention to develop and internationalize its airport, which the Respondent says that it has, in any event, done)<sup>620</sup> or constituted general pledges of support, which were “too vague to give rise to any legitimate expectations.”<sup>621</sup> Moreover, the Respondent does not accept that the Claimants could have formed any legitimate expectations based on Latvia’s regulatory framework, there being no evidence that they carried out any related due diligence or placed any reliance on that regulatory framework prior to making their investments. In particular, the Respondent submits that there is no evidence that the Claimants or Rixport “consulted the existing zoning plans or appropriate regulations” before Rixport submitted its tender application and signed the Land Lease Agreements.<sup>622</sup>

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<sup>615</sup> Resp. Counter-Mem. ¶595.

<sup>616</sup> TR, Day 1, p. 222.

<sup>617</sup> Resp. Counter-Mem. ¶¶571-602.

<sup>618</sup> TR, Day 1, p. 205.

<sup>619</sup> *Id.* at pp. 205-206.

<sup>620</sup> *Id.* at p. 208.

<sup>621</sup> *Id.* at p. 211.

<sup>622</sup> *Id.* at pp. 216-219.

394. For the Respondent, an investor has “a duty to undertake due diligence with respect to the relevant circumstances that will affect its investment, including the regulatory and political framework into which it invests” and that any “expectations formed in the absence of such due diligence cannot be considered ‘legitimate.’”<sup>623</sup>
395. Moreover, in this case it is the Respondent’s position that “the only truly legitimate expectation” that the Claimants could have had is that SJSC Airport would comply with the Land Lease Agreements and, if it did not, that Rixport would be able to seek relief before the Latvian courts, as provided in those agreements.<sup>624</sup>
396. Insofar as the Claimants found their claims upon contractual undertakings of SJSC Airport, these, according to the Respondent, cannot be the subject of a BIT claim given that the Land Lease Agreements constituted “a private, commercial deal between Rixport and SJSC Airport,” which is not attributable to the Respondent.<sup>625</sup> Nothing in those agreements, the Respondent notes, in any event “restricts SJSC Airport’s right to develop and change its plans, as long as the contractual rights of Rixport are respected.”<sup>626</sup> In this regard, the Respondent emphasizes, in particular, that the changes to various dates and deadlines in the Land Lease Agreements were by mutual agreement of the contracting parties and that “[a]ll actions that may have given rise to issues prior to November 2010 were settled by the 2010 Agreement.”<sup>627</sup>
397. It is the position of the Respondent, more generally, that neither the State nor SJSC Airport prevented the Claimants from proceeding with the development of the leased land.<sup>628</sup> In the Respondent’s view, as already noted, the Claimants failed to proceed with the development of the land because of the impact on the project of the global financial crisis, which, the Respondent observes, “hit Latvia particularly hard” as from 2008 and as a result of which “at the latest by 2008, Rixport would have known that the project was no longer realistic and would not be profitable in the foreseeable future.”<sup>629</sup>

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<sup>623</sup> Resp. Counter-Mem. ¶574.

<sup>624</sup> TR, Day 1, p. 206.

<sup>625</sup> Resp. Counter-Mem. ¶585.

<sup>626</sup> Id.

<sup>627</sup> Id. at ¶597.

<sup>628</sup> Id. at ¶13 and ¶¶596-600; Resp. Rejoinder, ¶¶7, 38, 158, 164, 303, 638.

<sup>629</sup> Id. at ¶4.

398. In the circumstances, according to the Respondent: “Rixport sought to buy time, apparently hoping that the local economy would recover faster than expected. The project was effectively left in a standstill: Rixport did not secure financing for the project, did not apply for construction permits, and never began construction. Instead, it sought to negotiate amendments to the Land Lease Agreements and the rent payments and other obligations thereunder.”<sup>630</sup>
399. For the Respondent, the Claimants’ contention that Rixport was prevented by a “rollercoaster” of regulatory change from proceeding with the project, contrary to the Claimants’ legitimate expectations, is little more than a pretext intended to distract attention from the real impediments to Rixport making any progress. As the Respondent states: “The problem was rather with Rixport.”<sup>631</sup>
400. With respect to the issue of transparency, the Respondent denies that it breached any related obligation. Although it notes that the Claimants criticize SJSC Airport (but not the State) for failing to communicate with Rixport regarding the Airport’s development plans, it argues that SJSC Airport did inform Rixport “when development plans actually affected Rixport’s leased lands” and that, in any event, the Claimants “have not shown how they relied on the airport’s plans in making their investments, or explained (a) what legitimate expectations arose from those plans; and (b) how those were frustrated.”<sup>632</sup>
401. As regards the environmental impact assessment process relating to SJSC Airport’s development plan for 2012-2036, the Respondent denies that there is any basis to assert that SJSC Airport, let alone the Respondent, failed to act sufficiently transparently. It notes that the development plan had no impact on Rixport or its project and that, in any event, Rixport was entitled to participate in public consultation meetings concerning the environmental impact assessment. Although the Respondent acknowledges, as the Claimants allege, that SJSC Airport was ordered by Latvia’s Environmental Monitoring State Bureau on two occasions (2 August and 28 October 2013) to reschedule a public meeting in respect of the development plan, the Respondent states that SJSC Airport did so, that Rixport participated, as evidenced by the Report on the Public Discussion of the Environmental Review Project,<sup>633</sup> and, accordingly, that

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<sup>630</sup> Id. at ¶5.

<sup>631</sup> Id. at ¶600.

<sup>632</sup> TR, Day 1, p. 225.

<sup>633</sup> Ex. R-187.

SJSC Airport was able to finalize the environmental impact assessment on 12 June 2014.<sup>634</sup>

402. The Respondent also notes that the Claimants contend that there was “an alleged failure” to invite the Claimants to meetings to discuss the 2013 Detailed Plan while it was being prepared, but refer the Tribunal to the Respondent’s account in its submissions of the development of the 2013 Detailed Plan.<sup>635</sup> It is the Respondent’s position that Rixport was given the opportunity to participate in meetings and comment on the proposals relating to the 2013 Development Plan.<sup>636</sup>
403. In the case of the confusion allegedly caused in respect of Rixport’s ability to obtain construction permits following the opening of the 2003 Detailed Plan, the Respondent disputes that Rixport could reasonably have been confused, given that it was “advised – and should, in any event have known, had it carried out proper due diligence – that it was perfectly possible to apply for and be granted construction permits pending the establishment of a new detailed plan for the area in question” and “[i]ndeed, other tenants of the airport” did so.<sup>637</sup>
404. Lastly, the Respondent does not accept that the Claimants can validly maintain that they have been denied either administrative or judicial due process.
405. As noted above, the Claimants’ administrative due process claim is based on the Claimants’ contentions that: (i) the Claimants were not invited to meetings concerning the 2013 Detailed Plan; (ii) SJSC Airport failed to ensure the holding of a public meeting in respect of the environmental impact assessment relating to SJSC Airport’s development plan for 2012-2036; and (iii) SJSC Airport issued an insolvency notice to Rixport on 3 March 2014 in respect of claims for outstanding rent and liquidated damages contrary to Latvian law because the claims were disputed by Rixport.
406. As a factual matter, as just noted, the Respondent denies that SJSC Airport failed to convene the public meeting that is the subject of the Claimants’ second complaint. The Respondent has also contended, as to the first complaint, that the Claimants’ allegation that Rixport was not informed of, nor involved in, the development of the 2013

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<sup>634</sup> Resp. Counter-Mem. ¶¶455-461; Resp. Rejoinder ¶354.

<sup>635</sup> Resp. Rejoinder ¶¶566-567.

<sup>636</sup> Resp. Counter-Mem. ¶¶367-375.

<sup>637</sup> TR, Day 1, pp. 228-229.

Development Plan is wrong.<sup>638</sup> It further notes, with respect to the matter of the insolvency notice, that: “We are talking about just a letter, sent in the context of a contractual dispute. There was never any follow-up: SJSC Airport did not seek to place Rixport into insolvency.”<sup>639</sup> In neither case, the Respondent submits, was there any breach of a rule of law, let alone a breach sufficient to constitute a denial of justice, based on the standard developed by the ICJ in the *ELSI* case.<sup>640</sup>

407. As regards the three prongs of the Claimants’ judicial due process claim, the Respondent responds as follows:

408. First, notwithstanding that, in accordance with what the Respondent describes as “a transitory provision in force during the reform of the judicial system,” the Kurzeme Regional Court acted both as a court of first instance and as an appellate court in respect of the action initiated by Rixport, it is the Respondent’s position that Rixport was afforded due process “and there is no basis to question the impartiality of the panel of three judges hearing Rixport’s appeal of the first-instance decision” rendered by a single and different judge.<sup>641</sup> Moreover, the Respondent notes that the appellate decision was appealed to the Supreme Court, thus curing any procedural irregularity.<sup>642</sup>

409. Second, the Respondent denies that there was any collusion between the Kurzeme Regional Court and the Ministry of Justice. According to the Respondent, the appearance of the name of Ms. Dace Kalniņa, a Ministry of Justice official, in the metadata of the Word version of the first instance judgment of the Kurzeme Regional Court is the consequence of the judgment having been created based on a template Word document created by Ms. Kalnina when she worked at the court before joining the Ministry of Justice. The Respondent denies that Ms. Kalniņa had any involvement in the case after leaving the court and notes that, in any event, the first instance judgment was subsequently appealed and reconsidered by different judges.<sup>643</sup>

410. Third, the Respondent argues that no justice could have been denied to the Respondent based on the level of Latvia’s court fees given, *inter alia*, that (i) Rixport was able to

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<sup>638</sup> Resp. Counter-Mem. ¶¶367-375.

<sup>639</sup> Id. at ¶625.

<sup>640</sup> Id. at ¶622.

<sup>641</sup> TR, Day 1, p. 233; Resp. Counter-Mem. ¶¶640-644.

<sup>642</sup> Resp. Counter-Mem. ¶644.

<sup>643</sup> Id. at ¶¶645-651.

pay the fees and (ii) would have been entitled to recover them had it been successful before the courts because Latvia civil procedural law subscribes to the “costs follow the event” rule.<sup>644</sup> The Respondent argues, in any event, that the court fees prescribed under Latvian law have been fixed “on the basis of clear public policy objectives [including discouraging frivolous claims], well-grounded in practice and international standards.”<sup>645</sup> The Respondent further notes that the court fees “are small in comparison to the costs of an ICSID arbitration.”<sup>646</sup>

411. More generally, it is the Respondent’s position that the Claimants’ claim does not meet the standard for denial of justice as it has been articulated in international jurisprudence. The Respondent has referred in this regard, in addition to the *ELSI* standard, *inter alia*, to the following passage from the opinion of Judge Greenwood in the *Loewen v. USA* case:<sup>647</sup>

*International law understandably applies a very strict test of what constitutes a denial of justice. The international tribunal is not a court of appeal from the national court (. . .), nor is its task to review the findings of the national court. In the absence of clear evidence of bad faith on the part of the relevant court (. . .), the claimant must demonstrate either that it was the victim of discrimination on account of its nationality or that the administration of justice was scandalously irregular. Defects in procedure or a judgment which is open to criticism on the basis of either rulings of law or findings of fact are not enough.*

412. The Respondent, thus, argues that the obligation of the State “is to provide an **internationally acceptable system of justice**, not to guarantee that each and every decision is perfect and complies with rules of procedural propriety” (emphasis in original).<sup>648</sup> It further submits, on the basis of the recent Partial Award in the *Lago Agrio* arbitration, that “a breach requires extreme measures, the whole system of justice of the host State being in contradiction of international norms of justice.”<sup>649</sup>
413. The Respondent continues: “A corollary of this principle is that unless and until the aggrieved party has tested the entire system – and thus in effect **exhausted domestic remedies** – it cannot bring its claim before an international tribunal. While exhaustion

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<sup>644</sup> Id. at ¶656.

<sup>645</sup> Id. at ¶654; TR, Day 1, p. 233.

<sup>646</sup> TR, Day 1, p. 233.

<sup>647</sup> Resp. Counter-Mem. ¶630; *Loewen Group and another v. United States of America*, ICSID Case No ARB(AF)/98/3, Opinion of Christopher Greenwood, 26 March 2001, Ex. RLA-39, ¶64 (“*Loewen v. USA*”).

<sup>648</sup> Resp. Counter-Mem. ¶633.

<sup>649</sup> Resp. Rejoinder ¶568; *Chevron Corporation and Texaco Petroleum v. The Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, Ex. RLA-85.

of domestic remedies is usually not a **procedural** requirement for an investment treaty case to be brought, it is a **substantive** constitutive element of denial of justice. Denial of justice cannot exist, as a matter of substantive international law, if local remedies have not been exhausted” (emphasis in original).<sup>650</sup>

414. While the Respondent accepts that the exhaustion of local remedies is not required where this would be futile, it notes that the Claimants “are silent on what would make the pursuit of further appeals ‘futile.’”<sup>651</sup>

415. The Respondent further rejects the Claimants’ submission that, in deciding whether there has been a denial of justice, the Tribunal should be informed by the provisions of the ECHR. For the Respondent, the ECHR is irrelevant. Rather, the Tribunal should be guided solely by “the high threshold for denial of justice claims under international customary law.”<sup>652</sup>

### 3. The Tribunal’s Analysis and Decision

416. In considering the Claimants’ claim that Latvia has failed to accord their investments equitable and reasonable treatment and protection in breach of Article III of the BIT, the Tribunal starts from the position that, as agreed by the Parties and noted earlier, the “equitable and reasonable treatment and protection” standard in Article III does not differ materially from the FET standard referred to in other BITs.

417. As indicated above, the Claimants contend that Latvia has breached Article III by (i) failing to provide a transparent, consistent and stable business framework; (ii) violating the Claimants’ legitimate expectations; and (iii) denying the Claimants justice by failing to provide them with administrative and judicial due process.

418. In addressing these contentions, the Tribunal will consider first the nature of the Claimants’ legitimate expectations. Although the Claimants have advanced their claim on the basis that the transparency, consistency and stability of the business framework should be considered independently of the legitimacy of their expectations, the Tribunal is not persuaded that these two elements of the Claimants’ claim can meaningfully be dissociated in the circumstances of this case. To the contrary, given that the Claimants themselves recognize that Article III does not impose upon the host

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<sup>650</sup> Resp. Counter-Mem. ¶635.

<sup>651</sup> Resp. Rejoinder ¶571.

<sup>652</sup> TR, Day 1, pp. 235-236.



State an obligation to effect “some form of regulatory freeze,”<sup>653</sup> the nature and extent of the regulatory change that may “equitably” and “fairly” be implemented cannot reasonably be considered without reference to what the Claimants may legitimately have been entitled to expect in this regard when making their investments. The Claimants have effectively acknowledged this in their submissions by stating that “such changes must be fair and equitable in light of the investor’s legitimate expectations.”<sup>654</sup>

419. After determining what the Claimants’ legitimate expectations were, the Tribunal will proceed to consider: (i) what, if any, changes occurred that the Claimants could not legitimately have expected; (ii) whether any such changes can properly be said to be attributable to the State, having regard to the findings that the Tribunal has already made on this subject in respect of SJSC Airport and Article 8 of the ILC Articles; and (iii) whether any changes attributable to the State adversely affected the Claimants’ investments, in breach of the standard set forth in Article III. Lastly, the Tribunal will address the Claimants’ denial of justice claim.

The Claimants’ legitimate expectations

420. In the absence of any specific undertakings of the State upon which the Claimants could reasonably have been expected to rely, it is the Tribunal’s position that the Claimants’ legitimate expectations in this case could not have exceeded the terms of the Land Lease Agreements that Rixport concluded with SJSC Airport and their subsequent amendments, given that it was on the basis of those agreements that the Claimants, through Rixport, made their investments.
421. The Parties differ as to whether the contractual undertakings of SJSC Airport, which the Tribunal has found above to be distinct from the State, could properly give rise to any legitimate expectations at all, other than, as the Respondent posits, that their breach would be subject to resolution before the Latvian courts.<sup>655</sup> It is the Tribunal’s view that, insofar as those undertakings could be said, as the Claimants argue, to have given rise to any legitimate expectations, the Claimants could not legitimately have expected the State to accord them any better treatment than was provided by the contracts themselves. As Judge Crawford has written in respect of State contracts:<sup>656</sup>

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<sup>653</sup> Id. at p. 117.

<sup>654</sup> Cl. Mem. ¶470.

<sup>655</sup> Resp. Rejoinder ¶554.

<sup>656</sup> J. Crawford, “Treaty and Contract in Investment Arbitration” (2008) 24(3) *Arbitration International*, Ex. RLA-26, p. 374.

*[T]he investment contract is itself an allocation of risks and opportunities, and (. . .) that allocation is relevant in determining, in particular, whether there has been fair and equitable treatment under the BIT. In particular, the doctrine of legitimate expectations should not be used as a substitute for the actual arrangements agreed between the parties, or as a supervening and overriding source of the applicable law.*

422. This approach was followed by the tribunal in the case of *Bayinder v. Pakistan*, where the tribunal found:<sup>657</sup>

*[I]n the present context of a contractual relationship between Bayinder and the NHA . . . the expectations of the Claimant are largely shaped by the contractual relationship between the Claimant and the NHA. In this connection, there was no basis for the Claimant to expect that NHA would not avail itself of its contractual rights. Although the Tribunal has no jurisdiction to assess whether there has been a breach of the Contract under the Contract's proper law, the Tribunal must nevertheless take into account the terms of the Contract as a factual element reflecting the expectations of the Claimant.*

423. Accordingly, insofar as any legitimate expectations can properly be said to arise from a contract entered into by an investment vehicle such as Rixport with a non-State organ such as SJSC Airport, it is the Tribunal's position that those expectations, as in the authorities cited above, cannot properly be divorced from the bargain that the investment vehicle has made.

424. This is, moreover, consistent with the Claimants' own contention that, in advancing their claims in this arbitration, they "are not trying to improve their contractual bargain; they are simply trying to see their contractual bargain honoured."<sup>658</sup> Referring to the Award in the case of *Alpha v. Ukraine*,<sup>659</sup> they have suggested that the gravamen of their complaint in this proceeding, as in that arbitration, is that, by its actions, the State has interfered with and effectively negated the agreements entered into between the investors and their contractual counterpart.<sup>660</sup>

425. The Tribunal nevertheless notes that, in their closing submissions, the Claimants argued that "insofar as the . . . terms of the 2007 and 2010 agreements . . . are concerned,

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<sup>657</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, Ex. RLA-5, ¶197.

<sup>658</sup> TR, Day 1, p. 124; Cl. Reply ¶793.

<sup>659</sup> *Alpha v. Ukraine*, Ex. CL-65.

<sup>660</sup> TR, Day 1, p. 124.

these are only relevant and should only be discussed” if it is accepted that the “contractual obligations are obligations owed by the state directly.”<sup>661</sup>

426. The Tribunal disagrees. Whether or not any of the agreements entered into by SJSC Airport with Rixport are binding on the State directly or can validly serve as a basis for a BIT claim by the Claimants in respect of any actions attributable to the State in respect of those agreements, the expectations that the Claimants could legitimately have entertained in respect of their investments, through Rixport, were, in the Tribunal’s view, necessarily circumscribed by the terms of those agreements. This is so in the absence of any other expectations that can properly be said to have been legitimately created by separate conduct of the State.
427. With respect to the agreements that Rixport concluded with SJSC Airport, the Tribunal notes the following:
428. First, as discussed in Sections III.B and III.C above, the Land Lease Agreements did not contain any representations concerning SJSC Airport’s then business development plans and, in particular, that its plans for the development of the Airport would not change. Nor did the leases exclude possible amendments to the 2003 Detailed Plan (or any other applicable laws or regulations). To the contrary, Clause 13.1 of the Tender Regulation forming part of each of the Land Leases Agreements expressly contemplates possible “amendments of the detailed planning” and obligates Rixport “to coordinate its plan of development” with any such amendments.<sup>662</sup>
429. Second, as also noted in Section III.C above, the leases did not provide for the expansion of the Airport terminal in accordance with any particular technical plan or timeline. Nor did they contain any representations concerning Airport passenger forecasts.
430. Third, notwithstanding the Claimants’ contention that Rixport entered into the Land Lease Agreements in the expectation that it would be in a position to proceed with the construction and operation of an Airport hotel on Draw 1, with a connection to the Airport terminal, before proceeding with the development of any of the other Draws, the leases did not release Rixport from any of its other development obligations if the land required for the construction of a hotel connected to the main Airport terminal was not made available first. As stated in Section III.C above, each of the Land Lease

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<sup>661</sup> TR, Day 8, pp. 70-71.

<sup>662</sup> Ex. C-29.

Agreements was a stand-alone agreement, and Rixport's obligations under the leases for Draws 2-4 did not depend upon the progress of Draw 1's development.

431. Fourth, although, as discussed in Section III.D above, different development plans for the Airport were under consideration by SJSC Airport subsequent to the conclusion of the Land Lease Agreements that affected the boundaries and locations of certain of the Land Plots in Draw 1 where the Airport hotel(s) was (or were) intended to be constructed, and that arguably delayed their development, the related changes were the subject of the 2007 Amendments and the 2010 Agreement which, as already discussed, amended the Land Lease Agreements. The 2010 Agreement, moreover, expressly provided that it would operate to extinguish all past, present and future claims that Rixport and SJSC Airport may have had against each other "in relation to fulfillment of mutual obligations arising out of the Land Lease Agreements for the period before" 5 November 2010.
432. Fifth, the 2010 Agreement, as already stated, acknowledged that SJSC Airport was considering whether to construct a new terminal for airBaltic and/or to expand the existing terminal, but did not state when a decision might be made by SJSC Airport concerning those options or when an expanded terminal could be expected to be completed. Although the 2010 Agreement, thus, envisaged possible delays in the development of parts of Draw 1, it did not acknowledge any possible impediments to the development of Draws 2 or 3, while also providing, however, for the relinquishment by Rixport of Draw 4. Rent holidays were granted in respect of land that could not be utilized.
433. In their submissions, the Claimants have contended that the following terms of the Land Lease Agreements gave rise to legitimate expectations that were later thwarted:<sup>663</sup>
- *The contractual provisions in the Land Lease Agreements Clause 3.1 stipulating to pay land lease created the legitimate expectation that the land in question could be utilized;*
  - *The contractual provision in the Land Lease Agreements Clause 2.1 stipulating the transfer of particular Draws created the legitimate expectation that such transfer would actually take place (and would not be unilaterally postponed);*
  - *The contractual provision in the 2007 Amendment Clause 1.1.2 stipulating that SJSC Airport should complete the technical project at the latest by 30*

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<sup>663</sup> Cl. Reply ¶759.

June 2008;

- *The contractual provision in the 2007 Amendment Clause 1.1.2 stipulating that Draw 1 Land 2 should be available for construction work at the latest by 1 January 2009;*
- *The contractual provision in the 2007 Amendment Clause 4.10.4 stipulating that the completion of Airport terminal extension works should be completed by 30 June 2011;*
- *The contractual provision in the 2007 Amendment Clause 3.16 stipulating that Rixport had exclusive rights to operate short-term parking for the airport terminal;*
- *The contractual provision in the 2010 Agreement Clause 3.1 stipulating that the Claimants would be included in the further development decision-making process created the legitimate expectation that such inclusion would actually take place.*

434. There is, however, a difficulty with the above contentions, even assuming that the contractual undertakings identified could be attributed to the State and/or that the State had any obligation under Article III of the BIT to ensure their performance by SJSC Airport.

435. The difficulty is that all but the last of the above contractual provisions were superseded by the terms of the 2010 Agreement. Consistent with its findings above, the Tribunal does not consider that the Claimants can properly claim under Article III of the BIT that their legitimate expectations have been frustrated and, accordingly, that their investments have been treated inequitably or unreasonably as a result of conduct that was the subject of a settlement between their investment vehicle, Rixport, and SJSC Airport under the terms of the 2010 Agreement.

436. In their submissions, the Claimants have undertaken to avoid such a result by arguing, first, that they were “forced into accepting the 2010 Agreement”<sup>664</sup> and that, as a result, the 2010 Agreement did not have the effect of validly amending the Land Lease Agreements or settling any claims.<sup>665</sup> The Tribunal has already found, however, in Section III.D above, that there is no evidence that Rixport was coerced into concluding the 2010 Agreement and that, during the Hearing, the Claimants’ Mr. Østhus accepted that Rixport had the option of refusing to enter into that agreement.

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<sup>664</sup> Cl. Reply ¶749; TR, Day 1, p. 118.

<sup>665</sup> TR, Day 8, p. 81.

437. The Claimants have further argued that the 2010 Agreement did not validly settle any claims because it was “premised on the condition” that SJSC Airport would “actually comply with its obligations” thereunder, which the Claimants contend that SJSC Airport did not do.<sup>666</sup> However, beyond asserting that the validity of the waiver of claims contained in the agreement was subject to such a condition, the Claimants have not established that that follows from Latvian law, the law governing the 2010 Agreement. Moreover, as the Respondent has noted, Rixport received rent holidays and compensation under the agreement, which it has not returned.<sup>667</sup> The receipt of such benefits by Rixport would appear to undermine the Claimants’ contention that its own contractual undertakings should simply be disregarded.
438. In any event, based on the evidence before it, and in the absence of any submissions on the relevant Latvian law, the Tribunal is not in a position to find that the 2010 Agreement did not validly settle the claims between Rixport and SJSC Airport as of that time or that that settlement did not adequately address the matters that now form the basis for the Claimants’ claims of inequitable or unreasonable treatment by Latvia in respect of the Claimants’ investments prior to that time.
439. Thus, although the Claimants have relied heavily in their submissions on representations claimed to have been made to Messrs. Østhus and Lundeby by then-Minister Peters and Mr. Šlesers (who was not at the time a member of the Government) prior to the conclusion of the Land Lease Agreements in 2006,<sup>668</sup> any such representations (or related Government Action Plans or pronouncements), even if sufficiently specific to have created any legitimate expectations of the Claimants, which the Respondent disputes, were no longer of any relevance in November 2010+, when the 2010 Agreement was concluded. By that time, the Claimants were obviously aware of the events that had occurred since the fall of 2006 and about which they have complained in this arbitration. The Claimants also knew that SJSC Airport was in the process of considering different terminal expansion plans, including notably the possible construction of a separate airBaltic terminal, and that the date by which a decision would be made concerning the plan to be adopted (and its related implementation) was uncertain. In addition, given the terms of the 2010 Agreement, the Claimants knew that rent would be payable to SJSC Airport in respect of Draws 2 and 3, in advance of Rixport having access to the land on Draw 1 that was closest to

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<sup>666</sup> Id. at pp. 81-83.

<sup>667</sup> Id. at p. 144.

<sup>668</sup> See, e.g., Cl. Reply ¶757.

the Airport terminal. Indeed, the Claimants acknowledged Draws 2 and 3 were available for immediate usage and development,<sup>669</sup> notwithstanding the Claimants' contention, as already noted, that the construction of an Airport hotel on Draw 1 was the "pre-condition for their investment and the condition sine qua non for its profitability."<sup>670</sup>

440. Further, by November 2010, the Ordinance of the Cabinet of Ministers dated 6 July 2006 approving the Operational Strategy 2007-2009 of the Ministry of Transport, upon which the Claimants have also relied, was no longer of any relevance. While the Claimants have noted that, according to the Ordinance, the Operational Strategy included among its "main tasks" the approval by 2007 and start of "further passenger terminal extension projects,"<sup>671</sup> that had, of course, not occurred as of November 2010.

441. The Claimants therefore could no longer have expected, as of November 2010, that Rixport's development project would be able to proceed in the same manner as they may have anticipated in the fall of 2006.<sup>672</sup> Accordingly, the only alleged changes that are relevant to the Claimants' claim are those that occurred subsequent to the 2010 Agreement.

#### Alleged changes in the business framework

442. The events that occurred subsequent to the 2010 Agreement have already been described in Section III.E above.

443. Of those events, the Claimants have argued that the following acts (in addition to those forming part of their denial of justice claim, which is considered separately below) placed the Respondent in violation of its obligations under Article III of the BIT:

- (i) SJSC Airport's application on 26 April 2011 to the Building Authority of the Mārupe Municipality to reopen the 2003 Detailed Plan for the purpose of developing a new, amended Detailed Plan in order to permit SJSC Airport to

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<sup>669</sup> Ex. C-86, ¶1.16.

<sup>670</sup> Cl. Mem. ¶491.

<sup>671</sup> Cl. Reply ¶713; Ex. C-256.

<sup>672</sup> Cl. Mem. ¶¶475-476.

carry out infrastructure projects being financed by the EU Cohesion Fund;<sup>673</sup>

- (ii) the cancellation of the airBaltic project in May 2011 and the preparation of the 2011 Business Plan for SJSC Airport by SIA Ernst & Young Baltic, which, according to the Claimants (but the Respondent disputes) postponed the expansion of the Airport terminal until after 2020;<sup>674</sup>
- (iii) the adoption of a Government Action Plan by the Cabinet of Ministers in February 2012 postponing the deadline for the terminal expansion project until 31 December 2014;<sup>675</sup>
- (iv) SJSC Airport's development of an updated business plan in 2013 about which no information was allegedly made available to Rixport or its representatives;<sup>676</sup>
- (v) the issuance by the Mārupe Construction Board of advice to Rixport in April 2012 that it could not obtain construction permits for projects on the leased land following the reopening of the 2003 Detailed Plan;<sup>677</sup>
- (vi) the approval by the Mārupe Municipality of the 2013 Detailed Plan in July 2013 and the issuance by the Municipality of the 2013 Spatial Plan in June 2013;<sup>678</sup> and
- (vii) the letter, dated 16 September 2013, from the MEPRD confirming that, in accordance with the 2013 Spatial Plan, a railway line might be built on the land leased by Rixport and dismissing Rixport's related objection.<sup>679</sup>

444. According to the Claimants, "all of these actions meant . . . that they could not commence construction of their investment project."<sup>680</sup> And, indeed, as discussed in Section III.E above, Rixport took the position before the Kurzeme Regional Court in June 2013 that the court should order the termination of the leases for Draws 2 and 3

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<sup>673</sup> Cl. Reply ¶¶319-327; TR, Day 8, p. 46. See also ¶¶171 and 188 above.

<sup>674</sup> Cl. Reply ¶¶328-339; TR, Day 8, pp. 46-47; Resp. Rejoinder ¶272. See also ¶¶146-147 and 171 above.

<sup>675</sup> TR, Day 8, p. 47, referring to Ex. C-367.

<sup>676</sup> Cl. Reply ¶376; TR, Day 8, p. 47-48.

<sup>677</sup> Cl. Reply ¶¶421-423; TR, Day 8, p. 48.

<sup>678</sup> Cl. Mem. ¶¶204 and 220-226; TR, Day 8, p. 48. See also ¶171 above.

<sup>679</sup> TR, Day 8, p. 48, referring to Ex. C-118.

<sup>680</sup> TR, Day 8, p. 51.



and in May 2014 requested that the lease for Draw 1 be terminated as well. Central to Rixport's position was that, as a result of the above acts, SJSC Airport had effectively failed to transfer the leased land to Rixport for its use. Moreover, Rixport contended that, given that, according to its understanding, the completion of the terminal expansion had been postponed until 2020, the project no longer had any interest for it.<sup>681</sup>

445. As already stated, in deciding whether the Claimants were denied equitable and reasonable treatment under Article III of the BIT, the Tribunal needs to consider: (i) whether any of the above acts can properly be said to have been contrary to the Claimants' legitimate expectations; (ii) if so, whether they can properly be said to be attributable to the State, having regard to the findings that the Tribunal has already made on this subject in respect of SJSC Airport and Article 8 of the ILC Articles; and (iii) if so, whether any acts attributable to the State adversely affected the Claimants' investments in breach of the standard set forth in Article III.
446. On the basis of the evidence before it, the Tribunal does not consider that any of the acts identified by the Claimants satisfies all three of these criteria such as to place the Respondent in breach of Article III.
447. Starting first with the Claimants' complaint about SJSC Airport's application for the reopening of the 2003 Detailed Plan in April 2011 and the subsequent approval of the 2013 Detailed Plan by the Construction Board of the Mārupe Municipality in July 2013, it is the Tribunal's view that, irrespective of whether these acts can be attributed to the State, the Claimants have failed to establish that they breached any legitimate expectation of the Claimants or had any adverse effect on the Claimants' investments, let alone an effect that could properly be said to breach the standard of protection set forth in Article III of the BIT.
448. As already noted, the Land Lease Agreements expressly contemplated the possibility that the Detailed Plan might be required to be amended, and the Claimants could not legitimately expect that SJSC Airport would not undertake to have the 2003 Detailed Plan reopened for the purpose of carrying out infrastructure projects that, in this case, were to be financed by the EU Cohesion Fund. Moreover, as noted in Section III.E above, those projects concerned the renovation, reconstruction and construction of runways, aprons, taxiways and drainage systems, in addition to certain other facilities

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<sup>681</sup> See, e.g., Cl. Mem. ¶258; see also Rixport's notices of cancellation of the leases for Draws 1, 2 and 3, dated 7 May 2013 (Ex. C-120) and 21 March 2014 (Ex. C-134).

outside the boundaries of the land that was the subject of the Land Lease Agreements. According to Mr. Saveljevs, the only aspect of those projects that would affect the leased land was certain of the drainage system work,<sup>682</sup> but the Claimants have failed to show that the drainage work in question had any material adverse effect on their planned development work. By letter dated 27 June 2011, SJSC Airport informed Rixport that land leased by Rixport might be affected by the drainage work and invited Rixport to appoint a representative with whom SJSC Airport could “discuss the most suitable technical solution” that would “match” Rixport’s development plans.<sup>683</sup> It has not been alleged, let alone demonstrated, that any related issues were not satisfactorily resolved.

449. The Claimants have nevertheless contended that the work on the 2013 Detailed Plan affected them adversely in two ways.

450. First, they assert, as noted above, that Rixport could not obtain construction permits while the new plan was being prepared and therefore Rixport was effectively prevented from carrying out any new construction as from SJSC’s application for a new plan on 26 April 2011.<sup>684</sup> In support of their position, they rely on a letter dated 23 April 2012 that Rixport received from Aida Skalberga (formerly Lismane), the Head of the Mārupe Construction Board, in response to an inquiry from Rixport on this subject and a further letter from the Ministry of Economy dated 17 July 2013.<sup>685</sup>

451. In her evidence, Ms. Skalberga explained, however, that, in sending her 23 April 2012 letter, she understood, based on a telephone conversation that she had the previous day with a representative of Rixport, that Rixport wanted to know whether Rixport could file a construction permit on the basis of the 2013 Detailed Plan prior to its approval, and that was the question that she believed that she had answered in the negative in her letter.<sup>686</sup> She was, moreover, insistent in her testimony that it would have been possible for the Claimants to apply for, and obtain, construction permits on the basis of the 2003 Detailed Plan for as long as that plan was in effect, as many other companies did during the period in question.<sup>687</sup> Although she was not the author of the 17 July 2013 letter from the Ministry of Economy, she further explained, based on her review

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<sup>682</sup> Saveljevs second witness statement ¶59.

<sup>683</sup> Ex. R-7.

<sup>684</sup> Cl. Mem. ¶178; Cl. Reply ¶¶319 and 412-434.

<sup>685</sup> Exs. C-160 and C-101.

<sup>686</sup> Skalberga witness statement ¶¶65-69; TR, Day 5, pp. 215-219.

<sup>687</sup> Skalberga witness statement ¶¶63 and 69-71; TR, Day 5, pp. 215-219.

of that letter, that the “explanations provided by the Ministry of Economy ... are based on the situation in which a detailed plan is in preparation or challenged before administrative courts, but where no other detailed plan exists.”<sup>688</sup> That was not the case in the present instance, given that, pending the approval and the subsequent challenge in the courts (by Rixport and Staur Building) of the 2013 Detailed Plan, the 2003 Detailed Plan remained in effect, as it apparently still did as of the date of the Hearing in this arbitration.

452. The Tribunal has no reason to doubt Ms. Skalberga’s evidence that Rixport could have applied for, and obtained, construction permits on the basis of the 2003 Detailed Plan during the entire period following the reopening of that plan (except during the one-month period in July/August 2013 when the 2013 Detailed Plan was briefly in effect). Moreover, the Tribunal has little sympathy for the Claimants’ contention that they and Rixport were misinformed or confused by Ms. Skalberga’s April 2012 letter and the letter subsequently received from the Ministry of Economics in circumstances where, as is not disputed: Rixport did not, in fact, apply for any construction permits subsequent to the conclusion of the 2010 Agreement; waited for nearly a year after the 2003 Detailed Plan was reopened to contact Ms. Skalberga; and then raised what appears to have been a purely hypothetical question. The Claimants have not even attempted to demonstrate that any specific building projects were blocked or required to be deferred as a result of the advice contained in the letters upon which the Claimants rely.
453. Nor does the Tribunal consider that there is any more merit in the Claimants’ additional contention that the 2013 Detailed Plan, when issued in July 2013, adversely affected Rixport’s development plans by: (i) imposing restrictions on building heights and density that did not apply previously; (ii) providing for the possible division of a land parcel (D5) upon which Rixport had intended to build the main Airport hotel; (iii) indicating railway routes across the leased land; (iv) changing open ground level parking facilities to a multilevel parking facility; and (v) moving the main Airport hotel away from the terminal behind the parking facilities.<sup>689</sup>
454. As the Respondent has correctly noted with respect to the restriction on building heights adjacent to the Airport’s runways, this restriction was already described in the explanatory memorandum forming part of the 2003 Detailed Plan, as set forth in Annex 5 to the Land Lease Agreements. In addition, the Claimants knew before entering into

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<sup>688</sup> Skalberga witness statement ¶80.

<sup>689</sup> Cl. Mem. ¶204.

the 2010 Agreement that a possible railway linking Riga to the Airport was being considered that might cross part of the leased land. As indicated in Section III.D above, this was described in the 2009 Hochtief masterplan, of which the Claimants were aware before entering into the 2010 Agreement, and was also the reason why Rixport was granted certain rent holidays in the 2010 Agreement in respect of Land Plots B-2 and B-4 of Draw 1 and in respect of Draw 3.<sup>690</sup> The Respondent has noted, further, that Rixport knew “or should have known” of the possibility of a rail connection since the outset of the project as this was already public knowledge at the time of the tender and, indeed, was shown on the cover page of the Griff sketches prepared for the tender.<sup>691</sup> The Respondent has also made the point, which has not been contradicted, that because the railway route shown on both the 2013 Detailed Plan and 2013 Spatial Plan was only a “potential conceptual location” and was not yet the subject of any registered encumbrances, Rixport could not have been denied a construction permit, had it applied for one, due to any potential railway.<sup>692</sup>

455. More importantly, however, the Claimants have failed to establish what specific plans had been developed by Rixport, as of the date of the 2010 Agreement or thereafter, that may have been frustrated or adversely affected by any of the alleged changes in the 2013 Detailed Plan about which they complain. The Claimants have asserted that they had to “draft and redraft and redraft their plans.”<sup>693</sup> However, they have not provided any evidence of this.
456. In the Tribunal’s view, it does not suffice for the Claimants to complain that the 2013 Detailed Plan differed from the 2003 Detailed Plan. Nor does it follow from the mere fact that there may have been changes to the Detailed Plan that Rixport’s ability to proceed with its development project was affected in any material way. It is for the Claimants to establish how they were adversely affected, and this they have not done.
457. The same considerations apply in respect of the Claimants’ complaints concerning changes incorporated in the 2013 Spatial Plan (in particular, in respect of a possible railway route, which at the time had yet to be finalized) and changes made subsequent to the 2010 Agreement in respect of SJSC Airport’s business development plans, including, in particular, SJSC Airport’s business plan dated 22 September 2011 which

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<sup>690</sup> See also Saveljevs first witness statement ¶¶73 and 78.

<sup>691</sup> TR, Day 8, p. 191, referring to Ex. C-193.

<sup>692</sup> TR, Day 8, pp. 191-192.

<sup>693</sup> Id. at p. 51.

the Claimants argue postponed the completion of the Airport's terminal expansion until after 2020.<sup>694</sup>

458. Although the Claimants have complained that delays in the expansion of the Airport terminal, as recorded either in SJSC Airport's business development plans or in Government Action Plans, were not expected by them and effectively frustrated their development project by postponing the construction of a hotel with a direct connection to the terminal, the Tribunal is not persuaded that the development project was actually blocked as a consequence.
459. First, from the evidence, and as acknowledged by Rixport itself when entering into the 2010 Agreement, there were many parts of the leased land that were available for immediate development in November 2010. However, Rixport made what appears to have been the commercial decision not to proceed with any development at all because, as it has acknowledged, it wished to build an Airport hotel adjacent to the terminal first and did not consider that it should be required to do so before the expansion of the terminal was completed. Responsibility for that decision cannot properly be attributed to any act of the Respondent.
460. Second, the Tribunal is not persuaded, in any event, that Rixport was prevented from proceeding with the construction of an Airport hotel once the decision was made in 2011 that a separate airBaltic terminal would not be constructed and that SJSC Airport would proceed with the 5<sup>th</sup> and 6<sup>th</sup> stages of the terminal expansion project, as previously planned, even if on a delayed schedule. In this regard, the Tribunal accepts Mr. Saveljevs' evidence, as described above, that Rixport was not required to wait for the terminal expansion project to be completed before commencing work on a hotel on Land 2 of Draw 1. Although the Claimants have complained that that Land Plot was never made available by SJSC Airport, as Mr. Saveljevs has noted, Rixport did not request that it be placed at Rixport's disposal before 1 April 2014, by which time Rixport had already purported to cancel the lease for Draw 1.<sup>695</sup> The Respondent has, moreover, noted that SJSC Airport offered to transfer Land 2 of Draw 1 to Rixport as early as April 2010, but Rixport was unwilling to take that land plot over at that time.<sup>696</sup>
461. Moreover, the Claimants have not established that the Respondent bears responsibility for the delays in the completion of the terminal's expansion. This was a matter that

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<sup>694</sup> Cl. Reply ¶354; Ex. C-228.

<sup>695</sup> See ¶¶191-193 above.

<sup>696</sup> TR, Day 8, p. 195, referring to Ex. C-78.

was being managed by SJSC Airport, and there is no evidence that SJSC Airport's business development plans during the period following the 2010 Agreement were the product of any instructions from the State to SJSC Airport. To the contrary, both Mr. Saveljevs and Ms. Innusa have testified that those plans were developed without the State's intervention, in which case they cannot properly be attributed to the Respondent under Article 8 of the ILC Articles.

462. In this regard, Mr. Saveljevs has given the following un rebutted account of the reasons for the delay in his evidence:<sup>697</sup>

*As of the date of the November 2010 Agreement, SJSC Airport was considering two alternative development scenarios – the expansion of the existing terminal, or the construction of a new terminal – both of which are addressed in the 2010 Agreement. After signing the 2010 Agreement, however, passenger numbers dropped between 2011 and 2012 and then stagnated until 2014. As such, there was no pressing need to drastically increase terminal capacity.*

*Given that passenger numbers had levelled off, the 5<sup>th</sup> stage development, the pier building, was separated into two parts to reduce the financial burden on the Airport. The first stage (“5.1”) was the construction of a connecting gallery between the existing terminal and the location where the new pier building would be constructed. This connecting gallery was then used for extra gates while the pier building was under construction. The second stage, the pier building itself (“5.2”), was completed in November 2016. SJSC Airport is now in the process of the next phase of the development, which includes expansion and reconstruction of the landside part of the terminal (see Section 3.7 below).*

*Mr Lundeby refers to an SJSC Airport business plan dated September 2011, which he says states that “the terminal expansion project was postponed until after 2020”. This is not correct. The business plan merely states that “[t]he most significant investment activity that the Airport is planning to implement after 2020, is the 2<sup>nd</sup> stage of expansion of the existing terminal”. This is a financial planning document; it does not affect any technical development plans or any decisions as to the Airport's expansion planning. As stated above, part of the terminal expansion, the pier building project, was in fact completed in 2016 and the next phase of the project is already underway.*

*SJSC Airport's business plans are prepared by outside consultancies, with input from Riga Airport's financial team. These business plans generally concern a lengthy period of time (the September 2011 business plan, for example, concerns the period of 2012 to 2036) and are used as a framework for investment planning. Once a business plan is accepted, SJSC Airport's financial department works from a financial*

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<sup>697</sup> Saveljevs second witness statement ¶¶52-55.

*model based on the business plan, which is updated regularly. The business plan itself is also updated periodically to reflect actual income and costs, etc. On certain occasions, the Management Board might vote to update an existing business plan or to issue a new business plan to reflect changes in the company's financial planning. Such changes might be related to ongoing projects at the Airport, but the business plans would address only the financial aspects, not the technical details . . . .*

463. In addition, Ms. Innusa testified that “[t]he objectives set in [the various Government Action Plans, to which the Claimants have referred, including the 2012 plan mentioned above (purportedly postponing the expansion of the Airport terminal until 2014)] are mid/long-term and mostly aspirational, without any administrative body in place to evaluate whether they have been reached.”<sup>698</sup> None of those Government Action Plans that have been introduced into evidence, moreover, purport to impose any binding obligations or deadlines on SJSC Airport or even mention the Land Lease Agreements concluded with Rixport.

464. In their submissions, the Claimants attribute the delay in the terminal expansion project to an alleged decision of the Latvian State to “prioritize” the infrastructure projects financed by the EU Cohesion Fund.<sup>699</sup> However, there is no evidence of this. The Claimants contend, apparently on the basis of various media reports, press releases and SJSC Airport’s 22 September 2011 Business Plan, that “[i]t seems clear that the Respondent prioritized the major project funded by the EU, and consequently the terminal expansion (6<sup>th</sup> stage) was postponed until after 2020.”<sup>700</sup> However, this is not stated in any of the press releases or media reports to which the Claimants have referred the Tribunal.<sup>701</sup> Nor is this stated in the 22 September 2011 Business Plan.<sup>702</sup> Moreover, it appears from the subsequent 2012 Government Action Plan, upon which the Claimants themselves rely, that the EU-funded works and the expansion of the terminal were expected to be carried out concurrently.<sup>703</sup> The Claimants have failed to identify any decision or instruction of the State to the contrary. Nor have they adduced any evidence contradicting Mr. Saveļjevs’ account of the reasons for the terminal expansion delay.

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<sup>698</sup> Innusa second witness statement ¶26.

<sup>699</sup> Cl. Reply ¶354; TR, Day 8, pp. 46-47.

<sup>700</sup> Cl. Reply ¶354; TR, Day 8, p. 33.

<sup>701</sup> Exs. C-273 to C-277 and C-324.

<sup>702</sup> Ex. C-228.

<sup>703</sup> Ex. C-367.

465. In any event, as already noted, the 2010 Agreement did not contain any terms providing for the completion of the terminal expansion by a specified date.
466. The Tribunal also does not accept, based on the evidence before it, that, as the Claimants have alleged, they were deprived of information by the Respondent (or by SJSC Airport at the direction of the Respondent) concerning the Airport's future development that would have had an impact on the development of the land leased to Rixport. Even if information was not timely provided by SJSC Airport, which the Respondent disputes, this might at most have given rise to a claim by Rixport against SJSC Airport under the Land Lease Agreements. However, in the absence of any wrongful conduct by the State itself, a claim of breach under the BIT does not arise.
467. As noted above, the Claimants have also complained about certain statements made by the MEPRD, in its letter of 16 September 2013,<sup>704</sup> and the Riga Administrative District Court<sup>705</sup> suggesting that the rights of SJSC Airport took precedence over the rights of Rixport because the Airport was an "object of national interest." However, the Claimants have failed to show that Rixport's ability to develop the leased land in accordance with the terms of the Land Lease Agreements, as amended in 2007 and 2010, was adversely affected in any way or, as discussed further below, that it was deprived of recourse in respect of any alleged interference with its contractual rights.
468. Furthermore, the Tribunal observes that by the time of the issuance of the 2013 Detailed Plan (which, as stated above, was only briefly in effect in July/August 2013), the 2013 Spatial Plan and MEPRD's letter, Rixport had already purported to terminate the leases for Draws 2 and 3, and by the time of the Riga Administrative Court Decision, Rixport had also purported to terminate the lease for Draw 1. Rixport had, in the meantime, suspended the payment of rent under all of the leases and appears to have lost interest in undertaking any of the development work for which it had originally contracted with SJSC Airport in 2006, prior to the financial crisis.
469. In view of the above considerations, the Tribunal does not accept, as argued by the Claimants, that the Respondent took any actions that made "the investment project impossible to conduct" or that SJSC Airport's behavior should be attributed to the

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<sup>704</sup> Ex. C-118.

<sup>705</sup> Ex. C-111.



Respondent on the basis that it “went above and beyond the conduct which an ordinary contracting party could adopt” such as to give rise to a breach of the BIT.<sup>706</sup>

470. Nor have the Claimants established that Latvia failed either to provide the Claimants with a transparent, consistent and stable business framework or to respect their legitimate expectations.

#### Denial of Justice

471. It remains to be considered whether the Claimants have a legitimate claim for denial of justice, in breach of Article III of the BIT.
472. As the Respondent has argued, a very high threshold is required to be met in order for an investor to prevail on a claim for denial of justice, whether in respect of an alleged failure to provide administrative or judicial due process.
473. In this regard, the Parties appear to agree that the *ELSI* standard is applicable to a claim for denial of administrative due process, thus requiring that the actions complained of would “surprise a sense of judicial propriety.” In the case of a claim for denial of judicial due process, it is uncontroversial, as stated by Judge Greenwood in the *Loewen v. USA* case, that an international tribunal is not to act as a court of appeal or to review the findings of a national court, but rather must find that the administration of justice was “scandalously irregular” or, as has been stated by others, involves “a particularly serious shortcoming” and “egregious conduct” that “shocks, or [as in *ELSI*] at least surprises, a sense of judicial propriety.”<sup>707</sup> It is also axiomatic, and undisputed, that all local remedies must have been exhausted, absent a finding that recourse to such remedies would be futile.
474. In the present case, the Claimants’ claim that the Respondent has violated administrative due process rules is, as indicated above, founded on: (i) an alleged failure to invite the Claimants to meetings concerning the 2013 Detailed Plan while it was being developed; (ii) SJSC Airport’s alleged failure to cause a public meeting to be held in respect of the environmental impact assessment relating to SJSC Airport’s 2013 development plan for 2012-2036; and (iii) an insolvency notice that SJSC Airport sent to Rixport on 3 March 2014 in respect of claims for outstanding rent and liquidated

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<sup>706</sup> TR, Day 1, p. 86.

<sup>707</sup> *Chevron Corporation and Texaco Petroleum v. The Republic of Ecuador*, UNCITRAL, Partial Award on the Merits, 30 March 2010, Ex. RLA-42; *Loewen v. USA*, Ex. RLA-39.

damages under the Land Lease Agreements, although the claims were disputed by Rixport, which, according to the Claimants, precluded SJSC Airport from sending such a notice under Latvian law.

475. The Claimants have failed to persuade the Tribunal, however, that there has been any violation by the Respondent of any administrative due process.
476. The Tribunal notes, first of all, that the second and third acts about which the Claimants complain were acts of SJSC Airport and not of the Respondent. The Tribunal has already found that acts of SJSC Airport are not attributable to the Respondent under Articles 4 and 5 of the ILC Articles, and the Claimants have not even attempted to demonstrate that the second and third acts described above are attributable to the Respondent under Article 8 of the ILC Articles.
477. As regards the alleged failure to invite the Claimants (in fact, Rixport) to meetings concerning the 2013 Detailed Plan, the Claimants have nowhere identified, either in their written or oral submissions: (i) the specific meeting or meetings to which they (or Rixport) were supposedly not invited; (ii) who had the alleged obligation to invite them (SJSC Airport or the Mārupe Construction Board?); or (iii) the source of the obligation that they claim was infringed. The Respondent has, for its part, adduced evidence showing that Rixport was invited to participate in SJSC Airport's working groups regarding development plans while the 2013 Detailed Plan was being prepared and that Rixport was represented at the public hearing held in respect of the draft Detailed Plan on 11 April 2013, prior to its approval.<sup>708</sup> The Claimants deny that Rixport was involved in the preparation of the 2013 Detailed Plan, but accept that Rixport was given an opportunity to comment on it before its finalization and participated in the public consultation meeting held in April 2013.<sup>709</sup> It is also undisputed that Rixport subsequently had the opportunity to challenge the 2013 Detailed Plan before the Riga Administrative District Court, as it did (together with Staur Building).
478. In these circumstances, the Tribunal can find no merit in the Claimants' contention that they were denied administrative due process, and the claim is required to be rejected.
479. Turning to the Claimants' claim that Latvia has violated judicial due process, the Tribunal has noted above that the claim has the following three components: (i) the Kurzeme Regional Court acted as both a first instance and appellate court in the

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<sup>708</sup> Exs. C-91 and R-21; Skalberga witness statement ¶¶43-44.

<sup>709</sup> Cl. Reply ¶¶404-411.

litigation between Rixport and SJSC Airport; (ii) the first judgment of the Kurzeme Regional Court of 13 February 2015 was delivered in an electronic Word document created by Ms. Dace Kalniņa, who worked as a lawyer for the Ministry of Justice at the time of the hearing on 13 February 2015 and when the judgment was emailed to the parties on 1 April 2015, thus suggesting that the Ministry of Justice may have “colluded” with the court in the preparation of the judgment; and (iii) the fees of the courts to which the case was referred were excessive.

480. With respect to this claim, the Tribunal observes, first of all, that, notwithstanding the amount of the court fees assessed, Rixport was not prevented from accessing the Latvian courts or pursuing its litigation against SJSC Airport through several levels of appeal. In addition, it has made the decision not to exhaust its judicial remedies in Latvia by allowing the most recent judgment of 5 July 2019 of the Kurzeme Regional Court to stand, without exercising its right to appeal that judgment to the Latvian Supreme Court. The Claimants have not contended that Rixport was unable to pay the court fees required for such an appeal, but have indicated that the appeal has not been pursued because the Claimants have concluded that “this process is futile.”<sup>710</sup>
481. The Claimants have not undertaken to establish, however, why they consider the process to be futile, and, given that Rixport has not exhausted the remedies available to it under the Latvian judicial system, the Tribunal is not inclined to accept the Claimants’ claim that they have been denied judicial due process.
482. This having been said, the Tribunal does not consider that any of the criticisms of the judicial process that the Claimants have made satisfies the very high threshold that must be met in order to sustain a claim for denial of justice under international law.
483. With regard to the first of the Claimants’ complaints (*i.e.*, the fact that the Kurzeme Regional Court has acted, through different judges, both as a court of first instance and as a court of appeal), the Tribunal does not consider that this calls into question the ability of the court to do justice. As the Respondent has argued, different judges were involved in each instance, and the appellate judgment was itself subject to review by the Supreme Court, which revoked the appellate ruling and remanded the case to the Kurzeme Regional Court for further review. There has been no showing that, either before the Kurzeme Regional Court or the Supreme Court, Rixport was denied due

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<sup>710</sup> Email, dated 19 August 2019.

process or that the proceedings were tainted by bias, discriminatory behavior or any other impropriety.

484. The Claimants have, moreover, failed to establish that, notwithstanding the metadata found in the electronic version of the initial ruling of the Kurzeme Regional Court, Ms. Kalniņa had any involvement in the case after leaving the court to join the Ministry of Justice; nor is there any evidence of “collusion” between the court and the Ministry of Justice. The Respondent has provided a perfectly plausible explanation for the metadata found and, in the absence of any evidence to the contrary, the Respondent’s explanation is accepted by the Tribunal. Furthermore, there has been no suggestion by the Claimants of “collusion” between the courts and the Ministry of Justice in respect of any of the various court judgments that followed the judgment initially rendered.
485. In addition, the Tribunal does not consider that a claim for denial of justice can be sustained based on the level of a jurisdiction’s court fees absent a showing that they are so high as effectively to preclude recourse to the courts or are otherwise shocking. In this case, as already stated, Rixport was not prevented from prosecuting its case before the Latvian courts and, as the Respondent has noted, it would have been entitled to the return of its court costs had it been successful.
486. As noted above, the Claimants have also criticized the process by which the case was transferred from the Riga Regional Court, where it was initially filed by Rixport, to the Kurzeme Regional Court. Without suggesting that Rixport was the subject of discriminatory treatment, the Claimants have observed that the process by which such transfers are effected, while provided for under the Civil Procedure Law, has been criticized by the CEPEJ on the basis that such transfers are not transparent and cannot be appealed, which therefore “might raise questions as regards the full respect of the requirements of a ‘tribunal established by law’ and the principle of legal certainty.”<sup>711</sup> The CEPEJ nevertheless also acknowledges that the transfer process is “broadly used in order to tackle the overburdening problem of Riga’s courts.”<sup>712</sup> It presumably was used for this purpose in the present case.
487. Notwithstanding the concerns expressed by the CEPEJ, the Tribunal does not consider that a process for the judicial assignment of cases in the interest of achieving judicial efficiency can properly be said to call into question, to the extent required to support a

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<sup>711</sup> Cl. Reply ¶808; Ex. C-370.

<sup>712</sup> *Id.*

claim for denial of justice under international law, the ability of the Latvian judicial system to do justice.

488. The Tribunal appreciates that the Claimants are disappointed that Rixport did not obtain the relief that it was seeking before the Latvian courts, but this does not suffice for the Tribunal to accept their claim, which is rejected.

### **C. Expropriation Claim**

#### **1. Claimants' Position**

489. The Claimants' next claim is that, by its acts and omissions, the Respondent has subjected the Claimants' investments to "measures having a similar effect" to expropriation, while not fulfilling any of the conditions for the expropriation to be lawful, in breach of Article VI(1) of the BIT.<sup>713</sup>

490. The Claimants have advanced their claim on the basis that, by virtue of a series of acts and omissions allegedly attributable to Latvia, there was a creeping *de facto* expropriation that led to the "absolute loss" of the Claimants' investments by 21 March 2014, which subsequently took the form of a *de iure* expropriation on 18 December 2017, when the Riga District Court declared in its judgment of that date that the Land Lease Agreements had been cancelled (as of 16 December 2016).<sup>714</sup>

491. The assets expropriated are stated by the Claimants to include the Claimants' shares in Rixport and the economic value of its contractual rights, including "the physical property of the land draws"; the "rights to construct and manage all projects set out in the applications that the Claimants submitted in response to the Tender issued by the Respondent (relating to the airport hotel, the office buildings, etc.)"; and the Claimants' rights in respect of short-term parking.<sup>715</sup>

492. According to the Claimants, the series of acts and omissions comprising the creeping *de facto* expropriation included:<sup>716</sup>

- "the constant changes by the Respondent of the development plans and the

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<sup>713</sup> Cl. Mem. ¶¶535-578; Cl. Reply ¶¶821-869.

<sup>714</sup> Cl. Reply ¶¶837-845.

<sup>715</sup> Id. at ¶828.

<sup>716</sup> Cl. Mem. ¶543; Cl. Reply ¶¶837-839.

detailed plans for the airport, which the Claimants relied upon;”

- “the cost-increasing changes and reduction of allowable building heights for non-commercial reasons, without warning and explanations;”
- “the announced plan that railway tracks will be built over the land leased by Claimants;”
- “the Respondent’s failure to transfer the usage of the land to the Claimants;”
- SJSC Airport’s failure to “honour Rixport’s parking rights;” and
- the “prioritis[ation]” of the “EU-funded infrastructure projects . . . over the terminal expansion project,” with the effect that the terminal expansion was postponed until after 2020.

493. With respect to the Respondent’s alleged failure to transfer the usage of land to the Claimants (in fact, Rixport), the Claimants have placed particular emphasis on the unavailability of Land 2 of Draw 1, “which was the land on which the hotel with direct access to the Airport terminal was to be built.”<sup>717</sup> They further insist, as in respect of their Article III claim, that they were prevented from carrying out any construction by the work on the 2013 Detailed Plan.

494. The Claimants contend that, while none of the above acts “independently transferred the title to the property in question, . . . the cumulative result of these acts, over time, has led to the virtual annihilation of the investment, through the neutralization of the Claimants’ rights.”<sup>718</sup> As indicated above, this is claimed by the Claimants to have occurred by 21 March 2014 when, by letter of that date, Rixport purported to terminate the lease for Draw 1,<sup>719</sup> after Rixport had already purported to terminate the leases for Draws 2 and 3 by letter dated 7 May 2013.<sup>720</sup>

495. As a formal matter, the Claimants note that the Riga District Court ruling of 18 December 2017 brought the Land Lease Agreements to an end, although the

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<sup>717</sup> Cl. Reply ¶847.

<sup>718</sup> Id. at ¶844.

<sup>719</sup> Ex. C-134.

<sup>720</sup> Ex. C-120.

“substance” of Rixport’s contractual rights had already been “destroyed” by the Respondent.<sup>721</sup>

496. The Claimants further “maintain that Latvia has not carried out [the] expropriation ... in accordance with applicable domestic legal procedures and . . . has not paid prompt, adequate and effective compensation to the Claimants.”<sup>722</sup>

## 2. Respondent’s Position

497. The Respondent denies that it expropriated the Claimants’ investments.

498. It submits, first of all, that in order for a creeping expropriation to have occurred, as alleged by the Claimants, the Claimants must prove a “substantial, radical, severe, devastating or fundamental deprivation of [their] rights or the virtual annihilation, effective neutralisation or factual destruction of [their] investment, its value or enjoyment.”<sup>723</sup>

499. Second, the Respondent argues that there can only be an expropriation if the allegedly expropriatory acts were taken by (or are attributable) to the State and were committed in the exercise of *puissance publique*, rather than pursuant to a contract.<sup>724</sup> According to the Respondent, therefore, the Tribunal “must, as a preliminary matter, consider whether each of the acts complained of as constituting steps in the creeping expropriation were taken by the government, rather than Rixport, and dismiss their relevance wherever they were not.”<sup>725</sup> The Respondent further argues, in this regard, that the only acts of possible relevance must have post-dated the 2010 Agreement as “all possible breaches predating November 2010 were settled.”<sup>726</sup>

500. More generally, it is the Respondent’s position that none of the acts of which the Claimants complain, either separately or cumulatively, had the effect of destroying or otherwise neutralizing the Claimants’ investments, prior to the “court-sanctioned termination of the Land Lease Agreements as of 16 December 2016,” by the contractually-agreed forum, for Rixport’s breaches of the Land Lease Agreements (and

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<sup>721</sup> TR, Day 8, p. 130.

<sup>722</sup> Cl. Reply ¶868.

<sup>723</sup> Resp. Counter-Mem. ¶660, quoting from *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, Ex. RLA-11.

<sup>724</sup> Resp. Counter-Mem. ¶¶662-663; Resp. Rejoinder ¶579.

<sup>725</sup> Resp. Rejoinder ¶579.

<sup>726</sup> Resp. Counter-Mem. ¶666.

which therefore was not itself expropriatory).<sup>727</sup> To the contrary, the Respondent argues that the Claimants were at all times in a position to proceed with the development of the leased land, but chose, for their own reasons, not to do so and decided instead to purport to terminate the Land Lease Agreements themselves in May 2013 (Draws 2 and 3) and March 2014 (Draw 1).<sup>728</sup>

501. With respect to the specific acts about which the Claimants complain, the Respondent argues (as in response to the Claimants' Article III claim considered above) that:<sup>729</sup>

- “regardless of the status of SJSC Airport’s development and business plans,” Rixport was always in a position to proceed with its development and construction work;
- “nothing in the process of developing the 2013 Detailed Plan . . . would have impacted Rixport’s existing rights”;
- in particular, the permissible building height was not reduced, but “always stayed the same” and the possible railway track was also not new, had only been indicated “temporarily,” was subject to “clarification” and “did not constitute an obstacle to obtaining construction permits”;
- there was “no ‘refusal’ to release the leased lands”: Draws No. 2 and 3 “were always available for Rixport to develop” and, in the case of Land 2 of Draw 1, on which the hotel connected to the terminal was going to be built, “under the 2010 Agreement it was for Rixport to give notice of its intention to take over the land, which it never genuinely did”;
- SJSC Airport did not fail to “honour Rixport’s parking rights”;
- rather, “Rixport was . . . seeking to renege on their promises to build additional parking and seeking simply to take over the Airport’s terminal parking to make easy money without any investment, which SJSC Airport disagreed with, as not being within the terms of the Land Lease Agreements, the 2007 Amendments or the 2010 Agreement”;

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<sup>727</sup> Id. at ¶667.

<sup>728</sup> Id. at ¶¶667-671; Resp. Rejoinder ¶¶580-581; TR, Day 8, pp. 141-142.

<sup>729</sup> Resp. Counter-Mem. ¶¶668-670; Resp. Rejoinder ¶580; TR, Day 8, pp. 141-142.



- the “EU-funded infrastructure projects” only “impacted the land leased to Rixport in necessitating the installation of some drainage systems on the land, of which Rixport was informed”; and
- the terminal expansion project was not postponed until after 2020: the “terminal expansion is currently ongoing, the 5<sup>th</sup> stage having been completed in 2016.”

502. The Respondent argues further that, in any event, none of the acts of which the Claimants complain were “major in character” or were capable, either separately or together, of destroying the Claimants’ ownership rights over Rixport or the Land Lease Agreements.<sup>730</sup> Ultimately, the Respondent submits, “the Claimants lost the rights under the Land Lease Agreements [only] when the Riga District Court granted SJSC Airport’s application to cancel them.”<sup>731</sup> As indicated, this judgment could not, in the Respondent’s view, have constituted an expropriation, given that it merely gave effect to the agreement of SJSC Airport and Rixport that disputes concerning their respective rights under the Land Lease Agreements should be decided by the Latvian courts.

### **3. The Tribunal’s Analysis and Decision**

503. The Tribunal agrees with the Respondent that there has neither been a creeping *de facto* expropriation of the Claimants’ investments nor a *de iure* expropriation.

504. Underlying the Claimants’ expropriation claim are the propositions that: (i) “Latvia has repeatedly acted in its public capacity by altering the conditions within which the [Land Lease Agreements were] to be executed, through acts of its Ministry of Transport, its local city council and several judgments of its domestic judiciary;”<sup>732</sup> and (ii) the “cumulative result of Latvia’s acts has gradually caused the actual investment to be entirely lost.”<sup>733</sup>

505. The Tribunal has the following difficulties with the Claimants’ position, however:

506. First, most of the acts of which the Claimants complain were acts of SJSC Airport and not Latvia, and the Claimants have failed to establish they were attributable to Latvia, as found in the preceding sections of this Award. Thus, as the Tribunal has already

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<sup>730</sup> Resp. Rejoinder ¶581.

<sup>731</sup> Id. at ¶584.

<sup>732</sup> Cl. Reply ¶861.

<sup>733</sup> Id. at ¶842.

found (see ¶¶461-464 above), there is no evidence that the changes of SJSC Airport's business plans, including the postponement of SJSC Airport's terminal expansion plans, were instructed, directed or otherwise attributable to any decisions of the State. Nor is there any evidence that the State, as distinct from SJSC Airport, had any involvement in the making of individual Land Plots available to Rixport under the Land Lease Agreements or Rixport's supposed failure to "honour Rixport's parking rights." The related disputes between Rixport and Latvia were referred by Rixport (and later SJSC Airport) to the Latvian courts for resolution, in accordance with the Land Lease Agreements, and were the subject of binding decisions of the Latvian courts, which this Tribunal is not in a position to question, in the absence of any showing, as already found above, that Rixport was denied justice by the Latvian judicial system.

507. Second, insofar as any of the acts of which the Claimants complain might be considered to be attributable to Latvia, such as changes claimed to have been incorporated in the 2013 Detailed Plan approved by the Mārupe Construction Board or the 2013 Spatial Plan issued by the Mārupe Municipality, the Claimants have failed to establish that their contractual rights were adversely affected, let alone that any such changes had the effect of leading to the "absolute loss" of the Claimants' investments (see ¶¶447-457 above).
508. In this regard, the Tribunal notes that Rixport itself purported to terminate the leases for Draws 2 and 3 by letter dated 7 May 2013, before the 2013 Detailed Plan had even been approved (in July 2013) and before the 2013 Spatial Plan had been issued. In its 7 May 2013 letter, Rixport stated that it was taking this step for two reasons: (i) it planned to develop Draws 2 and 3 after developing Draw 1, and the Draw 1 works were delayed due to the postponement of the terminal expansion works and the Draw 1 land allegedly not being available; and (ii) development and construction works on Draws 2 and 3 were, in any event, "prohibited" pending the issuance of the new Detailed Plan.<sup>734</sup>
509. The Tribunal has already found, however, that construction on Draws 2 and 3 was not prohibited pending the issuance of a new Detailed Plan (see ¶452 above). It appears, moreover, to have been Rixport's intention, as it acknowledged in its 7 May 2013 letter, to delay the development of Draws 2 and 3 until after it had constructed an Airport hotel on Draw 1. This, as already stated, was a commercial choice made by the Claimants and for which the Respondent cannot be said to have any responsibility. The

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<sup>734</sup> Ex. C-120.

Claimants have failed to provide any evidence, moreover, of the development plans for Draws 2 and 3, as of May 2013, that they claim were frustrated by the preparation and subsequent issuance of either the 2013 Detailed Plan or the 2013 Spatial Plan. Nor have they undertaken to show how any of the alleged changes in those plans would have affected adversely the value of their investments, let alone caused their “absolute loss.” In addition, as already found above, the Respondent bears no responsibility for the postponement of the terminal expansion works, which, in the Tribunal’s view, did not, in any event, require that the development of Draw 1 be delayed for the reasons already provided above (see ¶460 above). There is, in particular, no evidence, as already found (see ¶464 above), that the terminal expansion works were delayed because of a decision of the State to “prioritise” the “EU-funded infrastructure projects . . . over the terminal expansion project.”<sup>735</sup>

510. The Tribunal further notes that when Rixport subsequently purported, by letter dated 21 March 2014, to terminate the lease for Draw 1, it did so principally on the basis that, as of that date allegedly: (i) Rixport had no information concerning the possible location of the Airport hotel, “its connection with the terminal, foreseen commencement of construction works, project of extension of the terminal, further development of the airport;” (ii) SJSC Airport had failed to transfer to Rixport “rights to operate the short term parking;” and (iii) SJSC Airport had “not yet transferred for usage to Rixport the Land 2 and Land 3 of Draw 1, neither has it informed Rixport about the perspective [*sic*] dates of transfer.”<sup>736</sup>
511. All of these acts or omissions were alleged to constitute contractual defaults of SJSC Airport, which SJSC Airport, in turn, disputed. The Latvian courts subsequently found that it was Rixport, rather than SJSC Airport, that was in default of its contractual obligations (and, in particular, its failure to make lease payments) and, accordingly, declared the Land Lease Agreements cancelled as of 16 December 2016 as a consequence.
512. Even had the Latvian courts not so found, the Claimants have not established that Latvia was responsible for any of SJSC Airport’s alleged defaults or that Latvia otherwise took any actions such as to cause the “absolute loss” of the Claimants’ investments prior to Rixport itself purporting to terminate the Land Lease Agreements

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<sup>735</sup> Cl. Reply ¶839.

<sup>736</sup> Ex. C-134.

and thereafter refusing to perform any of its own obligations under those agreements, in particular, continuing to make lease payments.

513. Nor does the decision of the Riga District Court declaring the termination of the Land Lease Agreements for default by Rixport constitute an expropriation. To the contrary, the decision was issued in accordance with the terms of those agreements.

514. The Claimants' expropriation claim is therefore required to be rejected.

#### **D. Umbrella Clause Claim**

515. The Tribunal is finally left to consider the Claimants' umbrella clause claim. As noted above, it is the Claimants' position that Latvia has breached the umbrella clause contained in Article 2(2) of the UK-Latvia BIT (and/or other BITs), which they say should be considered to have been imported into the BIT by virtue of the BIT's MFN clause (Article IV).<sup>737</sup> As indicated above, Article IV(1) provides:

*Investments made by investors of one contracting party in the territory of the other contracting party shall be accorded treatment no less favourable than that accorded to investments made by investors of any third state.*

516. Article 2(2) of the UK-Latvia BIT, in turn provides that (emphasis added):<sup>738</sup>

*Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.*

517. By virtue of this provision, the Claimants submit that the Respondent is liable to the Claimants under the BIT for SJSC Airport's alleged breaches of the Land Lease Agreements. As already discussed, it is the Claimants' position that, although the Land Lease Agreements were entered into by Rixport and SJSC Airport, the contractual obligations "are those of the Respondent by attribution, and the contractual rights are those of the Claimants and not just Rixport."<sup>739</sup>

518. During the Hearing, the Claimants acknowledged that, in order for a claim to arise under the umbrella clause, the Tribunal must find not only that the clause has been imported into the BIT by the BIT's MFN provision, but that a relevant contract has

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<sup>737</sup> Cl. Mem. Section 8.4; Cl. Reply ¶¶870-947.

<sup>738</sup> UK-Latvia BIT, Ex. CL-5.

<sup>739</sup> Cl. Reply ¶945.

been entered into by Latvia, which the Tribunal could only find, in the present circumstances, if SJSC Airport were found to be “part of the Ministry of Transport.”<sup>740</sup> The Claimants, thus, conceded at the Hearing that: “If the Article 4 argument is not accepted by the Tribunal, then the umbrella clause argument will fail,” the reference to Article 4 being to Article 4 of the ILC Articles.<sup>741</sup>

519. The Tribunal has already decided, in Section VI.A above, that SJSC Airport is separate and distinct from the Latvian State and that it is not a State organ under Article 4. It therefore follows that no claim under the umbrella clause arises and that the Claimants’ claim is required to be rejected.

## VII. COSTS

520. Article 61(2) of the ICSID Convention provides:

*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

521. Article 47 of the Arbitration Rules further provides that the award shall contain, *inter alia*, “any decision of the Tribunal regarding the cost of the proceeding.”
522. It is uncontroversial that, under these provisions, the Tribunal has broad discretion to decide how the costs incurred by the Parties for the arbitration should be allocated.
523. Each of the Claimants and the Respondent also submit that, consistent with a practice that is commonly (although not universally) applied in international arbitration, the costs should “follow the event” if they respectively succeed.<sup>742</sup> It is nevertheless also the Claimants’ position, which the Respondent disputes, that if the Respondent is successful, the Parties should bear their own costs, with the Tribunal’s fees and expenses and ICSID’s administrative costs equally shared, given that the Claimants’ claim was not “frivolous” and the Claimants were “justified” in bringing this arbitration.<sup>743</sup> In addition, the Claimants have argued that “the repeated interventions

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<sup>740</sup> TR, Day 1, p. 145.

<sup>741</sup> *Id.*

<sup>742</sup> Cl. Statement of Costs ¶4; Resp. Submission on Costs ¶¶7-10.

<sup>743</sup> Cl. Statement of Costs ¶6.

of the Respondent's counsel on various points of order has inflated the expenditure significantly" and "this litigation tactic" should not be "transformed into a burden to be put on the shoulders of the Claimants, who have chosen to pursue a more financially sound and constructive strategy."<sup>744</sup>

524. In urging the Tribunal to allocate the costs to the successful Party, the Respondent has referred the Tribunal to the following passage in the case of *Libananco Holdings Co. Limited v. Republic of Turkey*:<sup>745</sup>

*[A] rule under which costs follow the event serves the purposes of compensating the successful party for its necessary legal fees and expenses, of discouraging unmeritorious actions and also of providing a disincentive to over-litigation. It also allows a tribunal sufficient leeway to take due account of specific issues on which the overall losing party has nevertheless succeeded, and to take account as well of the costs implications of procedural motions raised by one or another party.*

525. The Tribunal considers this to be a reasonable approach and sees no reason why it should deviate from it in the present case.
526. From the above, it is evident that the Respondent has been the successful party. All of the Claimants' claims have been rejected. It therefore follows that the Claimants should bear the costs reasonably incurred by the Respondent for the arbitration, in the absence of any circumstances that might militate against all or certain of those costs being awarded in the particular circumstances of this arbitration.
527. In this regard, as noted above, the Claimants have argued that they should not be required to bear the Respondent's costs because their claims were not "frivolous." However, the Tribunal does not consider that, even if it were accepted that the claims were not "frivolous," this would suffice to deny the Respondent an award of its costs in circumstances where the claims were all found to be lacking in merit, and without the case presenting any novel issues or otherwise being of unusual difficulty.
528. The Claimants have argued that the Respondent has, by its "litigation tactics," inflated the cost of the arbitration and that the Claimants should not bear the burden of this. However, they have failed, in making this argument, to identify any specific "litigation tactics" that they consider were unreasonable. In the Tribunal's view, the Claimants and the Respondent both conducted the proceedings in a professional and efficient

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<sup>744</sup> Cl. Correction and Comment Concerning Costs ¶1.

<sup>745</sup> *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, Ex. RLA-89, ¶563.

manner. The Tribunal does not consider that there was any procedurally abusive conduct that would warrant reducing the Respondent's cost entitlement. Nor have the Claimants indicated that any of the specific fees or expenses described by the Respondent in its Submission on Costs were excessive or unreasonably incurred.

529. According to the Respondent's Submission on Costs, it incurred legal fees in an amount of EUR 2,386,868.75 and expenses in an amount of EUR 464,755.67, in addition to making payments to ICSID in an amount of USD 325,000 as advances in respect of the fees and expenses of the Tribunal and ICSID.<sup>746</sup> Although the fees and expenses of the Claimants were lower, it does not appear to the Tribunal that the fees and expenses incurred by the Respondent were unreasonable for an arbitration of this nature.
530. The Tribunal nevertheless notes that, while rejecting all of the Claimants' claims, the Tribunal did not accept that the Respondent's jurisdictional and admissibility objections deprived the Tribunal of jurisdiction. Given that time was required to be devoted to the issue of the Tribunal's jurisdiction, which could have been avoided, the Tribunal considers it appropriate to make an adjustment to the Respondent's cost claim. Although the Respondent has not separately identified the amount of its legal fees that are attributable to its jurisdictional and admissibility objections, the Tribunal has determined, having regard to all of the submissions before it and in the exercise of its discretion, that the Respondent's recoverable legal fees should be reduced by 10%, *i.e.*, by EUR 238,687 to EUR 2,148,181.75, which amount should be reimbursed to the Respondent by the Claimants together with the Respondent's claimed expenses of EUR 464,755.67.
531. The Respondent has, in addition, requested that it be awarded interest on its costs at a rate of 6% per year as from the date of the Award.<sup>747</sup> The Respondent has adopted this rate because it is the rate proposed by the Claimants for interest on their claimed damages, based on the Latvian Civil Law.<sup>748</sup> For their part, the Claimants have neither objected to this rate nor proposed another rate. In the absence of any other proposed rate, the Tribunal adopts the rate proposed by the Respondent, which, in the exercise of its discretion, the Tribunal finds to be reasonable.

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<sup>746</sup> Resp. Statement of Costs ¶15 and Annex 1.

<sup>747</sup> Resp. Statement of Costs ¶18; Resp. Reply to Claimants' Statement of Costs ¶¶9-11.

<sup>748</sup> Resp. Reply to Claimants' Statement of Costs ¶10, referring to TR, Day 8, p. 94.

532. As regards the costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, these amount to (in USD):

Total Arbitrator fees and expenses	USD 437,459.29
Eric Schwartz	USD 175,286.94
Kaj Hobér	USD 173,603.00
Toby Landau QC	USD 88,569.35
ICSID's administrative fees	USD 158,000.00
Direct expenses	USD 63,535.13
<b>Total</b>	<b>USD 658,994.42</b>

533. The above costs have been paid out of the advances made by the Parties in nearly equal parts.<sup>749</sup> The Claimants paid USD 324,950; the Respondent paid USD 325,000. During the course of the proceeding, the funds advanced by the Parties accrued interest in the amount of USD 10,648.38. Accordingly, the Tribunal decides that the Claimants should reimburse to the Respondent the amount of USD 329,497.21 for the expended portion of its advances to ICSID.

## VIII. AWARD

534. For the reasons set forth above, the Arbitral Tribunal hereby makes the following Award:

- (i) the Tribunal has jurisdiction over all of the Parties to the arbitration, and all of the claims advanced by the Claimants;
- (ii) the Claimants' claims against the Respondent for breach of the BIT are rejected;
- (iii) the Claimants shall pay the Respondent EUR 2,612,937.42 and USD 329,497.21 in respect of the costs incurred by the Respondent for the arbitration; and

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<sup>749</sup> The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.



- (iv) the Claimants shall pay interest to the Respondent on the sums awarded in (iii) above at a rate of 6% per year accruing as from the date of the dispatch to the Parties of this Award.



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Kaj Hobér

Date: 3 February 2020



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Toby Landau QC

Date: 3 February 2020



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Eric Schwartz  
President

Date: 7 February 2020