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Attribution in Investment Arbitration: From Stricto Sensu to Lato Sensu

Csaba Kovacs · Monday, October 29th, 2018

In the recently published award in *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39)¹⁾ the tribunal considered whether the notion of attribution extends to the non-wrongful conduct of various State or State-linked actors.

The dispute concerned Croatia's alleged expropriation of properties and contract rights of a meat business acquired by the investor through a controversial bankruptcy sale, which was validated by Croatia's bankruptcy court. The claimants also complained of Croatia's alleged interference with the claimants' attempts to register ownership over the properties claimed to have acquired through the bankruptcy sale. The claimants did not challenge the involvement of the State in the bankruptcy process. Instead, the claimants relied on the attribution of the conduct of the liquidator, the Bankruptcy Council, the Bankruptcy Court, the Bankruptcy Judge and the Croatian Privatisation Fund in order to establish Croatia's breach of the fair and equitable treatment standard through violation of a legitimate expectation. The claimants argued that attribution could be used to establish who can make representations on behalf of the State, on which an investor is legitimately entitled to rely. In particular, the claimants argued that the State's involvement in the bankruptcy process gave rise to legitimate expectations concerning the registration of properties that the investor had reasonably and legitimately believed to have acquired through the bankruptcy sale. Citing serious irregularities in the bankruptcy sale, the respondent challenged the validity of the bankruptcy sale and contended that the rules of attribution operate only for the purposes of establishing conduct that is wrongful under international law.

The tribunal distinguished between the strict sense of attribution, which it held to apply in the context of the State's international responsibility for the wrongful acts of its organs and officers, and the 'broader questions of what constitutes the State'. It correctly observed (in paragraph 779) that the ILC Articles' rules on attribution apply to the wrongful conduct of the State, noting that the 'principles of attribution do not operate to attach responsibility for "non-wrongful acts" for which the State is assumed to have knowledge.' It then observed that the involvement of the host State in the bankruptcy sale was not a matter of attribution because there was no third party seeking to hold the State liable for that conduct.

The author submits that attribution establishes whether there is an act of the State through the examination of legal and factual factors connecting the actor, the act or both to the State. The question of the involvement of the host State arises in a number of different factual or legal contexts in investment disputes. For example, it may be necessary to examine if non-wrongful conduct is attributable to the State when a representation, as a predicate of an internationally wrongful act, is alleged to have engendered a legitimate expectation, which is then purportedly violated by the State.

The *Gavrilovic* tribunal's narrow conceptual approach to attribution, while correct from a normative angle, does not acknowledge that the premise of the concept of legitimate expectations is a promise or representation, which must necessarily be attributable to a competent organ or representative of the state in order to engender the investor's legitimate expectations. The issue of the normative framework is, of course, another matter: it is largely settled in the jurisprudence that the ILC rules on attribution do not apply outside the realm of State responsibility, which implies a complaint of a wrongful conduct. Instead, the attribution of lawful conduct is governed by the law applicable to the conduct in question.

Finally, attribution is not concerned with the legality of an act of the State. The question of whether the lawful conduct thus attributed to the State entitles the investor to rely on it or, put simply, the legitimacy of the investor's expectation is a matter for the merits of the case. Nevertheless, there can be no legitimate expectation without a representation attributable to the State. Indeed, the *Gavrilovic* tribunal found that Croatia was not named as a party and did not sign or represented that it intended to be a party to the purchase agreement by which the investor acquired the business in bankruptcy. The tribunal correctly noted (in paragraph 856) that ILC rules on attribution 'cannot be applied to create primary obligations for a State under a contract.' Although it found that Croatia orchestrated the bankruptcy in order to return the family business to the investor as a *quid pro quo* for his currency smuggling services, the tribunal's conclusion that the State was not a party to the purchase agreement meant that the claimants could not have had a legitimate expectation in respect of property that formed the object of that transaction.

The author submits that, in international investment law, the concept of attribution, as the means by which the State's multi-faceted involvement in an investment dispute is ascertained, goes beyond the traditional realm of State responsibility under international law. The concept of attribution lends itself to a number of uses specific to the substantive and procedural framework of investor-State arbitration, which do not necessarily turn on the legality of the examined conduct under international law. The purpose for which the attribution of a particular – wrongful or non-wrongful – conduct is considered determines its relevant normative framework. These and other related issues are examined in-depth in the author's book entitled 'Attribution in International Investment Law' (Kluwer Law International, 2018).²⁾


Csaba Kovacs is a solicitor-advocate with a long-standing practice and expertise in international commercial and investment arbitration. The views expressed in this post are the author's own.

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References

?1 *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia* (ICSID Case No. ARB/12/39), Award, dated 26 July 2018.

?2 Csaba Kovacs, [Attribution in International Investment Law](#) (Kluwer Law International 2018).

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