Dr habil.Tadeusz Szurski

01-636 Warszawa
ul.Cieszkowskiego 1/3 m.102.

Warszawa,26 September, 1994

Arbitrator
in the arbitration in Zurich
between
Saar Papier Vertriebs GmbH as claimant
and
The Republic of Poland as Respondent

Dissenting Opinion

to the INTERIM AWARD of the Arbitral Tribunal
dated August 17, 1994 and signed on September 22 , 1994

In the present dissenting opinion the undersigned arbitrator ,member of the Arbitral Tribunal /appointed by the Respondent/, herby confirmes and motivates his rejection to sign the above mentioned Interim Award , by which the Arbitral Tribunal , by majority of votes , has ruled on its jurisdiction to resolve the dispute submitted by the claimant to arbitration .

In the opinion of the dissenting arbitrator the Interim Award accepting jurisdiction as rendered by the majority of members of the Arbitral Tribunal is not justified for the following reasons :

I.-
The German-Polish "Investment Protection" Treaty of 10 November 1989 provides for the possibility of a foreign investor to resort to arbitration for resolution of investment disputes with the other State - Party to the Treaty only in cases when the dispute relates to expropriation,nationalization or "other measures having effect equivalent to expropriation or nationalization" . This principle arises from the provisions of Art.11.2 in connection with Art.4.2 of the Treaty.

In consequence thereof , disputes between a foreign investor and the hosting state relating to matters other then mentioned above, have to be resolved on a normal way i.e. in the ordinary state courts of the hosting state, of course unless the investor and the state concerned explicitly agree to solve them on the arbitration way too, such possibility being explicitly mentioned in the Art.11.2 of the Treaty.

2.=
Legal representative of Poland in reply to the claim submitted by the claimant to arbitration expressly denied the competence of the Arbitral Tribunal , formed on the ground of the provisions of the Treaty , to decide on that claim and pointed out that there was no dispute between the investor and Poland which could be classified as covered by Art.11.2 (in connection with Art.4.2) of the Treaty . He underlined that the dispute submitted to arbitration did not concern "measures having effect equivalent to expropriation and nationalization" and steld that claims of that kind should be resolved by the state courts in Poland , he ,however did not deny the competence of the Arbitral Tribunal to decide on its jurisdiction .

The dissenting arbitrator is of the opinion that in view of the above position of Poland and of the fact that the claimant's right to seek resolution of his claim on arbitration way depends 0on the interpretation of the German-Polish Treaty , it was the obligation of the Arbitral Tribunal to base its Interim Award on jurisdiction upon the outcome of thorough examination

of all arguments and evidence (documents) presented by the parties and particularly by the claimant.Such an opinion and position the dissenting arbitrator expressed at the internal meeting of the Arbitral Tribunal on September 22 , 1994 in Zurich , but it was rejected by the remaining members of the Tribunal.

3.-
Instead , the Arbitral Tribunal by majority of votes rendered the Interim Award on jurisdiction based exclusively on allegations of the claimant ,without evaluation of documents filed by the claimant to substanciate those allegations. This approach has been confirmed in the reasons formulated in the Interim Award , particularly in the general statement that " in order to decide whether the Arbitral Tribunal has jurisdiction it should not enter into the merits of the case itself (for instance the circumstances in the fact of the prohibition of importation of secondary raw material waste paper since July 1991) .Rather it must on the basis of claims allegations of fact (whether contested or not) , assessed in the light most favourable to claimant , decide whether prima facie claimant has made allegations which constitute the beginning of the case that Polish measures were measures having effect equivalent to nationalization or expropriation. (p.15)

Since also other, more specific , reasons presented in the Award to substanciate the decision accepting jurisdiction are based on nothing but allegations quated without their previous evaluation, the dissenting arbitrator feels obliged to point them out with some comments expressing his , position :

a).- In the reasons it is stated (point 17 of the Award) "... the Arbitral Tribunal cannot exclude that prohibition on importation of the raw material to be processed in a factory (a combination of a restriction of an environment nature and a restriction of access) could be an "equivalent measure" "also effecting the investment"..... "(point 17 of the award)

Comment: As it explicitly arises from all documents presented by the claimant , the only "measures" on which the claim has been based are in fact limited to the decision of the Polish customs office at the German-Polish border of 7 July 1991 not allowing the claimants lorry- transport of waist paper to cross the Polish frontier because of the prohibition of importation of the waist paper to Poland . As it has been stated by the Polish Embassy in the letter to the claimant dated August 9, 1991 (copy in the file) , as of 1 July 1989 importation of waists to Poland had been totally forbidden by the respective amendment of the statute on the protection of environement. (the respective provisions of the statute are known to the dissenting arbitrator.)

Dissenting arbitrator is of the opinion that the decision on jurisdiction of the Arbitral Tribunal cannot be made on of the above quoted theoretical assumption.

In the understanding of the dissenting arbitrator the decision of the border customs office prohibiting importation of waist paper , based on the statute of general aplication in Poland , could hardly be treated as "measures having effect equivalent to expropriatrion and nationalization" justifying the jurisdiction of the Arbitral Tribunal based on the provisions of Art.11.2 in connection with Art.4.2 of the German-Polish Investment Treaty.

b) In the reasons it is stated (p.17.) that "Saar Paner allegation is that Poland applies its prohibition of importation in a discriminatory way against Saar Papier but not against its Polish competitors. (owned by Poland)"

Comment: No evidence was presented by the claimant which could justify that allegation. Moreover, a letter of the Ministry of Environment to another Polish Ministry of 09.01.1992 (in the file) expressing an exceptional consent for importation , as an "interventional import", of the defined quantity of specific waste paper ("50 Tonnen kraftigen Altpapiers") can by no means be qualified as one of "measures having effect equivalent to expropriation and nationalization", and be quoted in order to substantiate the competence of the Arbitral Tribunal under the Treaty.

c) In the reasons it is stated (p.6) that : "Saar Papier...points out that Saar Papier had expressly applied for an authorisation for the importation of waste paper , which had been granted by the President of the Agency for Foreign Invesment on May 4, 1990.'

Comment: The above quoted allegation has no ground in the documents presented by the claimant. As it explicitly arises from Art.5 and 6 of the the statute of 23 December 1988 on "Economic Activity with the Participation of Foreign Subjects" (included in the file) the authorisation by the President of the Agency for Foreign Investment was inevitable for creation and registration of any company with the foreign participation .The authorisation received by the claimant defined the object and scope of the permitted activity of the company (GmbH) created by the claimant , which among others included importation and exportation with simultaneous reservation that it does not relate to goods requiring a concession. The legal significance of that document for the purpose of acceptance o jurisdiction was not assessed by the Arbitral Tribunal.

d) In the reasons it is stated (p.18) that : "Saar Papier allegation is that it was wronged by the way Poland's administrative and and judicial process worked"

Comment:There is no evidence submitted by the claimant justifying inclusion of such an allegation in the reasons of the Interim Award at all. The Arbitral Tribunal has not examined the correctness of that allegation nor any evidence relating to it.
On the other hand the dissenting arbitrator ,after thorough examination of the file , has established that instead of appealing against "unsatisfactory" administrative decision (of the customs office) according to the legally established procedure , the claimant fruitlessly directed numerous letters to various authorities legally not competent to examine and amend that decision .
With this respect the dissenting arbitrator points out to the judgement of the Polish Supreme Administrative Court of November 12, 1991 (original copy and its German translation in the file), by which the claimant's complaint against the position taken by the Ministry of Environment /State Inspectorate for Protection of Environment/ had been dismissed by that Court on the ground that the letter explaining the position of that Ministry /State Inspectorate/ with respect to the definition of "waists" is not an administrative decision but only an information /about the existing law / , against which no complaint to the court is provided by the law. It has been simultaneously stressed that it is only against the decision of the customs authorities taken on the motion re. importation of the waste paper to Poland that a complaint to the Court can be brought.

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The abvove short general comments with regard to the claimants allegations quoted in the reasons to the Interim Award , have been given by the dissenting arbitrator in order to substantiate his opinion that allegations on which the Arbitral Tribunal has accepted its jurisdiction , required previous investigation and assessment and that the dissenting arbitrator had serious reasons not to agree with the majority of arbitrators that the decision accepting jurisdiction could have been made simply on the basis of claimants allegations or assumptions of the Arbitral Tribunal.
Dissenting arbitrator has not found reasons justifying "postponment" of assessing "measures undertakem by Poland " in the light of the provisions of Art.4.2 of the Treaty till examination of the claim as to the merits , as intended by the Arbitral Tribunal. In the opinion of the dissenting arbitrator the documents submitted by the claimant even "prima facie" seem to exclude arguments for qualifying the disputed "Polish measures" as "having effect equivalent to expropriation and nationalization" and , in consequence , as justifying a jurisdiction of the Arbitral Tribunal on the ground of the German-Polish Treaty of November 10, 1989.
That is why the dissenting arbitrator has refrained from raising other arguments supporting his opinion, particularly in the light of public internationaal law.