

**In the Matter of an Ad Hoc Arbitration under the Treaty between the Federal Republic of
Germany and the People's Republic of Poland concerning the Encouragement and Reciprocal
Protection of Investments between:**

NORDZUCKER AG

Claimant

v

THE REPUBLIC OF POLAND

Represented by the Minister of the State Treasury of the Republic of Poland

Respondent

PARTIAL AWARD

TRIBUNAL

Professor Andreas Bucher, Arbitrator

Dr. Maciej Tomaszewski, Arbitrator

Mrs. Vera Van Houtte, Chairman

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0. ABBREVIATIONS

BIT:	Bilateral Investment Treaty between Germany and Poland
CWS:	Witness Statement of Claimant (as numbered by it)
GAM:	General Assembly Meeting
IPO:	Initial Public Offering
MFN:	Most Favoured Nation clause
NoA:	Notice of Arbitration of Nordzucker dated 17 February 2006
PHMN:	Post-hearing Memorial of Nordzucker dated 25 January 2008
PHMP:	Post-hearing Memorial of Poland dated 25 January 2008
RWS:	Witness Statement of Respondent (as numbered by it)
SoC:	Statement of Claim of Nordzucker dated 15 December 2006
SoD:	Statement of Defence of Poland dated 30 April 2007
SoRep:	Statement of Reply of Nordzucker dated 30 July 2007
SoReb:	Statement of Rebuttal of Poland dated 17 September 2007
SPA:	Share Purchase Agreement
Transcript I:	Transcript of the hearing on 5 November 2007
Transcript II:	Transcript of the hearing on 6 November 2007
Transcript III:	Transcript of the hearing on 7 November 2007
Transcript IV:	Transcript of the hearing on 8 November 2007

1. THE PARTIES

1.1 The Claimant

1. Nordzucker AG, (“Nordzucker” or “the Claimant”) is a private company organized and existing under the laws of Germany.
2. Nordzucker is the second largest sugar company in Europe. The large majority of its shareholders are sugar beet farmers’ associations.
3. Nordzucker’s registered office is located at:

Kuchenstrasse 9
38100 Braunschweig
Germany

and it is entered in the Commercial Register Amtsgericht Braunschweig under HRB No. 2936.

4. The Claimant is represented in this arbitration by:

Mr. John S. Willems
Ms. Melis E. Acuner
Mr. Charles R.P. Nairac
White & Case, LLP
11, Boulevard de la Madeleine
75001 Paris
France

Mr. Piotr Galuszynski
Mr. Arkadiusz Korzeniewski
Ms. Nathalie Vidrascu
White & Case W. Danilowicz, W. Jurcewicz I Wspolnicy Kancelaria Prawna Sp.K.
ul. Marszalkowska 142
00-061 Warszawa
Poland

1.2 The Respondent

5. The Respondent is the Republic of Poland ("Poland" or "the Respondent") represented by the Minister of the State Treasury of the Republic of Poland (the "State Treasury").
6. The Minister of the State Treasury has his offices at:

ul. Krucza 36/Wspólna 6
00-522 Warszawa

7. Poland is represented in this arbitration by:

Prof. Grzegorz Domański
Ms. Julita Zimoch-Tucholka
Mr. Krzysztof Zakrzewski
Of counsel:
Dr. Lechoslaw Stepniak
Ms. Monika Malinowska-Hyla
Ms. Anna Wojciechowska
Domański Zakrzewski Palinka Sp.K.
Rondo ONZ 1
01-124 Warsaw
Poland

2. THE ARBITRAL TRIBUNAL

2.1 Co-arbitrator appointed by the Claimant

8. In its Notice of Arbitration of 17 February 2006, Nordzucker appointed as Co-Arbitrator:

Professor Dr. Andreas Bucher
Ch. des Prés de la Gradelle 16
1223 Cologny
Switzerland

2.2 Co-arbitrator appointed by the Respondent

9. Poland has appointed in its Reply dated 15 May 2006 as Co-Arbitrator:

Dr. Maciej Tomaszewski
Weil, Gotshal & Manges LLP
Warsaw Financial Centre
Ul. Emilii Plater 53
00-113 Warsaw
Poland

2.3 Chairman of the Arbitral Tribunal

10. The two Co-arbitrators by letter dated 28 June 2006 invited to act as Chairman of the Arbitral Tribunal:

Mrs. Vera Van Houtte
Stibbe
Loksumstraat 25
1000 Brussels
Belgium

11. Mrs. Van Houtte accepted her nomination by letters of 29 June 2006 and 7 July 2006. The Co-arbitrators informed the Parties and the Arbitration Institute of the Stockholm Chamber of Commerce of the appointment of the Chairman by letters of 7, 10 and 11 July 2006.

3. SUMMARY OF THE ARBITRAL PROCEEDINGS

3.1 Initiation of the arbitration and constitution of the Arbitral Tribunal

12. On 17 February 2006, the Claimant sent a Notice of Arbitration to the Respondent which received it on the same date.
13. The notice was submitted "Pursuant to Article 4 of the Treaty concerning the encouragement and reciprocal protection of investments of 10 November 1989 (the "BIT"), executed by the Federal Republic of Germany and Poland, as amended by the Protocol of 14 May 2003"¹.
14. The notice states in its §169:

"In the absence of a reference to specific arbitration rules in the BIT, Claimant suggests that this Arbitration be conducted under the general rules of international arbitration, with particular attention to the Arbitration Rules of the Stockholm Chamber of Commerce and the Arbitration Rules of the United Nations Commission on International Trade (Resolution 31/98 Adopted by the General Assembly on 15 December 1976)."

The Claimant further submitted that the proceedings should proceed in the English language² and that "In view of Article 11 (3) of the BIT, [...] the place of arbitration shall be Stockholm, Sweden"³. The Claimant appointed Professor Andreas Bucher as Co-arbitrator.

15. On 15 May 2006, the Respondent sent its Reply to the Claimant, with a copy to the Arbitration Institute of the Stockholm Chamber of Commerce, which received it on 17 May 2006.
16. The Respondent, while specifying that its reply was only preliminary, rejected the Claimant's claims as groundless and appointed as other Co-arbitrator Dr. Maciej Tomaszewski. It furthermore proposed that the arbitration procedure should be conducted in accordance with the UNCITRAL Arbitration Rules and that the Arbitration Institute of the Stockholm Chamber of Commerce act as the appointing authority.
17. On 28 June 2006, the Co-arbitrators nominated as Chairman of the Tribunal Mrs. Vera Van Houtte, who accepted the nomination by letters of 29 June 2006 and 7 July 2006, and the Co-arbitrators informed the Parties and the Arbitration Institute of the Stockholm Chamber of Commerce of the appointment by letters of 7, 10 and 11 July 2006.

¹ NoA §1

² NoA §168

³ NoA §171

18. On 14 July 2006, the Tribunal issued draft Terms of Reference, draft specific rules of procedure and its Procedural Order No 1, announcing that an early procedural meeting would be held with the Parties and fixing the advance for costs and fees payable in a specifically dedicated *ad hoc* bank account opened by the Chairman, acting as trustee for the Arbitral Tribunal.
19. On 7 August 2006, the Parties informed the Tribunal of their comments on the two drafts and those were taken duly into account by the Tribunal.

3.2 Specific procedural rules

20. The Specific Procedural Rules were issued as Procedural Order No. 2 on 23 August 2006.

3.3 Terms of Reference

21. On 23 August 2006, an amended version of the draft Terms of Reference was sent to the Parties.
22. On 8 September 2006, the Parties and the Arbitral Tribunal during a meeting organized in Brussels signed the Terms of Reference which provide *i.a.* that:
 - the agreed place of arbitration is Brussels, Belgium (§ V.3);
 - the arbitral proceedings shall be governed by these Terms of Reference and the UNCITRAL Arbitration Rules, and, where the latter are silent, by any Specific Procedural Rules or directions as the Arbitral Tribunal has given in Procedural Order No. 2 and thereafter may give from time to time;
 - the arbitration proceedings shall be conducted in English.

3.4 Procedural meeting

23. An organizational meeting was held in Brussels on 8 September 2006 and attended by the following persons:
 - (i) on behalf of the Claimant:
 - Mr. John Willems,
 - Mr. Piotr Galuszynski,
 - Ms. Melis Acuner,
 - Mr. Achim Lukas.

(ii) on behalf of the Respondent:

- Ms. Julita Zimoch-Tucholka,
- Dr. Lechoslaw Stepniak.

24. During this meeting, the Parties and the Arbitral Tribunal discussed a tentative procedural agenda.

25. The Chairman confirmed the arrangements agreed upon during the procedural meeting of 8 September 2006 by letter of the same date.

3.5 Procedural calendar

26. The Procedural Order No. 3, also dated 8 September 2006, laid down the following procedural agenda:

Date	Action	Party
15 December 2006	Statement of Claim	Claimant
30 March 2007	Statement of Defence	Respondent
at the latest 20 April 2007	Communication by Parties whether they agree on another place than Brussels for holding the hearing	Claimant Respondent
20 April 2007	Parties' requests, if any, for the Arbitral Tribunal's assistance for production of documents	Claimant Respondent
17 May 2007	Decision of the Arbitral Tribunal on requests for production of documents	Arbitral Tribunal
31 May 2007	Submission of documents subject to production order, if any	Claimant Respondent
29 June 2007	Claimant's Statement of Reply	Claimant
31 August 2007	Respondent's Statement of Rebuttal	Respondent
21 September 2007	Submission of the Parties' respective lists of witnesses to be cross examined	Claimant Respondent
28 September 2007	List of witnesses not called by either Party, which the Arbitral Tribunal wishes to hear, if any	Arbitral Tribunal
1 October 2007	Conference call to organize hearing	All
22-24 October 2007 (firm)	Hearing	All including witnesses and experts
25-26 October 2007 (reserved)	Hearing	All including witnesses and experts
30 November 2007	Post-hearing Memorials	Claimant Respondent

27. Although all of the above dates, except the first, have thereafter been postponed in response to requests from the Parties, each of the above steps of the procedure have been complied with.

3.6 Further procedural orders

28. On 22 June 2007, the Tribunal decided on the Claimant's request of 23 May 2007 that it order the Respondent to produce certain documents (Procedural Order No. 4).
29. On 9 August 2007, the Tribunal in its Procedural Order No. 5 rejected the Respondent's request of 17 July 2007 that the Tribunal bifurcate the proceedings.

3.7 The evidentiary hearing

30. On 5, 6, 7 and 8 November 2007, the evidentiary hearing was held in Brussels.

The following counsels attended the hearing:

For the Claimant:

- Mr. Charles R.P. Nairac,
- Mr. John Willems,
- Mr. Piotr Galuszynski,
- Ms. Melis Acuner,
- Mr. Arek Korzeniewski.

For the Respondent:

- Prof. Grzegorz Domański,
- Ms. Julita Zimoch-Tucholka,
- Ms. Monika Malinowska-Hyla,
- Dr. Lechoslaw Stepniak,
- Mr. Krzysztof Zakrzewski.

The following witnesses were heard:

- Mr. Götz Von Engelbrechten,
- Mr. Achim Lukas,
- Dr. Hendrik Einfeld,
- Mrs. Barbara Litak-Zarebska,
- Mr. Krzysztof Jeznach,
- Ms. Elzbieta Jerzak.

31. A sound recording was made of the hearing as well as a transcript by a court reporter. Proofs of the transcript were delivered overnight throughout the hearing and the final transcripts, together with the soundtrack, were sent to the Parties on 12 November 2007. It was agreed at the hearing that any (request for) correction of the transcript would be exchanged informally.
32. At the outset of the hearing each Party had 20 minutes for an opening statement. The Claimant exposed the legal framework for some of the factual issues on which it intended to concentrate during oral testimony. The Respondent summarized its views on the jurisdiction issue, on the alleged breach of the BIT and on the damage issue.
33. At the closing of the hearing, the procedural follow-up was discussed between the Parties and the Tribunal. The further procedural steps were confirmed in the Chairman's letter of 13 November 2007.
34. After the hearing a question was brought up by the Claimant, in its letter of 20 November 2007, about the scope of the post-hearing submission, and in particular the Parties' right to submit new legal authority, to which the Tribunal responded on 14 December 2007.
35. Post-hearing memorials addressing the testimony brought at the hearing, were filed by the Parties on 25 January 2008 and the Tribunal declared the proceedings closed as far as jurisdiction is concerned. On 3 December 2008, the Tribunal informed the Parties that it was in a position to issue an award without having to address further questions to the Parties.

4. MAIN FACTS RELATING TO THE MERITS OF THE DISPUTE

4.1 The privatization of the Polish sugar industry

36. In June 1994 Poland started implementing a privatization programme for its sugar industry. The statutory and regulatory framework was laid down in the Act of 26 August 1994 on the Sugar Market Regulation and Privatization in the Sugar Industry (the "1994 Act") and the Regulation of 20 June 1995 on the Determination of the Principles and Time Schedule for the Privatization of the Sugar Companies (the "1995 Regulation").
37. The 1994 Act envisaged the creation of four joint stock companies, called "Spólki Cukrowe", "Sugar Holding Companies"⁴ to which the State Treasury would contribute 51% of the shares it held in existing sugar companies (hereafter called "Sugar Plants"), which were

⁴ There is an issue between the Parties about the use of the word "Sugar Companies" (SoD p. 19, §46). In order to avoid confusion with the sugar companies which were grouped into the four "Spólki Cukrowe", the Arbitral Tribunal will use the term "Sugar Holding Companies", to be distinguished clearly from their subsidiaries, the "Sugar Plants".

wholly owned by the State Treasury. The State would retain the balance of 49% in each of the Sugar Plants.

38. The Regulation envisaged the sale of shares in the Sugar Holding Companies to third Party investors or capital increases of the Sugar Holding Companies to which the investors would subscribe. It also described a schedule for the privatization envisaging 2 months for the selection of the investors and 5 months for the negotiation of the terms and conditions as well as conclusion of an SPA between the State Treasury represented by the Minister of Privatization and the investor.
39. The four Sugar Holding Companies so created at the turn of 1996 were:
 1. Mazowiecko-Kujawska Spółka Cukrowa (MKSC), with its registered office in Toruń.
 2. Poznańsko-Pomorska Spółka Cukrowa, with its registered office in Poznań (PPSC)
 3. Lubelsko-Malopolska Spółka Cukrowa (LMSC)
 4. Śląska Spółka Cukrowa (SSC).
40. Each of these Sugar Holding Companies held shares in various Sugar Plants (each of which had itself the legal form of a company) located in different parts of Poland.
41. At the turn of 1998, the State Treasury, aware of the worsening of the economic situation of the sugar sector in Poland, and of the need to speed up the privatization in order to provide the Sugar Plants with badly needed fresh capital, decided to authorize the Sugar Holding Companies to create regional groups of Sugar Plants and to allow them to sell shares in these selected Sugar Plants which were combined in these regional Sugar Groups.
42. One Sugar Holding Company (SSC) did not group its Sugar Plants. The other three did create groups in various regions such as, e.g.:
 - Poznań
 - Toruń
 - Szczecin
 - Gdańsk

In each Sugar Holding Company, a certain number of Sugar Plants were left to be privatized later along with the Sugar Holding Company itself. The proceeds from selling shares of Sugar Plants in the regional groups would allow to upgrade the Sugar Plants left in the Sugar Holding Companies.

43. Three of the four Sugar Holding Companies decided to sell majority-stakes in groups of individual Sugar Plants. Only two of them are immediately relevant in these proceedings:

a) PPSC offered for sale:

(i) on 2 June 1999 in the Poznań Sugar Group:

- 51% of the shares of Szamotuly
- 28,59% of the shares of Opalenica

(ii) on 29 June 1999 in the Szczecin Group, 51% of the shares of:

- Kluczewo
- Gryfice

(iii) on 29 November 1999 in the Gdańsk Group:

- 51% of the shares of Pruszcz
- 83% of the shares of Pelplin

b) MKSC put on sale:

(i) on 10 May 1999 in the Toruń Group, 51% of the shares of:

- Chelmza
- Melno
- Krasiniec

(ii) on 29 November 1999 in the Gdańsk Group, 51% of the shares of:

- Malbork
- Nowy Staw

44. The Regulation of 3 November 1999 (the "1999 Regulation") which created the framework for this regional restructuring provided that the terms and conditions of the sale of shares in Sugar Plants organized in regional groups were to be determined by the Sugar Holding Companies' respective General Meetings:

"The privatization of the Sugar Companies can be preceded⁵ by the sale of the blocks of shares in the sugar plants or in their groups held by the Sugar Companies by the method and on the rules specified by the General Meeting of the Company's Shareholders in accordance with Article 18 Section 2 point 3 and Section 3 of Act on Sugar Market

⁵ The Parties' interpretations of this sentence differs:

- Nordzucker argues that the privatization through sale of shares in the Sugar Plants was to be instead of privatization through sale of shares of the Sugar Holding Companies themselves.
- Poland argues that the sale of shares in the Sugar Plants could precede the sales of shares in the Sugar Holding Companies but was not in itself part of the privatization meant by the 1994 Act as amended.

*Regulation and Sugar Industry Privatization of 26 August 1994*⁶ (§2 of the 1995 Regulation as amended by the 1999 Regulation).

45. The 1999 Regulation moreover shortened the envisaged duration of the procedure: it increased the period for the selection of the investors from 2 to 3 months, but reduced the period for the negotiation and conclusion of the SPA to only 3 months (instead of 5 as in the 1995 Regulation)⁷.
46. PPSC and MKSC respectively, issued Rules for Selecting the Buyer of the Shares of respectively the Poznań, Toruń, Szczecin and Gdańsk Groups of Sugar Plants (Exh. C6).
47. The Rules were basically the same for the Poznań, Szczecin and Gdańsk Groups and substantially similar to, although slightly more elaborated than, these for the Toruń Group. Their main features were that the offers had to be submitted in two stages:
 - (i) in a first stage, an offer had to be submitted, containing:
 - a. a Social Package
 - b. a Planters' Package
 - c. an Investment Package stating respectively (a) the employment conditions and guarantees, (b) the conditions and guarantees for the planters and (c) the investment guarantees which the bidder was offering.

These packages were to be negotiated with and accepted by the Commission⁸ and the Employee and Growers Negotiating Teams of each Sugar Holding Company; thereafter the Sugar Holding Company was to qualify one or more bidders for the second stage;

 - (ii) in the second stage, the selected bidders were then to submit a pricing offer which could not be less than the minimum price determined by the Sugar Holding Company.
48. The minimum sales price was determined by the Management Board of each Sugar Holding Company (on basis of, *i.e.*, a valuation of each individual Sugar Plant's enterprise), of which the resolution had to be approved by the Supervisory Board (see Exh. R34 and 35 for the decisions relating to the plants in the Toruń and Szczecin Groups).

⁶ The text of article 18 has not been produced in this arbitration but the two Parties agreed during the hearing that it is not relevant.

⁷ Nordzucker considers that this provision applied to the sale of shares of the Sugar Plants. Poland claims it applies only to the sale of shares in the Sugar Holding Companies themselves.

⁸ Each Commission was appointed by the Management Board in coordination with the Supervisory Board of the relevant Sugar Holding Company for the purpose of holding negotiations with investors and recommending an investor to the Management Board who will conclude a share sale agreement.

49. The second stage included, following the opening of the offers:

- Price negotiations of the Commission with each bidder, successively.
- Presentation by the Commission to the Management Board, of the results of the negotiations of the Social, Investment, Growers packages, the price conditions of the transaction and a recommendation regarding the selection of the Share Purchaser, together with documentation gathered during the Share sale procedure. This documentation had to contain statements initialled by the investors concerning the main elements of the final outcome of the negotiations.
- Adoption of a resolution by the Management Board on the choice of the Share Purchaser and presentation of its decision, together with the tender documentation mentioned above, to the Company's Extraordinary General Meeting.
- Approval of the SPA by the Extraordinary General Meeting of the Sugar Holding Company (of which the State Treasury was the sole shareholder).
- Signature of the SPA by the Management Board of the Sugar Holding Company and the winning bidder.
- Closing of transaction⁹.

50. According to a letter from the State Treasury to Nordzucker of 9 June 2000 (Exh. C52), the negotiation stage was to be concluded by several preliminary steps before the SPA could be approved by the General Meeting of Shareholders of the PPSC:

1. initialling of draft share purchase agreements;
2. approval of the initialled share purchase agreements (by way of a resolution) by the Management Board and the Supervisory Board of the Sugar Holding Company;
3. formal review of the initialled agreements and resolutions of the Management Board and the Supervisory Board by the Ministry of State Treasury.

51. These intermediate steps described in the State Treasury's letter are not explicated in the Rules for Selecting the Buyer of Shares which were adopted by the Sugar Holding Companies, however.

⁹ The procedure is described in Exhibit C6-A and B for the Poznań and Szczecin Groups, both sold by PPSC. The procedures for the Toruń (to be sold by MKSC) and Gdańsk (to be sold by MKSC and PPSC, jointly) Groups differ in form but in substance only in as far as explicit provision was made for a due diligence by the offeror (Exh. C6-C§20-21 and Exh. C6-D§12).

4.2 Nordzucker's interest in the Polish sugar industry

52. In the early 1990's Nordzucker started to expand into East Germany and, given the expected accession to the European Union of sugar-producing Central and Eastern European States, it decided to expand into these countries as well.
53. With regard to Poland, it reportedly¹⁰ decided that it needed to acquire a share of no less than 20% of the Polish sugar market in order to benefit from the synergy of its Polish operations which it intended to concentrate in two plants, each with a sugar beet slicing capacity of 10,000 tons per day, providing together an output of 280,000 tons of sugar per year.
54. Nordzucker first bought at the end of 1998 a majority shareholding in a privately owned sugar plant in Opalenica and, shortly thereafter, it purchased another privately owned sugar plant, Wschowa.
55. Nordzucker then targeted to purchase Sugar Plants in the privatization programme.
56. Nordzucker which had previously expressed towards the Polish authorities its interest in purchasing plants which were earmarked for privatization, received - as other West-European sugar companies did - invitations to bid on shares of a large number of Polish Sugar Plants, including plants in the Southern, Western and Eastern Groups (Exh. R31). It decided to bid only for the plants listed in §43 above.
57. The various steps in the tender procedures for the four groups were basically the same but followed their own pace, as shown by the following table, composed by the Arbitral Tribunal on basis of the documents produced:

	TORUN (MKSC) Chelmza Melno Krasiniec	POZNAN (PPSC) Opalenica Szamotuly	SZCZECIN (PPSC) Gryfice Kluczewo	GDANSK (PPSC) Pruszcz + Pelplin	GDANSK (MKSC) Malbork Nowy Staw
Invitation to bid	10 May 1999	2 June 1999	29 June 1999	29 November 1999 (Exh. C37)	29 November 1999 (Exh. C37)
First offer with 3 packages		17 June 1999 (Exh. C15)	9 July 1999 (Exh. C16)	14 December 1999 (Exh. C39)	14 December 1999 (Exh. C39)
Negotiation of Social, Planters' & Investment Packages	28 June 1999 (Exh. C14)	19 June 1999 (Exh. C15)	August 1999 (Exh. C21-22)		

¹⁰ CWS 2 §15, 17; CWS 1 §31-32; CWS 3 §17

	TORUN (MKSC) Chelmza Melno Krasiniec	POZNAN (PPSC) Opalenica Szamotuly	SZCZECIN (PPSC) Gryfice Kluczewo	GDANSK (PPSC) Pruszcz + Pelplin	GDANSK (MKSC) Malbork Nowy Staw
Selection of Nordzucker as bidder	10 August 1999 (Exh. C20) 31 August 1999 (Exh.C25)	6 August 1999 (Exh. C19)	17 September 1999 (Exh.C27) 1 October 1999 (Exh.C28 = R26)	8 March 2000 (Exh.C45 = R27)	8 March 2000 (Exh.C45 = R27)
Pricing offer	25 November 1999 (Exh. C36)	19 August 1999 (Exh. C23)	5 October 1999 (Exh.C29)	30 March 2000 (Exh. C48)	31 March 2000
Designation of Nordzucker as winning bidder	22 March 2000 (Exh. C46)	7 September 1999 (Exh. C26)	13 October 1999 (Exh. C31)	9 May 2000 (Exh.C49 = R25) ¹¹	9 May 2000 (Exh.C49 = R25)
Negotiating SPA – Initialling SPA	28 June 2000 (Exh.C54)	21 December 1999 (Exh. C40) 28 June 2000 (Exh.C54)	28 June 2000 (Exh.C54)		
Extraordinary GAM for approval SPA	28 August 2000 (Exh.C57)	13 July 2000 (Exh.C55)			
Signature SPA	4 September 2000 (Exh.C59)	12 August 2000			

58. As the above table shows, the procedure for the Gdańsk Group was started later than for the other groups, but followed a similar tempo until May 2000 when Nordzucker was designated by both PPSC and MKSC as winning bidder for the Gdańsk Group. The negotiations of the SPAs for the three other Groups led to the initialling of an SPA for each of them on 28 June 2000. The SPAs were first approved for the Poznań and the Toruń Group respectively on 13 July 2000 by PPSC and on 28 August 2000 by MKSC and then signed, respectively on 12 August 2000 and 4 September 2000.

¹¹ The Tribunal notes – and cannot explain on basis of the documents produced that the Pelplin plant is not mentioned in this letter, or in any later correspondence between the Parties and that Nordzucker's claim calculation does not refer to this plant either (see Expert Report G. Lagerberg, 15 December 2006, p. 23), although Nordzucker included it in its price bid.

59. By letters of 30 August 2000, 25 October 2000, 14 November 2000, and 7 December 2000, Nordzucker inquired at the State Treasury about the lack of progress for the sale of the Szczecin and Gdańsk groups (Exh. C58, C61, C62, C64). All of these letters remained unanswered as acknowledged explicitly by one of Poland's witnesses (Transcript III, p. 183-184).
60. On 18 January 2001 a meeting was held between Nordzucker and Mr. Jeznach, Deputy Director of the Department of Supervision and Privatization at the State Treasury. At this meeting Mr. Jeznach explained that the government was considering new valuations of the Sugar Plants¹², without, however, indicating, at that time or thereafter, that if Nordzucker did not agree to increase the price, the sale process for the Szczecin and Gdańsk Groups would stop¹³.
61. Nordzucker reproaches Poland that it did not, at that time, nor at any time thereafter clearly state that unless the price for the Gdańsk and Szczecin Groups was increased, the sale would not go through. Nordzucker does acknowledge that the valuation of the shares was mentioned at the meeting¹⁴ but that it rejected this as a reason for postponement of the privatization. Nordzucker has even testified that this comment of Mr. Jeznach was not taken very seriously¹⁵.
62. By letter of 19 January 2001, MKSC requested Nordzucker to indicate, given the length of time of the procedure, until which date it considered itself bound by its offer of 31 March 2000¹⁶. Since the procedure did not contain a term for the validity of the offers, the Tribunal interprets this letter as an indication that MKSC considered that, as a result of the lapse of time since the price offer was made, the offer could validly be withdrawn at that stage. Nordzucker did not withdraw it, however, but instead reiterated that it wanted to close the transaction as soon as possible¹⁷.
63. Although Nordzucker reportedly did not take Mr. Jeznach's comment of 18 January 2001 about the new valuations of the Sugar Plant's very serious, it nonetheless wrote on 6 February 2001 two letters to the Presidents of the Management Boards of MKSC and PPSC, respectively, to object against an attempt to challenge the economic basic principles of the transaction by carrying out new valuations of the Sugar Plants and indicated that it would seek recourse in court for what it would consider as a violation of the privatization procedure and of the principles of civil law¹⁸.

¹² SoR p. 16 §46 and 47

¹³ Transcript III, p. 27-28

¹⁴ Transcript I, p. 100: 19 and 24-25

¹⁵ CWS 5, §9-12; Transcript I, p. 101: 1

¹⁶ Exh. C91

¹⁷ Exh. R70

¹⁸ Exh. R69 and R70

64. In another letter of 6 February 2001, to Mr. Chronowski, Minister of the State Treasury, Nordzucker admitted being “*aware of the problems that are currently hindering the progress of the privatization*”. [...]. It also referred to Polski Cukier (see chapter 4.3. hereafter) but assumed explicitly “*that the further course of the Gdańsk and Szczecin Group privatization will be in line with currently effective regulations, as long as legal security is ensured*”¹⁹.
65. Nordzucker, which was apparently of the opinion that the tender procedure had reached a point where both Parties were legally bound to close the transaction, sued on or about 25 April 2001 respectively PPSC and MKSC in the Courts of respectively Poznań and Toruń in order to obtain an order that the defendants were obliged to perform the SPAs with Nordzucker and to transfer the shares in the Szczecin and Gdańsk Groups Sugar Plants.
66. Before reviewing whether legally binding obligations had been assumed by the Sugar Companies, in both cases, each Regional Court first issued an interim order restraining the respective Sugar Holding Company from transferring its shares in the Sugar Plants covered by the tender procedures²⁰. On 18 March 2002, the Regional Court in Toruń dismissed Nordzucker’s claim against MKSC²¹ and on 24 June 2002, the Regional Court in Poznań did the same with its claim against PPSC²². Both courts refused to grant Nordzucker’s claim that the Sugar Holding companies be ordered to transfer their shares in the Malbork and Nowy Staw Sugar Plants, and in the Szczecin Group Sugar Plants, respectively²³, because they found no evidence that an agreement for the share sale had been concluded with either Sugar Holding Company.
67. Nordzucker insists on the fact that none of the submissions or witness statements filed in these court procedures mentioned that Poland refused to sign the SPAs because Nordzucker was not willing to raise its price for the two groups²⁴. Poland, on the other hand, emphasizes that these courts were only asked to determine whether Nordzucker was justified to consider that an agreement had been concluded at the meeting of 18 January 2001 and whether Mr. Jeznach could represent the Sugar Holding Companies in the discussions of that date; hence, that the circumstances justifying why the transaction had not been finalized, were treated only marginally²⁵.

4.3 Nordzucker’s failure to acquire the Gdańsk and Szczecin Sugar Groups

68. In parallel with the launch of privatization procedures in 1999, some Members of the Polish Parliament grouped around Mr. Gabriel Janowski, President of the Parliamentary Committee

¹⁹ Exh. R88

²⁰ Exh. C113 and C114

²¹ Exh. C98

²² Exh. C103

²³ There is no evidence in the file indicating that Nordzucker also filed a similar claim against PPSC in relation to the Pruszcz and Pelplin Sugar Plants which represented PPSC’s share in the Gdańsk Group.

²⁴ SoRep p. 35, §81

²⁵ SoReb p. 26-27, §46

for Agriculture and Country Development, opposed the privatization of the Polish sugar industry and called as from December 1999 for the creation of a national Polish Sugar Company, "Polski Cukier".

69. The government agreed to appoint a consultant to determine whether the formation of such an entity was economically justified, it being understood that it would group 16 Sugar Plants which had not yet been targeted for the privatization. The file shows that the government was of the opinion that the plans for Polish Cukier would not stop the privatization and that only the transfer of Sugar Plants for which the privatization procedure had not started could be transferred to Polski Cukier.
70. On 21 June 2001 the Act on the Sugar Market Regulation²⁶ was adopted. It provided for the creation of a new national Polish Sugar Company, Krajowa Spółka Cukrowa, to which, according to article 20 of this Act, the State Treasury was to contribute all shares it owned in Sugar Plants.
71. On 1 August 2001, the Extraordinary General Shareholders' meeting of PPSC adopted a resolution refusing to give consent on the sale of the shares in the Sugar Plants of the Szczecin and Gdańsk Groups²⁷.
72. On the same date the Deputy Secretary of the State Treasury informed Nordzucker²⁸ that the general shareholders' meetings of both PPSC and MKSC had refused to approve the sale of the Sugar Plants of the two Groups and mentioned three reasons therefore:
 - (i) the establishment of a national sugar company;
 - (ii) a decision of the Council of Ministers of 13 June 2001 changing the ownership transformations strategy in the sugar industry, and
 - (iii) formal and legal issues related to the procedure and documentation concerning the selection of an investor.
73. On 6 August 2001, MKSC itself wrote to Nordzucker, confirming the refusal and announcing the reimbursement of the bank guarantees posted by Nordzucker for the tender procedure, plus interest²⁹.

4.4 Subsequent events

74. On 14 May 2003, a Protocol amending the 1989 BIT between Germany and Poland was adopted.

²⁶ Exh. 69

²⁷ Exh. C70. A similar resolution of MKSC has not been produced

²⁸ Exh. C71

²⁹ Exh. C72. A similar letter from PPSC has not been produced.

75. On 24 June 2003, the Regional Court in Poznań dismissed Nordzucker's claim, after the Regional Court in Toruń had already issued a partial judgment dismissing the claim for ordering MKSC to communicate a declaration of will to transfer the shares of its Gdańsk Sugar Plants to Nordzucker.
76. On 1 September 2003, Nordzucker wrote to the President of the Polish Council of Ministers, "*with reference to Article 11 of the Agreement of 10 November 1989 between the Republic of Poland and the Federal Republic of Germany on the support and mutual protection of investments*", requesting to commence negotiations to resolve the dispute following the refusal to consent to the sale of the shares and the transfer of the shares of the Gdańsk and Szczecin Sugar Groups "*to the biggest competitor of Nordzucker AG on the sugar market in Poland, namely the Krajowa Spółka Cukrowa S.A.*".
77. On 6 October 2003, the Secretary of State replied on behalf of the Prime Minister that
- minimum prices for the two Groups determined in the opinion of the Minister of the State Treasury's consultant were set at an unsatisfactory level,
 - that the GAM's consent had not been given and
 - that the refusal to sell the shares was justified by the change in the privatization strategy of the sugar industry,
- confirming in conclusion that Nordzucker "in the lighting of applicable formal and legal conditions" had no justified claim.
78. On 1 December 2003, the Toruń Regional Court issued a final decision dismissing Nordzucker's claim.
79. On 23 April 2004, Nordzucker filed with the District Court of Warsaw a petition to make a settlement attempt with the State Treasury aiming at
- either the purchase by Nordzucker of quantities of sugar equal to the A and B sugar quota of the Gdańsk and Szczecin Sugar Groups (for introduction into the EU market);
 - or the payment of damages to Nordzucker for the losses caused by the State Treasury in the privatization process, estimated at PLN 107,000,000.
80. This proceeding ended on 2 September 2004 without any settlement.
81. On 18 April 2005, Nordzucker wrote to the Ministry of the State Treasury referring to the above mentioned unsuccessful request for negotiations of 1 September 2003 and to its 23

April 2004 petition to the Warsaw District Court for settlement, and confirmed its willingness to still resolve the dispute on an amicable basis and asked for an appointment.

82. On 5 May 2005, the Secretary of the State confirmed its earlier position, *de facto* declining the meeting invitation.
83. On 28 October 2005, the Protocol of 14 May 2003 took effect.
84. On 17 February 2006, the Claimant sent to the Respondent its Notice of Arbitration.

5. PRAYERS FOR RELIEF

5.1 The Claimant

85. In its Notice of Arbitration, the Claimant requested that the Tribunal:

“ (1) *Hold that Respondent breached its obligations under Article 2 (1) of the BIT;*

(2) Hold that Respondent breached its obligations under Article 2 (2) of the BIT;

(3) Hold that Respondent breached its obligations under Article 4 (1) of the BIT;

(4) Hold that Respondent breached its obligations under Article 4 (2) of the BIT;

(5) Award Claimant compensation and damages in an amount to be determined by the Tribunal, and including pre-award and post-award interest thereon, as applicable, continuing through to the date of payment; and

(6) Award Claimant the amount of its legal fees and costs incurred in these proceedings. ”

86. In its Statement of Claim, the Claimant expanded its request as follows:

“ (a) *hold that the Respondent breached its obligations under Article 2(1) of the BIT;*

(b) hold that the Respondent breached its obligations under Article 2(2) of the BIT;

(c) hold that the Respondent breached its obligations under Article 3(1) of the BIT;

(d) hold that Respondent breached its obligations under Article 3(2) of the BIT;

(e) hold that the Respondent breached its obligations under Article 4(1) of the BIT;

- (f) hold that the Respondent breached its obligations under Article 4(2) of the BIT;*
- (g) hold that the Respondent breached its obligations under Article 4(4) of the BIT;*
- (h) award the Claimant compensation and damages in an amount to be determined by the Tribunal, but not less than €185,4 million, and including pre-award and post-award interest thereon, as applicable, continuing through to the date of payment;*
- (i) award the Claimant the amount of its legal fees and costs incurred in these proceedings, including the arbitrator's fees and expenses, the fees and expenses of Claimant's experts, and the legal costs incurred by the parties (including the fees of counsel); and*
- (j) award the Claimant any other relief that the Tribunal deems appropriate. ”*

87. In its Statement of Reply, the Claimant revised its request further:

- “ *(a) hold that the Tribunal has jurisdiction over Nordzucker's claims;*
- (b) hold that Poland breached its obligations under Article 2(1) of the BIT;*
- (c) hold that Poland breached its obligations under Article 2(2) of the BIT;*
- (d) hold that Poland breached its obligations under Article 3(1) of the BIT;*
- (e) hold that Poland breached its obligations under Article 3(2) of the BIT;*
- (f) award Nordzucker compensation and damages in an amount to be determined by the Tribunal, and including post-award interest thereon, as applicable, continuing through to the date of payment;*
- (g) award Nordzucker the amount of its legal fees and costs incurred in this proceeding, including the arbitrator's fees and expenses, the fees and expenses of experts, and legal costs (including the fees of counsel); and*
- (h) award Nordzucker any other relief that the Tribunal deems appropriate. ”*

88. In its Post-Hearing Brief, the Claimant maintained this request but reformulated the previous paragraph (g) as follows:

- “ *(g) retain jurisdiction in order to address, in a subsequent phase of the arbitration, Nordzucker's claim that Nordzucker be awarded the amount of its legal fees and costs incurred in this proceeding, including the arbitrator's fees and expenses, the fees and*

expenses of experts, and legal costs (including the fees of counsel) and including post-award interest thereon, continuing through to the date of payment; ”

5.2 The Respondent

89. In its Reply to the Notice of Arbitration, the Respondent denied having infringed the BIT and reserved its right to present its position in the Statement of Defence.
90. In its Statement of Defence, as well as in its Statement of Rebuttal, the Respondent objected to the jurisdiction of this Tribunal, invoked a time bar and requested, also in its Post-Hearing Brief, that in any event all the claims submitted by Nordzucker be dismissed and that Nordzucker *“be ordered to pay all costs, disbursements and expenses incurred by Respondent in defending against this claim including, but not restricted to, legal, consulting and witness fees and expenses, travel and administrative expenses, and the costs of the Tribunal”*.

6. JURISDICTION

6.1 Admissibility of the objection on jurisdiction

91. In its Statement of Defence, Poland has objected against the jurisdiction of this Arbitral Tribunal. Nordzucker has argued (SoRep p.52) that this objection is inadmissible, (i) because it was raised for the first time in the Statement of Defence of Poland of 30 April 2007, and not in Poland’s Reply of 15 May 2006 to the Notice of Arbitration, (ii) because it was raised neither during the preliminary meeting with the Tribunal on 8 September 2006, nor at any other time in 2006, and (iii) because article V.1 of the Terms of Reference quotes the post-Protocol version of articles 11 (1) and 11 (2) of the BIT. Nordzucker considers that these facts prove that Poland acknowledged that the Tribunal has jurisdiction on basis of the Protocol.
92. This Tribunal is of the opinion that the jurisdiction issue was raised in due time by Poland in its Statement of Defence, as required by article 21.3 of the UNCITRAL Arbitration Rules. There can be no doubt that Poland’s Reply of 15 May 2006 was not a Statement of Defence in the sense of such article 21.3. Moreover, the Terms of Reference mention explicitly on p. 5, item III.b, that:

“Its [i.e. Poland’s] signature of these Terms of Reference does not imply its acceptance of the Arbitral Tribunal’s jurisdiction and/or of the admissibility of the case.”

93. Hence, this Tribunal shall entertain Poland’s plea that it does not have jurisdiction.

6.2 Applicability of the original BIT or of the Protocol: jurisdiction *ratione temporis*

94. Poland relies for its objection to jurisdiction *ratione temporis* on the fact that the Treaty concerning the encouragement and reciprocal protection of investments between Poland and Germany of 10 November 1989 as it was in force at the time of its alleged breach (the “original BIT”) provided arbitration exclusively for disputes about expropriation and about transfer of money. According to the English translation of article 11 of the original BIT:

“(1) Disputes with regard to investments between either Contracting Party and an investor of the other Contracting Party should, if possible, be settled amicably between the parties to the dispute.

(2) If a dispute under paragraph 2 of Article 4³⁰ or under Article 5³¹ has not been settled within six months after it has been raised by one of the parties to the dispute, either of the parties to the dispute shall be entitled to appeal to an international arbitral tribunal.

(3) The regulation established in paragraph 2 above shall also apply to disputes on matters with regard to which the investor and the other Contracting Party have agreed on arbitral proceedings.

(4) If the parties to the dispute do not make another arrangement, the provisions of paragraphs 3 to 5 of Article 10 shall be applied mutatis mutandis subject to the proviso that the members of the Arbitral Tribunal shall be appointed by the parties to the dispute and that, if the periods mentioned in paragraph 3 of Article 10 are not observed, either Contracting Party may in the absence of any other relevant agreements invite the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce to make the necessary appointments. The award shall be recognized and enforced under the Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

(5) Neither Contracting Party that is a party to the dispute shall raise the objection during arbitral proceedings or during the enforcement of an arbitral award that the investor of the other Contracting Party has received compensation from an insurance institution for part or the whole of the damage. This shall not affect the provisions of paragraph 2 of Article 6.”

95. Whereas Nordzucker initially claimed that Poland had breached articles 2 (1), 2 (2), 4 (1), and 4 (2) of the BIT relating to fair and equitable treatment, unjustified or discriminatory measures, full protection and security, expropriation, and thereafter also articles 3 (1), 3 (2) and 4 (4) relating to less favourable treatment and most-favoured-nation treatment (NoA, p.

³⁰ Expropriation disputes

³¹ Disputes about money transfers

23; SoC §226), Nordzucker later withdrew its claims based on Poland's alleged breach of articles 4(1) and 4(2) of the BIT (full protection and security, expropriation) as well as article 4(4) (most-favoured-nation-treatment)³².

96. Since the Parties to this procedure have not otherwise agreed on arbitral proceedings, the conclusion must be that this Tribunal has no jurisdiction under the original BIT to decide on Nordzucker's remaining claims for unfair and inequitable treatment and for unjustified and discriminatory measures.
97. The issue is whether this Tribunal has jurisdiction, as Nordzucker claims, under article 11 of the BIT as it was amended on 14 May 2003 through a Protocol amending and supplementing the original BIT (the "Protocol"). The amended article 11 reads as follows:

"(1) Any disputes pertaining to the investments made between the investor of one of the Contracting Parties and the other Contracting Party as regards the rights and obligations hereunder should be, wherever possible, resolved amicably between the Parties to such dispute.

(2) If such dispute fails to be resolved amicably within six months after one of the Parties to the dispute reports it, the investor shall have a right to refer it either to the competent courts of the other Contracting Party or to the international tribunal of arbitration. If the investor of one of the Contracting Parties has referred the dispute concerning the investment within the territory of the other Contracting Party to the competent court of the other Contracting Party, such investor shall have a right to, by the time of judgement issue, withdraw the claim and refer such dispute to the international tribunal of arbitration. In such case, the other Contracting Party shall give its consent to the claim withdrawal. The investor may refer such dispute to the international tribunal of arbitration also following the judgement issue provided that it is allowed by the internal law of the other Contracting Party.

(3) If the Parties to the dispute do not make another arrangement, the provisions of paragraphs 3 to 5 of Article 10 shall be applied mutatis mutandis subject to the proviso that the members of the Arbitral Tribunal shall be appointed by the Parties to the dispute and that, if the periods mentioned in paragraph 3 of Article 10 are not observed, either Contracting Party may in the absence of any other relevant agreements invite the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce to make the necessary appointments. The award shall be recognized and enforced under the Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

³² SoRcp §12 and §309-310

(4) Neither Contracting Party that is a Party to the dispute shall raise the objection during arbitral proceedings or during the enforcement of an arbitral award that the investor of the other Contracting Party has received compensation from an insurance institution for part or the whole of the damage. This shall not affect the provisions of paragraph 2 of Article 6."

98. This Protocol was ratified by Poland on 15 October 2004 and published in the Polish Official Journal of Laws of 26 January 2006, whereupon it became part of Poland's internal legal order (article 91, par. 1 of the Polish Constitution³³). According to its article 5 section 2, the Protocol was to enter into force within 30 days from the date of the exchange of the ratification documents. As this exchange took place on 27 September 2005, the amended BIT became effective on 28 October 2005 under international law.
99. The Protocol only determines the date of its entry into force. It does not contain a transitory provision that would determine whether situations that occurred before its entry into force are governed by the provisions of the Protocol or not³⁴.
100. Poland argues that the jurisdiction clause of the Protocol was not applicable before the Protocol took effect and thus cannot be applied to the alleged breach of the BIT by Poland which occurred in 2001. It relies on various arguments, all of which are contested by Nordzucker which has developed its own arguments in favour of the Tribunal's jurisdiction.

a. Non-retroactivity of Treaty obligations

101. Poland relies heavily on article 28 of the Vienna Convention on the Law of Treaties of 1969:

"Unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind a Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that Party."

and on the statement in the award of the *Mondev v. USA*³⁵ case:

"The basic principle is that a State can only be internationally responsible for breach of a Treaty obligation if the obligation is in force for that State at the time of the alleged breach."

102. Poland considers the obligation to arbitrate also about other breaches of the BIT than those of articles 4 (2) and 5, as a single obligation which entered into force only on 28 October 2005

³³ SoD, §255

³⁴ In contrast, the original BIT contains an article 9, which has not been amended by the Protocol, according to which "This Treaty shall also apply to matters arising after the entry into force of this Treaty with regard to investments that investors of either Contracting Party made in the territory of the other Contracting Party [...] between 14 September 1972 and the entry into force of this Treaty".

³⁵ *Mondev International Ltdv. United States of America*, ICSID Case N° ARB (AF) 99/2, Award of 11 October 2002 ("*Mondev v. US*")

when the Protocol became effective, or, at the latest, on 26 January 2006 when the Protocol became part of the internal Polish legal system.

103. Nordzucker considers that this argument must fail because a distinction must be made between the substantive obligation (to protect investments) which must have been in force at the time of the alleged breach of that obligation, on the one hand, and the obligation to arbitrate which must be in force at the time of referral of the dispute³⁶, on the other hand. It relies on:

(i) the substantive obligations to accord fair and equitable treatment to investments which were in effect at the time of the alleged breach in 2001, as they were imposed already by the original BIT of 1989.

(ii) a “weighty body of international judicial and arbitral decisions which confirm that a jurisdictional clause in an international instrument should be interpreted as applying to disputes and events occurred prior to its entry into force, unless there is an express limitation to the contrary³⁷.”

(iii) the *Tradex v. Albania* case³⁸ which shows similarity to this case in that jurisdiction was claimed by the Claimant on basis of an Albanian investment law providing for ICSID arbitration but which entered into force only after the alleged expropriation and after the “crystallisation” of the dispute. After concentrating on the criteria established by the relevant articles of the investment law and of the ICSID Convention, the *Tradex* tribunal found that the newer arbitration provisions could be invoked in disputes about violations committed before the ICSID arbitration provision became effective.

104. Poland refers to the *Liechtenstein v. Germany* case as an example where the ICJ decided that it had no jurisdiction *ratione temporis* under article 27(a) of the European Convention for the Peaceful Settlement of Disputes, because the breaches occurred before the Convention entered into force. It also cites the *Blečić v. Croatia* case where the European Court of Human Rights declined jurisdiction *ratione temporis* for a breach based on facts which took place before the date the Convention took effect in the breaching state³⁹.

105. The Arbitral Tribunal finds in relation to the authorities relied upon by the Parties as follows:

(i) As regards the *Mondev* case:

³⁶ SoRep §134

³⁷ SoRep §135 & ff.

³⁸ *Tradex Hellas SA (Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction of 24 December 1996 (“*Tradex*”)

³⁹ SoReb §119-221

The Tribunal cannot follow Poland in its reliance on the *Mondev* case. Indeed, this case was concerned (in the part on which Poland relies) with the jurisdiction of the tribunal for conduct which occurred both before and after the date of NAFTA's entry into force. The question was whether the conduct prior to NAFTA, if continued thereafter, could also be sanctioned under NAFTA. In *Mondev*, the NAFTA Treaty introduced simultaneously a substantive obligation and an obligation to arbitrate and the Tribunal, when making the statement quoted under §101 above, was exclusively concerned with determining whether there had been conduct of the State after the entry into force which constituted a breach of a substantive provision. In the case before this Tribunal, the original BIT imposed already the substantive obligation, but it became arbitrable only under the Protocol, and it is not disputed that the alleged breach occurred prior to the entry into force of the Protocol.

(ii) As regards the *Liechtenstein v. Germany* case:

In this case, the Court had to decide whether it was dealing with a dispute, "*relating to facts or situations prior to the entry into force of the Convention as between the parties to the dispute*" to which the Convention was not applicable.

One party had argued that the fact which led to the dispute was the expropriation which took place prior to the entry into force of the convention. Whereas it was acknowledged that the "dispute was triggered by the decisions of the German courts" which, after the Convention became effective, declared not to have jurisdiction in relation to the expropriation, the Court decided that the breach for which redress was sought was not the rejection of jurisdiction by the German courts, but the earlier expropriation. While the expropriation had occurred prior to the entry into force of the Treaty, the Court declined jurisdiction. Its statement on which Poland relies (... "*the critical issue is not the date when the dispute arose, but the date of the facts or situations in relation to which the dispute arose*") has therefore a very specific meaning in the context of that case which was exclusively concerned with substantive rights and cannot be pulled out of its context to serve as authority for the jurisdiction issue in this arbitration.

(iii) As regards the *Blečić v. Croatia* case:

In the *Blečić* case, the substantive obligations came into effect on the same date as the obligation to submit to the jurisdiction of the European Court of Human Rights. Thus, the principle of non-retroactivity of treaties made it impossible for the Court to redress wrongs or damages caused prior to the notification date of the Convention, on which date both the substantive obligations and the jurisdictional obligations took effect.

Thus, the Court's reasoning cannot be applied in this case for the amended BIT which created arbitral jurisdiction for breaches of obligations which existed already under the original BIT.

(iv) As regards article 28 of the Vienna Convention on the Law of Treaties :

While article 28 of the Vienna Convention on the Law of Treaties does not distinguish between jurisdictional obligations under a Treaty and substantive obligations, it must be assumed to apply to both.

If it is accepted that article 28 of the Vienna Convention on the Law of Treaties applies not only to provisions creating substantive obligations but also to provisions creating procedural obligations, then "any act of fact which took place before the date of the entry into force of the Treaty" may have a different meaning, depending on the substantive or procedural nature of the provision or obligation which is at stake.

106. Poland confirms that "*a clear distinction should be made between Poland's substantive obligations and Poland's obligation to submit to the jurisdiction of an arbitral tribunal with respect to decisions on breach of material obligations*"⁴⁰. But it denies that "*a distinction should be made between a decisive date with respect to the breached obligation and a decisive date with respect to the obligation to submit the breach to arbitration proceedings*"⁴¹. Thus, it finds that the two questions, (i) whether a breach occurred and (ii) whether the breach could have been claimed in arbitration proceedings, have to be assessed on the same date, *i.e.* on the day the breach occurs and not on the day the claim is asserted.
107. According to this Tribunal, the distinction is not important in a case where a Treaty simultaneously creates substantive and procedural obligations but, in a case where the Treaty provisions were created at different times, article 28 of the Vienna Convention requires to determine precisely the relevant fact for each provision. For a provision creating a right/obligation to arbitrate, this is the bringing of the claim. For a provision creating a substantive obligation, this is the breach of such obligation. Each obligation, the substantive obligation, on the one hand, and the procedural obligation to submit to arbitration, on the other hand, has to be assessed in relation to the respective date at which it took effect.
108. Poland correctly points out "that the State's consent to arbitration is also an obligation of the State"⁴². This obligation became effective on 28 October 2005. The obligation to treat investments fairly and equitably became effective already on 24 February 1991, however. Until 28 October 2005 disputes about this obligation could not be decided in arbitration unless the Parties to the dispute agreed to it in accordance with article 11 (3) of the old BIT.

⁴⁰ SoReb §115

⁴¹ SoReb §116

⁴² SoReb §118

As from 28 October 2005, arbitral tribunals had jurisdiction for all disputes described in article 11 (1) including those relating to breaches occurred before 28 October 2005. Such was the meaning and the scope of the consent to arbitrate contained in article 3 of the Protocol, “unless a different intention appears from the Treaty or is otherwise established” (Vienna Convention art. 28). With this last reservation – which the Tribunal will address hereafter, the Protocol became effective on 28 October 2005, not only for future breaches but also for past breaches to the extent they were not time-barred or otherwise became inadmissible.

109. The immediate application of a jurisdictional Treaty clause, also to pre-existing breaches, does not constitute a retro-active application of that clause, but is a correct application of article 28 of the Vienna Convention, it being understood that the fact to which the jurisdictional provision relates and which must occur after the Treaty or its jurisdictional clause becomes effective, is the filing of the claim.
110. The Arbitral Tribunal thus reaches the preliminary conclusion that, unless a different intention of the Parties is established, the immediate applicability of a jurisdictional clause of a Treaty implies that it can also be applied to “old” events, provided these constituted already a breach of the Treaty at the time they occurred.
111. The Tribunal finds support for its opinion in the following cases and authorities cited by Nordzucker:
 - *“The Court [PCIJ] is of the opinion that, in cases of doubt, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment... The reservation made in many arbitration treaties regarding disputes arising out of events previous to the conclusion of the Treaty seems to prove the necessity for an explicit limitation of jurisdiction and, consequently, the correctness of the rule of interpretation enunciated above.” (Mavromatis Palestine Concessions, PCIJ Judgment No. 2 of 30 August 1924, p. 35)*
 - *“The Genocide Convention – and in particular Article IX – does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction ratione temporis, and nor did the Parties themselves make any reservation to that end. [...] This finding is, moreover, in accordance with the object and purpose of the Convention.” (Bosnia-Herzegovina v. Yugoslavia, ICJ Judgment of 11 July 1996, §34).*
 - *“The Tribunal is not convinced that such a presumption [that a submission to arbitration must be presumed to be meant only for future disputes unless otherwise expressed] can be established in international arbitration. Submissions to arbitration, both in arbitration between States and in international commercial arbitration, are found in practice both regarding disputes that have already arisen and regarding future*

disputes.” (*Tradex Hellas SA. (Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction of 24 December 1996, p. 194).

- “*The [ICSID] Convention does not indicate at what time a dispute must have arisen. The answer to this question will ultimately depend on the terms of the consent to the Centre’s jurisdiction. Consent may relate to a specific dispute already existing between the Parties, it may relate to future disputes only or it may relate to any dispute, that is, embracing existing as well as future disputes.*” (Christopher Schreuer, *The ICSID Convention: A Commentary* (2000), p. 103)

112. Although there appears to be a majority of authority to hold that the application of a new jurisdiction clause to pre-existing substantive breaches is possible unless it was explicitly excluded, all above mentioned decisions have carefully reviewed all possibly relevant provisions of the respective treaties and therefore reached a conclusion which was specific to the applicable Treaty. This Tribunal shall therefore test its above preliminary conclusion that it has jurisdiction *ratione temporis* in the broader context of the BIT and the Protocol.

b. The context, object and purpose of the BIT and Protocol

113. Nordzucker finds 7 different reasons in the context, object and purpose of the BIT and the Protocol justifying jurisdiction of the Tribunal over article 2 and article 3 BIT claims based on breaches that allegedly occurred before the Protocol’s arbitration clause entered into force.

- (i) Article 11 (3) of the original BIT provided that, if the investor and a Contracting State specifically had agreed on arbitral proceedings for other disputes than relating to expropriation and money transfers, the obligation of article 11 (2), requiring 6 months prior settlement attempts, also applied.

According to Nordzucker, article 11 (3) could not possibly have been abrogated by the Protocol if it was the intention that old disputes over other matters would not mandatorily also become subject to the general arbitration clause of the new article 11 (2).

Poland denies the argument on basis of the fact that the old article 11 (3), as the entire old BIT, remains applicable to disputes which arose before the Protocol entered into force.

The Tribunal finds no support in the Protocol for Poland’s thesis that the provisions of the old BIT which were amended by the Protocol continue to stand in their original wording and to be applicable as such, next to the amended version.

Article 5.2 of the Protocol provides that

“Dieses Änderungs – und Ergänzungsprotokoll tritt dreißig Tage nach Austausch der Ratifikationsurkunden in Kraft”.

and Artikel 6 stipulates that

“Dieses Änderungs – und Ergänzungsprotokoll bleibt so lange in Kraft, wie der am 10. November 1989 in Warschau unterzeichnete Vertrag über die Förderung und den gegenseitigen Schutz von Kapitalanlagen in Kraft bleibt”.

These two articles indicate that the articles of the BIT which are amended by the Protocol, are fully and definitively replaced by the new version and leave no room for application of the old version. Given the wording of the articles 5.2 and 6 of the Protocol and the absence of any evidence of a different intention of the Parties to the BIT and Protocol, this Tribunal must conclude that the further application of the old article 11 (3) of the original BIT after the Protocol became effective, was not intended by Germany and Poland when they signed the Protocol. It follows that from the moment the Protocol became effective, investment disputes which were under the original BIT only arbitrable because the investor and the other Contracting Party had agreed thereto, were no longer envisaged. This can only be explained by the intention of the Parties to the Protocol to give the new article 11 (2) immediate application, meaning that also old breaches were henceforth arbitrable.

This analysis is, moreover, confirmed by the justification for the Protocol’s ratification, dated 16 October 2003 which explicitly states: “The current Article 11 section 3 lost its significance and was deleted”⁴³.

(ii) Article 8 (1) of the BIT which was not amended by the Protocol provides that:

“If the legislation of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Treaty contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Treaty, such regulation shall to the extent that it is more favourable prevail over this Treaty.”

Nordzucker is of the opinion that the 2003 Protocol is to be understood as such “obligation under international law” and that its provisions, and in particular article 11 (?) therefore shall prevail over those of the original BIT.

Poland contests that the 2003 Protocol is such an international obligation and disagrees with Nordzucker’s English translation of article 8 (1) which reads in the original Polish

⁴³ Exh. CA87 – Justification p.4

version “*niezależnie od niniejszej umowy*” and in the original German version “*neben diesem Vertrag*”, which would be better translated as “apart from this Treaty” or “irrespective of this Treaty”, instead of “in addition to this Treaty”.

The Tribunal notes Poland’s reference to Dolzer and Stevens’ description of the clause as a “clause on preservation of rights”⁴⁴ which “does not regulate the application in time of any changes to the BIT but provides that if any other obligation under international law which is “apart from this Treaty” or “irrespective of this Treaty exists or will be established in the future, such obligation will supersede the relevant Treaty provision”⁴⁵.

The Tribunal agrees with this statement and cannot agree that article 8 (1) shows the Parties’ intention to give all future amendments of the BIT retroactive effect. This does not mean, however, that the new article 11 (2) does not have immediate effect, as the Tribunal has preliminarily concluded above.

(iii) Article 9 of the original BIT provides that

“The Treaty shall also apply to matters arising after the entry into force of this Treaty with regard to investments that investors of either Contracting Party made in the territory of the other Contracting Party in accordance with the legislation of the latter between 14 September 1972 and the entry into force of this Treaty.”

Nordzucker, while acknowledging that article 9 is not directly applicable to the case at hand, reads in the article the confirmation that the Parties placed more value on investment protection than on concerns of “retroactivity”⁴⁶.

Poland dismisses this argument and distinguishes the consent to extend BIT protection to “old” investments from consent to arbitrate “old” disputes⁴⁷ (SoReb. §182).

The Tribunal has already acknowledged above that in certain circumstances the distinction has to be made between substantive rights under a BIT and the jurisdictional protection thereof. In relation to article 9, however, it finds that not only the substantive provisions of the 1989 BIT, but also the arbitral jurisdiction clause of the old article 11 (2) was to apply to matters arisen after 1991 with regard to old investments made since 1972.

The Tribunal finds that as “It is not usually necessary for an investment to be made after the BIT has come into force in order to be protected”⁴⁸, article 9 does not

⁴⁴ SoReb §180

⁴⁵ R. DOLZER and M. STEVENS, *Bilateral Investment Treaties*, Hague/Boston/London, 1995, p. 82-83

⁴⁶ SoRep §159

⁴⁷ SoReb §182

particularly show the Treaty parties' valuation of investment protection, as Nordzucker claims, because :

- the article still requires that the "matters" arise after the entry into force of the BIT although it is not clear whether "matters" is to be understood as "breaches" or rather as "disputes" in the sense of "claims filed".
- the article is in fact more restrictive than protective, as it limits the protection of "old" investments to those posterior to 1972.

The Tribunal therefore considers this element irrelevant for determining whether the Protocol's jurisdiction clause was or not to apply to breaches occurred before its entry into force.

(iv) Article 11 (2) of the amended BIT contains a timing provision:

"If such dispute fails to be resolved amicably within six months after one of the Parties of the dispute reports it, the investor shall have a right to refer it to [...] the international tribunal of arbitration."

Nordzucker draws from this clause contextual evidence that the Parties intended the right to arbitrate any kind of investment dispute to apply to "old" claims: if it was not the intention to apply the Protocol retroactively, article 11 (2) should in its opinion have been drafted differently in order to address the "sunset" of the applicability of the old version of article 11 (2)⁴⁹.

Poland disagrees, holding that for breaches which arose before 28 October 2005, the old version of article 11 (2) in the original BIT, simply continues to apply⁵⁰.

The Tribunal is of the opinion that, as for article 11 (3), the Protocol leaves no doubt that there is after October 2005 no room for further application of an old version of any of the amended articles.

(v) The Preamble of the BIT

Nordzucker relies on the Preamble's reference to the Treaty Parties' intention to create favourable conditions for reciprocal investments and argues that it is therefore justified to follow Dolzer and Stevens' suggestion that "any ambiguity should be interpreted in a way that would favour the rights granted to a foreign investor"⁵¹.

⁴⁸ C. McLACHLAN, L. SHORE and M. WEINER, *International Investments Arbitration*, Oxford, 2007, §6.37

⁴⁹ SoRep §161-162

⁵⁰ SoReb §183; §185

⁵¹ SoRep §163-164

Poland responds that, jurisdiction and the scope of consent to arbitration being clearly regulated in the BIT, there is no need to resort to the Preamble to determine jurisdiction⁵².

The Arbitral Tribunal, notes that the quotation from Dolzer and Stevens concerns the interpretation of the substantive provisions of the BIT, and may therefore not be automatically extended to the determination of the scope of a jurisdictional clause.

(vi) The wording of other Polish BITs

Nordzucker contrasts the “unrestricted nature” of article 11 of the amended BIT with other Polish treaties which contain timing limitations for disputes in their scope, in particular⁵³ those with Estonia (from 1993) and Jordan (from 1997) which both provide that while they also apply to investments made before the entry into force of the Treaty they shall not apply to disputes arisen before the entry into force⁵⁴.

Poland on the other hand cites other BITs it concluded without such an explicit clause, besides the German one: with Bulgaria (in 1994), Sweden (in 1989) and UK (1987).

It relies once more on the principle of article 28 of the Vienna Convention on the Law of Treaties confirming the non-retroactivity of treaties “unless a different intention appears from the Treaty or is otherwise established”, as confirmed by the *Mondev* tribunal⁵⁵.

The Arbitral Tribunal has already referred to the view that “It is not usually necessary for an investment to be made after the BIT has come into force in order to be protected”. Thus, the fact that an investment which is made prior to the entry into force of the BIT is protected by that BIT appears to be the rule and an express statement in a BIT that it applies to investments made both prior and subsequent to the coming into force of the Treaty (as can be found in the Polish BITs with Estonia and Jordan), is not requested to achieve that result.

Thus, unless the BITs referred to by either Party contain language to the contrary, they are all to apply to the pre-existing investments.

It is this general rule that has been restricted by article 9 of the original Poland-Germany BIT to investments made after 14 September 1972. However, this provision is not relevant in the case at hand.

⁵² SoReb §186

⁵³ Nordzucker claims that there are 7 but cites only 2.

⁵⁴ SoRep § 165-169

⁵⁵ SoReb §187-190

(vii) Diplomatic protection as sole alternative to arbitral jurisdiction

For Nordzucker it follows from the general trend of the replacement of diplomatic protection by investor-state arbitration that Poland cannot have intended to go against the current by wishing that old investment disputes other than for expropriation or money transfers should be excluded from arbitral dispute resolution otherwise available⁵⁶.

Poland rejects the argument and refers to a number of BITs, both of Poland and of Germany, which as of today still do not provide for investor-state arbitration⁵⁷.

The Tribunal concurs with Poland. The intention of the Parties in this specific Protocol is to be determined on basis of this specific Protocol and BIT, not on basis of other BITs where the intentions may actually have been different.

114. In conclusion, the Arbitral Tribunal finds no evidence in other articles of the BIT or the Protocol or in their object or purpose which show a different intention of the Parties than the one to give article 11 (2) as amended by the Protocol, immediate application to all breaches of the Treaty whether they occurred before or after the Protocol took effect.
115. This Arbitral Tribunal further finds that the second and fourth sentences of the new article 11 (2) of the Germany – Poland BIT also confirm its preliminary conclusion on its jurisdiction *ratione temporis*. The first sentence relates to the option which the investor has, to go either to arbitration or to the local court of the State where he invests (hereafter “the right to choose”). The second and fourth sentences relate to the right to withdraw a case from the local court “before”⁵⁸ or after it has rendered its judgments (hereafter “the right to switch”).
116. The right to choose is common in investment treaties and is in itself not helpful to determine whether this choice is available only for disputes or breaches committed after the entry into force of the Protocol or also earlier breaches (given the earlier existence of the substantive obligations)⁵⁹.
117. The right to switch, on the other hand, seems to have sense only if it can be used promptly and fully as soon as it takes effect. It is presumably intended for the investor who, prior to the Protocol, could only have recourse to the courts for a breach of a substantive Treaty obligation other than expropriation or a transfer issue. If, at the time the Protocol became effective, his case was pending before a court of the State in which he made his investment -

⁵⁶ SoRep §170-173

⁵⁷ SoReb §191-194

⁵⁸ Rather than “by the time” as in the English translation furnished to the Tribunal.

⁵⁹ Poland has called article 11 (2) a “fork in the road mechanism”(SoReb §184 and §265) but this Tribunal is of the opinion that it is not. The “fork in the road” supposes that once the choice of jurisdiction is made, it is irrevocable. This is precisely not the case in article 11 (2) which provides the contrary with the “right to switch”.

for lack of any arbitral jurisdiction before that time -, the benefit of the Protocol is granted to him through the right to switch.

118. Thus, the Tribunal finds in this article the confirmation that the jurisdictional clause of the new article 11 (2) became immediately effective on 28 October 2005, not only for new breaches but also for earlier breaches of any of the substantive obligations which, themselves, had been effective since 24 February 1991.

c. The legislative history of the Protocol

119. Nordzucker furthermore relies on the fact that by the time the Protocol was adopted, Poland's Treaty practice had evolved towards a broader protection for investors and wider consents for arbitration and cites also the Polish and German legislative history of the Protocol showing that it was the intention to improve the legal protection for investors⁶⁰.
120. Poland argues that the Protocol did nothing more than "close loopholes in its interpretation and implementation" and remedy "legal and linguistic defects". It furthermore denounces Nordzucker's incomplete translation of the Memorandum on the Amended Protocol of the German Bundestag⁶¹.
121. The Tribunal finds that this Memorandum, even if quoted correctly, confirms its above preliminary conclusion that, as from the entry into force, "an investor may appeal to an international arbitral panel with regard to all disputes from the Treaty⁶² on promotion and protection of investments – not only, as until now, in expropriation and transfer issues"⁶³. It is clear that as from now, the arbitral jurisdiction covers all breaches, even those committed before the entry into force.
122. In conclusion, the Arbitral Tribunal is confident in confirming its above preliminary finding that it has jurisdiction *ratione temporis* for Nordzucker's claims that Poland breached its substantive obligations to grant fair and equitable treatment to investments, which were effective from 1991 and thus certainly applicable to the alleged breaches committed by Poland in 2000-2001.

d. Application of the MFN clause of article 3 of the Poland - Germany BIT

123. Nordzucker has argued that, if the Tribunal were to decline to apply article 11 (2) of the BIT to disputes arising from events prior to the entry into force of the Protocol, it nevertheless has jurisdiction to hear such claims, based on the "most-favored-nation" provision of article 3 of the BIT. It relies on the *Suez, Maffezini v. Spain, Siemens and Gas Natural* cases in support

⁶⁰ SoRep p. 73-75

⁶¹ SoReb §198

⁶² Tribunal's own further correction of the English translation: "Treaty" rather than "contract"

⁶³ Tribunal's underlining and own translation

of its thesis that the right to international arbitration is part of the “treatment” of investors which is subject of the MFN clause. It is aware of the *Plama v. Bulgaria* and the *Telenor v. Hungary* cases which refused to extend arbitral jurisdiction on basis of the MFN clauses in the respective BITs, but argues that these cases have to be distinguished on their face from the present case⁶⁴.

124. Poland, on the other hand, distinguishes the first group of four cases which extended the arbitral jurisdiction on basis of the MFN clause, from the case at hand, and relies, not only on the *Plama* and *Telenor* but also on the *Salini* and *Berschader* cases which all rejected the application of an MFN clause to matters of jurisdiction.
125. The Tribunal having reached in chapter 6.2.a-c its decision on the application of the arbitral jurisdiction to claims brought after the entry into force of the Protocol, need not address any further question whether this jurisdiction can also be based on the MFN clause in the BIT.

e. Fork in the road?

126. Poland has also objected against this Tribunal’s jurisdiction on basis of what it calls the “fork in the road provision” of the new article 11 (2) of the BIT because Nordzucker in April 2001 also submitted its dispute to the Polish Courts which dismissed it on 24 June 2003 and 1 December 2003⁶⁵.
127. The Tribunal, without going into the question whether the Polish Courts dealt with the same dispute (in terms of Parties and legal ground of the claim) as this Tribunal has to decide, is of the opinion that there is no evidence that article 11 (2) of the BIT is a true “fork in the road” provision. The Tribunal is of the opinion that “the right to switch” of the second and fourth sentences of article 11 (2) of the BIT are the opposite of an “*electa una via*”. At first sight, the fourth sentence of article 11 (2) does precisely give the right to Nordzucker to bring its claim, even after the Polish courts issued a decision.

f. Conclusion

128. The Tribunal therefore decides that it has jurisdiction *ratione temporis*, notwithstanding the earlier decisions of the Polish Courts on the dispute between Nordzucker and the Sugar Holding Companies (not Poland as Contracting Party to the BIT).

⁶⁴ SoRep §182-196

⁶⁵ SoReb §264-266

6.3 Jurisdiction *ratione personae*

129. Another objection raised by Poland against the jurisdiction of this Tribunal is that Norzucker's claims relate to non-sovereign acts of Poland which are not subject to international responsibility of the State.
130. According to the Respondent, the basis of the Claimant's request is a purely commercial dispute over the failed sale by the Sugar Holding Companies of the Gdańsk and Szczecin Groups to Nordzucker. The State Treasury of the Republic of Poland played a secondary role in these transactions, acting only in its capacity as the sole shareholder of PPSC and MKSC. Consequently, the resolutions of the GAMs of these companies regarding the refusal to grant consent to the sale of the shares in the Sugar Plants of the Gdańsk and Szczecin Groups adopted by the Minister of the State Treasury must – in the opinion of the Respondent – be considered exclusively as acts of a merchant (*acta iure gestionis*) and not as acts of a sovereign power (*acta iure imperii*) which might justify Poland's responsibility under the BIT.
131. This Tribunal observes that the Claimant mainly based its claim on the position taken by the Council of Ministers of 13 June 2001 changing Poland's strategy for the privatization of its sugar industry and, in particular, on the new Act of 21 June 2001 on the Sugar Market Regulation directing, in Article 20(1), the Minister of the State Treasury to merge forthwith all Sugar Holding Companies, as well as the Sugar Plants in which the State Treasury and the Sugar Holding Companies jointly held 100% as of the date the Act entered into force, into the new entity Polski Cukier. These two governmental decisions were expressly referred to in the resolution on the refusal of the sales as adopted on 1 August 2001 by the GAM, as well as in the letter of the same date by which the Ministry of the State Treasury informed Nordzucker of the refusal.
132. This means that the Claimant's claims relate to acts which Poland committed in the exercise of its powers as a sovereign power. It is established that the Ministry acted on the basis of its responsibility to supervise and to approve the privatization process in the sugar industry conducted by the Sugar Holding Companies. In that role, the Ministry of the State Treasury did not act in a merely commercial capacity. The same is true in respect of the argument that has been raised by the Respondent that the sales were unsuccessful because Nordzucker offered a price that was too low in the Ministry's view. The fixing of the relevant price was part of the bidding processes and the prices offered by the bidder and accepted by the Sugar Holding Companies became part of the SPAs to be submitted to the GAMs. However, the Ministry, acting as sole shareholder, was representing the State government in charge of the overall privatization of the State owned assets. If the low price was also a reason for the refusal (which remains to be verified, as it was not mentioned as such in the minutes of the GAMs or in the Ministry's letter of 1 August 2001), it appears from the oral and written witness testimony that the Ministry was concerned with price, not as a commercial seller,

but as a sovereign power which had to deal with increasing opposition against the privatisation process and could not run the risk, politically, to sell the shares for a lower price than their actual value on the transaction date⁶⁶. Furthermore, the fact that the sale was, from a legal point of view to be concluded (or aborted) by a decision of the GAM (*i.e.* a private law instrument) does not alter the capacity of the Ministry of the State Treasury to act in its governmental functions in this respect. As such, it was bound by the obligations, to the extent relevant, created by the BIT. Therefore, this Tribunal finds that it has jurisdiction *ratione personae*.

6.4 Jurisdiction *ratione materiae*

133. Pursuant to article 11 (1) of the BIT, as amended by the Protocol “*any disputes pertaining to the investments made between the investor of one of the Contracting Parties and the other Contracting Party as regards the rights and obligations hereunder should be, wherever possible, resolved amicably between the parties to such dispute*” and, according to article 11 (2), “*If such dispute fails to be resolved amicably within six months after one of the parties to the dispute reports it, the investor shall have a right to refer it either to the competent courts of the other Contracting Party or to the international tribunal of arbitration.*”

a. Position of the Parties

134. It results from this article that this Arbitral Tribunal has jurisdiction only when four elements are present:

- (a) a dispute
- (b) pertaining to an investment
- (c) between an investor of one Contracting Party and the other Contracting Party
- (d) regarding the rights and obligations under the BIT,

all of which, Nordzucker argues, are present in this case.

135. Poland, besides denying that the new arbitration clause in article 11 of the amended BIT is applicable to the dispute (see chapter 6.2 above), maintains that

- (a) the dispute does not relate to an investment but is in fact a dispute over a failed entry of an investment; and
- (b) that the dispute is not in the scope of rights and obligations resulting from the BIT.

⁶⁶ RWS I §33; Transcript II, p. 34: 20 - p. 35: 14

136. Poland relies on the fact that the subject matter which the BIT protects is “investments that have been admitted in accordance with the respective law of one Contracting Party” (art. 2 (1) BIT), and not “investors”, to argue that,

(i) future investments and pre-investment and development expenditures are not “investments” in the meaning of the BIT;

(ii) an “investor” by deduction can claim rights under the BIT only in relation to an investment made in accordance with the host country’s law.

137. Poland acknowledges that Nordzucker made an investment by acquiring the Toruń and Poznań Groups but denies that it made an investment in the Gdańsk and Szczecin Groups: the possibly legitimate expectations of Nordzucker to acquire, after the Toruń and Poznań Groups, also the Gdańsk and Szczecin Groups do not amount to an “investment” protected under the BIT⁶⁷. Poland finds support for the exclusion of pre-investments in the decisions which were rendered *i.a.* in the *Mihaly v. Sri Lanka*⁶⁸ case and in the *Zhinvali v. Georgia*⁶⁹ case.

138. Nordzucker, for its part, insists on the importance of its investment in Poland, in an amount of € 120 million in the Toruń and Poznań Groups and on the fact that this investment was real and not just a “pre-investment” and that it had, from the outset, planned an investment in Poland which would amount to a “critical” mass of a 20 % market share⁷⁰. It relies heavily on the *Eureko v. Poland*⁷¹ case.

139. In rebuttal, Poland emphasizes that, while it does not question that the acquisition and modernization of the Toruń and Poznań Groups are investments under the BIT, the dispute does not relate to these investments, but to the envisaged – but failed – investments in the Gdańsk and Szczecin Groups. In its view Nordzucker’s “loss of the opportunity” to acquire these groups does not qualify as an investment⁷².

b. Discussion

1. The issue(s)

140. The Arbitral Tribunal finds that the Parties are in agreement on the following facts:

⁶⁷ SoD p. 102 §278-294

⁶⁸ *Mihaly International Corporation v. Sri Lanka* ICSID Case No. ARB/00/4, Award of 15 March 2002 (“*Mihaly v. Sri Lanka*”)

⁶⁹ *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Unpublished but described in W. BEN HAMIDA, “The *Mihaly v. Sri Lanka* case: Some Thoughts Relating to the Status of Pre-Investment Expenditures” in T. Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), (“*Zhinvali v. Georgia*”)

⁷⁰ SoRep p. 82-86

⁷¹ *Eureko v. Poland*, Partial Award with dissenting opinion, 19 August 2005

⁷² SoRep p. 109-120

1. Nordzucker made an investment in Poland by acquiring the Toruń and Poznań Groups;
2. Nordzucker is thus an “investor” under the BIT;
3. the acquisition of each of the four groups was to be completed by a legal transaction separate for each group;
4. the dispute is about Poland’s refusal to allow Nordzucker to complete the purchase of the Gdańsk and Szczecin Groups.

141. The disagreement between the Parties is on the following issues:

- a. does the acquisition of the Toruń and Poznań Groups constitute a part of an investment that also includes the acquisition of the Gdańsk and the Szczecin Groups?
- b. has Nordzucker made an investment in the sense of the BIT in the Gdańsk and Szczecin Groups, considered separately from the acquisition of the Toruń and Poznań Groups?
- c. Is the dispute about rights and obligations under the BIT and relating to an investment?

142. These questions (which will be addressed hereafter) arise because the dispute relates, primarily, if not exclusively, to the (non-) acquisition of the Gdańsk and Szczecin Groups and not to the acquisition of the Toruń and Poznań Groups which were acquired by Nordzucker⁷³.

2. Was the intended acquisition of the Gdańsk and Szczecin Groups part of a single investment comprising the four Groups?

143. This Arbitral Tribunal will first address the question whether the facts of this case allow to state, as Nordzucker does, that “because the acquisition of the four Sugar Groups constituted a single project” for Nordzucker, it was also “one investment”⁷⁴. The question is whether the Groups form one investment or whether each Group is an investment on its own.

144. Nordzucker argues that it has always looked upon the four Groups as a single investment, relying on its strategic goal of acquiring 20% of the Polish market and claiming that its initial acquisitions of the mainly privately owned sugar factories of Opalenica and Wschowa were

⁷³ Even if Nordzucker claims also damages because the Toruń and Poznań Groups are less profitable as a result of the lack of synergy with the Gdańsk and Szczecin Groups.

⁷⁴ SoRep §208 (last ainea)

“preliminary investments in Poland, preparatory to the major investment it sought to make in the context of the privatization”⁷⁵.

145. Nordzucker has not explained, though, why the purchases of Opalenica and Wschowa, besides the unsuccessful attempt to buy also Gora Slaska, are to be considered as “preliminary investments” and why the remainder of the realisation of Nordzucker’s strategy for Poland should form one single “major investment”.
146. The link between the various public sales procedures for the different Sugar Groups which have been launched by Poland is the fact that they were all governed by the same Privatization Act and that it was the same Ministry of State Treasury which was involved in the supervision of the sales process and, in last instance, had to give its final approval to the sales, in its capacity of shareholder of the Sugar Holding Companies which were the sellers. However, each Group was the subject of a separate public sales procedure, with its own timetable and sometimes even its own rules.⁷⁶
147. These limited common aspects of the sales procedures for Sugar Groups do not support the conclusion that the acquisition of more than one Group constitutes a single investment. The particular features of Nordzucker’s acquisitions do not support that conclusion either.
148. First, because even if Poland had only one Privatization Act which applied to the sugar industry, it has nonetheless created several “packages” of Sugar Plants (in 1990 Sugar Plants were “packaged” in four Sugar Holding Companies, from 1998 on, smaller packages forming Sugar Groups were formed in view of their sale). These “packages” of Sugar Plants, as composed by the sellers⁷⁷, were to be sold separately and to be tendered for separately by competitors who were free to choose for which Sugar Group(s) they wanted to be selected (or not) and they wanted to bid (or not). To the extent the privatization programme of the sugar industry implied many more Sugar Groups than the four dealt with in this arbitration⁷⁸, it called in theory for as many investors and as many investments as there were Sugar Groups to be acquired. The fact that a candidate investor was interested in acquiring more than one Sugar Group is not sufficient to make the acquisitions of these Sugar Groups a single investment.
149. Second, because Nordzucker’s intention to acquire 20% of the Polish sugar market is not sufficient either to make its successive acquisitions part of a single investment. It is to be

⁷⁵ SoC §62

⁷⁶ See e.g. §17 of the respective Rules for the Gdańsk and Szczecin Groups which contains a provision on the amendment of the Rules, which is different in article 27 of the Toruń Group, and missing altogether in the rules for the Poznań Group (Exh. C6)

⁷⁷ For example, the extraordinary meeting of Shareholders of MKSC decided on 5 March 1999 that the shares in the Malbork and Nowy Staw Sugar Plants (representing two of the four plants of the Gdańsk Group) had to be sold jointly to one buyer and that the shares in the Chelmza, Krasiniec and Melno Sugar Plants had also to be sold jointly (Exh. R18). Similarly, it follows from the invitation to bid launched on 29 November 1999 that it was the joint sellers’ decision to make one sale for the shares of the Sugar Plants in the Gdańsk Group (Exh. C37).

⁷⁸ See schedule listing Sugar Groups produced by Poland in response to the Tribunal’s Procedural Order N° 4, item 2

noted that the objective of 20% is mentioned in only two documents produced in this arbitration:

- Exhibit C5 is a document generated by Nordzucker, dated 2 November 1998, relating to "Prospects", and marked "strictly confidential". It describes the company development as *i.a.* "market share \geq 20% in each segment". Only if the term "segment" can be understood as each and everyone of the countries mentioned in the previous line of the document (Northern Germany, Poland, Czech Republic, Slovakia), can this document be accepted as evidence of Nordzucker's intention to acquire 20% of the Polish sugar market.
- Exhibit C10 is a document dated 31 March 1999 in preparation for a workshop with Nordzucker's management on the "Determination of the strategy and organization of Nordzucker". It indicates that the "objective in the market (Polish quota)" was 15-20%⁷⁹.

150. Relying on these two documents, Nordzucker's witnesses (CWS 3 §9-10; CWS 1 §49; CWS 2 §15) have emphasized that this company strategy had been communicated to representatives of the State Treasury. Poland's witnesses have not contradicted this⁸⁰ but this does not yet show that this 20% goal was considered by each of the Parties as a condition underlying or implicit in the transactions relating to the four Sugar Groups. Poland has explicitly denied that it had guaranteed "that Nordzucker could purchase sugar plants comprising 20% of the Polish sugar market"⁸¹ while also pointing out that the four Sugar Groups targeted by Nordzucker represented considerably less than 20% of the Polish sugar market⁸².

151. There is no evidence either that Poland actually promised that Nordzucker would acquire six plants from the Gdańsk and Szczecin Groups if it first acquired plants comprised in the Poznań and Toruń Groups. As mentioned, Poland designated many more Sugar Plants for privatization and the foreign investors were free in their choice of the Sugar Group(s) they offered to buy shares of. The unilateral decision of a potential investor to acquire more than one Sugar Group could not in any case bind Poland which was in principle entitled to expect to receive for each Sugar Group bids from more than one interested candidate. Thus, if the scope of an "investment" could be determined by a candidate's intended acquisitions, this would create serious conflicts in the normal situation where there were several bidders.

⁷⁹ This Tribunal notes, incidentally, that Nordzucker has not mentioned, in the separate notifications it made on the intended acquisition of the Kluczewo and Gryfice Sugar Plants to the Competition and Consumer Office (Exh. R22) that it was its intention to acquire 20% of the total Polish Sugar Market.

⁸⁰ Transcript II, p. 63-64

⁸¹ RWS1, p. 3 §15

⁸² SoD §120: "the sugar plants of those four Groups represented approx. 15.6% of the Polish sugar market only". Nordzucker admitted this to some extent: "our 20% target was an order of magnitude, based on our experience of sugar markets, so 17% or 18% was consistent with that 20% target" (CWS 4 §10).

152. Furthermore, if similar investments - actual and envisaged - by the same investor in the same country were to be considered as a single investment for purposes of finding arbitral jurisdiction as soon as a dispute regarding rights and obligations pertaining to an envisaged investment arises, it would be sufficient for an investor to have made one investment in a country to be allowed to claim protection for all envisaged investments in that country which would not otherwise be subject to protection. The ensuing discrimination between candidates for a future investment, in favour of the investor who had already made an earlier investment in that country, would be unacceptable.

153. There is not only no evidence that Poland agreed to treat all Nordzucker investments planned to be made in the plants belonging to all four Groups as forming part of a "package deal"⁸³ as alleged by Nordzucker. Rather, there is written and oral evidence in this arbitration that all Polish officials of higher and lower levels always strongly objected to such "package deal" approach whenever it was advanced by Nordzucker and that they several times explained and emphasized that the tender procedures or privatization of plants belonging to each Sugar Group must be treated as separate and independent so that there was no guarantee that Nordzucker would purchase all the plants it intended to acquire. Nordzucker has also admitted this in oral testimony:

" Therefore in our negotiations we always say: well, it would be best to make a package deal; it was not possible, we discussed this point " ⁸⁴.

154. The following exchange of correspondence during the negotiations deserves extensive quoting:

- On 4 February 2000, Nordzucker for the first time wrote about the issue to the Ministry of State Treasury:

" Finally, we would once again like to emphasize an issue which we already mentioned in the course of previous discussions, related to the combined execution of documents and agreements concerning the privatization of the abovementioned Companies⁸⁵. It is our aim and intention to sign agreements related to the purchase of shares from PPSC SA and MKSC SA for all the sugar mills referred to above. At the same time we would like to express our firm intention to purchase the shares in the sugar mills Malbork SA, Nowy Staw SA and Pruszcz SA⁸⁶, which conditions the efficiency of our investment in the sugar mills mentioned earlier" (Exh. C41).

⁸³ Nordzucker used the term in these proceedings both in writing (SoRep §30) and in its oral testimony (e.g. Transcript I p. 44: 20, p. 47: 5)

⁸⁴ Transcript I, p. 50: 4-6

⁸⁵ i.e. Kluczewo, Gryfice, forming the Szczecin Group, belonging to PPSC, and Cheltnza, Melno, Krasiniec, forming the Toruń Group, belonging to MKSC

⁸⁶ i.e. 3 of the 4 plants forming the Gdańsk Group; Pelplin is not mentioned although on 30 March 2000, Nordzucker confirmed again in a letter to PPSC that it wished to acquire this plant, together with Pruszcz (Exh. C48)

- The Ministry replied promptly and clearly on 7 February 2000:

"The agreements related to the individual regional groups will be negotiated and agreed independently of each other. Signing of an agreement related to one group cannot determine or influence the approval of the Shareholder's Meeting of MKSC SA or PPSC SA for the conclusion of agreements related to other groups of sugar mills. The dates of the Shareholder's Meetings will be set independently for each group at a time when, according to the Ministry of the State Treasury, the agreements concerning these groups are sufficiently prepared and complete. Similarly, any understandings between the State Treasury of the Republic of Poland and Nordzucker AG may be concluded only independently for each agreement related to the individual group of sugar mills." (Exh. C42)

- On 22 February 2000, Nordzucker insisted again:

"We would like you to acknowledge the confirmation of our existing position on the following issues:

- 1)
- 4) *the Management Board of Nordzucker AG perceives the possible significant capital involvement in Poland as comprehensive activities; therefore, the solution where only a package of agreements and documents related with the acquisition of shares of Cukrownia "Szamotuly" and "Opalenica" S.A. would be signed without taking into consideration our intention and wish, expressed many times, to concurrently sign all agreements regarding the acquisition of the shares of sugar plants in which Nordzucker AG was selected as strategic investor is not acceptable.*

Once again we would like to emphasize that having full understanding of the necessity of treating such agreements as separate, we would like to sign such agreements at approximately the same time set in advance. If for any reasons which have not been presented to us by you at that time, it is not possible to sign all agreements at approximately the same time, then we express our intention and wish to sign as the first the documents related with the acquisition of shares of the privatized sugar plants from MKSC⁸⁷ S.A., and the agreement regarding the acquisition of the shares of Cukrownia "Opalenica" S.A. and "Szamotuly" S.A. would be signed as the last one." (Exh. C43)⁸⁸

⁸⁷ Tribunal's underlining

⁸⁸ It is not altogether clear in this letter which Sugar Plants Nordzucker envisages here when it refers to MKSC S.A., because it referred at the beginning of the letter (§4) to (besides Opalenica and Szamotuly) Kluczewo and Gryfice, but these two Sugar Plants forming the Szczecin Group were not MKSC's but PPSC's property. One thing is clear, however: Nordzucker was less eager to buy the Poznań Group (i.e. Opalenica and Szamotuly). Yet that is the Group for which it signed the SPA first, on 12 August 2000, without having received any guarantee that the SPAs for the other Groups would also be signed.

- The Ministry refused, once more, on 6 March 2000:

" [.....]

- *for the first time a request was expressed to sign agreement for the "Poznań Group" concurrently with the agreements for groups in which Nordzucker AG shall be the investor both in PPSC S.A. as well as MKSC S.A.*

- *On 7.02.2000 a letter was sent to Nordzucker AG in which the MST firmly stated that there can be no discussion about conditioning the signature of the agreement for the "Poznań Group" by the signature of agreements for other sugar plant groups.*

[.....]

II. With respect to the position of Nordzucker AG regarding sequence of the signature of agreements and substance thereof:

1. I sustain the position contained in the letter dated 7.02.2000, i.e. "that agreements regarding individual regional groups shall be negotiated and agreed upon independently. The signature of the agreement regarding one of the groups cannot in any manner whatsoever decide about and impact the expression of consent by the General Meeting of Shareholders of MKSC S.A. and PPSC S.A. for the entry into agreements regarding other groups of sugar plants. Dates of the General Meetings of Shareholders shall be agreed upon separately for each group when in the opinion of the Ministry of State Treasury agreements regarding such groups are appropriately and finally prepared. Also, any possible understandings between Nordzucker AG and the State Treasury of Poland may be concluded only separately per each agreement regarding individual groups of sugar plants. Of course it does not mean that the Minister of State Treasury intends to express consent for the transfer of shares of sugar plant of only one group, however, it is not possible to condition the signature of the agreement for one of the groups by the expression of the consent by the General Meeting of Shareholders for the transfer of shares of other groups of sugar plants. "
(Exh. C44).

155. The timing of these letters is particularly significant, because they all pre-date Nordzucker's submission of its pricing offer for the Gdańsk Group (on 31 March 2000). It is also striking that Nordzucker's letter of 30 March 2000 states that *"it is our goal and intention to sign the agreements on acquisition of shares in Cukrownia Pruszcz S.A. and Cukrownia Pelplin S.A. from [PPSC] at the same or similar time as the signing of the agreements on acquisition of shares in Cukrownia Malbork S.A. and Cukrownia Nowy Staw S.A. from [MKSC]"*. In other words, Nordzucker itself links here the sale of the four Sugar Plants forming together the

total Gdańsk Group (although owned by two Sugar Holding Companies), but does not link it to the acquisition of any of the other three Groups.

156. It is a fact that once Nordzucker had submitted a price bid, it was no longer free to withdraw at its discretion from the procedure but was bound to leave its offer to purchase open during either a specified time (see Exh. C20 and C25, item 5) or a reasonable time (see Exh. 46 concerning the Toruń Group for which MKSC asked an extension of the initial validity term of the offer). However, if the linking of the four acquisitions was as crucial for Nordzucker as it claims in these proceedings, it is surprising that it nonetheless became involved in and proceeded with the sales procedures in the way it did without obtaining from Poland a written commitment that it would comply with Nordzucker's request. The Tribunal notes in particular that Nordzucker chose to react positively to the invitation of 8 March 2000 to submit a price offer for the Gdańsk Group, although it had not received in reply to its 4 and 22 February 2000 letters, such a commitment from Poland. On 30 March 2000, when it submitted a pricing offer for the Gdańsk Group, it had received at least two explicit refusals from the Ministry of State Treasury to make the acquisitions of the four Sugar Groups conditional upon each other. If it nonetheless made that price bid for the Gdańsk Group in these conditions, it knew, or should have known, that it took a risk (and in fact it took that risk already when it engaged in the first sales procedure which was started on 10 May 1999 for the Toruń Group).
157. Moreover, in March 2000 negotiations on the SPAs for the Toruń and Poznań Groups were still going on, which left Nordzucker the possibility not to agree on the SPAs if it did not wish to acquire one or two Groups without being certain that it would also acquire the two others. Although the SPAs for three Groups were initialled on the same day, there was only one of them which was signed on 12 August 2000. This first SPA moreover concerned the Poznań Group, which Nordzucker was less eager to acquire (see its letter of 22 February 2000 and footnote 88 above). It was one of the Groups which Poland was eager to sell (because of its urgent need for fresh capital) and it was effectively sold, as first of all Groups, without Nordzucker having succeeded, notwithstanding all its attempts, to obtain a binding commitment on the sale of the other three Groups. Each sale was thus an independent investment which could or could not be made by Nordzucker or any of its competitors.
158. The Tribunal concludes from the above that Nordzucker has attempted repeatedly to have its strategic goal (of pursuing and finalising the acquisitions of the targeted Sugar Groups as one overall transaction) accepted by the Ministry of the State Treasury, despite the fact that the pertinent legal undertakings had to be executed for each Group separately. The Tribunal also understands that Poland was aware of this strategy and accepted, pragmatically, to deal with all four Groups targeted by Nordzucker by way of a coordinated negotiation and based on documents (including SPAs) prepared on common grounds. However, the Tribunal observes that the Parties' conduct does not show that Nordzucker's strategy did develop to a degree where it became essential for the economy and the legal structure of the overall acquisition of

the four Groups. Nordzucker not only accepted to conduct the procedures in respect of the Toruń and Poznań Groups without being ensured that it would also receive the shares of the Sugar Companies involved in the Gdańsk and Szczecin Groups. Also, neither the investment packages nor the SPAs contained a provision making these documents conditional upon the acquisition of the other Groups. There was no debate either, on Nordzucker's side, or between both Parties, that Nordzucker might hold up the conclusion of the transaction relating to the Toruń and Poznań Groups until the moment when the SPAs relating to the Gdańsk and Szczecin Groups were close to be executed. Thus, the coordination Nordzucker sought to achieve was in fact limited to the practical aspects of the negotiation and the drafting of legal documents but it was not translated in an economic and legal significant feature of the overall project of Nordzucker on the Polish market. In particular, the Tribunal found no evidence that Nordzucker had an actual "all or nothing approach" to its participation in the privatization process of the four Groups, that it informed Poland thereof and that Poland accepted and agreed to this approach.

159. For this reason, this Tribunal concludes that the Gdańsk and Szczecin Groups are not part of a single overall investment which would also include the Toruń and Poznań Groups.

3. Has Nordzucker made an investment in the sense of the BIT in the Gdańsk and Szczecin Groups, considered separately from the acquisition of the Toruń and Poznań Groups?

160. If the acquisitions of the Gdańsk and Szczecin Groups are to be considered as separate from the investments which consisted of the acquisitions of the Toruń and Poznań Groups, then the dispute about the non-acquisitions of the Gdańsk and the Szczecin Groups can only be dealt with by this Tribunal if these "failed acquisitions" can nonetheless be considered as investments.
161. Another way to put the issue is whether, if the (non-) acquisitions of the Gdańsk and the Szczecin Groups are (to be) considered separately from the investments in the Toruń and Poznań Groups, there were rights and obligations under the BIT in relation to the intended/failed acquisitions of the Gdańsk and Szczecin Groups which may give rise to a dispute arbitrable under the arbitration clause of the BIT.
162. To answer these questions, the Tribunal has to examine, *inter alia*, the content and scope of the notion of "investments" under the BIT and to determine whether the dispute about the failed acquisitions of the Gdańsk and Szczecin Groups relates to investments as this term is defined, explicitly or implicitly, by the BIT.

(i) The term "investments" in article 11 (1)

163. Article 11 (1) of the BIT in the English translation submitted by the Claimant states that

" Any disputes pertaining to the investments made between the investor of one of the Contracting Parties and the other Contracting Party as regards the rights and obligations hereunder should be, wherever possible, resolved amicably between the parties to such dispute. "

and article 11 (2) then refers to "*such dispute*" and states that the investor shall, if such attempt to reach an amicable settlement fails, have the right to refer "it" either to the competent courts of the other Contracting Party or to the international tribunal of arbitration.

164. For the purpose of this discussion, the Tribunal notes that the text of article 11 (1) as quoted refers to investments "*made*". This expression implies that in order to trigger the application of the dispute resolution provisions of article 11, an investment must be actually completed in order to qualify as an investment that has been "*made*". However, the Tribunal notes further that the authentic versions of the Treaty refer to "*Streitigkeiten in Bezug auf Kapitalanlagen*" in German and to "*spory dotyczace inwestycji*" in Polish. While this does not necessarily mean that the English translation in this respect is incorrect, the Tribunal will not rely on the word "*made*" which does not figure in the official German and Polish versions of the Treaty to determine the meaning of "*investment*" in this Treaty.

(ii) The term "investments" as defined in article 1 (1) (a)

165. Article 1 (1) of the BIT contains the definition of key terms used in the Treaty. The provision on the concept of "*investments*" is contained under letter (a) and reads as follows:

" (a) The term "investments" shall comprise all kind of assets that an investor of one Contracting Party invests in the territory of the other Contracting Party pursuant to the latter's legislation, in particular:

- *Movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;*
- *Shares of companies and other kinds of interests;*
- *Claims to money which has been used to create an economic value or claims to any performance having an economic value;*
- *Copyrights, industrial property rights, technical processes, trade marks, trade names, know-how, and goodwill;*
- *Rights to engage in an industrial activity having an economic value, including rights to prospecting for, developing, mining or working of natural resources which are based on a permit in accordance with the legislation of the Contracting Party in whose territory the investments are*

made, or based on a permit in accordance with the meaning of a relevant agreement. ”

166. The Tribunal notes that the specification added to this definition is one of an “open” type which is contained in many BITs.⁸⁹ Indeed, the list of various specific investments is preceded by the terms “in particular”. It is therefore not exclusive and leaves room for other “kinds of assets” to be included in the notion of “investment” under the BIT. The key terms for purposes of definition are the words “all kinds of assets” (“*alle Arten von Vermögenswerten*” in the German authentic version and “*wszelkie mienie*” in the Polish authentic version which means the same), each of them being capable of constituting an investment.

167. The Tribunal also notes that the definition given in article 1 (1) (a) requires that the investor invests pursuant to the legislation of the other Contracting Party. Whereas the Tribunal does not consider that this reference to the host State's law allows a host State to determine unilaterally whether or not the “involvement” of an investor in its country amounts to an investment or not, the expression “pursuant to the legislation” of the host State, which also comes back in article 2.1 second sentence (see hereafter) in this Tribunal's opinion means more than just to exclude transactions which are illegal under the host State's law. It means that a tribunal, when deciding whether or not an investor invests in property, or shares or money claims or any other assets, has to apply the host State's law in assessing whether the investor has duly acquired property, shares, claims to money or other assets.

(iii) The term “investor”

168. The Tribunal notes, incidentally, that the terms “intended investment” or “pre-investment” used by Poland show some contrast to the terms used in the Rules for Selecting the Buyer of the Shares in each Group.⁹⁰ These Rules contain, *inter alia*, the following definitions⁹¹:

“Investor means a legal person, domestic or foreign, or a commercial company without a legal personality interested in acquiring the Shares;”

“Buyer means the Investor with which the Share sale agreement will be executed;”

“Investment Package means the investment and restructuring outlays for the Sugar Plant's enterprise together with the basic knowhow and HR management elements approved by the Investor and the Committee.”

⁸⁹ Poland argues that this definition is not open-ended because it does not protect pre-investments (SoD § 282). The Tribunal's use of the word “open” is different and primarily based on the insertion of the terms “in particular”.

⁹⁰ Exhibit C6

⁹¹ Quoted from the set of Rules relating to the Gdańsk and Szczecin Groups

169. The definition of the word "investor" in these Rules indicates that the person who participates as bidder in a sales procedure is, in this context, already called an "investor" before the investment is actually achieved.

170. However, the Arbitral Tribunal cannot use the above Rules' definition of "investor" which has been given its own definition in article 1 (1) (c) of the BIT:

" The term "investor" shall mean a natural person with permanent domicile or a juridical person with its seat in the respective area of application of this Treaty, entitled to engage in investments ".

171. This definition which in German refers to "eine Person [...] die berechtigt ist, Kapitalanlagen zu tätigen" and in Polish to "osoba [...] uprawniona do dokonywania inwestycji", does not imply that the investment must actually have been made in order to be "an investor". However, in order to be an investor under the BIT, it is required to have a "right" ("berechtigt") or an entitlement.

172. The Tribunal is convinced that this "right" does not refer to the personal "capacity" of the investor, but to some right he must have in the host country. It is less clear, though, whether this right must be an actual title (to an asset qualifying as an investment under article 1 (1) (a), such as property, or a legal claim, or a permit in its name) or whether some lesser "right" is meant here. The Tribunal notes that to be "entitled to engage in investments" is not the same as "having made an investment".

173. Poland has insisted both in its submissions and again at the hearing held in Brussels in November 2007 on the fact that the BIT protects "investments" and not "investors". Although Poland emphasized this difference in another context - when it was opposing Nordzucker's argument that it was an investor in Poland since it acquired the Toruń and Poznań Groups and was therefore entitled to protection under the BIT in relation to its intended acquisition of the Gdańsk and Szczecin Groups -, the Tribunal does not agree with Poland's statement that investors are not protected.

174. Even if most provisions of the BIT use the terms "investors" and "investments" as a couple (e.g. articles 2 (1), 3 (1) and 4 (1 and 2), all referring to "investments by investors" and article 3 (2) protecting "investors" as regards their activity in connection with investments in the territory of a Contracting State), it is a fact that several articles of the BIT focus specifically on protection of the investors themselves. This follows, for example from the comparison of article 3 (2), (3) and (4), with the provision of article 3 (1), which contains the same prohibition for less favourable treatment for investments as article 3 (2) does for investors.

175. The argument put forward by Poland that the BIT does not protect investors is also contradicted by articles 4 (3) and (4), article 5 and article 6 of the BIT which all create rights for investors of the other Contracting Party, be it in relation to their investments. The argument is not conclusive either to the extent Poland relies on it to support the position that an investor, even if accepted as such, is not entitled to any protection under the BIT as long as the investment he or she is engaged in has not been completed or admitted in the territory of the host State. The key issue is and remains whether an investment needs to reach such a stage of completion in order to trigger the application of the BIT, including its arbitration clause.

(iv) Interpretation of the term "investments"

176. Additional elements that may shed a light on the notion of "investments" are contained in Article 2, which is the general article on the Contracting States' obligations ("shall") in relation to investments and reads as follows:

(1) *Each Contracting Party shall in its territory promote as far as possible investments by investors of the other Contracting Party and admit such investments in accordance with its respective laws. Investments that have been admitted in accordance with the respective law of one Contracting Party shall enjoy the protection of this Treaty. Each Contracting Party shall in any case accord investments fair and equitable treatment.*

(2) *No Contracting Party should in any way impede the management, maintenance, use or enjoyment of investments in its territory by investors of the other Contracting Party by means of unjustified or discriminatory measures.*

177. Article 2 (1) covers two situations. The first sentence relates clearly to investments not yet made and completed, hence, to intended investments towards which host States must be open and which they must actually "promote as far as possible" and which they must even "admit in accordance with their respective laws". Thus, the Tribunal cannot follow Poland when it argues that investments "in the making" are altogether excluded from the scope of the BIT. The second sentence deals with "Investments that have been admitted in accordance with the respective law of one Contracting Party", which are granted "the protection of this Treaty". This distinction between investments that have been admitted and those still "in the making" is confirmed by article 2 (2) of the BIT, which does not extend the prohibition of unjustified and discriminating measures to the "establishment, acquisition or expansion" of investments⁹² but limits it to their "management, maintenance, use or enjoyment", thus clearly envisaging only investments already made.

⁹² Which are explicitly protected in some other BITs, see e.g. the US 2004 Model BIT, art. 3 (1) and (2) and art. 4 (1) and (2). The Tribunal notes that this US Model BIT also defines investor as "a national or an enterprise [...] that attempts to make, is making, or has made an investment". If this Model BIT applied, Nordzucker clearly was an investor in relation to the Gdańsk and Szczecin Groups.

178. The Tribunal observes that in light of the wording of article 2, "*the protection of the Treaty*" is granted only to investments that have been admitted, while it is stated that intended investments which are not covered by the second sentence of article 2 (1) shall be admitted in accordance with the laws of the host State. It therefore seems that intended future investments do not enjoy the Treaty protection meant in the second sentence and that a Contracting Party's obligation to promote and admit investments from the other Contracting Party is of a different type than its obligations to grant Treaty protection to investments that have been admitted in accordance with its laws.
179. If "the protection of this Treaty" meant in the second sentence of article 2 (1) is not available for "intended investments in the making", the question arises by which standard it must be measured whether a Contracting Party breached its obligation to "promote and admit" investments of an investor of the other Contracting Party. In that respect, the Tribunal must determine the scope of article 2 (1) which contains a third sentence according to which the host State "shall in any case accord investments fair and equitable treatment".
180. The next question is whether this obligation of fair and equitable treatment applies exclusively to the "investments that have been admitted in accordance with the laws" of the host State, mentioned in the second sentence, or also to the possible investments which the host State has to promote and admit in accordance with its laws, of the first sentence.
181. The words "in any case" could have a double meaning:
- it can either be a further clarification of the term "protection of this Treaty" mentioned in the preceding sentence, meaning that whatever the Treaty provides in terms of specific protection, the treatment of investments that were admitted (and only those) must in any case be fair and equitable;
 - or it can be an indication that the fair and equitable treatment to which investments are entitled applies in all cases of investments meant in article 2 (1), *i.e.* both in the pre-admission phase of the investment and after the investment has been admitted in accordance with the law of the host State.
182. The Tribunal considers both meanings plausible. However, since the obligation of "fair and equitable treatment" is specifically mentioned in article 2 (1) as if it were not comprised within the ordinary "protection of this Treaty" which is clearly only guaranteed for admitted investments, the Tribunal is inclined to accept that the "fair and equitable treatment" is applicable to both admitted investments and to the promotion and admission of investments.
183. This conclusion leads to the finding that not only the first sentence of article 2 (1) but also the third sentence uses the term investment in a broader meaning than that of "investments that

have been admitted in accordance with the law", and covers also intended investments likely to be admitted in accordance with the host State's law.

184. The finding that the word "investments" as used in the first and third sentences of article 2 (1) of the BIT also covers investments in the making, is not inconsistent with the definition in article 1 (1) (a) of "investments" which uses the present tense "invests" and not the past perfect tense "has invested".
185. The Arbitral Tribunal specifies, however, that the intended investment must be not only intended by the future investor but must be actually "in the making" or "about to be made". Indeed, for a host State to have an obligation to promote and admit an investment, there must be more than a mere intention to invest which exists only in the mind of the potential investor. The host State can have no obligation to promote anything it is not aware of or to admit something which is not ready to be admitted. Moreover, investments that must be admitted must be so in accordance with the law of the host State and investments which enjoy the protection of the Treaty must have been admitted in accordance with the same law.

(v) "Investment" meant in article 1.1 (a) third paragraph

186. The Tribunal has also checked whether the payment of the guarantee which Nordzucker had to deposit with the Sugar Holding Companies in its capacity of bidder for the shares constitutes an "investment" in the meaning of the BIT to which the second sentence of article 2 (1) of the BIT applies. The amount of this tender bond could be said to be "money which has been used to create an economic value" (article 1 (1) (a) third paragraph of the BIT). As the deposit was made in compliance with the Rules for Selecting the Buyer of the Shares, it could be said that a contract was concluded between Poland and Nordzucker, as well as between Poland and the other bidders⁹³.
187. The Tribunal cannot consider this guarantee deposit ("*wadium*" in Polish) as an "investment", though, because it is only a guarantee for the investor's undertaking to make the investment, if it is admitted by Poland. Moreover, the "contract" under which the bid bond was posted, was not a contract for the sale of the shares (SPA), but at the most a contract on the participation in a public sales procedure (so-called pre-contract).
188. Nordzucker itself clearly considered its payment of the guarantee deposit as a conditional payment, as it wrote to the respective Sugar Holding Companies at the time it made its bids:
- in relation to the Poznań Group on 19 August 1999 and in relation to the Toruń Group on 25 November 1999:

⁹³ See concurring opinion Suratgar in the *Mihaly* case, not produced as part of Exh. RA4, but mentioned in C. McLACHLAN, L. SHORE and M. WEINER, *International Investments Arbitration*, Oxford, 2007, §6.55

" *If, contrary to our mutual expectations, it is impossible to reach agreement during our negotiations, which we would in fact regret, we assume that we will be reimbursed with the deposit* ". (Exh. C23; Exh. C36)

- in relation to the Pruszcz and Pelplin Sugar Plants of the Gdańsk Group:

" *By placing this offer, we further assume that if the Parties fail to agree on the wording of the agreement through negotiations, the tender bond will immediately be returned to us* ". (Exh. C48)

189. It is not surprising that the host States that waive a part of their sovereign rights by their agreement to arbitrate the disputes concerning the investments made and admitted in accordance with their legislation do not agree to arbitration of disputes related to pre-investment relations with persons merely intending to invest. Taking into account the fact that tenders open for privatization of State's assets (shares, business, real estate etc.) attract usually a large number of foreign bidders only one of whom can be successful, the State would be exposed to many international arbitration proceedings commenced by unsuccessful bidders. For this reason the States in principle (and specifically in the case of Germany and Poland) agree to grant the full Treaty protection only with regard to investments actually made and admitted in accordance with the law of the host State and not to intended investments.

(vi) Nordzucker's involvement in the sales procedures for the Szczecin and Gdańsk Groups

190. The Tribunal will now review whether the involvement of Nordzucker in the sales procedures for the Szczecin and Gdańsk Groups amount to investments which enjoy the full protection of the BIT and, if not, whether they had reached a stage which qualifies them for the limited rights under the first and third sentences of article 2 (1) of the BIT.

191. In order to determine whether the involvement with these two Groups are investments enjoying the full protection of the BIT, the Tribunal has in particular reviewed – without considering them as binding precedents, however – the two major cases on which the Parties respectively rely to argue that this involvement had, or had not, the status of investments admitted and made in accordance with Polish law.

192. Nordzucker relies on the *Eureko v. Poland* case⁹⁴ which involved the Polish-Dutch BIT. This case has some similarity to the case at hand because it involved also a change in privatization policy before the claimant-investor (in the insurance sector) had realized his full intended investment.

193. Eureko had acquired 20 % of the shares in a wholly state-owned Polish insurance company (which had been earmarked for privatization) through the execution of a SPA which also

⁹⁴ *Eureko v. Poland*, Partial Award with dissenting opinion, 19 August 2005

confirmed the seller's and the purchasers' (of which Eureko was the most important) intention to publicly trade the remaining shares of this company through an IPO and successive public offerings, and which also confirmed the seller's intention not to sell a strategic block of shares through public trading to a strategic investor who is a competitor of the buyers. The *Eureko* tribunal had no doubt that the SPA did not contain a legal obligation of Poland to organize an IPO, as the SPA had only expressed an intention and at the best created a contingent right for the buyers. However, the First Addendum to the SPA in the Preamble of which the Parties confirmed the above intent, contained substantive provisions which led the *Eureko* tribunal to conclude that Poland had contracted obligations with regard to the IPO and that Eureko had acquired rights derived from its initial shareholding in the company which were entitled to protection under the Dutch-Polish BIT (§ 157 *Eureko* case).

194. The *Eureko* tribunal, as others before it, found it necessary to determine whether or not the host State had a legal commitment to the investor. This determination was made on basis of the assessment of the evidence existing in that case. What is relevant to the present case, is that it must also be decided on its own facts and on basis of this Tribunal's assessment of the evidence submitted to it.
195. When deciding on basis of the specific facts and evidence in this case whether a legal commitment was given by Poland to Nordzucker, this Arbitral Tribunal will also take into account the *Mihaly* case⁹⁵ on which Poland heavily relies.
196. The *Mihaly* tribunal reviewed, as other arbitral tribunals which had to determine whether an investment existed, whether or not the host State had a binding obligation. It decided that the unilateral and internal characterization of certain expenditures by the claimant in preparation for a project of investment did not constitute an investment.
197. The successive letters of intent, of agreement and of extension were found by the *Mihaly* tribunal not to have created a binding obligation on Sri-Lanka – in particular because the host State had consistently signalled in all documents that were issued on its behalf “that it was not until the execution of a contract that it was willing to accept that contractual relations had been entered into and that an investment had been made”⁹⁶.
198. Commentators have mentioned that the *Mihaly* award has to be understood on the basis of its intricate factual context and that in other circumstances, development expenditures might constitute a protected investment⁹⁷. The Tribunal recalls in this respect that the German-Polish BIT subjects the concept of investment to a general requirement of being made in

⁹⁵ *Mihaly International Corporation v. Sri Lanka* ICSID Case No. ARB/00/2, Award of 15 March 2002 (“*Mihaly v. Sri Lanka*”)

⁹⁶ *Mihaly v. Sri Lanka*, §51

⁹⁷ See Walid BEN HAMIDA, *The Mihaly v. Sri Lanka Case: Some Thoughts Relating to the status of pre-investment expenditures*, in T Weiler (ed), *International Investment Law and Arbitration; Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), page 75.

accordance with the laws of the host State and requires that an investor has a "title" to invest under the laws of that State. Therefore, the *Mihaly* award may have certain value of "authority" or source of broader inspiration for the settlement of this case. Indeed, there are Treaties as NAFTA, which (under article 1139) define an "investor" as one "that seeks to make, is making or has made an investment". Such wording is manifestly different in comparison with article 1.1 (c) of the German-Polish BIT, which identifies an investor as someone who is "entitled to engage in investment", that is someone who has a legal title to invest.

199. Under the Rules for Selecting the Buyer of the Shares applicable in these tender procedures and accepted by Nordzucker, the entering into the legally binding SPAs was explicitly made subject to the consent of the Minister of the State Treasury acting as the sole shareholder at the GAM of the respective Sugar Holding Companies : §§ 14 and 15 of the Rules for the Poznań, Gdańsk and Szczecin Groups and § 25 of the Rules for the Toruń Group. It is also established and undisputed that the required consent to make the contemplated transactions for the Gdańsk and Szczecin Groups was finally refused.
200. In its Post-Hearing Brief, Nordzucker has argued that "*the Hearing has proven beyond any possible doubt that Poland was fully informed about and understood, Nordzucker's investment strategy in Poland, and that there were "significant connections" between the legally independent acquisition procedures for the four Sugar Groups*"⁹⁸. This understanding of Poland has not been denied, as shown by the examples listed by Nordzucker in the same paragraph, and by the letters quoted hereabove. However, this understanding does not imply any agreement and the Tribunal cannot follow Nordzucker when it argues that "an agreement was reached among Nordzucker and MST" that would have had the effect of establishing such a connection. None of the letters of June and August 2000 to which Nordzucker refers in support of this statement show an agreement of Poland to grant Nordzucker any rights on or assurance in relation to the acquisition of any group for the mere reason that it had acquired another group.
201. This Tribunal therefore reaches the conclusion that in the absence of any binding promise or agreement on the acquisitions of the Gdańsk and Szczecin Groups, these envisaged acquisitions fall short of being "investments that have been admitted in accordance with the [...] law" of Poland and therefore do not "enjoy the protection of this Treaty." Since the approval by the GAMs of the sellers was essential for the transactions to be concluded, this Tribunal concludes that there was no legal commitment yet of the Sugar Holding Companies on the sale of shares and, hence, no investments yet in the Gdańsk and Szczecin Groups which were "admitted" in accordance with Polish law and therefore covered by article 2 (1) second sentence of the BIT.

⁹⁸ PHMIN §357

202. The Tribunal will now proceed to review whether Nordzucker's intended investments in the Gdańsk and Szczecin Groups were sufficiently "mature" to constitute "investments" for purposes of qualifying for the limited rights under the first and third sentences of article 2 (1) of the BIT.
203. Nordzucker's intention to acquire these Groups was duly known to Poland since Nordzucker's submission of its first offers for these Groups on 9 July 1999 and 14 December 1999, respectively. That Poland, as sole shareholder of the two Groups, also considered Nordzucker as a plausible investor was, moreover, confirmed by its designation as the winning bidder for these two Groups, on 13 October 1999 and 9 May 2000, respectively, and thereafter, by its deposit of a bid bond and the negotiation and agreement on social, investment and growers packages. The Rules for Selecting the Buyer of the Shares do not provide the possibility for the Buyer to unilaterally withdraw from the sales procedure.
204. On June 7, 2000, the Minister of the Treasury himself wrote to Nordzucker: *"In the course of talks carried on also in the Ministry of the Treasury, an accord was reached on essential matters with regard to three groups of regional sugar plants. Thus, a prompt finalization of these transaction[s] seems to be possible. Enclosed please find the initialed covenant which the Ministry of Treasury is ready to enter into upon signing of agreements of disposal of shares in the said groups"*⁹⁹.
205. Moreover, for the Szczecin Group, one more step towards the investment was actually made, by both parties, in the negotiation of the SPA and the initialling of the SPA, also by the Management Board and the Supervisory Board of PPSC, on 28 June 2000 (Exh. C54). The SPA was said to contain all essential elements of the transaction (*"essentialia negotia"*) and in certain circumstances and under certain applicable laws, it is accepted that an agreement exists as soon as all essential elements have been agreed upon. This is not the case, though, when the parties have specifically agreed that their agreement would actually exist only "subject to written contract" or only after a certain formal condition is fulfilled such as e.g. approval by the Board of Directors or, as in this case, approval by the GAM.¹⁰⁰ It is undisputed that, when such explicitly required formality is not forthcoming, there is no agreement. The issue whether the accomplishment of the required formality can be refused by the party who has to comply with it, only for so-called "good" reasons or whether that party is free to decide at its discretion to comply with the formality or not, is irrelevant to determine whether an agreement is concluded or not. It may only have relevance if the party invokes a *culpa in contrahendo*, i.e. a negligence in the conduct or termination of negotiations.

⁹⁹ Exh. C51

¹⁰⁰ The letter of the Undersecretary of State of 9 June 2000 (referred to in §50 above) had specifically insisted on this formality (Exh. C52)

206. After the initialling of the SPA for the Szczecin Group, only one further formal step was required, the approval of the GAM, which required in fact the approval of the State Treasury as sole shareholder of the Sugar Holding Company. Thus, for the Szczecin Group, Nordzucker was one formality away from the acquisition.
207. For the Gdańsk Group the situation was slightly more complicated because (i) the Management Board and the Supervisory Board had not yet approved and initialled the Share Purchase Agreement and (ii) the Group was the property of two sellers (PPSC and MKSC) which meant that two respective GAMs still had to give their final approval.
208. This Arbitral Tribunal is of the opinion that both intended investments, also the one in the Gdańsk Group, had proceeded sufficiently far to come within the scope of the obligation of Poland under article 2 (1) of the BIT to promote them as far as possible and to admit them in accordance with its law and to treat them fairly and equitably.
209. If taken separately, the Arbitral Tribunal might not have considered the Gdańsk procedure sufficiently close to an investment to bring it under the scope of the first and third sentences of article 2 (1) of the BIT. Indeed, if no SPA for the Szczecin Group had been negotiated and initialled yet, the terms of the investment to be made in the Gdańsk Group would normally be too uncertain. However, in view of
- (i) the fact that Nordzucker had been designated as winning bidder for the Gdańsk Group (on 9 May 2000) less than two months after it was declared winning bidder for the Toruń Group (on 22 March 2000), and
 - (ii) the fact that Nordzucker had successfully negotiated SPAs for all three other Groups and that these had been initialled on behalf of the respective sellers,

it is justified to state that Nordzucker was very close to seeing its investment in the Gdańsk Group admitted, presumably on contractual terms and conditions very similar, if not identical to those negotiated and initialled for the Szczecin Group with PPSC (which was also the seller of two of the four Sugar Plants of the Gdańsk Group). During his meeting with Nordzucker representatives, on 18 January 2001, Mr. Jeznach of the Ministry of the State Treasury told them, in relation to "the fate of the agreements for the sale of shares in the Szczecin and Gdańsk Group companies" that "the content of both agreements had been reviewed from the formal and legal perspective".¹⁰¹ According to Nordzucker's letter of 6 February 2001, it was even "clearly and explicitly stated that the agreements are formally and legally correct",¹⁰² which has not been contradicted at the time by Poland¹⁰³. The Arbitral

¹⁰¹ RWS 3 §22

¹⁰² Exh. C65

¹⁰³ In its letter of 1 August 2001, the State Treasury mentioned "formal and legal issues related to the procedure and documentation" as third reason for the refusal of consent by the GAMs.

Tribunal therefore considers that the Gdańsk Group was from a practical point of view as close to a sale, but for the last formal step of the GAM's approval, as the Szczecin Group was. Both Groups came within the category of the "investments in the making" for which the host State had limited obligations under the first and third sentences of article 2 (1) of the BIT.

4. Is the dispute about rights and obligations under the BIT and relating to an investment?

210. The remaining question then is whether the dispute at hand is one pertaining to investments as regards rights and obligations under the German-Polish BIT. The BIT indeed requires that the dispute relates to an investment and to rights and obligations related to that investment. Deciding otherwise would mean that any disputes involving an investor and the host State would come under the jurisdiction of an arbitral tribunal.
211. The Tribunal finds that the dispute definitely is about a right and obligation under the BIT, in particular about the obligation of a Contracting Party to promote as far as possible investments by investors of the other Contracting Party and to admit them in accordance with its laws and to treat them fairly and equitably in that promotion and admission, even before they are admitted. To the extent these obligations relate necessarily to investments not yet made but "in the making", the term "investment" as used in article 11 (1) of the Treaty has, for the purpose of disputes about the rights created in the first sentence of article 2 (1), the same meaning as the term "investment" has in article 2(1), first and third sentences.
212. As Nordzucker claims that its failed investments in the Gdańsk and Szczecin Groups were treated unfairly and inequitably, the Tribunal concludes that (i) there is a dispute (ii) between a Contracting State and an "investor" from the other State who was in the process of making an investment (iii) relating to "investments" in the sense of article 2 (1) first and third sentences, (iii) in respect of which Poland had limited obligations under the BIT, namely to promote and admit them in accordance with its law and to treat them fairly and equitably.
213. The Arbitral Tribunal will exercise its limited jurisdiction in relation to these failed investments exclusively in order to determine whether they were the subject of a failure of Poland to its obligations under the first and third sentences of article 2 (1).
214. In conclusion, the Tribunal considers that it has jurisdiction *ratione materiae* to determine whether Poland has breached its obligations under article 2 (1), in particular has not acted fairly and equitably in the promotion as far as possible of the investments by Nordzucker in the Gdańsk and Szczecin Groups and in their admission in accordance with its laws.
215. This Arbitral Tribunal is aware of the obiter dictum of the *Mihaly* tribunal:

"It may be and the Tribunal does not have to express an opinion on this, that during periods of lengthy negotiations even absent any contractual relationships obligations may

*arise such as the obligation to conduct the negotiations in good faith. These obligations if breached may entitle the innocent Party to damages, or some other remedy. However, these remedies do not arise because an investment had been made, but rather because the requirements of proper conduct in relations to negotiation for an investment may have been breached. That type of claim is not one to which the Convention has anything to say. They are not arbitrable as a consequence of the Convention*¹⁰⁴.

216. This Arbitral Tribunal which is deciding this case under the German-Polish BIT and on its own facts, comes to a different conclusion. Under article 2 (1) of the Germany-Poland BIT the host State has the obligation to promote as far as possible investments and to admit them in accordance with its laws, and, as stated above, has to treat these investments, about to be admitted, fairly and equitably. If a dispute relating to a breach of this Treaty obligation arises, the term "investment" as used in article 11 (1) must be understood in the same sense as in the first and third sentences of article 2 (1), that is, to cover also intended investments about to be made.
217. Since for the Arbitral Tribunal to have jurisdiction under the BIT, the rights and obligations under dispute must also relate to the investment, an Arbitral Tribunal's jurisdiction in relation to "intended investments about to be made" is necessarily also not the full BIT jurisdiction but a limited jurisdiction, restricted to deciding disputes relating to such intended "investments" if it is claimed that they have not been admitted in accordance with the law or have been unfairly or inequitably treated.

c. Conclusion

218. Based on the above reasons, the Arbitral Tribunal finds that:
1. the investments in the Szczecin and Gdańsk Groups have not been admitted by Poland in accordance with its law and therefore as a matter of principle do not enjoy the protection of the BIT according to article 2 (1) second sentence;
 2. as Poland was aware of these intended or envisaged investments and had actually solicited them and actively followed and supervised the procedure for the sale of the assets up to (the second before) the last step, Poland had not only an obligation to promote them as far as possible and to admit them in accordance with its law but also to treat them fairly and equitably in accordance with article 2(1) third sentence;
 3. as a dispute exists about Poland's obligation to admit, in accordance with its laws, and to treat fairly and equitably these intended investments, this Tribunal has jurisdiction to

¹⁰⁴ *Mihaly International Corporation v. Sri Lanka* ICSID Case No. ARB/00/2, Award of 15 March 2002 ("*Mihaly v. Sri Lanka*")

entertain claims based on an alleged breach of the obligations in the first and third sentences of article 2 (1);

4. this Tribunal has no jurisdiction to entertain claims based on an alleged breach of the second sentence of article 2 (1), of article 2 (2) and of article 3 (1) and 3 (2).

7. TIME BAR

219. The Respondent has argued that Nordzucker's claims are time-barred under international law and Polish substantive law.
220. According to the Claimant the time bar is not governed by Polish law, but exclusively by international law. It considers that its claims are not time-barred under the international law principles and not under Polish law either, if that were to apply.
221. The BIT not containing any rule on the matter of time bar, the Tribunal does not consider it appropriate to refer to Polish domestic law, at least not exclusively. The issue is to be resolved on the basis of the international law that governs the BIT. International law has no rule that specifies the time period which must elapse in order to render extinctive prescription operative. Instead of rules providing for precise time limitations, international law refers to a general principle that a claimant shall not unreasonably delay the pursuit of its claim.
222. In the instant case, Nordzucker must have been aware of its loss and the alleged breach on 1 August 2001 when the resolutions were adopted to refuse the sale of the Sugar Groups. It is common ground that the situation was not clear before these decisions had been taken. As from this date, Nordzucker was under an obligation not to unreasonably delay the pursuit of its claim. In this respect, the Tribunal notes the following:
 - On 1 September 2003, Nordzucker wrote to the President of the Polish Council of Ministers, requesting to commence negotiations to resolve the dispute. This proposal was rejected when the Secretary of State replied on 6 October 2003, on behalf of the Prime Minister, that Nordzucker had no justified claim.
 - On 23 April 2004, Nordzucker filed a petition for a settlement with the District Court of Warsaw. With this petition, directed to the State Treasury Minister of Poland as opposing part, the Respondent was clearly put on notice of Nordzucker's intention to pursue its claim for a stated amount of PLN 107,000,000. The proceedings based on this petition were eventually closed on 2 September 2004.

- On 18 April 2005, Norzucker again wrote to the Ministry of the State Treasury to confirm its willingness to still resolve the dispute on an amicable basis; on 5 May 2005, the Secretary of State declined again.

- The Notice of Arbitration was filed on 17 February 2006.

223. It follows from these events that the Notice of Arbitration was filed within 10 months after the last proposal to settle the dispute amicably and within 18 months after the failure of the attempt to settle the dispute before the Warsaw District Court and less than five years after the alleged breach occurred. In light of these developments, the Tribunal does not find that there occurred any unreasonable delay in Nordzucker's pursuit of its claim. Moreover, if Polish law were relevant to this matter, this Tribunal would find that Nordzucker also acted within the three year limit that started to run again when the proceedings before the Warsaw District Court was closed, on 2 September 2004¹⁰⁵.

8. COSTS

224. The Tribunal reserves its decision on costs until its final award and until it will have received, upon its instruction, details of the Parties' claims for costs.

9. DECISION

For the above stated reasons,

The Tribunal decides:

That it has jurisdiction to entertain a claim based on an alleged breach of the obligations in article 2 (1) first and third sentences of the Treaty concerning the encouragement and reciprocal protection of investments signed on 10 November 1989 between Germany and Poland, as amended by the Protocol of 14 May 2003;

That it has no jurisdiction to entertain claims based on a breach of the second sentence of article 2 (1), of article 2 (2) and of article 3 (1) and 3 (2);

That the claim is not time-barred.

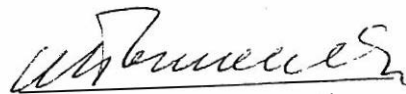
¹⁰⁵ The Respondent's argument (SoReb §334) that this settlement petition could not interrupt the statute of limitations because it was not an act directly aimed at enforcing a claim, is not valid in view of the decision of the Polish Supreme Court (V CSK 238/06; Orzecznictwo Sądów W Sprawach Gospodarczych, March 2007, nr. 3, nr. 29). According to this decision, a petition for settlement filed with the court interrupts the limitation period if the amount of the claim is specified in such petition.

Signed in seven originals, one for each Party, one for each member of the Arbitral Tribunal,
one for deposit with the clerk of the Court of First Instance and one as a reserve copy.

Brussels, 10 December 2008.



Andreas Bucher
Co-arbitrator



Maciej Tomaszewski
Co-arbitrator



Vera Van Houtte
Chairman

