

IN THE MATTER OF AN AD HOC ARBITRATION UNDER
THE AGREEMENT BETWEEN THE KINGDOM OF THE NETHERLANDS
AND THE REPUBLIC OF POLAND ON ENCOURAGEMENT AND
RECIPROCAL PROTECTION OF INVESTMENTS

BETWEEN

EUREKO B.V.

Claimant

and

THE REPUBLIC OF POLAND

Respondent

DISSENTING OPINION

DISSENTING OPINION

1. The essence of this dispute is Eureko B.V.'s ("Eureko") claim to acquire 21% of shares in a Polish insurance company, Powszechny Zakład Ubezpieczeń S.A. ("PZU"), from one of its co-shareholders in PZU – the State Treasury of the Republic of Poland (the "State Treasury"). The dispute arose out of a contract concluded by these two parties and, in consequence thereof, is of a purely commercial and contractual nature.

2. On 5 November 1999, the State Treasury concluded with Eureko and BIG Bank Gdański S.A. ("BIG Bank Gdański") a Share Purchase Agreement relating to PZU (the "SPA").

Under the terms of this contract, Eureko bought 20% and BIG Bank Gdański 10% of PZU shares from the State Treasury. BIG Bank Gdański immediately transferred its shares to BIG BG Inwestycje S.A. ("BIG BG Inwestycje"). BIG BG Inwestycje was not a party to the SPA.

The contract indicated the intention of the Seller to publicly trade, through an initial public offering (IPO), a part or all of the PZU shares as soon as it is practicable, however, no later than by the end of the year 2001, unless it would be impossible to carry the IPO in the above specified period due to market conditions unsatisfactory to the Seller [Article 3 para. 1 of the SPA].

Various disagreements and disputes that arose out of the contractual relations between the parties to the SPA lead to the conclusion on April 3, 2001

of an Addendum to the SPA (the "Addendum"). The Addendum was concluded between the State Treasury, on the one side, and Eureko, BIG Bank Gdański and a third subject – BIG BG Inwestycje, on the other side.

Thus the contractual structure of the deal became more complex involving on the side of the State Treasury's partners three corporations, one of which (Eureko) was a foreign company.

3. One of the intended aims of the parties to the Addendum was to cause the termination (without the right of repeated lodging of claims) of all outstanding controversies, disputes and court actions that had grown among them in relation to the SPA.

To this effect, they agreed that the fundamental premise and the condition precedent of the Addendum was the Parties' wish to settle and terminate (without the right of repeated lodging of claims) any and all claims and controversies that have arisen among them and in connection with certain individuals in relation to the SPA [Article 1.1 of the Addendum].

The Parties undertook to cease and terminate without delay all pending legal actions, public statements and adverse media activities both in Poland and at an international level [Article 1.2 of the Addendum].

They also agreed that till April 6, 2001, they shall undertake, or cause to be undertaken, actions necessary for the effective withdrawal (including the waiver of all claims pursued without the right of repeated lodging thereof) of all summons and claims with regard to the SPA, as well as, all other summons and claims that had been filed in connection with the resolutions of the general shareholders' meeting of PZU lodged by the Seller, the Buyers or by one or

more persons (identified by name) representing either Eureko or BIG Bank Gdański or BIG BG Inwestycje.

It is worth of note that all actions indicated in these contractual provisions were pending before competent Polish courts of law.

It is not disputed that both Parties (i.e., the State Treasury on one side and Eureko, BIG Bank Gdański and BIG BG Inwestycje on the other side) performed their obligations under Article 1 of the Addendum to effectuate a full and final waiver and release of all lawsuits and claims that had arisen among them and in connection with certain individuals representing i.a. governing bodies of Eureko, BIG Bank Gdański and BIG BG Inwestycje pending before competent Polish courts.

4. The Parties agreed that they and their duly elected representatives in the respective management boards and supervisory boards of PZU and its subsidiaries shall exercise due care and diligence in order to have the IPO concluded before December 31, 2001 [Article 5.1 of the Addendum].

It results clearly from this provision that the State Treasury undertook a duty of due care and diligence in order to have the IPO concluded before December 31, 2001. Such obligation did not bind it to achieve the envisaged result, i.e., to have the IPO conducted before December 31, 2001.

This is why the Parties expressly agreed that in case the IPO is not completed by the end of 2001, they unconditionally undertake to adopt a new schedule for the IPO [Article 5.3 of the Addendum].

However, although the Parties unconditionally undertook to adopt a new schedule for the IPO, they did not specify the time limit for the performance.

This solution might be justified by various reasons, e.g., taking into consideration changes of circumstances which might fundamentally alter the equilibrium of the contract.

By agreeing the above clause the Parties intended to protect their legitimate interests.

Eureko has thus had a claim against the State Treasury to specify the time limit for the adoption of a new schedule for the IPO. In case the Parties did not come to an agreement in this respect, the dispute should be resolved by the competent courts as agreed in the contract.

5. However the Tribunal is not satisfied with the clear content of the above contractual provisions, as they are inconsistent with the responsibility of the Republic of Poland vis-à-vis Eureko that has been assumed by the Tribunal.

To resolve the perceived inconsistency, the Tribunal resorts to an interpretation bordering on manipulation, incompatible with basic rules applicable under Polish law, which is the law governing the SPA and the Addendum.

It is to be noted that in the long reasons to its decision, the Tribunal has not once referred to any relevant provisions of Polish civil law when interpreting the contracts concluded by the Parties. This approach makes the impression that the Tribunal treats them as contracts "*sans loi*" -- which facilitates their free interpretation.

In Polish contract law and practice (as in the law and practice of many other countries) it is beyond any doubt that the parties to a contract do not create contractual rules in its preamble (unless otherwise expressly stipulated

by the parties). The preamble to a contract simply serves other purposes (to declare the parties intentions and expectations, to describe their objectives, etc.).

The Tribunal has breached this fundamental rule by assuming that *“the preamble... of the First Addendum demonstrates clearly that the statement of intent [in respect of the IPO – J.R.] which had been agreed by the Parties in the SPA crystallized and became a firm commitment of the State Treasury “ [para. 152].*

The Tribunal tries to justify this statement by referring to excerpts from paragraphs 2, 3 and 4 of the Preamble. However, the Tribunal forgets to indicate that all of them have been formulated under Part D of the Preamble which clearly indicates that they only express the intention of the Parties (*“By concluding this Addendum the Parties intend”*).

Thus the Tribunal has transformed a clear statement of intent into a firm commitment of the State Treasury.

Then, the Tribunal quotes some excerpts from Article 5 of the Addendum -- dissociated from the whole contractual context of this provision [para. 156].

The Tribunal confirms that by the terms of Article 5.1 of the First Addendum, the State Treasury binds itself *“to exercise due care and diligence in order to have the IPO concluded before December 31, 2001”*, but does not indicate that this obligation does not bind the State Treasury to actually have the IPO concluded before December 31, 2001.

The Tribunal carefully omits to observe that although the Parties had unconditionally undertaken to adopt a new schedule for the IPO they had not agreed the time limits for the performance of this obligation.

To make its assumption more credible, the Tribunal refers “*to another unconditional undertaking of the State Treasury set out in Article 5.4*”, but omits to quote the text of this provision – which reveals that the obligation concerns a post-IPO undertaking of the State Treasury (“*5.4 The Parties unconditionally undertake that following the IPO the Parties shall make their utmost efforts to agree the schedule for public offering of any remaining shares held by the State Treasury*”).

Finally the Tribunal stresses that the second Article 5.4 of the Addendum “*contains still a further undertaking of the State Treasury: to assist Eureko to obtain the permits of the Ministry of Finance to allow Eureko to become the majority, 51% owner of PZU*”.

Here again the Tribunal restrains itself from indicating the obvious – that this is not an undertaking of the State Treasury to conclude the IPO.

On the basis of misinterpretation of the above excerpts from the contractual provisions “*the Tribunal finds that under the First Addendum, the Republic of Poland [sic! – J.R.] contracted obligations and Eureko acquired rights from its shareholding in PZU which were entitled to protection under the Treaty*” [para. 157].

6. In these circumstances it is not surprising that Eureko decided, at all hazards, to avoid going to the competent court of commercial jurisdiction to determine its contractual rights.

To that effect it adopted tactics to politicize on an international level its commercial dispute with the State Treasury as a PZU shareholder, in order to be able to mask it as a BIT dispute with the Republic of Poland.

This has created a situation where now a BIT Tribunal has to interpret a contract governed by Polish law concluded by Eureko, BIG Bank Gdański and BIG BG Inwestycje with the State Treasury and to examine their contractual relations in the absence of both Eureko's partners and of the other contractual party (the State Treasury) who cannot be represented in BIT arbitration proceedings against the Republic of Poland.

To cover this, Eureko introduced significant confusion during the arbitration proceedings using interchangeably the concepts and terms "the State Treasury" and "the Republic of Poland", in order to create an impression that the Republic of Poland was its partner in the process of negotiations and performance of the SPA and the Addendum.

This confusion is still visible throughout the Tribunal's reasons and probably contributed to a certain extent to its decision.

Indeed, the Tribunal repeatedly expressly identifies the Republic of Poland as Eureko's contractual partner in the SPA and the Addendum. Examples of this approach are to be found in the following statements:

- * *"The Tribunal finds that under the First Addendum the Republic of Poland contracted obligations" [para. 157].*
- * *"The Tribunal finds confirmation in the Second Addendum of its present conclusion that the First Addendum conferred on Eureko acquired rights in respect of the conduct of the IPO and the obligations of the Republic of Poland in that respect" [para. 158].*

- * *“The Tribunal has found that under clear terms of the First Addendum the statement of intent of the Republic of Poland in the SPA to carry out IPO of PZU became a firm and binding commitment of the State Treasury”* [para. 201].
- * At para. 512 the Tribunal refers to *“the unconditional obligation of the Republic of Poland under the First Addendum”*.
- * *“The clear decision by the Republic of Poland to refuse abide by and respect its legal obligations under the SPA and the First Addendum”* [para. 225].

7. The above analysis of the provisions of the Addendum that are crucial for this case reveals that the only investment which Eureko made in PZU was constituted by the assets in the form of the PZU shares acquired from the State Treasury (20% of the shareholding in PZU) and from BIG BG Inwestycje (10% of the shareholding in PZU), the latter being a non-party to the SPA.

Non-enforceable rights and expectations arising out of the SPA and the Addendum, however, are not an investment -- even in the widest sense of the term -- both in Polish and international law. While they may be connected with the investment made by Eureko in PZU, they are not part of it.

A different view adopted by the Tribunal in this respect is groundless.

This probably explains why the Tribunal had to discover a new concept of “investment”, in order to be able to find a ground entitling Eureko to protection under the BIT.

This completely novel (both in Polish and international law) concept of investment has been described by the Tribunal as “*the ability to exercise substantial influence on the management and operation*” of a commercial company.

On the basis of very limited evidence, without the participation of the other contractual party (i.e., the State Treasury) in the arbitral proceedings, after only a very superficial analysis of some isolated contractual provisions (dissociated from their contractual context), the Tribunal has found that corporate rights granted to Eureko described as the ability to exercise substantial influence over management and operation of PZU were not contingent [para. 142].

However, the Tribunal's view according to which “*they were real rights granted in clear terms to Eureko by its contractual partner*” is badly lacking any precise legal grounds.

Indeed, the Tribunal has not indicated any contractual provisions in which these “clear terms” may be found.

It has also based its decisions “on the totality of evidence” without any precise indication, limiting itself to stress the particular importance of the testimony of Mr. Jansen.

Of course, the representative of the State Treasury – Eureko's contractual partner – could not participate in these proceedings and, in consequence thereof, could not give any testimony in that respect.

On the basis of a very limited evidence and without profound analysis of the whole contractual complex composed of SPA and the Addendum, as well as of the contractual and corporate relations between the contractual parties

(which is an analysis that every competent court of commercial jurisdiction would have had to conduct), the Tribunal has come to a firm and far reaching conclusion that the ability (as such?) “*to exercise substantial influence over management and operation of PZU*” qualifies as an investment under the BIT and entitles Eureko to protection under the Treaty.

Not only has the Tribunal been unable to define this extremely vague concept, but it has failed to even clarify it – for instance, by explaining at least the meaning of the notion of “substantial influence” over the management and operation of PZU.

A right the content of which cannot be determined with sufficient certainty may not be recognized as non contingent. To recognize it as an “investment” under the Treaty is, therefore, completely groundless.

The above analysis proves that there is no legal basis for Eureko’s claim under the BIT, as that the fundamental premise for the responsibility of the Republic of Poland is lacking.

8. In the reasons of the Award, the Tribunal stresses that, in its deliberations, it has “*examined the question of the attribution to the Polish Government of the acts of the State Treasury Minister in particular depth, with the benefit of the exceptional knowledge and insight of its distinguished member who is steeped in Polish law*” [para. 121].

Although this question, for the reasons discussed in the preceding paragraphs, is of no importance to the case at hand, it is to be noted that the reasons of the Tribunal’s decision indicate that the Tribunal has some difficulties in understanding that the SPA and the Addendum were concluded by two equal

parties enjoying the same legal status of civil law juridical persons legally separated from their owners.

These contractual parties are (1) the State Treasury, as the one side and (2) Eureko, BIG Bank Gdański and – in respect of the Addendum – BIG BG Inwestycje on the other side. (It is worth of note that the Tribunal has completely disregarded the fact that Eureko was not the sole contracting party of the State Treasury both in the SPA and in the Addendum).

The State Treasury is a specific juridical person which has been created by law (Article 33 of the Polish Civil Code).

Article 34 of the Civil Code expressly provides that in civil law relationships, the State Treasury shall be considered as the subject of the rights and duties which pertain to the State property that does not belong to other State juridical persons.

Article 40 §1 of the Civil Code confirms that the State Treasury is exclusively liable for its obligations.

It clearly results from these provisions that the State Treasury is a juridical person separate from the State.

Nevertheless the Tribunal is of a different opinion following in this respect a view of a late Polish scholar indicated by the Claimant [para. 133].

A.Wolter, quoted by the Tribunal with approval, wrote in the 1960s that *“in the prevailing view the State Treasury is not a legal entity separated from the State”* (this sentence was reproduced in all posthumous editions of his manual).

This view expressed the reality under the communist political and economic system based on socialist ownership of means of production and **centralized state management of a socialized economy.**

However, it has become obsolete after the transition of Poland to a democratic political system and a market economy. Poland has profoundly changed its legal system in order to create a proper legal framework for a market economy. Indeed, the State's ownership and property rights have been completely separated from the State and transferred to State juridical persons. The State Treasury and other State juridical persons regained their fully autonomous status and have been legally separated from the organization of the State.

The State Treasury's exclusive function is to exercise all rights and fulfill duties deriving from such ownership and other property rights which do not belong to any other State juridical persons (Article 44¹ of the Polish Civil Code).

It is beyond any doubt that the State Treasury as an autonomous juridical person being a subject of civil- and commercial law relationships is not an organ of the State – even in the widest possible meaning of the word.

It also follows from the very nature of this specific juridical person created by law that it cannot be authorized to exercise any public or regulatory functions.

The different view adopted by the Tribunal in this respect is a misunderstanding.

Thus the Tribunal's conclusion that "whatever may be the status of the State Treasury in Polish law, in the perspective of international law, the Republic of Poland is responsible to Eureko for the actions of the State Treasury" [para 134] is groundless.

The Tribunal bases its conclusion on Article 4 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful

Acts. However, the above analysis of the nature of the State Treasury confirms that the State Treasury may not be recognized as an organ of the Polish State, even on the widest possible interpretation of Article 4 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.

It is to be noted that the above conclusion of the Tribunal is also inconsistent with the “crystal clear” text of the above-mentioned Article 4 and the Tribunal’s own statement that “*in the perspective of international law, it is now a well settled rule that the conduct of any State organ is considered an act of that State and that an organ includes any person or entity which has that status in accordance with the internal law of that State” [para. 127].*

The Tribunal based its decision on a different view, according to which the conduct of a State-owned juridical person which does not have the status of a State organ in accordance with the internal law of the Republic of Poland should be considered an act of the Polish State.

9. The State Treasury acts in civil and commercial law relations through its statutory representative indicated by law.

Pursuant to Article 2 para. 5 of the Act of 8 August 1996 on the principles of performance of rights belonging to the State Treasury, the Minister of the State Treasury i.a. “*exercises rights resulting from the patrimonial rights pertaining to the State Treasury in the scope of rights derived from the shares belonging to the State Treasury, including rights in personam*”.

Acting in a private law capacity as the statutory representative of the State Treasury, the Minister of State Treasury has the status of a subject of civil law (an agent) fully independent from any public authority.

Indeed, no public authority, including the Government of the Republic of Poland can effectively intervene in the scope of his exclusive rights and competence established by the pertinent Act of Parliament (derived from his status of the statutory representative of the State Treasury).

The Tribunal has based its decision on a wrong view in this respect: *"In view of the Tribunal, there can be no doubt that the Minister of the State Treasury in the present case, when he sold to the Eureko Consortium 30% of the State Treasury's shareholding interest in PZU by virtue of the SPA and undertook in the First Addendum to carry out the IPO as to an additional 21% of the shareholding, or under the Second Addendum, sell it outright to Eureko, was acting pursuant to clear authority conferred on him by decision of the Council Ministers of the Government of Poland in conformity with the officially approved privatization policy of that Government. As such, the Minister of the State Treasury engaged the responsibility of the Republic of Poland"* [para. 129].

This view is both inaccurate and groundless.

First of all, it is not disputed that the Seller was not the Minister of the State Treasury, but the State Treasury represented by the Minister of the State Treasury as its statutory representative.

Secondly, the State Treasury sold to Eureko only 20% of the shareholding interest in PZU; 10% of this shareholding was sold to BIG Bank Gdański which transferred it immediately to Big BG Inwestycje. It is very characteristic that the Tribunal has, in the reasons to the Award, completely ignored the existence of other Parties to the SPA and Addendum, treating the pertinent contracts as concluded only between Eureko and the State Treasury.

Finally, to say that the Minister of State Treasury "*was acting pursuant to a clear authority conferred on him by decision of the Council of Ministers*" (which is the Government of Poland) and that "*as such, the Minister of the State Treasury engaged the responsibility of the Republic of Poland*" mean that the Tribunal misunderstood Polish law.

Polish privatization law (the Act of 30 August 1996 on commercialization and privatization) provides that privatization of these state-owned enterprises and companies owned by the State Treasury which are of particular importance for the national economy requires the consent of the Council of Ministers. PZU belonged to this category.

Therefore the consent of the Council of Ministers was a necessary legal condition upon the satisfaction of which the process of PZU privatization could be initiated.

The Council of Ministers granted such consent pursuant to Article 1a Section 2 of the above Act to the privatization of PZU and accepted its privatization strategy.

In spite of the clear language of the Resolution of the Council of Ministers, the Tribunal insists that the PZU privatization strategy was not accepted but adopted by the Council of Ministers (see, e.g., para. 193 -- "*privatization strategy of PZU adopted by the Republic of Poland's Council of Ministers*"; para. 194 -- "*the implementation of its privatization strategy by the Republic of Poland*"; etc.).

The Tribunal's intention seems to be to shift the responsibility for the adoption of the PZU privatization strategy from the State Treasury to the Republic of Poland.

However, the Council of Ministers could not and, in fact, did not grant any authority to the Minister of the State Treasury to conclude the contracts with Eureko.

The authority of the Minister of State Treasury (as a statutory representative of State Treasury) to enter into the SPA and the Addendum with Eureko, BIG Bank Gdański and BIG BG Inwestycje was conferred to him by law.

There should be no doubt that acting as a statutory representative of the State Treasury pursuant to a clear authority conferred on him by mandatory provisions of law, the Minister of State Treasury could not engage any responsibility of the Republic of Poland vis-à-vis Eureko (and its Polish partners) either in the SPA or in the Addendum.

As it has been explained above, when the Minister of State Treasury acts in his private law capacity as a statutory representative of the State Treasury, he is fully independent from any public authorities. His independence in that respect is guaranteed by law.

The Minister of the State Treasury as a statutory representative of the State Treasury has been expressly authorized by law to exercise all rights derived from PZU shares (Article 2 para. 5 of the Act of 8 August 1996 on the principles of performance of rights belonging to the State Treasury).

He is exclusively responsible for the proper exercise of these rights. No public authority including the Government of Poland can relieve him from this responsibility established by law.

Consequently there should be no doubt that the Minister of the State Treasury acting as the statutory representative of the State Treasury cannot

engage the responsibility of the Republic of Poland vis-à-vis its contractual parties, irrespective of their nationality. This does not mean that the Government of Poland representing the interests of the Nation cannot express its views concerning privatization of State-owned companies. It may express its views or present its opinions in that respect (as happened in this case).

However, even if these views or opinions are presented in a form of resolution they are of non-binding nature.

The statutory representative of the State Treasury -- an autonomous juridical person, legally separated from the organization of the State -- may take into consideration such views or opinions, but is under a strict legal duty to act exclusively according to rules of law in the best interest of the State Treasury as the owner of PZU shares.

It results from these remarks that the Tribunal's decision assuming that the Minister of State Treasury acting in his private law capacity as a statutory representative of the State Treasury being the PZU shareholder may engage the Responsibility of the Republic of Poland is groundless.

10. To conclude this dissenting opinion, it is to be stressed that Eureko's only investment in PZU within the meaning of Article 1 of the Treaty has consisted of the assets acquired in the form of PZU shares from the State Treasury and BIG BG Inwestycje.

There is no doubt that this investment has been fully protected in Poland, both according to Polish Law and generally accepted international standards.

Non-enforceable rights arising out of the contracts concluded by Eureko and its Polish partners (BIG Bank Gdański and BIG BG Inwestycje) with the State Treasury as a PZU shareholder, as well as some expectations created during the process of negotiations and discussions between these Parties do not qualify as an investment in the sense of Article 1 of the BIT, even if its widest possible interpretation is accepted.

Thus in my opinion there is no ground which could entitle Eureko to protection under the Treaty. It results therefrom that the Government of the Republic of Poland cannot be in breach vis-à-vis Eureko of its obligation under Article 3.1 [3.5] and 5 of the Agreement between the Kingdom of Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment.

11. It is worth of note that by opening a wide door to foreign parties to commercial contracts concluded with a State-owned company to switch their contractual disputes from normal jurisdiction of international commercial arbitration tribunals or state courts to BIT Tribunals, the majority of this Tribunal has created a potentially dangerous precedent capable of producing negative effects on the further development of foreign capital participation in privatizations of State-owned companies.

At the same time, this decision may lead to undermine the fundamental principles upon which both national and international laws on contracts have been based: equal legal protection of all parties to commercial contracts irrespective of their nationality.

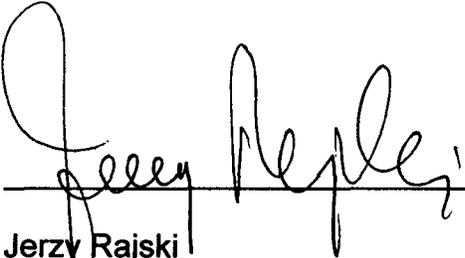
The Tribunal's decision may lead to create a privileged class of foreign parties to commercial contract who may easily transform their contractual disputes with State-owned companies into BIT disputes. This way, jurisdiction clauses agreed by the parties submitting all contractual disputes between the parties to an international arbitration tribunal or a state court may be easily frustrated by a foreign contracting party.

It is furthermore to be noted that in this particular case, only one of three commercial companies which entered into contracts with the State Treasury could submit its contractual dispute to this Tribunal.

BIG Bank Gdański and BIG BG Inwestycje have not been granted this privilege, although they have been Parties to the same contracts and, in consequence thereof, acquired rights and obligations derived from them.

All of this confirms that the Tribunal's decision is not only inconsistent with the Dutch-Polish BIT, but also with "*universally acknowledged rules and principles of international law*".

August 19, 2005



Jerzy Rajski
Co-Arbitrator, dissenting