

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

SECOND PARTIAL AWARD

ARBITRAL 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
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. INTRODUCTION

1. In its first Partial Award of 10 December 2008, this Arbitral Tribunal has concluded 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. Article 2 (1) is one of the articles of the BIT on which Nordzucker has based its claim. Hence this Tribunal will hereafter review whether these two sentences of this provision have been breached in respect of the acquisitions by Nordzucker of the Gdańsk and Szczecin Groups.

2. BREACH OF ARTICLE 2 (1) FIRST OR THIRD SENTENCE OF THE TREATY?

2. Article 2 (1) of the BIT states as follows:

“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.”

3. The first sentence of article 2 (1) of the BIT is identical to article 2 (1) of the German Model BIT (2005), which is cited as a typical clause for "treaties concluded by European countries [that] do not grant a right of admission but limit themselves to standards and guarantees for those investments which the host state has unilaterally decided to admit"¹.
4. The BIT did not create for Nordzucker an absolute right to invest, nor for Poland an absolute obligation to sell to investors. In the admission of foreign investments, Poland was and is still authorized to apply its own legislation which it need not revise after the ratification of the BIT.
5. Whereas the second sentence of article 2 (1) of the BIT grants the protection of the Treaty only to investments that have been admitted, the third sentence, requiring fair and equitable treatment applies in any case to investments, which requirement this Tribunal has interpreted in its first Partial Award dated 10 December 2008 as applying also to near-investments, *i.e.* investments in the process of being admitted in accordance with the first sentence.
6. Thus, as regards investments not yet admitted, a host State has only the obligations of article 2 (1) first and third sentences of the BIT:
 - promote them as far as possible and admit them in accordance with its law;
 - treat them fairly and equitably.

2.1 Promotion

7. There is no allegation in the submissions of Nordzucker that Poland has not promoted the investments as far as possible.

2.2 Admission in accordance with its law

8. The file contains no indication that Poland has failed to admit the investments in the Gdańsk and Szczecin Groups in accordance with its law. Nordzucker has not pointed to an infringement of any statute or rule and the Tribunal has not found one. The Tribunal finds that the refusal of the State Treasury to give its consent in the GAMs of MKSC and PPSC for the sale of the shares in the Sugar Plants of the Szczecin and Gdańsk Groups did not infringe Polish domestic law or the Rules for Selecting the Buyer of the Shares which explicitly required the approval of the SPA by the General Meeting of the Sugar Holding Company and did not limit the possibility to refuse consent to specific reasons².

¹ R. DOLZER and C. SCHREUER, *Principles of International Investment Law*, Oxford University Press, 2008, p. 81

² See Exh. C6: §15 of the rules for the Poznań Group; §15.1 of the rules for the Szczecin Group and those for the Gdańsk Group; §25 of the rules for the Toruń Group, of which §26 even states that MKSC has the right to close the proceedings with giving no reasons and without indemnity

2.3 Fair and equitable treatment

9. The Claimant claims that the Respondent failed to give fair and equitable treatment to what the Claimant considers to be its investment but what this Tribunal found in its first Partial Award dated 10 December 2008 to be only an "investment about to be made" (see chapter 6.4.b.3 of that Award), in that the Respondent:
- did not act with transparency and candour nor provide basic due process;
 - did not respect Nordzucker's legitimate expectations;
 - acted arbitrarily because it based its decisions on political and nationalistic reasons;
 - acted in bad faith during the negotiations with Nordzucker.
10. The Respondent argues that the standard of breach of fair and equitable treatment in international investment case law is particularly high.

It relies on the *S.D. Myers*, the *Waste Management* and the *Thunderbird* cases which require

- treatment "*in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective*"³;
- "*(...)conduct [which] is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety*"⁴; or
- "*gross denial of justice or manifest arbitrariness falling below acceptable international standards*"⁵

and denies having breached this high standard.

11. The Tribunal will review each of the allegations of the Claimant separately and review whether the facts as retained by the Tribunal breach the standard.

³ *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), First Partial Award of 13 November 2000 ("*S.D. Meyers v. Canada*"), Para. 263, Exh. RA 30

⁴ *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004 ("*Waste Management*"), Para. 98, Exh. RA 32

⁵ *International Thunderbird Gaming v. Mexico*, UNCITRAL (NAFTA), Final Award of 26 January 2006, Para. 194, Exh. RA 20

a. Transparency, candour and due process

1. Applicability of the transparency obligation

12. While the Parties agree that transparency is an element of fair and equitable treatment, the Claimant disagrees with the Respondent about the scope of the transparency obligation. It argues that the transparency standard applies not only to legislative and administrative acts of a State but to all State acts. It relies on the absence of wording in the BIT which would limit the obligation of transparency to the exercise of regulatory powers and on the *PSEG* case where the Tribunal found that there was "evident negligence on the part of the administration in the handling of the negotiations with the Claimant", as well as on the *Mafezzini* case in which the Tribunal found that "the lack of transparency with which this loan transaction was conducted is incompatible with Spain's commitment to ensure the investor a fair and equitable treatment". It also insists on the fact that Poland in this case did use regulatory powers when it interfered as a sovereign in the privatization process.
13. The Respondent denies that the transparency obligation exceeds the sphere of *acta iure imperii* and argues that subjecting a State to this transparency obligation in a merely commercial transaction would give the investor an inequitable advantage. It relies on the *Tecmed, Waste Management v. Mexico* and other cases in which the lack of transparency was linked only to administrative proceedings.
14. This Tribunal holds in this respect that, given its finding in chapter 6.3 of its first Partial Award, the objection of Poland that the transparency obligation is inapplicable in this case, is without ground. It may be argued that the Ministry of the Treasury was acting in a double capacity, as the chief of the State administration responsible for the privatization process in Poland, and as representative of the State Treasury which was the sole shareholder of the selling company. However, the Tribunal finds no basis in the BIT to distinguish between legislative/administrative acts and acts of any other nature committed by a State.

2. Lack of transparency and due process⁶

15. The Claimant argues that, on basis of the following factual circumstances, Poland breached its obligations of transparency, candour and due process:
 1. it failed to inform Nordzucker about the new valuations of the shares;
 2. it failed to respond to Nordzucker's requests in relation to the privatization process;

⁶ The Tribunal considers "candour" to be sufficiently close to the concepts of transparency and due process so as not to have to deal with it separately.

3. it never informed Nordzucker that it was reconsidering the privatization process for the Gdańsk and Szczecin Groups;
 4. it never clearly informed Nordzucker that increasing the offered price was a condition for the privatization to continue;
 5. it failed to repeat the "second stage" of the privatization procedures;
 6. it followed an "informal process" of which Nordzucker was not informed and which was different from the Rules for Selecting the Buyer of the Shares; and
 7. it failed to inform and consult with Nordzucker about the creation and composition of Polski Cukier.
16. The Respondent responds that not only the legal framework of the restructuring of the Polish sugar industry was transparent, but that Poland also acted transparently vis-à-vis Nordzucker in the sales process. It considers that it informed Nordzucker in the 18 January 2001 meeting of the fact that the price was too low and that the Ministry, not being allowed to negotiate the price with Nordzucker, could not do more than "suggest unofficially that Nordzucker take the initiative"⁷. It holds that there was ample opportunity for Nordzucker to discuss the price with Ministry representatives and concludes that it was Nordzucker's failure to make use of this opportunity and its unwillingness to increase the price, which led to the failure of the sale, and that Nordzucker's allegations of lack of transparency are therefore unfounded.

(i) Failure to inform about the re-valuation of the shares

17. The Tribunal finds Poland's failure to inform Nordzucker that it had requested at the end of January 2000 an update of the valuation of the shares of the companies comprised in the Poznań and Szczecin Groups does not constitute a lack of transparency. Leaving aside the fact that there is no dispute about the sale of the Poznań Group, the Tribunal is of the opinion that Poland, as sole shareholder of the selling Sugar Holding Company, was free to update its own estimates of the sales prices and that this was probably a normal thing to do when the minimum sales price for each Group had been determined already a while ago and when the Ministry was being challenged by political opponents because the privatization was allegedly realized at prices which were too low⁸.
18. There is no evidence on file that Nordzucker was at the beginning of 2000 concerned by the fact that the sales procedures were not proceeding as quickly as the 1995 Regulation and the

⁷ PHMP §41 and Transcript II, p. 181: 19 - 183: 21

⁸ Transcript II, p. 34: 20 - 35: 14

Rules for Selecting the Buyer of the Shares prescribed⁹. Thus, the timing became, with Nordzucker's implicit consent, "at large" and, as long as the Ministry did not otherwise change the procedure in a way which immediately affected Nordzucker's role or obligations in the procedure, it had no duty to inform Nordzucker of any internal initiatives without direct impact on the sales procedures. That there was no impact on the procedure is confirmed by an internal memorandum of the Ministry dated 9 February 2000: "The Ministry of the State Treasury does not challenge the material elements of Nordzucker AG's bid, i.e. the price for the shares and the overall value of the investment outlays"¹⁰.

19. The Tribunal finds that the procedure for the Gdańsk and Szczecin Groups has been followed properly - although slower than prescribed - until May-June 2000 when Nordzucker was designated as winning bidder for both Groups and an SPA for Szczecin was initialled on 28 June 2000, that is the same date as the SPAs for the Toruń and Poznań Groups.
20. On 7 June 2000, the Minister of the State Treasury himself wrote to Nordzucker referring to the latter's designation as "a potential investor for four regional groups of Sugar Plants", confirming that:

"In 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 transactions seems to be possible. Enclosed please find the initialled covenant which the Ministry of the Treasury is ready to enter into upon signing of agreements of disposal of shares in the said groups.

However, one issue requires a conclusion. Namely, the guarantee of performance of obligations towards planters of the Toruń Group may not be left aside for separate treatment.

In view of the Ministry of the Treasury, your guarantees of performance of the Planter's Package Deals should be consistent for all groups of regional sugar plants which you intend to acquire. The Ministry of the Treasury expresses its conviction that the obligations included in the Planters' Package Deals have been taken with the intention of fair performance thereof, hence the providing of guarantees of performance thereof in the agreement of disposal of shares should not arise any contrariety on your side.

⁹ Under the 1995 Regulation, the selection of the potential investors was to be done in two months and the negotiation and the conclusion of the SPA in five months. The Rules for Selecting the Buyer of the Shares for the Poznań and Szczecin Groups contained specific data which made the duration of the procedure even shorter than required under the Regulation (maximum three months for the entire procedure). As the procedure for Toruń, Poznań and Szczecin Groups had started, respectively, on 10 May 1999, 2 June 1999 and 29 June 1999, and Nordzucker had been selected as bidder on, respectively 10 August 1999, 6 August 1999 and 17 September 1999, the SPAs for these three Groups should in accordance with the 1995 Regulation have been concluded at the latest in the beginning of January, respectively mid February 2000.

In November 1999, the 1999 Regulation shortened even the term of five months between the selection of the bidder and the signature of the SPA to three months. Whether or not this change was to apply also to procedures already engaged, the change proves that Poland still wished to proceed diligently with the privatization, notwithstanding (or may be because of) the adoption of the Resolution on 9 September 1999 in the Polish Parliament encouraging the government to create a national sugar company.

¹⁰ Exh. R54

I think that we will soon clarify this obvious issue to facilitate prompt conclusion of this transaction ¹¹.

21. The initialled covenant attached was in fact a draft shareholders' agreement for Szamotuly (a Sugar Plant of the Poznań Group) and one for Kluczewo¹², a Sugar Plant of the Szczecin Group. Hence, it is not clear which are the "said groups" mentioned by the Minister: only the Poznań and Szczecin Groups, or the three Groups referred to in the first sentence or all four Groups targeted by Nordzucker.
22. One thing seems clear, though: on 7 June 2000 only the Toruń Group still had a problem but the Minister was confident that it would be solved. Thus, the letter certainly gives a positive impression, in particular that the three acquisitions could indeed be concluded soon. The Tribunal has no reason to believe that the letter was not written in good faith and that the Minister did not sincerely believe that the transactions were to be closed in the near future.
23. This impression was confirmed by another letter of only two days later, 9 June 2000, from the Undersecretary of State, Mrs. Litak-Zarebska (who also appeared as a witness before this Tribunal), and which described in some more details the remaining procedural steps to come to a signed SPA with PPSC. The letter deserves quoting in full:

" In reference to the dates of executing share purchase agreements of Poznań, Szczecin and Toruń Group sugar plants, I would like to remind you that the procedure in accordance with which a share purchase agreement can be signed with Poznańsko-Pomorska Spółka Cukrowa S.A. is as follows:

- 1. initialling 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 Poznańsko-Pomorska Spółka Cukrowa S.A.;*
- 3. formal review of the initialled agreements and resolutions of the Management Board and the Supervisory Board by the Ministry of State Treasury;*
- 4. approval of the sale of shares by the General Meeting of Shareholders of Poznańsko-Pomorska Spółka Cukrowa S.A.;*
- 5. execution of share purchase agreements by Nordzucker AG and Poznańsko-Pomorska Spółka Cukrowa S.A.*

¹¹ Edh. C51

¹² The Tribunal notes that Szamotuly S.A. is mentioned on the first page, but that the last page, both in the English and the Polish version, refers to Kluczewo S.A. This is probably due to a clerical error when the Kluczewo model, which is identical, was used for the Szamotuly covenant.

I am convinced that with more dynamic efforts of all parties, June 21, 2000 seems to be a realistic date for the execution of those agreements (provided that all previous stages are successfully completed).

As regards the guarantees of performance of the Planter's Package for the Toruń Group sugar plants, let me inform you that the position expressed by the Minister of State Treasury in the letter addressed to Nordzucker AG on June 7, 2000 has not changed. I hope that this issue will be reflected in the agreements initialled by the parties. If within the aforesaid time limit this is not possible, I suggest signing agreements for Poznań and Szczecin Groups (in the agreements for those Groups, all important issues have been agreed upon)."¹³

24. Leaving aside an anomaly in this letter¹⁴, the Tribunal notes that the letter details in five sub-steps the formal steps yet to be accomplished as from 9 June 2000, and that the Undersecretary is optimistic: "*June 21, 2000 seems to be a realistic date for the execution of these agreements (provided that all previous stages are successfully completed)*"¹⁵.
25. The Undersecretary of State testified at the hearing that when she reminded Nordzucker of the subsequent steps, it showed that "in our view, there is very little for us to do"¹⁶ and "at this stage, none of those steps was difficult"¹⁷. The only step which was required from Nordzucker was the first (initialling of the SPAs). This initialling was delayed because no agreement had been reached yet about the terms and conditions of the Toruń Group, but, as the letter of 9 June 2000 shows, the Ministry was prepared to proceed with the initialling of the SPAs for the Poznań and Szczecin Groups if the Toruń SPA could not be agreed soon. It follows from Nordzucker's reply¹⁸, one week later, to the above mentioned letter that it eventually did agree with the Ministry's proposal for Toruń, on 16 June 2000. Strikingly, Nordzucker writes on that date that it hopes to be able to initial the SPAs for three Groups on 21 June 2000, thus itself extending the procedure beyond the date the Ministry had advanced for the execution. The Tribunal notes, incidentally, that both letters, of 7 and 9 June 2000, insist on the performance guarantees of the Planters' Package for Toruń not yet being agreed. This supports the testimony of Mrs. Litak-Zarebska at the hearing that:

"We had the biggest problem of lack of understanding on the part of Nordzucker as to some mandatory contractual provisions, contractual provisions like the security for the performance of obligations, the standard provisions in the agreements. And that took the

¹³ Exh. C52

¹⁴ The letter refers to PPSC as signatory of the SPA's for the Toruń, Poznań and Szczecin Groups, whereas the Toruń Group was the property, not of PPSC, but of MKSC.

¹⁵ Tribunal's underlining

¹⁶ Transcript II, p. 57: 12-13

¹⁷ Transcript II, II, p. 61: 19-20

¹⁸ Exh. C53

*most of our time. If it were not for that, we would have finished that privatisation much earlier*¹⁹.

26. On 30 June 2000, Nordzucker confirms to the Undersecretary that *"on 28 June 2000 in Poznań Nordzucker AG initialled with MKSC S.A. and PPSC S.A. the agreements related to the purchase of shares in the privatized sugar mills: [of the Toruń, Poznań and Szczecin²⁰ Sugar Groups]*²¹. The SPAs were thus initialled by Nordzucker one week after the date of 21 June 2000 which the Undersecretary of State had envisaged for their execution. Thereafter, the course of events shows continued progress for at least two of the three Groups:

- 13 July 2000: GAM PPSC approves SPA Poznań
- 12 August 2000: GAM MKSC approves SPA Toruń
- 28 August 2000: signature SPA Poznań
- 4 September 2000: signature SPA Toruń

27. Thus, the Tribunal comes to the conclusion that until the summer of 2000 the sales procedures followed a normal course, even if some delay was incurred, which can be easily explained by the difficulties to come to an agreement on the terms and conditions of the SPAs. Moreover, there is no evidence that Nordzucker was at that time concerned by the slow progress of the procedure.

(ii) Failure to respond to Nordzucker's requests for information, to inform about reconsidering the privatization process and about the importance of the price increase, and to repeat the second stage

28. By letter of 2 August 2000 Nordzucker inquired about the process for the Szczecin and the Toruń Groups and on 30 August 2000 about the Szczecin and Gdańsk Groups. Nordzucker complains that these letters of 2 and 30 August 2000 were not answered. To the extent the letter of 2 August 2000 inquired about the process for the Szczecin and Toruń Groups and the SPA for the Toruń Group was signed on 4 September 2000, the Tribunal considers that there has been reaction to the letter of 2 August 2000. This is not so for the 30 August 2000 letter with which Nordzucker sent to the State Treasury draft SPAs for the Szczecin and Gdańsk Groups, as well as for further letters, of 25 October 2000, expressing to the

¹⁹ Transcript II, p. 146: 7-13

²⁰ There is no evidence showing why the SPA for the Gdańsk Group was not initialled at the same time as the SPAs for the three other Groups.

²¹ Exh. C54

Undersecretary its concern about the lack of privatization of the two Groups, and of 14 November 2000, sent to both the Undersecretary and the Board President of PPSC concerning the Szczecin Group.

29. The PPSC replied on 17 November 2000 that the privatization documentation had been forwarded to the Minister of the State Treasury²², but the Ministry itself never reacted in writing to any of the letters. Neither the Undersecretary of State nor Mr. Jeznach, who was at the time acting Director of the Privatization and Supervision Department of the Ministry of the State Treasury, could, in the course of their oral testimony, give a valid reason for leaving Nordzucker without an answer, after the encouraging and intense correspondence of the Ministry in June 2000.
30. It is not clear to the Tribunal whether the absence of written reaction from the Ministry to the letters allow to conclude that the Ministry broke all contact with Nordzucker as from October 2000. As the facts mentioned in § 28 suggest, the answer is probably negative. It is not contested that the Parties met on 12 August and 4 September 2000 for the signature of the SPAs for Poznan and Toruń although, no letters posterior to the one of 9 June 2000 have been produced. Moreover, the Tribunal has the testimony of Mrs. Litak-Zarebska which has not been contested, who stated that, although she found it "impolite" to leave the letters unanswered:

"But even if those letters remained unanswered, then I would like to assure you that Mr Galuszynski, the attorney who is present here and who was representing Nordzucker, I think he can confirm that even with myself or other staff members of the department we had something like a hotline with each other. The meetings were frequent, and we discussed various issues about the agreements, et cetera.

(...)Yes, these were phone calls or meetings between the attorney of the investor and myself, or lawyers from the Ministry"²³.

31. Even in the assumption that this statement applies also to the period September – December 2000, and not only to the earlier period, the Tribunal nonetheless finds the failure to respond in writing to the letters more than impolite and wonders whether it may have another cause.
32. The Tribunal has been convinced by the testimony of the two mentioned witnesses and the evidence on file that the mounting political pressure on the Ministry as a result of the protests of the growers in the Szczecin area, caused the Ministry to hesitate to go forward with the sales and to look again at the financial side of the transaction as the Undersecretary of State testified:

²² Exh/ C63

²³ Transcript II, p. 184: 3-6

“ The reason the Ministry of State Treasury postponed the decision on consent to the execution by PPSC of the agreement to sell shares in the Szczecin Group companies was firstly due to the protests focused on the Sugar Plants in this Group of growers²⁴” and

“ But definitely at the Ministry this process [of an audit made after the growers’ protests] had an impact on revisiting, or reviewing again the documentation process, which had to prolong the process”²⁵.

This delay lasted about six months according to Poland’s witnesses²⁶.

33. In a memorandum of 20 September 2000, Mr. Jeznach stated that the price offered for the Gdańsk Group was too low and recommended that the consent to sell the Gdańsk Group to Nordzucker be denied, that a new valuation be prepared and that the price setting phase of the process (the so-called “second stage”) be repeated²⁷. It is also proven that the Undersecretary of State followed these recommendations and ordered a new valuation and repetition of the second stage. Mr. Jeznach testified that he did not act upon these orders because of “*simply a coincidence of unfavourable, of bad events developments*”²⁸.
34. In a second memorandum, dated 3 October 2000, Mr. Jeznach came to the conclusion that also the price offered for the Szczecin Group was too low and advised against its sale – also for reason of the negative impact of the intensification of the sugar beet cultivation on animal breeding, thus causing unemployment in the area – but this time he did not suggest to repeat the second stage²⁹.
35. A handwritten note of the Undersecretary of State on the Polish version of this second memorandum was deciphered with her assistance at the hearing and translated and then explained by her³⁰. It thus was shown that the Undersecretary of State did not agree with Mr. Jeznach’s recommendation of 3 October 2000 to stop the sales procedure for the Szczecin Group, but ordered that a report be prepared by an independent advisor on the price, thus leaving open the possibility that the second stage might be repeated also for Szczecin.
36. During the entire period that Mr. Jeznach prepared the above mentioned memoranda and that the Undersecretary of State acted on them by ordering a new valuation, and/or that the so-called audit was performed, Nordzucker was, as far as the Tribunal can judge from the evidence produced, left in uncertainty about the procedure, although the Ministry was aware that the “revisiting”³¹ of the price was delaying the sales procedure. The Ministry’s

²⁴ RWS 1 §32

²⁵ Transcript II, p. 100: 3-11

²⁶ Transcript II, p. 103: 1-9, III, p. 38: 10-17

²⁷ Exh. R64

²⁸ Transcript II, p. 203: 17

²⁹ Exh. R66

³⁰ Transcript II, p. 175: 15 - p. 180: 3

³¹ Transcript II, p. 100: 8-11

witnesses at the hearing acknowledged at least implicitly that Nordzucker should have been informed because they indicated that they believed the Sugar Holding Companies would inform Nordzucker about the problems which had arisen³². Even in the assumption that the Ministry was not personally responsible to inform Nordzucker, and that the Sugar Holding Companies should have done it, the Tribunal finds it difficult to understand that the Ministry left all Nordzucker's letters from August till November 2000 unanswered. Even if there was a misunderstanding between the Ministry and the Sugar Holding Companies as to whom had to inform Nordzucker of the fact that there were doubts about the adequacy of Nordzucker's price and that a new valuation was being made (or at least ordered to be made or considered to be ordered), the absolute silence of the Ministry from the beginning of October 2000 until December 2000 does not seem compatible with the requirements of fair and equitable treatment of the foreign investor in this privatization process. Neither the belief that the Sugar Holding Companies would inform Nordzucker of the delay in the procedure and the possible reopening of the second stage, nor the administrative lack to follow up the instructions of the Undersecretary of State can explain why she and everybody else, whether or not acting upon her instruction, failed to react to any of Nordzucker's letters. This silence contrasts so starkly with the Ministry's letters of June 2000 that it is hard to believe in an unlucky coincidence. It is hard to see what the excuse could be for leaving three successive letters totally unanswered when they come from an investor with whom the Ministry had been in direct and frequent contact since more than a year and to whom the Ministry had written the letters of 7 and 9 June 2000 which clearly envisaged imminent action and no major problems.

37. The Tribunal, having reviewed the evidence, believes to understand why the Ministry remained silent or possibly even chose to remain silent: clearly, the Ministry was caught between its negotiations with Nordzucker (which were drawing to their end to such an extent that the Undersecretary of State had been able to advance a date for the closing of the transactions), on the one hand, and the political developments, in particular driven by the protest of growers' groups, which made the envisaged sale of the Gdańsk and Szczecin Groups more delicate every day, on the other hand. However, it follows from the testimony of the Undersecretary of State that the Ministry felt confident that, provided the price for the Groups was sufficiently high to put it beyond criticism on the political level, the sale could go forward.
38. Further, this Tribunal finds that, if it was so clear for the Ministry that the correctness of the price was crucial in the given circumstances, the Ministry's inertia is difficult to understand. If the price was too low – whether objectively or politically – the Ministry should have proceeded with the new valuation and, depending on its results, could have decided to repeat the second stage after adopting a resolution refusing consent to the sale. Its total inaction towards Nordzucker in transactions which had proceeded very far and were the subject of

³² RVS 3 §20; Transcript II, p. 117: 15-18 and p. 113: 3-7; Transcript III, p. 23: 7-22

public scrutiny was probably the worst possible course. The Ministry kept Nordzucker "on the line" and made Nordzucker wait at least half a year more.

39. Moreover, as no evidence has been produced that a re-valuation has been made, the Tribunal finds it hard to understand that this (need for a) re-valuation was the reason of the delay. If it is true, as it has been claimed much later by Poland, that consent to the sales was refused because the prices offered by Nordzucker were too low, the Tribunal fails to understand why Poland has not produced the result of these re-valuations.
40. On 7 December 2000, Nordzucker wrote to the new Undersecretary of the State Treasury, Mr Tropilo, and indicated that it wanted to discuss with him the status of the privatization of the Szczecin and Gdańsk Group Sugar plants. This led to a meeting on 18 January 2001 at which not the Undersecretary was present, but Mr. Jeznach. What happened precisely at this meeting has been the subject of long debates between the parties, both before the Polish courts and before this Tribunal.
41. On review of the testimonies about the 18 January 2001 meeting, the Tribunal considers it proven that Mr. Jeznach gave a hint that the price offered by Nordzucker was possibly too low. On both sides, Mr. Jeznach's "hint" was reported as being short. For Mr. Lukas, it was a "20 second remark in two sentences", made when they negotiated another topic and not taken seriously³³. For Mr. Jeznach, the issue was not discussed "for longer than one minute"; in his opinion, "it was only a signal, like delivering the information that the proposed price was not satisfactory to us"; "it could have been at the end of the meeting"³⁴. Mr. Jeznach did not inform Nordzucker that pricing was a crucial issue that may stop the whole process. When this question was put before the witness at the hearing, he answered clearly: "No"³⁵. He was very explicit on this point: "*I was not able to do so. I couldn't do so. As I said yesterday, I could not negotiate pricing conditions; I could only signal, send out the signal because I was not the party to negotiations; neither was the Ministry.*"³⁶ In conclusion, it is common ground between the Parties that Mr. Jeznach on 18 January 2001 did not say explicitly that if the price was not increased the sales could not proceed, and, clearly, the Sugar Holding Companies did neither.
42. There is evidence that the Ministry was uncertain which procedure it could legally follow in order to obtain a higher price for the two Groups: its own formal procedure left no room for price "negotiations" and it felt even that it could not inform Nordzucker about the problem "Because the price was not negotiated"^{37, 38}.

³³ Transcript I, p. 136: 17-21

³⁴ Transcript III, p. 146: 16-21

³⁵ Transcript III, p. 27: 16-21

³⁶ Transcript III, p. 25: 5-11

³⁷ Transcript II, p. 112: 18

³⁸ It is the Tribunal's understanding of the procedure that, had there been several selected bidders, there would have been negotiations with all of them. If Nordzucker was the only bidder, it is not clear whether the Commission could only agree with its price (provided it

43. In the Tribunal's opinion, this explains why - but, again, does not justify that - the Ministry/Mr. Jeznach was not more outspoken, on 18 January 2001 or thereafter, about the fact that the price was too low. As the Undersecretary testified, "*It was a very delicate matter, because of the fact that one had to reach an informal agreement that we will invalidate the second stage of the privatization regarding the price offer and then the investor at the invitation of the sugar company will submit their price offering*"³⁹. On the other hand, the Tribunal is also of the opinion that Mr. Jeznach could hardly insist on the need to increase the price if he did not have the result of a new valuation which would have been an indication of the amount by which the price would at least have to be increased in order to be acceptable.
44. When the Tribunal questioned the Parties at the hearing on this point, it appeared that the sole way for Poland to obtain a higher price than what Nordzucker had offered (other than a voluntary offer of Nordzucker to pay a higher price), consisted in the termination of the current sales procedure, obtaining a new valuation of the shares, determining a new minimum sales price and restarting the entire procedure or at least its second stage. The selected bidders were then to make new offers with prices at least as high as the new minimum sales prices so fixed.
45. This procedure was burdensome and lengthy, though, and would largely have been a sham since there would not have been any other "selected bidders" than Nordzucker as it was expected that it would have been the only interested participant in that renewed procedure⁴⁰. Therefore, if Nordzucker was willing to increase its initial bid price voluntarily, the same result (of a "politically acceptable" price) could be reached much quicker and easier⁴¹.
46. However, the Rules provided that price negotiations between the Commission and each of the bidders who fulfilled the requirements for participating in phase II, had to be closed by a certain date⁴². Thereafter, the Management Board had to choose the buyer and present its decision with full documentation to the GAM. Once that step of the procedure concluded, Nordzucker had not to expect further negotiations. The next step was approval or refusal of consent by the GAM⁴³. Thus, the Tribunal concludes that, since a draft SPA had been initialled for the Szczecin Group, the negotiations had indeed been closed at the level of the

was at least equal to the minimum price or whether it had also the option to negotiate about an increase (even if the minimum price was respected). Whatever the case, there can be no doubt that, if the Commission concluded the negotiations and the bidder was proposed as the "recommended purchaser", its price bid must have been accepted, at least at that level. Thereafter, the GAM could still reject the sale at that price.

Transcript II, p. 112: 21-25

Certainly in the Szczecin procedure, where the only other candidate, Danisco, was not qualified for the second stage. For the Gdańsk Group, not only Nordzucker but also Danisco and Pfeifer & Langen qualified for the second stage, but Danisco did not make a price bid and Pfeifer & Langen made a lower bid than Nordzucker (R55).

The Tribunal leaves in the middle whether a new minimum sales price should in any case have been determined or whether the Ministry could have decided without such objective measure, that the price increase was sufficient for it to be "politically safe" in selling at that price.

Ann. C6-A §13.1 and B §13.1

It is not clear whether in case of a refusal, the total procedure or its second phase had to be restarted or whether direct negotiations could be started again.

Management Board⁴⁴. As Mr. Jeznach explained at the hearing, the sugar companies had no power to re-open the price negotiations. This explains why the Ministry could not legally request Nordzucker to increase the price, as long as it had not first adopted a decision in the GAM to refuse to sell. It could only give a "signal" to Nordzucker that the price was too low – whether objectively, because the initial minimum sales price had in the meantime become too low, or whether politically, if the Ministry had to fend off the opposition against the privatization by showing that a "juicy" price had been obtained for the latest privatized plants – in the hope that Nordzucker would react to it with a voluntary offer to increase the price to a level where the State Treasury could feel confident that it could not be reproached to squander the state property.

47. This could explain why the "signal" of 18 January 2001 to Nordzucker was not stronger and in particular why the two parties have not been able to discuss openly how Nordzucker could contribute, with a price increase or otherwise, to make the transactions favourable enough for Poland so as to silence the opponents of the privatization. It also explains why the Ministry could not present the issue in writing to Nordzucker. If MKSC in a letter sent to Nordzucker the day after the morning of 18 January 2001⁴⁵ asked Nordzucker whether its offer which had been made in response to the invitation to bid of 8 March 2000 was still valid, this is another signal of the hesitation on the seller's side and an invitation to Nordzucker to discuss the offer which, in theory, had lapsed already.
48. Poland has argued that *"If Nordzucker had only been willing to discuss the price with the Ministry of State Treasury, there would have been ample opportunity for Nordzucker to discuss the matter with Mr. Jeznach or other Ministry of the State Treasury representatives"*⁴⁶, suggesting that the sale might then have gone through.
49. The Tribunal has no doubt that the signal given by Mr. Jeznach has been well understood by Nordzucker, even if it has claimed that it did not give it much attention⁴⁷. Mr. Einfeld testified that *"We said, 'No, Mr. Jeznach, we don't want to increase the -- we do not see any possibility to increase the price'"*⁴⁸. That Nordzucker did not misunderstand the message, is also proven by its strong reaction, in its letters of 6 February 2001 to the Management Board Presidents of PPSC and MKSC which were clearly written in the assumption that Nordzucker was entitled to close the deals for the prices it had offered and that the sales procedure left no room for Poland to start price negotiations. Each of these letters to the Management Board Presidents of PPSC and MKSC states that *"the attempt to challenge the economic rules of the transaction by carrying out new valuations of the Companies raises our strongest objection as it materially violates the privatization procedure and the basic principles of civil law (being bound by an accepted offer)"* and the letter to PPSC even

⁴⁴ At least for this Group.

⁴⁵ Exh. C91

⁴⁶ PHMP, §51

⁴⁷ CWS5, §9-12; Transcript I, p. 101: 1

⁴⁸ Transcript I, p. 193:6-8

repeats the message for each Group⁴⁹. This letter also proves that Nordzucker had been informed of the government's suspicion that the prices offered were too low, and of its (plans for) new valuations⁵⁰. The letter also makes it clear that Nordzucker did not want to envisage a price increase because it considered that its price offer had already been accepted and, hence, that there was a binding agreement.

50. However, Nordzucker was mistaken in this respect: the acceptance of the price offer of Nordzucker did not, under the applicable rules, imply that an agreement was concluded. It merely meant that the next step in the procedure could be made *i.e.* that an SPA had to be negotiated. Even if that SPA was thereafter initialled, the agreement still required a formal approval by the GAM of the selling Sugar Holding Company before it was validly concluded.
51. This Tribunal considers that Nordzucker, as a commercially diligent party and negotiator which was moreover assisted by Polish advisers, cannot have ignored, following the 18 January 2001 meeting, that a price increase might facilitate the conclusion of the sale in the difficult political circumstances which had in the meantime arisen and of which Nordzucker was fully aware.
52. While this Tribunal accepts that Nordzucker has learned only at the 18 January 2001 meeting that the Ministry had a concern about the price, it also considers as proven that Nordzucker was quite aware of the political evolution within the Parliament and conscious of the risk that this political evolution could present for the sale to it of the Sugar Groups. Indeed, in its second letter of 6 February 2001, to Mr. Chronowski, the new Minister of the State Treasury, with whom it had a meeting on the same date, Nordzucker confirms that:

"We are aware of the problems that are currently hindering the progress of the privatisation.

During our discussion you emphasised the unclear status of Polski Cukier, property restitution claims affecting fifteen sugar plants and the impact of public opinion.

As regards Polski Cukier and the settlement of the property restitution claims, you stated that an opinion regarding Polski Cukier would be presented in the following six weeks. During the same period of time, the resolution of the property restitution claims should also be clarified.

At the same time, the ongoing discussion between investors and the Ministry of State Treasury regarding the current privatisation should continue.

⁴⁹ Exh. C65 = R69 and Exh. R70

⁵⁰ Mr. Lukas explained at the hearing that the terms used in the letter were designed to pick up the comment on valuations made by Mr. Jeznach at the 18 January 2001 meeting (Transcript I, p. 141: 21-143:8).

We assume that the further course of the Gdańsk and Szczecin group privatisation will be in line with the currently effective regulations, as long as legal security is ensured.

We appreciate your promise to continue discussions concerning the current situation in the above topics.

Should any new problems arise that might inhibit successful completion of the ongoing privatisation, please do not hesitate to contact us as a matter of urgency to reach an understanding.”⁵¹.

53. This letter in this Tribunal’s opinion contradicts strongly the impression which Nordzucker now attempts to give *i.e.* that, as from February 2001 it was left without information by Poland on the privatization problems. Rather, this letter proves that the consistency of Nordzucker’s own behaviour in the privatization process may be questioned: if on 6 February 2001 Nordzucker itself states that there is still “an ongoing discussion between investors and the Ministry of State Treasury regarding the current privatization”, how could it, *bona fide*, sue the Sugar Holding Companies two months later on basis of an agreement which had allegedly been concluded on 18 January 2001?
54. On the other hand, it appears fair to draw the conclusion from the 6 February 2001 letter that the issue of the price, not mentioned in the letter, was not mentioned either at the meeting Nordzucker had with Mr. Chronowski at the same day, as this has been confirmed by one of its participants on Nordzucker’s side, Mr. Einfeld⁵². Mr. Einfeld also told the Tribunal that Mr. Chronowski mentioned that when the actual political debate was over, “we will continue the process of privatization with Nordzucker⁵³”.
55. As no new valuations for the Szczecin and Gdańsk Groups have been produced, the Arbitral Tribunal has investigated what was the price increase needed. The Ministry of the State Treasury did not expect the price to be lower than PLN 2000 per tonne of quota⁵⁴. To meet this price, Nordzucker should have offered PLN 53,884,560 for the Szczecin Group and PLN 65,982,680 for the Gdańsk Group instead of PLN 47,570,200 for the Szczecin Group and PLN 64,056,509 for the Gdańsk Group⁵⁵. Thus the price increase for the two Groups was PLN 8,240,481 or approximately 7.4% of the prices initially offered. Given the relatively small size of this price difference, this Tribunal has difficulty to grasp why Nordzucker – which no doubt was aware of market prices, and has admitted that Mr. Jeznach mentioned the valuation issue at the 18 January 2001 meeting – has allowed its commercial alertness (which should in the given circumstances have prompted it to inquire whether something could be done to match the valuation concerns of the Ministry) to be overtaken by a legal –

⁵¹ Exh. R88

⁵² Transcript I, 198: 13-24

⁵³ Transcript I, 197: 14-16

⁵⁴ RWS, 3 §16

⁵⁵ SoReb, §50

but erroneous – conviction that the agreement had already been concluded and that it was entitled to the transfer of the shares for the price of the initial bid.

56. In the meantime, a new Prime Minister, Mr. Buzek, had been appointed and on 2 March 2001 Nordzucker wrote to him about its concern and uncertainty concerning the privatization of the Gdańsk and Szczecin Groups⁵⁶. A similar letter was also written on the same date to the new Minister of the State Treasury, Mrs. Aldona Kamela-Sowińska, requesting furthermore that dates be fixed to “sign and execute” the SPAs⁵⁷. Following the adoption, on 21 March 2001, of a motion of the Minister of the State Treasury⁵⁸ requesting the Council of Ministers to accept the change in the sugar industry restructuring and privatization strategy and to give its consent to the establishment of the Polish national sugar company, Mr. Jeznach, on 2 April 2001, replied to Nordzucker’s letter of 2 March 2001 that “*the decision concerning the privatization [of the Gdańsk and Szczecin Groups] in the sugar industry will be taken after the Council of Ministers takes a standpoint on changes to the privatization strategy in the sugar industry, taking into account the establishment of the company “Polski Cukier”*”⁵⁹.
57. It is striking that this sentence is exactly the same as the sentence figuring in a letter of a few days earlier, dated “March 2001”, of the Ministry of the State Treasury (signed by Mrs. Dabrowska for the Director of the Department of Supervision and Privatization I) to the Director of the Secretariat of the Prime Minister, but which also said: “*In connection with the Szczecin and Gdańsk Groups, where the investor selection procedure has been completed, I would like to inform you that the analysis of the terms and conditions of the transaction and the sugar plants’ economic situation indicate that there is a need to update the valuation and repeat the price tender*”⁶⁰. The Tribunal cannot explain why Mr. Jeznach in his letter of 2 April 2001 to Nordzucker did not mention the need to update the valuation and repeat the price tender, unless the “March 2001” letter of Mrs. Dabrowska was written prior to the 21 March 2001 motion of the Ministry and Mr Jeznach’s letter took that motion into account, meaning that he knew all too well that his Ministry proposed that the two Groups would not be sold to Nordzucker but go to Polski Cukier.
58. The fact that, as late as March 2001, the Ministry still wrote that “there is a need to update the valuation and repeat the price tender”, although Mr. Jeznach had already reached this conclusion in his memorandum of 20 September 2000 on the Gdańsk Group⁶¹ and Mrs. Litak-Zarebska ordered a re-checking of the price when she received Mr. Jeznach’s memorandum of 3 October 2000 on the Szczecin Group proves at least a negligence on the Ministry’s behalf. If the re-valuation was indeed necessary, it should not have waited more than half a year to do it.

⁵⁶ Exh. R89

⁵⁷ Exh. C66

⁵⁸ Exh. C92

⁵⁹ Exh. R71

⁶⁰ Exh. R73

⁶¹ Exh. R64

59. It could be argued that Poland has been dissuaded from making new valuations by Nordzucker's firm refusal to increase the price (first during the meeting of 18 January 2001, then in its letters to the selling companies of 6 February 2001 and finally by bringing the law suits on 24 and 25 April 2001). In this hypothesis, which the Tribunal is prepared to consider as plausible, it fails to understand why the Ministry, knowing how much Nordzucker wished to acquire the two Groups, never told Nordzucker that its refusal to even consider a price increase necessarily would make the sales impossible. Poland never made Nordzucker understand that its refusal not to increase the price was not a mere part of the negotiation, but an actual deal-breaker. If Poland had given this message to Nordzucker, it could have reproached Nordzucker that it was itself the cause for the sales not being made. Absent transparency of Poland in this respect, it has only to blame itself if, until 1 August 2001, Nordzucker never dreamed of giving notice of the expiration of its bid and withdrawing its offer, but continued to await the consent of the GAMs.

60. It also appears from the letter of Nordzucker of 2 March 2001 to Mr Buzek that in the meantime a problem had arisen between Nordzucker and the Ministry of the State Treasury in relation to the issue of new shares for the Toruń Group sugar plants in relation to the capital increase, which may also have contributed to the *de facto* impossibility for the Parties to cooperate on a solution for the price problem of the Gdańsk and Szczecin Groups. This impossibility became probably definitive when, on 24 and 25 April 2001, Nordzucker sued respectively MKSC and PPSC before the Polish courts in order to have these Sugar Holding Companies ordered to execute the SPAs and hand over the shares in Gdańsk and Szczecin Groups.

61. The Arbitral Tribunal draws from the evidence offered to it the conviction that Nordzucker's strong reaction to the hint about the price increase of 18 January 2001 has been understood by Poland as a refusal of Nordzucker to even consider an increase of the price and has estranged the parties (later possibly also enhanced by the discussions around the Toruń capital increase) which made a further concerted action to finalize the sales impossible. This Tribunal is convinced that, if Nordzucker had had a commercial eagerness and reacted less negatively to the hint of Mr. Jeznach, and if the parties had continued to talk to each other instead of going to court, a solution might have been found. Nordzucker still had contact with the new Ministry of the State Treasury and the Prime Minister but if it was too delicate for the officials of the State Treasury to do more than give a signal about the price being too low, it was definitely beyond these Ministers to suggest themselves to Nordzucker that only money could meet the mounting pressure of the political opposition against the sale. The Tribunal's conviction is also based on the finding that notwithstanding the decision of the Council of Ministers of 13 June 2001 to create Polski Cukier, and the adoption of the act creating Polski Cukier on 21 June 2001, the Kalisko-Koninska Group has been sold, on 13 July 2001, because "the investor assumed on itself some additional obligations, like the guarantees that were provided by the companies and some others, and that was agreed

between the sugar company itself and the investor⁶². However, the Tribunal notes that the Kalisko-Koninska Group had, as from 21 March 2001, been singled out as a group of which the privatization process had to be completed, irrespective of the creation of Polski Cukier⁶³.

62. Even if the Parties' respective behaviour is understandable (Poland finding it too delicate to simply request Nordzucker to increase the price; and Nordzucker considering that the price was accepted already), the Tribunal considers that the Ministry was negligent because it allowed a delicate situation to drag on and it took no action to get out of it within a reasonable time, one way or another, whether by adopting, much earlier, a decision in the GAM not to sell, or by clearly informing Nordzucker that it had to "improve" its bid.
63. Mr. Jeznach, who was one of the main witnesses of Poland, seems to have played a steering role in the events: he wrote the two memoranda of 20 September and 3 October 2000 stating that the price was too low (although his basis for his findings was never very clear)⁶⁴; he was aware that he had to take action in accordance with the Undersecretary's orders on basis of these memoranda and failed to inform Nordzucker and the Sugar Holding Companies thereof⁶⁵ and could not recall whether he had ever taken the action ordered by the Undersecretary⁶⁶; he disagreed with the Undersecretary's decision to do a re-valuation⁶⁷; he only gave a weak signal to Nordzucker in the meeting of 18 January 2001; he did not inform Nordzucker that it was not possible for the Minister to consent to the execution of the agreements particularly in view of the share sale price which was too low, but expected the relevant sugar companies to do so without admittedly checking that that information was correctly given to Nordzucker⁶⁸; and he did not write to Nordzucker on 2 April 2001 what he had known before, i.e. that there was "a need to update the valuation and repeat the price tender". He represented the continuity in the Ministry throughout the sales procedure and was instrumental in letting a year go by in which the Parties were alienated from the common goal they had in the summer of 2000.
64. On basis of the above, this Arbitral Tribunal finds that Poland failed to respond as from October 2000 till December 2000 to Nordzucker's requests for information on the progress of the privatization procedure. The delay in answering (or the failure to answer to) Nordzucker's written requests in the fall of 2000 can be understood by the need the Treasury felt to proceed with a re-valuation of the shares because of the changed economic circumstances since the first valuations had been made and the minimum sales prices had been fixed. The Tribunal has comprehension for the Ministry's hesitance about how to realize its wish to sell the Groups for a correct price in view of the increase of market price, notwithstanding the mounting political pressure. These two evolutions, the increasing

⁶² Transcript III p. 196: 4-7

⁶³ Exh.C92, p.3

⁶⁴ Transcript II, p. 197: 1-p. 199: 14

⁶⁵ Transcript II, p. 201: 22 - p. 204: 7

⁶⁶ Transcript II, p. 209: 2-18

⁶⁷ Transcript III, p. 201: 1-2

⁶⁸ RWS 3: 520

market price and the political opposition, were also known to Nordzucker, as they were known by everybody concerned with the sugar industry. This may also explain why Nordzucker did not send any reminders or actually complain when it did not receive answers to its letters.

65. As from January 2001, the Tribunal's assessment is different. The communications (both oral and written) from the Ministry to Nordzucker, taken as a whole, gave Nordzucker reason to believe that the sales remained possible notwithstanding the turning of the political tide. Nordzucker certainly had enough reason - also without receiving information from the Ministry - to be concerned, because it knew what happened on the political scene. However, the messages it received (e.g. in its meeting with Mr. Chronowski on 6 February 2001) were overall reassuring and hence, it continued to wait. The Ministry, on its side, did not take a decision in the GAMS refusing to sell to Nordzucker, or alternatively, decide to restart the (second phase of the) procedure or request Nordzucker to increase its price "informally" after making it clearly understood that the sale would otherwise not go through.

By taking no action at all, but letting Nordzucker wait further and allowing the turning political tide to grow stronger, Poland failed in its duty to manage the sales procedure diligently and fairly⁶⁹ and to finalize it within a reasonable time.

(iii) Failure to inform and consult with Nordzucker about the creation and composition of Polski Cukier

66. As regards the alleged failure to inform and consult with Nordzucker about the creation and composition of Polski Cukier, this Tribunal is of the opinion that Nordzucker has shown that it was closely following political developments in Poland at the time and that, also with the assistance of its Polish counsel, it was or could have been adequately informed of the creation of Polski Cukier.
67. When the Polish government was confronted in March 2000 with the plans for the creation of Polski Cukier, it clearly intended them not to interfere with the ongoing privatizations: "*It is considered to form a new company i.e. Polski Cukier, based on 16 sugar plants ... The said sugar plants would be financed, inter alia, from the funds obtained from sales of shares in other sugar plants in the course of implementing the regional restructuring concept, carried out at present*"⁷⁰. In other words, the privatizations which had been launched already were indispensable to generate the funds which were needed for investments in the Sugar Plants which were not earmarked for privatization.

⁶⁹ In particular by adopting itself a motion to the council of Ministers on 21 March 2001 which formalized its decision to contribute the Groups to Polski Cukier, its attitude towards Nordzucker became inconsistent because it left the candidate purchaser simultaneously in the opinion that the sale would still be possible.

⁷⁰ Announcement of the Council of Ministers of 2 March 2000 (Exh. C87).

68. Mrs. Litak-Zarebska who was Undersecretary of the State Treasury until December 2000 testified that:

“Throughout the time that I was responsible for the sugar industry, we believed that Polski Cukier (if such company were to be set up) should be created from 16 sugar plants owned by the Poznańsko-Pomorska, Mazowiecko-Kujawska and Lubelsko-Malopolska companies, which were not included in the regional restructuring.

[...]

Thus it was not the government's intention to block the pending privatization process, as the company Polski Cukier was to be set up parallel to these processes.

[...]

As far as I know, Nordzucker is accusing the Ministry of not informing it of potential political obstacles to the successful closing of the sale processes that were already underway. In view of the fact that throughout this time I took the stance, supported by the Minister, that the creation of the concern could not in any way affect the talks held with potential investors, in our view there was no reasons to inform them.

In addition, during the time that I was responsible for the privatization of the sugar sector, the process to sell Nordzucker shares in the Gdańsk and Szczecin Group was never at any time held up by the work underway in the Sejm to adopt the act obliging the government to set up Polski Cukier.”

69. That this testimony can carry its full weight is confirmed by Mr. Lukas: *“My feeling is that Mrs. Litak-Zarebska was always fighting against this Polski Cukier approach, and she supported us and told us: don't be worried about that, it has no effect on you”*⁷¹.
70. In December 2000, Mrs. Litak-Zarebska was succeeded by Mr. Jacek Tropilo who failed to meet with Nordzucker on 18 January 2001 but sent Mr. Jeznach who gave the price “hint” in line with his memoranda of 20 September and 3 October 2000. There came also a new Minister of the State Treasury and apparently also a new policy in relation to the sugar industry.
71. In his Motion of 21 March 2001 “regarding the adoption of changes in the strategy of the sugar industry privatization”, the Minister of the State Treasury proposed to the Council of Ministers to agree that instead of 16 sugar plants and three Sugar Holding Companies, also “all sugar plants for which the privatization process has not been completed yet” be absorbed by Polski Cukier, because “it will be the most advantageous for the newly established entity

⁷¹ Transcript I, p. 139: 10-18

to concentrate as many sugar plants in that entity as possible, especially those whose economic and financial condition is favourable and whose technological potential is high"⁷². In particular the Minister recommended "the option of choosing 28 sugar plants", which 28 plants included, according to Mr. Jeznach's witness statement "the sugar plants making up the Gdańsk and Szczecin Groups"⁷³.

72. Following this recommendation, the letter of Mr. Jeznach of 2 April 2001 informed Nordzucker that "*the decision concerning the privatization of the [Gdańsk and Szczecin] sugar plants will be taken after the Council of Ministers takes a standpoint on changes to the privatization strategy in the sugar industry, taking into account the establishment of the company "Polski Cukier"*".

73. Therefore, Nordzucker was aware of the risk that the two groups it was waiting to buy might shift to Polski Cukier. Indeed, Mr. Lukas replied at the hearing to a question why he brought the law suits against the two Sugar Holding Companies (on 24 and 25 April 2001):

*"The reason was the establishment of Polski Cukier at this time, and we have the feeling that the Szczecin group and the Gdańsk group will be shifted to Polski Cukier and we wanted to protect our interests at this time, so we wanted to put our hands on these shares so that they cannot be contributed to Polski Cukier. That was the reason"*⁷⁴.

74. Having reviewed all the evidence produced, the Tribunal has the distinct impression that the Ministry of the State Treasury (or at least certain officials) at the latest in the winter of 2000/2001, abandoned its intention to sell the two Groups to Nordzucker, but failed to inform Nordzucker thereof (actually continued to feed its hope) so that the political alternative could be put in place first before dismissing Nordzucker.

75. The statement, in Poland's post hearing memorial, that "*It follows that after [.....]18 January 2001 [...]6 February 2001, an internal decision was reached within the Ministry to refuse to approve the sale of the Gdańsk and Szczecin Groups to Nordzucker due to the fact that the price was too low"*⁷⁵ no doubt intends to convince the Tribunal that the price was indeed the reason of the ultimate refusal. However, in this Tribunal's opinion, the statement is much more important as evidence that the decision of the GAMs not to consent to the sales could and should have been taken almost 6 months earlier than 1 August 2001 or, at least that the Ministry could have informed Nordzucker earlier of its intention to refuse consent at a later GAM. Hence, the sales procedure could have been closed – albeit without success – much earlier.

⁷² Exh C92

⁷³ RWS3, §24

⁷⁴ Transcript I, p. 82: 14-20

⁷⁵ PHMP §176

76. Certainly if Poland's statement that "*the adoption of the 2001 Act had no impact on Poland's decision to refuse to sell the Gdańsk and Szczecin Groups to Nordzucker*"⁷⁶ is correct, the Tribunal sees no good reason why it waited so long to decide to refuse to sell. In that case, Poland did not deal fairly with its "negotiation partner". And if that statement is accurate, why did the GAM of PPSC, on 1 August 2001, state in its decision that the sale could not go through because the newly created Polski Cukier was to absorb the two Groups targeted by Nordzucker? While this Tribunal acknowledges that the primary reason was the political opposition, it is equally convinced that a higher price would have allowed the parties to agree and that the low price was therefore a closely related reason.
77. This Tribunal therefore finds that Poland did not act equitably and fairly when, knowing since early 2001 what was most likely going to happen with the two Groups (it recommended this course), it left Nordzucker without timely and sufficient information and did not inform it of the crucial importance which, it now claims, the price had. Moreover, Poland did not conclude the sales procedure but left it hanging (presumably as a fall-back option should something go wrong with the creation of Polski Cukier). This was not fair to Nordzucker.

(iv) Failure to communicate about the reason of the refusal of consent

78. The decision of the GAM of PPSC of 1 August 2001 mentions as reason for its refusal to consent to the sale of the Szczecin and the Gdańsk Groups the fact that the newly created Polski Cukier would also encompass these Groups⁷⁷. The letter of the (new) Undersecretary of State, Mr. Laszkiewicz, of the same date, informing Nordzucker of the refusal, gave as additional reason that there were "formal and legal issues related to the procedure and documentation concerning the selection of an investor"⁷⁸. Later, and especially in this arbitration procedure, Nordzucker's refusal to increase its price, has primarily been invoked as reason by Poland.
79. As regards the formal and legal issues related to the procedure and documentation for the sale, this reason must be considered simply inaccurate in view of the assurance given by Mr. Jeznach at the 18 January 2001 meeting, that "*the agreement was approved in formal and legal terms*"⁷⁹ and of the total absence of any evidence on further negotiation between the Parties about the terms of the SPAs (and even their price) since August 2000. As much as this Tribunal believes that Mr. Jeznach gave a hint at the 18 January 2001 meeting about the price being too low, it also accepts as a fact that Mr. Jeznach also made this statement.

⁷⁶ PHMP §32

⁷⁷ Exh. C70

⁷⁸ Exh. C71

⁷⁹ Oral testimony of Mr. Jeznach before the Toruń Court on 10 December 2001 (Exh. C96).

80. In relation to Nordzucker's refusal to increase its price, the Tribunal has indicated above that, while a price increase voluntarily proposed by Nordzucker, in 2000 or early 2001, might indeed have prevented that the sale was postponed so much as to become entirely impossible in the new political context, such price increase has not been clearly requested by the Ministry or the selling companies and therefore cannot serve as a proper reason justifying the refusal.
81. In any case, it is a fact that whatever price Nordzucker would have offered after the taking effect of the Polski Cukier Act of 21 June 2001, the sale could no longer take place because it had been decided that the sugar plants concerned had to be merged with others in Polski Cukier⁸⁰. That presumably also explains why no correct and complete information on the situation was given to Nordzucker until the Privatization Act had actually been changed and Polski Cukier created. This also confirms that this political reason was the primary reason. If the other two reasons were true reasons, the GAMs could have taken a decision to refuse the sale for either of these reasons at the latest after 18 January 2001 but presumably much earlier since between Mr. Jeznach's memoranda of 20 September and 3 October 2000 not much happened either with regard to price or, as far as the file shows, with regard to formal documentation.
82. The Tribunal acknowledges that Nordzucker freely took part in the privatization proceedings governed by the Rules under which the consent of the Ministry of the State Treasure in the sellers' GAMs was a formal requirement for an agreement to exist, and under which the Ministry could give or refuse its consent with discretion and without having to give reasons.
83. Therefore, this Tribunal considers that Poland has not breached its duties under article 2 (1) third sentence of the BIT in relation to giving the reasons for its decision to refuse to sell, once it was taken, but that it lacked transparency in its communications during the negotiations, certainly from 18 January 2001 on, about the reasons which were going to lead to the negative decision.
84. This Arbitral Tribunal finds that the lack of information regarding the actual reasons of its possible refusal of consent, in combination with the lack of open and frank communication by the Ministry in the period October 2000 – March 2001 about what was upholding the sales constitutes a lack of transparency which Poland was under the BIT obliged to show in its dealings with a prospective investor who had completed the entire sales procedure and who was waiting for the other party to agree or at least tell him clearly what he had to do when a "hint" proved insufficient to push him into action.
85. For completeness' and clarity's sake, the Tribunal insists on the fact that the reasons mentioned or not mentioned, true or false, relate only to the transparency of the process, but

⁸⁰ In this respect, the sale of Kalisko-Koninska on 13 July 2001 proves that a sale was still possible after the adoption of the Act, provided it took place before the Act took effect. Moreover, an explicit exception had been provided for this Group (Exh. C92)

not to the validity or legality of the decision of the Ministry not to consent in the GAM to the sale. The Ministry was under the applicable rules free not to consent, without even having to give reasons.

b. Respect of Nordzucker's legitimate expectations

86. "Nordzucker believed that if it was selected as the winning bidder, and subsequently complied with the Rules, the process would be completed by the State"⁸¹.
87. The Tribunal, upon review of the evidence available, comes to the conclusion that this expectation of Nordzucker was not reasonable and legitimate. The Rules were clear that being the winning bidder only meant that it could engage in negotiations, also on the price⁸², and that upon closing of the price negotiations, the Management Board had to present its decision to the GAM which had to approve it. Mrs. Litak-Zarebska, in her letter of 9 June 2000, insisted explicitly on the five procedural steps still to be accomplished at that time⁸³. Consequently, being the winning bidder was no guarantee for becoming the purchaser. The only reasonable expectation was that there would be negotiations, both on the various packages, and possibly even on the price (whether it was equal to or exceeded the minimum price set in the invitation to bid).
88. Furthermore, the reasonableness of Nordzucker's expectations has to be tested in relation to the circumstances and context. Nordzucker was or must have been aware of the threat that a national sugar company might be created and that the groups it targeted might also be interesting for that new entity. In the political context of Poland at the time, Nordzucker should have been aware that political opposition could make the privatization difficult if not impossible and it was or must have been aware that this political situation could be a reason why the consent of the Ministry in the GAM of the Sugar Holding Companies might be withheld. Even if it had received assurances from Mrs. Litak-Zarebska that the creation of Polski Cukier would not impact on the sales procedure, the last of these dated from 23 October 2000 when she confirmed in an interview that the privatizations started should continue⁸⁴. Thereafter, and in particular after 18 January 2001, Nordzucker had no reason to continue to be confident in the course of the sales procedure. Mr. Jeznach's statement that from a legal and formal point of view the documentation raised no more problems, was counterbalanced by his hint that there was a price problem. If Nordzucker only took hope from that meeting and no concern, it did so at its own risk. Besides, its letters to the Sugar Holding Companies of 6 February 2001 confirm that it came out of that meeting with a concern. If Nordzucker wrote on 6 February 2001 to the Ministry of State Treasury that it

⁸¹ PHMN §95

⁸² see e.g. Exh. C6-A §12

⁸³ see § [23] above

⁸⁴ Exh C80-H

was "aware of the problems that are currently hindering the process of the privatization" and that the Minister had "emphasised the unclear status of Polski Cukier", but that Nordzucker nonetheless assumed "that the further course of the Gdańsk and Szczecin group privatization will be in line with the currently effective regulations, as long as legal security is ensured"⁸⁵, it expressed an expectation which it created at its own risk. Its request that "Should any new problems arise that might inhibit successful completion of the ongoing privatization, please do not hesitate to contact us as a matter of urgency to reach an understanding" was largely undercut by its simultaneous letters to the presidents of the Sugar Holding Companies that it would not accept a challenge of the economic basis of the transaction and was *de facto* withdrawn in April when it sued the Sugar Holding Companies on the basis that the sales were concluded at the prices offered.

89. Having followed – through its Polish advisors – the political scene relating to the privatization of the sugar industry, Nordzucker in any case could not reasonably expect that the sugar industry privatization process could not change substantially. Certainly with the changes of Undersecretary in charge and Ministry of the State Treasury, as well as of the Prime Minister, at the end of 2000 and the beginning of 2001, a turnaround could not be excluded. This probably explains why Nordzucker wrote to Mr. Tropilo in December 2000, and to the new State Treasury Minister and to the Prime Minister, in the spring of 2001.
90. The Tribunal understands that Nordzucker has been disappointed by the course of matters, but it does not agree that the expectations which have not been fulfilled were reasonable and legitimate, given the political protests against the privatisation since 1999 which grew stronger thereafter and were well publicized, and given the Rules which made it clear that the sales procedure would be closed only upon the Minister's consent in the GAM.

c. Arbitrary decisions of Poland based on political and nationalistic reasons

91. This Tribunal does not agree that the decisions of Poland have been arbitrary. It is not because the decisions were based on political reasons that they are arbitrary. And the political change has not been abrupt either. There is also no evidence in this case that the decision has been inspired by nationalistic reasons. The protests of the growers who would rather themselves become shareholders of the plants than having the plants sold to private investors, was not as such nationalistic. Even if one of the members in the Parliament has used nationalistic language at one time, the Respondent cannot be held responsible therefore. Nordzucker's conclusion that Mr. Jeznach's proposal in the fall of 2000 to discontinue the privatization process was also based on "the foreign nationality of the buyer" is not justified: Mr. Jeznach referred to a "danger on the part of large companies"⁸⁶ which were found to

⁸⁵ Exh. R88

⁸⁶ Exh. R66

cause an intensification of specialized crop production to the disadvantage of animal breeding. If Mr. Jeznach referred in this context to "foreign company" that was unavoidable as only Nordzucker was in the running for these groups.

d. Bad faith in the negotiations

92. The Tribunal has found no evidence of bad faith of Poland in the negotiations. Poland has been in a very difficult situation and the Ministry has been obliged to manoeuvre between growing political opposition on one side and its own wish to sell the Groups and conviction that this was the better solution for the Polish sugar industry (which existed at least until December 2000). That the balance between these two facts became an imbalance as from 18 January 2001 and if the Ministry, as a result of Nordzucker's refusal to consider a price increase, and its bringing suit against the sellers, started to abandon the idea of selling to Nordzucker, is not a matter of bad faith but a natural - even if avoidable if either party had been a bit more coming forward - phenomenon between negotiating parties.
93. Nordzucker was not a powerless party in the negotiations and was repeatedly in a position to abandon the deal had it wished so. Indeed, after it was selected as winning bidder, the SPAs still had to be negotiated and the file shows that negotiations were fierce and time consuming (cfr. Toruń SPA). The time schedule mentioned in the Regulation and in the Rules for Selecting the Buyer of the Shares, has been exceeded. In reply to a question of 19 January 2001 of one of the selling Sugar Holding Companies, Nordzucker declined to withdraw its offer and confirmed its will to conclude the transaction. The Tribunal thus finds that Nordzucker, fully aware of the protraction of the procedure and of the reasons therefore, not only wanted to make the purchase, but also make it at the price initially offered and in terms and conditions which it negotiated as best as it could. Nordzucker was of the opinion that it had a strong legal case and that Poland was obliged to conclude the transaction with it for the initial price, thereby neglecting the delicate balancing act which negotiations per definition are and running the risk that its counterpart might be overtaken by the events and decide to terminate the negotiations if it believed that they were leading nowhere given the fixed position of Nordzucker.
94. The Tribunal finds that each of the Parties has defended its interests in the sales procedure, which has led each of them to not being fully transparent in their dealings with the other and making statements in this arbitration which were not always consistent with each other or with the documents at the disposal of the Tribunal. The Tribunal found no evidence of bad faith, however.

2.4 Conclusion

95. The Tribunal concludes that, starting from January 2001, Poland has failed to deal fairly and equitably with Nordzucker by not communicating transparently about the reasons of the slow down of the procedure as from October 2000 on, about its alleged internal decision that the price offered by Nordzucker had become too low to make the sale and about its decision to merge the two Groups with Polski Cukier. In this way, it has caused Nordzucker a set-back of at least half a year for alternative investment plans and costs for the useless follow-up of the process and the situation in respect of the Szczecin and Gdańsk Groups.

3. COSTS

96. 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.

4. DECISION

For the above stated reasons,

The Tribunal decides:

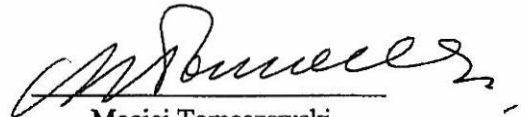
1. That Poland breached its duty under article 2 (1) third sentence of the Treaty concerning the encouragement and reciprocal protection of investments signed on 10 November 1989 between Germany and Poland, as amended by the Protocol of 14 May 2003, by failing to finalize the sales procedure within a reasonable time and uselessly protracting it, also by its lack to communicate transparently with the candidate investor during the last period of the pre-contractual phase of a sales procedure of the Gdańsk and Szczecin Sugar Groups.
2. That the damages caused by this failure will be dealt with in a separate future award after the Parties have been given an opportunity to express themselves on this issue.

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.

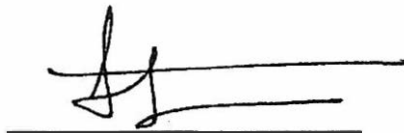
Brussels, 28 January 2009



Andreas Bucher
Co-arbitrator



Maciej Tomaszewski
Co-arbitrator



Vera Van Houtte
Chairman

