Dr habil.Tadeusz Szurski

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

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

Votum separatum
to the Final Award of October 16, 1995

The undersigned arbitrator, hereinafter called Arbitrator , refers in this votum separatum to his dissenting opinion to the Interim Award of August 17, 1994 , which was mainly based on the Arbitrator's disagreement that the "measures" faced by the SPI on July 7,1991 and afterwards , could be treated as measures equivalent in their effect to expropriation or nationalization and that the Arbitral Tribunal had jurisdiction to decide disputes connected with those "measures".

In the present votum separartum the Arbitrator should like to explain that he also disagrees with the confirmation of Arbitral Tribunal's jurisdiction in the Final Award , even if the "measures" faced by the SPI , as established in the arbitration proceedings,could have been classified as measures equivalent to expropriation or nationalization .That is why the Arbitrator limits his votum soparatum to the question of jurisdiction of the Arbitral Tribunal to award any compensation to the Claimant and ,consequently refrains from commenting on various conclusions contained in the Final Award ,not shared by him , except for those relevant for jurisdiction.

The Arbitrators position can be summarized as follows :

1.- The conclusions expressed under part G of the Final Award and particularly in item 72 , which in their substance seem to be the main legal arguments for accepting Arbitral Tribunal's competence to render the Final

Award, are -in the opinion of the Arbitrator- too general in order to constitute the legal ground for interpreting the German- Polish Investment Protection Treaty of November 10, 1989 in a way permitting acceptance of the jurisdiction of the Arbitral Tribunal to award in favour of the Claimant any compensation whatsoever . In particular a general statement in the Final Award that the Arbitral Tribunal does not see "a requirement in the Treaty " that "Saar Papier could bring an action before the Arbitral Tribunal only once the legal remedies in the host country were exhausted" does not take into account the meaning of the explicit provision of Art. 4.2 of the Treaty that

"the legality of expropriation, nationalization or measures equivalent in their effect as well as the amount of compensation is subject to examination in the ordinary court proceedings"

(The Arbitrator quotes here the exact translation of the Polish text of the Treaty , which according to the statement under Art.14 of the Treaty has the same binding force as the "German" text.)

In the Arbitrator's opinion, irrespective of the fact that according to Art.10 of the Treaty , disputes as to the interpretation and application of the Treaty (which undoubtedly relates also to the intention underlying particular provisions) should be decided on the intergovernemental level , such interpretation lacking the Arbitral Tribunal is bound by wordings of each provision of the Treaty , the wording of the above mentioned provision including .

2.- The Final Award, while pointing out to the six months "cooling down penod" established in Art.11.2 evidently disregards the fact that in the same Art.11.2 explicit reference is made only to such disputes relating to matters dealt with in Art.4.2 , the legality of which were subjected to examination in the ordinary court proceedings in the host state.

As it explicitly arises from Article 4.2 of the Treaty , examination of legality in the ordinary court proceedings is rerquired as regards " measures equivalent in their effect to expropriation and nationalization" and as regards " the amount of compensation established in connection with such measures.

That is why , in the Arbitrator's opinion , according to the Treaty no dispute between a foreign investor and the host state relating to " measures equivalent to expropriation or nationalization" can be settled by arbitration on the ground of Art.11 2 of the Treaty unless the legality of such measures have been subjected to examination in the ordinary state court proceedings in the host country.

The same relates to disputes concerning the amount of compensation connected therewith.

Nowhere in the Treaty there can be found a ground for other interpretation of its provisions . On the other hand it clearly arises from the outcome of the arbitration proceedings, measures alledged to be in their effect "equivalent to expropriation or nationalization" were not subjected to examination with respect to their legality in the ordinary courts proceedings.

3.- Thus , in the Arbitrator's opinion , only in a case when the legality of the customs office decision on prohibition of importation of makulatura (or of any other measures claimed by Saar Papier Vertriebs to be "equivalent to expropriation or nationalization") had been examined by the Polish Administrative Court and a possible dispute re. the amount of due compensation had not been amicably settled within 6 months , the Saar Papier Vertriebs would be authorized by the Treaty to refer the dispute to arbitration and in such a case only , the Arbitral Tribunal would have the power to award compensation on the ground of the jurisdiction based directly on the Treaty.

4.- While sharing the principle of good faith reliance protection expressed in the Final Award , the Arbitrator has serious doubts whether that principle can be invoked as argument to excuse SPI as a Polish legal entity (a GmbH created according to the Polish law and registered as such in the Polish registry of companies) from using proper mechanizm established in the Polish legal system to "fight" encountered administrative difficulties and measures.
Such mechanizm is clearly established in the Polish law and , in the opinion of the Arbitrator , if folowed by the SPI, the legality of the customs office decision of July 7, 1991 and the question as to whether makulatura had been lawfully qualified by the Polish offices as "waists" , prohibited for importation under the existing law , would have been clarified quickly (with all its further legal consequences related with such qualification).

5.- That is why the Arbitrator cannot share a general impression which may be drown from the arguments and conclusions contained in the Final Award and summarised in item 76 by the statement "justice delayed is justice denied".

There is no substantiation in the Final Award for any allegation that the SPI was deprived of the right to use the normal administrative procedure provided for in the Polish Law in order to reaching promptly (one instance only) the Supreme Administrative Court's decision on the legality of measures undertaken by the customs administration , alledged to be in their consequences equivalent to expropriation or nationalization.

Instead , the Final Award quotes as its justification various difficulties the SPI found at undertaking other than legally established steps in order to change the decision of the customs office , which the SPI found unjustified. The Arbitrator represents the point of view that the Treaty does not aim at excusing foreign investors' legal entities , created in a host country , from complying with the host countries legal mechanizms. Consequently , in the Arbitrator's opinion the references in the Final Award to the remedies other than legally established (such as inquiries with the Polish Embassy ,

unsuccessful interventions with the Ministry of Environement Protection ,etc) by the Claimant's Polish Subsidiary (the SPI) or the Clainmant itself,can hardly be quoted as measures equivalent to expropriation for the purpose of establishing jurisdiction of the Arbitral Tribunal based on the Treaty. Even if based on the lack of orientation in the existing legal system,such remedies could not overrule the universally accepted principle that "ignorantia iuris nocet"..

Beglaubigt:

Rechtsanwalt