V J. , S C LLC, AND A I P LLC

v.

REPUBLIC OF POLAND

ICSID Case No. ARB(AF)/11/3

PARTIAL DISSENTING OPINION

PROFESSOR FRANCISCO ORREGO VICUÑA

1. I very much regret not to be able to be in agreement with my distinguished colleagues in the Tribunal in respect of some aspects of the Award, although I can share its conclusions on specific points.

2. There is in this case a situation in which a significant investment has been totally lost. While there are some reasons for it relating to managerial and business difficulties, these do not account for the full array of factors intervening in this result. There are, in my view, other factors that have had a chain effect on the failure of the business undertaken, prominent among which are the tax questions that are at the heart of the difficulties noted. The aggregation of such factors led to the restriction of bank financing and ended up in the loss of the investment, among other consequences.

3. I do agree with the Award in that in this case there has been no expropriation, at least in a technical sense, but this does not mean that the policies pursued by governmental authorities are entirely separate from the end result noted. To that extent, I believe that a measure of liability should have been found.

4. The Treaty governing the investment in the instant case is a general treaty on business and economic relations between Poland and the United States − the fundamental principle of which is the fair and equitable treatment accorded to investments and related matters. Paragraph 6 of the Preamble proclaims fair and equitable treatment as the essential element in the treatment of foreign investments, an overarching guarantee that needs to be taken into account in the interpretation of all of the Treaty provisions.

5. In addition, the parties have specifically undertaken in Article II(6) the treatment of investments in accordance with fair and equitable treatment, full protection and security and non-impairment with particular reference to the adoption of discriminatory and arbitrary measures. These guarantees are also extended under Article III to business

facilitation, including effective means for asserting claims and enforcing rights under agreements, just as they are also present in respect of transfers and other business transactions under Article V, expropriation under Article VII and prominently in respect of taxation under Article VI(1). It must also be considered that because the tax proceedings in this case mainly concerned questions arising from the transfer of funds, the fair and equitable treatment envisaged in Article V is not only related to convertibility but also to a broad range of business transactions.

6. The specific provisions concerning *"matters of taxation"* must accordingly be interpreted in light of this overall framework of guarantees. Article VI(1) deals first with tax policies, in respect of which again the essential guarantee is that of fair and equitable treatment, applicable not only to investments but equally to commercial activity. It is in this matter that this Arbitrator has an important difference of views with the Award. In the opinion of this Arbitrator, tax policies were involved in this case since the transfers made by the Claimants were in accordance with the terms of the regulations governing this matter at the time that the investment was made and for several years thereafter until they were replaced by rules originating in OECD recommendations, which are by definition recommendations of policy. A government is certainly entitled to change its policies, but at the same time it must guarantee the rights that have been extended to the investor, which in the instant case would mean at the very least a process of transition from one regime to the next and the non-retroactive enforcement of such new policies. This would have certainly avoided compulsory tax proceedings and indictments, just as it would have had no direct effect on the business relations of the affected company, facilitating the adaptation to a new regime under clear instructions and defined periods, all of it resulting in the observance due to fair and equitable treatment.

7. With all due respect to the Polish authorities and a legal system based on the rule of law, which I greatly admire in many respects, this was regrettably not the case. Tax proceedings were lengthy, cumbersome, occasionally contradictory, and in more than one aspect failed to observe the standards of due process. Particularly opened to criticism was the question of submission of evidence. The Claimants produced in some cases defective evidence in connection with the new requirements put into effect, but this could have been corrected if a transition had been clearly provided for. The end result of criminal proceedings being instituted against the Claimants' executives was certainly an aggravating factor in respect of the appropriate observance of fair and equitable treatment.

8. Article VI(2) provides for the exclusion of *"matters of taxation"* from the treaty unless relating to expropriation, transfers and the observance and enforcement of an investment agreement or authorization. This Dissenting Opinion also touches upon several of these matters. As noted, it is agreed that no expropriation has intervened in this case, but this

fact does not exclude the applicable overall guarantee of fair and equitable treatment which is meant to operate independently of expropriation and in fact many times as an alternative to the latter. As also noted, the broad meaning of transfers in the treaty would amply justify the non-exclusion of matters of taxation in their respect. Thirdly, the fact that the investment was done in the context of the privatization of the business undertaken by the government, while not labeled *"investment agreement"* or *"authorization*" it is just that, and the different use of terms does not alter the legal quality of the agreement without which the investment would not have materialized. It follows that in this Arbitrator's view, the treaty guarantees are applicable to *"matters of taxation"* insofar they relate directly or indirectly to several of the exceptions listed under this Article.

9. The exceptions noted will make the Treaty applicable "*to the extent they are not subject to the dispute settlement provisions of a convention for the avoidance of double taxation between the two Parties, or have been raised under such settlement provisions and are not resolved within a reasonable period of time."* In this case, none of the disputes has been submitted to the double taxation convention between the two countries, and accordingly the counter-exception does not operate in their respect.

10. It should also be noted that the requirement of a *"reasonable period of time"* appropriately reflects the concern about the observance of due process. This of course not only relates to the Double Taxation Treaty, but also to the Treaty applicable in this case. The court proceedings were certainly not in compliance with this reasonable standard and, although some appeals that were available were not resorted to, this was because doing so would have had still more adverse implications for the tax treatment afforded to the Claimants, a situation which is also contrary to the guarantee provided under Article III in respect of the availability of effective means for asserting claims.

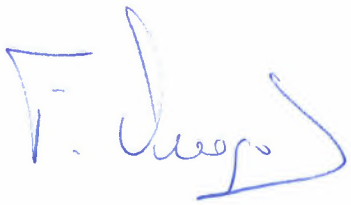
11. It should also be noted that the question of transfer out of sums paid to the investor's officials does not appear to be quite compatible with the Protocol's freedom to select commercial agents and agree to their remuneration. If there was any evidence of fraud this would be quite another matter, but such evidence was never put forth, and, quite to the contrary, the rebuttal requests made by the Claimants were turned down on various reasons. Accusations of forgery and backdating of documents would not withstand close scrutiny if examined in the light of the changing regulatory requirements and the need to adjust to some of its demands.

12. The connection between the fair and equitable treatment standard and the need to ensure a stable legal environment has not been well served as a result of the number and depth of the problems discussed.

13. The end result is that a legitimate business evaporated from Poland and losses were experienced. True enough, many reasons intervened in this result and not all of them can be attributed to the Polish State, but those noted should, in the opinion of this dissenting Arbitrator, have led to a different conclusion of the Award in respect of the breach of the fundamental standard of the treaty and the consequential liability.

14. The Award rightly follows the agreement expressed by both parties that costs should follow its conclusions. Had it not been for this agreement, this Arbitrator would have favored the sharing of costs with the view that even in light of an adverse result for the Claimants, there was a legitimate reason for bringing such claims to arbitration.

15. In concluding, this Arbitrator wishes to express his recognition for the most competent work done by counsel for both parties in presenting and arguing a matter of great complexity.



Francisco Orrego Vicuña

Date: 7 November 2015