Case Comments

Comparative Public Law at the Dawn of Investment Treaty Arbitration: Saar Papier Vertriebs GmbH v. Republic of Poland

UNCITRAL, Interim Award (Jurisdiction), 17 August 1994 (Pierre A. Karrer, Georg Ahrens, Tadeusz Szurksi) and Dissenting Opinion of Tadeusz Szurksi, 26 September 1994; Final Award (Pierre A. Karrer, Georg Ahrens, Tadeusz Szurksi) and Dissenting Opinion of Tadeusz Szurksi, 16 October 1995

Jarrod Hepburn
University of Exeter, Exeter, United Kingdom
j.hepburn@ex.ac.uk

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In January 2014, two arbitral awards dating from 1994 and 1995 were released by the Republic of Poland following a request under that state's freedom of information law. The two awards, on jurisdiction and merits respectively, were issued by an ad hoc tribunal convened under UNCITRAL Arbitration Rules in the case of Saar Papier Vertriebs GmbH v. Poland, finding the respondent in violation of the Germany-Poland BIT. This case is believed to be only the second investment treaty dispute ever to have been resolved, following AAPL v. Sri Lanka in 1990. With the extensive uptake of investment treaty arbitration since then, the two awards present a fascinating picture of the system in its

infancy. In particular, in drawing on domestic administrative law to interpret the Germany-Poland treaty’s provisions on indirect expropriation, the Tribunal hints at the ‘comparative public law’ approach now prominent in the field. However, as discussed in this case comment, the Saar Papier awards probably do not represent the careful and prescient adoption of a thought-provoking methodology for interpreting investment treaties. Instead, they are better viewed simply as pragmatic compromises worked out by arbitrators unfamiliar with the new context in which they found themselves.

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The dispute in question found its origin in a 1991 ban placed by Polish authorities on the import of makulatura, a high-grade waste-paper product. The Claimant in the case, German company Saar Papier Vertriebs GmbH, had previously imported this product and used it as an input to produce toilet paper and tissue paper in its factory at Kostrzyn, just inside Poland’s border with Germany. In doing so, the Claimant had relied on an express authorisation granted to it by Polish authorities in May 1990. However, in July 1991, Poland began turning back the Claimant’s makulatura shipments at the border, taking the position that the material was covered by a general environmental law banning the importation of waste, which had been in force since July 1989. Furthermore, according to the Claimant, makulatura imports destined for Polish-owned companies were not stopped at the border, constituting discrimination against the German Claimant.

Saar Papier complained to various Polish authorities, and commenced legal proceedings in Polish courts against the Ministry of Environmental Protection. However, these actions were of no avail, and in March 1992 the Claimant turned to the Germany-Poland bit. That treaty provided for Poland’s consent to investor-state arbitration over alleged breaches of the treaty’s expropriation clause (Article 4(2)), but not over alleged breaches of other relevant clauses (such as the guarantee of ‘fair and equitable treatment’ in Article 2(1), or the national treatment clause in Article 3(2)). For this reason, the Claimant claimed only that the import ban constituted a ‘measure equivalent to expropriation’ under the Germany-Poland bit. The Claimant sought DM 2.3 million (around EUR 1.2 million) in compensation for damage suffered until


The bit was later amended in 2003 to expand arbitral jurisdiction to all alleged breaches of the treaty.