Case Comments

Nordzucker AG v The Republic of Poland
ad hoc Arbitration (UNCITRAL), Partial Award, 10 December 2008; Second Partial Award, 28 January 2009; Third Partial and Final Award, 23 November 2009 (Vera Van Houtte, Andreas Bucher, Maciej Tomaszewski)

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Keywords

Nordzucker AG v Poland concerned a dispute between the second largest sugar-producing company in Europe and Poland that arose in the context of the privatization of the Polish sugar industry between 1999 and 2001. Although the awards were rendered in 2008 and 2009 respectively, they became public only recently following a request under Poland’s freedom of information laws. Nordzucker claimed that it could not acquire the shares of two sugar plants from State-owned sugar holding companies although it had been selected as the best bidder in the respective tenders. The Tribunal decided that it had jurisdiction ratione temporis despite of the fact that the Protocol to the bilateral investment treaty between Germany and Poland of 1989 (BIT), which broadened the originally narrow jurisdictional clause, was concluded only in 2003 and entered into force in 2005, years after the dispute had arisen. Furthermore, it held that it had jurisdiction ratione materiae on a dispute
about investments not yet made and that the BIT offered a certain level of protection also to investors in the process of making an investment.

As regards the merits, the Tribunal applied the fair and equitable treatment standard to the public tender process and the negotiations with the winning bidder and found that Poland had not complied with its obligations in this respect. The Tribunal did, however, not award any damages because the claimant had not submitted evidence to prove the amount of damages actually caused by Poland’s violations. The award shows, in addition to the interesting *ratione temporis* decision, how a BIT could be applied to grant a certain level of protection to foreign investors in a public tender process even where the investment is not eventually made. The award also demonstrates the importance of a diligent damages calculation and that claimants should be prepared to prove and calculate ‘negative’ damages.

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The German sugar company Nordzucker AG participated in the privatization process of the sugar industry in Poland. It made bids on shares in a number of sugar plants as part of its strategy to acquire a share of no less than 20% of the Polish sugar market. The legal basis for the privatization process was the Act of 1994 on the Sugar Market Regulation and Privatization in the Sugar Industry (the 1994 Act) and the Regulation of 1995 on the Determination of the Principles and Time Schedule for the Privatization of the Sugar Companies (the 1995 Regulation). The 1994 Act envisaged the creation of four Sugar Holding Companies, to which the State Treasury would contribute 51% of the shares it held in existing sugar plants. The Polish State was the sole shareholder of the Sugar Holding Companies whose primary task was to manage the privatization process of the sugar plants, and which would themselves be privatized at a later stage (First Partial Award, paras. 36–42). Nordzucker was interested in acquiring majority stakes in sugar plants offered by two of the Sugar Holding Companies, namely Paznańsko-Pomorska Spółka Cukrowa (PPSC) and Mazowiecko-Kujakowska Spółka Cukrowa (MKSC).

On the basis of the 1994 Act and the 1995 Regulation, PPSC and MKSC issued specific rules of procedure for selecting the buyer of the shares of the plants situated in Poznań, Torún, Szczecin, and Gdańsk respectively (First Partial Award, paras. 46–49). The main feature of this procedure was that the offers had to be submitted in two stages. In a first stage, (a) a Social Package, (b) a Planters’ Package, and (c) an Investment Package had to be negotiated with and accepted by a commission appointed by each Company’s board and by each Company’s negotiating team of employees and growers. On this basis, the