

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

THIRD PARTIAL AND FINAL AWARD

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
IPO:	Initial Public Offering
MFN:	Most Favoured Nation clause
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
RepoDam:	Reply on Damages of the Respondent dated 5 June 2009
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
SoDam:	Submission on Damages of the Claimant dated 10 April 2009
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. THE PARTIES

1.1. The Claimant

1. Nordzucker AG, (“Nordzucker” or “the Claimant”) is a private company organized and existing under the laws of Germany.
2. Nordzucker is the second largest sugar company in Europe. The large majority of its shareholders are sugar beet farmers’ associations.
3. Nordzucker’s registered office is located at:

Kuchenstrasse 9
38100 Braunschweig
Germany

and it is entered in the Commercial Register Amtsgericht Braunschweig under HRB No. 2936.

4. The Claimant is represented in this arbitration by:

Mr. John S. Willems
Ms. Melis E. Acuner
Mr. Charles R.P. Nairac
White & Case, LLP
11, Boulevard de la Madeleine
75001 Paris
France

Mr. Piotr Galuszynski
Mr. Arkadiusz Korzeniewski
Ms. Nathalie Vidrascu
White & Case W. Danilowicz, W. Jurcewicz I Wspolnicy Kancelaria Prawna Sp.K.
ul. Marszalkowska 142
00-061 Warszawa
Poland

1.2. The Respondent

5. The Respondent is the Republic of Poland (“Poland” or “the Respondent”) represented by the Minister of the State Treasury of the Republic of Poland (the “State Treasury”).

6. The Minister of the State Treasury has his offices at:

ul. Krucza 36/Wspólna 6
00-522 Warszawa

7. Poland is represented in this arbitration by:

Prof. Grzegorz Domański
Ms. Julita Zimoch-Tucholka
Mr. Krzysztof Zakrzewski
Of counsel:
Dr. Lechosław Stepniak
Ms. Monika Malinowska-Hyla
Ms. Anna Wojciechowska
Domański Zakrzewski Palinka Sp.K.
Rondo ONZ 1
01-124 Warsaw
Poland

2. THE ARBITRAL TRIBUNAL

2.1. Co-Arbitrator appointed by the Claimant

8. In its Notice of Arbitration of 17 February 2006, Nordzucker appointed as Co-Arbitrator:

Professor Dr. Andreas Bucher
Ch. des Prés de la Gradelle 16
1223 Cologne
Switzerland

2.2. Co-Arbitrator appointed by the Respondent

9. Poland has appointed in its Reply dated 15 May 2006 as Co-Arbitrator:

Dr. Maciej Tomaszewski
Weil, Gotshal & Manges LLP
Warsaw Financial Centre
Ul. Emilii Plater 53
00-113 Warsaw
Poland

2.3. Chairman of the Arbitral Tribunal

10. The two Co-Arbitrators by letter dated 28 June 2006 invited to act as Chairman of the Arbitral Tribunal:

Mrs. Vera Van Houtte
Stibbe
Loksumstraat 25
1000 Brussels
Belgium

11. Mrs. Van Houtte accepted her nomination by letters of 29 June 2006 and 7 July 2006. The Co-Arbitrators informed the Parties and the Arbitration Institute of the Stockholm Chamber of Commerce of the appointment of the Chairman by letters of 7, 10 and 11 July 2006.

3. ARBITRAL PROCEEDINGS¹

12. On 17 February 2006, the Claimant sent a Notice of Arbitration to the Respondent "Pursuant to Article 4 of the Treaty concerning the encouragement and reciprocal protection of investments of 10 November 1989 (the "BIT"), executed by the Federal Republic of Germany and Poland, as amended by the Protocol of 14 May 2003".
13. Article 11 of the BIT as it was amended on 14 May 2003 through a Protocol amending and supplementing the original BIT (the "Protocol"), reads as follows:

" (1) Any disputes pertaining to the investments made between the investor of one of the Contracting Parties and the other Contracting Party as regards the rights and obligations hereunder should be, wherever possible, resolved amicably between the Parties to such dispute.

(2) If such dispute fails to be resolved amicably within six months after one of the Parties to the dispute reports it, the investor shall have a right to refer it either to the competent courts of the other Contracting Party or to the international tribunal of arbitration. If the investor of one of the Contracting Parties has referred the dispute concerning the investment within the territory of the other Contracting Party to the competent court of the other Contracting Party, such investor shall have a right to, by the time of judgement issue, withdraw the claims and refer such dispute to the international tribunal of arbitration. In such case, the other Contracting Party shall give its consent to the claim withdrawal. The investor may

¹ A more detailed description of the arbitral proceedings until the end of 2008 is contained in chapter 3 of the Partial Award dated 10 December 2008.

refer such dispute to the international tribunal of arbitration also following the judgement issue provided that it is allowed by the international law of the other Contracting Party.

(3) If the Parties to the dispute do not make another arrangement, the provisions of paragraphs 3 to 5 of article 10 shall be applied mutatis mutandis subject to the proviso that the members of the Arbitral Tribunal shall be appointed by the Parties to the dispute and that, if the periods mentioned in paragraph 3 of Article 10 are not observed, either Contracting Party may in the absence of any other relevant agreements invite the Chairman of the Arbitration Institute of the Stockholm Chamber of Commerce to make the necessary appointments. The award shall be recognized and enforced under the Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

(4) [.....]"

14. On 28 June 2006, the Co-Arbitrators nominated as Chairman of the Tribunal Mrs. Vera Van Houtte, who accepted the nomination by letters of 29 June 2006 and 7 July 2006, and the Co-Arbitrators informed the Parties and the Arbitration Institute of the Stockholm Chamber of Commerce of the appointment by letters of 7, 10 and 11 July 2006.
15. On 8 September 2006, the Parties and the Arbitral Tribunal during a meeting organized in Brussels signed the Terms of Reference which provide *i. a.* that:
 - the agreed place of arbitration is Brussels, Belgium;
 - the arbitral proceedings shall be governed by these Terms of Reference and the UNCITRAL Arbitration Rules, and, where the latter are silent, by any Specific Procedural Rules or directions as the Arbitral Tribunal has given in Procedural Order No. 2 and thereafter may give from time to time;
 - the arbitration proceedings shall be conducted in English.
16. The procedural agenda was laid down in Procedural Order No. 3, as amended thereafter at the Parties' requests. Thus the Parties filed the submissions referred to in chapter 0. Abbreviations above, and a hearing was held on 5-8 November 2007.
17. On 10 December 2008, the Arbitral Tribunal issued a first Partial Award in which the Arbitral Tribunal 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.
18. On 19 December 2008, an original signed copy of this first Partial Award was deposited with the Clerk of the First Instance Court of Brussels. Thereafter, the Arbitral Tribunal resumed its deliberation on liability.

19. On 29 January 2009, the Arbitral Tribunal issued a second Partial Award, dated 28 January 2009, deciding that Poland breached its duty under article 2 (1) third sentence of the Treaty 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.
20. On 13 February 2009, the Arbitral Tribunal in its Procedural Order No. 6 gave the Parties an opportunity to file a submission on damages which takes into account the first and second Partial Awards and which was to be strictly limited to damages.
21. On 19 February 2009, an original signed copy of the second Partial Award was deposited with the Clerk of the First Instance Court of Brussels.
22. On 25 March 2009, the Claimant requested a postponement of the due date for its Submission on Damages from 28 March 2009 till 10 April 2009 and the Respondent agreed to respond to the Claimant's Submission by 5 June 2009. In its letter of the same day, the Arbitral Tribunal agreed to amend the submission dates accordingly.
23. On 31 March 2009, the Arbitral Tribunal was informed by the Claimant that the Respondent had started an annulment procedure before the Brussels Court of First Instance in relation to the first and second Partial Awards dated 10 December 2008, respectively 28 January 2009.
24. On 8 April 2009, the Respondent requested the Arbitral Tribunal to suspend the arbitral proceedings pending final disposition by the Court of First Instance of Brussels of the Respondent's application for the annulment of the first and second Partial Awards. It also indicated that the Claimant's announcement of 25 March 2009 that it was preparing jointly with its expert an updated damages model, would require from the Respondent a lot of time and money to reply to the Claimant's Submission on Damages which could be avoided by a suspension of the arbitration.
25. On 9 April 2009, the Claimant objected to this request and on the same date, the Arbitral Tribunal rejected the request for suspension and, in its Procedural Order No. 7, confirmed the filing dates contained in its letter of 25 March 2009. The Arbitral Tribunal emphasized that its decision was without prejudice to its future assessment of damages and a possible suspension following receipt of the Respondent's submission on damages on 5 June 2009, if justified at that time.
26. On 14 April 2009, the Claimant's Submission on Damages, together with a Supplemental Witness Statement on a Supplementary Expert Report, were duly received by the Arbitral Tribunal.

27. On 5 June 2009, the Respondent filed its Reply to Nordzucker's Submission on Damages, together with a Supplementary Report of its own expert.
28. On 10 August 2009, the Arbitral Tribunal informed the Parties that unless the Parties' wished to have a hearing on damages, there was in its opinion no need to have such hearing, and invited the Parties to submit their Statement on Costs, simultaneously, by 28 August 2009, and their reactions on the other Party's statement by 11 September 2009.
29. On 18 August 2009, the Claimant informed the Arbitral Tribunal that it did not consider a further hearing necessary and the Respondent sent the same message on 20 August 2009.
30. At the Parties' joint request, the above dates for the Statement on Costs were postponed and thus the Parties filed their Statement on Costs on 18 September 2009 and their Response to the other Party's Statement on Costs on 2 October 2009.
31. On 25 September 2009, the Respondent submitted further to its Statement on Costs of 18 September 2009 a detailed breakdown of fees and costs it had incurred in connection with these arbitral proceedings, as the Claimant had done already on 18 September 2009.
32. On 30 October 2009, the Arbitral Tribunal declared the proceedings closed.

4. FACTS

33. The Arbitral Tribunal refers to chapter 4 of its first Partial Award dated 10 December 2008 for the description of the main facts relating to the merits of the dispute.

5. PRAYERS FOR RELIEF

5.1. The Claimant

34. In its Submission on Damages, the Claimant requests that the Tribunal:

“

- (a) award Nordzucker compensation and damages in an amount of € 153.7 million, plus interest at the rate of 8% per annum from 31 December 2005 to the date of the Arbitral Tribunal's partial award on damages;
- (b) award Nordzucker the amount of its legal fees and costs incurred in this proceeding, including the arbitrators' fees and expenses, the fees and expenses of experts, and legal costs (including the fee of counsel);

(c) award Nordzucker post-award interest on any monetary award, through the date of actual payment, and;

(d) award Nordzucker any other relief that the Arbitral Tribunal deems appropriate.”

5.2. The Respondent

35. In its Reply to Nordzucker’s Submission on Damages, the Respondent “requests that the Arbitral Tribunal dismisses Nordzucker’s claims in their entirety and order Nordzucker to pay all the costs, disbursements and expenses incurred by Poland in defending its position, including, but not limited to legal, consulting, and witness fees and expenses, travel and administrative expenses, and the costs of the Tribunal”.

6. DISCUSSION

6.1. The Parties’ positions

6.1.1. The Claimant’s Submission

36. In its Submission on Damages dated 10 April 2009, Nordzucker acknowledges the Arbitral Tribunal’s finding that “Poland breached its duty under article 2 (1) third sentence of the [BIT], 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”. It argues, however, that its damages are much greater than what the Arbitral Tribunal mentioned in its second Partial Award: “In this way, it [Poland] 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”.

37. Nordzucker is of the opinion that, had Poland complied with its obligations under the BIT, it should either have been transparent with Nordzucker about the need to increase the price, or have officially repeated the “second stage” of the privatisation procedure, and that, in both cases, Nordzucker “would certainly have taken some action to make sure that it would not stay with just two Sugar Groups in Poland”².

38. Nordzucker argues that if the need to increase the price had been made clear by Poland, Nordzucker’s Management Board would have increased the price by an additional € 2 million and relies therefore on the written witness statement of Dr. Einfeld dated 10 April 2009 (CWS 6): “Had we been informed of this [need to increase the price by an

² SoDam §§ 14 and 15

additional 7.4 %], in my personal view it is obvious that Nordzucker would have agreed to such an increase³.

39. According to Nordzucker, Poland's "lack of transparency in its dealings with Nordzucker was thus the direct cause of the negative outcome of the privatisation process for the Szczecin and Gdańsk Sugar Groups" and resulted not only in a "set-back of at least half a year for alternative investment plans and costs for the useless follow-up of the process", but also in Nordzucker's loss of the opportunity to obtain the four Sugar Groups it planned to purchase in Poland.
40. Nordzucker claims damages on basis of their assessment as explained in its Post-hearing Memorial of 25 January 2008 which it updates in its Submission on Damages, in order to take into account actual (instead of projected) data that have become available since the end of 2007. Thus, it now quantifies its damages at € 153.7 million (instead of € 160.6 million) based on a calculation of net present value as of 31 December 2005, including interest until 31 December 2005. The adjustments to the claim have been performed by Nordzucker's quantum expert and are explained in the latter's Supplemental Expert Report.
41. Nordzucker furthermore claims (i) pre-award interest on this amount from 31 December 2005 to the date of the Arbitral Tribunal's award on damages, at the "appropriate and reasonable" flat rate of 8%, and (ii) post-award interest on all amounts awarded to Nordzucker (including legal fees and costs), through the date of payment, "at an appropriate rate to be determined by the Arbitral Tribunal", for which it proposes a flat rate of 10% per annum, compounded semi-annually, or, alternatively the average LIBOR rate plus 2 per cent, compounded semi-annually.

6.1.2. The Respondent's Reply

42. In its Reply on Damages of 5 June 2009, the Respondent claims that Nordzucker's Submission on Damages is in breach of article 32 sections 1 and 2 of the UNCITRAL Arbitration Rules because it disregards the final and binding conclusions of the Arbitral Tribunal concerning the consequences of the breach by Poland of its duty under article 2 (1) third sentence of the BIT.
43. Poland moreover considers that Nordzucker has disregarded Procedural Order No 6 and deliberately misinterpreted the second Partial Award, and should therefore not be given another opportunity to present a new submission on damages which would comply with the decisions made by the Arbitral Tribunal in the second Partial Award.
44. Poland argues that there is no evidence that, if it had informed Nordzucker of the fact that a price increase was needed, Nordzucker would have agreed to pay such price, and the sale

³ SoDarn §§ 42 and 44

would have been made. The third written witness statement, dated 10 April 2009, from Mr. Einfeld, one of Nordzucker's witnesses, that *"in my personal view it is obvious that Nordzucker would have agreed to such an increase"* is no such evidence and numerous other facts and elements in other submissions and witness statements of Nordzucker rather prove the contrary.

45. Finally, according to Poland, Nordzucker fails to prove that it would in any case have bought the Gdańsk and Szczecin Groups, no matter the level of the new evaluation of the shares and the reaction of a competitor who had also been selected as a candidate purchaser for the Gdańsk Group.
46. As regards the calculation of Nordzucker's damages, Poland files a Supplementary Report from its own expert, with comments on Nordzucker's Supplementary Expert Report and criticizes Nordzucker's production on 15 January 2008 of forecast figures which were much higher than the actual figures which are now produced but which were according to Poland nonetheless known by Nordzucker.

6.2. The Arbitral Tribunal's assessment of the damages

47. The Arbitral Tribunal notes that Nordzucker now mainly presents an updated calculation of its damages which follows the line of its submissions on damages filed up to and including its Post-hearing Memorial. This means that the damages presented in the Submission on Damages of 10 April 2009, as those presented prior to the Arbitral Tribunal's first and second Partial Awards, consist of the loss by Nordzucker of the earnings which Nordzucker expected to realize in Poland following its acquisition of the Gdańsk and Szczecin Groups.
48. Such presentation of Nordzucker's damages assumes that Nordzucker would have acquired the two Groups but for Poland's infringement of the BIT. It also assumes that the sale of the Gdańsk and Szczecin Groups to Nordzucker would have gone through in any event and that no event, other than the breach of the BIT which the Arbitral Tribunal found Poland to have committed, could have caused the sale to Nordzucker to fail.
49. These assumptions are inaccurate, though, are not contained in the second Partial Award and are not supported by the facts to the extent verifiable and verified in the first and second Partial Awards.
50. Nordzucker's assumptions are based on the inaccurate premise that *"had the State Treasury complied with its obligations under the BIT, it should either have transparently informed Nordzucker that Nordzucker had to (marginally) increase the price offered for the Szczecin and Gdańsk Groups, failing which the privatisations would not be completed by the State Treasury, or promptly followed the steps to officially repeat the "second stage" of the privatisation procedure. Had either of these courses of action been pursued by the State Treasury, Nordzucker "would certainly have taken some action to make sure that it would*

not stay with just two Sugar Groups in Poland" [reference omitted], for example by paying the State Treasury's desired price increase"⁴.

- 1) 51. First, Nordzucker has not proven that both or either of the options it describes, would necessarily have led to its purchase of the Gdańsk and Szczecin Groups.
52. Even if Nordzucker had been told explicitly that there would be no sale unless it increased its price, there is no evidence that the sale would have gone through. The Arbitral Tribunal has in its second Partial Award reviewed the submissions and the witness evidence and found that they show that Nordzucker considered from the beginning of 2001 that there was no more room for price negotiations and was even convinced that it was entitled to acquire the two Groups at the prices it had offered. Nordzucker's launching of the Polish court procedures to obtain orders that the shares were to be handed over to it, establishes this conviction. This Arbitral Tribunal finds it implausible that Nordzucker would have reacted differently if, on 18 January 2001, Mr. Jeznach had not merely given a hint, but actually requested that the price be increased as a condition for the sale to go through.
53. Nordzucker has not proven either that, if the second option had been followed (repeating the "second stage"), it would have bought the Groups. Repeating the second stage would have implied a new valuation and it is uncertain what increase in the price might have been required thereafter and whether it would indeed have been in the order of 7.4% as calculated by the Arbitral Tribunal.
- 2) 54. Second, Nordzucker foregoes the possibility of other options for Poland besides the two mentioned ones. More transparency and diligence of the State Treasury, might also have led the State Treasury to adopt a decision, in a GAM organized at the beginning of 2001, not to agree with the sale and thereby close the sales procedure. This would have left Nordzucker without any purchase and without any remedy as the procedure clearly provided the consent of the State Treasury as shareholder in the GAM as a last condition for the sale. As the Arbitral Tribunal found in its second Partial Award, withholding of this consent was not subject to specific conditions and thus was always a possibility.
- 3) 55. Third, even if Poland had followed one of the two options described by the Respondent, there is no evidence that Nordzucker would have concluded the sale. Mr. Lukas' statement, quoted at § 46 above, that, whichever of the two courses of action the State Treasury had pursued, Nordzucker would, in both cases, "*certainly have taken some action to make sure that it would not stay with just two Sugar Groups in Poland*", does not prove (i) that Nordzucker would have raised its price, and (ii) that it would subsequently have acquired the two additional Groups. The payment of the State Treasury's desired price increase is mentioned as a mere example by Mr. Lukas of "some action", thus showing that other action might also have been taken by Nordzucker. The statement may just as well refer to legal action, as

⁴ SoDam § 15 and CWS 5 § 15

Nordzucker in fact decided to take as soon as there was as much as a "hint" that Nordzucker's price was insufficient.

56. Also Dr. Einfeld's declaration in his supplemental written witness statement which he submitted in full knowledge of this Arbitral Tribunal's second Partial Award, does not constitute evidence that Poland's lack of transparency was the cause of Nordzucker not acquiring the two Groups: "*I cannot say today with absolute certainty what we would have done if the State Treasury had been transparent. I confirm that what is certain though is that we would have consulted Nordzucker's management board and followed some course of action designed to ensure that we could complete the privatisation process*"⁵. Again, this "course of action" can mean several things, besides increasing the price, such as suing Poland on basis of a legal undertaking which Nordzucker believed to exist. In any case, increasing the price still gave no guarantee that the sale would actually take place.
57. Dr. Einfeld misquotes the Arbitral Tribunal when he states that "*the Arbitral Tribunal has found that Nordzucker would have had to increase the price by an additional 7.4% in order to secure a positive outcome to the privatisation process*"⁶. The calculation of the Arbitral Tribunal related to the price needed in order to represent PLN 2000 per tonne of quotas⁷ which the State Treasury considered as a minimum. At no time has the Arbitral Tribunal indicated that such price increase would have guaranteed the sale of the two Groups to Nordzucker.⁸
58. Rather, the Arbitral Tribunal has concluded that the State Treasury was free in its decision whether to consent to a sale or not, even if all other conditions for it were fulfilled⁹. Nordzucker seems to assume that, once the sales procedure was launched, Poland was obliged to conclude it by a sale. This view is not correct, though.
59. Moreover, Nordzucker in its Submission on Damages concentrates on the price issue and totally overlooks the political opposition which had grown over time against the sale. There is no certainty that, even if the second phase had been repeated and a higher (the highest) price had been offered by Nordzucker, the responsible Secretary of State would still have felt sufficiently confident that the opposition to the privatisation could be placated with a high price.
60. In summary, Nordzucker has not proven that the damages which it claims are caused by the lack of transparency of Poland. It has not proven that, if Poland had been appropriately transparent and diligent, Nordzucker would have bought the two Groups, nor that it failed to

⁵ CWS 6, § 12

⁶ CWS 6, § 13

⁷ Second Partial Award, § 55

⁸ The Tribunal also notes that such assumption has been taken as a basis for an adjustment of the calculation of the claim in Mr. Lagerberg's Supplementary Report of 9 April 2009, while the Report does not refer accordingly to the Tribunal's conclusions on which its decision in the second Partial Award was based (cf. in particular § 82-85, 95, and the "Decision").

⁹ Second Partial Award, § 82

buy the Groups as a result of the lack of transparency of Poland. If Nordzucker eventually could not purchase the Gdańsk and Szczecin Groups, and cannot now claim the damages it is seeking, this is due to the fact that Poland had no legal obligation to sell these Groups to it and was free to refuse its consent to the sale or to the investment. There having been no investments in these two Groups, Nordzucker cannot claim damages for the loss of those investments.

61. Nordzucker, which brought this claim on the basis that the BIT had been breached by Poland's refusal to sell the two Groups to Nordzucker, is, notwithstanding the second Partial Award, still claiming damages which could be caused by Poland only if it had an obligation to sell the Groups to Nordzucker. ~~The Polish courts have determined that no such obligation existed and this Tribunal has found that Poland's failure to sell did not constitute an infringement of the BIT.~~
62. Nordzucker seems to disregard the importance of the words "*within a reasonable time*" and not to grasp the true meaning of "*finalise*" in those paragraphs of the second Partial Award in which the Arbitral Tribunal criticized Poland for having "*failed in its duty to manage the sales procedure diligently and fairly and to finalise it within a reasonable time*" (§65) and for "*failing to finalise 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 Gdańsk and Szczecin Groups*" (p. 32).
63. Poland's breach of the BIT does not consist in its not finalising the sales procedure but in not doing so within a reasonable time. Moreover, to "finalise" the sales procedure does not necessarily mean to "close the sale" but can also mean "terminate the sales procedure" in any other way, e.g. by deciding not to sell and informing the candidate buyer thereof, or by allowing the candidate buyer to withdraw its offer.
64. The damages demonstrated by Nordzucker therefore have no causal link with the breach which the Arbitral Tribunal decided in its second Partial Award to have been committed by Poland.
65. Nordzucker, in an attempt to prove that it suffered more damages than those linked to the set-back of at least half a year for alternative investment plans and costs for the useless follow-up of the sales process and the situation in respect of the Szczecin and Gdańsk Groups, has neglected to prove the damages possibly suffered as a result of the delay in an alternative investment and of the fruitless costs made for the monitoring of the sales procedures in Poland during another half year.
66. The Arbitral Tribunal has checked whether the Claimant's Submission on Damages includes such costs, but did not find them. The Arbitral Tribunal thus has no way to determine whether the damages which it had envisaged as a possible consequence of the breach of the

BIT by Poland have actually been suffered by Nordzucker, nor a way to assess the quantum of these damages.

7. COSTS

7.1. The Parties' Arguments

67. In their Submissions on Costs of 18 September 2009, each Party requests that the other be ordered to bear all the costs of the arbitration, including legal fees and costs and arbitrators' and experts' expenses and costs.

68. With this request, the Parties disregard the first sentence of article 10 (5) of the BIT and choose for the application of the second sentence. Article 10 (5) of the BIT provides as follows:

" Each Contracting Party shall bear the cost of its own member and of its counsel in the arbitral proceedings; the cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The arbitral tribunal may make a different regulation concerning costs. "

69. Each Party calls upon the Arbitral Tribunal to use its authority to adopt a different decision on costs in its award and specifically relies on the UNCITRAL Rules of which article 38 confirms the arbitrators' freedom to fix the costs in its award and article 40 (1) states that the costs of the arbitration (as defined in article 38) shall in principle be borne by the unsuccessful party, but that the Arbitral Tribunal may apportion each of such costs between the Parties if it determines that apportionment reasonable in the circumstances of the case.

70. Each Party considers in its submission that the other is unsuccessful in this arbitration. Nordzucker emphasizes that the Arbitral Tribunal found in its first Partial Award that it had jurisdiction to entertain a claim based on an alleged breach of the obligations in article 2 (1) first and third sentences of the BIT and that it found in its second Partial Award that Poland had breached its obligation to treat Nordzucker in a fair and equitable manner *"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 Gdańsk and Szczecin Sugar Groups"*.

71. Poland, on the other hand, submits that the degree of success achieved by the Parties has to be considered and that Nordzucker has achieved only minor success on jurisdiction, liability and damages. It emphasizes that the first Partial Award held that the Arbitral Tribunal had no jurisdiction for the alleged breached of several articles of the BIT – except one – and that, in the second Partial Award, on liability, the Arbitral Tribunal dismissed three allegations of

Nordzucker after Nordzucker had already withdrawn, in its Statement of Reply, its claims based on two other articles of the BIT. As regards damages, Poland is of the opinion that Nordzucker presented a calculation of damages which was not in accordance with the Arbitral Tribunal's guidelines in the second Partial Award dated 28 January 2009 and that, if it had complied therewith, the amount of damages would probably not have exceeded 1% of the amount claimed by Nordzucker in this arbitration.

72. Poland furthermore refers to the link between the costs engaged for the presentation of, and the defence against, claims which are dismissed, but gives no further details *e.g.* of the portion of its costs which relates to the defence against unsuccessful claims.
73. It finally points out that Nordzucker's costs are not reasonable in proportion to Nordzucker's possible compensation, and to Poland's costs.

7.2. Costs of the arbitration

74. Nordzucker's costs, as evidenced by Appendix I to its Statement on Costs of 18 September 2009, consist of:

- fees and disbursements of White & Case LLP:	€ 2,177,059.91
- fees and disbursements of experts:	€ 445,273.73
Total	€ 2,622,333.64

75. The costs of Poland as shown in its Appendix I of 25 September 2009 amount to:

- fees and disbursements of DZP:	€ 687,491.15
- fees and disbursements of experts:	€ 526,801.24
Total	€ 1,214,292.39

76. According to article 38 (a) of the UNCITRAL Rules, the fees of the Arbitral Tribunal are to be fixed by the Arbitral Tribunal itself in accordance with article 39. They shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

77. Having taken these various elements into account, the Arbitral Tribunal's fees can reasonably be determined as follows:

- Co-Arbitrators:	€ 274,250
- Chairman	€ 261,000
Total	€ 535,250

78. The travel and other expenses incurred by the Arbitral Tribunal (including the costs for the hearing room of the procedural meeting of 8 September 2006) amount to € 32,000.
79. The costs for the hearing room and break out room for the arbitrators as well as for the court reporter for the witness hearing of 5-8 November 2007 have been advanced by the Parties on a 50/50 basis. They are not included in the Parties' respective costs as mentioned in paragraphs 69 and 70 above which the Parties claim from each other.

7.3. Liability for costs

80. The Parties' respective requests to order the other Party to pay all costs of the arbitration and to disregard the rule of article 10 (5) of the BIT is clearly based on each Party's conviction that it is successful in the arbitration and that the other is unsuccessful.
81. The Arbitral Tribunal disagrees with these unilateral views. There can be no doubt that Nordzucker is not successful: it filed a claim for "not less than" € 185.4 million, later reduced to € 153.7 million and even if the Arbitral Tribunal found in its first Partial Award that it had limited jurisdiction and in its second Partial Award that there was a breach of one of the BIT provisions, it cannot recover anything on basis of the Final Award. This does not mean that Poland is successful, however: the Arbitral Tribunal found that Poland did breach its obligation under the BIT to treat Nordzucker, although only a candidate investor engaged in the sales procedure for the Gdańsk and Szczecin Sugar Groups, in a fair and equitable manner.
82. Consequently, the "costs follow the event" rule can in this case not possibly lead to an order for one Party to bear all the costs as both Parties request. Furthermore, a strict apportionment on basis of the "degree" of success, respectively failure, of each Party in this arbitration is not easy to make, as the Arbitral Tribunal has no information to determine which costs have to be apportioned between jurisdiction, liability and damages, or between the different initial requests for relief of the Claimant.
83. Both article 10 (5) of the BIT and article 40 (1) of the UNCITRAL Rules grant the Arbitral Tribunal authority to deviate from their respective principal rule on costs. Taking into account the mitigated success of each Party, the Arbitral Tribunal considers it appropriate that each Party shall bear its own costs (including all fees and costs of its counsel, witnesses, interpreters and experts), with the exception, mentioned in paragraph 84 hereafter, of Poland's costs for the Supplementary Expert Report, filed with Poland's Reply to Nordzucker's Submission on Damages.
84. The Arbitral Tribunal is of the opinion that Nordzucker has in its Submission on Damages of 14 April 2009 disregarded the second Partial Award on liability, although it was clear from the Arbitral Tribunal's Procedural Order No. 6 that the right to file an additional submission on damages was intended merely to allow to take account of the Partial Awards issued in the

meantime, not to "actualise" Nordzucker's original damage calculation. Thus, the Arbitral Tribunal finds that the costs for Poland's Supplementary Expert Report, dated 29 May 2009, which amounts to € 71,000 (invoice of 27 May 2009) according to Poland's letter of 25 September 2009, must be borne by Nordzucker.

85. Given the above mentioned mitigated success of each Party, the Arbitral Tribunal considers it appropriate to apportion the costs of the arbitration on a 50-50 basis between the Parties.
86. The advance on costs fixed by the Arbitral Tribunal at € 574,000 has been paid in equal shares by the Parties. Consequently, the Arbitrators' fees and costs are fully paid and € 6,750 will be reimbursed to the Parties together with the remaining amount in the trust account which represents interests after deduction of banking costs. Each Party will be paid 50% of these amounts.
87. The costs of the hearing room and court reporter for the witness hearing have been advanced by the Parties, each for 50%. These 50-50 payments are thus final.

8. DECISION

For the above stated reasons,

The Tribunal decides:

1. to dismiss Nordzucker's Claim for Damages, now in an amount of € 153,7 million.
2. that each Party shall bear its own costs, except as provided in item 3 hereafter.
3. that Nordzucker shall pay to Poland an amount of € 71,000 representing the costs of Poland's Supplementary Expert Report of 29 May 2009.
4. that the fees and costs of the Arbitrators, amounting to € 567,250, and other costs of the arbitration shall be borne in equal parts by the Parties.
5. as the Parties have each paid 50% of the advance of € 574,000 on fees and costs of the Arbitral Tribunal and also shared equally the advance on other costs of the arbitration, € 6,750 will be reimbursed to the Parties together with the remaining amount in the trust account.
6. to dismiss all other claims of either Party.

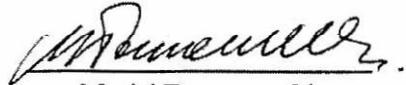
Signed in seven originals, one for each Party, one for each member of the Arbitral Tribunal, one for deposit with the clerk of the Court of First Instance and one as a reserve copy.

Seat of the Arbitration: Brussels

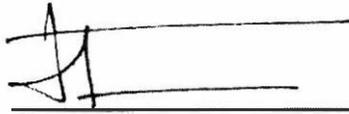
.....23.11.2009



Andreas Bucher
Co-Arbitrator



Maciej Tomaszewski
Co-Arbitrator



Vera Van Houtte
Chairman