
# When Environmental Issues Appear in International Investment Arbitration: Saar Papier Vertriebs GmbH v. Republic of Poland (I)

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The concept of international investment law evolved mainly for the purpose of giving protection to foreign investment. That is why only investors can bring a claim of breach of protection standards before the investment arbitral tribunal and the tribunal only follows the concerned International Investment Agreements (IIAs) to determine such breach. However, with the advent of the concept of sustainable development, nowadays, environmental protection of a host State has become a

major concern in competition with the investment protection before the investor-state arbitral tribunal. States are now frequently claiming the prevalence of their regulatory power for environmental protection over investment protection. In some cases, for example *Glamis v US*, the tribunal's decision was influenced by the State's regulatory power for environmental protection. In some recent cases, for example *Burlington v Ecuador* and *Perenco v Ecuador*, environmental issues arose with some separate standing. In these cases, the tribunals entertained host States' counterclaims and awarded compensation against the investors. In such backdrop, I would like to have a detour in an arbitral decision wherein environmental issues were raised by the State for the first time. I want to look back how the tribunal had decided that case.

The first ever case where an environmental issue was raised was the *Saar Papier Vertriebs GmbH v. Republic of Poland (I)*. In this case, the claimant, Saar Papier's investment activities in Poland was, inter alia, to process, manufacture, and produce paper products especially tissues, to import *makulatura* (high quality raw materials), and to engage in the export of finished products. Although it started the business in Poland on 1 March 1988, the subsidiary of Saar Papier was entered into the commercial register on 18 May 1990. Saar Papier intended to import the raw material *makulatura* particularly from the Federal Republic of Germany to Poland and manufacture it to base paper, and let this base paper be processed to finished products. On the basis of the entire business developments, it entered into several contracts with different stakeholders, for example, the importers, manufacturers, paper mills, foreign buyers and distributors. On 1 July 1989, unbeknownst to all the persons involved, the amendment of the Polish Environmental Protection Statute came into force. Around two years later, on 7 July 1991, the Polish customs authorities prohibited the importation of *makulatura*, claiming it to be 'waste'. As a result, Saar Papier could not continue its business. It tried to produce the tissue papers from Polish local raw materials, but failed to produce a quality one. At last, its factory went into bankruptcy and the workers became jobless. A Danish company with which Saar Papier had a contract to supply the tissues went to the court against Saar Papier because of its failure to fulfill the contract. Before the arbitral tribunal,

the investor-claimant claimed a compensation of all damages sustained by it and the lost profits with some interests.

**Tribunal's decision**

The tribunal applied the Germany- Poland BIT and UNCITRAL Rules to decide the case. The host State, Poland, provided three typical defences. First, it argued that the claimant's claim cannot come under the BIT because it came into force only in April 1990 whereas the Environmental Protection Statute came into force in 1989. The tribunal disregarded this claim because art 9 of the BIT provides that it applies to all investments made since September 14, 1972, years before Saar Papier started its economic activity in Poland. Second, Poland claimed that the claimant could bring an action before the Arbitral Tribunal once the legal remedies in the host country were exhausted. Although the tribunal does not see such a requirement in the BIT, arbitrator appointed by Poland, Dr habil. Tadeusz Szurshi, following the Polish text of the BIT stressed that exhaustion of local remedies is necessary because article 4.2 provides 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. Third, Poland put great emphasis on the fact that the claimant initially sued the Ministry of Environmental Protection rather than the custom authorities. The tribunal discarded this plea because the local custom authorities acted in compliance with an order given by the Ministry of Environmental Protection. Deciding the defences submitted by Poland, the tribunal determined that the issue before the arbitral tribunal is whether under the Treaty a measure equivalent to an expropriation is present. In order to decide indirect expropriation, the tribunal looked at the *economic effect* of the State measures. It states:

In order to judge the economic effect of a measure the Arbitral Tribunal must however, not look at the legal corporate purpose of the company but at the economic realities. The economic reality is that the lifeblood of the factory was cut off by Poland and this had an effect equivalent to that of an expropriation.

It appears that the Polish authorities issued Saar Papier the authorization to import *makulatura* years after the enactment of the impugned amendment to its

Environmental Protection Statute. Since the restriction was already there, Poland argued that the claimant is not eligible to get the compensation which arose out of an implementation of statutory provision. In deciding the claimant's eligibility for compensation, the tribunal conferred upon Poland an *obligation of good faith in public law* commenting that sometimes certain private persons must be fully compensated even though the application of the law is lawful. This principle applies where the state has given *misleading information* about the law or where the law or administrative or court practice have changed. However, arbitrator Dr habil. Tadeusz Szurshi in the dissenting opinion commented that the expropriation caused because of the investor's lack of orientation regarding the existing laws in Poland and it cannot overrule the universally accepted principle that '*ignorantia juris nocet*'. It appears that although this dispute arose due to the host State's measure for environmental protection, the tribunal decided this case following the principle *economic effect of State measures* upon the investor. The environmental issue could not influence the tribunal's decision. This decision demonstrates that the tribunal usually concentrates on the breach of investment protection. Environmental issues cannot influence its decision unless the State defends the case based on- its environmental obligations and the scientific justification behind its legislative changes/implementations.

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