



Legal Aspects of the Polish-German Dispute over the Fairway to Świnoujście

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The Polish-German dispute over the ship channel (fairway) to Świnoujście has been ongoing since the 1980s and stems from illegal actions by Germany. Resolving the dispute is growing because of Poland's new investments in critical infrastructure facilities in Świnoujście—an LNG terminal and the construction of a deepwater container terminal. The impediments to the investments generated by the dispute further strain bilateral relations. It should be in the interest of both parties to settle the matter in accordance with international law.

Subject of Dispute. Poland and Germany are arguing over a difference in the legal classification of sections of the northern approach fairway to the ports of Świnoujście and Szczecin. According to the German position, they are in the German Exclusive Economic Zone, while according to the Polish position, they are in Poland's territorial sea. This dispute has prevented Poland's development of this waterway over the years, for which the port of Świnoujście in particular is of growing importance in terms of security (both military and energy aspects, in particular the ability to receive gas tankers and container ships with military equipment) and trade. For this reason, at the beginning of July this year, the Maritime Office in Szczecin announced a tender for a navigational analysis (a detailed analysis of ship manoeuvring issues during approach to the port) for the planned new northeastern fairway. This study will be the first step in starting an investment that is expected to lead to the creation of a deepwater container terminal that will allow the handling of container ships adapted to ocean navigation. The cost of the designation and construction of the new approach channel together with port infrastructure has been estimated by the Polish side at PLN 10.3 billion, with the investment planned for 2023-2029. In response to the plans to build a new approach fairway, bypassing the areas disputed by Germany, concerns have been raised by German local authorities on the island of Usedom, alleging "deterioration of air quality in the neighbouring spa and recreation areas". In the background of the German allegations there are probably also

concerns about Hamburg losing its position as a major transshipment port for transport towards the Baltic Sea.

Historical and Legal Conditions. The claims raised by the German side about the course of the state border and the associated problems in using the ports of Świnoujście and Szczecin (the two ports share common approach channels—the Świnoujście-Szczecin fairway—for a certain section) are a further development in the longstanding dispute over the course of this sea route.

The problem with shipping to the port of Świnoujście arose in 1984 when then East Germany (GDR) unilaterally increased the width of the territorial sea from 3 to 12 nautical miles. This meant that the navigable channel, used for international shipping, came to be within the territorial sea of the GDR. Until then, the shipping fairway had been through the open sea (at that time, neither the GDR nor Poland had yet established exclusive economic zones). The People's Republic of Poland (PRL) did not recognise this act, considering it contrary to international law as infringing free access to the open sea. The situation escalated after 1986 when the GDR unilaterally defined the rules for use of shipping channels in the East German territorial sea. In the late 1980s, there were even incidents of Polish ships being stopped by East German border services. Poland consistently did not recognise the East German claims. The situation was resolved by signing an agreement on the delimitation of maritime areas in the Pomeranian Bay in Berlin on 22 May 1989. In accordance with the generally

applicable principles of international law of the sea, the maritime border of the PRL-GDR was delimited.

Article 5 of the agreement stipulated that the northern approach channel to the ports of Świnoujście and Szczecin for its entire length and the anchorages were within the Polish territorial sea or the open sea. It was also stipulated that the section of the northern approach channel located to the east of the boundary of the territorial sea of the GDR as defined in the agreement (including anchorages) would not constitute a continental shelf, a fishery, or an exclusive economic zone of the GDR. Article 6 of the agreement stipulates that navigation to the ports of Świnoujście and Szczecin along the approach and navigation channels through the German territorial sea east of the island of Rügen shall be on the basis of principles generally recognised in the international law of the sea (in particular, in accordance with the law of innocent passage and other relevant norms of international law). This course of the maritime boundary in this area was confirmed in the treaty concluded with a united Germany, the Treaty between the Republic of Poland and the Federal Republic of Germany on the Confirmation of the Existing Boundary Between Them of 14 November 1990, which directly invoked the agreement on the Pomeranian Bay. The dispute escalated in 1994 when Germany, in breach of Article 5 of the 1989 German-Polish Agreement, decided to designate an exclusive economic zone covering the northern approach channel to the port of Świnoujście. Poland responded with an objection in the form of a diplomatic note, declaring the entire area to be a Polish territorial sea (as allowed by Article 5 of the 1989 agreement), but the dispute was not formally resolved at the time, with negative consequences today. In addition, Germany established a maritime military training zone and a bird protection zone on the course of the northern fairway. Incidents known from the 1980s involving the detention of Polish ships recurred, and in addition the German side obstructed work to deepen the shipping lane. The construction of the Nord Stream gas pipeline, which started in 2010, could also potentially hamper shipping to Świnoujście. At that time, the pipeline routes crossed the shipping fairway to Świnoujście in German territorial waters, which could have had a negative impact on future access for LNG carriers to the liquefied natural gas terminal being built by Poland at the time. The Polish side raised its objections to the depth of the pipeline, which led to it being buried in the seabed at the intersection with the western approach fairway. At its intersection with the northern channel, it was run along the seabed, but in a deeper location. The current German protests over the construction of the container terminal are therefore part of a long history in the dispute.

Legal Options for Resolution of the Dispute. International disputes are a natural part of international relations. Those concerning the delimitation of maritime areas constitute a large

group of disputes between states settled under international law today. The basis for their peaceful settlement is provided by the provisions of Article 2(3) in conjunction with Article 33 of the UN Charter, which stipulate that the members of the organisation shall endeavour to settle such disputes by peaceful means, meaning by diplomatic or judicial settlement.

The basic bilateral act regulating Polish-German relations is the Treaty of Good Neighbourship and Friendly Cooperation of 17 June 1991. In Article 5, both sides undertook to settle disputes exclusively by peaceful means, while in Article 18 they undertook to endeavour to create favourable conditions for the use of communication routes, including maritime navigation. The specific regulations were contained in subsequent agreements: the Agreement on the passage of ships through the internal waters off the island of Usedom of 17 February 1993 and the Agreement on maritime navigation of 20 March 1995. Both parties declared that they would refrain from any actions restricting the freedom of maritime transport. Polish and German ships were given the right of passage between the high seas and ports and harbours open to international shipping in accordance with the right of innocent passage through the territorial sea as defined by customary international law of the sea and the Convention of 10 December 1982 on the Law of the Sea. In cases of conflict, the Agreement on maritime navigation provides for a diplomatic means to resolve disputes. International judicial settlement in accordance with the principle established by the Permanent Court of International Justice in 1925 (Mavrommatis Palestine concessions case) may occur after the negotiation route has been exhausted and the existence of a dispute has been established as a difference of law or fact.

Conclusions. The international dispute concerning the legal status of part of the northern shipping fairway is the result of the German side's violation of the above-mentioned Article 5 of the 1989 Agreement, and factual and legal arguments speak in favour of Poland. Under international law, Poland may seek to resolve the dispute by negotiation and by judicial means, before the International Tribunal for the Law of the Sea, an arbitral tribunal or the International Court of Justice. None of these solutions violates the principles of good neighbourship and friendly cooperation. The designation by Poland of a new approach channel to the proposed container terminal, bypassing the disputed area, allows the investment to begin immediately without the threat of a potential legal defect. However, this should not stop the pursuit of an unambiguous settlement of the disputed issue in order to limit its negative impact on bilateral relations. An additional aspect may prove to be the question of Germany's proportional contribution to expenditures for the construction of the new course if the dispute is settled in favour of Poland.