School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Muszynianka Spółka Z Ograniczoną Odpowiedzialnością v. the Slovak Republic (PCA Case No. 2017-08) – Award – 7 October 2020

Case Report by: Alexandros-Cătălin Bakos**, Editor Ignacio Torterola***

Summary: In 2012, Muszynianka acquired a Slovak company (GFT Slovakia) that was involved in the production and selling of mineral water. It planned to extract, and process, mineral water from Slovakia, but to ship it to Poland, where it would be bottled. At that moment, GFT was involved in the process of obtaining an Exploitation Permit which would allow it to pursue the envisioned business activity. After the sale, this administrative process continued for a few years, but was never finalized because a Constitutional Amendment had taken place in Slovakia, essentially prohibiting the export of unbottled water. This prevented Muszynianka from pursuing its envisioned business plans (*via* GFT). It also determined the Slovakian administrative authorities to deny GFT's application for the Exploitation Permit. As a result of this chain of events, Muszynianka started the present arbitral proceedings challenging the Constitutional Amendment and the subsequent denial of the request to be granted the Exploitation Permit as contrary to the applicable bilateral investment treaty (BIT). While the Tribunal found the Constitutional Amendment to be justified and not to constitute any breach of the applicable treaty (especially since GFT had not obtained, and was not entitled to, the relevant Exploitation Permit), it did find several violations of the BIT. These were premised on the flawed manner in which the administrative proceedings were conducted (essentially in a manner which was not compliant with domestic administrative law). Nonetheless, it did not award any damages, as it considered that no causal link between the breach and any subsequent loss existed, given the impending Constitutional Amendment that would have led to a denial of the Permit anyway. The same facts were found to also determine a violation of the non-impairment (through unreasonable or discriminatory measures) standard, but the same reasoning concerning a lack of causality applied here.

Main Issues: intra-EU investment arbitration objection; subsequent agreement to interpret a treaty; Constitutional Amendment affecting the investor's envisioned business plan; administrative proceedings conducted in breach of domestic law.

Tribunal: Prof. Gabrielle Kaufmann-Kohler, President; Prof. Robert G. Volterra, Arbitrator; Mr. J. Christopher Thomas QC, Arbitrator.

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Digest:

1. Relevant facts:

Muszynianka (the Claimant) is a company incorporated in Poland which is active in the production of highly mineralized water, selling its products in different markets (¶¶1-2). In December 2012, the Claimant acquired a Slovak company, GFT Slovakia (initially owned by a Polish company, Goldfruct, also selling mineral water), which would allow it to extract mineral water from Slovakia as part of its envisioned activity. Subsequently, that water would be bottled in Poland. Before being acquired by Muszynianka, GFT Slovakia had already started the administrative process of obtaining the relevant permits in order to undertake the envisioned project (between December 2011 and August 2012, but which had not been finalized at this latter date).

Even earlier, GFT had undertaken an exploration phase and discovered several mineral water reserves in the Legnava area of Slovakia, a process that lasted between 2002 and 2009 (¶¶14-24). It was the result of this exploratory phase which had prompted GFT to attempt to exploit those resources with the final goal of selling bottled mineral water. Its project, however, would run into complex obstacles, owing to the poor infrastructure surrounding the Legnava region; if GFT were to rely on the already-existing infrastructure, its operation would be rendered infeasible (¶¶27-30). As such, GFT came up with the following proposal: it would extract and treat the water in Slovakia but would transport it to Poland *via* specially constructed pipelines, so that the water could be bottled there (¶31). One of the relevant Slovak authorities, the State Inspectorate of Spas and Springs, did not object to this, when specifically asked about it by GFT (¶32).

Subsequently, GFT applied for an Exploitation Permit from the State Spa Committee (¶41), which would allow it to undertake the envisioned activity. The Authority, however, did not grant the request because the application was deemed incomplete; the Spa Committee also decided to postpone its decision until GFT would obtain the relevant building permits, necessary for laying the pipelines (¶¶42-3). However, when it amended its initial application to the Spa Committee, GFT did not provide the requisite building permits – as at that moment

it had obtained only a zoning permit and not the building ones (¶45). This determined the former to maintain its decision to suspend the granting of the exploitation permit (¶¶47-8).

In December 2012, GFT's ownership changed, with the Claimant in this arbitration acquiring the company (¶¶49-52). After the acquisition, GFT applied for, and obtained, the relevant building permits in Slovakia, so that it could build the treatment plant and lay the pipelines (¶¶53-6). Subsequently, in July 2014, GFT supplemented its application for the exploitation permit with the building permit (¶57). However, the Slovak Spa Committee eventually rejected the granting of the Exploitation Permit in December 2014 because a Constitutional Amendment had occurred in Slovakia in the meantime, prohibiting the cross-border transport of unbottled water (¶59). Although there were certain exceptions to this ban, none of them were applicable to GFT's envisioned activities (¶76). Irrespective of these changes, GFT insisted on using the same method for transporting water to its Polish facility *via* pipelines, while the Spa Committee maintained its position (¶¶59-61). As such, GFT attempted to challenge the Spa Committee's decision, both administratively and judicially, but was unsuccessful in this regard (¶¶78-82).

The aforementioned Constitutional Amendment, while effective and in force from December 2014 (¶76), was initiated in August 2014 (¶75). Irrespective of that, there had already been signs (including in the programme of the Slovak Social Democratic Party, which had obtained a parliamentary majority in 2012), some of them apparent even from 2012, that a change in water resources governance would ensue in the following years (¶¶63-73). Nonetheless, while it is true that stricter regulation of cross-border water transport from Slovakia was envisioned since 2012, the sweeping ban – and its specific contours – became apparent only in July and August 2014, when the form of the constitutional amendment was being shaped (¶¶74-5).

2. Procedural History:

The Claimant submitted its notice of arbitration to the Respondent on 18 August 2016 (¶85). On 17 February 2017, the Tribunal was constituted, with the Permanent Court of Arbitration acting in an administrative and fund-holding capacity (¶¶95-6). The first procedural hearing was held on 12 May 2017 (98), while the Hearing took place from 21 January to 25 January 2019 at the Peace Palace in the Hague (130). The final Award was rendered on 7 October 2020.

3. The Claimant's Position

3.1. The Claimant's position on the Respondent's intra-EU challenge to the Tribunal's jurisdiction (see, infra, 4.1.)

The Claimant firstly asserted that there was no conflict between the applicable BIT and the EU legal order (the EU treaties), since the relevant instruments did not share the same subject matter – not only were the substantive provisions on which an investor may rely different in the aforementioned legal orders, but the EU treaties did not offer a similar remedy to that of the BIT in case the investor felt that its rights were breached (¶195). The Claimant also argued that there was no incompatibility between the EU legal order and the BIT, especially by referring to the fact that there was no express provision in the EU treaties that prohibited intra-EU investment arbitration (¶197). When it comes to the *Achmea* judgment, although the CJEU did find an incompatibility between the two legal orders, the Claimant argued that any consequences of such findings cannot deprive the arbitral tribunal of its jurisdiction, since it had already been established at the moment that the proceedings had been commenced before

the CJEU's *Achmea* decision; and even if the latter had retroactive effects, those would occur only domestically, before the courts of EU member states (¶198).

Furthermore, the *Achmea* judgment should not bound the arbitral tribunal because the former has limited impact on the international legal sphere while the latter is the sole authoritative body when it comes to its jurisdiction – and not the CJEU (¶199). *Muszynianka* also argued that no behaviour that would be qualified by the Respondent as subsequent practice that would clarify the way in which the BIT can be applied/interpreted can be considered as such – most of it did not clarify the status of the BIT after *Achmea* and, in fact, it was rather focused on the CJEU's judgment – and not on the BIT itself (¶¶200-4). Finally, irrespective of the intra-EU BITs Termination Agreements, any effect would arise after the arbitral Tribunal's jurisdiction was established (thus not affecting it) and after the relevant facts underpinning these proceedings occurred (thus, the BIT's substantive protection standards were in force at the time of the relevant events and the tribunal would assess Slovakia's behaviour against the BIT's substantive standards) (¶¶205-7).

3.2. The Claimant's position on the Respondent's ratione materiae objection (see, infra, 4.2.)

The Claimant argued, firstly, that it did, in fact, make a significant contribution to Slovakia, as the area which it would exploit in order transport mineral water to Poland for bottling was an economically underdeveloped area and Muszynianka's investment would improve the economic prospects of that area (¶274). Secondly, the Claimant argued that the Respondent's position on the former not holding any qualifying asset that would come under the BIT's ambit of protected investments was based on a flawed reading of the applicable treaty – in fact, the predetermined list was non-exhaustive, with the BIT providing protection to essentially everything holding an economic value (¶275). Continuing, the Claimant argued that its investment should be seen as one indivisible whole, also including, but not limited to, its economic endeavours in Slovakia, together with the relevant real estate and infrastructure (¶¶276-9). In any case, Muszynianka also argued that each constitutive element of the investment could be considered, in isolation, to also be an investment that could be protected under the BIT by itself; to this end, the Claimant referred, among others, to its shareholding interests in GFT Slovakia or to the "know-how" underpinning its envisioned activity (¶¶280-1).

Finally, the Claimant tried to rebut Slovakia's argument that its alleged activity could not be considered an investment for failure to satisfy the four essential elements of an investment. In fact, the former demonstrated that it contributed funds in excess of EUR 5,000,000, which would also be used in Slovakia; its presence in Slovakia was envisioned to happen over an extended period of time, as this was necessary for the exploitation phase of the activity; a risk existed, since profits were not guaranteed; and the requirement that the investment contribute to the host state's development was also satisfied because Muszynianka would build infrastructure on Slovakian territory and would need to recruit local employees (nonetheless, the Claimant also argued that, this not being an ICSID arbitration, the development element was not applicable in the first place) (¶¶281-4).

3.3. The Claimant's position on the Respondent's third jurisdiction challenge (see, infra, 4.3.)

The Claimant asserted that there was no illegality surrounding its investment, that, in fact, this argument was made by the Respondent exclusively for the purposes of the present arbitration,

and that the Slovakian authorities had previously confirmed the legality of the entire endeavour (¶298).

3.4. The Claimant's position on the Respondent's inadmissibility argument (see, infra, 4.4.)

The Claimant began by pointing that the Respondent's inadmissibility argument was premised exclusively on Muszynianka's shareholding interest in GFT as the covered investment, but the former argued that the damage it allegedly sustained concerned the investment in its entirety (not only the shareholding interest) (¶309). In any case, a number of the criteria that Slovakia argued were not satisfied, in order to determine the inadmissibility of the claim, were actually satisfied. In the Claimant's view, an indirect expropriation occurred, while Muszynianka was denied a legal remedy because the main impugned measure, the Constitutional amendment, could not be reviewed (either judicially or administratively) (¶310).

3.5. The Claimant's position on the Respondent's illegality challenge (on the merits) (see, infra, 4.5.)

The Claimant began by pointing to Slovakia's speculative argument as regards the former's intention to have the extracted water sold from GFT to it; it particularly pointed to the fact that the technical details had not been determined but that, in any case, Muszynianka would not risk buying water in a manner non-compliant with GFT's (eventual) Exploitation Permit (¶¶343-5). Subsequently, Muszynianka contested the Respondent's allegation that there was an obligation under EU law to bottle the water at source; the Claimant also argued that EU law on the free movement of goods would preclude any rules that would limit the ability to move the extracted water along EU borders (¶¶346-7). In terms of mixing the extracted water (water from Slovak, respectively Polish, sources), Muszynianka argued that there was no prohibition to this end in EU law, as long as the characteristics of the extracted water were preserved (¶¶348). The Claimant also argued that, in any case, the sources shared the same origin and chemical composition (although the Respondent had argued to the contrary, the divergence being premised on the use of different technical standards) (¶348). Such a mixing process would have complied with domestic Slovak law, owing to the characteristics of the water extracted from the envisioned sources being the same in each case (¶¶349-51). The same identity between the characteristics of the water would have rendered the endeavour compliant with Polish law (¶¶352-4). Finally, the Claimant argued that it would have complied with all the applicable rules on branding, labelling, and packaging, since the prohibition to use a brand referring to a territorial area different than the exploitation area did not mean that such area could not refer to the final part of the production chain – in this case the place in which bottling occurs (¶355). In any case, the Claimant argued that it could have used a branding name incorporating both the extraction area and the bottling one (¶356). This would not have misled the consumers, as the concerned Slovak and the Polish areas were part of the same "neighbouring region" (¶357).

3.6. The Claimant's violation of the fair and equitable treatment by the state (FET) claim

The Claimant underpinned its FET claim by reference to the protection of legitimate expectations to which it was entitled, but which was not complied with by the Respondent. To this end, Muszynianka relied on several alleged representations that were made by both local and regional authorities in Slovakia as concerns the legality and suitability of envisioned project (the Claimant emphasised representations such as confirmation by the authorities of the legality of the envisioned project – including ministerial representations – and, among others,

the fact that the Exploitation Permit would be granted if Muszynianka obtained the relevant building permits, thus creating the expectation that all other requirements were met) (¶¶426-29). It was at the moment that the Constitutional Amendment was enacted, together with the denial of the Exploitation Permit, that Slovakia violated these expectations (¶430). Moreover, without arguing that it expected a freezing into place of the applicable rules, Muszynianka also relied on the regulatory framework when building its legitimate expectations argument. In fact, it contended that the regulatory framework, as it was established prior to the Constitutional Amendment, created the expectation that the project could be carried out as envisioned (¶¶431-5). Slovakia, however, acted neither reasonably and predictably, nor in good faith and proportionally, when amending the applicable rules (¶431). Another argument brought forward by the Claimant, in this context, was that it had a "legal right" to the Exploitation Permit – essentially because it considered that it had fulfilled all the conditions for the granting of the Permit (¶¶436-7). Finally, Muszynianka argued that it was, in fact, the target of the Constitutional Amendment and that this also breached the Claimant's legitimate expectations (¶438).

3.7. The Claimant's expropriation claim

The Claimant began by pointing out that the only way in which it could successfully pursue an economic activity based on extracting and bottling mineral water was through its envisioned plan to export water to Poland (¶622). This is because the Slovakian infrastructure was not suitable for a business plan whereby the bottling plant would be located in Slovakia and because the area was under constant risk of floods (¶¶622-4). It was in this context that the Claimant argued that a cross-border business structure was the only feasible option for Muszynianka to exploit its investment. Thus, what followed through the Constitutional Amendment and beyond made it impossible for the Claimant to enjoy its investment, "rendering it completely valueless" (¶¶625-7 and 629). This also took place without Muszynianka being offered any compensation (¶625). The Claimant also stressed that the denial of the Exploitation Permit constituted another violation of the expropriation standard (¶628). Finally, Muszynianka also argued that the expropriatory measure was not taken in the public interest, it was not justified by a legitimate public purpose, it was discriminatory, unreasonable, and disproportionate, and was adopted in violation of principles of due process (the Claimant not being able to challenge the Amendment) (¶629).

3.8. Muszynianka's claim that the Respondent impaired the investment through unreasonable or discriminatory measures

The Claimant argued that the Constitutional Amendment and the denial of the Exploitation Permit had the effect of impairing the investment through measures that were alleged to be unreasonable and discriminatory (¶642). To substantiate this argument, Muszynianka referenced its arguments under the expropriation and FET claim (¶643).

4. The Respondent's Position

4.1. The Respondent's first challenge to the Tribunal's jurisdiction: the bilateral investment treaty is incompatible with EU law and, therefore, inoperable

Slovakia challenged the Tribunal's jurisdiction because of an alleged incompatibility between the BIT and EU law. Since EU law entered into force after the BIT between Slovakia and Poland was signed and became effective, the Respondent argued that the incompatibility

between the two legal regimes rendered the investment treaty inapplicable – including its dispute resolution clause (¶171). Slovakia developed its argument by pointing, firstly, to the "overlapping, but not coextensive" subject matter arising both under the BIT and under applicable EU law (in Poland and in Slovakia); in other words, investors benefitted from the same substantial protection under both legal regimes, this leading to an incompatibility between them (¶173-4). Continuing, Slovakia referred to elements of the EU legal order underpinning the alleged incompatibility: the impossibility of the arbitral tribunal to hear the case because questions involving EU legal matters cannot be adjudicated by arbitral tribunals (the "autonomy" argument(s), based on Articles 267 and 344 of the Treaty on the Functioning of the European Union); the discriminatory nature of the arbitral dispute settlement mechanism (only Polish and Slovakian investors could make use of it under the applicable treaty, excluding other EU investors); and a breach of the principle of mutual trust applicable between EU member states, since investor-state dispute settlement allegedly arises out of a mistrust of the other BIT party's judicial system (¶175).

The Respondent also argued that EU law was directly applicable (and/or relevant for the interpretation of the treaty under the tenets of the Vienna Convention on the Law of Treaties) (¶178). This would mean that the *Achmea* award, rendered by the Court of Justice of the European Union and which determined the inoperability of intra-EU BITs from the moment EU law became applicable to the two parties to any given intra-EU BIT, would also bind the arbitral tribunal (¶179). It was also by reference to subsequent practice, more specifically the practice of Slovakia and Poland (the parties to the applicable BIT), that the Respondent supported its incompatibility with EU law argument (¶¶181-7). Finally, Slovakia also relied on the intra-EU BITs Termination Agreement (signed by a number of EU states, including Slovakia and Poland) (¶¶188-9).

4.2. The Respondent's second challenge to the Tribunal's jurisdiction: there was no relevant investment made on Slovakia's territory

The Respondent argued that Muszynianka's "bundle of rights" did not amount to an investment under the applicable BIT, firstly, because no predetermined asset that would come under the BIT's ambit of protected investments was held by the Claimant (¶¶267-8). In any case, the Claimant did not demonstrate that its assets, and interests, objectively determined an investment – to which the traditional four criteria would apply (contribution of resources, made over an extended period of time; attendant risk; and a contribution to the host state's economy) (¶269). More specifically, the economic activity taking place on Slovakian territory was limited to extracting the water and this was akin to a sale, while the acquisition of GFT Slovakia simply involved an extraterritorial transaction (¶270). Moreover, most of the benefits would occur on Polish territory, rendering the activities taking place on Slovakian territory of secondary importance – while also raising questions about the presence of the time factor of the alleged investment and the risk entailed by the envisioned activities on Slovakian territory (¶¶271-2). Finally, Slovakia argued that the Claimant failed to demonstrate the input that it brought in terms of its "know-how", while also claiming that Muszynianka did not have any rights to exploiting the Slovakian water resources, but simply an expectation – which, in any case, could not be considered to amount to an investment (¶273).

4.3. The Respondent's third challenge to the Tribunal's jurisdiction: the investment did not satisfy the legality criteria

The Respondent argued that the Claimant's investment was not compliant with applicable national and European laws, especially the Mineral Water Directive (¶¶296-7).

4.4. The Respondent's position on the inadmissibility of the claim

The Respondent argued that claims under the applicable BIT would only be admissible if one of the following four situations had occurred: there was an expropriation rendering the investment worthless; the company (investor) did not have any remedy to redress its injury; the company was deprived of its capacity to sue; there was a denial of justice (¶306). Slovakia argued that none of this had occurred (¶307). The Respondent also argued that the investment's illegality could be assessed at this stage, in order to render the claim inadmissible (¶308).

4.5. The Respondent's position on the investment's legality (merits)

The tribunal decided to start the merits phase with an assessment of the investment's legality – this would clarify the extent to which legitimate expectations worthy of protection existed and the extent to which the investor was entitled to obtain the exploitation permit (¶316). There were four allegations of illegality, with the first criticism being the bottling of the water by an entity (Muszynianka) different than the one extracting it (GFT) (¶318). The second allegation of illegality concerned the bottling of the mineral water at a place different than its source, this being prohibited by EU law, according to the Respondent (¶¶319-21). Thirdly, the Respondent alleged that the Claimant wanted to mix water extracted from several (different from a chemical point of view) Slovakian sources (albeit found in the same area) and, possibly, to mix that water with Polish water (again, different from the water extracted from Slovakian sources), something which would also be illegal under EU, Slovak, and Polish law (¶¶322-35). An issue of particular importance was that although the Slovak authorities had initially conceded to the investor that mineral water extracted from 4 of the 5 Slovak sources was of the same chemical type, this was later refuted by the Respondent's own experts, which conducted a different assessment specifically for the present arbitration (¶330). Another issue which determined the illegality of the investment, according to Slovakia, was that Muszynianka planned to sell the water under the same brand; this would mislead consumers, owing to the differences in the sourced water (¶¶336-42). Of particular importance here is that the Slovak authorities never managed to reach the point of analysing the name of the brand under which the Claimant intended to sell its product. Although one Slovak official made a handwritten note on the cover of GFT's application for the exploitation permit, mentioning that a Polish name could not be used – since it was alleged that this is what the Claimant wanted to do (¶342).

4.6. The Respondent's position on the Claimant's FET claim (see, supra, 3.6.)

After arguing that the applicable FET standard should be the same as the one found in customary international law (relevant *via* Article 31(3)(c) of the Vienna Convention on the Law of Treaties, mandating a tribunal to consider other relevant rules of international law when interpreting a treaty provision), the Respondent argued that there was a high threshold that should be reached for a violation of the FET standard to be established – this meant that, among others, the arbitrators would need to account for the "investor's due diligence and its assessment of risk associated with entering into a particular business environment" (¶439). Then the state argued that only expectations that were created at the moment the investment

was made were relevant, and only if the investor had relied on them (¶440). It was also necessary to point to the fact that expectations as regards to regulatory stability were protected only if the state had given specific assurances to this end (¶440). It was in this context that, the Respondent argued, Muszynianka should have known about the changes that were to occur as regards the regulatory framework on water, since this had been envisioned since 2012 and known from the governing programme of the ruling party (¶¶442-5). As concerns the Claimant's argument that it had a right to obtain the Exploitation Permit, Slovakia denied this by pointing out, among others, that: not all legal rules were necessarily complied with by Muszynianka; the state authorities had much wider discretion to deny a permit on public interest grounds; the Constitutional amendment would have led to a modification of the Exploitation Permit if it had been granted in the first place (¶¶446-53). Finally, the Respondent argued that even if it had given assurances to the Claimant as regards the legality of the project and the granting of the Exploitation Permit, this was based on incomplete information (Muszynianka had withheld relevant information which, if the authorities had had, would have led to a denial of the Exploitation Permit) (¶454).

4.7. The Respondent's position on the expropriation claim

The Respondent pointed out that the Claimant's enjoyment of its investment was not interfered with – its ownership of GFT, in particular, was not affected; GFT also retained all its assets and rights (¶631). As concerns the Exploitation Permit, the Respondent stressed that the Claimant did not have any entitlement to it and, as such, no expropriation could have occurred (¶631). The Respondent also insisted on the Claimant's possibility to amend its business plan (¶632). Finally, Slovakia pointed out that Muszynianka was not faced with a violation of due process principles, since it was able to pursue its claims before the Slovakian domestic courts (¶636).

4.8. The Respondent's position on the non-impairment claim

The Respondent pointed out that the impugned measures did not touch upon Muszynianka's shareholding interest in GFT or upon its other associated rights; it also argued that the measures were not discriminatory and were both appropriate and reasonable as concerns the denial of the Exploitation Permit (¶643).

5. The Tribunal's Analysis

5.1. The Tribunal's assessment of its jurisdiction pursuant to the Respondent's intra-EU objection

The Tribunal began by referring to the *Achmea's* judgment as concerns the compatibility between the EU legal order and intra-EU BITs; in this context, the arbitrators remarked that the CJEU's analysis was conducted exclusively pursuant to EU law – thus, the arbitral tribunal was bound to conduct its own conflict analysis in order to understand which legal order prevailed (¶¶213-7). The Tribunal then turned to what the Respondent had deemed subsequent conduct clarifying the status of the BIT – the *Achmea* declaration and the *notes verbales* sent between the governments of Slovakia and Poland (essentially confirming the aforementioned declaration) as concerns the effects of the CJEU's *Achmea* judgment (¶¶218-20). Firstly, the arbitrators found that those subsequent developments concerned, in fact, the consequences of the *Achmea* judgment – and did not purport to interpret the applicable BIT (¶¶221 and 225). Secondly, the Tribunal considered that a party to a BIT may not rely on such interpretative

tools to invalidate its consent to arbitration – essentially, such tools are only part of the elements of an interpretative endeavour under public international law and cannot be used to invalidate a clearly-worded dispute resolution clause, as was the case with the one found in the applicable BIT (¶¶222-4).

Moving to assess the alleged incompatibility between the BIT (and its arbitration clause) and the EU treaties, the Tribunal began by looking at the subject matter of these legal instruments. By construing similarity of subject matter as a common nexus between the main provisions, and objectives, of the two legal instruments in alleged conflict, the tribunal found that BITs and the EU treaties did not, in fact, share the same subject matter (¶¶232-8). Subsequently, the tribunal also addressed the second prong of the conflict assessment (assuming, as an argumentative exercise, that the BIT and the EU treaties shared the same subject matter). It started by showing that no conflict existed between the BIT, on the one hand, and EU law provisions, such as Article 344 of the TFEU (¶¶243-5), Article 267 of the TFEU (¶¶246-8), Article 18(1) of the TFEU (¶¶250-3), and Article 4(3) of the TEU (254-6). Finally, as concerns the intra-EU BITs Termination Agreement, the Tribunal analysed it by reference to the moment at which its jurisdiction was established – before the Termination agreement came into force (¶¶262 and 265). In any case, it did not enter into force between Poland and Slovakia – the two parties to the applicable BIT (¶263).

5.2. The Tribunal's assessment of its jurisdiction pursuant to the Respondent's ratione materiae objection

The Tribunal started by admitting that an investment under the applicable treaty must satisfy a certain number of objective criteria to benefit from that BIT's protection, irrespective of the present arbitral proceedings not being conducted under the ambit of the ICSID framework (¶288). In any case, these criteria did not include, as a threshold obstacle, the contribution to the development of the host state element (¶289). It is in this context that the Tribunal found that the Claimant held certain assets (the one considered by the Tribunal being the shareholding interest in GFT Slovakia) (¶290) and it moved on to assess these assets against the aforementioned objective criteria. Firstly, it was the funds used to acquire Muszynianka, together with the subsequent capital expenditures needed to transform GFT into a profitable endeavour, that determined the tribunal to consider the Claimant to have committed adequate capital to Slovakia (¶291). Secondly, according to the Tribunal, the duration criterion was satisfied because of GFT's long existence and Muszynianka's plans to exploit water resources over a long term (¶292). Thirdly, the risk element existed because, outside of the normal investment risk, there was no certainty that GFT would obtain the relevant exploitation permits so that it could pursue its envisioned project (¶293). Thus, the shares that Muszynianka held in GFT were sufficient for the tribunal to conclude that a protected investment existed (¶294).

5.3. The Tribunal's assessment of its jurisdiction pursuant to the Respondent's third jurisdiction challenge

After emphasising that the illegality of an investment may only bar the Tribunal's jurisdiction if that investment was procured/established illegally (¶¶299-301), the Tribunal found that there was nothing illegal in Muszynianka's acquisition of GFT's shares (the investment) (¶302). Moreover, the alleged illegalities were all concerned with what happened after the investment was established, not during that moment (¶302).

5.4. The Tribunal's position on the admissibility of the claims

The Tribunal found the claims admissible because it was clear that the Respondent's measures had a direct economic impact on the Claimant (a decrease in the shareholding interest in GFT) (¶313) and that any issues of illegality would be assessed at the merits stage of the proceedings (¶314).

5.5. The Tribunal's analysis of the investment's legality (merits phase)

The Tribunal began with the Respondent's allegation as concerns the sale of the water prior to bottling. While there was a prohibition for the holder of the permit to sell the extracted water to a third-party for bottling, there was no evidence that GFT intended to do this (¶¶360-3). In terms of the Respondent's allegation that the extracted mineral water could only be bottled at source under EU law, the Tribunal found that such a reading was based on an erroneous understanding of the applicable rules (¶¶364-7). And even if such a rule existed in the applicable EU law (a directive), it was not directly binding on the Claimant; the source of any such obligation would need to be found in the applicable domestic legislation (¶368). Slovak law did not lay down such a prohibition and, in fact, the administrative authorities' behaviour prior to the Constitutional amendment seemed to confirm the lack of any obligation to this end (¶¶369-71). As concerns the mixing of the water sources, the Tribunal considered that mixing the water derived from the various Slovakian sources was legal because of the water flowing from the same hydrogeological source, having the same chemical composition, and not showing prohibited differences in terms of mineralization (¶413). In terms of the legality of mixing the water from Slovakia with water from Poland, the tribunal dispensed with this analysis. It assumed that the Claimant had established two alternative options, mixing only Slovakian water or mixing both Slovakian and Polish water, with the former being in conformity with the applicable regulations. If it turned out that mixing water from Slovakia and Poland was illegal, it could reasonably be assumed that the Claimant would choose the other option, which was legal – here, the tribunal assumed that Muszynianka was a rational actor, minimizing its exposure to the consequences of a breach of the applicable rules (¶¶414-5). Hence, no need to analyse the legality of the other option, as the Claimant would choose the one which did not entail a violation of the applicable rules. As far as the Claimant's branding plans went, the Tribunal considered them to be compliant with the applicable law as long as the Claimant used a name reflecting the reality of the cross-border process – maintaining the Polish name as long as the place of origin was also clear (¶424). Thus, the investment was not illegal, even if certain aspects concerning it were not absolutely clearly determined – but this was owed to the phase that the process reached.

5.6. The Tribunal's analysis of the FET claim

The Tribunal started by looking over the content of the FET standard and finding that it has an autonomous treaty meaning (including the protection of legitimate expectations), not limited to the minimum standard of treatment found in customary international law (¶458). It also mentioned that, for legitimate expectations to receive protection, they must be based on an express assurance (that must also be sufficiently specific) that the state gives an investor so that the latter would commit its capital to the former's territory – and that it would also rely on these assurances (¶462). The Tribunal also denied that, unless specific assurances existed (which did not exist in this specific case), an investor could not form legitimate expectations stemming from the stability of a State's legal framework – this necessarily applied in cases where the legal framework is not adopted to attract foreign investment (¶466). At the same time, the

tribunal admitted that "unreasonable, discriminatory, or disproportionate [legal] reforms, adopted contrary to due process", could breach the FET standard, but under different prongs than the protection of legitimate expectations (¶466).

The Tribunal then moved on to assess the alleged assurances given by the central, and regional, authorities, as regards the Claimant's envisioned project. It found that, up until March 2010, no assurance was relevant because it was based on a different business model than the one envisioned by Muszynianka (¶¶475-7). Between March 2010 and 31 December 2012 (the date on which Muszynianka acquired GFT), there were two types of representations worthy of consideration: statements/acts by the Inspectorate and by the State Spa Committee and statements/acts stemming from the Municipality of Legnava/the Ministry of Environment in the context of the Zoning Permit (¶477). As regards the first category, the Tribunal considered that no representation could lead to the formation of legitimate expectations, as all of them pointed to various flaws (or potential illegalities) in GFT's project design or were based on insufficient information (¶¶479-94). When it comes to the second category, the Tribunal found that no legitimate expectations could stem from such representations either because they were not concerned with the conditions that needed to be fulfilled for the grant of the Exploitation Permit (¶¶495-6). After that, the Tribunal addressed the Claimant's contention that it was entitled to be issued the Exploitation Permit – the former found that this was not the case since it was not clear if the latter had complied with all the conditions that had to be fulfilled before the Permit could be granted (in this case, more specifically, it was not clear whether the projected complied with the public interest condition) (¶¶506-511).

The Tribunal then moved on to assess the Constitutional Amendment against different elements of the FET – discrimination, (un)reasonableness, (dis)proportionality, and (in)consistency. In terms of discrimination, the arbitrators considered that there was no issue of *de jure* discrimination since the prohibition on exporting water applied equally to all water producers (¶516). As regards *de facto* discrimination, this was not believed to have occurred either because any producer of drinking water which had as its *modus operandi* the cross-border transport of unbottled Slovak drinking or mineral water was not allowed to proceed in its endeavours (¶¶520-2). Finally, the Tribunal also assessed whether the Constitutional Amendment specifically targeted the Claimant, as a distinct form of discrimination. The arbitrators considered that this was not the case, especially since the Constitutional Amendment was based on more general concerns as regards drinking water (for example, in the context of climate change) and it was also concerned with water reserves situated in the southern part of Slovakia (the Claimant was operating in the north-eastern part of the state) – so it was not possible to consider that there was a conspiracy against a producer of mineral water (¶¶523-44). Continuing, the Tribunal looked at the reasonability of the measures. It found, firstly, that the Constitutional Amendment pursued a public purpose – environmental protection, safeguarding the public health, and regulation of the use of natural resources in an "informed and optimal fashion" (¶¶546-56). Secondly, the Tribunal analysed whether the measure entailed a reasonable connection with the identified public purpose. After acknowledging that a certain deference must be given to state authorities in cases such as the present one (¶¶557-8), the Tribunal found that the measure was, in fact, reasonable – it assessed the measure against all the objectives and found relevant reasons for it successfully attaining those aims (¶¶559-65). Moving on, the tribunal assessed the proportionality of the measure. It firstly found that the measure was suitable to achieve the stated purpose (as already determined before) (¶567). Secondly, as concerns the necessity of the measure, the arbitrators considered that the Amendment also satisfied this condition since it was not proven that there were alternative, but equally effective and, at the same time, available, options (¶¶568-72). Finally, the Tribunal

considered that the proportionality *stricto sensu* (considering the effects of the measure on the investor's rights/interests) condition was also satisfied, since the importance of water preservation – together with the other envisioned purposes – was not negligible, ensuring a balance between it and the investor's rights/interests (¶¶573-6).

The last element of the FET against which the Tribunal assessed the measure was that of consistency. The arbitrators considered that no problems arose here either, since the Constitutional Amendment was based, from the beginning, on a host of issues of fundamental public importance – and not on a conspiracy to target the Claimant (¶577). The second alleged inconsistency regarded the treatment of the water as a commodity subject to EU rules on the free movement of goods. The Claimant alleged that the Respondent was inconsistent as concerns the moment at which water become a good under the aforementioned framework (arguing that the latter had conceded initially that unbottled mineral water was a commodity, but that it later contradicted itself) (¶578). The Tribunal, while emphasising the right of the State to regulate the use of the water, considered that there was no inconsistency in the authorities' approach since water, as long as it stayed underground, was in Slovakia's ownership (¶582). It was true that water may become a commodity when extracted by an economic operator, but the Constitutional Amendment referred to underground water, the use of which the state was free to regulate (¶582).

Before concluding its FET analysis, the Tribunal turned its attention to the Exploitation Permit proceedings. It was at this point that a violation of the FET was found because the authorities did not comply with applicable (procedural) rules of Slovakian administrative law (as concerns the time limits that should have been observed by the authorities tasked with assessing the Exploitation Permit application) – and this was considered to have been done in an abusive, and arbitrary, manner (¶616). Nonetheless, because it had already been determined that the Claimant did not have any legitimate expectations to the granting of the Exploitation Permit (¶620) and that there was no entitlement to this Permit, the Tribunal decided not to award any damages for this violation of the FET standard (¶621).

5.7. The Tribunal's analysis of the expropriation claim

The Tribunal denied the expropriation claim because it considered that the Claimant's investment, its shareholding interest in GFT, was not affected; in turn, GFT's assets and the know-how concerning the water exploitation and bottling process were not affected either (¶639). Thus, the investment still had economic value (¶639), even if it was affected by the Constitutional Amendment (¶640).

5.8. The Tribunal's analysis of the alleged violation of the non-impairment standard

While the Tribunal did find a violation of the non-impairment standard by reference to the arbitrary manner in which the administrative proceedings were conducted, it considered that it could not award compensation for this breach. Similar to its findings in the context of the FET violation, the breach was not causal with any subsequent loss (¶648). As such, it did not entitle the Claimant to compensation (¶648).

6. Costs

Owing to the fact that the parties to this arbitration have each prevailed on separate issues, the Tribunal decided to split the costs between them as regards the expenses with the Tribunal,

Secretary, and the PCA fees (¶669). It also decided that each party should bear its own legal costs and other expenses incurred in connection with the arbitration.

7. Partial dissenting opinion of Robert G. Volterra

Arbitrator Volterra considered that the Arbitral Tribunal erroneously found that there was no violation of the applicable BIT when the Constitutional Amendment took place (¶19). This was because the Constitutional Amendment contained an exception to its ban on the export of water – mineral water that was already packaged in Slovakia (¶21). This meant that the Respondent had pursued more than environmental or preservation of water supply objectives, since this exception was premised on industrial policy considerations – job creation and tax revenues (22). As such, when looking at the Constitutional Amendment from this point of view, it became clear that it was unjustified when assessed against the applicable BIT, since it was discriminatory (¶83), arbitrary and unreasonable (¶91), disproportionate (¶92), and inconsistent (¶93). In any case, Arbitrator Volterra emphasised that it reached this conclusion when assessing the measure by reference to the aforementioned exception and by reference to the pursuit of industrial policy interests – otherwise, it considered the Constitutional Amendment to be in line with the provisions of the BIT (¶¶24 and 94).