PCA CASE NO. 2017-08 7 October 2020

UNCITRAL investment arbitration under the Agreement between the Republic of Poland and the Slovak Republic on the Reciprocal Promotion and Protection of Investments

MUSZYNIANKA SPÓŁKA Z OGRANICZONĄ ODPOWIEDZIALNOŚCIĄ

(formerly SPÓŁDZIELNIA PRACY "MUSZYNIANKA")

CLAIMANT

v.

THE SLOVAK REPUBLIC

RESPONDENT

AWARD

Arbitral Tribunal

Prof. Gabrielle Kaufmann-Kohler, President

Prof. Robert G. Volterra, Arbitrator

Mr. J. Christopher Thomas QC, Arbitrator

Secretary of the Tribunal

Mr. Lukas Montoya

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TABLE OF ABBREVIATIONS

"Muszynianka Plus"	One of the Claimant's main products, trade descriptions/names
"Muszynianka"	One of the Claimant's main products, trade descriptions/names
2004 Final Report	Final Report on Hydrogeological Prospecting Survey, August 2004
2008 Final Report	Final Report on Hydrogeological Prospecting Survey, 20 December 2008
Achmea Declarations	Declarations by various EU Member States on the legal consequences of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union, 15-16 January 2019
Achmea or **Achmea Judgment**	*Slovak Republic v. Achmea B.V.*, CJEU Case C-284/16, 6 March 2018
Act on Foodstuffs	Act No. 152/1995 Coll. on Foodstuffs, as amended
Act on Geological Works	- Up to **31 December 2007**: Act No. 313/1999 Coll. of Laws on Geological Works and the State Geological Administration - As of **1 January 2008**: Act No. 569/2007 Coll. on Geological Works, as amended
Act on Mineral Waters	Act No. 538/2005 Coll. on Natural Healing Waters, Natural Healing Spas, Spa Locations and Natural Mineral Waters and on amendment and supplements of certain acts, as amended
Act on Waters	Act No. 364/2004 Coll. of Laws on Waters and on Amendments to the Act of the Slovak National Council No. 372/1990, as amended
Administrative Procedure Code or **APC**	Act No. 71/1967 Coll. of Laws on Administrative Procedure (Administrative Procedure Code)
Answer	Respondent's Answer to Claimant's Notice of Arbitration, 16 March 2017
AQUA	AQUA LC s.r.o.
BIT or **Treaty**	Agreement between the Republic of Poland and the Slovak Republic on the reciprocal promotion and protection of investments, 18 August 1994
Building Permit	Decision of the District Office in Prešov – Building Permit, 30 May 2014.
CJEU	Court of Justice of the European Union
Claimant or **Muszynianka**	Muszynianka spółka z ograniczoną odpowiedzialnością (formerly Spółdzielnia Pracy "Muszynianka")
Comments NV	Respondent's comments on Ms. Bek's Communication and the *Notes Verbales*, 18 March 2020
Constitution or **Slovak Constitution**	Constitutional Act No. 460/1992 Coll, Constitution of the Slovak Republic, as amended

Constitutional Amendment	Amendment to Article 4 of the Slovak Constitution, approved on 21 October 2014 and in force as of 1 December 2014 (Act No. 306/2014 Coll. Amending the Slovak Constitution)
C-PHB	Claimant's First Post-Hearing Brief, 13 May 2019
C-PHB 2	Claimant's Second Post-Hearing Brief on the Achmea Declarations, 3 June 2019
C-Reply on Costs	Claimant's reply to the Respondent's cost statement, 4 July 2019
C-Statement on Costs	Claimant's cost statement, 24 June 2019
CTA	Claimant's submission on the Termination Agreement, 3 June 2020
Decree 100	Decree No. 100/2006 Coll. on requirements for mineral water
ER	Expert Report
EU	European Union
EU Commission	European Commission
EU Treaties	TEU and TFEU
Exploitation Permit or **Mineral Water Permit**	Permit allowing the holder to exploit a natural healing water source or a natural mineral water source
Exploration Permit I	Decision of the Ministry of Environment, Department of Geology and Natural Resources, 24 May 2002
Exploration Permit II	Decision of the Ministry of Environment, Department of Geology and Natural Resources, 8 November 2002
Exploration Permit III	Decision of the Ministry of Environment, Department of Geology and Natural Resources, 23 February 2006
GFT Slovakia	GFT Slovakia s.r.o.
Goldfruct	GFT–Goldfruct Sp. z o.o.
ICJ	International Court of Justice
ILC	International Law Commission
Information Memorandum	Information memorandum prepared by Warsaw Equity Advisors on the transportation of the water extracted from the Legnava Sources to a bottling plant in Muszyna, July 2012
Inspectorate	Inspectorate of Spas and Springs of the Slovak Republic
Legnava Sources	Boreholes LH-1, LH-2A, LH-3, LH-4 and LH-5
LH-1 Maximum Quantities Decision	Decision by the Ministry of Environment to set the maximum usable amounts of water with respect to borehole LH-1, 17 February 2005

LH-1 Natural Mineral Water Recognition	Decree by the Ministry of Health recognizing borehole LH-1 as a spring of natural mineral water, 23 March 2005
LH-2A to LH-5 Maximum Quantities Decision	Decision by the Ministry of Environment to set the maximum usable amounts of water with respect to Boreholes LH-2A, LH-3, LH-4 and LH-5, 21 May 2009
LH-2A to LH-5 Natural Mineral Water Recognition	Decision by the State Spa Committee recognizing Boreholes LH-2A, LH-3, LH-4, and LH-5 as springs of natural mineral water, of 6 July 2009
Main Achmea Declaration	Declaration of 15 January 2019, executed by 22 EU Member States including the Slovak Republic and the Republic of Poland, on the legal consequences of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union
Maximum Quantities Decisions	The LH-1 Maximum Quantities Decision and the LH-2A to LH-5 Maximum Quantities Decision, together
Measures	The Constitutional Amendment and the denial of the Exploitation Permit, jointly
Mineral Water Directive	Directive 2009/54/EC of the European Parliament and of the Council on the exploitation and marketing of natural mineral waters
Ministry of Environment	Ministry of Environment of the Slovak Republic
Ministry of Health	Ministry of Health of the Slovak Republic
MPs or **MP**	Member(s) of the Slovak Parliament
Ms. Bek's Communication	Communication of 2 March 2020 by Ms. Joanna Bek (an official of the Ministry of Economic Development of the Republic of Poland), attaching the Main Achmea Declaration and the *Notes Verbales*
Muszynianka	The core trademark/brand of the Claimant's product line
Muszynianka Water	Natural mineral marketed under any variation of the trademark/brand *Muszynianka*, including "*Muszynianka*" and "*Muszynianka Plus*".
NDTP	Non-Disputing Third Person
NoA	Notice of Arbitration, 18 August 2016
Notes Verbales	The Slovak *Note Verbale* and Polish *Note Verbale*, jointly
Parties	The Claimant and the Respondent
Party	Either the Claimant or the Respondent
PCA	Permanent Court of Arbitration
PILA	Swiss Private International Law Act, 18 December 1987, as amended
PNIPH	Polish National Institute of Public Health

Polish Mineral Water Regulation	Regulation of the Polish Minister of Health on natural mineral waters, spring waters and table waters, 31 March 2011
Polish *Note Verbale*	*Note Verbale* of 24 January 2020, issued by the Ministry of Foreign Affairs of the Republic of Poland to the Embassy of the Slovak Republic in Warsaw
Programme Declaration	SMER's Programme Declaration for the 2012-2016 governmental period, May 2012
Project	The exploration, extraction, and commercial exploitation of the Legnava Sources
Rejoinder	Respondent's Rejoinder on Jurisdiction, Merits and Quantum, 21 November 2018
Rejoinder NV	Claimant's rejoinder on Ms. Bek's Communication and the *Notes Verbales*, 20 April 2020
REOP	Regional Environmental Office in Prešov
Reply	Claimant's Reply on Jurisdiction, Merits and Quantum, 20 July 2018
Reply NV	Respondent's reply on Ms. Bek's Communication and the *Notes Verbales*, 9 April 2020
Respondent	The Slovak Republic or Slovakia
Response NV	Claimant's response on Ms. Bek's Communication and the *Notes Verbales*, 1 April 2020
Roads Act	Act No. 135/1961 Coll. on Roads, as amended
R-PHB	Respondent's First Post-Hearing Brief, 13 May 2019
R-PHB 2	Respondent's Second Post-Hearing Brief on the Achmea Declarations, 3 June 2019
R-Reply on Costs	Respondent's reply to the Claimant's cost statement, 4 July 2019
R-Statement on Costs	Respondent's cost statement, 24 June 2019
RTA	Respondent's submission on the Termination Agreement, 3 June 2020
Secondary Achmea Declaration	Declaration of 16 January 2019, executed by Finland, Luxembourg, Malta, Slovenia and Sweden, on the legal consequences of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union
SFC or **Slovak Food Code**	Decree of the Ministry of Agriculture of the Slovak Republic and the Ministry of Health of the Slovak Republic No. 608/9/2004 - 100, issuing the Chapter of Food Code of the Slovak Republic regulating natural mineral water, spring water and packaged drinking water, as amended
Slovak Act on Consumer Protection	Act No. 250/2007 Coll. on Consumer Protection, as amended

Slovak *Note Verbale*	*Note Verbale* of 8 November 2019, issued by the Embassy of the Slovak Republic in Warsaw and addressed to the Ministry of Foreign Affairs of the Republic of Poland
SMER	Slovak Social Democratic Party
SoC	Claimant's Statement of Claim, 15 September 2017
SoD	Respondent's Statement of Defense, 19 January 2018
SOLVIT	EU Commission's Internal Market Problem Solving Network Centre
State Spa Committee	State Spa Committee of the Slovak Republic
Supreme Court	Supreme Court of the Slovak Republic
SVP	Stredoslovenská vodárenská prevádzková spoločnosť a.s.
SVS	Stredoslovenská vodárenská spoločnosť a.s.
Termination Agreement	"Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union", signed on 5 May 2020 by, *inter alia*, the Slovak Republic and the Republic of Poland
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
ToA	Terms of Appointment, 16 May 2017
UNCITRAL Rules	1976 UNCITRAL Arbitration Rules
VCLT	Vienna Convention on the Law of Treaties
VVS	Východoslovenská vodárenská spoločnosť a.s.
Warsaw Equity or **WEA**	Warsaw Equity Advisors sp. z o.o.
Water Report	Report by the Ministry of Environment, entitled "Water as Strategic Raw Material of the State and Proposal for its Protection and Sustainability in Relation to Cross-Border Disposal of Water Extracted from Resources Situated in the Territory of the Slovak Republic", 24 October 2012
Water Resolution or **Resolution No. 583/2012**	Resolution 583 of 24 October 2012 issued by the Slovak Cabinet
WS	Witness Statement
Zoning Permit	Permit allowing the placement of the water treatment plant and the proposed pipeline through the Poprad river, 15 June 2012
ZVK	Zempléni Vizmü Kft

I. INTRODUCTION

A. THE PARTIES

1. The Claimant

1. The Claimant is *Muszynianka spółka z ograniczoną odpowiedzialnością*, a limited liability company incorporated under the laws of the Republic of Poland (the "Claimant" or "Muszynianka"),[1] with the following registered seat:[2]

Al. Nikifora Krynickiego No. 58
33-380 Krynica-Zdrój, Poland

2. The Claimant's core business is the production of highly mineralized water, which it sells in the Polish market, as well as markets within and outside Europe, including Canada, the United States of America, Australia, and the United Kingdom. The Claimant's base products or trade descriptions/names are "*Muszynianka*" and "*Muszynianka Plus*".[3] The Tribunal will refer to natural mineral water marketed under variations of these core trade descriptions as "Muszynianka Water".

3. The Claimant's main and secondary production plants are located in the Polish municipalities of Muszyna and Milik respectively.

4. The Claimant is represented in this arbitration by:

Mr. Marek Jeżewski
Ms. Dominika Durchowska
Mr. Michał König
Ms. Magdalena Papiernik
Ms. Amelia Krajewska
Ms. Natalia Godula
Mr. Andrzej Malec
Mr. Wojciech Wrochna

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[1] Up to 2 September 2019, the Claimant was incorporated as *Spółdzielnia Pracy Muszynianka*, namely, a "cooperative" (i.e., an entity consisting of a voluntary association of unlimited number of members pursuing a joint economic activity in their common interest). *See* the Cooperative Law Act, 16 September 1982 (Journal of Laws of 2017, item 1560; consolidated text of 22 August 2017), **C-37,** Art. 1 § 1. *See also* Excerpt from the National Court Register, 11 February 2016, **C-3**, p. 16 (of the PDF).

[2] Excerpt from the National Court Register, 3 September 2019.

[3] Muszynianka's product offer, **C-42**; SoC, fn. 27.

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2. The Respondent

5. The Respondent is the Slovak Republic (the "Respondent"), and is represented in this arbitration by:

Mr. Stephen P. Anway
Mr. David W. Alexander
Mr. Rostislav Pekař
Ms. Tatiana Prokopová
Mr. Alexis Martinez
Mr. Raúl B. Mañón
Mr. William Sparks
Ms. Eva Cibulková
Mr. Jakub Kamenický
Ms. Aleksandra Dziki

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B. THE TRIBUNAL

6. The Tribunal is composed of:

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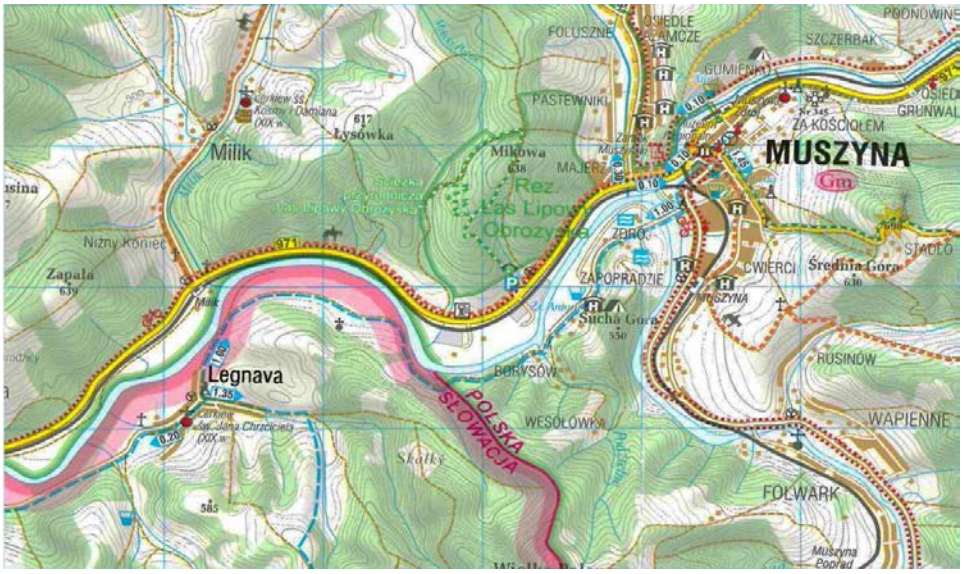
7. With the consent of the Parties, the Tribunal appointed Mr. Lukas Montoya, a lawyer of the President's law firm, as Secretary of the Tribunal, to perform the tasks set out in Section 12 of the Terms of Appointment. His *curriculum vitae* and a declaration of impartiality and independence were circulated to the Parties.

II. FACTUAL BACKGROUND

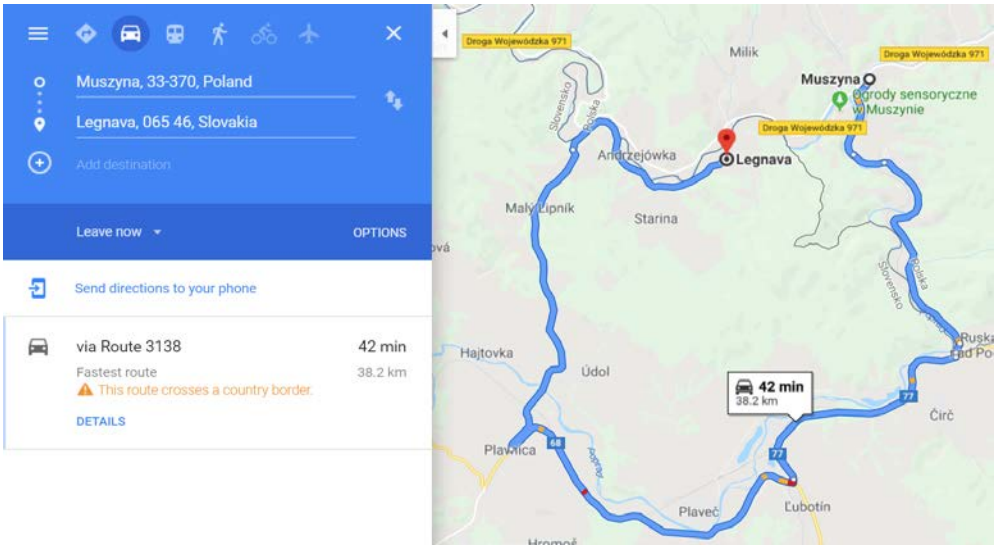
A. THE LEGNAVA REGION

8. Legnava is a municipality of the Stará Ľubovňa district (Prešov region) in the northern part of the Slovak Republic, an area reputed for the high presence of mineral water. It is located on the left bank of the Poprad river, a natural boundary defining part of the border between the Slovak Republic and the Republic of Poland.[4]



[4] A. Wędrychowska, S. Borkowski, J. Majerczak, Touristic map of Beskid Sądecki and Poprad Landscape Park (ca.1:50 000), Warsaw 2015, Demart (excerpt), **C-53**.

9. The Legnava area has a network of "primitive roads" connecting its more remote areas[5] and is only accessible through State Road 3183, a 3rd degree road.[6] Land transportation from Legnava to Muszyna requires a 45-minute trip via State Road 3138,[7] despite being 3.8 km apart when measured by a straight line from each other. [8]



10. Floods, the magnitude and impact of which are in dispute, have been reported in the Stará Ľubovňa district where Legnava is located in 2001, 2004 and 2010.[9]

[5] SoD, ¶ 63; Reply, ¶ 74.

[6] SoD, ¶¶ 61, 505; Reply, ¶ 76.

[7] Google Maps 2018, Road map from Legnava to Muszyna, **C-160**.

[8] Map showing distance between Legnava, Milik and Muszyna, **R-146**.

[9] *Infra*, ¶¶ 622, 624, 632, 633.iii.

B. GOLDFRUCT AND THE ESTABLISHMENT OF GFT SLOVAKIA

11. GFT–Goldfruct Sp. z o.o. ("Goldfruct") is a Polish company active in the mineral water production and bottling sector. Goldfruct is the producer of "*Kinga Pienińska"*, a medium-mineralized water extracted from and bottled in the Polish Municipality of Krościenko nad Dunajcem.[10]

12. Intending to expand its business, Goldfruct focused its attention on the Slovak side of the border and considered Legnava the nearest convenient area for the exploration and exploitation of mineral water in the Slovak Republic.[11]

13. To that effect, on 22 October 2001, Goldfruct established a local subsidiary, GFT Slovakia s.r.o ("GFT Slovakia"). With its registered seat in Legnava, GFT Slovakia was 90% owned by Goldfruct.[12] The remaining 10% shareholding was held by natural persons.[13]

C. THE DISCOVERY OF THE LEGNAVA SOURCES AND INITIAL PERMITS

1. Borehole LH-1A (2002-2005)

14. In 2002, GFT Slovakia sought authorization from the Ministry of Environment to carry out exploration activities in the Legnava area.

15. On 24 May 2002, the Ministry of Environment delineated a first exploration area in the municipality of Legnava, and allowed GFT Slovakia to perform a "detailed hydrogeological" survey focusing on the "verification" of mineral water abundance in said area (the "Exploration Permit I").[14]

16. On 8 November 2002, the Ministry of Environment determined a second neighboring exploration area and authorized GFT Slovakia to conduct an "exploratory hydrogeological" survey, again focusing on the "verification" of mineral water abundance in the delimited area (the "Exploration Permit II").[15]

17. In August 2004, upon the conclusion of the hydrogeological survey in both exploration areas, GFT Slovakia issued a final report summarizing its findings (the "2004 Final

[10] SoC, ¶ 69; SoD, ¶ 94.

[11] Zieliński WS I, **CWS-3**, ¶ 13.

[12] GFT Slovakia Full Extract from the Commercial Register, 6 March 2017, **R-21.**

[13] GFT Slovakia Full Extract from the Commercial Register, 6 March 2017, **R-21.**

[14] Exploration Permit I, **C-9**; Act on Geological Works, **C-83**, Arts. 19-22.

[15] Exploration Permit II, **C-10**; Act on Geological Works, **C-83**, Arts. 19-22.

Report").[16] It memorialized the discovery of borehole LH-1 (situated southwest in the Legnava municipality)[17] as a "new source of carbonic mineral water".[18]

18. On 17 February 2005, based on the calculation of groundwater quantities in the hydrogeological survey contained in the 2004 Final Report, the Ministry of Environment set the maximum usable amounts of water with respect to borehole LH-1 at 1.70 $l.s^{-1}$ (the "LH-1 Maximum Quantities Decision").[19]

19. On 23 March 2005, the Ministry of Health of the Slovak Republic issued a decree whereby it recognized LH-1 "as a spring of natural mineral water" (the "LH-1 Natural Mineral Water Recognition").[20]

2. Boreholes LH-2A, LH-3, LH-4, and LH-5 (2005-2009)

20. In addition to continuing its works under Exploration Permits I and II, GFT Slovakia submitted an application for the determination of a third exploration area. On 23 February 2006, the Ministry of Environment granted the request and authorized GFT Slovakia to carry out a "prospecting hydrogeological survey" in a newly delineated exploration area in Legnava (the "Exploration Permit III").[21]

21. On 20 December 2008, GFT Slovakia issued a final report summarizing its findings with respect to the further hydrogeological surveys executed between 2005 and 2008 (the "2008 Final Report").[22] Like the 2004 Final Report, the 2008 Final Report memorialized the discovery of Boreholes LH-2A, LH-3, LH-4 and LH-5 (together with Borehole LH-1, the "Legnava Sources"), located northeast of the Legnava Municipality.[23]

22. On 21 May 2009, the Ministry of Environment approved the 2008 Final Report and set the maximum usable amounts of water of the new boreholes as follows: 2.83 $l.s^{-1}$ for LH-2A, 2.30 $l.s^{-1}$ for LH-3, 2.40 $l.s^{-1}$ for LH-4, and 1.70 $l.s^{-1}$ for LH-5 ("LH-2A to LH-5 Maximum

[16] 2004 Final Report, **R-142**; Act on Geological Works, **C-83**, Art. 14.

[17] 2004 Final Report, **R-142**, § 1.1.1.

[18] 2004 Final Report, **R-142**, §§ 1.1.2, 4.

[19] LH-1 Maximum Quantities Decision, **R-45**.

[20] LH-1 Mineral Water Recognition, **C-14**, §§ 1-2.

[21] Exploration Permit III, **C-11**.

[22] 2008 Final Report, **R-138**.

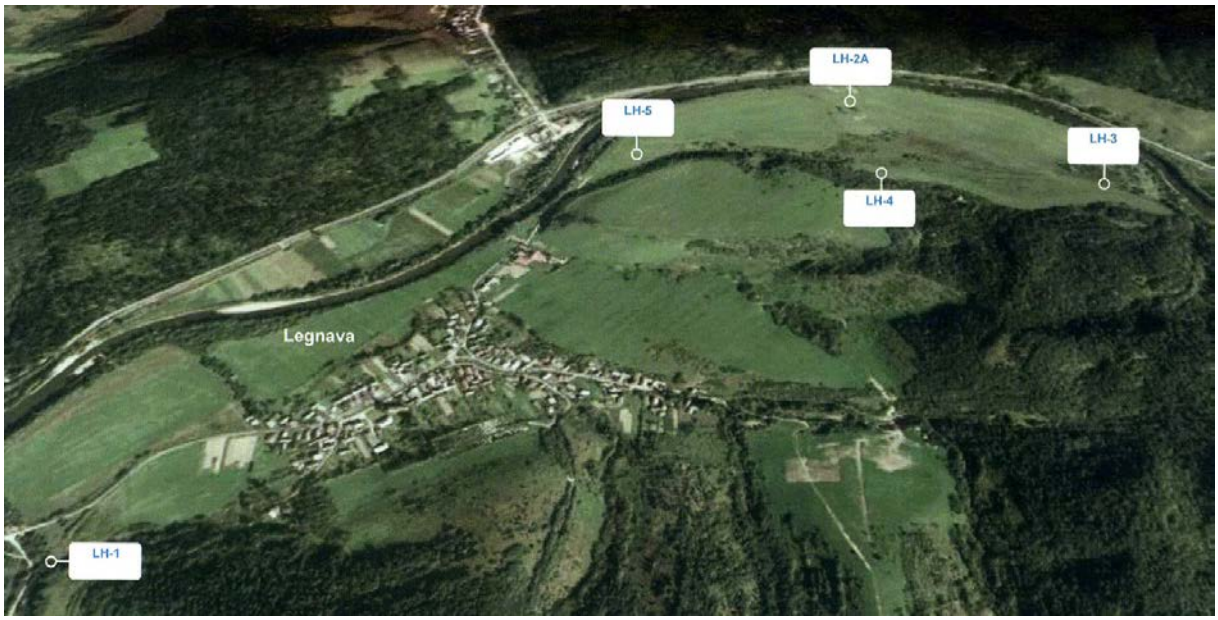
[23] 2008 Final Report, **R-138**, pp. 86-89.

Quantities Decision", together with the LH-1 Maximum Quantities Decision, the "Maximum Quantities Decisions").[24]

23. On 6 July 2009, the State Spa Committee of the Slovak Republic recognized Boreholes LH-2A, LH-3, LH-4, and LH-5 as springs of natural mineral water ("LH-2A to LH-5 Natural Mineral Water Recognition").[25] The State Spa Committee is an administrative authority organized and operating under the Ministry of Health that, from January 2006 onwards, was in charge of the recognition of natural mineral waters previously exercised directly by the Ministry of Health.[26]

D. THE BOTTLING PLANT: FROM LEGNAVA TO MUSZYNA (2004 - 2011)

24. The Legnava Sources are located as follows:[27]



25. Upon discovery of Borehole LH-1 in 2004, GFT Slovakia contemplated the possibility of building a bottling plant on lots No. 362/3 and 366/1 (adjacent to State Road 3138) surrounding Borehole LH-1,[28] which it had purchased for that purpose and which are situated as shown in the following map.[29]

[24] LH-2A to LH-5 Maximum Quantities Decision, **C-15**, § II.

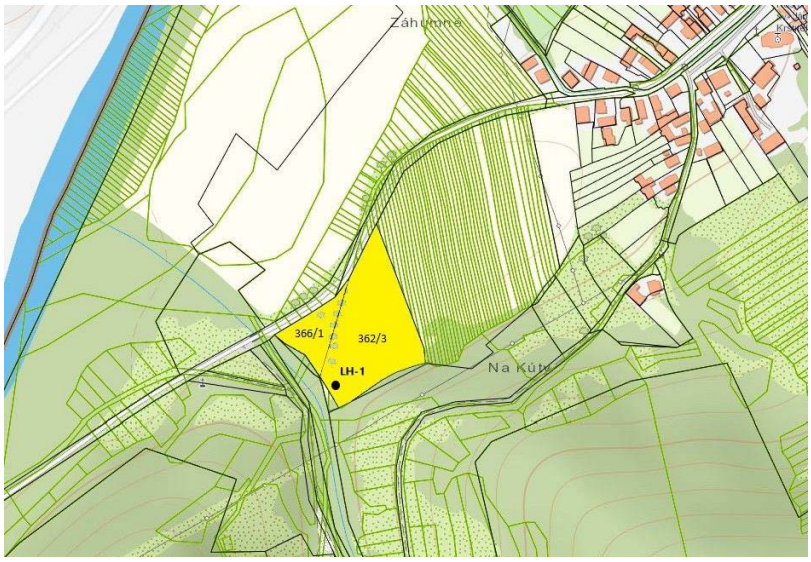
[25] LH-2A to LH-5 Natural Mineral Water Recognition, **C-16**.

[26] Act on Mineral Waters, **R-35**, Art. 5(1); *supra*, ¶ 19; SoD, fn. 91.

[27] 2008 Final Report, **R-138**, p. 20; Map of Legnava with indication of boreholes, 4 June 2012, **C-84**.

[28] 2004 Final Report, **R-142**, § 1.1.2; Geometric plan for determining the ownership rights to the land (plots) No. 362/3, 366/1, 20 July 2000, **R-344;** SoC, ¶ 88; Rejoinder, ¶ 343.

[29] Letter from GFT Slovakia to the Ministry of Environment, 10 December 2010, **C-86**, p. 1; Zieliński WS I, **CWS-3**, ¶¶ 20, 26.



26. The location contemplated for the bottling plant did not change with the discovery of Boreholes LH-2A, LH-3, LH-4 and LH-5, northeast of Legnava. Rather, GFT Slovakia intended to transport the water extracted from the newly discovered boreholes to the site surrounding Borehole LH-1 through a "2 kilometres long pipeline".[30] Local authorities assisted GFT Slovakia to acquire shares in several properties to allow for the construction of that pipeline.[31]

27. GFT Slovakia later informed the Slovak authorities, however, that constructing a bottling plant near Borehole LH-1 "was conditional on the reconstruction of the Malý Lipník – Legnava access road [(i.e., a segment of State Road 3138)] with a total length of 4,500 m".[32] It is undisputed that such reconstruction has not taken place to date. Indeed, while the Prešov Self-Governing Region (an autonomous territorial and administrative entity of the Slovak Republic in which Legnava is situated) initiated the first phase of reconstruction of State Road 3138 (including the 4.5 km portion between Malý Lipník and Legnava),[33] the works comprised only the "stabilization of landslides".[34] Also, while the Prešov Self-Governing Region agreed to commence a more comprehensive second

[30] Zieliński WS II, **CWS-6**, ¶ 8; Rejoinder, ¶ 345.

[31] Zieliński WS II, **CWS-6**, ¶ 8.

[32] Letter from GFT Slovakia to the Ministry of Environment, 10 December 2010, **C-86**, p. 1 (emphasis added).

[33] Agreement between Prešov Self-Governing Region and company EUROVIA SK, a.s. for reconstruction of a road between municipalities Legnava and Malý Lipník, 15 February 2011, **R-148**.

[34] Agreement between Prešov Self-Governing Region and company EUROVIA SK, a.s. for reconstruction of a road between municipalities Legnava and Malý Lipník, 15 February 2011, **R-148**, Art. 2.

phase, the approval for such undertaking was obtained after the initiation of the present proceedings.[35]

28. Between 2006 and 2008, as a second alternative, GFT Slovakia contemplated building the bottling plant in proximity to Boreholes LH-2A and LH-5. This prospect was prompted by preliminary discussions between Slovak and Polish authorities on the construction of a bridge connecting Legnava and Milik in Poland.[36] The bridge "would have made it possible to transport bottled water from a bottling plant [in the newly envisaged location] by trucks using the road infrastructure on the Polish side, regardless of the technical condition of the road leading to Legnava on the Slovak side".[37]

29. To that effect, in 2007 Goldfruct contacted the District Office in Stará Ľubovňa requesting the construction of the bridge in the following terms:

> In connection with the obtained information about the project of building a footbridge with limited carrying capacity between Legnava in Slovakia and Milik - Andrzejówka in Poland, we kindly ask you to consider the possibility of designing and building a bridg**e** at this place of not very large dimensions - one lane with street lighting - but with a high carrying capacity enabling the movement of heavy vehicles […].
>
> An example that confirms the real need for the proposed solution is the situation of GFT Slovakia […].The outlays and the works already carried out confirm the possibility of obtaining high quality mineral waters on an industrial scale in the Legnava region. In order to implement this project it is necessary to build a modern mineral water bottling plant […]. Due to the current condition of the roads in the Legnava area, such a solution is not possible. The construction of a bridge connecting Legnava with the road system on the Polish side would make the planned investment possible.[38]

30. It is common ground that the bridge in question was never built due to financial constraints.[39]

31. On 24 March 2010, GFT Slovakia requested a preliminary opinion from the Inspectorate of Spas and Springs of the Slovak Republic (the "Inspectorate") on a third alternative: the construction of a bottling plant in Poland to be supplied with water extracted from the Legnava Sources through pipelines placed under the Poprad river after being treated in Slovak territory.[40]

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[35] Podtatranské noviny: "The roads in our region will finally get fixed", 1 June 2017, **R-149**.

[36] *See* map at *supra*, ¶ 8.

[37] Zieliński WS II, **CWS-6**, ¶ 11; SoD, ¶ 115; Rejoinder, ¶ 346.

[38] Letter of Goldfruct to the Head of the District Office in Stará Ľubovňa, 27 August 2007, **C-155** (emphasis added).

[39] SoD, ¶ 116; Reply, ¶ 93.

[40] Letter from GFT Slovakia to Inspectorate, 24 March 2010, **C-87**; Zieliński WS I, **CWS-3**, ¶ 29.

32. On 30 March 2010, the Inspectorate replied that it had "no objections against [GFT Slovakia's] plan of us[ing] the natural mineral sources in Legnava".[41] It also pointed out that EU law did not permit mixing the water from the Legnava Sources, and that the company with the right to exploit the Legnava Sources "would also have to be the company bottling the water in consumer packaging".[42]

33. On 4 November 2010, the Polish National Institute of Public Health ("PNIPH") issued an "opinion" in response to a previous inquiry filed by Goldfruct (which is not on the record of this arbitration) on the possibility of "combining water from 5 boreholes located in Slovakia [(i.e., the Legnava Sources)] and using it to produce bottled water in a bottling plant in Poland".[43] In particular, the PNIPH stated that Polish law permitted the mixing of the water from the Legnava Sources in Poland in the following terms:

> On the basis of the data submitted regarding the basic mineral composition of the water from the abovementioned five boreholes drilled in Legnava (Slovakia), to a depth of 140 to 160 m, it is concluded that the water from all boreholes is of the same chemical type, i.e. HCO_3-Ca-Mg - naturally carbonated in the deposit. Waters from these boreholes can therefore be combined to obtain raw material for the production of bottled natural mineral water.[44] […]
>
> At the same time, it is stated that all activities related to water extraction, protection of intakes and preparation of the water for bottling (separation of unstable elements: Fe and Mn), should be carried out in compliance with Directive 2009/54/EC and Codex Stan 1081984 (as amended in 1985 and 1991). Compliance with the recommendations set out in this legislation should be confirmed by the competent institutions in Slovakia.[45]

34. On 22 November 2010, GFT Slovakia requested a second preliminary opinion from the Inspectorate on the inspection of the Legnava Sources.[46] In particular, GFT Slovakia sought (i) confirmation of its understanding that, in the Slovak Republic, the Inspectorate would "inspect the quality of water in the sources and after its treatment, its quantity and compliance with other applicable legislation"; and (ii) confirmation "that in Slovakia the inspections will be carried out according to the applicable EU directives and Slovak law".[47]

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[41] Letter from the Inspectorate to GFT Slovakia, 30 March 2010, **C-17**.

[42] Letter from the Inspectorate to GFT Slovakia, 30 March 2010, **C-17**.

[43] Position of the National Institute of Public Health - National Institute of Hygiene, 4 November 2010, **C-151**.

[44] Position of the National Institute of Public Health - National Institute of Hygiene, 4 November 2010, **C-151**, ¶ 1.

[45] Position of the National Institute of Public Health - National Institute of Hygiene, 4 November 2010, **C-151**, ¶ 3.

[46] Letter from GFT Slovakia to the Inspectorate, 22 November 2010, **C-106**.

[47] Letter from GFT Slovakia to the Inspectorate, 22 November 2010, **C-106**.

35. The Inspectorate's answer was the following:

> [W]e announce that the natural mineral springs in Legnava have been recognized under the existing legislation as well as proceedings for an authorization for the use and treatment of water from sources as well as the consequent inspection of resources and the inspection of compliance with statutory conditions and conditions arising from decisions on resource use and treatment of water from resources will be carried out under the legislation of the Slovak Republic.
>
> Since the natural mineral water will be filled into consumer packages in the bottling plant located in the territory of the Republic of Poland, the process of inspection and checking of compliance of the consumer packaging of the natural mineral waters shall be subject to the legislative regulations in force in the Republic of Poland and will be carried out by the competent authorities of the Republic of Poland.[48]

36. On 10 December 2010, GFT Slovakia described its business plan to the Ministry of Environment of the Slovak Republic by setting out the three alternatives for the bottling plant, and the reasons for not implementing the first two.[49]

37. With respect to the first alternative,[50] GFT Slovakia stated it had to be discarded on the basis that there were no "major reconstructions" planned on the 4.5 km tranche of State Road 3138 connecting Malý Lipník with Legnava.[51] Hence, the condition of the access road to Legnava, which GFT Slovakia reported had "spot defects" and had been "damaged by floods in 2010", would make it "impossible" for the "heavy trucks" necessary to distribute the water to transit.[52]

38. Regarding the second alternative,[53] GFT Slovakia stated it could not be executed given that the plan to build a bridge over the Poprad river (thus connecting Legnava with Milik) "will not be implemented" by the Slovak and Polish authorities "in the extent [GFT Slovakia] required due to financial reasons".[54]

39. Turning to the third and final alternative,[55] GFT Slovakia described the construction of a bottling plant in Muszyna as the only viable option to exploit the Legnava Sources as follows:

> The only feasible solution in the current and future circumstances is to connect the bottling plant to the Polish transport infrastructure. This solution involves the division

[48] Letter from the Inspectorate to GFT Slovakia 16 December 2010, **C-18**.

[49] Letter from GFT Slovakia to the Ministry of Environment, 10 December 2010, **C-86**.

[50] *Supra*, ¶¶ 25-27.

[51] Letter from GFT Slovakia to the Ministry of Environment, 10 December 2010, **C-86**, p. 1.

[52] Letter from GFT Slovakia to the Ministry of Environment, 10 December 2010, **C-86**, p. 1.

[53] *Supra*, ¶¶ 28-30.

[54] Letter from GFT Slovakia to the Ministry of Environment, 10 December 2010, **C-86**, p. 2.

[55] *Supra*, ¶¶ 31-32.

> of technology into two parts: extraction and treatment of mineral water in the Slovak Republic, its subsequent transport by a pipeline under the Poprad River and its bottling into consumer packaging in Poland. Land with an area of 35,000 m^2 was purchased for this purpose in the cadastral territory of the town of Muszyna. We have received an approving opinion for the plan from the Spa and Spring Inspectorate of the Ministry of Health of the Slovak Republic.[56]

40. On 14 November 2011, GFT Slovakia received an answer from the Mayor of Legnava regarding a previous inquiry on "the possibility of using heavy lorries on local roads in the municipality".[57] According to the Mayor, "[d]riving heavy vehicles through the municipality is not possible due to the width of roads and their technical condition, and the distance of family houses from the roads. The roads end in the built-up area of the municipality".[58]

E. EXPLOITATION PERMIT - PHASE I (DECEMBER 2011 APPLICATION - FEBRUARY 2012 STAY)

41. On 22 December 2011, pursuant to Article 11 of the Act on Mineral Waters,[59] GFT Slovakia applied to the State Spa Committee for a license to exploit the Legnava Sources (an "Exploitation Permit" or "Mineral Water Permit").[60] In its application, GFT Slovakia declared its intention to extract the natural mineral water from the Legnava Sources and "pipe it to the bottling plant, which [would] be located on plot No. 996/1 owned by the company".[61] In particular, GFT Slovakia stated that it would (i) build containers and facilities intended for separating iron and manganese compounds in a water treatment plant; and (ii) transport the water from the treatment plant to the bottling plant using pipelines under the Poprad river, where water would be "filled in consumer packages" under the product name "Skarb Muszyny".[62]

42. The State Spa Committee considered the application and concluded that "the documents accompanied thereto [did] not meet all the requirements set out in [Article] 11 of the [Act on Mineral Waters]".[63] Moreover, the Committee considered it "impossible to continue the proceedings due to the need to first resolve the preliminary issue regarding the possibility of exploitation and treatment of natural mineral water sources in Slovakia and

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[56] Letter from GFT Slovakia to the Ministry of Environment, 10 December 2010, **C-86**, p. 2.

[57] Letter from Mayor of Legnava to GFT Slovakia, 14 November 2011, **C-62**.

[58] Letter from Mayor of Legnava to GFT Slovakia, 14 November 2011, **C-62**.

[59] Act on Mineral Waters, **R-35**, Art. 11.

[60] Exploitation Permit Application, 22 December 2011, **C-19**.

[61] Exploitation Permit Application, 22 December 2011, **C-19**.

[62] Exploitation Permit Application, 22 December 2011, **C-19**.

[63] Decision of the State Spa Committee, 8 February 2012, **C-20**, p. 3

its subsequent transport by pipeline to the Polish territory in order to have it filled in consumer packages in [a] bottling plant for mineral waters in Poland, and therefore the issue of building the intake duct under the river of Poprad to Poland".[64]

43. On 8 February 2012, the State Spa Committee thus decided to "stay" the Exploitation Permit proceedings and requested GFT Slovakia to (i) "complete [and] remedy the defects in its application" by providing a series of listed documents within 180 days;[65] and (ii) provide "a building permit issued by the competent building authority" on the construction of the proposed pipeline under the Poprad river.[66]

F. ZONING PERMIT (DECEMBER 2011 TO JUNE 2012)

44. On 22 December 2011, in addition to the Exploitation Permit application,[67] GFT Slovakia submitted an application before the Municipality of Legnava to obtain a zoning permit over the location of a water treatment plant in Legnava and the pipelines through the Poprad river.[68]

45. On 15 June 2012, the Municipality of Legnava granted the requested permit (the "Zoning Permit") and thus accepted the "placement" of both a water treatment plant in Legnava and "of drill piping to the treatment plant and towards the bottling plant after treatment [through the Poprad river]" into Poland.[69] The Zoning Permit, however, did not include the bottling plant itself, as it was considered to be an issue "to be dealt with in the Polish Republic".[70]

46. In granting the Zoning Permit pursuant to Slovak law, the Municipality of Legnava assessed and incorporated the opinions submitted by all other relevant authorities, in particular, the following:

    i. The District Environmental Office in Stará Ľubovňa stated that the "construction concerned [was] possible from the aspect of water condition protection". It pointed out, however, "that a building permit must be

[64] Decision of the State Spa Committee, 8 February 2012, **C-20**, p. 3.

[65] Decision of the State Spa Committee, 8 February 2012, **C-20**, pp. 1-2.

[66] Decision of the State Spa Committee, 8 February 2012, **C-20**, p. 1.

[67] *Supra*, ¶ 41.

[68] Zoning Permit Application, 22 December 2011, **R-180**.

[69] Zoning Permit, **C-21**, p. 1.

[70] Zoning Permit, **C-21**, p. 1.

requested" from the District Environmental Office in Stará Ľubovňa for the "construction" of the pipeline into the Polish Republic".[71]

ii. The Regional Environmental Office in Prešov (the "REOP") initially stated that the "given water structure [was] possible [as regards] water regime protection",[72] subject to, *inter alia,* the discussion and conclusion of an inter-governmental agreement between the Slovak Republic and the Republic of Poland regulating the "rights and obligations" of "ground water as a commodity […] extracted in Slovakia and exploited in Poland".[73] The REOP would later amend its position stating that, "after repeated discussion about the given requirement with the Ministry of Environment of the Slovak Republic, it [would] not apply the requirement to conclude an inter-governmental agreement […]".[74]

G. EXPLOITATION PERMIT - PHASE II (AUGUST 2012 FIRST SUPPLEMENT – SEPTEMBER 2012 CONTINUED STAY)

47. On 1 August 2012, within the applicable 180-day deadline, GFT Slovakia supplemented its Exploitation Permit application by submitting the documents previously identified by the State Spa Committee as missing.[75]

48. On 19 September 2012, the State Spa Committee deemed "completed" the "particulars to the application" for the issuance of an Exploitation Permit as regards its decision of 8 February 2012.[76] The Committee held, however, that it could not "continue" with the Exploitation Permit proceedings given that the "resolution of the preliminary issue" regarding the building permit for the construction of the pipeline under the Poprad river had "not been documented so far".[77] The proceedings were thus ordered to "remain suspended pending such resolution and documentation".[78]

[71] Zoning Permit, **C-21**, p. 6; Statement of District Environmental Office in Stará Ľubovňa, 27 August 2010, **R-177**; *supra*, ¶ 42.

[72] Zoning Permit, **C-21**, p.7.

[73] Standpoint of Regional Environmental Office in Prešov, 27 June 2011, **R-178**, pp. 2-3.

[74] Zoning Permit, **C-21**, p.13.

[75] Reply, ¶ 246; Letter from the State Spa Committee to GFT Slovakia, 19 September 2012, **C-94**; GFT Slovakia to the Inspectorate, 27 June 2012, **C-88**; *supra*, ¶ 43.

[76] Letter from the State Spa Committee to GFT Slovakia, 19 September 2012, **C-94**; *supra*, ¶ 43.

[77] Letter from the State Spa Committee to GFT Slovakia, 19 September 2012, **C-94**; *supra*, ¶¶ 42-43.

[78] Letter from the State Spa Committee to GFT Slovakia, 19 September 2012, **C-94**.

H. MUSZYNIANKA'S PURCHASE OF GFT SLOVAKIA (JULY 2012 - DECEMBER 2012)

49. Upon the receipt of the Zoning Permit,[79] Goldfruct decided to sell GFT Slovakia. While the reason for the sale is contentious,[80] it is undisputed that, as a first step, Goldfruct engaged Warsaw Equity Advisors sp. z o.o. ("Warsaw Equity" or "WEA") to provide an expert opinion.

50. In July 2012, Warsaw Equity issued an information memorandum covering the transborder transportation of water extracted from the Legnava Sources to a mineral water bottling plant in Muszyna (the "Information Memorandum").[81] This Information Memorandum, prepared for Goldfruct and GFT Slovakia's prospective buyers, contained the following relevant statements:

i. Regarding a bottling plant in Muszyna:

> An attractive location in the neighborhood of a Polish mountain health resort – Muszyna, surrounded by untouched nature, on territories which are pollution-free and not used for intense agricultural crops constitute important advantages in the promotional campaign. The proximity to the dynamically developing water markets of Central and Eastern Europe and to the big German market increases the market and logistic attractiveness of the project.[82]
>
> […]
>
> 2.2 Key investment issues: […]
>
> 8. Reducing investment outlays (capex) by locating the plant in Muszyna, on the territory which has access to the necessary infrastructure
>
> • The cross-border concept of locating the plant on the territories with a permit for the foundation of such a plant, with the full utility infrastructure (water supply, sewage system, electricity, gas supply) renders it possible to significantly reduce investment outlays.
>
> • Locating the plant directly on national road No. 971 which will provide a convenient access to the plant.[83]
>
> […]
>
> The initial project concept assumed the construction of the bottling plant on the property of GFT Slovakia in Legnava, however, it was excluded

[79] *Supra*, ¶ 45.

[80] SoC, ¶ 106; Rejoinder, ¶ 291.

[81] Information Memorandum, **C-55**.

[82] Information Memorandum, **C-55**, p. 6.

[83] Information Memorandum, **C-55**, p. 9.

due to the logistic and transport needs of the future plant and the current poor road infrastructure in Legnava.

After the analysis of legal, logistic and infrastructure conditions of the project, SLOV Company decided that the optimal solution was to build a cross-border mineral water bottling plant which would be located on both sides of the border in Poland and in Slovakia.

This project renders it possible to e.g.:

• reduce investment outlays – locating the plant on the developed land in Muszyna which is directly connected with national road network

• use favourable formal and legal conditions applicable in each country;

• extend, in the future when the communication infrastructure in the neighbourhood of Legnava is developed, the logistic and technical capabilities by building new buildings on the territories of the Company in Legnava, which might be important in the case of developing sales in the countries of Southern Europe as well as in Germany, Austria and others.[84]

ii. Regarding the resources and chemical composition of the Legnava Sources, as well as the mixing and sale of the extracted water, the Information Memorandum set out the following explanations:

The geophysical tests conducted upon request of GFT Slovakia and the knowledge about the geological structure of those areas obtained while drilling the current wellbores render it possible to assume that there are huge resources of water of the uniform type and with higher mineralisation on the land owned by GFT Slovakia. […] Natural mineral water with the high content magnesium and calcium, insignificant amount of chlorides and small amount of sodium (around 50 mg/dm^3) is obtained from all wellbores. The water is of the uniform type and contains no unwanted elements in amounts exceeding the norms applicable in Poland, Slovakia and other EU countries. The water does not contain any constituents indicating its contact with the external environment.[85]

[…]

The concept of building the cross-border mineral water bottling plant assumes: […] 3. Building the water bottling plant on the land parcel in Muszyna (Polska), in which the water transported through water pipes from the territory of Slovakia will be mixed, bottled and sold according to the provisions applicable in Poland and the EU.[86]

[…]

In November 2010, the official position of the Department of Health Resort Materials of the National Institute of Public Health of the National Institute of Hygiene of the Republic of Poland was obtained, which allows for mixing water from 5 above-mentioned wellbores and using it

[84] Information Memorandum, **C-55**, pp. 26-27.

[85] Information Memorandum, **C-55**, p. 29.

[86] Information Memorandum, **C-55**, p. 28.

> for the production of bottled water in the bottling plant on the territory of Poland, which is located 200 m from the Polish and Slovakian border.
>
> On the basis of the data concerning the basic mineral composition of water from the above-mentioned wellbores drilled in depth of 140-160 m, it was stated that all wellbores provide water of the same chemical type, i.e. HCO3-Ca-Mg – naturally saturated with carbon dioxide in the deposit. Therefore, the water from those wellbores can be mixed, bottled and market as natural mineral water under one brand (name).[87]
>
> […]
>
> Registered brands and trademarks "Skarb Muszyny" and "Zdroje Muszyny" can be used by the investor to place water on the Polish market.[88]

iii. The Information Memorandum continued in respect of the information relied upon and the accuracy of the findings:

> This Analysis was prepared with due diligence on the basis of the public information as well as information provided by GFT Slovakia s.r.o, GFT Goldfruct Sp z o.o. and their shareholders, however, WEA does not guarantee the accuracy or completeness of the Memorandum, in particular if the information which constituted the basis for preparing the Analysis turned out to be inaccurate, incomplete or not fully reflecting the facts. The information included in the Memorandum was not the subject of an independent verification or the verification of WEA, in particular concerning the legal status, geological as well as physical and chemical tests and in every case, it may be subject to changes and modifications.[89]

51. In addition to the Information Memorandum,[90] on 8 August 2012, Muszynianka, as a prospective buyer of GFT Slovakia, was provided with (at least) the following documents:

> 1. Final and non-appealable Land Development and Planning Conditions for the investment in the territory of Slovakia (Legnava) + translation into Polish + maps and drawings.
>
> 2. Architectural concept of a mineral water bottling plant in Muszyna at ul. Lipowa.
>
> 3. Decision of the Ministry of Environmental Protection of the Slovak Republic – approving the final report: LEGNAVA – natural mineral water spring and approving usable quantities of mineral waters for particular boreholes + translation into Polish.
>
> 4. Decision of the National Health Care Commission of the Ministry of Health of the Slovak Republic on recognition of mineral water from the following springs: LH-2A, LH-3, LH-4 and LH-5, located in LEGNAVA, as natural mineral water + translation into Polish.

[87] Information Memorandum, **C-55**, p. 30.

[88] Information Memorandum, **C-55**, p. 9; *supra*, ¶ 41.

[89] Information Memorandum, **C-55**, p. 2.

[90] Mosur WS I, **CWS-1**, ¶ 38.

5. Extensive physical and chemical, microbiological and radiological analyses of the following intakes: LH-2A, LH-3, LH-4 and LH-5 + translations of the analyses into Polish.

6. Specialised balneological expert analyses of natural mineral water from the following intakes: LH-2A, LH-3, LH-4 and LH-5, located in LEGNAVA + their translations into Polish.

7. LH-1 intake documentation, i.e. the Decision of the Ministry of Health of the Slovak Republic on recognition of mineral water from the LH-1 intake as natural mineral water, description of the hydrogeological structure of the LH-1 intake as well as the map and description of boundaries of 1 and 2 degree protection zones.

8. The list of "recognised" mineral and thermal waters in Slovakia.[91]

52. On 31 December 2012, Muszynianka purchased 100% of GFT Slovakia's shares.[92] The share transfer was registered in the relevant Commercial Registry by 12 February 2013.[93]

I. THE BUILDING PERMIT (OCTOBER 2013 – MAY 2014)

53. On 30 October 2013, pursuant to the State Spa Committee's and the district authorities' previous decisions,[94] GFT Slovakia (now owned by Muszynianka) applied to the District Office in Prešov for a building permit.[95]

54. On 30 May 2014, the District Office in Prešov granted GFT Slovakia the permit to build the water treatment plant, the pipelines connecting it with both the relevant boreholes and a bottling plant in Poland, and all other related structures (the "Building Permit").[96] Similar to the Zoning Permit,[97] the Building Permit approved project documentation dealing with "the inlet of mineral water from individual existing drills through water pipe connections to the hall for the mineral water treatment and its consequent transport to the bottling plant in the Polish Republic", but stated that the bottling plant was not part of its scope.[98]

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[91] List of documents provided to Muszynianka, 8 August 2012, **R-335.**

[92] Share Transfer Agreement between Goldfruct and Muszynianka in the form of a notarial deed, 31 December 2012, **C-5**; Share Transfer Agreement between Stanislaw Józef Gluc and Muszynianka in the form of a notarial deed, 31 December 2012, **C-6**; Share Transfer Agreement between Marek Andrzej Zieliński and Muszynianka in the form of a notarial deed, 31 December 2012, **C-7**; Share Transfer Agreement between Paweł Mariusz Zieliński and Muszynianka in the form of a notarial deed, 31 December 2012, **C-8**.

[93] GFT Slovakia Full Extract from the Commercial Register, 6 March 2017, **R-21**.

[94] *Supra*, ¶¶ 43, 46, 48.

[95] Notice on initiation of building proceeding, 2 April 2014, **R-52**, p. 1.

[96] Building Permit, **C-22**.

[97] *Supra*, ¶ 45.

[98] Building Permit, **C-22**, p. 2.

55. Accordingly, the Building Permit's "[b]inding terms and conditions" required that "relevant permits must be obtained in line with applicable laws of the Polish Republic", in order for GFT Slovakia to carry out the "micro-tunneling of the pipeline under the border river of Poprad […] in the territory of the Polish Republic".[99] These terms and conditions further mandated for GFT Slovakia to submit the Building Permit (upon it "becom[ing] effective") to "the State Spa Commission […] for the purposes of issuing a permit for the use of natural mineral resources".[100] In addition, the "general provisions" stated that the Building Permit would "cease to be valid" if "construction" was not "started within two years" of its effective date.[101]

56. As in the proceedings culminating with the Zoning Permit,[102] the District Office in Prešov assessed and incorporated into the Building Permit the opinions rendered by various other relevant authorities. Notably, the State Spa Committee had submitted a statement agreeing with the issuance of the building permit requested by GFT Slovakia, "provided that the protection conditions for natural medicinal sources in Legnava are met".[103] To that effect, the State Spa Committee set out a number of measures to be implemented by GFT Slovakia.[104] The State Spa Committee's opinion moreover made the following clarifications:

> The Commission also informs the applicant of the fact that this [positive] opinion does not replace the preliminary issue related to the issue of a permit to exploit natural mineral sources LH-1, LH-2A, LH-3, LH-4 a LH-5 in Legnava for their company under paragraph 1 of Decision of the State Spa Commission […] of 8 February 2012 on the suspension of proceedings/the possibility of extracting and treating natural mineral water from Legnava sources in Slovakia and transporting the water by pipeline to Poland to be bottled in consumer packaging at the existing mineral water bottling plant in Poland, i.e. the matter of the supply pipeline construction under the Poprad River to Poland – obtaining the relevant permit to construct the water structure to Poland.[105]

[99] Building Permit, **C-22**, § C, ¶ 23.

[100] Building Permit, **C-22**, § C, ¶ 21.

[101] Building Permit, **C-22**, § D, ¶ 2.

[102] *Supra*, ¶ 46.

[103] Letter from the State Spa Committee to GFT Slovakia, 10 October 2013, **C-109**, p. 1; Building Permit, **C-22**, § C, ¶ 20 (3rd bullet point).

[104] Letter from the State Spa Committee to GFT Slovakia, 10 October 2013, **C-109**, pp. 1-2, ¶¶ 1-10.

[105] Letter from the State Spa Committee to GFT Slovakia, 10 October 2013, **C-109**, p. 2; *supra*, ¶ 43.

J. EXPLOITATION PERMIT - PHASE III (JULY 2014 SECOND SUPPLEMENT – JANUARY 2015 REJECTION)

57. On 11 July 2014, pursuant to the Building Permit's instructions and the State Spa Committee's determination in February 2012,[106] GFT Slovakia submitted the Building Permit to supplement its Exploitation Permit application.[107]

58. On 8 October 2014, GFT Slovakia filed a complaint before the Supreme Court of the Slovak Republic (the "Supreme Court") against the State Spa Committee,[108] seeking that the latter (i) be declared in breach of the time limits set out in Article 49 of the Slovak Administrative Procedure Code ("Administrative Procedure Code" or "APC");[109] and, consequently (ii) be ordered to issue its decision within a month of the Supreme Court's ruling.[110]

59. On 9 December 2014, the State Spa Committee reverted to GFT Slovakia, informing it of a recent amendment to the Constitution of the Slovak Republic prohibiting the cross-border transport of unbottled water. The State Spa Committee thus invited GFT Slovakia to state whether it insisted on the original Exploitation Permit application or whether it intended to amend it. In the former case, the State Spa Committee informed that it would not be in the position to grant the Exploitation Permit.[111]

60. On 18 December 2014, GFT Slovakia rejected the State Spa Committee's invitation to modify the application and insisted on its original terms. It noted that the transport infrastructure in the Legnava area was poor and it thus had "no other choice" but to "bottle the water in consumer containers in the bottling plant in the Republic of Poland". It also specified that the "bottled water" would "fully remain" in GFT Slovakia's "ownership". [112]

61. On 26 January 2015, the State Spa Commission therefore denied the Exploitation Permit.[113]

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[106] *Supra*, fn. 100, ¶¶ 42-43.

[107] Letter from GFT Slovakia to Inspectorate, 10 July 2014, **C-113 / R-55**.

[108] GFT Slovakia complaint before the Supreme Court, 8 October 2014, **C-24**.

[109] GFT Slovakia complaint before the Supreme Court, 8 October 2014, **C-24**, p. 2.

[110] GFT Slovakia complaint before the Supreme Court, 8 October 2014, **C-24**, p. 3.

[111] Letter from the State Spa Committee to GFT Slovakia, 9 December 2014, **C-131**, p. 2.

[112] Letter from GFT Slovakia to the State Spa Committee 18 December 2014, **C-132 / R-59**.

[113] Decision of the State Spa Committee, 26 January 2015, **C-25**.

62. On 12 March 2015, faced with the State Spa Committee's decision, GFT Slovakia withdrew its earlier complaint before the Supreme Court.[114]

K. THE ROAD TO THE CONSTITUTIONAL AMENDMENT (MARCH 2012 – DECEMBER 2014)

63. On 10 March 2012, the Slovak Social Democratic Party ("SMER") won the national elections with a historic majority in Parliament (83 out of 150 seats).[115] The SMER's campaign had been partly based on the "rational utilization and protection of natural resources" such as water, and the "regulat[ion]" of "relationships with entities using water".[116]

64. During the same month, prior to GFT Slovakia's first supplement to the Exploitation Permit application,[117] the SMER published its Programme Declaration for the 2012-2016 governmental period ("Programme Declaration").[118] The Programme Declaration made several mentions to hydrological resources in general and water provision and preservation in particular.[119]

65. On 24 October 2012, in line with the SMER's Programme Declaration, the Ministry of Environment, headed by Minister Peter Žiga, published a report recommending that legislation should recognize groundwater as a "strategic raw material of the state" (the "Water Report").[120]

66. The Water Report took a preventive approach to ensure water availability for future generations.[121] Therefore, it called for "any cross-border exploitation" to require the approval of the Slovak Government, to be "granted on a case-by-case basis", subject to the payment of a fee and considering whether the applicant could demonstrate that drinking water demand in the Slovak Republic would still be satisfied despite the extraction.[122] The Water Report further stressed that groundwater, natural healing waters, and surface waters, were raw materials of "particular importance" owned by the

[114] *Supra*, ¶ 58; Reply, fn. 336.

[115] Overview of results of elections to the National Council of the Slovak Republic, **R-188.**

[116] Programme intentions of SMER – Social Democracy for 2012 – 2016 Election Period**, R-36**, p. 19.

[117] *Supra*, ¶ 47.

[118] Programme Declaration, **R-18**.

[119] Programme Declaration, **R-18**, pp. 90, 91, 95.

[120] Water Report, **R-37**, p. 13.

[121] Water Report, **R-37**, p. 13.

[122] Water Report, **R-37**, p. 13.

State. As such, the Slovak Government would support the "versatile protection" and "rational exploitation" of water, while "reserv[ing] the right to make decisions on the disposal, transport and transfers of groundwater resources outside the territory of the [Slovak Republic] in accordance [with] the public interest of the state".[123]

67. On the same day, over two months prior to Muszynianka's acquisition of GFT Slovakia,[124] the Water Report was taken up by the Slovak Cabinet, which issued Resolution 583 of 24 October 2012 (the "Water Resolution" or "Resolution No. 583/2012").[125]

68. In addition to approving the Water Report and declaring water as a "raw material of the State" subject to its "national interests",[126] the Water Resolution instructed the Ministry of Environment, *inter alia*, to: (i) "amend [the Act on Waters] so that water is defined a strategic raw material of the State which is subject to the national interests"; and (ii) "submit to the Government for discussion a proposal for transport or transmission of groundwater through a State border individually for each request for transport or transmission, which will specify the conditions and procedure".[127]

69. In June 2013, pursuant to the Water Resolution, the Ministry of Environment published a first draft amendment to the Act on Waters,[128] and submitted it to an "interdepartmental commenting procedure", which was also open to private persons.[129]

70. By the time of the closing of such procedure in mid-July 2013,[130] numerous comments had been submitted by various stakeholders, including multiple Government entities,[131]

[123] Water Report, **R-37**, p. 15.

[124] *Supra*, ¶ 52.

[125] Water Resolution, **R-19**.

[126] Water Resolution, **R-19**, § A.

[127] Water Resolution, **R-19**, §§ B.1.- B.2, B.4.

[128] Draft Amendment to the Act on Waters, **C-29**.

[129] Overview of legislative process, **R-38**; Submission Report to the Draft Amendment to the Act on Waters, **R-294**, p. 3.

[130] Overview of legislative process, **R-38**; *supra*, ¶ 53.

[131] List of all of the stakeholders who submitted comments on the Draft Amendment to Act on Waters, **R-297**.

industry groups and associations,[132] private companies,[133] private individuals,[134] and the public in general.[135] GFT Slovakia submitted no comments.

71. On 6 June 2014, after the issuance of GFT Slovakia's Building Permit, the Slovak Cabinet introduced a revised draft amendment to the Act on Waters to Parliament for discussion.[136] It incorporated some of the points gathered during the commenting procedure and maintained (i) the recognition of water as a strategic raw material subject to the State's national interests; (ii) the need for each cross-border (transport or transmission) operation to be approved pursuant to certain conditions established in the law; and (iii) the requirement for the payment of a fee for the issuance of the permit allowing such cross-border activities.[137]

72. On 2 July 2014, a first parliamentary session took place to discuss the revised draft amendment to the Act on Waters. Minister Žiga opened the floor by stating *inter alia* that the draft amendment intended to address Slovakia's regulatory gap regarding the cross-border transportation of groundwater, whereby the legal framework did not either "regulate or prohibit" such activity and thus State authorities had no "legal basis to dismiss or restrict a motion of this type".[138]

73. During the debate, some Members of the Parliament ("MPs") supported the bill from the outset, agreeing with the objective that underground water needed to be preventively preserved irrespective of current availability.[139] Others disputed the existence of a regulatory gap, finding that, in the absence of a specific legal basis providing otherwise, cross-border transportation of groundwater was in principle prohibited. As the Slovak Republic already controlled the granting of permits for exploitation and exportation of

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[132] Record from proceeding on resolution of dissenting opinions with Slovak Association of Water Companies ("*Asociácia vodárenských spoločností*"), 30 July 2013, **R-298**; Record from proceeding on resolution of dissenting opinions with the Slovak Agriculture and Food Chamber ("*Slovenská poľnohospodárska a potravinárska komora*"), 26 July 2013, **R-299**; Letter from Slovak Association of Towns and Communities ("*Združenie miest a obcí Slovenska*") to Ministry of Environment, 9 July 2013, **R-300**; Record from proceeding on resolution of dissenting opinions with Association of Industrial Ecology ("*Asociácia priemyselnej ekológie*"), 8 August 2013, **R-301**; Letter from Sugar Beet Growers Association ("*Slovenský zväz pestovateľov cukrovej repy*"),12 July 2013, **R-303.**

[133] Record from proceeding on resolution of dissenting opinions with SLOVNAFT, 25 July 2013, **R-304**; Letter from AGRIPENT to the Ministry of Environment, 12 July 2013, **R-305**; Letter from AGROMACAJ to the Ministry of Environment, 12 July 2013, **R-306**; Letter from AGROMARKT to the Ministry of Environment, 12 July 2013, **R-307**; Letter from ELWA to the Ministry of Environment, 12 July 2013, **R-308**.

[134] Letter from Ing. Milan to the Ministry of Environment, 12 July 2013, **R-0309**.

[135] The Collective Comment, 15 July 2013, **R-310.**

[136] Parliamentary Paper No. 1051, **R-22**.

[137] Resolution of the Slovak Government No. 270, 4 June 2014, **R-312**.

[138] Parliamentary Session, 2 July 2014, **C-35**, p. 1.

[139] Rejoinder, ¶¶ 221-222, not contested by the Claimant.

water, the proposed amendment to the Act on Waters was said to be unnecessary.[140] Throughout the 2 July 2015 debate,[141] as well as in other parliamentary sessions discussing the regulatory gap on water export,[142] Minister Žiga directly or indirectly referred to the Legnava Sources, Goldfruct or Muszynianka.

74. On 8 July 2014, prior to GFT Slovakia supplementing its Exploitation Permit application with the Building Permit,[143] Prime Minister Fico and Minister Žiga announced that some of the changes sought by the Government through the proposed amendment to the Act on Waters would instead be pursued through a constitutional amendment.[144] During the parliamentary session of the same day, Minister Žiga explained that, in the interest of prohibiting speculation in water resources, the constitutional amendment would consist of a ban on water exports, which would not apply to water packaged in Slovakia or to water needed in emergency situations.[145]

75. On 22 August 2014, the Government introduced to Parliament a draft amendment seeking to supplement Article 4 of the Constitution.[146] The amendment sought to establish a ban on large-scale cross-border water transportation (i.e., exports through "pipelines, cisterns, tanks, or other water transport means"),[147] with certain exceptions (i.e., water in consumer packaging, and water needed for personal consumption, emergency situations and humanitarian aid).[148] For the Government, this "special protection" was justified on the basis that, given "its sensitive predisposition to vulnerability, as well as an increasing impact of the climate change and its expected negative impacts on the environment, waters included, it [was] necessary [for] the State [to] protec[t], sustai[n] and maintai[n] its water resources as a valuable and irreplaceable raw material".[149]

[140] Parliamentary Session, 2 July 2014, **R-313**, pp. 2-3 (MP Chren).

[141] Parliamentary Session, 2 July 2014, **C-35**, p. 2.

[142] Parliamentary Session, 9 July 2014, **C-35**, p. 5.

[143] *Supra*, ¶ 57.

[144] P. Bárdy, *Water could be spirited out of Slovakia to Poland and Hungary, the prime minister stated*, Aktuality, 8 July 2014, **C-123.**

[145] Parliamentary Session, 8 July 2014, **R-314**, pp. 5-6 (of the PDF).

[146] Parliamentary Paper No. 1110, **R-39**.

[147] Rationale Report, 20 August 2014, **R-33**, pp. 6-8.

[148] Rationale Report, 20 August 2014, **R-33**, pp. 7-8.

[149] Rationale Report, 20 August 2014, **R-33**, p. 6.

76. On 21 October 2014, after debates in Parliament on 10 September and 17 October 2014,[150] the draft constitutional amendment was approved by a qualified majority of 102 over 5 votes ("Constitutional Amendment").[151] As a result, the following language was added to Article 4 of the Slovak Constitution and came into force as of 1 December 2014:

> […] (2) The transport of water taken from water bodies located in the territory of the Slovak Republic across the borders of the Slovak Republic by means of transport or by pipelines is banned; the ban shall not apply to water for personal consumption, drinking water packaged in consumer packaging in the territory of the Slovak Republic and natural mineral water packaged in consumer packaging in the territory of the Slovak Republic, and to provision of humanitarian aid and help in emergency situations. Details of conditions of transport of water for personal consumption and water to provide humanitarian aid and help in emergency situations shall be laid down by law.[152]

77. On 2 December 2014, the Parliament also passed the amendment to the Act on Waters, which had continued its course through the legislative process in parallel with the Constitutional Amendment.[153] The amended Act on Waters dealt with those aspects not settled through the Constitutional Amendment.[154] It set out in more detail the exceptions to the Constitutional Amendment's prohibition of cross-border transportation other than in consumer packaging, namely, water for personal consumption and for humanitarian aid or emergency assistance.[155]

L. MUSZYNIANKA'S CHALLENGE OF THE STATE SPA COMMITTEE'S DECISION

78. On 17 February 2015, GFT Slovakia challenged the decision of the State Spa Committee to deny the Exploitation Permit.[156] On 25 February 2015, after reviewing GFT Slovakia's submission, the State Spa Committee saw "no reason to change its decision" and forwarded the file to the Ministry of Health.[157]

79. On 24 September 2015, the Minister of Health rejected GFT Slovakia's challenge and confirmed the State Spa Committee's decision denying the Exploitation Permit.[158] The Minister did so after having extended the deadline to render its decision on 24 March

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[150] Parliamentary Session, 10 September 2014, **C-35/R-316**; Parliamentary Session, 17 October 2014, **C-35/R-317.**

[151] Voting Record from Parliamentary Session No. 39, 21 October 2014, **R-25**.

[152] Constitutional Amendment, **RLA-18**, Art. 1(2).

[153] Act No. 409/2014 Coll. amending and supplementing Act on Waters, 2 December 2014, **R-320**.

[154] *See* Act on Waters, Comparison of Article 21 effective until 14 January 2015 with Article 21 effective as of the date of Draft Amendment to the Act on Waters, 15 January 2015, **R-413**; Letter from Ministry of Environment, dated 21 November 2018, **R-319**.

[155] Act on Waters, **C-127**, Art. 17(a)**.**

[156] Appeal of GFT Slovakia to the State Spa Committee, 17 February 2015, **C-134**; *supra*, ¶ 61.

[157] Letter from the State Spa Commitee to GFT Slovakia, 25 February 2015, **C-135.**

[158] Decision of the Minister of Health of the Slovak Republic, 24 September 2015, **C-26**.

2015 "[g]iven the complexity of the case".[159] GFT Slovakia challenged that extension *inter alia* because the Building Permit would "lapse soon".[160]

80. On 18 November 2015, GFT Slovakia filed a motion before the Supreme Court seeking to revoke the Minister of Health's and the State Spa Committee's adverse decisions.[161]

81. On 28 February 2018, having received the file from the Supreme Court as the competent judicial entity to resolve the issue,[162] the Regional Court in Bratislava dismissed GFT Slovakia's motion.[163]

82. On 20 February 2020, the Supreme Court dismissed a cassation complaint filed by GFT Slovakia against the judgment of the Regional Court in Bratislava.[164]

III. OVERVIEW OF THE DISPUTE

83. The Claimant argues that the Constitutional Amendment and the denial of the Exploitation Permit (together the "Measures") breached several of the Treaty's substantive standards.[165] According to the Claimant, the Measures expropriated and impaired its investment in Slovakia through unreasonable and discriminatory measures, and also constituted unfair and inequitable treatment.

84. The Respondent disputes the Tribunal's jurisdiction on several grounds, denies any breach of the BIT, and argues that there is no causation between the Measures and the claimed damages. In particular, the Respondent submits that the Constitutional Amendment is a legitimate exercise of police powers, which precludes liability under international law. It also argues that the Claimant was not entitled nor could have it

[159] Letter from the Minister of Health to GFT Slovakia, 24 March 2015, **C-136**.

[160] Letter from GFT Slovakia to the Minister of Health, 26 June 2015, **C-137**; *supra*, fn. 101.

[161] GFT Slovakia's Action against the Ministry of Health, 16 November 2015, **R-28/R-414**.

[162] SoC, ¶ 308; SoD, ¶ 268.

[163] Decision of the Regional Court in Bratislava, 28 February 2018, **R-252**.

[164] Cassation decision of the Supreme Court of the Slovak Republic, 20 February 2020, **R-420**.

[165] The Tribunal notes that, in its Statement of Claim, the Claimant submitted that the amendment to the Act on Mineral Waters also constituted "an individual breach of Respondent's international obligations under the Treaty" (SoC, ¶ 410). Yet, throughout this arbitration the Claimant has not attempted to elaborate on how this amendment independently breaches the BIT. Rather, the Claimant's submissions show that, in its view, it is the Constitutional Amendment, together with the amendment to the Act on Waters (as a measure that implements the Constitutional Amendment), that violates the Treaty. Notably, the Claimant refers to both of these State measures, jointly, as "Lex Muzynianka" or the "Water Ban" (SoC, ¶ 5). The Tribunal will not adopt the terms "Lex Muzynianka" or "Water Ban". However, for the sake of clarity, the Tribunal's references and findings regarding the Constitutional Amendment must be understood as also including its legislative implementation, namely, the amendment to the Act on Waters.

legitimately expected to obtain the Exploitation Permit, because its business plan was illegal.

IV. PROCEDURAL HISTORY

A. INITIATION OF THE ARBITRATION

85. On 18 August 2016, the Claimant submitted the Notice of Arbitration (the "NoA"), pursuant to Article 7(2) of the Agreement between the Republic of Poland and the Slovak Republic on the reciprocal promotion and protection of investments of 18 August 1994 ("BIT" or "Treaty"), along with Exhibits C-1 to C-34 and Legal Authorities CLA-1 to CLA-9. In its NoA, the Claimant appointed Mr. Stanimir Alexandrov as its party-appointed arbitrator.

86. By letter of 19 September 2016, the Respondent appointed Mr. J. Christopher Thomas QC as its party-appointed arbitrator.

87. On 5 September 2016, the Respondent challenged Mr. Alexandrov on the basis of his past role as counsel for the claimant in the claim advanced against the Slovak Republic in *HICEE v. Slovak Republic*.[166]

88. On 20 September 2016, the Claimant opposed the Respondent's challenge to Mr. Alexandrov.

89. On the same day, the Respondent wrote to the Claimant on certain procedural matters raised in the NoA, namely, the applicable version of the UNCITRAL Arbitration Rules, the selection of the presiding arbitrator, and the place of arbitration.

90. On 27 September 2016, the Claimant replied to the Respondent's letter of 20 September 2016.

91. By separate communications on 20 October 2016 and 21 October 2016, the Parties wrote to the Secretary-General of the Permanent Court of Arbitration ("PCA") requesting that he rule on the challenge submitted by the Respondent.

92. On 14 December 2016, Mr. Alexandrov resigned.

[166] *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11 (UNCITRAL).

93. By letter of 19 December 2016, following Mr. Alexandrov's resignation further to the Respondent's challenge, the Claimant appointed Prof. Robert G. Volterra as its party-appointed arbitrator.

94. On 16 February 2017, the two party-appointed arbitrators informed the Parties that Prof. Gabrielle Kaufmann-Kohler had been selected pursuant to Article 7(1) of the 1976 UNCITRAL Arbitration Rules to act as President of the Tribunal.

95. By letter of 17 February 2017, Prof. Kaufmann-Kohler confirmed the acceptance of her appointment as President of the Tribunal and likewise confirmed the constitution of the Tribunal.

96. On 27 February 2017, Prof. Kaufmann-Kohler informed the PCA that the Parties had agreed that the PCA act in an administrative and fund-holding capacity.

97. On 16 March 2017, the Respondent submitted the Answer to the Notice of Arbitration ("Answer"), along with Exhibits R-18 to R-34 and legal authorities RLA-17 to RLA-37.

98. On 12 May 2017, the Tribunal held the first procedural hearing with the Parties by telephone conference.

99. On 16 May 2017, the Tribunal adopted the Terms of Appointment ("ToA") and issued Procedural Order No. 1, *inter alia* appointing Mr. Lukas Montoya as Arbitral Secretary and fixing the procedural calendar setting out two scenarios for bifurcated and non-bifurcated proceedings.

B. THE WRITTEN PHASE

100. On 15 September 2017, the Claimant filed the Statement of Claim ("SoC"), along with Exhibits C-35 to C-142, Legal Authorities CLA-10 to CLA-80, Witness Statements CWS-1 to CWS-4, and Expert Report CER-1, together with Appendices 1 to 6.

101. On 10 October 2017, the Tribunal noted that the Respondent had not submitted a request for bifurcation by 6 October 2017 in accordance with Procedural Order No. 1. The Tribunal further noted that the proceedings would therefore follow the non-bifurcated procedural calendar referred to as Scenario 2 in Annex 1 to Procedural Order No. 1.

102. On 27 November 2017, after considering the Parties' comments on the matter, the Tribunal issued Procedural Order No. 2 whereby it determined that the seat of arbitration shall be Geneva, Switzerland.

103. On 19 January 2018, the Respondent submitted the Statement of Defense ("SoD"), along with Exhibits R-35 to R-198, Legal Authorities RLA-38 to RLA-108, Witness Statements RWS-1 and RWS-2, and Expert Reports RER-1 to RER-5.

104. By letter of 22 January 2018, the Tribunal noted that the SoD did not include a request for the bifurcation of the proceedings, with the result that the proceedings would continue in line with the non-bifurcated procedural calendar set out in Scenario 2 in Annex 1 to Procedural Order No. 1.

105. On 26 January 2018, the Respondent sought to admit into the record corrected versions of its Statement of Defense, List of Documents, and Expert Report RER-3. On 29 January 2018, the Tribunal invited the Parties' comments on the Respondent's request. After considering the Parties' comments, the Tribunal decided on 14 February 2018 to admit the corrected versions into the record.

106. On 30 March 2018, the Respondent requested the bifurcation of the proceedings on the basis of the judgment rendered by the Court of Justice of the European Union ("CJEU") in the *Slovak Republic v. Achmea B.V.* case ("*Achmea*" or "Achmea Judgment").

107. On 10 April 2018, the Claimant submitted its answer to the Respondent's bifurcation request.

108. On 17 April 2018, the Respondent replied to the Claimant's answer on bifurcation.

109. On 20 April 2018, the Claimant submitted its rejoinder on bifurcation.

110. On 1 May 2018, the Tribunal denied the Respondent's request for bifurcation and revised the Procedural Calendar.

111. Between 16 February and 30 March 2018, the Parties exchanged their respective requests, objections and replies on document production.

112. On 16 May 2018, the Tribunal issued Procedural Order No. 3 on document production, directing the Parties to produce the documents responsive to requests that had been fully or partially granted, and inviting the Parties to set out any objections they may have in respect of documents for which privilege or confidentiality were invoked.

113. On 5 June 2018, the Claimant submitted certain objections to the Respondent's document production on the basis of privilege and confidentiality, as well as other

document production issues. The Respondent responded to these objections on 13 June 2018.

114. On 27 June 2018, the Tribunal ruled on the Claimant's objections to the Respondent's privilege log and other document production issues unrelated to privilege or confidentiality.

115. On 20 July 2018, the Claimant filed the Reply on Jurisdiction, Merits and Quantum ("Reply"), along with supplements to Exhibits C-18, C-22, C-87, and Exhibits C-143 to C-181, Legal Authorities CLA-81 to CLA-129, Witness Statements CWS-5 to CWS-7, and Expert Reports CER-2 to CER-6 together with their accompanying exhibits.

116. On 11 October 2018, the European Commission ("EU Commission") filed an application for leave to intervene as a Non-Disputing Third Person ("NDTP") or *Amicus Curiae* in these proceedings, with respect to the legal consequences of *Achmea* in the present case.

117. On 31 October 2018, the Respondent submitted its comments and observations on the EU Commission's application to intervene as a NDTP, along with Legal Authorities RLA-109 to RLA-117. On the same date, the Claimant submitted its comments and observations on the same, along with Exhibit C-182 and Legal Authorities CLA-130 to CLA-141.

118. On 21 November 2018, the Respondent filed the Rejoinder ("Rejoinder"), along with Exhibits R-199 to R-414, Legal Authorities RLA-118 to RLA-167, Witness Statements RWS-3 and RWS-4, and Expert Reports RER-6 to RER-11.

119. On 27 November 2018, the Tribunal granted leave to the EU Commission to participate as a NTDP and therefore to file an *amicus curiae* brief on the legal consequences of *Achmea* in these proceedings.

120. On 14 December 2018, the EU Commission filed its *amicus curiae* brief, along with Annexes EC-1 to EC-30.

121. On 14 January 2019, the Claimant requested the inclusion of additional exhibits into the record, namely Exhibits C-183 and C-184.

122. On 15 January 2019, the Parties filed their comments on the EU Commission's *amicus curiae* brief. The Claimant submitted Legal Authorities CLA-142 to CLA-162 along with its comments.

123. On 15 January 2019, the Claimant requested the inclusion of Exhibit C-185 into the record.

124. On 16 January 2019, the Respondent objected to the Claimant's request for the inclusion of Exhibits C-183 and C-184 into the record.

125. On 17 January 2019, the Respondent requested further clarification from the Claimant regarding Exhibit C-185.

126. On 17 January 2019, the Tribunal denied the inclusion of Exhibit C-184 into the record but allowed Exhibit C-183 to become part of the record.

127. On 19 January 2019, further to clarifications provided by the Claimant regarding Exhibit C-185, the Respondent agreed that the said Exhibit become part of the record.

C. THE ORAL PHASE

128. On 2 July 2018, the Tribunal fixed the Peace Palace at The Hague, the Netherlands as the venue for the Hearing scheduled between 21 and 25 January 2019.

129. On 3 December 2018, following the Pre-Hearing Telephone Conference held on 29 November 2018 between the Parties and the Tribunal, the Tribunal issued Procedural Order No. 4 setting out certain organizational and logistical arrangements for the Hearing.

130. The Hearing took place from 21 to 25 January 2019 at the Peace Palace in The Hague, Netherlands, as scheduled. The following individuals attended the Hearing:

The Tribunal:

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

The Secretary of the Tribunal:

Mr. Lukas Montoya

PCA Legal Counsel:

Dr. Levent Sabanogullari

For the Claimant:

Party Representatives

Mr. Ryszard Mosur	President of the Management Board of Muszynianka

Mr. Leszek Cidylo	Vice-president of the Board of Muszynianka

Counsel

Mr. Marek Jeżewski	Kochanski Zieba & Partners
Ms. Dominika Durchowska	Kochanski Zieba & Partners
Mr. Michał König	Kochanski Zieba & Partners
Ms. Magdalena Papiernik	Kochanski Zieba & Partners
Ms. Amelia Krajewska	Kochanski Zieba & Partners
Ms. Natalia Godula	Kochanski Zieba & Partners
Mr. Andrzej Malec	Kochanski Zieba & Partners
Mr. Wojciech Wrochna	Kochanski Zieba & Partners

Assistants

Ms. Karolina Gumiela
Ms. Justyna Ziemińska

Witnesses

Mr. Marek Zieliński	Former President of the Management Board of Goldfruct
Mr. Pavol Kacvinský	Managing director of GFT Slovakia
Mr. Dušan Krivoňák	Former Head of the District Office in Stará Ľubovňa

Technical experts

Prof. Andrzej Szczepański	Hydrogeology expert
Dr. Mieczysław Kucharski	Expert on water production and sales forecasts

Legal experts

Prof. Peter-Christian Müller-Graff	EU law expert
Dr. Radomír Jakab	Slovak administrative law expert

Quantum experts

Mr. James Nicholson	Senior Managing Director – FTI Consulting
Mr. Emmanuel Grand	Managing Director – FTI Consulting

For the Respondent:

Party Representatives

Ms. Zuzana Jeskovà	Ministry of Finance of the Slovak Republic
Mr. Julián Kupka	Ministry of Finance of the Slovak Republic

Ms. Andrea Holikovà	Ministry of Finance of the Slovak Republic
Counsel	
Mr. Stephen P. Anway	Squire Patton Boggs
Mr. David W. Alexander	Squire Patton Boggs
Mr. Rostislav Pekar	Squire Patton Boggs
Ms. Tatiana Prokopová	Squire Patton Boggs
Mr. Alexis Martinez	Squire Patton Boggs
Mr. Raul B. Manon	Squire Patton Boggs
Mr. William Sparks	Squire Patton Boggs
Ms. Eva Cibulková	Squire Patton Boggs
Mr. Jakub Kamenicky	Squire Patton Boggs
Ms. Aleksandra Dziki	Squire Patton Boggs
Witnesses	
Mr. Peter Žiga	Minister of Economy of the Slovak Republic
Ms. Jarmila Božíková	Chair of the State Spa Committee and Director of the Inspectorate of Spas and Springs of the Slovak Republic
Technical experts	
Dr. Daniel Marcin	Hydrogeology expert
Mr. Ľubomír Turinič - PRODEX	Civil engineering and infrastructure expert
Legal experts	
Mr. Raymond O'Rourke	EU food regulation law expert
Professor Peter Potasch	Slovak administrative law expert
Quantum experts	
Dr. Richard Hern	Managing Director – NERA Economic Consulting)

D. THE POST-HEARING PHASE

131. On 4 February 2019, the Tribunal issued the Procedural Order No. 5 on post-Hearing matters.

132. On 17 April 2019, further to the Tribunal's decision at the Hearing to admit into the record the declarations issued by various EU Member States on 15-16 January 2019 regarding the legal consequences of the Achmea Judgment on investment protection in the European Union (the "Achmea Declarations"), the Respondent filed *inter alia* Exhibits R-

415 (the "Main Achmea Declaration" of 15 January 2019, executed by 22 EU Member States including Slovakia and Poland), and R-416 (the "Secondary Achmea Declaration" of 16 January 2019, executed by Finland, Luxembourg, Malta, Slovenia and Sweden).

133. On 25 April 2019, the Respondent submitted an application requesting the production of a report issued by Deloitte in the context of GFT Slovakia's sale by Goldfruct to Muszynianka ("Deloitte Report").

134. On 29 April 2019, the Claimant objected to the Respondent's request for the production of the Deloitte Report.

135. On 8 May 2019, the Respondent replied to the Claimant's objection regarding the production of the Deloitte Report

136. By letter of 13 May 2019, the Tribunal rejected the Respondent's application for the production of the Deloitte Report.

137. On 13 May 2019, the Claimant submitted its first Post-Hearing Brief ("C-PHB") along with Legal Authorities CLA-163 to CLA-170. On the same day, the Respondent filed its first Post-Hearing Brief ("R-PHB"), along with Exhibits R-42, R-220, and R-415 to R-419, and Legal Authorities RLA-168 to RLA 169.

138. On 3 June 2019, the Claimant and the Respondent each filed their reply Post-Hearing Brief on the Achmea Declarations ("C-PHB 2" and "R-PHB 2", respectively).

139. On 24 June 2019, the Claimant and the Respondent each submitted their costs statements ("C-Statement on Costs" and "R-Statement on Costs", respectively).

140. On 4 July 2019, the Claimant and the Respondent each submitted their reply to the other Party's costs statement ("C-Reply on Costs" and "R-Reply on Costs", respectively).

141. On 3 and 9 September 2019, the Parties submitted updated cost statements.

142. On 2 March 2020, the Tribunal received a communication by Ms. Joanna Bek, an official of the Ministry of Economic Development of the Republic of Poland ("Ms. Bek's Communication"). Ms. Bek's Communication attached, allegedly upon the request of the Slovak Republic, the following documents:

    i. The Main Achmea Declaration.

ii. A *Note Verbale*, dated 8 November 2019, issued by the Embassy of the Slovak Republic in Warsaw and addressed to the Ministry of Foreign Affairs of the Republic of Poland (the "Slovak *Note Verbale*").

iii. A *Note Verbale*, dated 24 January 2020, issued by the Ministry of Foreign Affairs of the Republic of Poland to the Embassy of the Slovak Republic in Warsaw (the "Polish *Note Verbale*"; together with the Slovak *Note Verbale*, the "*Notes Verbales*").

143. On 4 March 2020, the Tribunal invited the Parties to comment on (i) the admissibility and (ii) the substance and effects of Ms. Bek's Communication, in particular of the attached *Notes Verbales*. To that effect, the Tribunal scheduled two rounds of submissions.

144. On 5 and 9 March 2020, the Parties exchanged submissions regarding a request by the Claimant that the Tribunal (i) confirm that the Claimant was entitled to request document production with respect to Ms. Bek's Communication and the *Notes Verbales*; and (ii) order the Respondent to produce documents to be indicated in further submissions.

145. On 13 March 2020, the Tribunal determined that it was not in a position to make a meaningful determination on the Claimant's document production request without knowing the content and scope of such request. The Tribunal therefore adjusted the timetable established on 4 March 2020, with which the Parties complied, as follows:

i. On 18 March 2020, the Respondent filed its comments on Ms. Bek's Communication and the *Notes Verbales* ("Comments NV");

ii. On 1 April 2020, the Claimant filed its response and requests for document production ("Response NV");

iii. On 9 April 2020, the Respondent's filed its reply and objections to document production ("Reply NV");

iv. On 20 April 2020, the Claimant filed its rejoinder and replies on document production ("Rejoinder NV").

146. On 30 April 2020, the Tribunal issued Procedural Order No. 6, whereby it (i) declared the *Notes Verbales* admissible and part of the record; (ii) reserved its decision on the characterization and legal effects of the *Notes Verbales* on its jurisdiction for this Award; and (iii) denied the Claimant's document production requests concerning the *Notes Verbales*.

147. On 5 May 2020, 23 EU Member States, including the Slovak Republic and the Republic of Poland, signed the "Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union" (the "Termination Agreement").

148. On 12 May 2020, the Tribunal considered it appropriate to hear the Parties on the significance and effects of the Termination Agreement on its jurisdiction. Therefore, it gave the Parties an opportunity to file simultaneous submissions to that effect by 29 May 2020.

149. On 13 May 2020, the Respondent requested leave to admit into the record a decision by the Supreme Court of the Slovak Republic confirming the decision by the Regional Court in Bratislava that had upheld the State Spa Committee's denial of the Exploitation Permit.[167]

150. On 26 May 2020, the Claimant objected to the Respondent's request to introduce the Supreme Court's decision into the record.

151. On 28 May 2020, the Tribunal allowed the Supreme Court's decision to be introduced into the record. It recalled being aware from the Parties' main submissions in this arbitration that GFT Slovakia was pursuing a challenge before the Supreme Court against the decision of the Regional Court in Bratislava.[168] Therefore, introducing the Supreme Court's decision in the record would complete the factual matrix of the dispute. The decision was introduced as Exhibit R-420.

152. On the same day, further to a request by the Respondent not opposed by the Claimant, the Tribunal granted an extension for the Parties to file their submissions on the Termination Agreement by 3 June 2020.

153. On 3 June 2020, the Claimant and the Respondent each filed their submission on the Termination Agreement ("CTA" and "RTA" respectively). The Claimant submitted Legal Authorities CLA-171 to CLA-179 along with its CTA and the Respondent submitted RLA-170 with the RTA.

154. On 29 June, 10 July, and 2 and 9 September 2020, the Parties submitted updated cost statements.

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[167] *Supra*, ¶¶ 78-81.

[168] Reply, ¶ 818; Rejoinder, ¶ 384.

V. PRAYERS FOR RELIEF

A. THE CLAIMANT

155. In its C-PHB, the Claimant requests the Tribunal to:

> **DECLARE** that:
>
> (i) it has jurisdiction over the Claimant's claims
>
> **DECLARE** that:
>
> (ii) the Slovak Republic breached its obligations under Article 4(1) of the Treaty by unlawfully expropriating the Investment;
>
> (iii) the Slovak Republic breached its obligations under Article 3(2) of the Treaty by failing to grant fair and equitable treatment to the Investment;
>
> (iv) the Slovak Republic breached its obligations under Article 3(1) of the Treaty by impairing the Investment by unreasonable and discriminatory measures;
>
> **ORDER** that:
>
> (v) the Slovak Republic fully repair all damage incurred as a result of the Measures;
>
> (vi) the Slovak Republic pay the Claimant full compensation amounting to PLN 575,603,000.00 gross for its breaches of the Treaty, or such other amount as the Tribunal determines appropriate;
>
> (vii) the Slovak Republic pay pre-award interest accruing from the date of assessment until the date of the Award at the rate of 2.1 percent;
>
> (viii) the Slovak Republic pay post-award interest at the rate of 2.1 percent;
>
> (ix) the Slovak Republic bear all of the costs and expenses of the present arbitration, including the Claimant's legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and PCA's costs;
>
> **GRANT**:
>
> (x) any such relief as the Tribunal may deem just and appropriate.[169]

B. THE RESPONDENT

156. In its SoD and its Rejoinder, the Respondent requests:

> (a) a declaration dismissing Muszynianka's claims;

[169] C-PHB, ¶ 415.

(b) an order that Muszynianka pay the costs of these arbitral proceedings, including the cost of the Arbitral Tribunal and the legal and other costs incurred by the Slovak Republic, on a full indemnity basis; and

(c) interest on any costs awarded to the Slovak Republic, in an amount to be determined by the Tribunal.[170]

157. In its R-PHB, the Respondent repeated its requests in a different form:

> Muszynianka has failed to carry its burden to overcome even one of the four hurdles it must clear before it can recover anything from the Slovak Republic: no jurisdiction; no breach; no causation; and no damages. For the foregoing reasons, and those set forth in its prior submissions (all incorporated herein by reference), the Slovak Republic respectfully requests that the Tribunal reject Muszynianka's case in its entirety and award the full costs of the proceeding to the Slovak Republic.[171]

VI. APPLICABLE LAW

A. LAW GOVERNING THE ARBITRATION PROCEEDINGS

158. This proceeding is a treaty-based investment arbitration seated in Geneva, and conducted under the 1976 UNCITRAL Arbitration Rules ("UNCITRAL Rules"). It is thus primarily governed by any procedural rules contained in the Treaty, the *lex arbitri*, i.e., Chapter 12 of the Swiss Private International Law Act ("PILA"), and the UNCITRAL Rules. Section 45 of the Terms of Appointment lists the relevant sets of rules in their order of priority:

> The mandatory rules of the law on international arbitration applicable at the seat of the arbitration;
>
> The 1976 UNCITRAL Arbitration Rules, save where modified by these Terms of Appointment or the procedural rules issued by the Tribunal (as will be reflected in Procedural Order No. 1, and any amendments thereof);
>
> These Terms of Appointment and the procedural rules issued by the Tribunal, as will be reflected in Procedural Order No. 1 and any amendments thereof.[172]

B. LAW GOVERNING JURISDICTION

159. The Tribunal's jurisdiction derives from a treaty and is thus governed by international law, first and foremost by the BIT, which must be interpreted by application of Articles 31 to 33 of the Vienna Convention on the Law of Treaties (the "VCLT").[173] The Republic of Poland and the Slovak Republic have been parties to the VCLT since 1990 and 1993, respectively. In any event, the VCLT's rules on treaty interpretation are widely considered to reflect the rules of customary international law on treaty interpretation. The national

[170] Rejoinder, ¶ 582.

[171] SoD, ¶ 568, R-PHB, ¶ 303.

[172] ToA, Art. 8, ¶ 45.

[173] VCLT, **CLA-15.**

laws of the Contracting Parties to the BIT may also be relevant in respect of certain issues, in particular if a jurisdictional requirement in the BIT contains a reference to national law[174] or uses a term that can be understood only by reference to national law.

160. The arbitration is seated in Switzerland and therefore Articles 177 and 178 of the PILA are also applicable to the validity of the arbitration agreement and thus to the Tribunal's jurisdiction. The determination of the law governing jurisdiction just set out is in line with Article 178 of the PILA. As to its form, there is no question that the arbitration agreement is in writing under Article 178(1) of the PILA. As to the law governing the substantive validity of the arbitration agreement, that determination is at least in conformity with the second option of Article 178(2) of the PILA (the law governing the merits). It should finally be specified that contracting States consent to jurisdiction when concluding the treaty and the investor consents when it initiates an arbitration under the treaty.

161. A particular question arises in connection with the applicability of EU law in matters of jurisdiction, which is discussed in the analysis below.[175]

C. LAW GOVERNING THE MERITS

162. Article 7(3) of the BIT contains the following choice of law clause:

> The arbitration award shall be based on:
>
> - the provisions of this Agreement;
> - the national law of the Contracting Party in whose territory the investment was made, including the rules relative to conflict of laws;
> - the rules and the universally accepted principles of international law.

163. The Tribunal will revert to the issue of governing law in its analysis.[176]

D. *IURA NOVIT CURIA*

164. When applying the governing law, be it in the context of jurisdiction, admissibility, or merits, the Tribunal is not bound by the arguments and sources invoked by the Parties. Under the maxim *iura novit curia*–or more accurately *iura novit arbiter*–the Tribunal is required to apply the law of its own motion, provided it seeks the Parties' views if it

[174] *See Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶ 47.

[175] *Infra*, ¶¶ 209 *et seq*.

[176] *Infra*, ¶¶ 210-211, 245.

intends to base its decision on a legal theory that was not addressed by the Parties and that the Parties could not reasonably anticipate.[177]

165. In this context, Section 44 of the Terms of Appointment must also be noted:

> The Parties shall establish the content of the applicable law, being understood that the Tribunal may, but is not required to, make its own inquiries into the content of the applicable law.

E. THE RELEVANCE OF PRIOR DECISIONS

166. The Tribunal notes that the Parties have referred to a large number of awards of investment tribunals and other decisions dealing with international law. In this regard, the Tribunal considers that it is not bound by prior decisions. At the same time, it finds that it should give due consideration to earlier decisions of international courts and tribunals. More specifically, it is of the view that, subject to compelling contrary grounds, it should follow legal principles applied in a consistent line of cases, provided of course it gives due regard to the applicable BIT and to the specifics of the particular case. The Tribunal adopts this approach with a view to promoting legal certainty and the rule of law.

167. As is set out in his dissenting opinion, Arbitrator Volterra is in strong disagreement with the views expressed in the preceding paragraph as a matter of principle under public international law. For the avoidance of doubt, the Tribunal clarifies that it has reached its own conclusions on the basis of the record without in any way considering that it is bound by prior decisions. This said, the Tribunal has cited prior awards in the spirit of the preceding paragraph and because it is often informative and helpful to consider how other tribunals have considered identical or similar issues, not to speak of the fact that the Parties have often drawn the Tribunal's attention to these decisions.

VII. JURISDICTION

168. The Respondent challenges the Tribunal's jurisdiction on three grounds: the BIT is incompatible with EU law and therefore inoperable **(A)**; the Claimant has made no investment pursuant to Article 1(2) of the BIT **(B)**; and the Claimant's alleged investment is in any event illegal and thus not protected by the BIT**(C)**.

[177] Swiss Federal Tribunal decisions 4P.114/2001 of 19 December 2001, ¶¶ 3a, 20 *ASA Bulletin* (2002), pp. 493, 511 and 4A_214/2013 of 5 August 2013, ¶ 4. *See also Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 ¶ 118.

169. By contrast, it is undisputed that the Claimant is an investor in accordance with Article 1(1) of the BIT.[178] There is no controversy either on the fulfillment of pre-arbitration conditions. In the exercise of its *ex officio* power to assess its treaty-based jurisdiction, the Tribunal shares the Parties' views that these other requirements are all met.

170. Insofar as necessary, the Parties' positions are summarized prior to the Tribunal's analysis, where the latter may also consider additional arguments of the Parties. The Tribunal has considered all the Parties' submissions, even when a particular allegation or argument is not expressly referred to in this Award.

A. INTRA-EU OBJECTION

1. The Respondent's Position

171. The Respondent submits that, as a result of Slovakia's accession to the EU on 1 May 2004 and it becoming a party to the Treaty on European Union ("TEU") and the TFEU (together, the "EU Treaties"), the BIT, being an earlier treaty, became immediately inoperable.[179]

172. The following sections set out the Respondent's position in more detail.

a. The BIT and the EU Treaties share the same subject matter

173. According to the Respondent, the BIT and the EU Treaties share the same subject matter.[180] EU law has created a Single Market within which investors and investments from other EU Member States enjoy a vast array of rights, such as freedom of movement of goods, services, capital, and persons within the EU.[181] Hence, EU law, just as the BIT, promotes and protects economic cooperation and "favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party".[182] In addition, the EU Treaties and the BIT both address "the manner of resolution of disputes between EU Member States, on the one hand, and investors from the other EU Member States, on the other".[183]

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[178] SoC, ¶¶ 365-368; BIT, **C-1**, Art. 1(1)(b) ("The term 'investor' refers with regard to either Contracting Party to: […] legal entities, including companies, corporations, business associations and other organizations, which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party").

[179] SoD, ¶ 316.

[180] SoD,¶ 336; Rejoinder, ¶ 110.

[181] SoD, ¶¶ 316, 336.

[182] SoD, ¶ 336.

[183] Rejoinder, ¶ 110.

b. The BIT and the EU Treaties are incompatible

174. For the Respondent, "a fundamental incompatibility exists between the substantive protections invoked by Muszynianka under the BIT and the overlapping (but not coextensive) protections granted under EU law in the same sphere of economic activity".[184] This incompatibility affects the dispute resolution provision in the BIT.[185] Therefore, Slovakia's offer to arbitrate under Article 7 of the BIT, "as well as more generally the Contracting States' conferral of rights on third-party beneficiaries", have become inoperative, thus precluding the Tribunal from accepting jurisdiction over the present dispute.[186]

175. In order to establish the incompatibility between the BIT and the EU Treaties, the Respondent refers to various rules of the VCLT and EU law.[187] It first submits that the BIT has become inoperable by virtue of Article 59(1)(b) of the VCLT,[188] under which a treaty is implicitly terminated "if there is incompatibility between the provisions of the earlier and the later treaty, which makes it impossible to apply both treaties simultaneously".[189] In this regard, Article 7 of the BIT is fully incompatible with Articles 18, 267, and 344 of the TFEU, as well as Article 4(3) of the TEU.[190] In particular:

i. Article 344 of the TFEU intends to preserve the autonomy of the EU legal system by ensuring that questions involving "the interpretation and application of EU law are only adjudicated by the competent European court and not by private arbitral tribunals".[191] It does not cover only disputes between EU Member States, but also disputes between EU Member States and private parties from other EU Member States.[192] EU law is central to the present case and its adjudication by this Tribunal would impermissibly deprive the CJEU of its judicial competence, creating a risk for the autonomy of the EU legal system.[193]

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[184] Rejoinder, ¶ 111.

[185] Answer, ¶ 66.

[186] Answer, ¶¶ 66-67.

[187] *See*, to this effect, SoD, ¶ 354; Rejoinder, ¶ 111.

[188] SoD, ¶¶ 334, 354.

[189] SoD, ¶¶ 334-335.

[190] SoD, ¶¶ 316, 337-353.

[191] SoD, ¶ 338.

[192] SoD, ¶¶ 337-340.

[193] SoD, ¶ 342.

ii. Article 267 of the TFEU protects the autonomy of EU law through the significant role assigned to the domestic courts of the EU Member States, which can or must request preliminary rulings from the CJEU on matters of EU law;[194] a prerogative that arbitral tribunals lack.[195] While an EU national court, when faced with an annulment or enforcement request, could seek a preliminary ruling from the CJEU, this would not suffice to ensure the effectiveness of EU law as the scope of judicial review is narrow.[196] This is even more so in the present case, where the seat of the arbitration is not within the EU.[197]

iii. The consent of the Contracting Parties to the BIT to arbitrate disputes with one another's nationals, but not other EU nationals, breaches the prohibition of discrimination in Article 18(1) of the TFEU.[198]

iv. Investor-State arbitration is born "from a fundamental mistrust of the other State's judicial system", which runs contrary to the principle of mutual trust enshrined in Article 4(3) of the TEU.[199]

176. The Respondent adds that the BIT is incompatible with EU law by virtue of Article 30(3) of the VCLT, pursuant to which the later treaty takes priority over the earlier one if (i) "the parties to the earlier treaty and later treaty are not the same, but there are State parties to both treaties; (ii) the two treaties relate to the same subject matter; and (ii) there is an incompatibility between the provisions of the two treaties".[200] Unlike Article 59(1)(b) of the VCLT, which applies in cases of "broader incompatibility" between an earlier and later treaty, Article 30(3) of the VCLT is triggered by the "slightest incompatibility".[201] Pursuant to the CJEU in *Achmea*, "Article 7 of the Poland-Slovak Republic BIT is incompatible with […] Article 4(3) of the TEU and Articles 267 and 344 of the TFEU".[202]

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[194] SoD, ¶¶ 343-344; Rejoinder, ¶ 70.

[195] SoD, ¶¶ 345-347. *See also* SoD, ¶¶ 348-350, referring to Opinion 1/09, CJEU EU:C:2011:123, 8 March 2011, **RLA-53**, ¶ 85; Rejoinder, ¶ 69, referring to Opinion 2/13, CJEU EU:C:2014:2454, 18 December 2014, **RLA-65**, ¶¶ 207-208.

[196] Rejoinder, ¶ 73.

[197] Rejoinder, ¶ 73.

[198] SoD, ¶¶ 351-353.

[199] Rejoinder, ¶¶ 78-80.

[200] Rejoinder, ¶ 109; SoD, ¶¶ 332, 354.

[201] SoD, ¶ 333.

[202] Rejoinder, ¶ 110.

The Claimant's reliance on intra-EU arbitral awards to the contrary is inapposite, as *Achmea* has authoritatively lifted any ambiguity.[203]

177. An incompatibility also exists under Article 30(3) of the VCLT between the substantive protections of the BIT and "the overlapping (but not coextensive) protections granted under EU law in the same sphere of economic activity".[204] Although *Achmea* did not rule on the incompatibility of substantive provisions, "it is clear that the same result […] would follow under both EU law and the VCLT with respect to those provisions, too".[205]

c. The *Achmea* Judgment confirmed the incompatibility and binds the Tribunal

178. According to the Respondent, the CJEU has the final authority to adjudicate on questions of compatibility between EU law and international treaties of EU Member States by virtue of Article 19 of the TEU and CJEU case law.[206] Accordingly, *Achmea* is binding on the Tribunal:

i. EU law is "unambiguously part of international law" and therefore is the applicable law in this arbitration according to Article 7(3) of the BIT.[207]

ii. EU law is part of the Slovak legal order.[208] Hence, it is equally part of the governing law as mandated by Article 7(3) of the BIT.[209]

iii. EU law is also relevant pursuant to Article 31(3)(c) of the VCLT, according to which the BIT's interpretation shall take into account rules of international law applicable between the parties, EU law constituting such rules.[210]

[203] Rejoinder, ¶ 112.

[204] Rejoinder, ¶ 111.

[205] Rejoinder, ¶¶ 111 *et seq*.

[206] Rejoinder, ¶¶ 96-102.

[207] Rejoinder, ¶¶ 88-91, referring to *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **CLA-28,** ¶¶ 4.120, 4.122; R-PHB 2, ¶ 8.

[208] R-PHB 2, ¶¶ 8, 14, referring to *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, **CLA-164**, ¶ 230.

[209] Rejoinder, ¶ 92.

[210] Rejoinder, ¶ 94.

iv. This is not a dispute where one could argue that EU law does not apply. To the contrary, the illegality of the Claimant's business plans requires an interpretation of EU law.[211]

v. The Claimant errs when suggesting that "while Slovak law and EU law are inapplicable, Swiss law is somehow applicable".[212] Not only is this argument novel and contrary to earlier submissions, but it is also unsupported.[213] The Claimant merely invokes the section of the Terms of Appointment on "applicable procedural rules", which is irrelevant for purposes of substantive law.[214] The pertinent section of the Terms of Appointment on "applicable substantive law" precisely cites Article 7(3) of the BIT.[215] Still, even if Swiss law governs the issue (*quod non*), the VCLT is an integral part of Swiss law and international public policy resulting from the VCLT forms a basis of Swiss mandatory law.[216] Moreover, Articles 18, 267, and 344 of the TFEU and Article 4(3) of the TEU would have to be taken into account as foreign mandatory rules under the rules of public policy.[217]

vi. The Tribunal has a "fundamental duty" to avoid issuing an annullable and unenforceable award, and any award not in accord with *Achmea* would breach that standard.[218] Any set-aside proceedings before the Swiss courts will consider the Tribunal's jurisdiction by reference to EU law and international law.[219] Therefore, "[i]f a Swiss court applies Swiss law to this question, then it must [...] apply the VCLT as part of the Swiss legal system, which would lead to the conclusion that the arbitration clause is invalid".[220] The same considerations are applicable if EU public policy is considered.[221]

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[211] R-PHB 2, ¶ 3; *infra*, ¶¶ 296 *et seq*.

[212] R-PHB 2, ¶ 9, referring to C-PHB, ¶ 16.

[213] R-PHB 2, ¶ 10.

[214] R-PHB 2, ¶ 10.

[215] R-PHB 2, ¶ 10.

[216] R-PHB 2, ¶ 11.

[217] R-PHB 2, ¶ 12.

[218] Rejoinder, ¶¶ 113-120.

[219] Rejoinder, ¶ 117.

[220] R-PHB 2, ¶ 28.

[221] Rejoinder, ¶ 118.

179. In short, it is the Respondent's submission that Article 7 of the BIT is invalid, as now confirmed by the CJEU.[222] *Achmea*, which is in line with the CJEU's previous case law, gives an interpretation of what EU law has "always meant".[223] It follows that the Respondent's offer to arbitrate was rendered incompatible with EU law on the date of the Slovak Republic's and Poland's accession to the EU.[224]

180. Similarly, the Claimant could not have any legitimate expectations post-accession that the BIT's arbitration agreement was valid, assuming (*quod non*) that expectations could be relevant at all.[225] In this context, it bears observing that a number of EU Member States terminated their intra-EU investment treaties consensually, including the sunset clauses therein.[226] There has been no suggestion that this consensual conduct was legally invalid.[227] If no vested rights of third parties were implicated in that scenario, then none would be involved here.[228]

d. Subsequent practice and agreements

181. For the Respondent, having regard to Article 31(3) of the VCLT, the subsequent agreements and practice of Slovakia and Poland show that the BIT is inoperable.[229]

182. The two states have publicly stated that the BIT is incompatible with EU law. Slovakia did so in the *Achmea* proceedings and Poland noted its position in communications with the Slovak Republic, in its motion to reopen *Achmea* supporting the Slovak Republic's position, and in specialized press reports.[230] These converging "unilateral statements" constitute "subsequent conduct".[231]

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[222] Rejoinder, ¶ 121.

[223] Rejoinder, ¶¶ 74-76, 80, 87, referring to *Commission of the European Communities v. Ireland*, CJEU Case C-459/03, Judgment, 30 May 2006, **RLA-64**, ¶¶ 136-137, 169-171.

[224] R-PHB 2, ¶ 22.

[225] R-PHB 2, ¶¶ 23-26, referring to German Federal Court of Justice (Bundesgerichtshof), Case I ZB 2/15, Decision, 31 October 2018, **R-281**, ¶¶ 58-59**.**

[226] R-PHB 2, ¶ 27.

[227] R-PHB 2, ¶ 27.

[228] R-PHB 2, ¶ 27.

[229] SoD, ¶ 323.

[230] SoD, ¶¶ 326-327, referring to Letter from the Ministry of Foreign Affairs of the Republic of Poland to Slovak Embassy in Warsaw, 4 October 2017, **R-196**; Marcin Orecki, *Let the Show Begin: Poland has Commenced the Process of BITs' Termination*, Kluwer Arbitration Blog, 8 August 2017, **R-197.**

[231] SoD, ¶¶ 324, 328.

183. This conduct is reinforced by the Achmea Declarations, endorsed by both Poland and Slovakia.[232] As the Achmea Declarations constitute a "subsequent agreement" between the Contracting Parties to the BIT under Article 31(3) VCLT, the Tribunal must consider that the intra-EU arbitration clauses in BITs are "contrary to Union law and thus inapplicable".[233] The fact that the Achmea Declarations were not signed "in connection" with the BIT but rather "in relation" to *Achmea* misses the point,[234] as the "in connection with" requirement "appears not in Article 31(3)(a) […] but, rather, in Article 31(2)(a)" of the VCLT.[235] A subsequent agreement within the meaning of Article 31(3)(a) of the VCLT is not limited to the interpretation of the BIT and may concern "the interpretation of the treaty or the application of its provisions".[236] Here, Slovakia and Poland, through the Achmea Declarations, have expressed their shared understanding about the "application" of the BIT.[237]

184. Accordingly, the Respondent argues that the Tribunal must take into account the Achmea Declarations "with respect to at least two matters": (i) "the interpretation of Article 7(3) of the BIT, including matters such as the existence of a conflict and/or overlap between the provisions of the BIT and the constitutional EU law treaties also binding on the Slovak Republic and Poland"; and (ii) "the application of Article 7(3) of the BIT, in light of provisions of the VCLT like Articles 30 and 59 governing the relationship between the various treaties to which the Slovak Republic and Poland belong".[238]

185. According to the Respondent, the *Notes Verbales* exchanged between the Slovak and Polish Governments confirm the shared understanding to "implement" the Main Achmea Declaration.[239] The *Notes Verbales* jointly declare that, pursuant to Article 30(3) of the VCTL, Article 7 of the BIT is not applicable from 1 May 2004 onwards given its

[232] R-PHB, ¶¶ 23-24, referring to the Declaration of the Representatives of the Governments of 22 Member States on the Legal Consequence of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Eunion, 15 January 2019, **R-415**; Declaration of the Representatives of the Governments of 5 Member States on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Invsetment Protection in the European Union, 16 January 2019, **R-416**; Declaration of the Government of Hungary on the Legal Consequence of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, 16 January 2019, **R-417**.

[233] R-PHB, ¶¶ 25-26; R-PHB 2, ¶ 15.

[234] R-PHB 2, ¶ 16, referring to C-PHB, ¶ 20.

[235] R-PHB 2, ¶ 16 (emphasis added by the Respondent).

[236] R-PHB 2, ¶ 17.

[237] R-PHB 2, ¶ 18.

[238] R-PHB 2, ¶ 19 (emphasis added by the Respondent).

[239] Comments NV, ¶¶ 5,16.

incompatibility with the EU Treaties, as confirmed in the Achmea Judgment.[240] They further state that this joint "declaration is to be regarded as a subsequent agreement between the Parties to the treaty regarding the interpretation of the treaty and the application of its provisions under Article 31(3)(a) of the [VCLT]".[241] Therefore, the Respondent submits that the *Notes Verbales* are an "authoritative interpretation of the application of the BIT",[242] as they "need not be limited to authoritatively interpreting the BIT, but may extend to its application".[243] The Respondent notes that Slovakia and Poland did not "amend the meaning of any article of the BIT", but rather "interpreted the legal status of the application of the BIT in view of supervening legal developments—namely, both States Party's accession to the EU in May 2004".[244]

e. The Termination Agreement

186. The Respondent puts forward three main reasons why the Termination Agreement is relevant to the Tribunal's decision.

187. First, like the Main Achmea Declaration and the *Notes Verbales*, the Termination Agreement is a subsequent agreement between the Contracting Parties to the BIT within the meaning of Article 31(3)(a) of the VCLT that subscribes the inapplicability of Article 7 of the BIT, given its incompatibility with EU law since 1 May 2004.[245] According to the Respondent, upon Slovakia's and Poland's accession to the EU it became clear that the "place for resolving intra-EU investment disputes is the EU legal order" only, i.e., EU national courts.[246] In this regard, the Respondent notes that Muszynianka pursued claims before the Slovak courts.[247]

188. Second, upon entering into force, the Termination Agreement will terminate the BIT with immediate albeit "prospective effect",[248] and will form part of the law applicable in these proceedings be it as international or Slovak law.[249] In this context, the Respondent stresses that, because Article 7 of the BIT has been inoperable since May 2004 and the

[240] Slovak *Note Verbale*, p. 1; Polish *Note Verbale*, p. 1.

[241] Slovak *Note Verbale*, p. 2; Polish *Note Verbale*, p. 2.

[242] Reply NV, ¶ 19.

[243] Reply NV, ¶ 21.

[244] Reply NV, ¶ 19.

[245] RTA, ¶¶ 3, 15-20, referring to Termination Agreement, Preamble, Art. 4(1).

[246] RTA, ¶¶ 21, 23-24, referring to Termination Agreement, Art. 8(1).

[247] RTA, ¶¶ 22-24.

[248] RTA, ¶¶ 12-13, referring to VCLT, Art. 54(b).

[249] RTA, ¶ 11.

Termination Agreement applies prospectively, "[n]o concerns of retroactivity arise".[250] This is all the more true considering that, pursuant to Article 28 of the VCLT, the "non-retroactivity of treaties does not apply" where "a different intention appears from the treaty", as is the case with the Termination Agreement.[251]

189. Third, even assuming that the Claimant can establish that the Tribunal has jurisdiction and that the Slovak Republic has breached the BIT, *quod non*, the termination of the BIT will put an end to its effects, including any protection it might have granted to the Polish investors.[252] Subsequent to the BIT's termination, no breach can occur and, in the absence of breach, no damage can be claimed.[253] Therefore, the Respondent contends that Muszynianka could at most claim damages up to the termination of the BIT.[254]

2. The Claimant's Position

190. The Claimant seeks to refute the Respondent's position[255] and submits that the BIT was in force at the time of its breach by the Respondent, with the result that the Tribunal has jurisdiction *ratione temporis* to decide on its claims.[256]

191. According to the Claimant, the BIT is exclusively governed by public international law and hence by the rules of the VCLT.[257] International law thus governs the validity of the arbitration agreement under Article 178(2) of the PILA.[258]

192. In this context, the Claimant argues that legal certainty demands that the consent to arbitrate disputes must be formally withdrawn or invalidated in accordance with the BIT and the VCLT.[259] Under Article 42 of the VCLT, the Respondent is precluded from invoking any grounds affecting the applicability of the BIT, unless the VCLT or the BIT so permits.[260] In this vein, there is no evidence that the BIT has been terminated pursuant

[250] RTA, ¶¶ 5, 13.

[251] RTA, ¶ 14, quoting VCLT, **CLA-15**, Art.28 and referring to VCLT, Art. 70(1)(b).

[252] RTA, ¶ 32.

[253] RTA, ¶ 33.

[254] RTA, ¶¶ 32, 34-39.

[255] Reply, ¶ 605.

[256] SoC, ¶¶ 355, 357, 364.

[257] SoC, ¶¶ 358-359; Reply, ¶¶ 615-616.

[258] Reply, ¶¶ 619-622.

[259] C-PHB 2, ¶ 31.

[260] SoC, ¶¶ 360-361; C-PHB, ¶ 19; C-PHB 2, ¶¶ 24-25.

to its Article 13(1).[261] No formal step was taken in the form of a notification to terminate the BIT under Article 65 of the VCLT either.[262] Thus, the BIT enjoys a presumption of continued validity under Article 42(2) of the VCLT.[263] Additionally, there can be no invalidation of consent on the basis of Article 46(1) of the VCLT for manifest disregard of internal law related to the competence to conclude treaties, as any alleged incompatibility with between the BIT and EU law would not be manifest.[264] But even then, a termination would have to comply with Articles 65 to 67 the VCLT, which is not the case here.[265]

193. Furthermore, the Claimant argues that the Respondent "continues to struggle with proper legal qualification of the objection as based on either EU Treaty, Article 30 of the VCLT or Article 59 of the VCLT".[266] Be this as it may, these provisions are only relevant when the later treaty covers the same subject matter as the earlier one, which is not the case.[267] Moreover, there is no inconsistency between the "obligations under the [BIT] and [EU Treaties], including those with respect to dispute settlement mechanism",[268] nor a common intent of the Contracting Parties to terminate the BIT.[269] Finally, contrary to the Respondent's position, this Tribunal is not bound by the recent judgment of the CJEU in *Achmea*, which constitutes a "new development" in this case,[270] and there is no subsequent conduct of the Contracting Parties in the form of practice or agreements that would have terminated the BIT or rendered it inapplicable.[271]

194. For all these reasons, the Respondent's contention that Article 7 of the BIT is inoperable must fail.[272]

a. The BIT and the EU Treaties do not share the same subject matter

195. The Claimant submits that the Slovak Republic has failed to show that the BIT and the EU Treaties have the "same subject matter" in accordance with Articles 31 and 59 of the

[261] SoC, ¶¶ 362-363; C-PHB, ¶ 19.

[262] Reply, ¶¶ 672-675.

[263] Reply, ¶ 623.

[264] C-PHB 2, ¶¶ 27-28.

[265] C-PHB 2,¶ 29.

[266] Reply, ¶ 608.

[267] Reply, ¶¶ 642, 653.

[268] Reply, ¶ 662.

[269] Reply, ¶¶ 644, 655, 657.

[270] Reply, ¶¶ 631, 636.

[271] C-PHB, ¶ 3; C-PHB 2, ¶ 6.

[272] Reply, ¶ 605; C-PHB, ¶ 641.

VCLT, i.e., to show that "their object is identical and presents a comparable degree of generality".[273] For the Claimant, the "TFEU does not provide for substantive obligations comparable to the Treaty and does not provide for effective or adequate international remedy against violations of those obligations".[274] The Claimant relies on a number of awards in support of its position.[275]

b. The BIT and the EU Treaties are not incompatible

196. According to the Claimant, the Respondent has failed to substantiate that the BIT and the EU Treaties are incompatible.[276] There is no inconsistency between the obligations existing under the BIT and under the EU Treaties, including the obligation related to dispute settlement.[277] Here again, the Claimant refers to prior awards of investment treaty arbitrations to substantiate its arguments.[278]

197. The Claimant acknowledges that *Achmea* came to a different conclusion particularly with respect to the CJEU's alleged monopoly over EU law. However, it points out that the *Achmea* Judgment did so without providing insight as to the alleged uniqueness of an arbitration agreement concluded by the acceptance of a standing offer in a BIT compared to arbitration agreements in a commercial contract potentially involving the interpretation of EU law.[279] Notably, even the European Court of Human Rights "took liberty to implicitly elaborate on consistency of EU law with the European Convention on Human Rights in disputes between individuals and EU Member States, not to mention numerous arbitration tribunals in commercial disputes".[280] It follows that, although the BIT provides

[273] Reply, ¶¶ 624, 644, quoting Olivier Corten and Pierre Klein (eds.), The Vienna Conventions on the Law of Treaties: A Commentary, Vol. II (Oxford University Press 2011), **CLA-106**, p. 1335.

[274] Reply, ¶ 653.

[275][275] Reply, ¶¶ 646-652, referring to *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, **CLA-24**, ¶¶ 160, 167; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, **CLA-25**, ¶¶ 74-77; *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17 (UNCITRAL), Award on Jurisdiction, 22 October 2012, **CLA-27**, ¶¶ 168, 171, 178; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **CLA-28**, ¶ 4.176; *WNC Factoring Limited v. The Czech Republic*, PCA Case No. 2014-34 (UNCITRAL), Award, 22 February 2017, **CLA-107**, ¶ 298; *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03 (UNCITRAL), Final Award, 11 October 2017, **CLA-102**, ¶ 253.

[276] Reply, ¶ 624.

[277] Reply, ¶ 662.

[278] Reply, ¶¶ 662-668, referring, in particular, to *Rupert Joseph Binder v. The Czech Republic*, UNCITRAL, Award on Jurisdiction, 6 June 2007, **CLA-99**, ¶ 63; *Achmea B.V. (formerly known as Eureko B.V.) v. The Slovak Republic*, PCA Case No. 2008-13 (UNCITRAL), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, **CLA-26**, ¶¶ 245, 268, 274; *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17 (UNCITRAL), Award on Jurisdiction, 22 October 2012, **CLA-27**, ¶¶ 217, 248.

[279] Reply, ¶ 666.

[280] Reply, ¶ 666, referring to *Case of Michael Matthews v. The United Kingdom*, Application no. 40302/98, European Court of Human Rights, Application no. 40302/98, Judgment (Friendly Settlement), 15 July 2002, **CLA-111**; *Case*

for an additional remedy for the "breach of substantive standards which may correlate to fundamental freedoms of the EU Internal Market", such remedy does not contradict the "unique role" of the CJEU in applying and interpreting EU law.[281] This is particularly so as there exists "no rule of EU law that prohibits investor-State arbitration".[282]

c. The *Achmea* Judgment is not binding on this Tribunal

198. According to the Claimant, it is a well-established principle of international law that jurisdiction is assessed as of the date on which the act instituting proceedings was filed.[283] *Achmea* is a new development occurring after the initiation of this arbitration and as a result does not affect the Tribunal's jurisdiction.[284] Yet even if *Achmea* applied *ex tunc* in the EU legal order, that rule would only govern in the courts of the EU Member States.[285] Moreover, the multiplicity of awards denying the intra-EU BIT objection allowed the Claimant to "legitimately assume that the binding nature of the Treaty would be unquestionable".[286]

199. In any event, the Tribunal is not bound by *Achmea* for the following main reasons:

i. While *Achmea* may have some impact on the EU Member States, it has no effect on the validity of the BIT under international law as the Achmea Judgment makes no reference at all to the VCLT.[287] This a consequence of

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of Bosphorus Hava Yollari Turzim VE Ticaret Anonim Şirketi v. Ireland, European Court of Human Rights, Application No. 45036/98, Judgment, 30 June 2005, **CLA-112**.

[281] Reply, ¶ 667.

[282] Reply, ¶ 668, quoting *Achmea B.V. (formely Eureko B.V.) v. The Slovak Republic*, PCA Case No. 2008-13 (UNCITRAL), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, **CLA-26**, ¶ 274.

[283] Reply, ¶¶ 625-630, quoting, *inter alia*, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, **CLA-95**, p. 12, ¶ 26; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, **CLA-98**, ¶ 255.

[284] Reply, ¶ 631.

[285] C-PHB, ¶ 9.

[286] Reply, ¶¶ 632-635, referring to *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, **CLA-24**; *Rupert Joseph Binder v. The Czech Republic*, UNCITRAL, Award on Jurisdiction, 6 June 2007, **CLA-99**; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 30 2010, **CLA-25**; *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic*, PCA Case No. 2008-13 (UNCITRAL), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, **CLA-26**; *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17 (UNCITRAL), Award on Jurisdiction, 22 October 2012, **CLA-27**; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, **CLA-100**; *Anglia Auto Accessories Ltd. v. The Czech Republic*, SCC Case No. V 2014/181, Final Award, 10 March 2017, **CLA-101**; *Ivan Peter Busta and James Peter Busta v. The Czech Republic*, SCC Case No. V 2015/014, Final Award, 10 Mach 2017, **CLA-23**; *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. The Czech Republic*, PCA Case No. 2014-03 (UNCITRAL), Final Award, 11 October 2017, **CLA-102**; *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award, 28 June 28 2017, **CLA-103**.

[287] Reply, ¶ 639.

the CJEU's limited jurisdiction, which cannot decide on the termination of an international agreement concluded between the Member States.[288]

ii. The Tribunal is not part of the EU judicial system. Therefore, any obligation under EU law to follow the interpretation of the CJEU does not extend to the Tribunal, more so considering that its seat is located in a third State.[289] For the same reason, Swiss courts "controlling the prospective award will not be bound by [*Achmea*] either".[290] In short, "the Tribunal is the sole guardian of its competence including the validity of the arbitration agreement concluded between the Claimant and the Respondent".[291]

iii. Irrespective of the "threats" by the Respondent concerning enforcement, a prospective award is capable of creating international legal effects, including the obligation on the part of the Slovak Republic to pay compensation and comply with other orders issued by the Tribunal.[292] Given that the Respondent is not a "State failing to observe basic principles of rule of law, the Tribunal should not assume the Respondent's failure to observe the abovementioned obligations".[293] The fact that the forthcoming award may be challenged in set aside proceedings does not change these considerations.[294]

d. No subsequent practice or agreement

200. The Claimant disputes that the subsequent conduct of Poland and Slovakia has rendered the BIT inoperative.[295] There was no intent of termination, either express or implied, under Article 59(1)(a) of the VCLT.[296]

[288] Reply, ¶ 639.

[289] Reply, ¶ 640.

[290] Reply, ¶ 640.

[291] Reply, ¶ 640.

[292] Reply, ¶ 677.

[293] Reply, ¶ 677.

[294] Reply, ¶ 678.

[295] Reply, ¶ 656.

[296] Reply, ¶¶ 654, 657.

201. First, Poland's motion to reopen the *Achmea* proceedings before the CJEU cannot qualify as "subsequent practice" under Article 31(3)(b) of the VCLT as it was a position taken in legal proceedings.[297]

202. Second, Poland's diplomatic note on the proposal to initiate negotiations on the mutual termination of the BIT does not constitute a "subsequent agreement" to that effect under Article 31(3)(a).[298] Indeed, the note indicates that the BIT has not been terminated and merely states an intent to negotiate.[299]

203. Third, according to the Claimant the Achmea Declarations are not a "subsequent agreement" under Article 31(3)(a) of the VCLT, as they were signed in relation to *Achmea* and not to the BIT.[300] More specifically, the Claimant's argument is threefold.

i. Having been signed two years after the initiation of this arbitration, the Achmea Declarations have no effect on the jurisdiction of the Tribunal.[301] Slovakia's consent was perfected on 18 August 2016 and cannot be withdrawn unilaterally.[302] It created vested rights which are protected under international and EU law. [303] The Declarations only create obligations *pro futuro,* expressing the "inten[t] to terminate" intra-EU BITs.[304] They do not state that such BITs are "invalid or non-existent", only that they are incompatible with EU law.[305] No EU Member State considers that its intra-EU BITs have automatically been terminated by virtue of either the Achmea Judgment or the Achmea Declarations.[306]

[297] Reply, ¶ 659, referring to Irina Buga, Modification of Treaties by Subsequent Practice (Oxford University Press 2018), **CLA-109**, p. 30.

[298] Reply, ¶¶ 658, 660.

[299] Reply, ¶ 661.

[300] C-PHB, ¶ 20; C-PHB 2, ¶ 7.

[301] C-PHB, ¶¶ 4, 6, referring to *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, **CLA-164**, ¶ 226 ("[T]he Tribunal is unable to accept that it should be given retroactive effect to require the termination of a pending arbitration, initiated in good faith by an investor years before the Declaration was issued".).

[302] C-PHB 2, ¶ 42.

[303] C-PHB 2, ¶¶ 31, 37-38; C-PHB, ¶ 10, referring to *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment on the Merits, P.C.I.J. Series A, No. 7, **CLA-20**, p. 19; *J. J. Kersbergen-Lap and D. Dams-Schipper v. Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen*, CJEU Case C-154/05, Judgment (Third Chamber), 6 July 2006, **CLA-165**, ¶ 42.

[304] C-PHB, ¶ 7; C-PHB 2, ¶¶ 12-13, 33.

[305] C-PHB, ¶ 8.

[306] C-PHB, ¶¶ 23, 25; C-PHB 2, ¶¶ 18, 32.

ii. The Achmea Declarations do not constitute a subsequent agreement regarding the interpretation of the BIT as provided in Article 31(3)(a) of the VCLT.[307] They do not interpret the BIT; they "reflect" only upon the interpretation of EU law by the CJEU.[308] Moreover, the purpose of Article 31(3)(a) of the VCLT "relates to the specific question as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation".[309] By contrast, "[a]fter the treaty comes into force, its parties may either amend it through prescribed procedures or interpret what already is contained by the treaty".[310] In this respect, "[n]either the Achmea Judgment nor the Achmea Declarations assert that any understanding regarding the arbitration clauses under intra-EU BITs was reached during its negotiations".[311] Overall, "interpretation or application may not diminish the rights and obligations of the parties to the treaty", which in this case includes the Respondent's obligation to "accept" the jurisdiction of an arbitral tribunal established under Article 7 of the BIT.[312]

iii. The Achmea Declarations cannot produce any effect as they contravene international and EU law, namely (i) the principle of *pacta sunt servanda* in Article 26 of the VCLT; (ii) the principle of security of the legal order; (iii) the general principle of investors' acquired and vested rights; (iv) the Tribunal's power to decide on its own jurisdiction; and (v) Article 47 of the Charter of Fundamental Rights of the European Union, according to which "[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law".[313]

204. Fourth, to the extent that they do not refer to the Treaty's interpretation or application, but rather to the legal consequences of the Achmea Judgment pursuant to the Achmea Declarations, the *Notes Verbales* do not constitute a subsequent agreement in accordance with Article 31(3)(a) of the VCLT.[314] In any event, the arbitration agreement

[307] C-PHB 2, ¶¶ 5-6.

[308] C-PHB 2, ¶¶ 7-8.

[309] C-PHB 2, ¶ 10.

[310] C-PHB 2, ¶ 10.

[311] C-PHB 2, ¶¶ 11, 13.

[312] C-PHB 2, ¶ 17.

[313] C-PHB 2, ¶¶ 34-40.

[314] Response NV, ¶¶ 30-34; Rejoinder NV, ¶¶ 10-11.

between Muszynianka and the Slovak Republic was perfected on 18 August 2016 with the filing of the Notice of Arbitration, and cannot be affected by subsequent events.[315] Neither the Achmea Declarations nor the *Notes Verbales* can retroactively impact a previously accepted offer to arbitrate, as it would otherwise violate the principles of *nemo venire contra factum proprium* and acquired rights.[316]

e. The Termination Agreement

205. The Claimant disputes that the Termination Agreement is of any consequence to the present dispute.[317] Its argument is two-fold.

206. First, the Treaty was in force at the time of the asserted breaches in 2014-2015 and at the time of Muszynianka's acceptance of Slovakia's offer to arbitrate by commencing these proceedings in August 2016.[318] Jurisdiction must be assessed at the time of the initiation of the proceedings.[319] Subsequent events, such as the Termination Agreement, are irrelevant for jurisdictional purposes.[320] Similarly, the Termination Agreement does not change the position that Slovakia's responsibility is governed by the law in force at the time of the allegedly wrongful act, namely by the BIT's substantive standards.[321]

207. Second, the application of the Termination Agreement to these proceedings would be retroactive, and would thus violate the principle of legal certainty and be contrary to the protection of vested rights.[322] It would also violate public policy within the meaning of Article 190(2)(e) of the PILA,[323] amount to a denial of justice as Muszynianka lacks other means of redress,[324] and be in conflict with a peremptory norm of international law, namely the right to a fair trial.[325]

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[315] Rejoinder NV, ¶ 26.

[316] Rejoinder NV, ¶ 26.

[317] CTA, ¶ 1.

[318] CTA, ¶¶ 2, 14-17, 20-28.

[319] CTA, ¶¶ 5-6.

[320] CTA, ¶¶ 8, 40-47.

[321] CTA, ¶¶ 9-10.

[322] CTA, ¶¶ 29-36.

[323] CTA, ¶ 37.

[324] CTA, ¶¶ 64-88.

[325] CTA, ¶¶ 38-39.

3. The EU Commission's *amicus curiae* brief

208. The EU Commission's *amicus curiae* brief largely supports the Respondent's intra-EU objection.[326] To the extent that the Respondent's position in this respect is summarized in detail, the Tribunal deems it unnecessary to set out the EU Commission's arguments separately.

4. Analysis

209. When the Claimant served its Notice of Arbitration on 18 August 2016, it purported to accept the Slovak Republic's offer to arbitrate which is contained in Article 7 of the BIT and reads as follows where relevant:

> (1) Disputes between one of the Parties and an investor of the other Party shall be notified in writing, including a detailed information, by the investor to the host Contracting Party of the investment. As far as possible the Parties shall endeavour to settle these differences by means of a friendly agreement.
>
> (2) If these disputes cannot be settled in this way within six months from the date of the written notification mentioned in paragraph (1) the dispute shall be submitted, at choice of the investor to:
>
> - a court of arbitration in accordance with the Rules of Procedure of the Arbitration Institute of the Stockholm Chamber of Commerce;
>
> - the court of arbitration of the Paris International Chamber of Commerce;
>
> - the ad - hoc court of arbitration established under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law;
>
> - the International Centre for Settlement of Investment Disputes (ICSID)set up by the "Convention on Settlement of Investment Disputes between States and Nationals of other States", in case both Contracting Parties have become signatories of this Convention.
>
> […]
>
> (4) The arbitration decisions shall be final and binding for the Parties to the disputes. Each Contracting Party undertakes to execute the decisions in accordance with its national law.
>
> (5) The Contracting Party which is a party to the dispute shall at no time whatsoever during the procedures involving investments disputes, assert as a defence its immunity or the fact that investor bas received compensation under an insurance contract covering the whole or part of the incurred damage or loss.

210. The Respondent objects that, at the time of the Claimant's acceptance, the offer was no longer valid due to Slovakia's accession to the EU Treaties in 2004. To resolve this objection, the Tribunal must start by determining the law governing the question whether the EU Treaties override the dispute resolution clause of the BIT. For the Claimant, this

[326] *See generally* EU Commission's *amicus curiae* brief.

question is exclusively subject to international law,[327] while the Respondent considers that EU law is also relevant in accordance with Article 7(3) of the BIT, as this choice of law provision refers to national law and general principles of international law, which incorporate or allude to EU law.[328]

211. The Tribunal has already set out its understanding of the law governing jurisdiction, to which it refers.[329] In addition, it notes that EU law is a *sui generis* legal order, which, as was extensively discussed in *Electrabel v. Hungary*, is both international and national law.[330] As such, it may be relevant to the analysis of the Tribunal's jurisdiction. This being so, as stated earlier, the Tribunal remains a tribunal established on the basis of an international treaty whose primary role is to apply international law and in particular that treaty.

212. Before reviewing whether the EU Treaties prevail over the arbitration provision in Article 7 of the BIT in application of the VCLT, the Tribunal will examine the Respondent's submissions that it is bound by the *Achmea* Judgment (**a**) and both the Achmea Declarations and the *Notes Verbales* (**b**).

a. The relevance of the *Achmea* Judgment

213. In the Achmea Judgment, the CJEU held that:

> Articles 267 and 344 [of the TFEU] must be interpreted as precluding a provision in an international agreement concluded between Member States [...] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[331]

214. Pursuant to Article 186(1) of the PILA, the Tribunal "shall itself decide on its jurisdiction". Similarly, under Article 21(1) of the UNCITRAL Rules, the Tribunal "shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause […]". In other words, the Tribunal has *Kompetenz-Kompetenz* and in the exercise of such power, it must analyze whether there

[327] *Supra*, ¶ 191.

[328] *Supra*, ¶¶ 178.i-ii.

[329] *Supra*, ¶¶ 159-160.

[330] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **CLA-28**, ¶¶ 4.117 *et seq*.

[331] *The Slovak Republic v. Achmea B.V.*, CJEU Case C-284/16, Judgment, 6 March 2018, **RLA-109**, ¶ 60.

is a valid consent to arbitrate under Article 7 of the BIT. It cannot abandon this mission and, instead, simply endorse the ruling of another adjudicatory body.

215. In any event, the CJEU's interpretative authority extends to the interpretation and application of the EU Treaties.[332] It does not encompass an exclusive or ultimate mandate in respect of the interpretation of the BIT or the VCLT rules on treaty conflicts. Moreover, to decide whether Article 7 of the BIT is inoperable on the ground of the EU Treaties, one must interpret not only the EU Treaties but also the BIT and assess their interaction. A decision by the CJEU on EU law does not prejudge the critical questions under Articles 30 and 59 of the VCLT of whether the BIT and the EU Treaties govern the same subject matter; and, if so, whether there is a normative conflict between the EU Treaties and the BIT.

216. The CJEU has not addressed these issues in *Achmea*, but has no exclusive authority to do so in any event. A review of the Achmea Judgment shows that the CJEU carried out no conflict analysis under the VCLT. As noted in *United Utilities v. Estonia*, the CJEU appears to have assumed that the alleged incompatibility between the EU Treaties and intra-EU BITs "must be considered through, and only through, the lens of EU law".[333] The Tribunal makes no observation about this, insofar as it relates to EU law; it notes, however, that the CJEU's assumption is not compatible with public international law, whether customary or conventional.

217. Therefore, the *Achmea* Judgment gives no guidance on the relevant issues before the Tribunal, which must conduct an independent analysis to determine whether the EU Treaties have rendered the BIT inoperable under public international law.

b. The relevance of the Achmea Declarations and the *Notes Verbales*

218. On 15 January 2019, 22 EU Member States, including Poland and Slovakia, concluded the Main Achmea Declaration on the legal consequences of the Achmea Judgment, affirming that "all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable".[334] The Slovak and Polish Governments confirmed this statement

[332] *Da Costa en Schaake N.V., Jacob Meijer N.V. and Hoechst-Holland N.V. v Nederlandse Belastingadministratie*, ECJ Cases 28, 29 and 30/62, 27 March 1963.

[333] *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, ¶ 539; *see also Magyar Farming Company Ltd, Kintyre Kft, Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, 13 November 2019, ¶ 210.

[334] Declaration of the Representatives of the Governments of 22 Member States on the Legal Consequence of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, 15 January 2019, **R-415.** The Tribunal recalls that Finland, Luxembourg, Malta, Slovenia and Sweden concluded the Secondary

specifically in relation to the Treaty through the *Notes Verbales* exchanged between November 2019 and January 2020.[335]

219. The Respondent does not argue that the Main Achmea Declaration or the *Notes Verbales* for that matter terminated the BIT and rightly so. The Declaration manifests the intent of the signatories to terminate their investment treaties in the future, i.e., in December 2019.[336] Had the Main Achmea Declaration and the *Notes Verbales* themselves been sufficient to put an end to the intra-EU BITs, the scheduled December 2019 termination, now materialized in the Termination Agreement, would have made no sense being unnecessary.

220. The Respondent also argues that the Main Achmea Declaration and the *Notes Verbales* constitute subsequent agreements "between the parties regarding the interpretation of the treaty or the application of its provisions" as contemplated in Article 31(3)(a) of the VCLT. Accordingly, the Declaration and the *Notes Verbales* would dictate that Article 7 of the BIT be interpreted as incompatible with EU law and, hence, inapplicable.

221. However, the Main Achmea Declaration does not appear to offer a joint interpretation of the intra-EU BITs. Its title, "Declaration […] on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union", suggests that the EU Member States seek to explain the legal consequences of the Achmea Judgment, rather than to give an interpretation of Article 7 of the BIT.

222. Be that as it may, interpretative declarations within the meaning of Article 31(3)(a) of the VCLT are not an exclusive and dispositive method of treaty interpretation. They are merely one element that "shall be taken into account, together with the context" of the relevant treaty terms. Context is itself a means of interpretation under Article 31(1) of the VCLT, together with the ordinary meaning and object and purpose of the treaty.

223. The treaty provision that is purportedly the subject of interpretation is Article 7 of the BIT, quoted above.[337] Their ordinary meaning leaves no doubt that the words used in it are the expression of a binding consent to arbitrate. In the face of such clear text, interpretative declarations pursuant to Article 31(3)(a) of the VCLT cannot be employed

Achmea Declaration on 16 January 2019 (*supra*, ¶ 132). To the extent that the Contracting Parties to the BIT did not subscribe the Secondary Achmea Declaration, the latter has no bearing on the present dispute and the Tribunal therefore will dispense with its analysis.

[335] *Supra*, ¶ 142.

[336] C-PHB, ¶ 7.

[337] *Supra*, ¶ 209.

as "a trump card to allow States to offer new interpretations of old treaty language, simply to override unpopular treaty interpretations based on the plain meaning of the terms actually used".[338]

224. The observation that a subsequent agreement may relate to the application of a treaty does not alter the outcome of the analysis. Under Article 31(3)(a) of the VCLT, subsequent agreements must be considered, together with the context, as interpretative tools only.[339] They may thus clarify the meaning or scope of a treaty provision, but "cannot modify treaty obligations"—their value is limited to "interpreting [a] treaty in accordance with the general rule of interpretation of treaties".[340] The Achmea Declarations, however, purport to prevent intra-EU investors from relying on clear language which, in its ordinary meaning, gives them the ability to resort to arbitration. Such a result goes beyond what can be achieved through interpretation and thus disqualifies the Main Achmea Declaration from being a subsequent agreement in accordance with Article 31(3)(a) of the VCLT.

225. Turning to the *Notes Verbales*, they indeed contain an affirmation that they constitute a subsequent agreement in the meaning of Article 31(3)(a) of the VCLT.[341] Yet, the characterization of the true nature of the *Notes* requires an objective assessment. Otherwise, parties to international treaties could easily and impermissibly circumvent international customary law as codified in the VCLT. The content of the *Notes Verbales* shows that they were exchanged in implementation and furtherance of the Main Achmea Declaration and the Achmea Judgment,[342] which is confirmed by the Respondent

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[338] *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, **CLA-164**, ¶ 223.

[339] The Respondent appears to concede this when stating, albeit in the context of its submissions on the *Notes Verbales*, that the latter are an "authoritative interpretation of the application of the BIT" (Reply NV, ¶ 19) (emphasis added).

[340] See International Law Commission's 2011 Guide to Practice on Reservations to Treaties, Guideline 4.7.1.1 ("An interpretative declaration does not modify treaty obligations. It may only specify or clarify the meaning or scope which its author attributes to a treaty or to certain provisions thereof and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties") (emphasis added).

[341] Slovak *Note Verbale*, p. 2; Polish *Note Verbale*, p. 2; *supra*, ¶ 185.

[342] Slovak *Note Verbale*, pp. 1-2 ("The Embassy of the Slovak Republic in Warsaw […] in light of the [Main Achmea] Declaration […] has the honor to propose conclusion of the following Declaration between the Government of the Slovak Republic and the Government of the Republic of Poland on the legal consequences of the [Achmea Judgment]. […] The Embassy of the Slovak Republic in Warsaw proposes that in case the Government of the Republic of Poland accepts the proposal, this note together with the note constituting the response will constitute [a] Declaration between the Government of the Slovak Republic and the Government of the Republic of Poland on the legal consequences of the [Achmea Judgment]"); Polish *Note Verbale*, pp. 1-2 ("Ministry of Foreign Affairs of the Republic of Poland […] with reference to the *Note Verbale* of the Embassy of the Slovak Republic in Warsaw […] agrees to conclude [a] Declaration between the Government of the Republic of Poland and the Government of the Slovak Republic on the legal consequences of the [Achmea Judgment]. […] The [Slovak *Note Verbale*] and this *Note Verbale* constitute [a] Declaration between the Government of the Republic of Poland and the Government of the Slovak Republic on the legal consequences of the [Achmea Judgment]".). Although not dispositive, the Tribunal

itself.[343] Hence, for the reasons set out above in connection with the Main Achmea Declaration and the Achmea Judgment, applicable here *mutatis mutandis,* the Tribunal comes to the conclusion that the *Notes Verbales* cannot constitute a subsequent agreement for interpreting the BIT in accordance with the VCLT.

226. As a result of the foregoing analysis, the Tribunal considers that the Main Achmea Declaration and the *Notes Verbales* do not determine the outcome of its analysis regarding the alleged incompatibility of the EU Treaties and the BIT's arbitration clause. The Tribunal must thus conduct its own analysis into such conflict, if any, on the basis of the VCLT rules on treaty conflict.

c. Article 7 of the BIT and the EU Treaties

227. Both Parties refer to the conflict rules in Articles 30 and 59 of the VCLT. However, they disagree on whether, as a result of these rules, Articles 267, 344, and 18(1) of the TFEU and Article 4(3) of the TEU invalidate Article 7 or terminate the BIT in general.

228. Article 30 of the VCLT sets forth rules to resolve conflicts between "successive treaties relating to the same subject matter". In relevant parts, it reads as follows:

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
>
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

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further notes that Ms. Bek's Communication, through which the *Notes Verbales* were brought to its attention (*supra*, ¶ 135), states that the *Notes Verbales* "result[] from paragraph 2" of the Main Achmea Declaration.

[343] Comments NV, ¶¶ 5,16 ("The *Notes Verbales* were thus sent in order to implement these provisions of the [Main Achmea] Declaration, which reflect EU law. […] The *Notes Verbales* are done in furtherance of the Declaration […]".).

229. Article 59 of the VCLT regulates the "[t]ermination or suspension of the operation of a treaty implied by conclusion of a later treaty" also sharing the "same subject matter". In relevant part, Article 59 VCLT reads as follows:

> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:
>
> (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
>
> (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

230. Accordingly, the first question for the Tribunal is whether the BIT and the EU Treaties have the same subject matter ((**i**) below). If so, the next step will be to review whether the BIT and in particular Article 7 of the BIT are in conflict with Articles 267, 344, and 18(1) of the TFEU and Article 4(3) of the TEU ((**ii**) below).

i. The same subject matter requirement

231. The Respondent refers to Articles 30(3) and 59(1)(b) of the VCLT to submit that the BIT has been rendered inoperative as a result of Slovakia's and Poland's accession to the EU. The applicability of these provisions is contingent on finding that the EU Treaties and the BIT share the "same subject-matter".

232. According to certain highly qualified publicists, the term "same subject-matter" should be understood widely.[344] However, the Tribunal concludes that this cannot be reduced to a requirement that the two treaties be potentially applicable to or govern the same set of circumstances or facts. As noted by the tribunal in *EURAM*:

> Even if two different rules deal with issues arising from the same facts, it does not necessarily mean that they have the same subject matter. This can be seen from a simple example: a treaty on environmental protection and a treaty on trade may both apply to the same factual situation but the subject matter with which they deal is quite different.[345]

233. In this context, investment arbitration tribunals have held that subject matter identity of treaties is defined by the matters with which the treaty's constituent provisions deal. For instance, the *Oostergetel* tribunal held:

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[344] Oliver Dörr and Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties: A Commentary (Springer 2012), p. 544, ¶ 12.

[345] *European American Investment Bank AG v. The Slovak Republic,* PCA Case No. 2010-17 (UNCITRAL), Award on Jurisdiction, 22 October 2012, **CLA-27**, ¶ 172.

> The requirement […] that the two treaties relate to the "same subject matter" has to be construed in line with the dominant view expressed in scholarly writings to the effect that two treaties can be considered to relate to the "same subject matter" only if the overall objective of these treaties is identical and they share a degree of general comparability.[346]

234. In respect of the EU Treaties, investment arbitration tribunals have held that investment treaties do not share the subject matter with the EU Treaties. The *Wirtgen* tribunal considered it "obvious" that intra-EU investment treaties and EU Treaties did not have identical subject matters.[347] As noted in *Marfin*, the EU Treaties and BITs do not only have a different objective, but the protections afforded by the latter are not coextensive or exhausted by the former.[348] Similarly, the *Eastern Sugar* tribunal had earlier observed that:

> [BITs provide] for fair and equitable treatment of the investor during the investor's investment in the host country, prohibits expropriation, and guarantees full protection and security and the like. The BIT[s] also provide[] for a special procedural protection in the form of arbitration between the investor state and the host state and, especially arbitration of a "mixed" or "diagonal" type between the investor and the host state, as in the present case.
>
> From the point of view of the promotion and protection of investments, the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties. Whereas general principles such as fair and equitable treatment or full security and protection of the investment are found in many international, regional or national legal systems, the investor's right arising from the BIT's dispute settlement clause to address an international arbitral tribunal independent from the host state is the best guarantee that the investment will be protected against potential undue infringements by the host state. EU law does not provide such a guarantee.[349]

235. The findings in *Eastern Sugar* were recently stressed by the tribunal in *Magyar* as follows:

> [A]s the most evident distinction [between the EU Treaties and investment treaties], the application of [BITs] is contingent upon an investor of one State making a cross-border investment in the other State. In turn, the EU Treaties provide guarantees for nationals of the EU Member States irrespective of an investment. Due to this crucial distinction, the substantive protections afforded to a foreign investor under the Treaty are unsurprisingly not comparable to, or of the same nature as, those offered to EU nationals under the BIT. By way of an example, as the *Eureko v. Slovakia* tribunal observed, the protections afforded by BITs under the FET standard are not limited to the existing EU law provisions prohibiting discrimination. Similarly, while EU law

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[346] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, **CLA-25**, ¶ 75.

[347] *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. The Czech Republic*, PCA Case No. 2014-03 (UNCITRAL), Final Award, 11 October 2017, **CLA-102**, ¶ 253.

[348] *Marfin Investments Group Holdings S.A., Alexandros Bakatselos and others v. Republic of Cyprus,* ICSID Case No. ARB/13/27, Award, 26 July 2018, **CLA-159**, ¶ 589.

[349] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, **CLA-24**, ¶¶ 164-165; *see also European American Investment Bank AG v. The Slovak Republic,* PCA Case No. 2010-17 (UNCITRAL), Award on Jurisdiction, 22 October 2012, **CLA-27**, ¶ 184 ("[T]he EU Treaties and the EU law rooted in, and flowing from them do not relate to the same subject matter as BITs or multilateral treaties for the protection of foreign investment. To accede to an economic community is simply not the same as to set up a specific investment protection regime providing for investor-State arbitration".); *WNC Factoring Limited v. Czech Republic*, PCA Case No. 2014-34 (UNCITRAL), Award, 22 February 2017, **CLA-107**, ¶ 298.

> may condition expropriatory takings upon public interest and fair compensation, it has not been established that it offers comparable protections to those available under the Treaty in case of indirect expropriations, or that it applies the protections to "every kind of asset".
>
> The BIT and the EU Treaties also differ in their overarching goals. As the *Oostergetel* tribunal underscored, the EU treaties' objective is to promote economic integration, including by creating a common market, among the Member States, whereas the objective of BITs (including the Treaty) is to provide for specific guarantees in order to encourage the international flows of investment into particular States.[350]

236. The Tribunal shares the views expressed in these decisions. Therefore, it comes to the conclusion that the BIT and the EU Treaties do not share the same subject matter for the purposes of the VCLT. For this reason, Articles 30 and 59 of the VCLT are inapplicable to the present case.

237. The Parties have not invoked any principle or customary norm of international law that would govern a possible conflict between treaties that do not share the same subject matter. Article 42(1) of the VCLT in turn states that "[t]he validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention".

238. As a result, since the BIT and the EU Treaties lack the same subject matter, there is no legal basis for the Tribunal to conclude that Slovakia's and Poland's accession to the EU Treaties in May 2004 rendered the BIT inoperable. Consequently, Slovakia's standing offer to arbitrate, contained in Article 7 of the BIT, was valid when the Claimant accepted it by filing its Notice of Arbitration in August 2016. This conclusion allows the Tribunal to dispense with resolving the question whether the EU Treaties are in conflict with the BIT and the offer to arbitrate, and the analysis could thus end here. Given that the Parties have extensively briefed the issue of a possible conflict, the Tribunal will nevertheless address it in the following section.

ii. The conflict requirement

239. Assuming the Tribunal were to accept that the BIT and the EU Treaties have the same subject matter, *quod non*, the BIT and the offer to arbitrate which it includes would not be precluded by operation of the EU Treaties. Indeed, there is no incompatibility between Article 7 of the BIT and Articles 267, 344, and 18(1) of the TFEU and Article 4(3) of the TEU under Articles 30 or 59 of the VCLT.

[350] *Magyar Farming Company Ltd, Kintyre Ktf, Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, 13 November 2019, ¶¶ 234-235.

240. When States subscribe to successive treaties, without terminating or amending the "earlier in time" treaty (or treaties), it should be presumed that they did not intend to create a normative conflict. This presumption derives from the principle of harmonious interpretation of international law:

> There is a general rule under international law whereby the interpreter tries to smooth out or even to avoid conflict by way of "harmonizing interpretation" (presumption of non-conflict). This rule is based on the assumption that when States wanted different rules to be applicable they could not at the same time have wanted normative contradiction. [351]

241. As a leading commentary to the VCLT suggests, if "the apparently conflicting treaty provisions can be interpreted in such a way that they are compatible with each other, this approach is the first to be chosen."[352] Harmonious interpretation should not be regarded as an incentive to ignore outright conflicts. An outright conflict "arises only where a Party to the two treaties cannot simultaneously comply with its obligations under both treaties,"[353] or in different words:

> Treaties are incompatible with each other if their obligations cannot be complied with simultaneously, *ie* if a State Party to both treaties cannot comply with one of them without breaching the other.[354]

242. On this basis, the Tribunal sees no conflict between Article 7 of the BIT and Articles 344, 267, and 18(1) of the TFEU and Article 4(3) of the TEU.

243. Article 344 of the TFEU reads as follows:

> Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

244. This provision is not a general prohibition on EU Member States creating and using treaties other than the EU Treaties to govern relations between them. Rather, it limits the power of the Member States to litigate or arbitrate disputes concerning the interpretation or application of the EU Treaties by means not foreseen in those treaties. It cannot be understood to affirm that investor-State disputes based on investment treaties may not be resolved by adjudicatory bodies other than those provided in the EU Treaties.

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[351] Robert Kolb, The Law of Treaties: An Introduction (Elgar 2016), p.183.

[352] Oliver Dörr and Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties: A Commentary (Springer 2012), ¶ 13.

[353] C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, British Year Book of International Law 30, 1953, p. 426.

[354] Oliver Dörr and Kirsten Schmalenbach (eds.), Vienna Convention on the Law of Treaties: A Commentary (Springer 2012), p. 545, ¶ 13.

245. This being so, Article 7 of the BIT does not deal with disputes "concerning the interpretation or application of the [EU] Treaties". In its first paragraph, Article 7 speaks of "[d]isputes between one of the Parties and an investor of the other Party" and, in its fifth paragraph, of "investment disputes".[355] It is true that such an investment dispute may in certain circumstances involve matters calling for the interpretation or application of the EU Treaties as issues incidental or preliminary to the application of the investment treaty.[356] Yet, even where this is so, the dispute remains one concerning the interpretation and application of the investment treaty and the resulting award will carry *res judicata* effects under international law solely in respect of the claims brought under that treaty. Indeed, "tribunals are established under BITs to resolve disputes over the interpretation and application of the obligations set out in the BIT in question. They are not established to resolve disputes under EU law".[357]

246. The next relevant provision is Article 267 of the TFEU, which reads as follows:

> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union[.]

247. This provision empowers the CJEU to render preliminary rulings on the interpretation of the EU Treaties. Investment treaty arbitration tribunals may not resort to the CJEU to that effect. Still, the Tribunal fails to see the risk of a normative conflict between Article 267 and the submission of a dispute to international arbitration pursuant to Article 7 of the BIT. Article 267 does not impose an obligation to ensure that all adjudicatory bodies potentially dealing with EU law seek a preliminary ruling from the CJEU. Even national courts of EU Member States are not all required to refer matters of interpretation of EU law to the CJEU. If such an obligation existed, it would be routinely breached by tribunals in commercial arbitration and extra-EU investment treaty arbitration, which are occasionally called upon to interpret and apply EU law and are not empowered to seek

[355] BIT, Arts. 7(1), 7(5); *supra*, ¶ 209.

[356] *Ioan Micula, Viorel Micula and others v. Romania [II]*, ICSID Case No. ARB/14/29, Award, 5 March 2020, ¶ 283 ("[A] tribunal may well have to have regard to EU law, but this will be incidental and will not be a question going to the core issues of the dispute".).

[357] *Ioan Micula, Viorel Micula and others v. Romania [II]*, ICSID Case No. ARB/14/29, Award, 5 March 2020, ¶ 282; *see also Greentech Energy Systems A/S, et al v. Italian Republic*, SCC Case No. V 2015/095, Final Award, 23 December 2018, ¶ 350; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, **CLA-29**, ¶ 79.

preliminary rulings. Yet the compatibility of these dispute settlement mechanisms with Article 267, or with Article 344, for that matter, is not questioned.

248. Overall, the Tribunal holds that there is no conflict between Articles 344 and 267 of the TFEU and intra-EU investor-State dispute resolution. The Tribunal notes that numerous investment awards have reached the same conclusion.[358]

249. The Respondent also refers to Article 18(1) of the TFEU as a third provision that conflicts with Article 7 of the BIT. Article 18(1) prohibits discrimination in the following terms:

> Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

250. According to the Respondent, Slovakia's and Poland's consent to arbitrate dispute with Polish and Slovak investors, but not with other EU nationals is incompatible with the prohibition of discrimination in Article 18(1) of the TFEU.[359] Referring to the CJEU's judgment in *Commission v. Belgium*,[360] the Respondent submits that a breach of Article 18(1) results from the "mere existence of the discriminating provision in the international instrument in question", and not from possible conduct in application of that provision.[361]

251. The Respondent's reliance on *Commission v. Belgium* is inapposite. In that case the CJEU dealt with an extra-EU bilateral agreement between Belgium and the United States on open skies and air transport services. The CJEU noted that the clause at issue in that agreement (i) obligated the United States to grant certain rights to airlines registered in Belgium and owned or controlled by Belgium or Belgian nationals;[362] and (ii) simultaneously permitted the United States to "withdraw, suspend or limit" those same

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[358] *See*, *inter alia, Achmea B.V. (formely Eureko B.V.) v. The Slovak Republic*, PCA Case No. 2008-13 (UNCITRAL), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, **CLA-26**, ¶ 276; *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17 (UNCITRAL), Award on Jurisdiction, 22 October 2012, **CLA-27**, ¶¶ 248 *et seq.*; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, **CLA-30**, ¶¶ 288-289, 303; *Anglia Auto Accessories Ltd. v. The Czech Republic*, SCC Case No. V 2014/181, Final Award, 10 March 2017, **CLA-101**, ¶¶ 126-128.

[359] SoD, ¶ 352.

[360] *Commission of the European Communities v. Kingdom of Belgium*, CJEU Case C-471/98, Judgment, 5 November 2002, **RLA-71**.

[361] SoD, ¶ 353.

[362] *Commission of the European Communities v. Kingdom of Belgium*, CJEU Case C-471/98, Judgment, 5 November 2002, **RLA-71**, ¶ 139.

rights to airlines registered in Belgium but not owned or controlled by Belgium or Belgian nationals.[363]

252. It followed that non-Belgian EU airlines could "always be excluded from the benefit of the air transport agreement between the Kingdom of Belgium and the United States of America, while that benefit [was] assured to Belgian airlines".[364] The CJEU therefore deemed discriminatory the relevant clause in the US-Belgium agreement, as non-Belgian EU airlines would be prevented from "benefiting from the treatment which the host Member State, namely the Kingdom of Belgium, accords to its own nationals".[365] It is in this context that, as noted by the Respondent, the CJEU held that the "direct source" of the discrimination was not the "possible conduct" of the United States, but the "clause" that "specifically acknowledge[d] the right of the United States […] to act in that way".[366]

253. The present situation is distinguishable from the issue raised in *Commission v. Belgium*. Article 7 of the BIT at no point prevents either Slovakia or Poland from granting the same treatment to other EU Member States.[367] Accordingly, it cannot be construed as a "direct source" of discrimination, if any. Moreover, the Tribunal shares the view of the tribunal in *EURAM*, which held that "any possible discrimination might be taken up by the European institutions to sanction a Member State for violation of EU law", adding that "such discrimination has no consequence on the validity of the treaty under public international law: 'this is an internal EU law problem and not an issue of treaty compatibility'".[368] The Tribunal agrees and therefore finds no conflict with Article 18(1) of the TFEU.

254. Lastly, the Respondent argues that Article 7 of the BIT is incompatible with the principle of mutual trust and cooperation between EU Member States enshrined in Article 4(3) of the TEU,[369] which reads as follows:

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[363] *Commission of the European Communities v. Kingdom of Belgium*, CJEU Case C-471/98, Judgment, 5 November 2002, **RLA-71**, ¶ 137.

[364] *Commission of the European Communities v. Kingdom of Belgium*, CJEU Case C-471/98, Judgment, 5 November 2002, **RLA-71**, ¶ 140.

[365] *Commission of the European Communities v. Kingdom of Belgium*, CJEU Case C-471/98, Judgment, 5 November 2002, **RLA-71**, ¶ 140.

[366] *Commission of the European Communities v. Kingdom of Belgium*, CJEU Case C-471/98, Judgment, 5 November 2002, **RLA-71**, ¶ 141.

[367] *See European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17 (UNCITRAL), Award on Jurisdiction, 22 October 2012, **CLA-27**, ¶¶ 271-272.

[368] *European American Investment Bank AG v. The Slovak Republic*, PCA Case No. 2010-17 (UNCITRAL), Award on Jurisdiction, 22 October 2012, **CLA-27**, ¶ 270.

[369] Rejoinder, ¶¶ 78-79.

> Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

255. According to the Respondent, the conflict lies in that this principle requires Member States to trust each other's judicial systems and investor-State arbitration "is born, by contrast, from a fundamental mistrust of the other state's judicial system".[370] The Respondent stresses that the "core aim" of Article 7 of the BIT is impermissibly to remove disputes from the judicial system of the host State and thus also from the EU legal order.[371] It adds that the "violation of the principle of mutual trust under Article 4(3) of the TEU goes hand-in-hand with the violations of Articles 267 and 344 of the TFEU".[372]

256. The Tribunal has already established that no conflict exists between the two latter provisions and Article 7 of the BIT. The Tribunal cannot see the existence of a non-judicial dispute settlement mechanism as a threat much less a breach of the principle of mutual trust. Resort to commercial arbitration, including by EU Member States acting *jure gestionis*, is not regarded as such,[373] yet precisely the same objection could be made (i.e., that removing a commercial dispute from the jurisdiction of a court of an EU Member State could be regarded as signifying a lack of confidence in that court's ability to resolve such a dispute) and one does not see why investment treaty arbitration would be different in this respect.

257. For these reasons, subject to its analysis of the Respondent's other jurisdictional objections below, the Tribunal confirms its conclusion that Slovakia's offer to arbitrate was effective in August 2016 and that the Claimant's acceptance formed a valid arbitration agreement.

258. In this context, the Tribunal notes that the Respondent has also submitted that a "fundamental incompatibility" exists between the BIT's substantive provisions and EU law.[374] While this submission has no bearing on jurisdiction, the Tribunal addresses it here for the sake of convenience. It observes that the Respondent has not substantiated the alleged incompatibility between the BIT's substantive standards and EU law. Both regimes can coexist. The Tribunal has reached the same conclusion, in this respect, as prior investment treaty arbitration tribunals dealing with intra-EU BIT issues. For

[370] Rejoinder, ¶¶ 79-80.

[371] Rejoinder, ¶ 80.

[372] Rejoinder, ¶ 80.

[373] *The Slovak Republic v. Achmea B.V.,* CJEU Case C-284/16, Judgment, 6 March 2018, **RLA-109**, ¶¶ 54-55.

[374] Rejoinder ¶ 111; *see also* EU Commission's *amicus curiae* brief, ¶ 67.

example, as noted by the tribunal in *Eureko*, while a BIT's substantive protections may "extend beyond the protections afforded by EU law", there is "no reason why those rights should not be fulfilled and upheld in addition to the rights [and obligations] protected by EU law".[375] Similarly, as recognized by the tribunal in *WNC* in reference to *Eastern Sugar*:

> The fact that the BIT affords certain rights not available to other EU investors does not make the BIT discriminatory; there is nothing in the BIT that prevents investors of other states claiming equal rights under the BIT. It also does not bar investors of non-party states from accessing commensurate protections under EU law.[376]

259. Accordingly, the Tribunal finds no incompatibility between the BIT's substantive standards and the EU Treaties.

d. The Termination Agreement

260. On 5 May 2020, pursuant to the Achmea Declarations,[377] Slovakia and Poland, along with 21 other EU Member States, signed an agreement, referred to as the Termination Agreement, which provided that, upon its entry into force, it would terminate all outstanding bilateral investment treaties.[378]

261. The Respondent submits that the Termination Agreement is a subsequent agreement between Slovakia and Poland pursuant to Article 31(3)(a) of the VCLT as to the incompatibility and invalidity of the BIT in light of EU law, and that it confirms the previous subsequent agreements to the same effect, i.e., the Main Achmea Declaration and the *Notes Verbales*.[379] On this basis, it argues that the Termination Agreement, which applies prospectively, does not give rise to any retroactivity concerns, as Article 7 of the BIT has been inoperable since Slovakia's and Poland's accession to the EU in May 2004.[380]

262. The preceding sections establish that the Main Achmea Declaration and the *Notes Verbales* are not subsequent agreements pursuant to Article 31(3)(a) of the VCLT; that

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[375] *Achmea B.V. (formely Eureko B.V.) v. The Slovak Republic*, PCA Case No. 2008-13 (UNCITRAL), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, **CLA-26**, ¶ 263.

[376] *WNC Factoring Limited v. The Czech Republic*, PCA Case No. 2014-34 (UNCITRAL), Award, 22 February 2017, **CLA-107**, ¶ 309, referring to *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, **CLA-24**, ¶ 170 ("If the EU Treaty gives more rights than does the BIT, then all EU parties, including the Netherlands and Dutch investors, may claim those rights. If the BIT gives rights to the Netherlands and to Dutch investors that it does not give other EU countries and investors, it will be for those other countries and investors to claim their equal rights. But the fact that these rights are unequal does not make them incompatible".).

[377] Main Achmea Declaration, ¶ 8; Secondary Achmea Declaration, ¶ 8; *supra*, ¶ 219.

[378] Termination Agreement, Arts. 2, 4(2).

[379] *Supra*, ¶ 187.

[380] *Supra*, ¶ 188.

the BIT and the EU Treaties do not share the same subject matter; and that the BIT (including its Article 7) is not incompatible with EU law. While the Termination Agreement does restate the alleged inoperability of arbitration clauses in intra-EU BITs in light of EU law,[381] it adds nothing to what the Tribunal has already considered and dismissed in this same respect. Consequently, it would serve no purpose for the Tribunal to elaborate further. It cannot but repeat the conclusion of its earlier analysis: Slovakia's offer to arbitrate was valid when Muszynianka accepted it.

263. This being so, the Tribunal agrees with the Respondent that the Termination Agreement raises no issues of retroactivity, nor could it.[382] First, the Termination Agreement is not yet in force between the Slovak Republic and the Republic of Poland and thus carries no effects, be they prospective or retroactive. Even in force, the Termination Agreement would still have no bearing on the present dispute. It is a well- settled principle that jurisdiction is determined at the time of the institution of the proceedings,[383] here on 18 August 2016 when the Notice of Arbitration was filed.[384] Thus, if jurisdiction existed on that date (subject to the Respondent's remaining jurisdictional objections), it will remain so regardless of subsequent events,[385] including the termination of the BIT.[386]

264. The BIT's substantive treaty protections would remain equally unaffected. As early noted in *Island of Palmas*, "a juridical fact must be appreciated in the light of the law

[381] See Termination Agreement, Preamble and Art. 4(1).

[382] Indeed, the Respondent's reliance on Articles 28 and 70(1)(b) of the VCLT to suggest the contrary is inapposite (RTA, fn. 11; *supra*, ¶ 188). It is true that Article 28 recognizes that, if expressed in the treaty or otherwise established, States can be bound by the provisions of a treaty "in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty", hence retroactively. However, it does not govern retroactivity in relation to treaties already in force at the time of the alleged breaches. It is also true that, pursuant to Article 70(1)(b), Contracting Parties may agree to terminate a treaty and "affect [the] right[s], obligation[s] or legal situation[s] of the parties created through the execution of the treaty prior to its termination". Yet, the International Law Commission ("ILC") made "it clear that [this article] is not in any way concerned with the question of the 'vested interests' of individuals" (ILC Draft Articles on the Law of Treaties, Article 66 ¶ 3), here protected investors.

[383] *See e.g. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, **CLA-95**, p. 12, ¶ 26 ("[A]ccording to […] settled jurisprudence, […] jurisdiction must be determined at the time that the act instituting proceedings was filed".). *See also Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, **CLA-96**, ¶ 31; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, **CLA-98**, ¶ 255.

[384] *Supra*, ¶ 85; 1976 UNCITRAL Arbitration Rules, Art. 3(2) ("Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent").

[385] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, **CLA-95**, p. 12, ¶ 26.

[386] *See e.g. Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A.* (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, **CLA-97**, ¶¶ 60, 63; *see also Magyar Farming Company Ltd, Kintyre Kft, Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, 13 November 2019, ¶¶ 222, 214; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, **CLA-177**, ¶ 213.

contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled".[387] In this context, the Tribunal recalls that the BIT was in force and thus binding on the Respondent at the time of the alleged breaches.[388] As a result, in line with the ICJ's judgment in *Northern Cameroons*,[389] the Respondent's responsibility as well as the monetary consequences of a breach are governed by the BIT irrespective of the latter's termination.[390]

265. On this basis, the Tribunal comes to the conclusion that the Termination Agreement is of no consequence in this arbitration. As a result, it can dispense with addressing the Claimant's submissions on vested rights, public policy, *jus cogens*, or denial of justice.[391]

B. RATIONE MATERIAE OBJECTION

1. The Respondent's Position

266. As a threshold matter, the Respondent argues that the Claimant bears the burden of proving that the Tribunal has jurisdiction.[392]

267. The Respondent argues that the Claimant has not established its primary contention, i.e., that its investment must be seen as a "bundle of rights" (also referred to as "unity of investment")[393] for the following reasons.

268. First, Article 1(2) of the Treaty makes clear that an "investment" under the BIT is a specific type of asset.[394] Second, none of the arbitral decisions relied upon by the Claimant are of assistance to its case. While the tribunals in *Electrabel*, *Joy Mining*, and *ATA* adopted the Claimant's "holistic" approach, they did so only with respect to

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[387] See *Island of Palmas case (Netherlands, USA)*, United Nations Reports of International Arbitration Awards, Vol. II, 1928, **CLA-21**, p. 845.

[388] A "breach of an international obligation" occurs if the wrongful act is perpetrated while the "State is bound by the obligation in question" (*see* ILC Articles onResponsibility of States for Internationally Wrongful Acts, Art. 13).

[389] *Case concerning the Noerthern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1963, **CLA-22**, p. 35 ("[I]f during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the ternination of the Trust".).

[390] Indeed, "once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law" (ILC Articles on Responsibility of States for Internationally Wrongful Acts, Commentary to Article 13, ¶ 7).

[391] *Supra*, ¶ 207.

[392] SoD, ¶¶ 273, referring to *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, **RLA-39**, ¶ 171; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, **RLA-40**, ¶ 68.

[393] *Infra*, ¶¶ 276-278.

[394] SoD, ¶ 278; Rejoinder, ¶ 176.

Article 25 of the ICSID Convention, which does not apply here,[395] and proceeded to consider the investor's relevant assets individually under the applicable investment treaty.[396] Moreover, the *Mytilineos* award invoked by the Claimant only referred to the combined assets in *obiter dictum*, after it had found that each of the assets at issue constituted an investment in its own right.[397]

269. The Respondent further submits that, even if the Claimant's "holistic" approach were correct, *quod non*, the Claimant would still have to show that its alleged investment meets the objective ordinary meaning of the term investment used in the BIT. As such, the Claimant must demonstrate the existence of a contribution of resources, made for a certain period of time, with attendant risk, and a contribution to the host State's economy.[398] According to the Respondent, these criteria are relevant not only in ICSID cases but in non-ICSID cases, such as the present one,[399] as well, and the Claimant satisfies none of the criteria.

270. More specifically, the only meaningful activity that was planned to take place in the territory of the Slovak Republic was the large-scale extraction of mineral water for transport to Poland for bottling. It is difficult to distinguish this from a simple sale of an asset abroad which cannot be deemed a "contribution". The Tribunal notes that investment treaty arbitration tribunals have reached similar conclusions in other cases.[400] As for Muszynianka's purchase of GFT Slovakia, this was limited to transferring money to Goldfruct (a Polish company) and three Polish individuals.[401] Given that no water treatment plant or pipeline was ever built, that transaction alone, which took place entirely

[395] SoD, ¶ 280.

[396] SoD, ¶¶ 279-282, referring to *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **CLA-28**, ¶¶ 5.48, 5.47-5.59; *Joy Mining Machinery Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, **CLA-31**, ¶¶ 53-63; *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan,* ICSID Case No. ARB/08/2, Award, 18 May 2010, **CLA-32**, ¶¶ 115, 117.

[397] Rejoinder, ¶ 177, referring to *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, **CLA-84**, ¶ 120.

[398] Rejoinder, ¶¶ 178-179; SoD, ¶¶ 294-299, referring to *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-7/AA280 (UNCITRAL), , Award, 26 November 2009, **RLA-19**, ¶¶ 206, 214, 237; *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL, Award, 5 March 2011, **RLA-44**, ¶ 241; *Ulysseas, Inc.v. The Republic of Ecuador,* UNCITRAL, Final Award, 12 June 2012, **RLA-45**, ¶¶ 251-252; *Republic of Italy v. Republic of Cuba*, Preliminary Award, 15 March 2005, **RLA-46**, ¶ 81; *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, **RLA-47**, ¶ 108; *Franz Sedelmayer v. Russia Federation*, Award, 7 July 1998, **RLA-48**, ¶ 242.

[399] SoD, ¶ 300.

[400] Rejoinder, ¶ 181, referring to *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-7/AA280 (UNCITRAL), Award, 26 November 2009, **RLA-19**, ¶¶ 215, 222.

[401] *Supra*, fn. 92.

outside the Slovak Republic, is insufficient to fulfill the first component of the objective definition of an investment.[402]

271. Further, the Claimant's "would-be" investment only sought to expand its business by acquiring new water sources capable of filling the growing demand for Muszynianka Water. Such a "sale and purchase arrangement", even "over some time", does not create the necessary duration to constitute an investment.[403] Neither does it entail a sufficient degree of investment risk, as the Claimant has represented that its growth was limited only by its ability to acquire water.[404]

272. Finally, the Claimant only intended to extract water from the Legnava Sources and pump it into Poland, keeping the possible benefits of such economic operation outside of the Slovak Republic and *inside* of Poland. All the costs and investment expenditures (with the exception of the base minimum required for water extraction) were to be incurred and made in Poland. Only Muszynianka, a Polish company, would be the entity receiving, bottling, marketing, and selling the water in Poland. As a result, all the financial benefits of the operation would accrue in Poland, GFT Slovakia being a mere shell. A project such as this is not in conformity with the BIT's purpose, which is to promote investments from Poland *into* the Slovak Republic (or *vice-versa*), and can hardly be deemed as a contribution to the development of the host State.[405]

273. In any event, the Respondent submits that the constituent elements of the Claimant's alleged overall investment cannot be considered as self-standing investments under the BIT. The Claimant has failed to adduce any evidence regarding the alleged "know-how" relating to the "exploration, identification and assessment" of the Legnava Sources pursuant to Article 1(2)(d) of the BIT.[406] In addition, the categorization of an alleged "entitlement" to the Exploitation Permit as an investment under Article 1(2)(e) of the BIT is baseless.[407] GFT Slovakia never obtained the Exploitation Permit, nor was it assured that the permit would be granted. It thus never acquired the "right" to "carry out [the]

[402] Rejoinder, ¶ 182.

[403] Rejoinder, ¶ 183, referring to *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-7/AA280 (UNCITRAL), Award, 26 November 2009, **RLA-19**, ¶ 227.

[404] Rejoinder, ¶ 184.

[405] SoD, ¶¶ 302; Rejoinder, ¶ 185.

[406] Rejoinder, fn. 220; *infra*, ¶ 280.ii.

[407] SoD, ¶¶ 286-290.

economic activity" pursuant to the Exploitation Permit and a "mere expectation" does not qualify as a protected investment under the BIT.[408]

2. The Claimant's position

274. At the outset, the Claimant refers to the BIT's preamble to show the treaty's objective to "promote and protect foreign investments with the aim to foster the economic prosperity of both" the Slovak Republic and the Republic of Poland.[409] It argues that no other activity could be more beneficial to both Contracting States than the "trans-border infrastructural venture" sought by Muszynianka.[410] The Claimant further submits that, in any event, the commitment of significant resources in the region by the Muszynianka was the "first and by now the only" way to reverse the economic struggles of Legnava,[411] which was of considerable importance to the local community.[412] Therefore, so insists the Claimant, it is evident that a contribution was made in the territory of the Slovak Republic to the benefit of Legnava and its surroundings.[413]

275. Further, the Claimant invokes the *chapeau* of Article 1(2) of the BIT, which defines the term investment as "any kind of asset invested" and is followed by a non-exhaustive list of forms of qualifying assets.[414] According to the Claimant, under international investment law such definition "capture[s] investments in the broadest sense possible",[415] including "everything of economic value, virtually without limitation".[416]

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[408] SoD, ¶ 287-290 and Rejoinder, ¶¶ 191-196, referring to Potasch ER I, **RER-2**, ¶ 116 *et seq.*; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **CLA-28**, ¶ 9.10; *Cargill, Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, 5 March 2008, **RLA-42**, ¶ 510; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, **RLA-31**, ¶ 731; *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003, **RLA-43**, ¶ 300.

[409] Reply, ¶ 529, referring to BIT, **C-1**, Preamble (emphasis added).

[410] Reply, ¶ 530.

[411] Reply, ¶ 531, referring to Letter from Mr. Ján Kičura and Mikuláš Kundrát to Prime Minister Fico, April 2012, **C-67** ("This project is the only way we can achieve progress and maintain and develop employment in our village. At the same time, it is an ecological project. The municipality sold the land to the entrepreneurs and the funds from these operations contributed significantly to our budget. With no tax proceeds from the company, our municipality will barely survive. An important point is also that this project would make our municipality more visible and attractive both for Slovakia and the cross-border area."(emphasis added)).

[412] Reply, ¶ 532, referring to Krivoňák WS I, **CWS-7**, ¶ 6 ("It was considered an important Project, as no one had showed any interest or undertaken any action to explore mineral water sources in this region before. Goldfruct was the first company to start explorations there").

[413] Reply, ¶¶ 531-534.

[414] Reply, ¶ 555, referring to BIT, **C-1,** Article 1(2).

[415] Reply, ¶ 555

[416] Reply, ¶ 556, referring to UNCTAD, "International Investment Agreements: Key Issues", vol. I (2004), **CLA-85**, p. 119; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, **CLA-86**, ¶ 113; *see also* Reply, ¶ 557, referring to

276. In this context, the Claimant submits that its investment, "understood as [the] entire operation […] needed for bottling mineral water from the Legnava Sources, meets the definition of investment" in the BIT.[417] Indeed, the Claimant's exploration, extraction, and commercial exploitation of the Legnava Sources (the "Project") should be considered as an "indivisible whole".[418] All of its "parts", i.e., the Exploration Permits, the Maximum Quantities Decisions, the know-how and rights under such administrative acts, the real estate and supporting infrastructure, the Building Permit, and the "entitlement" to receive the Exploitation Permit,[419] are interconnected and necessary to utilize the Legnava Sources.

277. For the same reasons "[t]he fact that the 'operation' is conducted through [GFT Slovakia] via ownership of its shares should have no bearing on identifying the [i]nvestment as a single asset having economic value".[420] This is so as the main purpose of the overall investment was to "synerg[ize]" Muszynianka's core business (i.e., the sale of Muszynianka Water) with the natural mineral resources in Legnava.[421] As such, the Claimant's and Goldfruct's presence in Legnava through GFT Slovakia went beyond receiving dividends and other benefits associated with shareholding. In fact, GFT Slovakia was a mere "investment vehicle".[422]

278. The Claimant therefore submits that the Tribunal's *ratione materiae* jurisdiction must extend to the investment as a whole, "irrespective of qualification of individual assets as protected investments under Article 1(2) of the Treaty".[423] From an economic perspective, it would be "impractical" to break the Claimant's venture into pieces in order to assess which individual part is within the Tribunal's jurisdiction and which one is not.[424] From a legal perspective, "a series of coherent arbitral awards" have followed a "holistic"

Saluka Investments B.V. v. The Czech Republic, PCA Case No. 2001-04 (UNCITRAL), Partial Award, 17 March 2006, **CLA-8**, ¶ 211.

[417] Reply, ¶ 558.

[418] Reply, ¶ 542.

[419] Reply, ¶¶ 535, 543, 553, 570-571, 768, applying the "unity-of-investment" and "bundle of rights" doctrines.

[420] Reply, ¶ 559.

[421] SoC, ¶¶ 380. 391.

[422] Reply, ¶ 554.

[423] SoC, ¶ 373.

[424] Reply, ¶ 545.

approach and have thus recognized complex operations as an overarching protected investment.[425]

279. The Claimant recognizes that these doctrines have mostly been developed in the ICSID context. It is, however, of the view that decisions of ICSID arbitration tribunals are helpful where the measures taken by the host state are directed against "the whole activity of an investor in that state", as is the case here.[426] It also points to *Mytilineos* as an instance where an UNCITRAL tribunal adopted a "holistic" view.[427]

280. Alternatively, the Claimant argues that each of the constituent parts of the overall investment qualifies as a self-standing investment in accordance with Article 1(2) of the BIT, a provision that needs to be read strictly in order to give due deference to the Contracting Parties' consent. Therefore, the Tribunal need not go further than to ascertain whether a particular asset falls within the list of protected investments in Article 1(2).[428] In this vein, the Claimant makes the following submissions:

    i. Muszynianka's 100% shareholding in GFT Slovakia falls under Article 1(2)(b) of the BIT.[429] This provision is "clear and unambiguous" as to "shares" being qualified investments,[430] which is sufficient to find that the Claimant has made an investment protected by the BIT.[431]

    ii. The "know-how" relating to the "exploration, identification and assessment" of the Legnava Sources squarely falls within the scope of Article 1(2)(d).[432] Goldfruct invested substantial resources in exploring sources of natural

[425] Reply, ¶¶ 543-550; SoC, ¶¶ 375-377, referring to *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction of August 6, 2004, **CLA-31**, ¶ 54; *ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, **CLA-32**, ¶ 96; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **CLA-28**, ¶¶ 5.45, 5.48, 6.57.

[426] Reply, ¶¶ 543-544.

[427] Reply, ¶ 551, referring to *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, **CLA-84**, ¶ 120.

[428] Reply, ¶¶ 562-568, referring to, *inter alia*, *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, **CLA-87**, ¶ 31; *Abaclat and others (formerly Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, **CLA-88**, ¶¶ 352-357; *Franz Sedelmayer v. Russia Federation*, Award, 7 July 1998, **RLA-48**, p. 65.

[429] Reply, ¶ 569, referring to BIT, **C-1**, Article 1(2)(b) ("[…] shares, stocks and debentures of companies, parts or any other kinds of participation in companies. […]").

[430] Reply, ¶ 572.

[431] Reply, ¶ 572; SoC, ¶ 385.

[432] Reply, ¶ 570, referring to BIT, **C-1**, Article 1(2)(d) ("[…] copyrights, industrial property rights (such as patents, utility models, industrial desings or models, trade or service marks, trade names, indications of origin), know-how and goodwill. […]").

mineral water in Legnava and thus contributed significant know-how in the form of hydrogeological and chemical expertise, which the Slovak Republic did not previously possess.[433] Muszynianka relies on this contribution as Goldfruct's successor in interest.[434]

iii. The Building Permit and the Maximum Quantities Decisions,[435] which contain "rights" to "carry out an economic activity", fall within the ambit of Article 1(2)(e).[436] The same applies to the "entitlement" to receive the Exploitation Permit.[437] Indeed, that entitlement to begin exploitation of the Legnava Sources, which was "objectively" due under Slovak law,[438] must be "considered comparable" to a right to carry out an economic activity pursuant Article 1(2)(e).[439] The Respondent's arguments that no such entitlement ever existed "confuses issues of jurisdiction, i.e., whether entitlement to receive a permit may be considered an asset, with [the] merits of the case, i.e., whether under international law an investor may have a right to receive a permit".[440]

281. Moreover, should the Tribunal consider that the notion of investment under the BIT must conform to an alleged objective meaning, the Claimant's investment meets that test too, "whether considered as a whole or not".[441]

282. Indeed, in addition to the contribution made by Goldfruct,[442] Muszynianka "contributed" PLN 22,511,280.87 equating to EUR 5,516,253.88 to acquire its shares in GFT Slovakia.[443] These funds were in part committed to finance GFT Slovakia's activity in Legnava, "including the efforts to obtain the Exploitation Permit".[444] Second, the investment was made for a duration, as it entailed "a permanent presence in Legnava

[433] Reply, ¶¶ 537, 553, 593.

[434] Reply, ¶ 537; SoC ¶ 66.

[435] *Supra*, ¶¶ 18, 22, 54.

[436] Reply, ¶ 592, referring to BIT, **C-1**, Article 1(2)(e)("rights granted by a public authority to carry out an economic activity, including concessions, for example, to search for, extract or exploit natural resources"); *see also* SoC, ¶ 398.

[437] Reply, ¶ 571.

[438] Reply, ¶ 591.

[439] Reply, ¶ 586.

[440] Reply, ¶¶ 587; *see also* Reply, ¶¶ 588-590.

[441] Reply, ¶¶ 594, 599.

[442] Reply, ¶ 600.

[443] SoC, ¶ 378.

[444] Reply, ¶ 600.

for the purpose of utilizing the Legnava Sources".[445] The investment also involved a risk, as the Claimant was not certain that it would realize profits at the time it purchased GFT Slovakia.[446]

283. Finally, although only germane to ICSID proceedings and thus not applicable here,[447] the evidence indicates that the investment would contribute to the development of Slovakia.[448] Indeed, in addition to the know-how contributed,[449] the substantial part of the infrastructure needed to exploit the Legnava Sources was intended to be located in the Slovak Republic. This infrastructure included the real estate owned by GFT Slovakia, the water treatment plant, any other constructions necessary to operate the boreholes, the connecting pipelines, and part of the cross-border pipeline.[450] In particular, the water treatment plant was to be a fully equipped one-story building of 417.35m^2 (consisting of a hall for technological purposes and auxiliary premises serving as an office space for at least five employees).[451] The operations of the infrastructure situated in Legnava would have required recruiting local employees.[452]

284. In this regard, the Claimant submits that the fact that the investment is closely linked to its activity in Poland, or that the proceeds of the investment would be distributed in one way or another within Muszynianka's "capital group", has no bearing on the Tribunal's jurisdiction.[453] Nothing in the BIT conditions investment protection to undertakings that choose to retain revenues in the host State. To the contrary, Article 5(1)(b) of the BIT expressly grants investors the right to profit from their investments and distribute such revenue as they choose.[454]

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[445] Reply, ¶ 601.

[446] Reply, ¶ 602.

[447] Reply, ¶ 595.

[448] Reply, ¶¶ 604, 530-531, referring to Letter from Mr. Ján Kičura and Mikuláš Kundrát to Prime Minister Fico, April 2012, **C-67**.

[449] *Supra*, ¶ 280.ii.

[450] Reply, ¶ 535.

[451] Reply, ¶ 536, referring to Zoning Permit, **C-21**, p. 2; *supra*, ¶ 45.

[452] SoC, ¶ 402.

[453] Reply, ¶¶ 538-539.

[454] Reply, ¶ 540, referring to BIT, **C-1**, Article 5(1)(b) ("Each Contracting Party in whose territory investment have been made by investors of the other Contracting Party shall grant those investment the free transfer of the payments in freely convertible currency relating to these investments, particularly of: […] gains, profits, interests, dividend and other current income")

3. Analysis

285. Article 1(2) of the BIT defines an "investment" as follows:

> The term 'investment' means any kind of asset invested by an investor of one Contracting Party, provided that they have been made in accordance with the laws and regulations of the other Contracting Party and shall include in particular though not exclusively:
>
> a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
>
> b) shares, stocks and debentures of companies, parts or any other kinds of participation in companies;
>
> c) claims to money or to any performance having an economic value;
>
> d) copyrights, industrial property (such as patents, utility models, industrial [designs] or models, trade or service marks, trade names, indications of origin) know-how and goodwill;
>
> e) rights granted by a public authority to carry out an economic activity, including concessions, for example to search for, extract or exploit natural resources.

286. According to the Respondent, holding an asset enumerated in Article 1(2) of the BIT is not sufficient to conclude that an investor has a protected investment. In addition, so the Respondent submits, a purported investment must meet the so-called objective definition, involving an allocation of resources, a duration, a risk, and a contribution to the host State's development.[455] By contrast, for the Claimant, its shareholding in GFT Slovakia is sufficient to determine that it has a protected investment under the Treaty.[456] However, in the event that the Tribunal were to resort to the objective definition of investment, the Claimant asserts that the definition only comprises the elements or allocation of resources, duration and risk.[457]

287. It follows from the wording of the Treaty definition that an asset qualifies as an investment if it is "invested" and falls within one of the non-exhaustive categories listed in Article 1(2) of the BIT. In addition, the investment must have been made "in accordance with the laws and regulations of the [host State]". This latter condition is relevant in the context of the Parties' dispute regarding the alleged illegalities underlying the Project[458] and is

[455] SoD, ¶¶ 293-302.

[456] SoC, ¶ 385.

[457] Reply, ¶ 595.

[458] *Supra*, ¶ 168; *infra*, ¶¶ 296 *et seq.*, 298 *et seq*.

addressed separately.[459] For present purposes, the Tribunal is concerned only with the Respondent's submission that the Claimant does not own a protected investment.

288. In application of the treaty interpretation rules codified in the VCLT, the Tribunal must give to the word "invested" used in Article 1(2) its ordinary meaning. That meaning has been elicited through arbitral decisions resulting in what is often called the "objective" definition of investment. It is true that investment tribunals, starting with the one in *Salini*,[460] have elaborated that definition in relation with Article 25 of the ICSID Convention and that this arbitration is not subject to the ICSID regime. It is also true that some tribunals have held that the objective definition should not be transposed into a non-ICSID context.[461] Other tribunals, however, have considered that the objective definition is "inherent" to the notion of investment,[462] or that the term investment has a meaning of its own that cannot be ignored when considering a list of different forms in which an investment can take, such as that contained in the BIT.[463] Whatever the controversy, this Treaty expressly speaks of assets "invested", a characterization that calls for the application of the objective definition in addition to the presence of an asset falling within the categories of the Treaty list.

289. In connection with the components of the objective definition, the Parties agree, and rightly so, on the elements of allocation of resources, duration, and risk. By contrast, they disagree on the need for a contribution to the development of the host State economy. The Tribunal is of the opinion that the development of the local economy is an expected consequence of the investment, but not a self-standing condition of the latter's existence, an opinion shared by a number of prior investment awards.[464]

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[459] *Infra*, ¶¶ 299 -302.

[460] *Salini Costruttori S.p.A. and Italstrade S.p.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, ¶ 52.

[461] *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17 (UNCITRAL), Award, 31 January 2014, ¶ 364; *see also White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011, ¶ 7.4.9; *Flemingo DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶ 298.

[462] *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 165.

[463] *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-7/AA280 (UNCITRAL), Award, 26 November 2009, **RLA-19,** ¶¶ 180, 207.

[464] *See Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶¶ 110-111; *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award, 22 June 2017, ¶ 422; *Phoenix Action Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, **RLA-40**, ¶ 85; *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶ 224.

290. Having described the legal requirements posed to the existence of a protected investment, the Tribunal now turns to the application of these requirements to the facts. It is undisputed that, on 31 December 2012, Muszynianka acquired 100% of the shares in GFT Slovakia, a Slovak company.[465] Muszynianka's shareholding in GFT Slovakia undoubtedly falls within the asset categories listed in the BIT, specifically within Article 1(2)(b). As a result, the Claimant does hold an asset under Article 1(2) of the BIT.

291. It remains to be established that this asset is the result of an investment as defined above. In respect of the first element related to a contribution or allocation of resources, the record shows that Muszynianka allocated capital towards its acquisition of GFT Slovakia in an amount of PLN 18,433,478 million (approximately EUR 4.5 million).[466] It also shows that throughout 2013 Muszynianka increased its share capital in GFT Slovakia by PLN 4,032,691 (approximately EUR 1 million).[467] Moreover, it is common ground that GFT Slovakia's activities have been financed by its "mother-company", initially Goldfruct and then Muszynianka, through debt or equity.[468]

292. Regarding the element of duration, GFT Slovakia operated uninterruptedly in Slovakia since its establishment in October 2001 by Goldfruct, and the Claimant has owned its investment, i.e., GFT Slovakia, since 31 December 2012. In addition, the Tribunal has no doubt that Muszynianka (through GFT Slovakia) intended a long-term water exploitation operation in Slovakia.

293. As to risk, Muszynianka's acquisition of GFT Slovakia implied an assumption of investment risk, i.e., the risk that the value of the shares could increase, decrease, or

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[465] *Supra*, ¶ 52.

[466] The Claimant's accounting entries: 30-02 regarding purchase of 100% shares in GFT Slovakia, 31 December 2012- 27 September 2013, **C-91**; Share Transfer Agreement between Goldfruct and Muszynianka in the form of a notarial deed, 31 December 2012, **C-5**, p. 2 ("[Muszynianka] acquires the concerned share for the agreed price that is PLN 4,232,078"); Share Transfer Agreement between Stanislaw Józef Gluc and Muszynianka in the form of a notarial deed, 31 December 2012, **C-6**, p. 2 ("[Muszynianka] acquires the concerned share for the agreed price that is PLN 4,783,450"); Share Transfer Agreement between Marek Andrzej Zieliński and Muszynianka in the form of a notarial deed, 31 December 2012, **C-7**, p. 2 ("[Muszynianka] acquires the concerned share for the agreed price that is PLN 4,717,300"); Share Transfer Agreement between Paweł Mariusz Zieliński and Muszynianka in the form of a notarial deed, 31 December 2012, **C-8**, p. 2 ("[Muszynianka] acquires the concerned share for the agreed price that is PLN 4,700,650").

[467] The Claimant's accounting entries: 30-02 regarding purchase of 100% shares in GFT Slovakia, **C-91**; Minutes of tax on-site investigation of GFT Slovakia, 15 January 2015, **C-92**; FTI ER II, **CER-6**, ¶ 2.63 ("[The Respondent's quantum expert] disregards that Muszynianka was committed to this project that would have needed the investment of further substantial CAPEX as well as time and resources, in addition to the PLN 18.4 million (EUR 4.4 million) it paid for GFT, to make it a profitable business (in fact it already invested PLN 4.0 million (EUR 1.0 million) in GFT in 2013)").

[468] SoC, ¶ 77; SoD, ¶ 96.

even be lost entirely.[469] The risk here is heightened by the fact that a decision on the Exploitation Permit, a *sine qua non* condition to the generation of profits, was still pending when Muszynianka acquired GFT Slovakia.

294. In conclusion, the Claimant's shares in GFT Slovakia meet the objective definition of investment in addition to constituting an asset under Article 1(2)(b) of the Treaty.

295. Subject to its findings on illegality,[470] this conclusion suffices to establish *ratione materiae* jurisdiction.[471] Therefore, for the sake of procedural economy, the Tribunal dispenses with analyzing whether the Claimant holds other assets in Slovakia capable of constituting protected investments. Likewise, it need not assess whether these assets may cumulatively form one protected investment.

C. THE LEGALITY OF THE INVESTMENT

1. The Respondent's Position

296. As a third and last jurisdictional defense, the Slovak Republic alleges that the Claimant's investment does not meet the legality requirement contained in Article 1(2) of the BIT. Specifically, it asserts that Muszynianka intended to sell Slovak-sourced mineral groundwater under the Muszynianka Water brand;[472] to mix the water from the Legnava Sources among themselves and/or with water extracted from Polish boreholes;[473] for GFT Slovakia to sell or transfer the water from the Legnava Sources to Muszynianka prior to bottling;[474] and to bottle the mixed water in Muszyna.[475]

297. The Respondent argues that each of these actions that are part of the Claimant's business plan breach EU, Slovak, and/or Polish law.[476] In respect of EU law, it refers to the Mineral Water Directive. For the Respondent, unlawful investments are outside the scope of the BIT and thus the Tribunal lacks jurisdiction over disputes arising out of such investments.[477]

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[469] *See e.g. KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶ 218.

[470] *Infra*, ¶¶ 299-302.

[471] SoC, ¶ 385.

[472] Rejoinder, ¶¶ 123, Mosur WS I, **CWS-1**, ¶ 48; Mosur WS II, **CWS-5**, ¶¶ 8, 30; Cidyło WS I, **CWS-2**, ¶ 33.

[473] Rejoinder, ¶¶ 145, *et seq.,* referring to, *inter alia,* Reply, ¶¶ 177, 179, 184.

[474] Rejoinder, ¶ 309 , referring to SoC, ¶ 97, 113; SoD, ¶ 501, referring to FTI ER I, **CER-1**.

[475] Rejoinder, ¶ 309 , referring to SoC, ¶ 113.

[476] The Respondent's detailed submissions on illegality are summarized below at *infra* ¶¶ 317 *et seq.*

[477] SoD, ¶ 17: Rejoinder, ¶ 122.

2. The Claimant's Position

298. The Claimant opposes this objection. It challenges the applicability of the laws that the Respondent invokes and especially of the Mineral Water Directive.[478] It also disputes that its business plan involved any unlawful actions, stressing that the said plan was EU, Slovak and Polish law-compliant in all aspects,[479] and that the Respondent has developed the illegality argument "solely for the purpose of the present arbitration".[480] According to the Claimant, at no point prior to these proceedings did a Slovak authority express doubts as to any illegality regarding the exploitation of the Legnava Sources or Muszynianka's business plans.[481]

3. Analysis

299. Article 1(2) of the BIT defines the term investment used in the States' offer to arbitrate enshrined in Article 7, as "any kind of asset invested by an investor of one Contracting Party, provided that they [*sic*] have been made in accordance with the laws and regulations of the other Contracting Party […]".[482] In other words, access to treaty protection, including arbitration, is conditional upon the legality of the investment.[483]

300. Specifically, to fall within the host State's consent to arbitrate, an investment must be "made" in accordance with the law. The use of the word "made" indicates the point in time when the investment must comply with the law. In this respect, it is well-settled that the "jurisdictional significance" of a legality requirement found in the definition of an investment, like the one contained in Article 1(2) of the BIT, "is exhausted once the investment has been made".[484] Only an illegality that exists at the time of "entry", "procurement", "initiation" or "establishment" of the investment may preclude the existence of a protected investment.[485] This is particularly clear in the present treaty from

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[478] Reply, ¶¶ 136-139.

[479] Reply, ¶¶ 128, 132, 157 *et seq.* The Claimant's detailed submissions on illegality are summarized below at *infra* ¶¶ 343 *et seq.*

[480] Reply, ¶ 127.

[481] Reply, ¶¶ 122-126.

[482] BIT, **C-1**, Article 1(2).

[483] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶ 266.

[484] *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Award, 16 January 2013, ¶ 167.

[485] *See Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, ¶¶ 344-345; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, ¶ 331; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, **CLA-34**, ¶ 420; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, ¶ 260; *David R. Aven and others v. Republic of Costa*

the use of the verb to “make”, which is synonymous to “establish”. In addition, the Treaty employs the past tense “made”, which confirms that the illegality test applies at the time of making of the investment.[486]

301. By contrast, if the breach of law occurs during the life of the investment after it has been established, then it is generally accepted that the illegality does not bar access to arbitration.[487] It may constitute an objection to admissibility or a defense against the claim on the merits, but these are different matters.

302. Hence, the question for the Tribunal is whether the Claimant made its investment in a lawful manner. As was discussed above, that investment consisted in the purchase of the equity of GFT Slovakia. Nothing in the record suggests an illegality in Muszynianka’s acquisition of GFT Slovakia and, in fact, none is alleged. Rather, the Respondent argues that the illegalities concern the “implementation” of the Claimant’s business plan.[488] Accordingly, there is no question that the Claimant has “made” an investment “in accordance with the laws and regulations” of the Slovak Republic, as required by Article 1(2) of the BIT.

303. There is thus no need for the Tribunal to delve further into the Respondent’s illegality allegations at this stage. While it will have to revert to this topic later, at this juncture it suffices to note that there is no indication of any illegality in the making of the investment, with the result that the illegality objection must be denied.

304. Therefore, the Tribunal finds that Muszynianka’s shareholding in GFT Slovakia constitutes a protected investment under the Treaty and that it has *ratione materiae* jurisdiction.

Rica, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, ¶ 342; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2 (UNCITRAL), Award, 15 March 2016, ¶ 5.54-5.56; *Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia,* ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶ 303.

[486] The Tribunal notes that this view has been shared by prior investment treaty tribunals, such as *Vladislav Kim and others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, ¶ 374; and *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, ¶ 266 (“Additionally, under this BIT, the temporal scope of the legality requirement is limited to the establishment of the investment; it does not extend to the subsequent performance. Indeed, the Treaty refers to the legality requirement in the past tense by using the words investments "made" in accordance with the laws and regulations of the host State and, in Spanish, ‘*haya efectuado’* […]”.).

[487] *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, **CLA-34**, ¶ 420; *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, ¶ 345.

[488] SoD, ¶ 6; Rejoinder, ¶ 24.

305. In conclusion, the Tribunal holds that it has jurisdiction over the dispute before it because all of the Treaty's jurisdictional requirements are met. In particular, it considers that the objections raised against its jurisdiction are not well-founded:

i. Slovakia and Poland's respective accessions to the EU Treaties has not rendered the BIT inoperable and the Claimant has validly accepted the Respondent's offer to arbitrate under the BIT;

ii. The Claimant holds an investment in the form of its shareholding in GFT Slovakia; and

iii. That investment was made in accordance with the laws of the Slovak Republic.

VIII. ADMISSIBILITY

A. THE RESPONDENT'S POSITION

306. According to the Respondent, the Claimant seeks damages for the alleged diminution of the value of its shares in GFT Slovakia due to the measures adopted by the Slovak Republic.[489] Such claims, the Respondent states, are only admissible if "(i) the assets of the company have been expropriated by the host contracting state party so that the shareholding has been rendered worthless; or (ii) the company is without or has been deprived of a remedy to redress the injury it has suffered; or (iii) the company is without or has been deprived of the capacity to sue either under the *lex societatis* or *de facto*; or (iv) the company has been subjected to a denial of justice in the pursuit of a remedy in the system for the administration of justice of the host contracting state party".[490]

307. This being so, for the Respondent, none of these requirements are satisfied. The shares in GFT Slovakia are not worthless as GFT Slovakia retains the rights that it acquired in respect of the Legnava Sources. Muszynianka can still exploit the Legnava Sources if it makes the necessary investments. Further, GFT Slovakia has not been deprived of local remedies to reassess the harm, nor has there been a denial of justice, and indeed none

[489] SoD, ¶ 309.

[490] SoD, ¶ 309, quoting Zachary Douglas, The International Law of Investment Claims (Cambridge University Press 2009), **RLA-20,** pp. 415-416.

is argued.[491] Therefore, claims regarding the diminution in value of its shareholding GFT Slovakia are inadmissible.[492]

308. Alternatively, the Respondent contends that the claims are inadmissible because the Claimant's investment is illegal.[493]

B. THE CLAIMANT'S POSITION

309. At the outset, the Claimant notes that the Respondent raises this admissibility defense only in relation to the shareholding in GFT Slovakia as a protected investment and not in respect of other elements of its investment.[494] In this regard, the Claimant submits that its case is premised "not on the mere decrease of value of shares or other shares-related injury" but on the "deprivation *in toto"* of the investment pursued through GFT Slovakia.[495] Therefore, it chiefly claims redress for the "direct harm" incurred by Muszynianka (resulting from the Slovak Republic's unlawful actions), which can be assessed both with respect to the loss of value of GFT Slovakia's shares and of the assets owned by GFT Slovakia. Indeed, for the Claimant, prior decisions of investment treaty tribunals consistently show that "shareholders of a company incorporated in a host state are entitled to pursue their claims for injuries made directly to that company".[496] This is so particularly when the locally incorporated company is an investment vehicle fully owned by the claiming shareholder, as is the case here.[497]

310. The Claimant further argues that its case stands even if the Tribunal were to favor the Respondent's approach.[498] Indeed, all of GFT Slovakia's assets have been indirectly yet effectively expropriated, with the result that Muszynianka's shares have lost their full value. Furthermore, GFT Slovakia has no legal remedy to redress this injury because

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[491] Rejoinder, ¶ 188.

[492] SoD, ¶ 309.

[493] SoD, ¶ 315.

[494] Reply, ¶ 573.

[495] SoC, ¶ 387.

[496] Reply, ¶ 575.

[497] Reply, ¶¶ 575-579, referring to *DutyFree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016, **CLA-79**, ¶¶ 310, 935; *Elettronica Sicula S.p.A. (ELSI)*; USA v. Italy, ICJ Reports 1989, Judgment of 20 July 1989, **CLA-89**, ¶ 132; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, **CLA-34**, ¶¶ 325-326; SoC, ¶¶ 390, referring to *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, **CLA-33**, ¶ 74; s*ee also RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, **CLA-29**, ¶ 120.

[498] Reply, ¶¶ 574, 583.

the measures impugned took the form of a Constitutional Amendment that, by definition, cannot be the subject of judicial or administrative review in Slovakia.[499]

311. Lastly, the Claimant submits that its investment meets all legality requirements and therefore the claims in this arbitration are admissible.

C. ANALYSIS

312. The Tribunal has established that the Claimant's shares in GFT Slovakia constitute a protected investment under the Treaty.[500] It is undisputed that the Measures impeded the cross-border exploitation of the Legnava Sources. It is equally undisputed that GFT Slovakia had no business in the Slovak Republic other than the Project.

313. In this regard, the Tribunal has no difficulty in accepting that the value of Muszynianka's shares in GFT Slovakia, or at least a considerable part thereof, was linked to the ability to carry out the Project as originally intended.[501] The Measures have thus impacted the value of the Claimant's shareholding in GFT Slovakia. Such value-reducing or value-destroying impact represents a loss which the Claimant incurs directly. Whether that loss is compensable because the Measures engage the international responsibility of the State is a different matter that goes to the merits.

314. The Tribunal has also already determined that the Claimant's investment was not illegal at the time when it was made.[502] Whether the implementation of the Claimant's business plan would have been illegal as the Respondent claims, is again an issue that pertains to the merits. When illegality allegations refer to the operation or performance of the investment, they fall within the scope of the merits. The Tribunal notes that this holding has also been adopted in earlier investment awards, for example in *Urbaser*.[503] This is particularly clear here, as the Respondent alleges the illegalities in Muszynianka's business plan primarily as a defense on the merits,[504] and only mentions them in the context of admissibility in passing.

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[499] Reply, ¶¶ 581-584.

[500] *Supra*, ¶¶ 295, 302.

[501] Reply, ¶ 912.

[502] *Supra*, ¶¶ 302-304.

[503] *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, ¶ 260; *see also Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015,¶ 129.

[504] *Infra*, ¶¶ 316, 317 *et seq.*

315. For these reasons, the Tribunal finds that the claims before it are admissible.

IX. LIABILITY

316. The Claimants asserts that the Slovak Republic breached the Treaty standards in respect of fair and equitable treatment **(B)**, expropriation **(C)**, and non-impairment **(D)**. As a first defense, the Respondent submits that all of the claims with respect to the Constitutional Amendment are barred by the doctrine of police powers.[505] For a clearer structure of the legal analysis, the Tribunal will address the police powers doctrine after the alleged breaches. The Slovak Republic also objects that the planned operation of the investment, and more specifically the Claimant's business plan, was illegal. It does so to refute the existence of legitimate expectations under FET[506] and in the context of causation.[507] Yet, on the merits,[508] illegality may also play a role in the framework of an alleged entitlement to the Exploitation Permit.[509] Because it has an impact on several areas of the analysis, the Tribunal reviews the legality of Muszynianka's business at the outset **(A)**.

A. LEGALITY OF MUSZYNIANKA'S BUSINESS PLAN

1. The Respondent's Position

317. The Respondent's allegations of unlawfulness target the plans to sell or transfer the water before bottling **(a)**; to bottle other than at source **(b)**; to mix the water **(c)**; and to sell the water under the Muszynianka brand **(d)**.

a. GFT Slovakia could not have sold or transferred the extracted water to another entity prior to bottling

318. According to the Respondent, the Claimant "has consistently argued in this arbitration that it intended to use GFT Slovakia as a supplier of raw material—i.e., Slovak-sourced natural mineral water—to increase the production of the water that Muszynianka itself was bottling and selling under its 'Muszynianka Water' brand".[510] Such a plan, however, constituted an "illegal change-in-ownership" of the water, which would be transferred for bottling to an entity other than the one having permission to extract it.[511] Considering the

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[505] SoD, ¶¶ 357 *et seq.*, 393; Rejoinder, ¶¶ 199 *et seq.*, 250 *et seq.*; R-PHB, ¶ 31.

[506] Rejoinder, ¶¶ 264 *et seq*.

[507] SoD, ¶¶ 491 *et seq*.

[508] *See supra*, §§ VII.C.3, VIII.C for illegality in the context of jurisdiction and of admissibility, respectively.

[509] *See e.g.* Rejoinder, ¶¶ 152-153.

[510] Rejoinder, ¶ 169; SoC, ¶¶ 112, 371; Reply, ¶¶ 62, 535.

[511] Rejoinder, ¶ 24, referring to Slovak Food Code, **R-60**, Article 3(2)(b); Act on Mineral Waters, **R-35**, Art. 13(2).

Inspectorate's preliminary opinion of 30 March 2010,[512] the Claimant was aware of such illegality.[513] Indeed, presumably because of the Inspectorate's position, GFT Slovakia later changed its position stating that it would "fully" retain "ownership" of the water at all times.[514] For the Respondent, the Claimant's new allegations regarding how Muszynianka would have devised alternatives ensuring that the extracted water would be bottled by GFT Slovakia, are baseless and lack any detail.[515]

b. The water from the Legnava Sources could not have been bottled other than at its source

319. The Respondent submits that the Claimant's overall business plan was "incompatible" with the "bottle-at-source" principle found in the Mineral Water Directive, according to which EU law "does not allow for the cross-border transfer of [unbottled] natural mineral water".[516] Therefore, the Respondent was under an obligation to access every stage of the production of the Slovak-sourced natural mineral water, including bottling.[517] In particular, Article 1(1), 1(5), Annex II (2), (3), (4)(b), and Article 11 of the Mineral Water Directive require "one and the same Member State", namely the State where the water is extracted, to: "(i) recognize that the water is natural mineral water; (ii) ensure that it is produced in compliance with the Directive, including as regards bottling; and (iii) remain responsible for the safety of that water on an ongoing basis".[518]

320. According to the Respondent, contrary to the evidence of Claimant's EU law expert Prof. Müller-Graff,[519] the fact that the Mineral Water Directive prevents the export of unbottled mineral water is not contrary to EU primary law on free movement of goods between Member States. First, unbottled water is not a "good" within the meaning of EU law and is thus not subject to free movement.[520] Second, even if unbottled water were a

[512] *Supra*, ¶ 32.

[513] Rejoinder, ¶ 167.

[514] *Supra*, ¶ 60; Rejoinder, ¶ 309, referring to Božíková WS II, **RWS-4**, ¶ 26.

[515] Rejoinder, ¶ 168, referring to Reply, ¶ 198; R-PHB, ¶ 175.

[516] Rejoinder, ¶ 170, referring to O'Rourke ER II, **RER-8**, ¶¶ 47, 56, 89(c); *Commission of the European Communities v Federal Republic of Germany*, CJEU Case C-463/01, EU:C:2004:797, Judgment, 14 December 2004, **R-42**, ¶ 64.

[517] Rejoinder, ¶ 170, referring to O'Rourke ER II, **RER-8**, ¶ 56.

[518] R-PHB, ¶¶ 127, 46.

[519] Müller-Graff ER I, **CER-3**, ¶ 122.

[520] R-PHB, ¶¶ 130-136.

good (*quod non*), the Mineral Water Directive constitutes "vertical legislation" that legitimately restricts free movement of goods in the interest of protecting consumers.[521]

321. In any event, even if the Mineral Water Directive were to be found to be illegal due to its alleged incompatibility with primary EU law, the Slovak Republic would nonetheless be bound by it as long as it is not declared illegal by the CJEU.[522] Indeed, the Mineral Water Directive could not be interpreted contrary to its express wording so as to make it consistent with EU primary law.[523]

c. The Legnava Sources could not have been mixed among each other or with Polish sources

322. It is the Respondent's submission that mixing of water from the Legnava Sources among them or with Polish water would be contrary to EU, Slovak, and Polish law.

323. Relying on its expert witnesses, Mr. O'Rourke and Dr. Marcin, the Respondent submits that the Claimant's plan to mix Slovak-sourced and Polish-sourced natural mineral water is incompatible with the Mineral Water Directive for three reasons: "(i) both waters' original characteristics would be altered by the process of mixing; (ii) the resulting mix would not originate from a single Member State or state-of-origin; and (iii) the resulting mix would not have a single 'provenance' […]".[524]

324. The Respondent further explains that the Mineral Water Directive distinguishes "natural mineral water" from "ordinary drinking water" by its nature, i.e., the water's "mineral content" and its "original purity".[525] The Mineral Water Directive provides that both characteristics must be "preserved intact because of the underground origin of such water" (i.e., an "underground water table or deposit") and protected from "all risk of pollution".[526] Therefore, unless mineral water comes from the same "hydraulic and geological origin" and has the same chemical composition, "mixing mineral water is self-evidently incompatible with these rules".[527] According to the Respondent, the expert evidence on record shows that "the water from Legnava Sources alone does not have

[521] R-PHB, ¶¶ 137-142.

[522] R-PHB, ¶ 143.

[523] R-PHB, ¶¶ 144-148.

[524] Rejoinder, ¶¶ 146-151; R-PHB,¶¶ 81-91.

[525] R-PHB, ¶¶ 81-84, referring to Mineral Water Directive, **R-40**, Annex I, § 1.

[526] R-PHB, ¶¶ 81-84, referring to Mineral Water Directive, **R-40**, Annex I, § 1.

[527] R-PHB, ¶ 84, referring to Mineral Water Directive, **R-40**, Annex I, § 1; *see also*, *Hotel Sava Rogaška, gostinstvo, turizem in storitve, d.o.o. v. Republika Slovenija*, CJEU Case C-207/14, EU:C:2015:414, Judgment, 24 June 2015, **R-41**, ¶¶ 31, 33, 38.

the same chemical composition".[528] Moreover, "the water from the Legnava Sources and from Polish Sources not only lack the same chemical composition […], but do not belong to the same underground water deposit", as recognized by the Claimant's own expert at the Hearing.[529]

325. The Respondent further observes that mixing the waters from the Legnava Sources would have breached Slovak law, which applies even if the mixing takes place in Poland, for the following reasons:

i. Slovak law is applicable by virtue of the state-of-origin principle of the Mineral Water Directive.

ii. At no point has the Slovak Republic consented to the bottling of the mineral water of the Legnava Sources, including its potential mixing, branding and labelling, being subject to Polish law. The Claimant's reliance on the Inspectorate's letter of 16 December 2010 to argue the contrary is misplaced.[530] Prior to this arbitration, neither GFT Slovakia, nor Goldfruct or Muszynianka ever disclosed to the Slovak authorities their plan to mix the mineral water extracted from the Legnava Sources.[531] Moreover, despite the "express instructions" given by the PNIPH in its letter of 4 November 2010,[532] GFT Slovakia, Goldfruct or Muszynianka never sought clearance from the State Spa Committee to ensure that "their [business] plan complied with the [Mineral Water Directive], including its provisions on mixing".[533] Differently stated, the Inspectorate was "kept in the dark about [the Claimant's] mixing plans" and "therefore could not have agreed that the mixing would be governed by Polish law".[534] In any event, the Inspectorate's letter of 16 December 2010 "makes no reference to mixing whatsoever".[535]

iii. As explained by Ms. Božíková at the Hearing, had the State Spa Committee known that the water from the Legnava Sources would be mixed in Poland,

[528] R-PHB, ¶¶ 87-88, referring to Ženišová ER I, **RER-3**, ¶ 25; Ženišová ER II, **RER-7**, ¶¶ 68-69.

[529] R-PHB, ¶¶ 87-90; Marcin ER I, **RER-11**, ¶ 27; Tr. 766:21-767:1, 771:18-21 (Szczepański).

[530] C-PHB, ¶¶ 63-80; Letter from the Inspectorate to GFT Slovakia, 16 December 2010, **C-18**; *supra*, ¶ 35.

[531] R-PHB, ¶ 98.

[532] Position of the National Institute of Public Health - National Institute of Hygiene, 4 November 2010, **C-151**; *supra*, ¶ 33.

[533] R-PHB, ¶¶ 98, 99, referring to Tr. 480:12-481:5 (Kacvinský).

[534] R-PHB, ¶¶ 99-100.

[535] R-PHB, ¶ 98.

that would have been considered "a problem and [the State Spa Comittee] would have [had] to deal with that".[536] The Inspectorate is under a duty to register recognized mineral waters in Slovakia within the list of mineral waters administered by the EU Commission.[537] That list specifies the source of the water and confirms that the conditions for bottling and consumer packaging have been met.[538] Therefore, a potential Exploitation Permit would have listed the conditions under which the water could be bottled, packaged and branded in Poland.[539] It would be "unthinkable" for the State Spa Committee to simply "leave an information for the EU Commission that water is from Legnava and it's being mixed and bottled" in Poland.[540] For instance, to prevent mixing, the Exploitation Permit would have required that "water be bottled through individual bottling lines for each individual source".[541] Notably, if this and any other conditions in the Exploitation Permit were breached, the State Spa Committee could initiate proceedings to cancel the Exploitation Permit.[542]

iv. Pursuant to the Act on Mineral Waters, the Inspectorate must ensure that mineral water maintains its "quality" throughout its production process. Accordingly, the Inspectorate conducts assessments of the mineral water at each production stage, namely extraction, treatment, accumulation, and bottling.[543] To this end, sampling devices must be installed at each stage.[544] In the present case, the last stage, i.e., bottling, would have occurred in Poland, where the Inspectorate has no competence.[545] For that reason, in December 2010, the Inspectorate agreed that "the quality of water in those bottles [could] be inspected by the [Polish agency PNIPH]",[546] which would

[536] R-PHB, ¶ 103, referring to Tr. 611-25-612:1 (Božíková).

[537] R-PHB, ¶ 103; Act on Mineral Waters, **R-35**, Art. 44(2)(e).

[538] Tr. 612:2-11 (Božíková); Act on Mineral Waters, **R-35**, Art. 44(2)(e).

[539] Tr. 612:11-18 (Božíková).

[540] R-PHB, ¶ 103, referring to Tr. 612:11-18 (Božíková).

[541] R-PHB, ¶ 104, referring to Tr. 645:11-14 (Božíková).

[542] Tr. 656:19-657:5 (Božíková); Act on Mineral Waters, **R-35**, Art. 17.

[543] R-PHB, ¶¶ 100-101, referring to Act on Mineral Waters, **R-35**, Art. 44(2)(b).

[544] R-PHB, ¶ 101.

[545] R-PHB, ¶ 101.

[546] R-PHB, ¶ 101, referring to Tr. 607:2-4 (Božíková); *see also* Letter from the Inspectorate to GFT Slovakia 16 December 2010, **C-18.**

have proceeded on the basis of Polish legislation.[547] However, the fact that the Polish authorities would have carried out inspections pursuant to Polish law would not have relieved the Inspectorate from discharging its duty under Slovak law. Had an Exploitation Permit been issued, the State Spa Committee would have included a condition that GFT Slovakia provide an analysis of water quality in accordance with Slovak law from an independent laboratory to "compare parameters" between the extraction and bottling stages.[548]

326. Based on the Inspectorate's preliminary opinion of 30 March 2010,[549] the Slovak Republic stresses that the Claimant was aware that mixing was unlawful under Slovak law.[550] Indeed, for its Zoning Permit application, GFT Slovakia submitted construction plans providing for the construction of six separate pipelines, one for each of the Legnava Sources with two for reserve.[551] This design indicated that Muszynianka planned to comply with the Inspectorate's preliminary opinion "regarding the impossibility to mix water from different sources".[552]

327. In particular, the mixing would have breached Article 9(2) of the Slovak Food Code,[553] thus incurring in counterfeiting of mineral water.[554] This provision states that mixed mineral water can only be placed on the market under the same brand if it fulfills the following strict conditions: (i) all sources of water must be from one output area; (ii) the water must be of the same type as regards its chemical composition; and (iii) the total mineralization of individual sources may not differ more than the natural fluctuation of the total mineralization of the main source of mineral water determined by a long-term regime monitoring.[555] The Claimant's business plan could not have met these cumulative requirements.

328. Regarding the first requirement (one output area), the Legnava and Polish sources are not from one output area just because of their proximity and location in the "same

[547] R-PHB, ¶ 102.

[548] R-PHB, ¶ 102, referring to Tr. 654:16-22, 655:12-15 (Božíková); *see also* Act on Mineral Waters, **R-35**, Art. 14(1)(c).

[549] *Supra*, ¶ 32.

[550] Rejoinder, ¶¶ 152-153.

[551] Božíková WS II, **RWS-4**, ¶ 30; *supra*, ¶ 44.

[552] Božíková WS II, **RWS-4**, ¶¶ 17, 30.

[553] Slovak Food Code, **R-60**, Art. 9(2).

[554] SoD, ¶ 500; Slovak Food Code, **R-60**, Art. 8(1)(c).

[555] SoD, ¶ 138.

geological and hydrogeological area".[556] Even though they opined "that any division between [the] continuous hydrogeological structure of this area is unjustified",[557] the Claimant's experts, Profs. Szczepańska-Plewa and Szczepański, did not determine that mineral water in the Legnava and Muszyna regions come from one output area within the meaning of Article 9(2) of the Slovak Food Code.[558] By contrast, Dr. Marcin, the Respondent's expert, concluded that borehole LH-1 has a distinct output area, while boreholes LH-2A to LH-5 share the same (all of these output areas being located within the Slovak Republic).[559] According to the Respondent, Dr. Marcin's findings confirm those of its other expert,[560] Prof. Ženišová, who affirmed that the natural mineral water from boreholes LH-2A to LH-5 are from the same output area,[561] but from another output area than the Polish sources.[562]

329. As to the second requirement in Article 9(2) of the Slovak Food Code (same chemical composition), the Legnava and Muszyna sources have a different chemical composition.[563] The Respondent's expert Prof. Ženišová stated that (i) "the water from the LH-2A and LH-5 sources differs from the water from the LH-3 and LH-4 sources due to the higher magnesium levels";[564] (ii) the water from borehole LH-2A "significantly differs" from the other Legnava Sources as it has lower mineralization;[565] and (iii) the Legnava Sources and the Polish sources have different chemical types, especially with respect to their content of sodium, potassium, and sulfates.[566]

330. The Respondent concedes that, through the LH-2A to LH-5 Maximum Quantities Decision, the Ministry of Environment found that the waters from the Legnava Sources were of the same chemical type.[567] However, it submits that the Ministry reached that conclusion on the basis of a hydrogeological study commissioned by GFT Slovakia and

[556] Reply, ¶ 189.

[557] Reply, ¶ 191, referring to Szczepańska-Plewa and Szczepański ER I, **CER-4**, pp. 3-4.

[558] Rejoinder, ¶ 154.

[559] Rejoinder, ¶ 155, referring to Marcin ER I, **RER-11**, ¶ 24.

[560] Rejoinder, fn. 172.

[561] Ženišová ER I, **RER-3**, ¶¶ 5, 24.

[562] Ženišová ER I, **RER-3**, ¶¶ 49-51.

[563] Rejoinder, ¶¶ 157-158, referring to Ženišová ER II, **RER-7**, ¶¶ 6-22, 31-36.

[564] Ženišová ER II; **RER-7**, ¶ 35.

[565] Ženišová ER II; **RER-7**, ¶ 35.

[566] Ženišová ER II; **RER-7**, ¶ 66.

[567] R-PHB, ¶ 113, referring to LH-2A to LH-5 Maximum Quantities Decision, **C-15**, § II; *supra*, ¶ 22.

not as a result of the Ministry's own investigation.[568] According to the Respondent, the "expert analysis carried out for this arbitration now concludes that [the study and the conclusions in the Maximum Quantities Decision] were inaccurate".[569] Consequently, the Claimant "could not have based its expectations to mix Legnava Sources on the Ministry's approval of the study, because it is the real factual situation—and the correct calculations of the chemical type—that are decisive".[570]

331. With respect to the third requirement (total mineralization), the Respondent disputes the Claimant's assertions,[571] since "no combination of the Legnava Sources meets the necessary criteria of mineralization".[572] Moreover, according to Prof Ženišová, even a "preliminary review" indicates "evident" and "significant" differences in mineralization of the Legnava and Polish Sources.[573]

332. Finally, the Respondent submits that mixing of the Legnava Sources would also be contrary to Polish law.[574]

333. First, under Article 34 of the Polish Act on Nutrition Safety, mineral water "traded" in Poland must be recognized[575] by the Polish Chief Sanitary Inspector if "the water has been extracted from a hole located in the Republic of Poland", or by a "competent body of a different European Union Member State" if "the water has been extracted from a hole located in that state".[576] The recognition by the relevant authority covers the name of the mineral water to be introduced into the market and the source from which the water is extracted.[577] It follows that the Polish authorities could not recognize the Claimant's mixed product, as it would contain Slovak water over which Polish authorities lacked authority.[578]

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[568] R-PHB, ¶ 113.

[569] R-PHB, ¶ 113.

[570] R-PHB, ¶ 113.

[571] Reply, ¶¶ 194-195.

[572] Rejoinder, ¶ 159, referring to Ženišová ER I; **RER-3**, ¶ 46.

[573] Ženišová ER II; **RER-7**, ¶ 70.

[574] Rejoinder, ¶ 160 *et seq.*; R-PHB, ¶¶ 117-124.

[575] R-PHB, ¶ 121.

[576] Polish Act on Nutrition Safety, **R-288**, Art. 34.1.

[577] R-PHB, ¶ 122; Decision of Chief Sanitary Inspector, 6 July 2016, **R-374**; Claimant's request to the Chief Sanitary Inspector, 23 June 2016, **R-402**; Decision of Chief Sanitary Inspector, 20 September 2016, **R-406**.

[578] Rejoinder, ¶ 161.

334. Second, even if it were correct that the Claimant could have sold a mix of Slovak and Polish-sourced waters pursuant to Article 20(3) of the Polish Mineral Water Regulation,[579] that provision must be read in conjunction with Article 20(1),[580] which provides that bottled natural mineral water, having a single trade name, may be drawn from "specific groundwater resources" using one or more "holes that are a water intake". Such wording must be interpreted in light of the Mineral Water Directive and the CJEU's decisions, which suggest that the relevant criteria is whether the extracted water (to be mixed) originates from the same underground deposit or accumulation area.[581] Contrary to Prof. Szczepański's statements at the Hearing, the relevant criteria cannot be that the water come from the same aquifer or water table (i.e., the Piwniczna Sandstones or, in Slovak terminology, *Krynica Flysh*).[582] Otherwise, considering the broad extension of the *Krynica Flysh*, one could mix waters of the same chemical composition that are hundreds of kilometers apart, which cannot be the meaning of the law.[583] In reliance on Dr. Marcin, the Respondent submits that the Legnava and Polish sources do not originate in the same underground deposit,[584] which is not disputed by Prof. Szczepański.[585]

335. Third, the Claimant's reliance on the position taken by the PNIPH in November 2010 is ill-conceived.[586] That position required that "all activities related to", *inter alia*, the "preparation of the water for bottling" ("i.e., mixing") be compliant with Slovak law.[587] Moreover, it was issued prior to the enactment of the Polish Mineral Water Regulation.[588]

[579] Polish Mineral Water Regulation, **R-144**, Art. 20(3).

[580] Polish Mineral Water Regulation, **R-144**, Art. 20(1).

[581] Rejoinder, ¶¶ 163-164, referring to Mineral Water Directive, **R-40**, Art. 8(1).

[582] Tr. 768:18-21 (Szczepański).

[583] R-PHB, ¶ 120.

[584] Rejoinder, ¶ 165, referring to Marcin ER I, **RER-11**, ¶ 27.

[585] R-PHB, ¶¶ 89-90, 120, referring to Tr. 771:18-21 (Szczepański).

[586] Reply, ¶ 185; Position of the National Institute of Public Health - National Institute of Hygiene, 4 November 2010, **C-151**; *supra*, ¶ 33.

[587] Rejoinder, ¶ 166, referring to Position of the National Institute of Public Health - National Institute of Hygiene, 4 November 2010, **C-151**, ¶ 3.

[588] Rejoinder, ¶ 166.

d. The Legnava Sources could not have been sold under the Muszynianka brand

336. The Respondent submits that the Claimant's plan to sell the water extracted from the Legnava Sources under the Muszynianka brand would mislead consumers and thus breach EU, Slovak and Polish law.[589]

337. With respect to EU law, it would violate Articles 8(1) and 9(1)(a) of the Mineral Water Directive.[590] Article 8(1) allows for a trade description to incorporate a specific location, "provided that it is not misleading as regards the place of exploitation of the spring".[591] In this vein, the "relevant and decisive" factor for a trade description is "the place where natural mineral water is extracted", not where it is bottled.[592] The Claimant is thus wrong when asserting that the "place of exploitation of the spring" in Article 8(1) encompasses both the place of the water in Legnava, and the place of the rest of the production process in Muszyna.[593]

338. As to Article 9(1)(a), it makes it illegal to package, label, or advertise natural mineral water in a manner that suggests a characteristic that the water does not possess, "in particular as regards its origin".[594] By selling the water extracted from the Legnava Sources under the Muszynianka brand, the Claimant would mislead consumers by indicating that Muszyna is the place of origin, when the water actually came from Legnava.[595] According to the Respondent, that misrepresentation could not be cured by the Claimant's suggestion of combined branding under a label such as for instance "Muszynianka-Legnava".[596] Such a combination would contradict the Claimant's intent to avoid using another trade name.[597] It would also be "inherently unclear", making it "impossible" for consumers to know the actual origin of the water.[598]

339. With reference to the Claimant's reliance on Article 7(2)(b) of the Mineral Water Directive, the Slovak Republic notes that the latter requires that labels specify both the name of

[589] SoD, ¶ 492; Rejoinder, ¶ 126.

[590] SoD, ¶ 493; Rejoinder, ¶ 127.

[591] Mineral Water Directive, **R-40**, Art. 8(1).

[592] Rejoinder, ¶ 131.

[593] Rejoinder, ¶ 128, referring to Reply, ¶¶ 143-144.

[594] Mineral Water Directive, **R-40**, Art. 9(1)(a).

[595] SoD, ¶ 493.

[596] Rejoinder, ¶ 132, referring to Reply, ¶ 149.

[597] Rejoinder, ¶ 299, referring to Mosur WS I, **CWS-1**, ¶ 48.

[598] Rejoinder, ¶ 132, referring to O'Rourke ER II, **RER-8**, ¶¶ 70-71.

the spring and the place of its exploitation.[599] While the combined brand name Muszynianka-Legnava may comply with that provision, the same could not be said of Articles 8(1) and 9(1), which constitute independent requirements.[600]

340. The Respondent further disputes the Claimant's argument that the Mineral Water Directive only binds EU Member States and is thus not directly applicable to private parties.[601] The Directive has been implemented through legislation in the Slovak Republic and in Poland, which the Claimant would have breached by misleading consumers.[602]

341. Specifically, the Respondent invokes Articles 6(1)[603] and 11(2)(a)(1)[604] of the Slovak Food Code, Articles 7(1)[605] and 8(1)[606] of the Slovak Act on Consumer Protection, and Articles 7(1)(2)[607] and 8(1)[608] of the Polish Mineral Water Regulation:[609]

i. Slovak law governs the labelling and marketing of natural mineral water extracted from the Legnava Sources although the bottling occurs in Poland. Pursuant to the "state of origin" principle embedded in the Mineral Water Directive, which "allows for no derogation in this regard", the "Member State in which natural mineral water is extracted must be responsible for controlling every stage of its production".[610] This includes the recognition as natural mineral water, extraction, bottling, marketing and branding[611] and does not foresee divided or shared responsibilities between Member States.[612]

ii. Pursuant to Article 11(2)(a)(1) of the Slovak Food Code, water from the Legnava Sources cannot be "correctly described" as water from the Muszyna

[599] Mineral Water Directive, **R-40**, Art. 7(2)(b).

[600] Rejoinder, ¶ 133, referring to O'Rourke ER II, **RER-8**, ¶ 76.

[601] Rejoinder, ¶ 127, referring to Reply, ¶¶ 137-138.

[602] SoD, ¶¶ 494-498; Rejoinder, ¶¶ 127, 140, 143.

[603] Slovak Food Code, **R-60**, Art. 6(1).

[604] Slovak Food Code, **R-60**, Art. 11(2)(a)(1).

[605] Slovak Act on Consumer Protection, **R-145**, Art. 7(1).

[606] Slovak Act on Consumer Protection, **R-145**, Art. 8(1)(b).

[607] Polish Mineral Water Regulation, **R-144**, Art. 7(1)(2).

[608] Polish Mineral Water Regulation, **R-144**, Art. 8(1).

[609] Reply, ¶¶ 132-135, 157-174; SoD ¶¶ 493-498.

[610] Rejoinder, ¶ 136, referring to O'Rourke ER II, **RER-8**, ¶¶ 54-55; Mineral Water Directive, **R-40**, Art. 1, and Annex II, § 1, 2, 4.

[611] Rejoinder, ¶ 137.

[612] Rejoinder, ¶ 136, referring to O'Rourke ER II, **RER-8**, ¶ 55.

region, on the ground that they broadly belong to the same "geological and hydrogeological structure". The decisive factor is that both sources belong to the same "underground water deposit" or "accumulation area", which is not the case here.[613] Notably, Slovak authorities never agreed that the branding of Muszynianka's product be governed by anything but Slovak law.[614]

iii. It is true that Article 7(1)(1) of the Polish Mineral Water Regulation allows the use of a location as a tradename when the water is not only extracted from that location, but also from a "neighboring region".[615] However, Article 7(1)(2) requires that the use of a location "not mislead as to the place of water extraction".[616] In this case, the water would be extracted in Legnava, not Muszyna, yet "the use of the brand 'Muszynianka Water' would suggest that the natural mineral water was extracted in Muszyna, when it was not".[617] This would be misleading, particularly to Polish consumers, who according to the Claimant's own evidence show a strong preference for Polish products.[618]

342. Lastly, the Respondent contends that GFT Slovakia never disclosed to the State Spa Committee that it "would sell the water to its mother company to brand it under the existing 'Muszynianka' brand recognized in Poland".[619] In its Exploitation Permit application, GFT Slovakia did state that the water would be sold under the name "Skarb Muszyny", also a Polish name.[620] However, while the State Spa Committee "never reached the point" of commenting on that name, Ms. Božíková made a handwritten note on the cover of the GFT Slovakia's application at the time, observing that the name could not be Polish.[621]

[613] Rejoinder, ¶ 138-139, referring to Marcin ER, **RER-11**, ¶¶ 24-27.

[614] R-PHB, ¶¶ 165-170.

[615] Polish Mineral Water Regulation, **R-144**, Art. 7(1)(1).

[616] Polish Mineral Water Regulation, **R-144**, Art. 7(1)(2).

[617] Rejoinder, ¶ 143.

[618] Rejoinder, ¶ 141, referring to KPMG, *The soft drinks market in Poland*, September 2016, **CER-1/FTI-8**, § 1.3, and pp. 27 ("Local solutions are most vital for Polish consumers, and they are eager to buy domestic products from the bottled water segment. This is because Poles are aware that we have very good mineral waters in Poland and they want to drink them") (emphasis added by the Respondent), 35 ("Other consumer and product trends include, among others, innovation, health, well-being, and localness.") (emphasis added by the Respondent).

[619] Rejoinder, ¶ 144.

[620] *Supra*, ¶ 60.

[621] Rejoinder, ¶ 144, referring to Handwritten note of Ms Božíková, 2012, **R-205**; Božíková WS II, **RWS-4**, ¶ 21.

2. The Claimant's Position

a. GFT Slovakia would not necessarily have sold or transferred the water to Muszynianka prior to bottling

343. Muszynianka submits that the Respondent "incorrectly assumes" that GFT Slovakia would have sold or otherwise transferred the water extracted from the Legnava Sources to Muszynianka (or another entity) prior to bottling.[622] It insists that the "technical details" of the production had not yet been devised.[623] Thus, GFT Slovakia could have bottled the water itself.[624] Indeed, Muszynianka would not have risked "losing" GFT Slovakia's Exploitation Permit by "adopting a method of cooperation […] that would not be compliant with the permit or with Polish or Slovak law […]".[625] For instance, as a common arrangement in the consumer-packaged-goods industry, Muszynianka could have "leased" a "production line" to GFT Slovakia in its Muszyna plant. This would have allowed GFT Slovakia to bottle the water under its ownership and to then sell the final product to Muszynianka.[626]

344. In general, the Respondent's arguments on the alleged illegality of the investment are "based solely on speculations as to the Claimant's future decisions and actions".[627] It is Muszynianka's submission that the Project cannot be deemed illegal for the mere fact that it considered "various business options with respect to the mixing, branding or labelling of the mineral water from the Legnava Sources".[628]

345. For the Claimant, it never took any final decision on how to market the water from the Legnava Sources as the Project did not reach that stage.[629] Notably, Ms. Božíková confirmed at the Hearing that there were no "final arrangements made by the Slovak authorities with respect to the details of the Project which the Respondent now considers illegal".[630] At most, Ms. Božíková stated that the "specifics of the Project" could have been dealt with through conditions incorporated in an Exploitation Permit.[631] That being

[622] Reply, ¶ 197.

[623] Mosur WS II, **CWS-5**, ¶ 26.

[624] Reply, ¶ 198.

[625] Mosur WS II, **CWS-5**, ¶ 27.

[626] C-PHB, ¶ 157.

[627] C-PHB, ¶ 48.

[628] C-PHB, ¶ 48.

[629] C-PHB, ¶¶ 49-51.

[630] C-PHB, ¶ 59, referring to Tr. 611:18-612:18 (Božíková).

[631] C-PHB, ¶ 59, referring to Tr. 611:18-612:18 (Božíková).

so, the Respondent cannot question "*a priori*" the Claimant's ability to adjust its plans and follow any requirements imposed by the relevant authorities.[632]

b. There is no bottle-at-source requirement in the Mineral Water Directive

346. According to the Claimant's expert, Prof. Müller-Graff, neither the Mineral Water Directive nor its Annex II contain a bottle-at-source requirement or any wording stating that mineral water must be bottled before it can be exported.[633] The alleged bottle-at-source principle is taken from the CJEU's *German Packaging* case.[634] However, this decision dealt with a factual pattern entirely distinguishable from the particulars of the Project.[635] Moreover, the Mineral Water Directive aims at ensuring that the production process guarantees the quality of the water and the health of prospective consumers. The cross-border infrastructure at issue in this case is compatible with those goals.[636]

347. In any event, the Claimant stresses that the starting point of the interpretation of the Mineral Water Directive should be the primary internal market law on free movement of goods within the EU.[637] Raw mineral water (i.e., mineral water in an unbottled form) has an "intrinsic commercial value" and is thus a "good" protected by the rules on the free movement of goods,[638] as confirmed by the Respondent prior to this arbitration.[639] Therefore, pursuant to Article 35 TFEU, unbottled mineral water cannot be subject to any restrictions on export to another EU Member State, including restrictions regarding the method of transportation.[640] It follows that the Respondent's attempt to interpret the

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[632] C-PHB, ¶ 61.

[633] Müller-Graff ER I, **CER-3**, ¶ 35.

[634] *Commission of the European Communities v Federal Republic of Germany*, CJEU Case C-463/01, EU:C:2004:797, Judgment, 14 December 2004, **R-42**, ¶ 64.

[635] Müller-Graff ER I, **CER-3**, ¶ 36.

[636] C-PHB, ¶ 45, referring to Tr. 1209:19-1210:3, 1212:24-1213:8 (O'Rourke).

[637] C-PHB, ¶ 43.

[638] Müller-Graff ER I, **CER-3**, ¶¶ 6-11, referring to, *inter alia*, Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for the Community action in the field of water policy, **R-157**, Recital 1 ("Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such").

[639] C-PHB, ¶ 39, referring to Letter from the Ministry of Environment to GFT Slovakia, 26 July 2012, **C-114**; *see also* Letter from SOLVIT Centre SR (Section of Government Legislation, Department of Law Approximation) to Dušan Čerešňak (General Director of Section of Water Bodies, Ministry of Environment), 28 May 2012, **C-171**; Letter from Štefan German (Director General of the Section of the Government Legislation) to Vojtech Ferencz (Ministry of Environment), 14 November 2013, **C-173**; Letter from Peter Pellegrini (Ministry of Finance) to Vojtech Ferencz (Ministry of Environment), 22 November 2013, **C-174**.

[640] C-PHB, ¶ 37, referring to Tr. 1160:12-1161:5 (Müller-Graff).

Mineral Water Directive in a way that "prohibits" the "trans-border production of mineral water […] manifestly violates the primary internal market law".[641]

c. Muszynianka would have complied with all relevant laws on mixing

348. It is the Claimant's argument that, contrary to the Inspectorate's letter of 30 March 2010,[642] the Mineral Water Directive does not prohibit the mixing of mineral water.[643] In fact, the Mineral Water Directive "does not touch upon the mixing of mineral water" at all, as Prof. Müller-Graff confirmed.[644] Given the Directive's silence in this respect, "it is necessary to analyse this question in the light of EU primary law and the directive's purpose".[645] In particular, Recital 5 of the Mineral Water Directive states that "[t]he primary purposes of any rules on natural mineral waters should be to protect the health of consumers, to prevent consumers from being misled and to ensure fair trading".[646] It follows that if Muszynianka's process of mixing preserves the characteristics of the Legnava Sources, "there is no reason to prohibit the mixing" under EU law.[647] Since the Legnava and Polish Sources share the same underground origin and chemical composition, the Claimant is of the view that mixing would not be inconsistent with the Mineral Water Directive.[648]

349. With respect to Slovak law, the Claimant submits that its plan to mix would have also complied with Article 9(2) of the Slovak Food Code.[649] First, the Legnava and Polish Sources are "part of the same geological and hydrogeological structure" (i.e., the aquifier of the Piwniczna Sandstones formed in the geological unit of the *Krynica Flysh*),[650] which means that there is no justification for a division of this area.[651] In particular, boreholes

[641] C-PHB, ¶ 43, referring to Tr. 1166:24-1168:6 (Müller-Graff).

[642] Letter from the Inspectorate to GFT Slovakia, 30 March 2010, **C-17**; *supra*, ¶ 32.

[643] C-PHB, ¶¶ 86-88.

[644] C-PHB, ¶ 89, referring to Tr. 1188:2-8 (Müller-Graff).

[645] C-PHB, ¶ 90.

[646] Mineral Water Directive, **R-40**, Recital 5.

[647] C-PHB, ¶¶ 90, 94.

[648] C-PHB, ¶¶ 91-99.

[649] Reply, ¶¶ 188 *et seq*.

[650] Reply, ¶¶ 189-191, referring to Szczepańska-Plewa and Szczepański ER I, **CER-4**, pp. 2-4; C-PHB, ¶ 114.

[651] Reply, ¶ 191, referring to Szczepańska-Plewa and Szczepański ER I, **CER-4**, pp. 3-4.

LH-2A, LH-3, LH-4, and LH-5 all belong to the same natural output area of "Legnava – Na Rovne",[652] a fact explicitly confirmed by the Respondent[653] and Dr. Marcin.[654]

350. As to the second requirement in Article 9(2) of the Slovak Food Code, the Claimant asserts that the mineral waters from the Legnava and Polish Sources are of the same chemical type. Prof. Ženišová's and Dr. Marcin's findings to the contrary are premised on the application of the Gazda Classification.[655] In reality, the applicable test is the Predominant Ion Classification test, as it arises from Slovak regulation, according to which natural mineral waters are classified by, *inter alia*, the "volume of predominating ions".[656] If that test is resorted to, all experts on record confirm that the Legnava Sources and the majority of the Polish Sources are of the same hydro-geochemical type.[657] In any event, even if the Gazda Classification were nevertheless deemed applicable, "all the documents prepared prior to this arbitration", particularly the 2008 Final Report and the LH-2A to LH-5 Maximum Quantities Decision,[658] state that the mineral water of the Legnava Sources are of the same chemical type for purposes of the Gazda test.[659] Moreover, Dr. Marcin acknowledged at the Hearing that the majority of the Polish Sources also had the same chemical type as the Legnava Sources, even according to the Gazda test.[660]

351. Regarding the third requirement under Article 9(2) of the Slovak Food Code (total mineralization), the Claimant argues that "Prof. Ženišová did not provide the results of her own ionic balance calculations and assessed the hydrogeochemical type of the water from the Legnava Sources incorrectly".[661] Therefore, any mineralization evaluations made by Prof. Ženišová are unreliable.[662] What is more, she confirmed that she did not study the allowable differences in the total mineralization of the Polish and Legnava

[652] C-PHB, ¶ 110.

[653] C-PHB, ¶ 110, referring to Rejoinder, ¶ 155.

[654] C-PHB, ¶ 110, referring to Tr. 869:6-21 (Marcin).

[655] C-PHB, ¶¶ 118-121.

[656] C-PHB, ¶ 120, referring to Decree No. 100/2006, **R-139**, Art. 6(1)(c).

[657] C-PHB, ¶¶ 119, 125-126, referring to Szczepańska-Plewa and Szczepański ER I, **CER-4**, p. 5; Ženišová ER II; **RER-7**, ¶¶ 31; Tr. 853:3-7 (Marcin); Tr. 750:2-20 (Szczepański); Marcin ER I, **RER-11**, Table 2 (corrected).

[658] 2008 Final Report, **R-138**, pp. 44, 47, 50, 53; LH-2A to LH-5 Maximum Quantities Decision, **C-15,** § II; *supra*, ¶¶ 21-22.

[659] C-PHB, ¶ 123.

[660] C-PHB, ¶ 126, referring to Marcin ER I, **RER-11**, Table 2 (corrected).

[661] C-PHB, ¶ 129.

[662] C-PHB, ¶ 129.

Sources.[663] In short, the Respondent has not established that the Claimant's business concept would have violated any provision of Slovak law on mixing, branding, and labelling of natural mineral water.[664]

352. With respect to Polish law, the Claimant asserts that its plan to mix the Legnava sourced water with the Polish Muszynianka Water, and "to sell the water under the '*Muszynianka*' brand, was in line with Polish law on mixing, branding, labelling, and marketing of mineral water. Alternatively, under Polish law the Claimant was entitled to mix Legnava Sources among themselves and to sell that mixed water under the '*Muszynianka*' brand".[665]

353. Indeed, Article 20(3) of the Polish Mineral Water Regulation allowed Muszynianka to "combine natural mineral waters originating from various boreholes" and to sell them using a "single trade name", if the waters met the "same requirements for chemical qualification".[666] In this respect, the Claimant refers to its position under Slovak law and argues that all of the Legnava and Polish Sources "originate from the same groundwater resources" and contain natural mineral water of the "same hydrogeochemical type".[667] Notably, the PNIPH had confirmed these facts in November 2010, concluding on the basis of data submitted by Goldfruct at the time, that the Legnava Sources (i.e., LH-1 to LH-5) produced water of the same chemical type.[668] As such, the extracted water could be "combined" under Polish law "to obtain raw material for the production of bottled natural mineral water", subject to "the exploitation capacity of each borehole".[669]

354. Lastly, the Claimant argues that the Respondent misrepresents the meaning of Article 34 of the Polish Act on Nutrition Safety.[670] This provision concerns the "trading" in Poland of the mineral water "extracted and bottled" in Poland or in another country.[671] Neither that provision nor the Act more generally govern the recognition of natural mineral water extracted in one EU Member State and bottled in another.

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[663] C-PHB, ¶ 129.

[664] Reply, ¶ 196.

[665] Reply, ¶ 175.

[666] Polish Mineral Water Regulation, **R-144**, Art. 20(3).

[667] Reply, ¶¶ 180-182, referring to Szczepańska-Plewa and Szczepański ER I, **CER-4**, pp. 6-7; Comparison of the chemical composition of mineral waters in Carpathian flysch formations in the Poprad Valley near the Muszyna (PL)–Legnava (SK) Region, **CER-4 / AGH-1**, pp. 22-39; C-PHB, ¶ 134.

[668] Position of the National Institute of Public Health - National Institute of Hygiene, 4 November 2010, **C-151**, ¶ 1; *supra*, ¶ 33.

[669] Position of the National Institute of Public Health - National Institute of Hygiene, 4 November 2010, **C-151**, ¶ 1.

[670] Polish Act on Nutrition Safety, **R-288**, Art. 34.1.

[671] C-PHB, ¶ 136.

d. Muszynianka would have complied with all relevant laws on branding, labelling and packaging

355. Regarding Article 8(1) of the Mineral Water Directive, the Claimant submits that the legality of a trade description which refers to a location (e.g. "*Muszynianka*" referring to Muszyna) depends on the location of the "exploitation of the spring", and not on the location of the spring itself.[672] Further, the term "exploitation" must not be construed strictly to mean the place of the water's extraction.[673] For instance, Article 8(3) of the Mineral Water Directive distinguishes "the name of the spring" from "the place of its exploitation".[674] Therefore, in an integrated cross-border production, such as the present one, which the Mineral Water Directive does not envisage, the notion of "exploitation" can well be viewed as the place of the last action in the production chain, here Muszyna.[675]

356. As to Article 9(1)(a) of the Mineral Water Directive, "the indication of the location of the last substantive action in the chain of production before putting the bottled natural mineral water on the market does not suggest a characteristic which the water does not possess".[676] However, if the term "origin" in Article 9(1)(a) is read to mean only the location of the spring, then branding the final product to indicate both the places of extraction and bottling would serve the purpose of this provision, which is to avoid misleading consumers. Accordingly, the water could, for instance, be sold as "*Muszynianka-Legnava*" water.[677] While the Claimant had not yet defined these modalities, it would have been willing to do so.[678] Moreover, pursuant to Article 7 of the Mineral Water Directive, the label would have further specified the name of the Legnava Sources, their location, and the place where the water was bottled (just as Muszynianka does with all its products).[679] This would have avoided any possible misrepresentations to consumers.

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[672] Reply, ¶ 143, referring to Müller-Graff ER I, **CER-3**, ¶ 99.

[673] Reply, ¶¶ 144-145, referring to Müller-Graff ER I, **CER-3**, ¶¶ 100-101.

[674] Mineral Water Directive, **R-40**, Art. 8(3).

[675] Reply, ¶ 147; Müller-Graff, **CER-3**, ¶¶ 103-104.

[676] Reply, ¶ 149; Müller-Graff ER I, **CER-3**, ¶¶ 103-104.

[677] Reply, ¶ 149, referring to Müller-Graff ER I, **CER-3**, ¶ 105.

[678] Reply, ¶ 26 ("While decisions as to the marketing and sales policy were yet to be made, it was clear that the natural mineral water from the Legnava Sources would be sold under the Muszynianka Brand either simply by informing the consumer that the water was extracted from a particular borehole or by creating a new product named, for instance, '*Muszynianka-Legnava*').

[679] Reply, ¶¶ 150-155.

357. Turning to the laws implementing the Mineral Water Directive or otherwise governing the water's production process on the national level, the Claimant submits that its investment and business plan would have complied with all the requirements set out in the Polish Mineral Water Regulation. Referring specifically to Article 7(1)(1) of the Regulation,[680] it argues that using the Muszynianka Water brand would not have been misleading because the Legnava Sources are in Muszyna's "neighboring region".[681] Indeed, not only are the Legnava Sources in the vicinity of Muszyna, but the entire region constitutes one "geographically and geologically homogenous area" divided only by the Poprad river.[682] For the same reason, the Claimant argues, the business plan would have met the "origin" requirement in Article 11(2)(a)(1) of the Slovak Food Code (applicable *quod non*).[683]

3. Analysis

358. The Tribunal will review the Respondent's illegality contentions in the order in which they were raised, namely sale prior to bottling **(a)**, bottling other than at source **(b)**, and mixing and branding **(c)**.

a. The sale of the water from the Legnava Sources prior to bottling

359. An Exploitation Permit allows the permit holder, that is the "source user",[684] to extract, treat, and bottle mineral water into consumer packaging.[685] Article 13(2) of the Act on Mineral Waters states that the "[r]ights resulting from [a] mineral water exploitation permit cannot be transferred to [others]".[686] Accordingly, the source user must be the one carrying out all production stages up to the bottling of the mineral water. It follows that the source user cannot sell or otherwise transfer the extracted and treated water prior to bottling. The Inspectorate made this clear to GFT Slovakia in its communication of 30 March 2010.[687]

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[680] Polish Mineral Water Regulation, **R-144**, Art. 7(1)(1).

[681] Reply, ¶¶ 157-162, 165.

[682] SoC, ¶ 38, referring to M. Więckowski, D. Michniak, M. Bednarek-Szczepańska, B. Chrenka, V. Ira, T. Komornicki, P. Rosik, M. Stępniak, V. Szekely, P. Śleszyński, D. Świątek, R. Wiśniewski, "Polish-Slovak Borderland. Transport Accessibility and Tourism", Warsaw 2012, Institute Of Geography and Spatial Organization, Polish Academy Of Sciences, **C-54**, p. 113.

[683] Reply, ¶¶ 164-174; C-PHB, ¶ 156.

[684] Tr. 1126:7-20 (Potasch); *see also* Act on Mineral Waters, **R-35**, Arts. 14-16.

[685] Act on Mineral Waters, **R-35**, Art. 10.

[686] Act on Mineral Waters, **R-35**, Art. 13(2).

[687] Letter from the Inspectorate to GFT Slovakia, 30 March 2010, **C-17** ("[The] rights and duties implied by the decision to use sources may not be transferred to any third persons, it means that the water from these sources may not be sold to any other company and thus the company with the granted permission for use will also have to be the company bottling the water in consumer packaging."); *supra*, ¶ 32.

360. Turning to the facts, the Tribunal finds that the record does not establish that GFT Slovakia would have sold the water to a third party prior to bottling. In response to an invitation of the State Spa Committee to amend its Exploitation Permit application in light of the Constitutional Amendment,[688] GFT Slovakia expressly confirmed in December 2014 that the water from the Legnava Sources to be bottled in Muszyna would "fully remain" in its "ownership".[689]

361. In support of this assertion, the Claimant has given plausible explanations as to how GFT Slovakia could have retained ownership over the water and still have bottled it in Muszyna. Muszynianka could have leased a production line of its bottling plant to GFT Slovakia, which would have sold the water to Muszynianka once it was bottled.[690] As noted by Mr. Mosur, this model is common in the consumer-packaged-goods industry[691] and is used to produce "*Muszynianka Plus*", one of the Claimant's star products.

362. The Respondent points out that the Claimant instructed its damages experts to base their calculations on transfer pricing, and that this implies a transfer of ownership prior to bottling.[692] This is the only evidence put forward by the Respondent to argue that the Claimant would have breached the prohibition in Article 13(2) of the Act on Mineral Waters. While the use of transfer pricing in the damage computations entails a transfer of ownership, it says nothing about the timing of that transfer. Indeed, the transfer could well take place after bottling. Damage calculations are in any event no substitute for contemporaneous evidence and thus are insufficient to put into question GFT Slovakia's affirmation of December 2014 that the water would not be sold prior to bottling.

363. Hence, the Tribunal concludes that no illegality is established as far as the sale of the water from the Legnava Sources is concerned.

b. Bottling other than at source

364. There is no question that it was a key aspect of the Project that the water from the Legnava Sources be exported to Muszyna prior to bottling. Yet, the Respondent submits that the "bottle-at-source" principle enshrined in the Mineral Water Directive prevents the

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[688] Letter from the State Spa Committee to GFT Slovakia, 9 December 2014, **C-131**, p. 2.

[689] Letter from GFT Slovakia to the State Spa Committee, 18 December 2014, **R-59** ("As in this area there is a poor transport infrastructure, we have no other choice than to bottle the water in consumer packaging in the bottling plant in the Republic of Poland, as the submitted project documentation indicates; we do that for consideration. Bottled water will fully remain in our ownership") (emphasis added); *supra*, ¶¶ 59-60.

[690] C-PHB, ¶ 157. *See also* Mosur WS II, **CWS-5**, ¶ 28.

[691] Mosur WS II, **CWS-5**, ¶ 28.

[692] Hern ER I, **RER-5**, ¶ 25.

export of mineral water unless it has been packaged for the consumer. For the Slovak Republic, this is because "the Directive requires the Member State in which mineral water is extracted—the State of origin—to control every stage of its production, up to and including bottling".[693] In support, the Respondent refers to Article 1(1) and (5), Annex II (2), (3), (4)(b), and Article 11 of the Mineral Water Directive.[694]

365. The Tribunal has difficulty accepting that the bottle-at-source principle has the significance which the Respondent seeks to assign to it. While the Directive does employ the term "bottled at source", it only does so with respect to spring water,[695] not to mineral water. Nowhere else does it refer to a bottle-at-source requirement.

366. As stressed by the Claimant's EU law expert, Prof. Müller-Graff, the bottle-at-source principle does not stem from the Mineral Water Directive but from the CJEU in *German Packaging*.[696] It is correct that in that case the CJEU held that Article 3 of Directive 80/777/EEC, the predecessor of the Mineral Water Directive, in conjunction with its Annex II, indicated that natural mineral water must be bottled at source.[697] Yet, in *German Packaging*, the CJEU decided on the narrow issue of the (in)compatibility between a system implemented by Germany seeking the re-use of packaged products covered by Directive 80/777/EEC and Directive 94/62/EC (on packaging and packaging waste). Notably, it dealt with the distinct (and in the present case irrelevant) question of the trade hindrance resulting from the costs associated with transporting the mineral water's packaging back to the original bottling location for it to be reused.

367. It is thus doubtful that the CJEU purported to set an unqualified bottle-at-source rule with respect to mineral water as it is currently regulated by the Mineral Water Directive (as opposed to Directive 80/777/EEC). As Prof. Müller-Graff opined, it is unlikely that *German Packaging* pre-judges "the question of the passage of mineral water within an integrated production process from extraction to bottling […]".[698] It is even more unlikely if one considers that many years after that decision and the adoption of the Mineral Water Directive cross-border production of mineral water remains a "new phenomenon" in the

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[693] R-PHB, ¶ 126.

[694] R-PHB, ¶ 127.

[695] Mineral Water Directive, **R-40**, Article 9(4) ("The term 'spring water' shall be reserved for a water which is intended for human consumption in its natural state, and bottled at source […]") (emphasis added).

[696] Müller-Graff ER I, **CER-3**, ¶ 36; *Commission of the European Communities v Federal Republic of Germany*, CJEU Case C-463/01, EU:C:2004:797, Judgment, 14 December 2004, **R-42**, ¶ 64.

[697] *Commission of the European Communities v Federal Republic of Germany*, CJEU Case C-463/01, EU:C:2004:797, Judgment, 14 December 2004, **R-42**, ¶ 61.

[698] Müller-Graff ER I, **CER-3**, ¶ 36.

industry.[699] The Parties have not pointed to any venture similar to the Project currently being carried out within the EU or elsewhere for that matter. In those circumstances, the Tribunal agrees with Prof. Müller-Graff that it is "very difficult to assume that the European legislator […] considered […] the trans-border production" of water when passing the Mineral Water Directive.[700]

368. That said, even if the Mineral Water Directive were to preclude cross-border exploitation of mineral water, that preclusion could not be held against the Claimant. The Mineral Water Directive is not a source of obligations that can be applied directly to the Claimant. Rather, the Claimant's investment must be assessed on the basis of the implementing legislation of the relevant EU Member States,[701] i.e., the Slovak Act on Mineral Waters and Food Code and the Polish Mineral Water Regulation and Act on Nutrition Safety.

369. Prior to the Constitutional Amendment, there was no provision in the Act on Mineral Waters, the Food Code, or elsewhere in Slovak law, prohibiting the export of unbottled mineral water. At no time before this arbitration did the Slovak authorities oppose the Project's cross-border nature. To the contrary, in March 2010, the Inspectorate, which already was under the direction of Ms. Božíková, stated its having "no objections" to GFT Slovakia's plan to bottle the water from the Legnava Sources in Poland.[702] Ms. Božíková confirmed this absence of objections when she testified that, before the Constitutional Amendment, the State Spa Committee considered giving "permission" to the Project,[703] a consideration given after receiving legal advice.[704] It follows that, prior to the Constitutional Amendment, Slovak administrative authorities did not see Slovak law (or the Mineral Water Directive) as being prohibitive of the Project's cross-border nature.

370. An important debate surrounding the changes to the Act on Waters and the Constitutional Amendment was whether the export of unbottled water was admissible considering that underground water was the property of the State until extracted,[705] and that State authorities may act only if authorized by the Constitution and legislation.[706] On

[699] Tr. 1174:1-17 (Müller-Graff).

[700] Tr. 1174:1-17 (Müller-Graff).

[701] TFEU, **CLA-11**, Article 288; B*ernhard Pfeiffer and Others v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, Joined ECJ Cases C-397/01 to C-403/01, Judgment, 5 October 2004, ¶ 108; *Uniplex (UK) Ltd v NHS Business Services Authority*, CJEU Case C-406/08, EU:C:2009:676, **RLA-136**, ¶ 45.

[702] Letter from the Inspectorate to GFT Slovakia, 30 March 2010, **C-17**; *supra*, ¶ 32.

[703] C-PHB, ¶ 228, referring to Tr. 633:11-24 (Božíková).

[704] Tr. 595:23-596:22 (Božíková).

[705] Act on Mineral Waters, **R-35**, Art. 3; Potasch ER II, **RER-6**, ¶ 125.ii.

[706] Slovak Constitution, **R-351**, Art. 2(2).

this basis, some MPs argued that the existing regulatory framework at the time already prohibited the export of unbottled water.[707] This view was not shared by the Government. As the Legislative Department of the Ministry of Health wrote to Ms. Božíková in July 2014, the legislation then in force "did not prohibit cross-border transfers" of water but rather that such activity was "unregulated".[708]

371. Therefore, the Tribunal finds that the Respondent has not established that the cross-border nature of the Project was *per se* illegal.

c. Mixing and branding

372. To simplify the analysis, the Tribunal will address the alleged illegalities linked to mixing and branding together. Specifically, it will set out the content of the Claimant's plans on mixing and branding **(i)**, determine which law governs these activities **(ii)**, and assess the legality of the Claimant's mixing **(iii)** and branding **(iv)** plans.

i. The content of the Claimant's plans on mixing and branding

373. According to the Claimant, Muszynianka "never made any, not to mention binding, decisions on the detailed aspects of introducing the mineral water from the Legnava Sources to the market as a final product".[709] In particular, the Claimant submits that the "Project [never reached] a stage in which [it] would have to take final decisions on such detailed aspects of the Project as the mixing of mineral water from the Legnava Sources or bottling it separately from each source, or the branding […] of the final product".[710] On this footing, the Claimant argues that the Respondent's illegality accusations with respect to Muszynianka's alleged plan to mix and brand the water from the Legnava Sources should be dismissed as speculative.

[707] Parliamentary Sessions, 2 July 2014, **R-313**, p. 3 (MP Chren).

[708] Email correspondence between Jarmila Božíková and Legislative Department of the Ministry of Health, 29 July 2014, **C-158** ("The present legislation does not prohibit cross-border transfers. Should the [Exploitation Permit] explicitly state that such use is allowed that constitutes a cross-border transfer, that would mean, on the one hand, that they have been granted a right which unregulated under the applicable law, such decision exceeding its competence. […] Should it be possible […] to omit taking into consideration the fact that the pertinent transfer would be of a cross-border nature […] nobody could claim that we have directly (and exceeding the extent of the applicable law) allowed a cross-border transfer. The [holder of the Exploitation Permit] would only perform an activity that is not prohibited under the law or by the permit […]") (emphasis added).

[709] C-PHB, ¶ 49.

[710] C-PHB, ¶ 49.

374. In reality, as discussed in further detail below, the record shows that Muszynianka did have plans on both branding **(a)** and mixing **(b)**.

(a) Branding

375. The production and marketing of underground natural mineral water in the EU is highly regulated and subject to taxing technical requirements. The reason for such strict regulation is to protect the health of consumers and to prevent consumers from being misled.[711] These two objectives go hand-in-hand. As noted by Ms. Božíková, "[t]he composition of natural mineral water can have physiological influence on consumers",[712] which may be both positive and negative.[713] It is thus paramount "to ensure that consumers buying natural mineral waters know exactly what mineral water they are buying and drinking and what effect this mineral water may have on their physiological condition".[714]

376. As a successful producer of natural mineral water in Poland, the Claimant has always been aware of the challenges underlying the stringent regulation applicable to the production of natural mineral water. In the words of Mr. Mosur, President of the Management Board of Muszynianka:

> Because of the product we offer, we are limited by the availability of the raw material we can use. Being a natural mineral water, Muszynianka Water is subject to strict monitoring of the composition, the origin of the water used for production, as well as the method of production. Therefore, it would be unacceptable, and unthinkable, to mix Muszynianka Water with spring water, e.g. extracted directly from the Poprad River. We have a responsibility to maintain a relatively constant mineral content in '*Muszynianka*' and '*Muszynianka Plus*', which is only possible using boreholes with a particular chemical specification. […] [E]ven the waters produced by our neighbors in the region [and] extracted from the neighboring areas, despite their good taste, differ significantly from Muszynianka Water. This is because waters from two neighboring boreholes, sometimes located only a few dozen meters from each other, can have a different chemical composition[…]. Due to [these] circumstances, the production of bottled natural mineral water is limited by the available quantity of water with strictly defined parameters. In the case of Muszynianka Water, we have not been able to meet the demand for several years. […] Any further expansion of Muszynianka, which is inseparable from an increase in production, will only be possible when we obtain access to sources of mineral water with the composition required to produce Muszynianka Water. [715]

[711] Mineral Water Directive, **R-40**, Recital 5.

[712] Božíková WS II, **RWS-4**, ¶ 7.

[713] Mosur WS I, **CWS-1**, ¶¶ 14, 71; Cidyło WS I, CWS-2, ¶¶ 15, 17; Božíková WS II, **RWS-4**, ¶¶ 8-10.

[714] Božíková WS II, **RWS-4**, ¶ 7.

[715] Mosur WS I, **CWS-1**, ¶¶ 24-26.

377. Mr. Cydiło, Vice-President of Muszynianka's Management Board, echoed Mr. Mosur's observations:

> We were aware of the unusual characteristics of Muszynianka Water. We knew it to be extraordinary water. On the one side Muszynianka Water is highly mineralized water, with a large amount of magnesium, calcium and bicarbonates, which are essential elements for the proper functioning of the human body. On the other side, contrary to other highly mineralized waters with similar qualities, Muszynianka Water had a pleasant and neutral flavor. […] Paradoxically, we are a victim of our own success. The demand for Muszynianka Water steadily grows and it surpassed the supply of this water long time ago. […] We simply lack[ed] the raw material.[716]

378. Mr. Mosur further testified that the purchase of GFT Slovakia was prompted by the understanding that the Legnava Sources have "an almost identical chemical composition to those used for the production of Muszynianka Water",[717] and that marketing "water from Legnava under the 'Muszynianka' brand" would not be misleading, given that the Legnava Sources are just "a few hundred meters away from Muszyna and that the entire region is a geologically and geographically homogeneous area".[718] In short, Muszynianka saw the purchase of GFT Slovakia and the exploitation of the Legnava Sources as an opportunity to gain access to the raw material necessary to expand its business in Poland.[719]

379. The record shows that Muszynianka did have fairly defined plans in terms of branding the water from the Legnava Sources. Mr. Mosur's first witness statement is unambiguous in this respect. The water extracted from the Legnava Sources would be used to increase the production of Muszynianka's existing products "*Muszynianka*" and "*Muszynianka Plus*", in order to avoid launching a competing product;

> Therefore, it was an increase in the production of Muszynianka Water [**[720]**], a leading Polish brand promoted over many years, rather than the launch of a completely new, unknown brand to the market, which was economically justified. Producing water under another trade name would be an entirely different investment objective which we did not take into consideration. It is all the more true since such product would compete with our '*Muszynianka*' and '*Muszynianka Plus'*.[721]

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[716] Cydiło WS I, **CWS-2**, ¶¶ 16, 24.

[717] Mosur WS I, **CWS-1**, ¶ 39.

[718] Mosur WS II, **CWS-5**, ¶ 20; *see also* Mosur WS I, **CWS-1**, ¶ 48 ("In order not to mislead consumers, only mineral water extracted from only one set of intakes, which together form one outlet, may bear the trade name containing '*Muszynianka*'. The connection of the boreholes in Legnava to those existing ones on the Polish side would precisely make it possible to increase the production of Muszynianka Water. Otherwise, a new trade name would have to be marketed").

[719] Mosur WS II, **CWS-5**, ¶ 8.

[720] The Tribunal notes that Mr. Mosur's first witness statement defines the trade description/names "*Muszynianka*" and "*Muszynianka Plus*", collectively, as "Muszynianka Water" (*see* Mosur WS I, **CWS-1**, ¶ 16).

[721] Mosur WS I, **CWS-1**, ¶ 48 (emphasis added).

380. Mr. Cydiło again echoed Mr. Mosur's evidence, emphasizing that the acquisition of GFT Slovakia was intended to keep the supply of "*Muszynianka*" and "*Muszynianka Plus*" at a high level and that promoting a new brand would be "madness".[722]

381. These clear views on branding, which make perfect business sense, were substantially attenuated in the second round of the Claimant's submissions in this arbitration. In his second witness statement, Mr. Mosur no longer referred only to the objective of increasing the production of existing products. Rather, he referred to the broader objective of increasing the production of water sold under Muszynianka's "trademark". To that effect, he mentioned for the first time the possibility of introducing a third product that, so long as it bore the trademark "Muszynianka", could be distinguished from "*Muszynianka"* and "*Muszynianka Plus*":

> The most important thing was, and still is, to launch the Project that would allow us to increase the production of water under the "Muszynianka" trademark.[723]
>
> Also, the name of the product itself could include an indication distinguishing the product from existing products, i.e. "Muszynianka" and "Muszynianka Plus", with a further division into various assortments and carbonization levels. The most important thing, however, was to market the water under the trademark 'Muszynianka', because it is this brand that consumers associate with the high quality of our products.[724]

382. Mr. Mosur similarly adjusted his earlier position at the Hearing, where he affirmed:

> We didn't go as far as stating the exact name [the final product] would have. The main part of the name would definitely be Muszynianka, but as to the second part, whether it would be Muszynianka Plus, Muszynianka Legnava, Muszynianka GFT, I can't say that yet. But I confirm that the main word "Muszynianka" would be part of the name of the water coming from Slovakia.[725]

383. In the Tribunal's view, the fact that the Claimant reformulated its branding plans after the initiation of these proceedings is not accidental. Rather, it appears to be the result of the Respondent's submissions in its Statement of Defense that marketing water from the Legnava Sources under the "*Muszynianka*" or "*Muszynianka Plus*" trade descriptions/names would be misleading under either EU, Slovak or Polish law. The potential use of a trade description/name entailing a combined approach (such as "Muszynianka-Legnava") was mentioned only after it was flagged by Prof. Müller-Graff (not by the Claimant or its top executives in either the contemporaneous documents or in their prior testimonies) as a branding option that in his view, would not mislead

[722] Cydiło WS I, **CWS-2**, ¶¶ 7, 30, 33.

[723] Mosur WS II, **CWS-5**, ¶ 30.

[724] Mosur WS II, **CWS-5**, ¶ 20.

[725] Tr. 205:14-21 (Mosur).

consumers.[726] Indeed, as already seen, Mr. Mosur had earlier acknowledged that marketing a new competing product was "an entirely different investment objective" that Muszynianka "did not take into consideration" when acquiring GFT Slovakia.[727]

384. It is thus clear that the Claimant did have a clear strategy and plan for the branding of the water from the Legnava Sources. That said, the Act on Mineral Waters does not list the branding of the final product as an item to be specified in an application for the issuance of an Exploitation Permit.[728] Accordingly, Muszynianka was under no explicit obligation to inform the State Spa Committee of any trade description/name to obtain the Exploitation Permit. Ms. Božíková confirmed this position at the Hearing, when she stated that the brand name information included in GFT Slovakia's application (i.e., "Skarb Muszyny")[729] had been included by mistake, as the requirement was to indicate the name of the source, not the brand.[730] Therefore, while the Ministry of Health would at some point have to approve the branding of the final product,[731] the State Spa Committee was to decide on GFT Slovakia's Exploitation Permit even in the absence of information on branding.[732] In these circumstances, it makes sense that Muszynianka, as a rational commercial actor, would have adapted its original branding plans at the pertinent stage (i.e., post-Exploitation Permit), if necessary. Accordingly, the Tribunal will assess the legality of both the Claimant's original and alternative branding plans.

(b) Mixing

385. The Claimant's submissions refer to its "plan to mix water from the Legnava Sources with the Polish sources of Muszynianka Water"[733] or alternatively to "combine water from the Legnava Sources only".[734] Mr. Mosur confirmed these plans on different occasions. For instance, in his second witness statement:

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[726] R-PHB, ¶¶ 156-157; *see also* Müller-Graff ER I, **CER-3**, ¶ 105; Tr. 1193:19-1194:18 (Müller-Graff).

[727] Mosur WS I, **CWS-1**, ¶ 48; *supra*, fn. 721.

[728] Act on Mineral Waters, **R-35**, Art. 11.

[729] *Supra*, ¶ 41.

[730] Tr. 637:11-17 (Božíková)("There was a sentence in the application where the applicant wrote, I think incorrectly, because he was supposed to write the name of the source, 4 and the source is something different from the trade name. And he put down a name of source as "Skarb Muszyny". It was one note in the application.").

[731] *See infra* ¶¶ 392.i, 396.

[732] Tr. 1074:18-1075:2 (Jakab).

[733] Reply, ¶ 179.

[734] Reply, ¶ 184.

> Muszynianka […] planned to extract water from the boreholes in Legnava in the quantities approved by the Slovak authorities, transport the water to a treatment plant and then transport it via separate pipelines to the plant in Poland. It is only in this plant that the water [from the Legnava Sources] would be mixed [among themselves].[735]

386. And at the Hearing:

> **MR ALEXANDER**: […] Mr Mosur, has it been your plan from the outset of your acquisition of the shares in GFT Slovakia to send water in bulk via pipeline to Poland and in Poland, to mix the waters, the source of which was Legnava, Slovakia, with waters from Poland? Has that been the plan from the outset?
>
> **MR MOSUR**: Yes […][736] Our presumption was that the water would be mixed, and I still uphold that, that the water would be mixed.[737]

387. It is true that Mr. Mosur also testified that it was unclear "who" would mix the water, "how" it would be mixed, and exactly "what" water would be mixed.[738] However, these uncertainties do not change the fact that Muszynianka intended to produce a mixed product. Indeed, the Claimant's primary business objective was, consistent with its commercial interests in both advancing and protecting its "Muszynianka" brand, to market the water from the Legnava Sources as Muszynianka Water,[739] which necessitated mixing.[740] In other words, mixing was an essential aspect of the Project.

ii. Law governing mixing and branding

388. The Claimant submits that Slovak law would govern the stages of production occurring in Slovakia, i.e., the extraction and treatment of the water, and Polish law would govern the remaining production steps taking place on Polish territory, i.e., mixing, bottling, and branding. It also argues that the Respondent was in agreement. By contrast, the Slovak Republic disputes having agreed to this division of applicable laws as it was unaware of the specificities of the Project occurring in Poland. It also claims that the Slovak authorities had in any event to ensure compliance with Slovak law throughout the entire production process.

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[735] Mosur WS II, **CWS-5**, ¶ 17 (emphasis added).

[736] Tr. 204:15-21 (Mosur).

[737] Tr. 220:22-24 (Mosur).

[738] Tr. 221:1-2 (Mosur).

[739] *Supra*, ¶¶ 379-383.

[740] As to Slovak law, *see* at *infra*, ¶ 400. As to Polish law, *see* Polish Mineral Water Regulation, **R-144**, Article 20(3) ("[i]t is allowed to combine natural mineral waters originating from various holes and to name them using single trade name if the water drawn from these holes meets the same requirements for chemical qualification")(emphasis added).

389. In support of its argument that the Respondent consented to Polish law applying to the production steps occurring in Poland, the Claimant refers only to one contemporaneous document: the Inspectorate's letter to GFT Slovakia of 16 December 2010,[741] which in pertinent part reads as follows:

> [W]e announce that the natural mineral springs in Legnava have been recognized under the existing legislation as well as proceedings for an authorization for the use and treatment of water from sources as well as the consequent inspection of resources and the inspection of compliance with statutory conditions and conditions arising from decisions on resource use and treatment of water from resources will be carried out under the legislation of the Slovak Republic.
>
> Since the natural mineral water will be filled into consumer packages in the bottling plant located in the territory of the Republic of Poland, the process of inspection and checking of compliance of the consumer packaging of the natural mineral waters shall be subject to the legislative regulations in force in the Republic of Poland and will be carried out by the competent authorities of the Republic of Poland.[742]

390. The Inspectorate's letter was an answer to the following request that Mr. Kacvinský, managing director of GFT Slovakia, had filed in November 2010:[743]

> [W]e kindly ask you to provide your opinion on the inspection of our sources in Slovakia. I understand that in the Slovak Republic you will inspect the quality of water in the sources and after its treatment, its quantity and compliance with other applicable legislation.
>
> We have received an opinion from the Polish National Institute of Public Health that the sources have been designated in compliance with the applicable regulations and the analyses have been conducted in the required extent, and the Institute requests a confirmation that in Slovakia the inspections will be carried out according to the applicable EU directives and Slovak law.[744]

391. As can be seen from the quotation above, the Inspectorate's letter indicates that the "inspection and checking of compliance of the consumer packaging" was expected to be performed by the Polish authorities pursuant to Polish law. That statement is in and of itself of little assistance here. It seems obvious that Polish authorities acting in Poland will apply Polish administrative law. It is a different question, however, one that the Inspectorate's letter leaves unanswered, whether GFT Slovakia, as holder of an Exploitation Permit for water extracted from Slovak soil, would be required to comply with Slovak law for the entire production process, including production activities taking place outside of the Slovak Republic. After all, in its letter of 24 March 2010, GFT Slovakia itself represented to the Inspectorate that it being a company registered in the Slovak

[741] *Supra*, ¶ 35.

[742] Letter from the Inspectorate to GFT Slovakia, 16 December 2010, **C-18**.

[743] *Supra*, ¶ 34.

[744] Letter from GFT Slovakia to the Inspectorate, 22 November 2010, **C-106**.

Republic, "the water will be supplied for bottling in line with the applicable Slovak regulations".[745]

392. The implementing legislations of the two member States involved are unhelpful to answer the question posed here. Although at the Hearing Prof. Müller-Graff opined in favor of shared responsibilities between States participating in a cross-border exploitation of mineral water,[746] implementing legislations must be interpreted in light of the Mineral Water Directive.[747] For its part, the Directive is clear in assigning a dominant (if not exclusive) role to the State of extraction and its regulations. That role does not accommodate shared responsibilities:

i. Article 1(1) of the Directive empowers the "responsible authority" of the Member State where the water is extracted to "recogni[ze]" the water as mineral water.[748] Upon the initiation of the bottling process,[749] that Member State must inform the EU Commission that the recognized mineral water can be added to the "list of natural mineral waters […] published in the Official Journal of the European Union".[750] This means that had GFT Slovakia ever gotten to the stage of finalizing its extraction, processing, and production plan, the water that it would extract from the Slovak Republic would have had to be recognized as natural mineral water and added to the EU's list of natural mineral waters at the instance of the Slovak Republic. The notification to the EU would require that the trade description, the source, and the place of exploitation, would have to be identified by the Slovak authorities.[751]

ii. Moving forward into the production process, Article 3 states that "[n]atural mineral water springs may be exploited and their waters bottled only in

[745] Letter from GFT Slovakia to Inspectorate, 24 March 2010, **C-87**, p. 1.

[746] Tr. 1180:2-1181:14 (Müller-Graff).

[747] *Uniplex (UK) Ltd v NHS Business Services Authority*, CJEU Case C-406/08, EU:C:2009:676, **RLA-136**, ¶ 45 ("In the case of national provisions transposing a directive, national courts are bound to interpret national law, so far as possible, in the light of the wording and purpose of the directive concerned in order to achieve the result sought by that directive").

[748] Mineral Water Directive, **R-40**, Art. 1(1). In the Slovak Republic, this authority is the State Spa Committee (Act on Mineral Waters, **R-35**, Arts. 6(1)(a), 6(4), 5(1)).

[749] Tr. 612:2-19 (Božíková).

[750] Mineral Water Directive, **R-40**, Art. 1(5).

[751] In the Slovak Republic, this function pertains to the Inspectorate (*see* Act on Mineral Waters, **R-35**, Art. 44(2)(e)) ("The Inspectorate carries out the following within the supervision: […] maintains a list and informs the relevant bodies of the European Union about the recognized natural mineral waters in the Slovak Republic that have met the conditions for bottling and consumer packaging or that have had that recognition revoked."); *see infra* fn. 762.

accordance with Annex II".[752] Moreover, according to Section 1 of Annex II, the "exploitation of a natural mineral water spring shall be subject to permission from the responsible authority of the country where the water has been extracted".[753] Thus, the Slovak Republic had responsibility for ensuring compliance with Annex II.

iii. Section 4 of Annex II provides that "[t]he responsible authority in the country of origin", that is the country where the water is extracted,[754] "shall carry out periodic checks to see whether", *inter alia*, the "provisions" set out in Sections 2 and 3 of Annex II "are applied by the person exploiting the spring".[755] This makes clear that the Slovak Republic was responsible for the carrying out of periodic checks in relation to water production.

iv. Section 2 of Annex II stipulates that the "[e]quipment for exploiting the water shall be so installed as to avoid any possibility of contamination and to preserve the properties, corresponding to those ascribed to it, which the water possesses at source".[756] To that effect, "the conditions of exploitation, particularly the washing and bottling equipment, shall meet hygiene requirements; in particular, the containers shall be so treated or manufactured as to avoid adverse effects on the microbiological and chemical characteristics of the natural mineral water".[757] This makes clear that the Slovak Republic was made responsible for the carrying out of periodic checks in relation to hygiene requirements.

v. Finally, Section 3 of Annex II states that "[w]here it is found during exploitation that the natural mineral water is polluted and no longer presents the microbiological characteristics laid down in Article 5, the person exploiting the spring shall forthwith suspend all exploitation, particularly the bottling process, until the cause of pollution is eradicated and the water complies with the provisions of Article 5".[758] Again, it was the Slovak Republic which was made responsible for ensuring that the exploiting person suspended all

[752] Mineral Water Directive, **R-40**, Art. 3.

[753] Mineral Water Directive, **R-40**, Annex II, § 1.

[754] O'Rourke ER I, **RER-4**, ¶ 39; O'Rourke ER II, **RER-8**, ¶ 32; Tr. 1172:5-19 (Müller-Graff).

[755] Mineral Water Directive, **R-40**, Annex II, § 4(b).

[756] Mineral Water Directive, **R-40**, Annex II, § 2.

[757] Mineral Water Directive, **R-40**, Annex II, § 2(c).

[758] Mineral Water Directive, **R-40**, Annex II, § 3.

extraction and bottling activities in the event of pollution or of the fact that the water no longer presented the same microbiological characteristics.

393. It follows from these provisions, that one state, the State of extraction, *viz*. the Slovak Republic in this case, is responsible for the recognition of a determined natural mineral water, ensuring the application of the Directive's provisions to the production process from extraction to bottling, and protecting the safety of the water so extracted from its territory.

394. The State of extraction which recognizes the water has still further reaching responsibilities. At the latest upon being bottled, mineral water becomes a commodity that enjoys freedom of movement across the European internal market.[759] That freedom, however, can be curtailed. A Member State which considers that a particular mineral water "does not comply with the provisions" of the Mineral Water Directive, or "endangers public health", "may temporarily restrict" or even "suspend" the "trade [of] that product within its territory".[760] In that event, the State of extraction must "provide all relevant information concerning [the] recognition of that water",[761] which entails an approval of the mineral water's trade name/description, the "name of [its] source", and the "place of [its] exploitation".[762] The same State must also provide "the results of the regular checks"[763] into the water's "original purity", "mineral content", "trace elements" and "other constituents" from extraction to bottling.[764]

395. It is thus self-evident from the structure and explicit wording of the Mineral Water Directive that the regulatory authorities of the Republic of Poland could take no step in relation to all of the foregoing activities, with the exception of whatever Polish regulations might also apply to the limited acts of bottling and marketing the mineral water.

396. Now, in a cross-border exploitation scenario such as that envisaged by Muszynianka in the present case, the question arises how the authorities of the Member State where the water is extracted could effectively discharge their functions given the territorial limits on

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[759] *Infra*, ¶¶ 580 *et seq*.

[760] Mineral Water Directive, **R-40**, Art. 11(1).

[761] Mineral Water Directive, **R-40**, Art. 11(2). *See also* Art. 1(5) and *supra*, ¶ 392.i.

[762] European Commission, "List of Natural Mineral Waters Recognized by Member States", https://ec.europa.eu/food/sites/food/files/safety/docs/labelling-nutrition_mineral-waters_list_eu-recognised.pdf, last accessed on 6 October 2020; *see also* List of recognized sources of natural healing waters and natural mineral waters in Slovakia, updated on 17 May 2018, **R-199**.

[763] Mineral Water Directive, **R-40**, Art. 11(2); *supra*, ¶ 392.iii.

[764] Mineral Water Directive, **R-40**, Art. 1, Annex I, Annex II.

their regulatory powers. According to the Slovak Act on Mineral Waters, a mineral source must be exploited in accordance with the Exploitation Permit,[765] which sets forth the "method and conditions of exploitation".[766] The permit also provides for the monitoring of the "hydrogeological, chemical, physical, microbiological and biological" content of the water throughout the production process.[767] Moreover, a permit holder is required to submit the results of the monitoring to the Inspectorate.[768] Otherwise, the Exploitation Permit may be revoked.[769] The Inspectorate can monitor compliance through "remote supervision".[770] Ms. Božíková explained at the Hearing that GFT Slovakia would have been under an obligation to provide samples at various points of the production process, including of water in bottles for assessment under the relevant Slovak decree.[771] That process would have enabled the Inspectorate to inform the EU Commission about the final product from the Legnava Sources, as required by the Act on Mineral Waters.[772]

397. The Tribunal further notes that, contrary to the interpretation offered by Prof. Müller-Graff,[773] the Polish Act on Nutrition Safety is consistent with its Slovak counterpart and the EU Directive. Indeed, it provides that the decision to recognize mineral water, which must cover its properties, trade name, label, and results of tests conducted throughout production,[774] can be taken either by the Polish "Chief Sanitary Inspector, if the water

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[765] Act on Mineral Waters, **R-35**, Arts. 10(3), 12(1).

[766] Act on Mineral Waters, **R-35**, Art. 13(1)(f).

[767] Act on Mineral Waters, **R-35**, Arts. 13(1)(h), 2(14).

[768] Act on Mineral Waters, **R-35**, Arts. 14(1)(j), (c).

[769] Act on Mineral Waters, **R-35**, Art. 17(7)(b) ("The State Spa Committee should initiate a proceeding for revocation of [an Exploitation Permit], if […] the source user severely breaches, despite a notice, the conditions set out [in the Act on Mineral Waters] or in the [Exploitation Permit]")(emphasis added).

[770] Act on Mineral Waters, **R-35**, Art. 44(2)(b).

[771] Tr. 655:4-17, 656:8-14 (Božíková) ("[I]f the [Exploitation Permit] had been issued, [given the complexity of the Project] we would have stipulated a condition in the permit—we always stipulate or put conditions in a permit for users—to the effect that the quality of water in bottles would be assessed according to [Decree No. 100/2006, Exhibit R-139]. This is our Decree. Because the [holder of an Exploitation Permit] has a duty […] to send us an analysis from all points that we set for him for sampling or from all spots from the beginning until the end of production[,] this would enable comparison of the analysis of the finished product**.** […] I don't know whether the assessment of mineral water in Poland is being assessed according to the same conditions as in Slovakia, but for a laboratory, it's never a problem to carry out an analysis according to the conditions [set out in the Exploitation Permit] and to give a result of the analysis […]")(emphasis added).

[772] Act on Mineral Waters, **R-35**, Art. 44(2)(e); *see also* Tr. 612:2-19 (Božíková)(" The EU has a list of mineral waters, and each state enters recognized mineral waters in the list according to strictly set rules what should be provided with respect to each source. Since we, as a state institution, recognised the water from Legnava, we were obliged to report when this water starts to be bottled—at that moment when it will start to be bottled—to the European list, what is the name of the water, how it is bottled and from which sources. It means that […] we would have to, in the exploitation permit, list the conditions under which the water could be bottled and the Polish side would have to fulfil this because we cannot leave an information for the EU Commission that water is from Legnava [and nothing more]. That's unthinkable for us as a state authority")(emphasis added).

[773] *Supra*, ¶ 392.

[774] Polish Act on Nutrition Safety, **R-288**, Art. 35; *see also* Decision of Chief Sanitary Inspector dated 6 July 2016, **R-374**.

has been extracted from a hole located in the Republic of Poland,[775] or by the "competent body of a different European Union Member State, if the water has been extracted from a hole located in that state".[776]

398. On the basis of the foregoing reasons, the Tribunal concludes that Slovak law and where pertinent EU law would have governed the entire production process of the water from the Legnava Sources, and that the Slovak authorities had the responsibility of ensuring compliance with the requirements set by EU and national law, an allocation of responsibility which the Polish State recognized. As a result, Slovak law would have applied to the mixing and branding of the water from the Legnava Sources. The Tribunal observes further that, as a company incorporated under the law of the Slovak Republic, GFT Slovakia would be fully subject to the regulatory control of the competent Slovak authorities to whom it would be reporting.

399. In an attempt to avoid this conclusion, the Claimant argues that the Polish Act on Nutrition Safety concerns only the trading in Poland of mineral water "extracted and bottled" in Poland or in another country,[777] and "does not regulate the situation of recognition of the water as a natural mineral water extracted in one EU Member State, i.e., the Slovak Republic, and then bottled in another Member State, i.e., the Republic of Poland".[778] According to the Claimant, it would "be for the Polish authorities to decide which institutions are competent to recognize the mixed product that Muszynianka considered producing".[779] The Tribunal finds this argument unconvincing. It fails to reconcile such purported exclusive application of Polish law with the clear language of the Mineral Water Directive.

iii. Legality of the Claimant's plans on mixing

400. According to Articles 8(1)(c) and 9(2) of the Slovak Food Code, mineral waters from different sources can be mixed and "placed on the market under one trade description", provided the relevant sources integrate the same "output area";[780] the water of the different sources is "of the same type as regards its chemical composition";[781] and the

[775] Polish Act on Nutrition Safety, **R-288**, Art. 34.1(1).

[776] Polish Act on Nutrition Safety, **R-288**, Art. 34.1(2).

[777] C-PHB, ¶ 136.

[778] C-PHB, ¶ 137.

[779] C-PHB, ¶ 137.

[780] Slovak Food Code, **R-60**, Art. 9(2).

[781] Slovak Food Code, **R-60**, Art. 9(2).

total "mineralization" of the individual sources does not differ more than the "natural fluctuation of the total mineralization of the main source of mineral water".[782]

401. The Tribunal will review these three requirements for the two scenarios envisaged by the Claimant, namely mixing the water from the Legnava Sources among themselves **(a)** or with water from Polish sources exploited by Muszynianka **(b)**.[783]

(a) Mixing the Legnava Sources among themselves

(aa) Output area

402. The term "output area" refers to an "area where water outflows to the earth surface" whether naturally or through artificial boreholes.[784] The CJEU has held that mineral water comes from the same "output area" (or, in the Mineral Water Directive, the same "spring"),[785] if it "is drawn from one or more natural or bore exits", and "originates in one and the same underground water table or in one and the same underground deposit".[786] In hydrogeology, the term "underground water table" corresponds to the term "aquifer" or "hydrogeological collector"[787] and the term "underground deposit" corresponds to the term "accumulation area".[788]

403. The Claimant only intended to exploit the Legnava Sources LH-2A to LH-5.[789] It is now common ground that these boreholes (i) share the same output area (i.e., the output area of Legnava – Na Rovne);[790] (ii) originate in the same underground water table (i.e., the same aquifer or hydrogeological collector),[791] referred to as the Piwniczna Sandstones, the Krynica Flysh, or the Magura Nappe; and (iii) form in the same

[782] Slovak Food Code, **R-60**, Art. 9(2).

[783] *Supra*, ¶¶ 385 *et seq*.

[784] Ženišová ER I; **RER-3**, ¶ 9(c); *see also* Marcin ER I, **RER-11**, ¶ 15.

[785] Mineral Water Directive, **R-40**, Article 8(2) and Annex I § 1 ("It shall be prohibited to market natural mineral water from one and the same spring under more than one trade description […]'Natural mineral water' means microbiologically wholesome water, within the meaning of Article 5, originating in an underground water table or deposit and emerging from a spring tapped at one or more natural or bore exits")(emphasis added).

[786] *Hotel Sava Rogaska v. Republika Slovenija*, CJEU Case C-207/14, EU:C:2015:414, Judgment, 24 June 2015, **R-41**, ¶ 45.

[787] Marcin ER I, **RER-11**, ¶ 18.

[788] Marcin ER I, **RER-11**, ¶ 19.

[789] Zoning Permit, **C-21**, p. 2; Building Permit, **C-22**, pp. 2-3.

[790] Marcin ER I, **RER-11**, ¶ 24; Ženišová ER I, **RER-3**, ¶¶ 5, 24.

[791] Marcin ER I, **RER-11**, ¶ 27; Szczepańska-Plewa and Szczepański ER I, **CER-4**, pp. 3-4.

underground deposit (i.e., the same accumulation area).[792] It follows that this first condition is fulfilled.

(bb) Chemical composition

404. Article 6 of Decree 100 provides that natural mineral waters are classified based on the Predominant Ion Classification ("PIC").[793] Article 11 of Decree 100 further stipulates that a basic analysis of mineral waters must contain the water's chemical indicators, which are subject, *inter alia*, to "Gazda's classification indices" ("Gazda").[794] It results from these provisions that the determination of the chemical composition of natural mineral water in the Slovak Republic involves the use of both the PIC and Gazda indices.[795]

405. The Parties' hydrogeology experts agree that, pursuant to the PIC, the water from boreholes LH-2A and LH-5 have the same chemical composition, namely, HCO3- Ca- Mg.[796] As to the Gazda classification, the Respondent's experts, Dr. Marcin and Prof. Ženišová, opine that boreholes LH-3 and LH-4 have a different chemical type of HCO3–Ca,[797] while their counterparts, Profs. Szczepańska-Plewa and Szczepański, express no opinion as they conducted no analysis.

406. The documentation prior to this arbitration indicates that, pursuant to Gazda, the waters from the Legnava Sources all share the same chemical composition of HCO3-Ca-Mg. This is in particular true of the 2008 Final Report which GFT Slovakia commissioned upon the discovery of boreholes LH-2A, LH-3, LH-4 and LH-5.[798] The Ministry of Environment approved the 2008 Final Report in May 2009 through the Maximum Quantities Decision for these boreholes.[799] Nothing in the Maximum Quantities Decision suggests that the Ministry of Environment did not properly scrutinize the 2008 Final Report before approving its content and findings.

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[792] Marcin ER I, **RER-11**, ¶¶ 27-29; Tr. 770:22-772:17 (Szczepański).

[793] Ministry of Health, Decree 100, **R-139**, § 6(1)(c).

[794] Ministry of Health, Decree 100, **R-139**, Art. 11(1)(c)(6).

[795] *See* the same conclusion reached by Prof. Ženišová ER II; **RER-7**, ¶ 19.

[796] Szczepańska-Plewa and Szczepański ER I, **CER-4**, p. 6; Marcin ER I, **RER-11**, ¶ 24; Ženišová ER II, **RER-7**, ¶ 31.

[797] Marcin ER I, **RER-11**, ¶ 24; Ženišová ER II, **RER-7**, ¶¶ 33-34, 19-22.

[798] 2008 Final Report, **R-138**, pp. 44, 47, 50, 53; *supra*, ¶¶ 20-21.

[799] LH-2A to LH-5 Maximum Quantities Decision, **C-15**, § I, p. 2 (of the PDF); *supra*, ¶ 22.

407. The Respondent criticizes the Maximum Quantities Decision for not conducting "its own investigation to verify whether the findings of the [2008 Final Report] were accurate".[800] At the same time, its experts who challenged these findings did not carry out their own investigation either. They based their opinion merely on the data underlying the 2008 Final Report.[801] Yet, as the Respondent itself emphasizes, it is the "*real* factual situation" that is "decisive", something that could only be "revealed" with certainty "during [an] inspection of the waters".[802]

408. In conclusion, while it is uncontroversial that the Legnava Sources are of the same chemical type under the PIC methodology, it is doubtful that they are pursuant to Gazda. Under the circumstances and bearing in mind the burden of proof, the Tribunal finds that it is not established that the Legnava Sources have a different chemical composition.

409. For the above reasons, the Tribunal finds that the Respondent has been unable to establish satisfactorily that mixing Legnava Sources among themselves would fail to meet the chemical composition requirement in the Slovak Food Code.

(cc) Fluctuation of mineralization

410. The Respondent's expert, Prof. Ženišová, opined that this condition was not satisfied, concluding that no combination of the Legnava Sources shows permissible differences in terms of mineralization with respect to the "main source" as required by Article 9(2) of the Slovak Food Code.[803] She explained that it was necessary to assess "two variants for each combination [of boreholes], depending on which source is considered as the main one", yielding four scenarios: LH-2A and LH-5, LH-5 and LH-2A, LH-3 and LH-4, and LH-4 and LH-3.[804]

411. Neither the Claimant nor its experts offered an assessment on this condition. Nevertheless, the Claimant submits that Prof. Ženišová's mineralization fluctuation analysis is unreliable because she "did not provide the results of her own ionic balance calculations and assessed the hydrogeochemical type of the water from the Legnava Sources incorrectly [by applying the Gazda test]".[805]

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[800] R-PHB, ¶ 113.

[801] Ženišová ER II, **RER-7**, ¶¶ 26, 28; Marcin ER I, **RER-11**, fn. ¶ 31; Tr. 862:23-863:3, 864:25-865:6 (Marcin).

[802] *See* R-PHB, ¶ 113 (italics by the Respondent).

[803] Ženišová ER I, **RER-3**, ¶¶ 27 *et seq*., 46.

[804] Ženišová ER I, **RER-3**, ¶ 31.

[805] C-PHB, ¶ 129.

412. The Tribunal understands that Prof. Ženišová's pairings are correlated to her conclusion that, pursuant to the Gazda test, boreholes LH-2A and LH-5 are of the chemical type HCO3-Ca-Mg, while boreholes LH-3 and LH-4 are of the chemical type HCO3-Ca. In other words, Prof. Ženišová's analysis on mineralization is contingent on her determination on chemical composition. However, the Tribunal has found above that the latter was inconclusive. As a result, it cannot hold that the former is established.

413. It follows that there is no clear evidence that mixing the Legnava Sources would have shown impermissible fluctuation in terms of the water's mineralization. Consequently, as the Party bearing the onus of proving illegality,[806] the Respondent has not discharged its burden to establish that the third condition would not be fulfilled. Hence, the Tribunal must consider that the Claimant's plan to mix the water from the Legnava Sources among themselves would not be illegal.

(b) Mixing the Legnava and the Polish Sources

414. The Tribunal notes that the Claimant's plans to mix Legnava Sources with Polish sources or to mix the Legnava Sources among themselves were alternative to each other. It also notes that it appears reasonable to consider that, as rational economic actors, GFT Slovakia and its owners would have opted for a lawful solution. As it was just established that mixing the Legnava Sources among themselves was lawful, GFT Slovakia had in any event a lawful option available and whether its other alternative was legal or not thus loses its relevance. If it was illegal, it would simply have been abandoned (assuming it was pursued at all) in favor of the first option.

415. On this basis, the Tribunal considers that it can dispense with the analysis of the lawfulness of the plan to mix the Legnava and the Polish sources.

iv. The legality of the Claimant's branding plans

416. As was discussed earlier, the Claimant had plans to market the water from the Legnava Sources under its existing trade descriptions/names "*Muszynianka*" and "*Muszynianka*

[806] *See Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, **RLA-155**, ¶ 229 ("[T]he Respondent bears the burden of proving illegality"); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, **CLA-98**, ¶ 324 ("Respondent has failed to demonstrate that Claimants, as a factual matter, committed illegalities in the process of acquiring their investment in the Argentine Airlines. In this respect, the onus is on Respondent"); *see also Copper Mesa Mining Corporation v. Republic of Ecuado*r, PCA Case No. 2012-2, Award, 15 March 2016, ¶ 5.59.

Plus".[807] Alternatively, it could have envisaged to market the water as "Muzynianka-Legnava".[808]

417. In its relevant part, Article 6(1) of the Slovak Food Code provides that the name of the source or of its location can be added to the trade name or description, adding that the consumer should not be misled about the "place of exploitation" of the water:

> The trade description of mineral water […] may be supplemented by the name of source of mineral water or […] by name of locality, municipality or place where the source of mineral water or spring water is located, while the source is used in the place determined by this labelling and secures that the labelling is not misleading with respect to the place of exploitation of the mineral water […]. [809]

418. The provision just quoted implements Article 8(1) of the Mineral Water Directive, the language of which is worth quoting because it is clearer:

> "The name of a locality, hamlet or place may occur in the wording of a trade description provided that it refers to a natural mineral water the spring of which is exploited at the place indicated by that description and provided that it is not misleading as regards the place of exploitation of the spring".[810]

419. Further, in line with Article (9)(1)(a) of the Mineral Water Directive,[811] Article 11(2)(a)(1) of the Slovak Food Code prohibits the use of indications that do not reflect reality, especially in respect of the water's origin:

> It is forbidden […] to use on the packaging, the label or in whatsoever form of advertising such indications, names, trademarks, brand names, pictures or other visual or other signs which in case of […] mineral water suggest the characteristic which the water does not possess, particularly regarding its origin, the date of approving to exploit it, analyses results or any information to guarantees of authenticity.[812]

420. It is clear from these provisions that the legislation seeks to avoid any possibility that consumers be misled about the origin, source, or spring of the water.[813] Or in the words

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[807] *Supra*, ¶ 384.

[808] *Supra*, ¶ 384.

[809] Slovak Food Code, **R-60**, Art. 6(1) (emphasis added).

[810] Mineral Water Directive, **R-40**, Art. 8(1) (emphasis added).

[811] Mineral Water Directive, **R-40**, Art. 9(1)(a) ("It shall be prohibited, both on packaging or labels and in advertising in any form whatsoever, to use indications, designations, trademarks, brand names, pictures or other signs, whether figurative or not, which (a) in the case of a natural mineral water, suggest a characteristic which the water does not possess, in particular as regards its origin, the date of the authorisation to exploit it, the results of analyses or any similar references to guarantees of authenticity") (emphasis added).

[812] Slovak Food Code, **R-60, Art.** 11(2)(a)(1) (emphasis added).

[813] The Claimant specifies that it would indicate the actual source of the water on the label, together with the chemical composition as required (Reply, ¶¶ 154-155). Hence this is not the dispute here. It rather hinges upon the use of a potentially misleading trade name, such as "*Muszynianka"* or "*Muszynianka* Plus" for water sourced in Legnava.

of the CJEU, the purpose "is to ensure that, in each case, the […] indication of the place of exploitation of a natural mineral water enables consumers, when making a purchase, to unequivocally identify the provenance of the water in question […]".[814]

421. This rationale is evident from Articles 11(2)(a)(1) of the Food Code and 9(1)(a) of the Directive and may be also seen from Article 6(1) of the Slovak Food Code and the corresponding Article 8(1) of the Directive and. Indeed, the latter provisions emphasize the concept of exploitation, which is not equivalent to "extraction". Article 8 of the Mineral Water Directive distinguishes between "the name of the spring" and the "place of its exploitation",[815] and Annex II of the Directive indicates that the terms "extraction" and "exploitation" are distinct, albeit related, as it confirms that exploitation includes all production stages up to bottling.[816]

422. In a project where the production would have been spread over two locations in two countries, i.e., Legnava and Muszyna, a trade name such as "*Muszynianka"* or "*Muszynianka Plus"* that alludes to only one of these locations may be regarded as misleading.

423. In this context, the Tribunal cannot accept Prof. Müller-Graff's suggestion that a trade description showing only "the location of the last substantive action and responsibility in the chain of the production", namely bottling in Muszyna, would not mislead consumers.[817] Precisely because the Project entailed a cross-border exploitation of the Legnava Sources, all of which would have originated in the Slovak Republic, the water's "provenance" cannot be circumscribed to Polish territory alone.

424. This conclusion arises even more clearly from the application of Articles 11(2)(a)(1) of the Slovak Food Code and 9(1)(a) of the Mineral Water Directive, which prohibit indications on the origin of the water that are not consistent with reality. How could a consumer know that the water's origin is Legnava in Slovakia when the trade name refers to Muszyna in Poland? To ask the question is to answer it: branding the water from the

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[814] *Hotel Sava Rogaska v. Republika Slovenija*, CJEU Case C-207/14, EU:C:2015:414, **R-41**, ¶ 33.

[815] Mineral Water Directive, **R-40**, Art. 8(3) ("When the labels or inscriptions on the containers in which the natural mineral waters are offered for sale include a trade description different from the name of the spring or the place of its exploitation, that place of exploitation or the name of the spring shall be indicated in letters at least one and a half times the height and width of the largest of the letters used for that trade description").

[816] Mineral Water Directive, **R-40**, Annex II, § 1 ("Exploitation of a natural mineral water spring shall be subject to permission from the responsible authority of the country where the water has been extracted" […]) (emphasis added), § 2 ("the conditions of exploitation, particularly the washing and bottling equipment, shall meet hygiene requirements […]. However, point (d) need not be applied to mineral waters extracted, exploited and marketed in the territory of a Member State […]")(emphasis added).

[817] Müller-Graff ER I, **CER-3**, ¶ 104; Reply, ¶ 147.

Legnava Sources as "*Muszynianka"* or "*Muszynianka Plus"* would be misleading and, hence, contrary to the law. The same cannot be said with respect to a trade name such as "*Muszynianka-Legnava"*. Such name would cover the two locations involved in the production and thus conform to reality. Hence, it would not be misleading and would not breach the law. Since the Claimant could lawfully have adopted such brand at the appropriate moment in the development of its business plan and of the regulatory process, the Tribunal holds that this aspect of Muszynianka's branding plans was legal albeit late discovered, i.e., elaborated in the course of this arbitration.

425. In conclusion of this review of the Respondent's illegality objection, the Tribunal cannot but dismiss that objection. This conclusion will also play a role in the assessment of the FET claim which follows.

B. FAIR AND EQUITABLE TREATMENT

1. The Claimant's Position

426. Muszynianka primarily claims that the Respondent breached the guarantee of fair and equitable treatment prescribed in Article 3(2) of the BIT by violating its legitimate expectations.

427. The Claimant submits that Article 3(2) constitutes an "unqualified FET standard formulation".[818] It makes no reference to the minimum standard of treatment under public international law,[819] showing that the Contracting Parties did not intend to limit the protection to a customary international law minimum standard.[820] Rather, Article 3(2) provides a broad scope of protection, which requires the State to preserve the investor's legitimate expectations, and to act in good faith, in a transparent, consistent, and non-discriminatory manner.[821]

428. With respect to legitimate expectations, the Claimant argues that they may arise both from specific assurances and from the legal framework existing at the time of the

[818] Reply, ¶ 823.

[819] Reply, ¶¶ 825, 829.

[820] Reply, ¶¶ 826-828, 835, referring to *OKO Pankki Oyj and others v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007, **CLA-120**, ¶ 246; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, **RLA-74**, ¶ 125; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1March 1 2012, **CLA-3**, ¶ 265.

[821] Reply, ¶ 839, referring to *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, **RLA-94,** ¶ 602.

investment.[822] It submits that the Slovak authorities gave "multiple" and "specific representations" that GFT Slovakia would be able to carry out its intended activity.[823] More specifically, prior to Muszynianka's investment, GFT Slovakia received specific assurances which expressed general support for the Project,[824] and on which the Claimant is entitled to rely as Goldfruct's successor-in-interest:[825]

i. Between 2002 and 2006, the Ministry of Environment granted three "exclusive" Exploration Permits.[826]

ii. In March 2005, the Ministry of Health recognized borehole LH-1 as a spring of natural mineral water.[827] In doing so, it recognized that the area of Legnava belonged to the regional geological unit of Krynica flysch shared with Poland.[828] This "natural connection became one of the basic assumptions behind the Project and the Claimant's Investment".[829]

iii. In February 2005 and May 2009, the Ministry of Environment issued the Maximum Quantities Decisions,[830] which were not dependent on a given transportation mode of the water to a bottling plant. Under those Decisions, as long as the quantities of water extracted from the boreholes would not exceed the quantities prescribed, the "Legnava Sources would remain renewable and fully sustainable".[831]

[822] Reply, ¶ 844, 717-724, referring to *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award. 4 April 2016, **RLA-30**, ¶ 552 ; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, **RLA-96.** ¶¶ 130-131, 139; *Tecnicas Medioambientales Tecmed v. Mexico*, Case No. ARB (AF)/00/2, Award, 29 May 2003, **RLA-24,** ¶ 154; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, **RLA-79**, ¶ 568; *Murphy Exploration and Production Company International v. Republic of Ecuador,* PCA Case No. 2012-16 (UNCITRAL), Partial Final Award, 6 May 2016, **CLA-117,** ¶ 249.

[823] Reply, ¶ 855.

[824] Reply, ¶¶ 736-746.

[825] Soc, ¶ 66.

[826] S*upra*, ¶¶ 15,16, 20.

[827] *Supra*, ¶ 19.

[828] LH-1 Mineral Water Recognition, **C-14**, p. 5.

[829] Reply, ¶ 737.

[830] *Supra*, ¶¶ 18, 22.

[831] Reply, ¶ 738.

iv. In July 2009, the State Spa Commission officially recognized the water from boreholes LH-2A to LH-5 as springs of natural mineral water.[832]

v. In March 2010, the Inspectorate expressly stated that it had "no objections against [GFT Slovakia's] plan of us[ing] the natural mineral sources in Legnava",[833] which at the time "included the main premise of the Project", i.e., the cross-border transportation of the extracted water.[834]

vi. In December 2010, the Inspectorate confirmed that the inspection of the Project would be conducted in both Slovakia and Poland, with a division of competences,[835] according to which, inspection of the bottling process and marketing of the water would be carried out in Poland by Polish authorities, and all preceding stages would be assessed in Slovakia by Slovak authorities.[836]

vii. In February 2012, the State Spa Commission "acknowledged that cross-border pipelines [would] be built by GFT Slovakia in order to transport the mineral water from the Slovak Republic to a bottling plant in Poland". It voiced no objection provided GFT Slovakia obtained a building permit. Immediately thereafter, GFT Slovakia undertook the first steps to this effect.[837]

viii. In June 2012, the Municipality of Legnava granted the Zoning Permit,[838] by which the "Mayor of Legnava officially acknowledged the cross-border water transport from Legnava to Muszyna as a part of the Project".[839]

ix. In July 2012, the Ministry of Environment confirmed the legality of the construction of cross-border pipelines. It also confirmed that there were no impediments against the exploitation of the prescribed amount of water from the Legnava Sources. It explained that natural mineral water extracted from the ground could not be deemed exclusive property of the Slovak Republic

[832] *Supra*, ¶ 23.

[833] Letter from the Inspectorate to GFT Slovakia, 30 March 2010, **C-17**; *see also* Letter from GFT Slovakia to the Inspectorate, 24 March 2010, **C-87**; *supra*, ¶ 32.

[834] Reply, ¶ 740.

[835] *Supra*, ¶¶ 33-35; *see also* Letter from the Inspectorate to GFT Slovakia, 16 December 2010, **C-18**.

[836] Reply, ¶ 741.

[837] Reply, ¶ 742, referring to *supra*, ¶¶ 42-43.

[838] *Supra*, ¶ 45.

[839] Reply, ¶ 745.

and should be considered as "goods" subject to the EU rules on free movement of goods, by which the Ministry of Environment confirmed the legality of cross-border water transport.[840] Importantly, the Ministry's position was prompted by an opinion of the EU Commission's Internal Market Problem Solving Network ("SOLVIT") Centre for Slovakia, which had earlier confirmed that unbottled water was a "commodity" under EU law and was thus protected by the free movement of goods principle governing the EU internal market.[841]

x. In September 2012, after receiving GFT Slovakia's first supplement to its Exploitation Permit application,[842] the State Spa Committee confirmed that (i) the application was "satisfactory" and "me[t] the requirements under the Act on Mineral Waters"; and (ii) the "only obstacle to issue the Exploitation Permit" was the lack of the Building Permit.[843] This gave GFT Slovakia reason to believe that the Exploitation Permit would be issued upon presenting the Building Permit.[844]

429. The Claimant further states that the Slovak authorities gave "at least three clear and specific assurances" after Muszynianka acquired GFT Slovakia,[845] manifesting support for the Project and its cross-border nature:

i. In October 2013, the State Spa Committee provided a "binding, positive standpoint in the context of" the Building Permit proceedings.[846] This was significant because that permit would allow GFT Slovakia not only to build a mineral water treatment plant, but also to lay the pipelines under the Poprad river that were necessary for the cross-border production infrastructure.[847]

[840] Reply, ¶ 743, referring to Letter from the Ministry of Environment to GFT Slovakia, 26 July 2012, **C-114**.

[841] C-PHB, ¶ 225, citing Letter from SOLVIT Center SR, Section of Government Legislation, Department of Law Approximation to Dušan Čerešňak, General Director of Section of Water Bodies, Ministry of Environment, 28 May 2012, **C-171**.

[842] *Supra*, ¶ 47.

[843] Reply, ¶ 744, referring to *supra*, ¶ 48.

[844] Reply, ¶ 744.

[845] Reply, ¶ 753.

[846] Reply, ¶ 749; Letter from the State Spa Committee to GFT Slovakia, 10 October 2013, **C-109;** *supra*, ¶ 56.

[847] Reply, ¶ 749.

ii. In May 2014, the District Office in Prešov issued the Building Permit,[848] which referred to the numerous "binding" and "positive standpoints" issued by other authorities, including but not limited to the Ministries of Justice and Health. Moreover, the Building Permit was "issued specifically for the purposes of filing it with the State Spa Commission in order to finally obtain the Exploitation Permit for the Legnava Sources".[849]

iii. In July 2014, Minister Žiga publicly stated that the "then-existing legal framework" did not prohibit the "transfer and transportation" of water abroad "via pipelines and tanks" or otherwise.[850]

430. The Claimant contends that the representations enumerated above establish its case for legitimate expectations.[851] Through the Constitutional Amendment and the denial of the Exploitation Permit, the Respondent eradicated these expectations and, therefore, breached the FET standard in Article 3(2) of the BIT.[852]

431. Irrespective of any specific allowances, it is Muszynianka's submission that the regulatory framework existing prior to the Constitutional Amendment also gave rise to legitimate expectations that the Project could be carried out as originally intended.[853] The Claimant accepts that the FET standard does not imply that the legal framework remains static. However, the host State should implement changes in "a reasonable and predictable manner", in good faith, and with proportionality.[854]

432. In this respect, the Claimant contends, prior to the Constitutional Amendment Slovakia allowed cross-border transport of extracted mineral water via pipelines,[855] as Minister Žiga's statements showed.[856] While the Slovak Republic may argue that "the regulation

[848] *Supra*, ¶ 54.

[849] Reply, ¶ 750, referring to *supra*, fn. 100.

[850] Reply, ¶ 751, referring to *supra*, ¶ 72.

[851] Reply, ¶ 756.

[852] Reply, ¶ 856.

[853] Reply, ¶¶ 758-761, 855.

[854] Reply, ¶ 845-851, referring to *ADC Affiliate Ltd. et al. v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CLA-40,** ¶¶ 423-424; *PSEG GLOBAL INC. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. the Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, **RLA-97,** ¶ 255; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, **CLA-62**, ¶¶ 364, 370-371, 381-382.

[855] Reply, ¶ 200.

[856] Reply, fn. 133, referring to Parliamentary Session, 2 July 2014, **C-35**; *supra*, ¶ 72.

of water exports was ambiguous",[857] Article 2(3) of the Constitution provides that "[e]veryone may do what is not forbidden by a law and no one may be forced to do what the law does not enjoin".[858] Hence, so says the Claimant, "despite being a novelty", GFT Slovakia's operation could be "legally launched".[859] As confirmed by Ms. Božíková at the Hearing, at the time when GFT Slovakia submitted the Exploitation Permit application, the State Spa Committee considered giving "permission" to the Project.[860]

433. Prior to making the regimes changes, nothing suggested that the legal framework for the export of natural mineral water "could change".[861] Neither the SMER's 2012 Programme Declaration, nor the Water Resolution that followed, warned about forthcoming restrictions or limitations as to the transportation of mineral water.[862] Indeed, so says the Claimant, the Water Resolution was "primarily aimed" at protecting drinking water (not mineral water) in Žitný ostrov, located on the country's southern border, hundreds of kilometers away from Legnava in the north. Notably, unlike Legnava, Žitný ostrov had been a "Protected Water Management Area" since 1978.[863]

434. Furthermore, the Claimant reiterates that control over the sustainable exploitation of natural mineral water already existed in Slovak regulation (hence, the Maximum Quantities Decisions).[864] Therefore, at the time, it could not be anticipated that cross-border transport of water in bulk would be prohibited, especially considering that the "method of transport has no influence on the sustainability" of the exploitation of a water source,[865] and that, according to the Water Report, 140 out of the 141 hydrogeological regions in the country presented a "favorable [water] balance" and thus "the possibility of further problem-free exploitation of groundwater resources".[866]

435. In sum, Muszynianka argues, it could not have expected the disproportionate and unreasonable content of the Constitutional Amendment.[867] This is particularly so given

[857] Reply, ¶ 201, referring to SoD, ¶ 227.

[858] Slovak Constitution, **R-351**, Article 2(3).

[859] Reply, ¶ 202.

[860] Tr. 633:11-24 (Božíková).

[861] Reply, ¶ 860; SoC, ¶¶ 248-260.

[862] Reply, ¶ 860; SoC, ¶¶ 248-260.

[863] SoC, ¶ 260.

[864] Reply, ¶¶ 526; SoC, ¶¶ 162-170.

[865] Reply, ¶ 862.

[866] C-PHB, ¶ 168, citing Water Report, **R-37**, p. 8.

[867] Reply, ¶¶ 862, 891-892, 520-521; SoC, ¶ 552; C-PHB, ¶¶ 185-192

that, as late as 2 July 2014, the Slovak Government "simply" sought the introduction of a "fee for water export".[868] The decision to ban the cross-border transport of water in unbottled form was taken practically "overnight",[869] when on 8 July 2014 the approach changed "dramatically",[870] aligning with "nationalistic sentiments" that targeted the Claimant.[871]

436. In respect of the general legal framework, the Claimant also argues that GFT Slovakia had a "legal right"[872] to the issuance of the Exploitation Permit:[873]

i. By supplementing its Exploitation Permit application on 1 August 2012,[874] GFT Slovakia met all the positive conditions required by the Act on Mineral Waters for the issuance of that permit.[875] The declaration of the Legnava Sources as natural mineral water had been given years before,[876] and the State Spa Committee itself stated that the application was complete.[877] Moreover, at the time, none of the three negative conditions set out in the Act on Mineral Waters calling for the denial of the Exploitation Permit could have been established.[878]

ii. Accordingly, as all the conditions were met on 1 August 2012,[879] the State Spa Committee was under an obligation to issue the permit within 60 days pursuant to Article 49(2) of the Administrative Procedure Code.[880] Approximately 40 days had already passed between the initial application in December 2011 and the stay of the proceedings in February 2012.[881] Consequently, 20 days remained for the administrative proceedings to end, with the result that the Exploitation Permit should have been issued on 21

[868] Reply, ¶ 863; *supra*, ¶ 71.

[869] Reply, ¶ 864.

[870] Reply, ¶ 7.

[871] Reply, ¶ 864.

[872] Reply, ¶¶ 208, 270; Jakab ER, **CER-2**, ¶¶ 87-110.

[873] Reply, ¶¶ 205 et seq.

[874] *Supra*, ¶ 47.

[875] Reply, ¶¶ 271-274, referring to Act on Mineral Waters, **R-35**, Article 12(6).

[876] *Supra*, ¶¶ 19,23

[877] *Supra*, ¶ 48.

[878] Reply, ¶ 275, referring to Act on Mineral Waters, **R-35**, Article 12(7).

[879] Reply, ¶ 418; *supra*, ¶ 436.i.

[880] SoC, ¶ 229; Reply, ¶ 442; Administrative Procedure Code, **C-98**, Article 49(2).

[881] *Supra*, ¶¶ 41-43

August 2012.[882] Had the 60-day time limit been respected, GFT Slovakia would have been entitled to exercise its rights under the Exploitation Permit at least until 15 March 2018, even if the Constitutional Amendment had then entered into force.[883] Indeed, it could have secured the other permits (the occupancy and water treatment permits) before the entry into force of the Constitutional Amendment on 1 December 2014.[884]

437. By contrast, the Slovak Republic took steps contrary to its own domestic law and the Claimant's legitimate expectations:

i. The State Spa Committee unlawfully stayed the Exploitation Permit proceedings in February 2012 "due to the need to first resolve the preliminary issue" of the Building Permit;[885] and maintained that stay in September 2012.[886] Yet, a building permit is not a requirement to secure an Exploitation Permit,[887] and thus the State Spa Committee had no basis to stay the proceedings.[888]

ii. The State Spa Committee never requested an extension of the 60-day time period to issue the Exploitation Permit pursuant to Article 49(2) of the Administrative Procedure Code.[889] This provision foresees the possibility of an extension "when an administrative authority is not able to decide within the statutory time-limits due to the need to properly establish the facts".[890] Rather than availing itself of that provision,[891] the Committee remained inactive for months and "simply waited for the Constitutional Amendment to come into force" in order to deny the Exploitation Permit on that basis alone.[892]

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[882] Reply, fn. 230.

[883] Reply, ¶¶ 260-262; Jakab ER, **CER-2**, ¶ 136.

[884] Reply, ¶¶ 296-297; Jakab ER, **CER-2**, ¶ 40.

[885] Decision of the State Spa Committee, 8 February 2012, **C-20**, p. 3; *supra*, ¶¶ 42-43.

[886] *Supra*, ¶ 48.

[887] Reply, ¶¶ 247 et seq.

[888] Reply, ¶ 436-439, referring to Jakab ER, **CER-2**, ¶¶ 157, 160-163; C-PHB, ¶¶ 258-259.

[889] Reply, ¶ 238; *see also supra*, fn. 880.

[890] Reply, ¶ 223, referring to Jakab ER, **CER-2**, ¶ 19.

[891] Reply, ¶¶ 221-228.

[892] Reply, ¶ 417; *supra*, ¶ 61.

438. Lastly, the Claimant argues that the Respondent independently breached the FET standard by targeting the Claimant through the Constitutional Amendment.[893] In response to the Respondent's argument that it should have expected the introduction of the Constitutional Amendment,[894] Muszynianka stresses that awareness of coming legal changes "does not exculpate the State's willful targeting".[895]

2. The Respondent's Position

439. The Respondent argues that the FET standard of the BIT is "substantially identical to the current minimum standard of treatment in customary international law".[896] Relying on Article 31(3)(c) of the VCLT, which provides that tribunals must take into account the relevant rule of international law applicable to the relations between the treaty parties, it argues that the customary minimum standard of treatment "constitutes such a rule" and should guide the interpretation of the FET standard in the BIT.[897] Accordingly, the Respondent argues, a breach of FET is "subject to a high threshold and requires a balanced analysis of the State's conduct and that of the investor, including the level of the investor's due diligence and its assessment of risk associated with entering into a particular business environment".[898]

440. Expectations, so says the Respondent, are only protected if they are based on "assurances" given by the host State "at the time the investment was made and relied on" by the investor.[899] These assurances must be "specific".[900] Similarly, legitimate expectations with respect to the stability of the legal framework can only arise if the host

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[893] Reply, ¶¶ 870 et seq.

[894] SoD, ¶¶ 469 et seq.; Rejoinder, ¶¶ 268 et seq.

[895] Reply, ¶ 878, referring to *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, **CLA-122**, ¶ 303.

[896] SoD, ¶¶ 419, 424, referring to *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, **RLA-94**, ¶¶ 597-600.

[897] SoD, ¶¶ 422-423, referring to *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, 27 August 2009, Award, **RLA-85**, ¶ 176.

[898] SoD, ¶ 425.

[899] SoD, ¶¶ 426-427, referring to *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, **RLA-95**, ¶ 340; *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, **CLA-13**, ¶ 318; *Técnicas Medioambientales Tecmed S.A, v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, **RLA-24**, ¶ 154; *LG&E Energy Corp.,LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, **RLA-96**, ¶ 127; *Waste Management, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, **RLA-86**, ¶ 98; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, **RLA-35**, ¶¶ 9.3.8-9.3.9.

[900] SoD, ¶¶ 428-431, referring to *Walter Bau v. Thailand*, UNCITRAL, Award, 1 July 2009, **CLA-78**, ¶ 11.11 (emphasis added); *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, **RLA-74**, ¶ 121**;** *Crystallex International Corporation v Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **RLA-30**, ¶ 547**.**

State has given an "express undertaking" not to modify its legal or regulatory framework,[901] or if such legal framework was created to "attract" or "encourage" foreign investment,[902] and the changes were not foreseeable at the time of the investment.[903]

441. Against this backdrop, the Respondent contends that the FET claim must fail, even if the Tribunal were to hold that the Constitutional Amendment was not an appropriate exercise of Slovakia's police powers *quod non*.[904]

442. Regarding the general legal framework,[905] the Respondent argues that the Claimant's reliance on Article 2(3) of the Constitution is inapposite[906] and ignores Article 2(2) which allows state authorities to "act only on the basis of the Constitution, within its limits, and to the extent and in a manner defined by law".[907] Moreover, the Respondent submits that Muszynianka knew or should have known about the impeding changes to the Slovak legal framework on waters.[908] Contrary to the Claimant's allegations,[909] the March 2012 Programme Declaration was not limited to control and protection over access to water by the local population.[910] When it came to environmental protection and to the regulation of water resources, "everything was on the table".[911] In fact, the Claimant itself concedes that the "main area of concern" for the Slovak Republic "was the alleged threat of uncontrolled exploitation and export of water from the Southern Slovakia".[912] There was no reason to believe that the Government's focus would be exclusively on Žitný ostrov.[913]

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[901] SoD, ¶ 432-435, referring to *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, **CLA-56**, ¶ 217; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, 19 December 2013, **RLA-108**, ¶ 629; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 , **RLA-34**, ¶¶ 332-333**.**

[902] SoD, ¶ 440-441, referring to *LG&E Energy Corp.,LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, **RLA-96**, ¶ 133; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, **CLA-62**, ¶ 365.

[903] SoD, ¶ 436-437, referring to *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, **RLA-34**, ¶¶ 331, 335; *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, **RLA-25**, Part IV, Chapter D, p. 5, ¶¶ 9,10.

[904] Rejoinder, ¶ 264.

[905] *Supra*, ¶¶ 432 et seq.

[906] Rejoinder, ¶ 415; referring to Reply, ¶ 215.

[907] Rejoinder ¶ 415, citing Slovak Constitution, **R-351**, Article 2(2).

[908] Rejoinder, ¶ 268.

[909] Reply, ¶ 484.

[910] *Supra*, ¶ 64.

[911] Rejoinder, ¶ 272, citing SoC, ¶ 484.

[912] Rejoinder, ¶ 272, citing Reply, ¶ 484.

[913] Rejoinder, ¶ 209; *supra*, ¶ 433.

As the Programme Declaration shows, the SMER intended to protect all water sources.[914]

443. Furthermore, for the Respondent, the Water Report should have alerted the Claimant. It similarly concluded that water was a "strategic raw material" and called for regulation.[915] In particular, it provided that the Government "reserve[d] the right to make decisions on the disposal, transport and transfers of groundwater resources outside the territory of the [Slovak Republic] in accordance [with] the public interest of the state".[916] To that effect, it further recommended the implementation of measures "requir[ing] consent of the Government of the [Slovak Republic] or under Resolution of the Government of the [Slovak Republic] for the given specific transfer or transport across the state borders".[917] This shows that the Government was publicly considering a "major overhaul" of the legal framework on waters, with "specific focus" on cross-border transport.[918]

444. Moreover, so says the Slovak Republic, the Water Resolution that followed shortly thereafter made it clear that stricter regulation was coming and that projects concerning water export would require approval,[919] meaning that "some water export projects would not meet the criteria and would be banned".[920] A cross-border ban of Muszynianka's Project was thus a "possibility", just as a denial of its Exploitation Permit when the amendment announced in the Water Resolution would eventually come into force.[921]

445. The Respondent insists that Muszynianka chose to invest notwithstanding these facts, which were amply publicized and discussed. In this context, the Claimant's argument that the measures under discussion in 2012 were narrower in scope than those ultimately introduced through the Constitutional Amendment is irrelevant.[922] Given that the Slovak framework on waters was not created to attract foreign investment and that no assurances were given that it would remain unchanged,[923] the Slovak Republic was not "hamstrung" by the matters addressed in 2012 when considering the Constitutional

[914] Rejoinder, ¶ 273.

[915] Rejoinder, ¶¶ 274-277; *supra*, ¶ 65.

[916] Rejoinder, ¶ 275, referring to Water Report, **R-37**, p. 15.

[917] Rejoinder, ¶ 277, referring to Water Report, **R-37**, p. 15.

[918] Rejoinder, ¶ 279.

[919] Rejoinder, ¶ 281; *supra*, ¶¶ 67-68.

[920] Rejoinder, ¶ 281.

[921] Rejoinder, ¶ 281.

[922] Rejoinder, ¶ 285.

[923] Rejoinder, ¶ 286.

Amendment two years later.[924] It could consider any changes to the law that were not discriminatory and were founded on good faith public policy.[925] Muszynianka could not have legitimately expected otherwise, particularly given its "lackluster due diligence" when purchasing GFT Slovakia.[926] Had the Claimant considered the Inspectorate's preliminary opinion on 30 March 2010,[927] that letter alone would have shown that its expectations were ill-founded.[928]

446. Regarding the legal framework,[929] the Respondent argues that the Claimant was not entitled to the issuance of the Exploitation Permit before the Constitutional Amendment. It puts forward six main arguments in support.

447. First, the positive conditions listed in the Act on Mineral Waters set out the "minimum requirements" to be considered by the State Spa Committee.[930] Nothing prevented the State Spa Committee from considering other "lawful prerequisites", such as compliance with the Slovak rules on water mixing, branding, and bottling,[931] which the Claimant's plan failed to do.

448. Second, the negative conditions provided in the Act on Mineral Waters allow the State Spa Committee to deny an Exploitation Permit on public interest grounds,[932] embodying an overriding duty of administrative bodies that goes beyond conformity with the law.[933] The notion of public interest entails an element of discretion[934] and encompasses "the majority of facts that GFT Slovakia and Muszynianka withheld from the Spa Committee",[935] especially the Claimant's intention to mix and to sell the water from the Legnava Sources as Muszynianka Water. Having failed to disclose such material

[924] Rejoinder, ¶ 288.

[925] Rejoinder, ¶ 288.

[926] Rejoinder, ¶¶ 289-300.

[927] Letter from the Inspectorate to GFT Slovakia, 30 March 2010, **C-17**; *supra*, ¶ 32.

[928] Rejoinder, ¶ 295. The Respondent developed the arguments summarized here up to *infra* ¶ 453 mainly in respect of the non-impairment standard (Rejoinder, ¶¶ 386 et seq.). However, because they were raised by the Claimant in connection with FET, they concern legitimate expectations, and also have an impact on expropriation, they are summarized here for easier understanding.

[929] *Supra*, ¶ 436.

[930] Rejoinder, ¶¶ 432-433, referring to Act on Mineral Waters, **R-35**, Article 12(6).

[931] Rejoinder, ¶ 433.

[932] SoD, ¶ 447.

[933] Rejoinder, ¶ 438, referring to Potasch ER II, **RER-6**, ¶¶ 62-63, 79.

[934] Rejoinder, ¶¶ 438, 440, referring to Administrative Procedure Code, **R-104,** Article 3(2); *see also* R-PHB, ¶ 205.

[935] R-PHB, ¶ 204.

aspects of the Project, the Claimant could have no legitimate expectations to obtain the Exploitation Permit.[936]

449. Contrary to the Claimant's allegations,[937] the State Spa Committee never declared that the Project was in conformity with public interest during the Building Permit proceedings. It expressed no opinion about the legality or the public interest associated with the overall Project.[938]

450. Third, the Claimant could not have expected the Exploitation Permit by 21 August 2012 in any event,[939] as the application was only complete on 11 July 2014 with the submission of the Building Permit that the State Spa Committee had required in February 2012.[940] Notably, GFT Slovakia never challenged the State Spa Committee's decision to stay the proceedings due to the lack of the Building Permit, which it could have done if it believed that the decision was improper.[941]

451. Fourth, any delay in the State Spa Committee's decision over the Exploitation Permit had no effect on the validity of such decision. The time limits provided in the Administrative Procedure Code are "disciplinary procedural deadlines".[942] Their non-compliance "cannot by itself cause unlawfulness of the decision of the administrative authority and the participant may not derive any rights from these time limits in relation to the substantive decision".[943]

452. Fifth, even if the Exploitation Permit had been issued before the Constitutional Amendment, *quod non*, the Claimant could not have expected to exercise its rights under the permit after 1 December 2014.[944] Pursuant to Article 17(3)(b) of the Act on Mineral Waters,[945] the State Spa Committee would have modified the Exploitation Permit *ex*

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[936] R-PHB, ¶ 206.

[937] *Supra*, fn. 1056.

[938] Rejoinder, ¶ 441.

[939] *Supra*, ¶ 436(i-ii).

[940] Rejoinder, ¶¶ 403-406, referring to Potasch ER II, **RER-6**, ¶¶ 11-12, 136, 140-154.

[941] Rejoinder, ¶ 407.

[942] Rejoinder, ¶ 422, citing Judgement of the Regional Court in Bratislava, No. 1A/6/2016 - 210, 28 February 2018, **R-252**, ¶ 115.

[943] Rejoinder, ¶ 421, citing Judgment of the Supreme Court of the Slovak Republic, No. 5Sžo/47/2011, 31 May 2012, **RLA-113**, p. 4.

[944] *Supra*, fn. 883.

[945] Act on Mineral Waters, **R-35**, Article 17(3)(b).

officio to bring it into conformity with the Constitution as amended.[946] Such a modification would have been "perfectly lawful" under the "untrue retroactivity" rule in Slovak law.[947]

453. Sixth and last, the Claimant could not have expected to obtain the occupancy permits before the adoption of the Constitutional Amendment as these permits could only been issue upon completion of the relevant works, i.e., of the water treatment plant and the related pipelines.[948]

454. In connection with the "specific assurances" which it allegedly gave, the Slovak Republic submits that the Claimant's argument fails for "two independent reasons".[949] First, the Slovak Republic could not have approved the Project, because neither GFT Slovakia nor Muszynianka ever disclosed all of the details of the Project.[950] The Claimant never disclosed that it would mix the Legnava Sources, nor that it would transfer the water to another entity for bottling, nor that the mixed water would be sold under the Muszynianka brand.[951] Had the Claimant done so, the Slovak authorities would not have granted the Exploitation Permit, irrespective of the Constitutional Amendment.[952]

455. Second, while the Slovak authorities may have approved discrete parts of the Project, it did not grant all the applications necessary to carry out the Project. Each of the individual permitting authorities only makes findings on the matters assigned to it and it expresses no views on the Project as a whole.[953] In any event, the Claimant's allegations with respect to the specific assurances purportedly given before and after its purchase of GFT Slovakia are misleading.[954]

456. The Respondent therefore submits that Muszynianka had no legitimate expectations to exploit the Legnava Sources pursuant to the Project. Accordingly, the claim with respect to Article 3(2) of the BIT must be dismissed.[955]

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[946] SoD, ¶¶ 252-254.

[947] SoD, ¶ 258, referring to Potasch ER I, **RER-2**, ¶ 164.

[948] Rejoinder, ¶¶ 444-447; Letter from GFT Slovakia to Inspectorate, 10 July 2014, **C-113 / R-55**, p. 1; *supra*, ¶ 57.

[949] Rejoinder, ¶ 301.

[950] Rejoinder, ¶ 307.

[951] Rejoinder, ¶ 307.

[952] Rejoinder, ¶¶ 308-309, referring to, *inter alia,* Letter from the Inspectorate to GFT Slovakia, 30 March 2010, **C-17;** Božíková WS II, **RWS-4**, ¶ 17.

[953] SoD, ¶¶ 98-99; Rejoinder, ¶ 302; Potasch ER I, **RER-2**, ¶ 49.

[954] Rejoinder, ¶¶ 303-305.

[955] Rejoinder, ¶ 320.

3. Analysis

457. The Tribunal will start by setting out the content of the FET standard in so far as relevant (**a**). It will then review whether the Claimant had legitimate expectations arising from specific assurances and, if so, whether these expectations were breached (**b**). Thereafter, it will examine the alleged FET breaches related to Slovakia's legal framework, including the claimed entitlement to the issuance of the Exploitation Permit (**c**), the adoption of the Constitutional Amendment (**d**), and the State Spa Committee's conduct during the Exploitation Permit proceedings (**e**).

a. Content of FET standard

458. Article 3(2) of the BIT reads as follows:

> Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. […]

459. A first question is whether this language reflects the customary international law minimum standard of treatment, as the Respondent argues, or whether it embodies a broader autonomous standard, as the Claimant submits. Unlike some other treaties, the BIT does not refer to the "international minimum standard" or similar wording.[956] Rather, the Treaty speaks of "fair and equitable treatment". The question thus becomes what these words mean.

460. In light of the rules for treaty interpretation as codified in Articles 31 and 32 of the VCLT and, in particular, the primacy of the Treaty's text,[957] the "ordinary meaning" of the terms "fair and equitable" is of little assistance in this inquiry.[958] These notions can "only be

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[956] *See*, e.g. NAFTA, Article 1105, entitled "Minimum Standard of Treatment".

[957] For decisions holding that FET is only equated to MST if the BIT expressly states so (which is not the case here), s*ee*, *inter alia*, *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04 (UNCITRAL), Partial Award, 17 March 2006, **CLA-8**, ¶ 294; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, ¶ 263; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, **RLA-74,** ¶¶ 125 *et seq.*; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Excerpts of Award, 1 March 2012, **CLA-3,** ¶ 265; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶ 1003; *Valeri Belokon v. Kyrgyz Republic*, PCA Case No. AA518 (UNCITRAL), Award, 24 October 2014, ¶¶ 224-225, *et seq.*; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **RLA-30,** ¶¶ 530-536; *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 316; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017, ¶ 666; *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, ¶ 530; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, ¶¶ 804-810.

[958] *See Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 504; *see also Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability,

defined by terms of almost equal vagueness",[959] such as "just", "even-handed", "unbiased", and "legitimate". Although vague, these terms "are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law".[960]

461. Irrespective of the difficulty of capturing the elusive essence of FET, and of the nuances in the formulation of the standard by each tribunal, there is a common understanding of the core elements of FET among investment treaty tribunals. Autonomous FET provisions, such as Article 3(2) of the BIT, have been deemed to protect against State conduct that frustrates an investor's reasonable and legitimate expectations,[961] or that is otherwise contrary to the minimum standard of treatment, unreasonable, discriminatory, disproportionate, or overall lacking in good faith, due process, transparency and consistency.[962] The Tribunal shares this understanding.

462. In line with the standard set out above, a State fails to accord FET if it does not respect the legitimate expectations which the investor held at the time of the making of the investment. This raises the question of the scope of protection of the investor's legitimate expectations. The Tribunal finds that the main components of the doctrine of FET and legitimate expectations are helpfully summarized by the tribunal in *Antaris v. Czech Republic*.[963] To qualify as legitimate, the investor's expectations must be based on assurances (i) given by the State in order to encourage the making of the investment; (ii) addressed specifically to the investor; and (iii) that are sufficiently specific in content. In addition, an investor must establish that it placed reliance upon the assurance. While

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14 January 2010, ¶ 258; *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, ¶ 357.

[959] *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04 (UNCITRAL), Partial Award, 17 March 2006, **CLA-8,** ¶ 297.

[960] *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04 (UNCITRAL), Partial Award, 17 March 2006, **CLA-8,** ¶ 284; *see also MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 113; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, **CLA-13**, ¶ 360; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 290.

[961] *Tecnicas Medioambientales Tecmed, SA v United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, **RLA-24,** ¶ 154; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, **RLA-96**, ¶ 127; *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, ¶ 114; *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007, **CLA-58**, ¶ 298.

[962] *See*, *inter alia*, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **CLA-19,** ¶ 677; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284; *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, ¶ 336. For the sake of clarity, the State measure at issue need not be "outrageous", amount to bad faith, or be otherwise 'shocking', for it be in breach of FET. *See*, *inter alia*, *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 116.

[963] *Antaris GmbH and Göde v. Czech Republic*, PCA Case No. 2014-01 (UNCITRAL), Award, 2 May 2018, ¶ 360.

some arbitral decisions may have chosen a broader definition of legitimate expectations, the cumulative three-pronged test just referred to well respects the essence of FET in this Tribunal's opinion, which is confirmed by numerous investment treaty awards.[964] In keeping with this test, the Tribunal will examine the assurances allegedly given by Slovakia to the Respondent, both before and after its acquisition **(b)**.

463. The Claimant also invokes legitimate expectations arising from Slovakia's general legal framework, specifically expectations that:

i. The Respondent would comply with its own substantive administrative law and issue the Exploitation Permit,[965] to which GFT Slovakia had a "legal right" before the Constitutional Amendment.[966]

ii. The Respondent would not dismantle the legal framework existing at the time of making the investment, which allowed for the cross-border exploitation of underground mineral water,[967] through unforeseeable, unreasonable, discriminatory, disproportionate and inconsistent measures such as the Constitutional Amendment.[968]

iii. The Respondent would comply with its own procedural law and decide on the Exploitation Permit in a timely manner, instead of delaying the administrative proceedings in order to deny the Exploitation Permit pursuant to the Constitutional Amendment.[969]

464. In the Tribunal's view, these allegations cannot be properly characterized as claims based on legitimate expectations under FET.

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[964] *See, inter alia, Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador,* ICSID Case No. ARB/04/19, Award of 18 August 2008, **RLA-95,** ¶ 340; *Marvin Roy Feldman Karpa v United Mexican States,* ICSID Case No ARB(AF)/99/1, Award, 16 December 2002, **RLA-32,** ¶¶ 148-149; *Frontier Petroleum Services Ltd v The Czech Republic,* UNCITRAL, Final Award, 12 November 2010, ¶ 287; *Cargill, Incorporated v. Republic of Poland,* ICSID Case No. ARB(AF)/04/2, Award, 5 March 2008, **RLA-42,** ¶ 490; *El Paso Energy International Company v. The Argentine Republic,* Award, 31 October 2011, **RLA-27,** ¶¶ 375-379; *White Industries Australia Limited v. The Republic of India,* UNCITRAL, Final Award, 30 November 2011, ¶ 10.3.17; *Peter A. Allard v. The Government of Barbados,* PCA Case No. 2012-06 (UNCITRAL), Award, 27 June 2016, ¶¶ 194 *et seq.*; *Venezuela Holdings B. V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award, 9 October 2014, ¶ 256.

[965] Reply, ¶¶ 758-760.

[966] *Supra*, ¶ 436.

[967] *Supra*, ¶ 432.

[968] Reply, ¶¶ 858-865, 483-498; C-PHB, ¶¶ 160 *et seq.*.

[969] Reply, ¶¶ 761, 430-447.

465. First, whether GFT Slovakia had an entitlement to the issuance of the Exploitation Permit under Slovak law concerns the interpretation and application of the Respondent's domestic law as part of the applicable law pursuant to Article 7(3) of the BIT.[970] If the Tribunal were to establish that GFT Slovakia indeed held a right to the Exploitation Permit under Slovak law, the question that ensues is whether the failure to recognize that right through the denial of the Exploitation Permit was arbitrary or otherwise contrary to FET. This inquiry, however, is required irrespective of legitimate expectations.

466. Second, absent specific assurances, FET does not protect expectations in relation to the stability of a State's legal framework,[971] at least when the legal framework was not adopted to attract foreign investments. [972] The Claimant does not identify any specific assurances that the Respondent would maintain its laws on water exploitation. Nor did the Claimant rely on any Slovak legislation or regulation adopted to encourage investments. Hence, the Claimant's submission that it had legitimate expectations that the Respondent would not dismantle the legal framework applicable at the time of the investment through the Constitutional Amendment is ill-conceived. States are free to modify the legal regime applicable at the time of the investment to the extent they do so within the limits prescribed by FET.[973] Accordingly, regardless of the investor's expectations, FET bars unreasonable, discriminatory, or disproportionate reforms, adopted contrary to due process.[974]

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[970] *Supra*, ¶ 162.

[971] *See* e.g. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, **RLA-34**, ¶ 332; *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Award, 19 December 2013, ¶ 629.

[972] For cases recognizing upholding legitimate expectations regarding legal frameworks deemed to (i) have contained specific guarantees; and/or (ii) have been adopted precisely to attract foreign investors and encourage their investments, *see* e.g. *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, **RLA-96,** ¶ 139; *Murphy Exploration and Production Company International v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶¶ 252-253; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, **CLA-62,** ¶ 365.

[973] Contrary to the Claimant's submissions, the foreseeability or predictability of a State measure is not a yardstick to determine whether a legislative or regulatory change is FET-compliant. While the Tribunal is familiar with the often-repeated formula that predictability is central to FET, it also notes that this assertion is rarely, if at all, substantiated. The Tribunal is unaware of a generally accepted principle requiring changes in the legal framework of a State to be predictable or foreseeable, and the Claimant has pointed to none. Moreover, the inaptness of predictability as a self-standing component of FET is underscored by the fact that even a foreseeable measure can be in breach of FET. An investor may foresee that the host State is likely to adopt arbitrary, unreasonable, discriminatory, disproportionate or other measures contrary to FET. Yet, that would not preclude the host State's international responsibility for a breach of FET (*see e.g. ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CLA-40**, ¶ 424).

[974] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, **RLA-34**,, ¶ 332; *TECO Guatemala Holdings, LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23, Award, 19 December 2013, ¶ 630.

467. Third, FET implies that State authorities are under an obligation to act in good faith in accordance with the law that governs them.[975] The non-compliance with domestic laws by State authorities may form the basis of a successful FET claim, if (i) there is proof of arbitrary conduct in the application of the laws in question; or (ii) there is some form of abuse of power.[976]

468. Consequently, the Tribunal will examine the foregoing allegations under the components of FET not linked to the protection of expectations, in sections **(c)** to **(e)** below

b. Muszynianka's expectations based on specific assurances

469. The Claimant submits that, upon the purchase of GFT Slovakia, it legitimately expected that (i) "the Exploitation Permit for the Legnava sources would be issued and that it would be allowed to transport the extracted water from the Slovak Republic to Poland in the way it intended from the very beginning";[977] and (ii) that ultimately it would be able to "capitalize from its investment" through the increased production of Muszynianka Water.[978] It claims that such expectations were based on specific assurances given by the Respondent before and after its acquisition of GFT Slovakia in December 2012.[979]

470. Pre-investment, the Claimant alleges specific assurances contained in the following: (i) the Exploration Permits issued by the Ministry of Environment in May and November 2002 and February 2006;[980] (ii) the recognition of the Legnava Sources as springs of natural mineral water by the Ministry of Health and the State Spa Committee in March 2005 and July 2009;[981] (iii) the Maximum Quantities Decisions issued by the Ministry of Environment and the State Spa Committee in February 2005 and May 2009;[982] (iv) the Inspectorate's communications of 30 March and 16 December 2010;[983] (v) the State Spa Committee's decisions during the Exploitation Permit proceedings of 8 February and 19

[975] *See e.g. Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, ¶ 242.

[976] See e.g. C*rystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **RLA-30**, ¶ 552; *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award, 7 March 2017, ¶¶ 523, 527.

[977] Reply, ¶¶ 204, 48, 259, 300, 725; *see also* SoC, ¶ 425.

[978] Reply, ¶¶ 384, 735.

[979] Reply, ¶¶ 736-755.

[980] Supra, ¶¶ 15, 16, 20.

[981] *Supra*, ¶¶ 19, 23.

[982] *Supra*, ¶¶ 18, 22.

[983] *Supra*, ¶¶ 32, 33-35.

September 2012;[984] (vi) the Zoning Permit issued by the Municipality of Legnava in June 2012;[985] and (vii) the communication by the Ministry of Environment (regarding the inter-governmental agreement between Slovakia and Poland discussed during the Zoning Permit proceedings) of 26 July 2012.[986]

471. Post-investment, the Claimant alleges specific assurances contained in the following: (i) the State Spa Committee's positive standpoint in the context of the Building Permit proceedings of October 2013;[987] (ii) the Building Permit issued by the District Office in Prešov in May 2014;[988] and (iii) some statements made by Minister Žiga in July 2014 during the parliamentary debate of the revised draft amendment to the Act on Waters.[989]

472. It is well established that the "relevant point in time for the assessment of legitimate and reasonable expectations [refers] to the time at which the investment is made".[990] Investors cannot base their legitimate expectations on assurances on which they could not have relied when making their investment.[991] As a result, the Claimant cannot invoke the post-investment assurances as basis for its expectations.

473. It true that some investments are effected in several consecutive steps over time. In those cases, "legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganization of the investment".[992] In similar terms, the tribunal in *AES* considered the claimants' alleged legitimate expectations both at the time they first invested in Hungary, and when they made additional investments in order to advance the activities of the locally incorporated company that they had previously acquired.[993] However, this is not the

[984] *Supra*, ¶¶ 43, 48.

[985] *Supra*, ¶ 45.

[986] Letter from the Ministry of Environment to GFT Slovakia, 26 July 2012, **C-114**.

[987] *Supra*, ¶ 56.

[988] *Supra*, ¶ 54.

[989] *Supra*, ¶ 72.

[990] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **CLA-28** ¶ 7.76.

[991] *Invesmart B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, ¶¶ 252-253; *Jurgen Wirtgen and others v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, ¶¶ 421-423, 436.

[992] *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, ¶ 287.

[993] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, **RLA-35**, ¶¶ 9.3.13 – 9.3.17.

situation here, where the only relevant investment is Muszynianka's acquisition of GFT Slovakia in December 2012.[994]

474. As to the alleged representations made prior to the acquisition of GFT Slovakia, the Claimant argues that it is entitled to rely on the statements made by Slovak authorities to Goldfruct as its predecessor in interest.[995] These statements all concerned GFT Slovakia or the Project and they were made available to the Claimant before it bought the shares in GFT Slovakia.[996] Hence, the Tribunal sees no reason of principle why the Claimant could not invoke these assurances.

475. Turning now to the different acts on which Muszynianka relies, the Tribunal finds that the Claimant cannot invoke the Exploration Permits, the recognition of the Legnava Sources as springs of natural mineral water, or the Maximum Quantities Decisions.[997] These three sets of administrative acts, which the Claimant characterizes as "specific assurances" that "manifested general support for the Project",[998] were taken between May 2002 and July 2009. At that time, Goldfruct and GFT Slovakia still purported to build a bottling plant in Slovakia and thus exploit the Legnava Sources exclusively on Slovak territory.[999] Yet, this was not the production model contemplated when Muszynianka purchased GFT Slovakia. At that time, the Claimant "considered only one production model" for the Project,[1000] namely "the construction of a water treatment plant in Legnava, [transporting the] treated water with pipelines under [the Poprad river] to Muszyna, and bottling [the] water in Muszyna".[1001]

476. While Goldfruct started considering the possibility of a bottling plant in Poland in the second half of 2009,[1002] it is only in March 2010 that GFT Slovakia voiced that intention

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[994] The Tribunal recalls that in 2013 Muszynianka increased its share capital in GFT Slovakia (*supra,* ¶ 291)—which the Respondent does not dispute—and that these funds "were used by GFT Slovakia to carry out its activity in Legnava" (Reply ¶ 600), which includes the procurement of the Building Permit in May 2014 (*supra*, ¶ 54). In this context, the Claimant argues that the Building Permit also qualifies as a protected investment (*supra*, ¶ 280.iii). Be this as it may, Muszynianka's additional allocation of funds preceded the alleged assurances now invoked by the Claimant. Therefore, the chronology is such that the Claimant could not have relied on these assurances upon making its 2013 additional contribution.

[995] SoC, ¶ 66, 426; *see also* Reply, ¶ 722.

[996] List of documents provided to Muzynianka, 8 August 2012, **R-335**; Mosur WS I, **CWS-1**, ¶¶ 40, 54; Mosur WS II, **CWS-5**, ¶¶ 10, 15-17.

[997] *Supra*, ¶ 470.

[998] Reply, ¶¶ 746, 736-745.

[999] *Supra*, ¶¶ 25-28.

[1000] Mosur WS I, **CWS-1**, ¶ 46.

[1001] Mosur WS I, **CWS-1**, ¶ 46.

[1002] Zieliński WS I, **CWS-3**, ¶ 29.

with the Slovak authorities.[1003] It follows that any statements by Slovak authorities about the Project prior to March 2010 concerned a business model that the Claimant did not consider when making its investment.

477. In conclusion, only the alleged representations from March 2010 through Muszynianka's acquisition of GFT Slovakia on 31 December 2012 are *prima facie* capable of creating legitimate expectations. These statements can be divided into those emanating from the Inspectorate and the State Spa Committee **(i)** and those from the Municipality of Legnava and the Ministry of Environment in the context of the Zoning Permit **(ii)**.

i. Statements/acts by the Inspectorate and the State Spa Committee

478. The Claimant argues that the Inspectorate's communications of 30 March **(a)** and 16 December 2010 **(b)**, and the State Spa Committee's decisions of 8 February and 19 September 2012 **(c)**, constitute assurances that the Exploitation Permit would be issued and that the Project would unfold as intended.[1004]

(a) Inspectorate's communication of 30 March 2010

479. On 24 March 2010, GFT Slovakia requested a "preliminary opinion" from the Inspectorate regarding its intention to exploit the Legnava Sources. According to GFT Slovakia, it would build a water treatment plant in Slovakia and transport the treated water under the Poprad river into Poland, where it would be bottled. GFT Slovakia described the Project as follows:

> – on plot 966/1 we will build a hall with water tanks and a water treatment plant. The hall will feature the technology of water accumulation and treatment as well as source monitoring. The outlet will be equipped with sample collection points for water quality monitoring.
>
> – The source water will be supplied to the hall through state and municipal plots, and plots owned by the company.
>
> – The service itself will be provided across the Poprad river in the territory of the Republic of Poland. /Site plan attached/. Water would be supplied to the bottling plant beneath the Poprad river.[1005]

[1003] Letter from GFT Slovakia to Inspectorate, 24 March 2010, **C-87**; *supra*, ¶¶ 31- 32.

[1004] SoC, ¶¶ 292, 425 *et seq.*; Reply, ¶¶ 740-744.

[1005] Letter from GFT Slovakia to Inspectorate, 24 March 2010, **C-87, p. 1**.

480. The Inspectorate answered on 30 March 2010 declaring that it had no objections to the Project. However, in its answer, the Inspectorate expressly warned GFT Slovakia that the mixing of Legnava Sources was prohibited:

> The Ministry of Health of the Slovak Republic – Inspectorate of Spas and Water Springs has no objections against your plan of use of the natural mineral sources in Legnava. However, we would like to draw your attention to the following facts:
>
> *1. We suggest shortening the pipeline for transport of water to the Republic of Poland (enclosed);*
>
> *2. In accordance with EU laws, the water from respective sources may not be combined and bottled in consumer packs and thus it is necessary to take this fact into account in the designed water storage, treatment and transport […].*[1006]

481. Even a cursory reading of the language just quoted shows that the Inspectorate's communication cannot be the source of the alleged expectations. Even if the Tribunal were to accept that this preliminary opinion,[1007] which did not emanate from the entity competent to issue exploitation permits,[1008] constituted an assurance that an Exploitation Permit would be granted, *quod non*, that permit would not have been aligned with the Claimant's key Project assumptions. It would only have covered the Project described in GFT Slovakia's letter of 24 March 2010, namely a cross-border exploitation without mixing. Yet, that was not the Claimant's Project. The Claimant intended to mix the waters from the Legnava Sources.[1009]

(b) Inspectorate's communication of 16 December 2010

482. The Claimant relies on the Inspectorate's letter of 16 December 2010[1010] as basis for the expectation that the Inspectorate agreed that the production stages taking place in Poland, including mixing and bottling, would be "governed by Polish law and carried out by competent authorities of the Republic of Poland",[1011] and that, consequently, there was "no need […] to seek a corresponding declaration on the possibility of mixing the water from the particular Legnava Sources under Slovak law".[1012]

[1006] Letter from the Inspectorate to GFT Slovakia, 30 March 2010, **C-17** (italics in original).

[1007] SoD, ¶ 451.

[1008] Act on Mineral Waters, **R-35**, Article 12.

[1009] *Supra*, ¶¶ 385 *et seq*.

[1010] Letter from the Inspectorate to GFT Slovakia 16 December 2010, **C-18**; in answer to a letter from GFT Slovakia to the Inspectorate, 22 November 2010, **C-106**.

[1011] SoC, ¶ 429; *see also* Reply, ¶ 741.

[1012] C-PHB, ¶ 69.

483. It is recalled that, as was already established,[1013] the Inspectorate's communication did not address whether Polish law excluded the application of Slovak law to the production stages occurring in Poland. More importantly, the Inspectorate's communication makes no mention of mixing. This is indeed unsurprising when one takes into account that, before this arbitration, GFT Slovakia at no point notified the Slovak authorities of its intent to market a mixed product.[1014] Absent such disclosure, the Inspectorate's communication could not be read as opining on the possibility to mix the Legnava Sources.

(c) State Spa Committee's decision of 8 February and communication of 19 September 2012

484. The State Spa Committee's decision of 8 February 2012 and communication of 19 September 2012 were issued in the context of the Exploitation Permit proceedings. The February 2012 decision stayed the proceedings due to GFT Slovakia's failure to adduce information required by the Act on Mineral Waters.[1015] It also requested the provision of a Building Permit as a "preliminary issue".[1016] The September 2012 communication stated that, following the supplementation of the application on 1 August 2012,[1017] the required information was complete. It maintained the stay, however, because the Building Permit was still outstanding.[1018]

485. According to the Claimant, through its decision of February 2012, the State Spa Committee acknowledged and took no issue with the fact that the Project entailed cross-border pipelines, provided that GFT Slovakia obtained a related Building Permit.[1019] Muszynianka further claims that, in the communication of September 2012, the State Spa Committee confirmed that the Exploitation Permit application met all the requirements under the Act on Mineral Waters, subject to the Building Permit.[1020] Hence,

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[1013] *Supra*, ¶ 391.

[1014] Tr. 378:12-16 (Zieliński) ("**MR ANWAY**: Thank you. Mr Zielinski, did you ever request approval from the Slovak authorities to mix the natural mineral water in Legnava? **MR ZIELINSKI:** No, I did not"); Tr. 229:13-17 (Mosur) ("**MR ALEXANDER:** Would you agree that you never told the Slovak authorities that you would be mixing Slovak mineral water in Poland? **MR MOSUR**: We did not inform the Slovak authorities"); Tr. 471:12-18 (Kacvinský) ("**MR ANWAY**: Mr Mosur was asked yesterday: 'You did not advise the Slovak authorities that you planned to mix, correct?' And he said 'That is correct'. My question to you is do you agree with Mr Mosur's testimony? **MR KACVINSKÝ**: I do agree […]").

[1015] Decision of the State Spa Committee, 8 February 2012, **C-20**; *supra*, ¶ 43.

[1016] Decision of the State Spa Committee, 8 February 2012, **C-20**; *supra*, ¶ 42.

[1017] GFT Slovakia to the Inspectorate, 27 June 2012, **C-88**; *supra*, ¶ 47.

[1018] Letter from the State Spa Committee to GFT Slovakia, 19 September 2012, **C-94**; *supra*, ¶ 48.

[1019] Reply, ¶ 742.

[1020] Reply, ¶ 744.

in the Claimant's view, the State Spa Committee gave GFT Slovakia "every reason to believe" that the Exploitation Permit would be issued upon the submission of the Building Permit.[1021]

486. The Tribunal does not share the Claimant's understanding of the facts. The latter invokes the February 2012 decision merely to show that the State Spa Committee did not object to the transportation of the water from Legnava to Muszyna.[1022] In other words, the Committee did not object to the cross-border nature of the Project.[1023] Yet, that observation in and of itself gives no assurance about the issuance of the Exploitation Permit.

487. The September 2012 communication does not support the Claimant's argument either. For the State Spa Committee to state that the Exploitation Permit application was "completed" can hardly be construed as an assurance that the Exploitation Permit would be granted. The September 2012 communication simply followed procedure. It confirmed that GFT Slovakia's previously deficient application met the content stated in Article 11 of the Act on Mineral Waters,[1024] which is but one of the conditions for the issuance of an Exploitation Permit.[1025]

488. Additionally, when asked to provide information on production, specifically "adding information [on] where and how the water is to be filled/bottled/ after being treated" and on the "proposed exploitation and method of exploiting [the] resources",[1026] GFT Slovakia did not disclose that the water would be mixed. Rather, it gave the following clarifications:

> The business plan of GFT Slovakia […] is to extract natural mineral water from sources LH-2A, LH-3, LH-4 and LH-5 into a mineral water treatment plant to be located [in Slovakia]. After treatment (removal of iron and manganese), natural mineral water from each source will be stored in separate accumulation reservoir and then transported under the Poprad river to the existing mineral water bottling plant in the cadastral territory of the town of Muzsyna in Poland […].
>
> The method of exploiting mineral water from wells LH-2A, LH-3, LH-4 and LH-5 will be extraction using immersion pumps installed above the top level of perforation at each well.

[1021] Reply, ¶ 744.

[1022] Reply, ¶ 742.

[1023] *Supra*, ¶¶ 368-370.

[1024] Act on Mineral Waters, **R-35**, Article 12(3)("If the application for the issuance of mineral water exploitation permit fails to contain the formalities stated in Article 11 or is incomprehensible, the State Spa Committee shall call upon the applicant to supplement or correct the application and shall determine a reasonable period for the applicant, which shall not be shorter than ten business days […]").

[1025] The Tribunal addresses the requirements set for the issuance of the Exploitation Permit in further detail at *infra*, ¶¶ 497 *et seq*.

[1026] Decision of the State Spa Committee, 8 February 2012, **C-20**, p. 2.

> Natural mineral water will be transported by designed distribution pipes and will be used in the existing bottling premises to bottle natural mineral water.[1027]

489. The facts just referred to show that the State Spa Committee did inquire on the specifics of the production stages occurring in Poland. This stands in contrast to the Claimant's submission, further to Mr. Kacvinský's testimony,[1028] that the Slovak authorities never required such information.[1029] On the other hand, these facts also demonstrate that GFT Slovakia omitted information regarding the potential mixing of the Legnava Sources in Poland at a time when Goldfruct, the then shareholder, did envisage mixing. In 2010, Goldfruct had asked the Polish PNIPH whether the water from the Legnava Sources could be mixed in Poland.[1030] Moreover, through the Information Memorandum, Goldfruct marketed the possibility of producing a mixed product from the Legnava Sources as one of GFT Slovakia's selling points.[1031]

490. Upon its acquisition of GFT Slovakia in December 2012, the Claimant did not prompt the correction of the Exploitation Permit application in order to reflect its intention to mix the Legnava Sources. The Parties' Slovak law experts essentially agree that Slovak administrative law imposes on an applicant the duty to amend an application that is inaccurate or otherwise misleading.[1032]

491. More significantly, both under Goldfruct and Muszynianka's control, GFT Slovakia actively suggested to the Slovak authorities that the waters from the Legnava Sources would not be mixed. GFT Slovakia applied for and obtained a Zoning and a Building Permit that planned a water treatment plant with reservoirs and pipelines allowing to treat and store the water from each Legnava Source independently, and to transport it separately from Legnava to Muszyna. In particular, the water treatment plant would have

[1027] GFT Slovakia to the Inspectorate, 27 June 2012, **C-88**, pp. 1-2.

[1028] Tr. 472:18-20 (Kacvinský)("We didn't advise [the Slovak authorities] about [mixing and] the technological details of bottling [in Poland] because nobody was interested in that. Nobody asked").

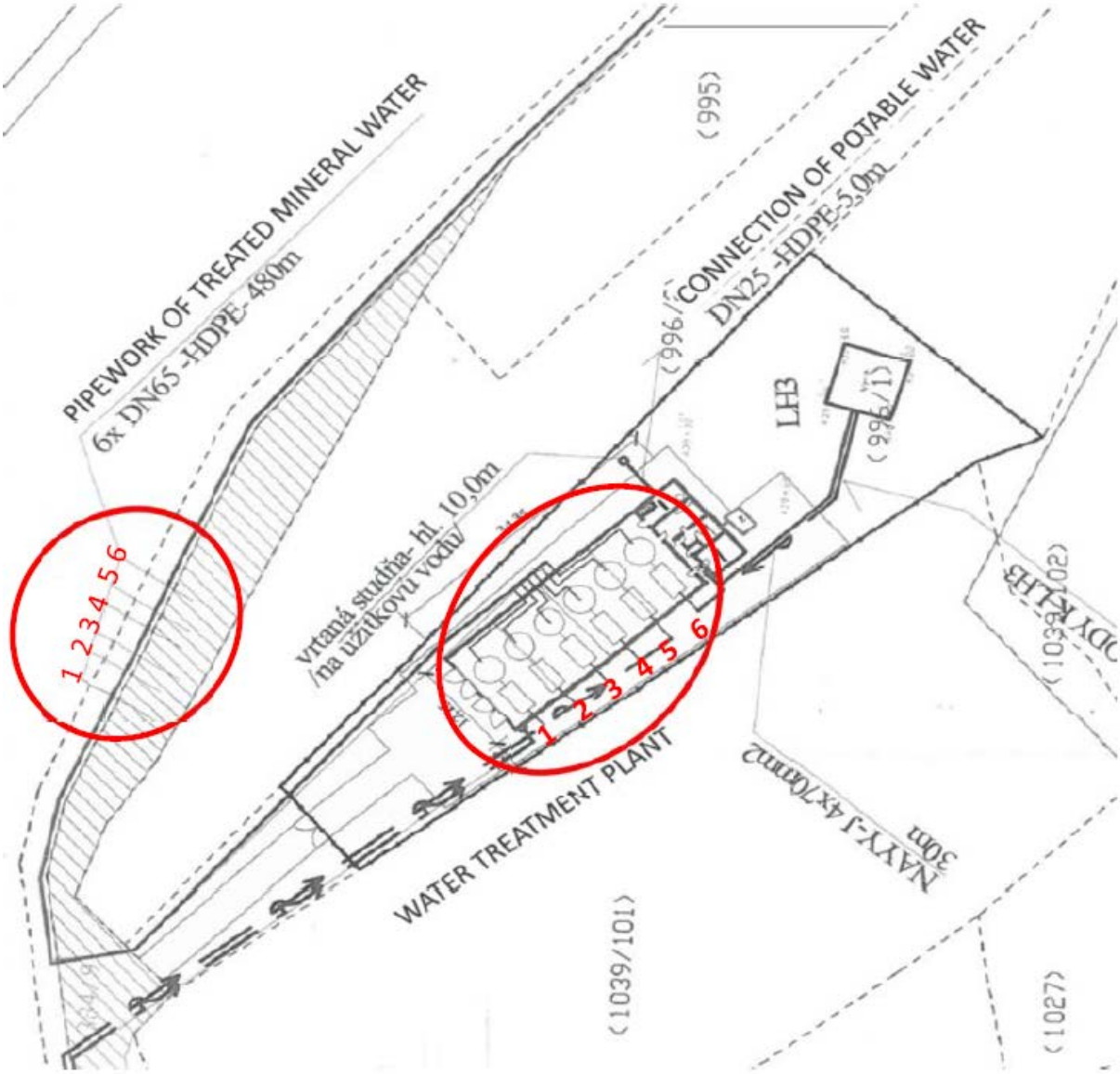
[1029] C-PHB, ¶ 54.

[1030] *Supra*, ¶ 33.

[1031] Information Memorandum, **C-55**, pp. 28-29; *supra*, ¶ 50.ii.

[1032] Tr. 1066:7 – 1069:25 (Jakab); Tr. 1155:4-17 (Potasch).

four (plus two in reserve) reservoirs, treatment modules and pipelines, one for each source,[1033] placed as follows:[1034]



[1033] Zoning Permit, **C-21**, p. 2 ("The treated water is transported onto the Polish side using six pipelines made of HDPE 100 pipes"); Building Permit, **C-22**, pp. 2-3 ("The mineral water transported to the mineral water treatment plan from individual drills will be kept [in] collecting vessels […]. A total of six reservoirs have been designed, including two reserve ones. […] De-ironed water will [then] be pumped by pumps through the underground pipeline into the mineral water bottling plant located on the Polish side. There are 6 sets of technological process designed in the hall. After the launch, the company plans to operate 4 sets supplied by water from the existing drill, two sets will be reserve ones […] The object deals with the inlet of mineral water from the individual drills to the treatment plant and from the treatment plant hall to the bottling plant in the territory of the Polish Republic. Individual drills are equipped with immersion pumps and the necessary armatures. The area of the drills is fenced. […] Treated water will be transported by six pipes […]").

[1034] Taken from Project documentation of GFT Slovakia submitted in Zoning Permit proceeding, November 2010, **R-49** (red highlights and numbers added by the Tribunal)**.**

492. That drawing implied that the water from the Legnava Sources would be transported into Poland without mixing. It led Ms. Božíková to assume that GFT Slovakia intended to comply with the State Spa Committee's communication of 30 March 2010,[1035] according to which mixing was prohibited.[1036] Mr. Mosur actually confirmed at the Hearing that, based on the State Spa Committee's warning of March 2010, the Project was designed so that water would not be mixed, in Slovakia at least:

> [W]e analysed [the State Spa Committee's communication of 30 March 2010]. In Poland the regulation of the Ministry of Health that I mentioned allows for mixing waters. We didn't plan to mix waters in Slovakia. The project envisaged that four intakes and four pipes of water are going to reach Poland. I confirm that, and that's in the Project. Four pipes to Poland, and in Slovakia it is not allowed to mix waters. […] I didn't see any concerns about not being able to [mix] the water imported to Poland.[1037]

493. In the Tribunal's view, the fact that GFT Slovakia omitted information on one of the key aspects of the Project when specifically asked, rules out the creation of any legitimate expectation under the BIT's FET standard. Although not decisive for purposes of the assessment under international law, it warrants noting that the Claimant's Slovak law expert, Dr. Jakab, gave evidence that applications filed before State authorities containing "untruthful" information could not give rise to legitimate expectations under national law either.[1038]

494. It is true that the Respondent has not established that the Claimant's mixing plan would have been unlawful under Slovak law.[1039] However, that does not change the determination reached in terms of legitimate expectations. The Inspectorate's 30 March 2010 letter had already stated that mixing of the Legnava waters was not permitted and a plan to comply with that position so long as the waters were in Slovak territory and then mix them in Poland could, at a minimum, be expected to raise issues of the Slovak Republic's compliance with the EU Directive for the State Spa Committee. Moreover, the concealment of the Claimant's mixing plans prevented the State Spa Committee from discussing with GFT Slovakia the permissibility of such plans and ascertaining the actual

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[1035] Letter from the Inspectorate to GFT Slovakia, 30 March 2010, **C-**17; *Supra*, ¶ 32.

[1036] Božíková WS II, **RWS-4**, ¶ 30 ("Approximately seven months after the Inspectorate sent its preliminary opinion, GFT Slovakia submitted documents to support its application for the zoning permit. Those documents included also construction plans based on which GFT Slovakia asked for approval for constructing six separate pipelines under the Poprad river, one for each of the Legnava Sources, with two reserve pipelines. Therefore, our understanding based on these documents was that GFT Slovakia had planned such design to comply with our preliminary opinion regarding the impossibility to mix water from different sources. We were never informed of a change in that design").

[1037] Tr. 210:13-211:12 (Mosur).

[1038] Tr. 1070:2-8 (Jakab).

[1039] *Supra*, ¶ 413.

chemical composition of the Legnava Sources.[1040] The non-disclosure thus not only precluded the State Spa Committee from properly apprehending GFT Slovakia's full production process, but also prevented it from investigating the possible health impact of the final product. These matters almost certainly could have played a significant role in the State Spa Committee's assessment of the public interest of the exploitation of the Legnava Sources.[1041] Indeed, under the Act on Mineral Waters, the presence of a public interest requires ensuring the "qualitative and quantitative properties" of the natural mineral, as well as its "sanitary flawlessness".[1042]

ii. Statements/acts by the Municipality of Legnava and the Ministry of Environment

495. The Claimant refers to the Zoning Permit issued by the Municipality of Legnava[1043] and to the communication which the Ministry of Environment sent on 26 July 2012 regarding the Zoning Permit,[1044] as evidence that the Respondent never objected to the cross-border nature of the Project.[1045] It is clear that prior to the Constitutional Amendment, the transport of the water from Legnava to Muszyna was not prohibited or otherwise unlawful.[1046] The Zoning Permit and the communication by the Ministry of Environment support that finding. At the same time, they do not speak to the issuance of the Exploitation Permit, which depends on a number of other considerations.

496. Moreover, an investor can only reasonably trust assurances and thus derive legitimate expectations from them if these assurances emanate from the governmental entities which, by law, have competence over the subject matter of the assurance.[1047] This is not the case of the Municipality of Legnava and the Ministry of Environment. Moreover, the

[1040] *Supra*, ¶ 407.

[1041] Act on Mineral Waters, **R-35**, Article 12(7)(a).

[1042] Act on Mineral Waters, **R-35**, Article 39(1). The Tribunal addresses the public interest requirement in the Act on Mineral Waters in further detail at *infra*, ¶ 499 *et seq*.

[1043] Zoning Permit, **C-21**; *supra*, ¶ 45.

[1044] Letter from the Ministry of Environment to GFT Slovakia, 26 July 2012, **C-114**; *see infra*, ¶¶ 583-584, 588.

[1045] Reply, ¶¶ 743, 745.

[1046] *Supra*, ¶¶ 369-370.

[1047] *See*, in particular, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, **CLA-62,** ¶ 382; *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award, 19 September 2013, **RLA-33**, ¶ 4.771.

Zoning Permit only dealt with the "placement" of the water treatment plant in Legnava,[1048] which was just one component out of many involved in the Project.

c. Entitlement to the issuance of the Exploitation Permit

497. The Act on Mineral Waters sets out both positive and negative conditions for the issuance of an Exploitation Permit.

498. Regarding the positive conditions, Article 12(6) of the Act states that the State Spa Committee "shall issue" an Exploitation Permit application "only if": (i) the sources at issue have been recognized as natural mineral water; and (ii) the application meets the "formalities" listed in Article 11 involving a detailed and documented description of the project.[1049]

499. As to the negative conditions, Article 12(7) of the Act provides that the State Spa Committee "shall reject" an exploitation permit application if: (i) "it is in the public interest" that the natural mineral water source "is not exploited"; (ii) the plan for the exploitation of the natural mineral water source "is not suitable in relation to the exploitable quantity of water in it"; and (iii) the requested Exploitation Permit has already been granted to another applicant.[1050]

500. The term "public interest" used in Article 12(7) is defined in Article 39:

> Public interest for the purposes of this act shall mean interest in [the] search[,] exploitation[,] and protection of […] natural mineral sources in order to preserve their qualitative and quantitative properties and their sanitary flawlessness.[1051]

501. The Respondent argues that the words "only if" used in Article 12(6), just referred to, suggest that the positive conditions are minimum requirements, with the result that the State Spa Committee may consider additional elements, such as ensuring compliance with Slovakia's regulations on mixing and branding.[1052] Be that as it may, the Respondent has been unable to establish that GFT Slovakia's business plan was *per se* unlawful. Moreover, the Respondent does not challenge that, before the Constitutional Amendment, GFT Slovakia's application met the positive conditions. Nor is it disputed that the Exploitation Permit had not been granted to another applicant and that, pursuant

[1048] Zoning Permit, **C-21**, p. 1.

[1049] Act on Mineral Waters, **R-35**, Articles 12(6), 11(2)-(3), (5).

[1050] Act on Mineral Waters, **R-35**, Articles 12(7)(a)-(c).

[1051] Act on Mineral Waters, **R-35 (supplemented)**, Article 39(1); R-PHB, ¶ 204.

[1052] Rejoinder, ¶¶ 432-433.

to the LH-2A to LH-5 Maximum Quantities Decision,[1053] the plan for exploitation of the Legnava Sources appeared suitable for the quantity of mineral water available.

502. This being so, the Parties' disagree on the negative condition requiring a determination linked to "public interest".

503. According to the Claimant, prior to the Constitutional Amendment, there were no grounds for the State Spa Committee to find the Project contrary to public interest.[1054] Moreover, by providing a binding positive opinion during the Building Permit proceedings,[1055] the State Spa Committee affirmed the Project's compatibility with public interest.[1056] Therefore, as all other requirements set in the Act on Mineral Waters were also met, GFT Slovakia had a "legal right" to the issuance of the Exploitation Permit.[1057]

504. The Respondent opposes the idea that the State Spa Committee's binding opinion given in the course of the Building Permit proceedings affirmed the existence of a public interest.[1058] Consequently, for the Respondent, Muszynianka merely had a completed application for an Exploitation Permit. That application started the proceedings,[1059] and gave the Claimant the right to obtain a decision on the application but not to receive a positive outcome.[1060]

505. As a first observation, the binding opinion provided by State Spa Committee on 13 October 2013 in the context of the Building Permit proceedings does not prejudge the existence of a public interest as defined in Article 39 of the Act on Mineral Waters. In that opinion, the State Spa Committee simply "agree[d] with the [issuance] of a building and water permit" for the construction of the water treatment plant envisaged by GFT Slovakia.[1061] It did so subject to various requirements with which GFT Slovakia was to comply in terms of the protection of the Legnava Sources through the construction and operation of the plant.[1062] Differently put, that opinion did not assess the public interest

[1053] *Supra*, ¶ 22.

[1054] Reply, ¶ 282.

[1055] Letter from the State Spa Committee to GFT Slovakia, 10 October 2013, **C-109**; *supra*, ¶ 56.

[1056] Reply, ¶ 283.

[1057] C-PHB, ¶¶ 236, 208.

[1058] Rejoinder, ¶ 441.

[1059] Rejoinder, ¶ 431.

[1060] Rejoinder, ¶ 431, referring to Potasch ER II, **RER-6**, ¶ 85.

[1061] Letter from the State Spa Committee to GFT Slovakia, 10 October 2013, **C-109**, p. 1; Building Permit, **C-22**, ¶ 20 (3rd bullet point).

[1062] Letter from the State Spa Committee to GFT Slovakia, 10 October 2013, **C-109**, pp. 1-2; Building Permit, **C-22**, ¶ 20 (3rd bullet point).

involved in the overall exploitation of the Legnava Sources and other elements of the Project.

506. Having clarified this point, the Tribunal turns to Muszynianka's claim that it had an acquired right or entitlement to the issuance of an Exploitation Permit. Laws usually afford discretion to the State in exercising its decision-making functions aimed at implementing the laws. In the words of the *Crystallex* tribunal, the provisions of a law are "rarely unconditional" with the result that private actors "have difficulty founding an actual expectation akin to a vested right" on legislation.[1063] The provisions of the Act on Mineral Waters are no exception.

507. Article 12 of that Act requires the State Spa Committee to review an application's compliance with the law and with public interest. When assessing the existence of a public interest, the State has a level of discretion to determine whether or not the planned activity is in the public interest. Dr. Potasch, the Respondent's Slovak law expert, confirmed that the test is linked to public interest and that the discretionary power associated with it means that an applicant can have no entitlement or acquired right to a favorable decision from the State Spa Committee as a result of filing a complete Exploitation Permit application.[1064]

508. Contrary to the Claimant's submissions,[1065] the existence of discretion on the part of the State Spa Committee which allows the latter to deny an Exploitation Permit in light of public interest considerations, and the consequential preclusion of acquired rights, do not amount to arbitrary treatment *per se*. As Dr. Potasch testified, conduct would only be arbitrary if the State Spa Committee failed to derive sufficiently cogent grounds justifying a denial of the Exploitation Permit on the basis of public interest.[1066] In the present case, the State Spa Committee never reached that stage.

509. The Tribunal's views are in conformity with those expressed by the Slovak judiciary. In its decision on GFT Slovakia's motion to revoke the State Spa Committee's denial of the

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[1063] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **RLA-30**, ¶ 552.

[1064] Potasch ER II, **RER-6**, ¶¶ 58, 89 ("[T]he applicant does not have a legal entitlement to the mineral water exploitation permit even if it submits a full application with the required content because the administrative authority has a discretionary power to assess whether or not the planned activity is in public interest or not […] When the issuance of a permit is subject to the administrative authority's discretionary assessment of public interest, the applicant can never have legitimate expectations that the permit would be issued because the applicant cannot anticipate how the public authority will assess public interest"); *see* also Potasch ER I, **RER-2**, ¶ 126.

[1065] C-PHB, ¶¶ 243, 245.

[1066] Tr. 1122:3-7 (Potasch).

Exploitation Permit, the Regional Court in Bratislava stated that there was no legal certainty that the permit would be issued:

> Another fact that cannot be omitted in this matter is also the fact that the decision-making competence stipulated in [the Act on Mineral Waters], which governs the proceedings on issuance of the permit to exploit natural mineral sources, does not guarantee [a] legal entitlement to the issuance of a positive decision even if the applicant's application [is complete]. The provision of Article 12(7) [the Act on Mineral Waters] authorizes the [State Spa Committee] also to reject the application for issuance of the permit to exploit a source, if that is in [the] public interest. Therefore, applicant could not have had any legally certain expectations that its application would be granted […].[1067]

510. Strangely enough, the Claimant and its Slovak law expert, Dr. Jakab, do not address such decision. Neither does the Claimant argue that this judgment breaches the BIT. In fact, neither the Claimant nor Dr. Jakab refer to any other authority of Slovak law asserting that a complete Exploitation Permit application vests upon an applicant an acquired right to that permit. Rather, Dr. Jakab reviews the administrative file of GFT Slovakia's application,[1068] and, based on that review, posits that "the need to protect the public interest in relation to the mineral water exploitation [of the Legnava Sources] did not exist until the adoption of the [Constitutional Amendment]".[1069] Therefore, in the expert's opinion, "there was no reason [for the State Spa Committee] to reject GFT Slovakia's application due to the alleged incompliance of the exploitation of the [Legnava Sources] with the public interest".[1070] It is on this basis that, the other conditions being met, Muszynianka claims that GFT Slovakia "was legally entitled to receive the Exploitation Permit and the State Spa Commission was legally obliged to issue one".[1071]

511. The Tribunal cannot follow that approach. It cannot substitute its judgment for the State Spa Committee's discretionary assessment of public interest and thus assume that the permit would have been granted and that the applicant had a right to it.

512. For these reasons, the Tribunal reaches the conclusion that the Claimant has not established having a legal entitlement to the issuance of the Exploitation Permit prior to the Constitutional Amendment.

[1067] Judgment of the Regional Court in Bratislava, No. 1S/6/2016 – 210, 28 February 2018, R-252, ¶ 110. The Regional Court's reasoning was upheld by the Supreme Court (see Judgment of the Supreme Court of the Slovak Republic, No. 8Sžk/23/2018, 20 February 2020, **R-420**, ¶ 62).

[1068] Jakab ER, **CER-2**, ¶¶ 92-106.

[1069] Jakab ER, **CER-2**, ¶ 107.

[1070] Jakab ER, **CER-2**, ¶ 107.

[1071] C-PHB, ¶ 283.

d. Enactment of the Constitutional Amendment

513. The Constitutional Amendment reads in relevant part as follows:

> […] The transport of water taken from water bodies located in the territory of the Slovak Republic across the borders of the Slovak Republic by means of transport or by pipelines is banned; the ban shall not apply to water for personal consumption, drinking water packaged in consumer packaging in the territory of the Slovak Republic and natural mineral water packaged in consumer packaging in the territory of the Slovak Republic, and to provision of humanitarian aid and help in emergency situations. Details of conditions of transport of water for personal consumption and water to provide humanitarian aid and help in emergency situations shall be laid down by law.[1072]

514. This section assesses whether, irrespective of legitimate expectations, the Constitutional Amendment breaches the FET standard for being discriminatory **(i)**, unreasonable **(ii)**, disproportionate **(iii)**, or inconsistent **(iv)**.

i. Discrimination

515. It is well established that State conduct is discriminatory if investors in like circumstances are subjected to different treatment without a reasonable justification.[1073] Discriminatory treatment may occur either *de jure* **(a)** or *de facto* **(b)**.[1074] A measure may further be discriminatory if it willfully targets a foreign investor **(c)**.[1075]

(a) *De jure* discrimination

516. The Constitutional Amendment applies to all types of water, be it drinking, healing, spring, or mineral water, and does not distinguish between Slovak and foreign water producers. There is thus no need for further analysis to determine that it entails no *de jure* differential treatment.

[1072] Constitutional Amendment, Art. 1(2), **RLA-18**.

[1073] *Saluka Investments B.V. v. The Czech Republic*, PCA Case No. 2001-04 (UNCITRAL), Partial Award, 17 March 2006, **CLA-8**, ¶ 313; *see also Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 25 November 2015, **RLA-116**, ¶ 175; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **RLA-30**, ¶ 616; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, **RLA-29**, ¶ 247.

[1074] *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶ 43; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, ¶ 193; *Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, ¶ 115.

[1075] *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, **CLA-34**, ¶ 501; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, **CLA-5**, ¶ 261; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, **CLA-122**, ¶¶ 303-304; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, 8 June 2009, **RLA-75**, fn. 1087.

(b) *De facto* discrimination

517. Discriminatory treatment, including *de facto* differential treatment, occurs if cases in like circumstances, that is identical or materially similar cases, are treated differently without a reasonable justification.[1076]

518. As noted in *Parkerings*, in reference to *Pope & Talbot*, to establish whether a foreign investor finds itself in like circumstances with other operators, one must determine the relevant business or economic sector.[1077] In the Statement of Claim, the Claimant noted that it was in like circumstances with "all water producers". [1078] In the Reply, it changed its position and limited the comparator to Slovak entities engaged in the production of natural mineral water.[1079] The Respondent for its part advocates in favor of a comparison with all water producers, in line with the Claimant's initial argument.[1080]

519. This being so, the Parties have barely substantiated their proposed comparators, if at all. The Respondent provides no justification for its position. The Claimant does state that water producers currently operating in the Slovak Republic, including producers of mineral water, either already have bottling plants in the Slovak Republic, or do not produce bottled water, and/or did not intend to operate a cross-border water exploitation.[1081] Yet, even assuming that they are correct, these observations do not explain why only mineral water producers are in like circumstances with GFT Slovakia or Muszynianka. If anything, the Claimant's assertions rather seem to militate against using Slovak mineral water producers as the comparator.

520. Taking into consideration GFT Slovakia's purported end consumers, it appears appropriate to compare the treatment of its Project to that of other producers of drinking water, including mineral water producers who use Slovak water as raw material. Restricting the comparator to mineral water producers would ignore the fact that, like mineral water, drinking water in the narrow sense is primarily intended for human consumption and thus is arguably in competition with mineral water. By contrast,

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[1076] *Quiborax SA and Non Metallic Minerals S.A. v. Plurinational State Bolivia*, ICSID Case No. ARB/06/2 Award, 16 September 2015, **RLA-29**, ¶ 247; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, **RLA-74**, ¶ 210.

[1077] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, **RLA-34**, ¶¶ 369-371, referring to *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, ¶ 78.

[1078] SoC, ¶ 520.

[1079] Reply, ¶ 894.

[1080] SoD, ¶ 484; Rejoinder, ¶ 387; R-PHB, ¶ 70.

[1081] Reply, ¶ 894.

broadening the comparator to any water producer would include water usages far from being in competition with mineral water, such as water intended for irrigation or industrial purposes. There remains the question whether transborder production should be part of the comparator. The cross-border nature was an essential and very specific element of the Claimant's plans. If it were not part of the test, one would end up comparing operators that are not in like circumstances.

521. Between January and April 2014, Východoslovenská vodárenská spoločnosť ("VVS"), a Slovak company, and Zempléni Vizmü Kft ("ZVK"), a Hungarian company, discussed the possibility of establishing and jointly operating a drinking water supply network (i.e., non-mineral water) between the cities of Slovenské Nové Mesto in the Slovak Republic and Sátoraljaújhely in Hungary.[1082] Similarly, in November 2016, three Slovak companies, Stredoslovenská vodárenská spoločnosť ("SVS"), Stredoslovenská vodárenská prevádzková spoločnosť ("SVP"), and AQUA LC ("AQUA"), concluded a memorandum of understanding setting out plans for mutual cooperation in order to supply drinking water to Hungarians end users.[1083]

522. Neither these nor any other projects entailing the cross-border transport of unbottled Slovak drinking or mineral water were allowed to proceed after the adoption of the Constitutional Amendment,[1084] or before it for that matter. Hence, no *de facto* differential treatment is made out between GFT Slovakia and other would-be operators in like circumstances.

(c) Targeting

523. The question here is whether the Constitutional Amendment targeted the Claimant's Project. To answer this question, it is helpful to review the process that led to the adoption of the Constitutional Amendment. As will be seen, that review does no show targeting. It evidences that the change in the Constitution was driven by concerns over drinking (in the sense of non-mineral) and underground water in an era of climate change, when the Project was about mineral water. It also demonstrates that the Constitutional Amendment aimed essentially at the protection of the Zitný ostrov reserves in the southwest of the country close to the border with Hungary, when the Project was located in the north by the Polish border. In addition, the Government was concerned that water resource

[1082] Letter from Východoslovenská vodárenská spoločnosť, 30 January 2014, **R-329;** Memorandum from the working session, 12 March 2014, **R-330;** Memorandum from the working session, 25 April 2014, **R-0331.**

[1083] Memorandum on drinking water coordination, 7 November 2016, **R-332.**

[1084] Tr. 461:12-14 (Kacvinský), 661:6-10 (Božíková).

exploitation decisions were too de-centralized under the then-extant legal regime and that regional and local authorities did not possess the necessary information about the overall balance of water resources in Slovakia; hence there was an interest in allocating water management competence to the central government level.[1085]

524. In 2012, the Water Report, issued by the Ministry of Environment further to the SMER's interest (namely the governing political party at the time) on water provision and preservation,[1086] had warned about the water deficit in the northeast and east of the Slovak Republic,[1087] and stressed that Žitný ostrov deserved "special attention" for being "one of the largest drinking water reserves in Central Europe".[1088] It also spoke of the risk of "plundering or uneconomic exploitation" of Slovak water sources, as well as of "uncontrolled transfer" of groundwater outside of Slovak territory.[1089] Essentially, it cautioned about the heightened "interest of business groups in transferring via piping or otherwise transporting mineral water or groundwater extracted in [Slovak] territory, especially from the protected water management area of the Žitný ostrov outside the borders of the [Slovak Republic] directly as a raw material".[1090]

525. Resolution No. 583/2012, which was issued in October 2012, reaffirmed the Government's commitment towards the protection of groundwater, especially drinking water.[1091] It approved the Water Report;[1092] declared water a "raw material of the State" subject to its national interests;[1093] and instructed the Ministry of Environment to promote legislative measures to "ensure a universal protection of groundwater in the protected water management areas with an emphasis on the area of Žitný ostrov given its strategic significance".[1094]

526. In June 2014, pursuant to Resolution No. 583/2012, the Slovak Cabinet introduced a draft amendment to the Act on Mineral Waters for discussion.[1095] On 8 July 2014, after

[1085] Tr. 536:20 – 537:14 (Žiga); *see also* Žiga WS I, **RWS-1**, ¶ 14; Water Report, **R-37**, pp. 13-14.

[1086] *Supra*, ¶¶ 63-66.

[1087] Water Report, **R-37**, p. 5.

[1088] Water Report, **R-37**, p. 12.

[1089] Water Report, **R-37**, p. 11.

[1090] Water Report, **R-37**, p. 11.

[1091] *Supra*, ¶¶ 67-68.

[1092] Water Resolution, **R-19**, § A.1.

[1093] Water Resolution, **R-19**, § A.2.

[1094] Water Resolution, **R-19**, § B.1.

[1095] *Supra*, ¶¶ 69-71.

a first parliamentary debate, Prime Minister Fico and Minister Žiga announced that some of the changes sought through the proposed amendment to the Act on Waters would instead be pursued by way of the Constitutional Amendment.[1096]

527. The Claimant concedes that, before 8 July 2014,[1097] the amendment to the Act on Waters was primarily focused on Žitný ostrov.[1098] Yet, contrary to the Claimant's contention,[1099] this focus on drinking water and Žitný ostrov, amidst an overall concern over the export of Slovak groundwater, continued after the Constitutional Amendment was announced. For instance, on 9 July, Minister Žiga stated:

> […] I waited for, you know, at least some credit from you, for you to give credit to the Minister, great move, we are protecting the waters of Rye Island [Žitný ostrov], the largest body of freshwater in Slovakia. Nothing. […] This is one of the other measures provided for in the law, namely maintaining the quality of drinking water in Slovakia. We recommend amending the article of the legislation in which we will ban exports of drinking, mineral and geothermal waters abroad […].[1100]

528. Even MPs highly critical of the Constitutional Amendment did not center their remarks on the Project or otherwise on mineral water. Rather, they expressed concern over Žitný ostrov; or the lack of data regarding the availability of drinking water and groundwater, thus calling into question the appropriateness of any regulation on raw water export:

> **[MP Chren:]** Lets take Žitný ostrov, as we are probably mainly talking about it [i.e.,] our biggest drinking water supplies, the one of the highest quality, [and] greatly threatened nowadays. [T]he water from the Žitný ostrov is [not all] of the same quality. If only the one of the highest quality, clean one, was extracted and sold abroad, paradoxically, only the worse one would remain for Slovakia with the costly treatment method applied. Paradoxically, the price of the drinking water for Slovakia would be increased.[1101]
>
> **[MP Mezenská:]** I consider proposing and approving this disputable Draft Act in the situation, when the quantities of drinking water surplus sources are not known and confirmed, to be inappropriate, absurd and irresponsible approach by the Government. Export of estimated amount of drinking water up to 274 million m³ represents 80% of the annual water consumption in Slovakia. And I cannot imagine what would happen if the water balance of Slovakia would deteriorate, if it would decrease.[1102]

[1096] Supra, ¶¶ 74-75.

[1097] Which the Claimant calls the "critical date" arguing that it was the date when the Respondent announced its plan to proceed by way of a constitutional change and commenced its unlawful targeting (*see* Reply, ¶¶ 7, 20).

[1098] Reply, ¶ 500.

[1099] Reply, ¶¶ 20, 498.

[1100] Parliamentary Session, 9 July 2014, **C-35**, pp. 4-5.

[1101] Parliamentary Session, 17 October 2014, **R-189**, p. 4.

[1102] Parliamentary Session, 8 July 2014, **R-314**, p. 2. MP Mezenská maintained this view considerably after 8 July 2014. *See* Parliamentary Session, 10 September 2014, **R-316**, pp. 1-2 ("What I have been missing in this Constitution Amendment, and I missed it also during the first reading of the Act on Waters was that we, MPs, could

> **[MP Viskupič:]** Many of pre-speakers dedicated exactly to the methodology and compared figures. And I have to say that this data does not express what is the exact situation with our water, or the drinking water situation or water in Slovakia generally.[1103]

529. The statements of other MPs, supportive of the Government's proposal, corroborate that drinking water or water in general was indeed the main objective driving the Constitutional Amendment. They also suggest that the risk of foreign investors exporting Slovak water was not a crucial or pervasive consideration in the passing of the Constitutional Amendment. For instance:

> [**MP Mičovský:**] Nobody among us knows exactly, what are the current drinking water quantities available [or] what will happen with resources of both groundwater and surface water [in the future].[1104] [Because there is] no certainty [,] the best solution is to submit a constitutional amendment, and to me it seems that it could be the solution of all our hesitations presented in our debate.[1105] [Yet], if there is a surplus of water and there would be a demand, and I do not know whether there is somebody knocking the door, I have not heard about it till now, that somebody would like to buy water from us, [then] such an alternative for sure cannot be refused in the future [and] our descendants […] may one day decide to unlock the Constitution […]. They will however do so only when it is known [that] quantities available today, shall be also available tomorrow, [and upon] being sure in the knowledge that [water is not] not only available in the Žitný ostrov region or the spring regions of the Horehronie, but on a country-wide level […].[1106]

530. These statements indicate that the Constitutional Amendment sought to address a much broader concern than just mineral water, which constitutes only a small portion of the total water in the Slovak Republic, a fact that the Claimant does not dispute.[1107] In this context, the Claimant's submission that the Constitutional Amendment "falls squarely into the definition of targeted legislation"[1108] appears unavailing. According to the Claimant, the following constitutes evidence that the Constitutional Amendment targeted the Project: Muszynianka was the only one affected by the Constitutional Amendment **(aa)**;[1109] Ms. Božíková confirmed at the Hearing that the State Spa Committee was asked by the Ministry of Health to stop GFT Slovakia's Exploitation Permit proceedings until the issuance of the Constitutional Amendment **(bb)**;[1110] and the parliamentary debates and

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not use exact data from a Rational Report, which would include solid expert opinions what is the situation in Slovakia like in respect to the water balance, or whether there is enough water in Slovakia, both drinking and supply water").

[1103] Parliamentary Session, 8 July 2014, **R-314**, p. 3.

[1104] Parliamentary Session, 10 September 2014, **R-316**, p. 2.

[1105] Parliamentary Session, 17 October 2014, **R-317**, p. 3.

[1106] Parliamentary Session, 17 October 2014, **R-317**, pp. 1-2 (emphasis added). A similar statement was made by MP Kaník during the same parliamentary session (*see* p. 3).

[1107] SoD, ¶ 28; R-PHB, ¶ 53.

[1108] SoC, ¶ 275.

[1109] Reply, ¶¶ 499-506.

[1110] C-PHB, ¶¶ 205-208, referring to Tr. 639:9 - 640:23 (Božíková).

media coverage show that Muszynianka was vilified in order to pass the Constitutional Amendment **(cc)**.[1111]

(aa) GFT Slovakia was not the only entity affected by the Constitutional Amendment

531. As already established above,[1112] Muszynianka and GFT Slovakia were not the only companies affected by the Constitutional Amendment. The Claimant nevertheless puts into doubt the "seriousness" of the plans by other companies and the impact of the Constitutional Amendment on those plans.[1113]

532. At the Hearing, the Claimant argued that nothing in the documentation of the VVS-ZKV venture, referred to earlier, "indicates even the basic parameters of the co-operation between those two companies" or the "trans-boundary character of their initiative".[1114] It further submitted that that project was highly uncertain, as the conclusion of a water supply agreement between VVS and ZKV was subject to numerous conditions, such as the procurement of guarantees, approvals by Slovak State authorities, and an assessment of the economic viability of the project.[1115] Regarding the other venture mentioned above, the SVS-SVP-AQUA venture, the Claimant contended that the documentation in the record only suggests "two Slovak companies vaguely discussing a project" that, while clearly involving cross-border transport of drinking water, remained largely unknown in terms of "the fate of that initiative and whether it was real".[1116] Moreover, it submitted that, in any event, it seemed "unlikely that the Constitutional Amendment was of any concern for those two companies, both of them [being] Slovak".[1117]

533. In the Tribunal's view, the Claimant's submissions are misguided. First, the VVS-ZKV venture was a cross-border project. It was meant to establish a drinking water supply network between the Slovak Republic and Hungary through the "potential joint use of the transboundary Roňava basin water source".[1118] Notably, the representatives of VVS and

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[1111] SoC, ¶¶ 275-276; Reply, ¶ 498.

[1112] *Supra*, ¶¶ 521-522.

[1113] C-PHB, ¶ 212.

[1114] Tr. 56:7-9 (Jeżewski).

[1115] Tr. 56:13 - 57:1 (Jeżewski).

[1116] Tr. 58:8-11 (Jeżewski).

[1117] Tr. 58:12-14 (Jeżewski).

[1118] Letter from Východoslovenská vodárenská spoločnosť, 30 January 2014, **R-329**, p. 1.

ZKV met in March 2014 to "discuss drinking water and its supply for the population of both sides of the border", after which they sought to examine *inter alia* the "technical, economic, legal conditions for the joint sale of drinking water".[1119]

534. Second, all of the Claimant's remaining objections in connection with the VVS-ZKV venture are incorrectly premised on the documentation adduced by the Respondent in relation to the SVS-SVP-AQUA venture. It is the memorandum of understanding pertaining to the SVS-SVP-AQUA venture project (which concerned three and not two Slovak companies as argued by the Claimant) that lists the conditions for the conclusion of a supply agreement of drinking water.[1120] This being so, the existence of conditions precedent to the conclusion of a contract is standard practice and does not take away the "seriousness" of the undertaking. Neither is there any element in the record substantiating the Claimant's allegation that this venture was not real.

535. Third, the fact that only Slovak companies executed the SVS-SVP-AQUA memorandum is irrelevant here. The purpose of the project was to supply drinking water to users in Hungary.[1121] Hence, it was a cross-border venture which fell squarely within the ambit of the Constitutional Amendment.

(bb) Ms. Božíková's admission at the Hearing does not inform the motives behind the Constitutional Amendment

536. It is true that Ms. Božíková admitted that the Minister of Health requested the State Spa Committee to delay the Exploitation Permit:

> **MS DURCHOWSKA**: […] Is there any? Can you point out any other activity that's recorded concerning GFT Slovakia's application?
>
> **MS BOŽÍKOVÁ**: I communicated with the head of the Ministry [of Health], with the minister. There's one more record where she told us to wait […]. The only reason was to see whether the Constitutional Amendment would be adopted or not because if it is adopted, it would be a new situation for us. If we were to issue a decision and then the conditions were changed, we would have to deal with it again.[1122]

537. However, in and of itself, that statement is not evidence of targeting. It may put into question the treatment afforded to GFT Slovakia during the Exploitation Permit

[1119] Memorandum from the working session, 12 March 2014, **R-330**, pp. 1-2.

[1120] Memorandum on drinking water coordination dated 7 November 2016, **R-332.**

[1121] Memorandum on drinking water coordination dated 7 November 2016, **R-332.**

[1122] Tr. 640:3-9 (Durchowska); 640:10-18 (Božíková).

proceedings, but that is another matter, which is addressed below.[1123] This being so, neither the Ministry of Health's request, nor Ms. Božíková's compliance, inform about the motivation behind the Constitutional Amendment. In reality, the prolongation of the Exploitation Permit proceedings at the instance of the Minister of Health appears more to be the result of a genuine concern over the legal status of the cross-border exploitation of water.

538. Article 2(2) of the Slovak Constitution provides that "State authorities may act solely […] within the scope and manner laid down by law".[1124] Still, before the Constitutional Amendment, there was no rule in Slovak law on the export of water prior to bottling.[1125] Hence, there was considerable uncertainty within the Ministry of Health on how to address GFT Slovakia's application.[1126] The uncertainty was exacerbated by the then looming Constitutional Amendment. A July 2014 exchange between Ms. Božíková and Mr. Mário Fraňo, Director of the Legislative Department of the Ministry of Health, is clear in this respect:

> **[Ms. Božíková's inquiry]**
>
> I would like to ask after all whether you have given any thought to the legal interpretation of my question—should the Constitution stipulate—the transportation and transfer of water […] is prohibited. Should this also apply to any and all decisions issued in the capacity of constitutional laws? If so, how should we address the pertinent situations [(i.e., GFT Slovakia's request)]?
>
> **[Mr. Fraňo's reply]**
>
> I have quite a problem with the possibility of requiring applicants to comply with unspecified methods and conditions of use being stipulated in a broad fashion and lacking the legal basis in the relevant provision of the applicable law. […].
>
> The present legislation does not prohibit cross-border transfers. Should the permit explicitly state that such use is allowed that constitutes a cross-border transfer, that would mean […] that they have been granted a right which is unregulated under the applicable law, such decision exceeding [the State Spa Committee's] competence. [Would] it be possible under the decision issued to omit taking into consideration the fact that the pertinent transfer would be of a cross-border nature[?] [I]n this case, nobody could claim that we have directly (and exceeding the extent of the applicable law) allowed a cross-border transfer.[1127]

[1123] *Infra*, ¶¶ 614 *et seq*.

[1124] Slovak Constitution, **R-351**, Art. 2(2).

[1125] *Supra*, ¶¶ 369-370.

[1126] Božíková WS I, **RWS-2**, ¶ 50 ("After the draft amendment to the Water Act was presented to the National Council of the Slovak Republic, it spurred a vivid discussion on regulation of exports, which led to the plan to adopt a ban on export of unbottled water in the form of the Constitutional Amendment. This was of particular importance to us because we had pending before us an unprecedented application by GFT Slovakia for the export of unbottled mineral water. It was a complex case".); *see also* Tr. 589:2-5 (Božíková)("When we received the project from GFT, that was the first time that we received such a project. We didn't know at all what to do, how to go about it".).

[1127] Email correspondence between Jarmila Božíková and Mário Fraňo of the Legislative Department of the Ministry of Health, 29 July 2014, **C-158**.

539. Therefore, the Tribunal cannot see the Minister of Justice's request to delay the Exploitation Permit proceedings as a manifestation of targeting through the Constitutional Amendment. It is clear that the State Spa Committee (and by extension the Ministry of Health) did not know how to address GFT Slovakia' application, which indisputably raised a novel issue. The Constitutional Amendment presented itself as a solution to the authorities' dilemma.

(cc) The references to the Project does not suggest targeting

540. The Claimant invokes the following main references by Minister Žiga or Prime Minister Fico as evidence of the Constitutional Amendment's alleged targeting:

i. On 2 July 2014:

> **[Minister Žiga:]** In accordance with the current laws […] there is currently no legislative or formal tool that would prohibit water exports. As soon as [one] decides to export water abroad, [one can] have it exported. […] We already have one specific experience. Although it concerns mineral rather than drinking water, the principle remains the same. A major warning for Slovakia and the Ministry of the Environment was the Legnava case, where the company attempted to build an underground pipeline under the Poprad riverbed into Poland for the collection of mineral water and its subsequent bottling and distribution outside Slovakia. The Slovak authorities had no basis in legislation to prohibit such activity and could not support their stance with any specific regulation.[1128]
>
> Our priority is to conserve water to cover the needs of the people. You are being misleading and dishonest by claiming that you are protecting water resources from being taken out of the country. You are lying because that's not what the truth is, we have specific examples. I was talking about Legnava. No national regulation currently prohibits or regulates water exports. Therefore, in that case, I would like to reiterate that there is a rule in place that states that if something is not forbidden or otherwise regulated, it is allowed.[1129]

ii. On 8 July 2014:

> **[Prime Minister Fico:]** We received information that the transport of mineral water via a pipeline to Poland was planned. We also have information about the planned transport of drinking water to Hungary. […] It will not be possible to export drinking, geothermal or mineral water using pipelines or tankers. There will be one exception—humanitarian situations when it will be necessary to help. We will protect the producers of Slovak mineral and table waters. We cannot prevent them from exporting packaged water from Slovakia.[1130]

[1128] Parliamentary Session, 2 July 2014, **C-35**, pp. 1-2.

[1129] Parliamentary Session, 2 July 2014, **C-35**, p. 3.

[1130] "Water could be spirited out of Slovakia to Poland and Hungary, the Prime Minister stated. Its export will be banned", Aktuality, 8 July 2014, **C-123**, p. 2.

iii. On 9 July 2014:

> **[Minister Žiga:]** We want this law to protect water for future generations. We have enough of it, but [we want to make sure that] there will be sufficient water for the future generations, as if we do not protect water, nothing will be left. […] If mineral water is exported in a tanker or via a pipeline, those who will be extracting it directly from the spring will be charged 200 euros per cubic metre. When the […] draft legislation is passed, there will no longer be such an alternative because mineral water will not be exported in tanks or via pipelines, and only bottled water, only bottled mineral or table water will be exported. We had a very clear example. It concerns precisely this type of mineral water and I describe it in detail here. The company found, from Poland, found a spring in the village of Legnava [and] and asked for a permit […] in order to be able to extract the water and transport it to Poland via a pipeline […]. [U]nfortunately, the law does not regulate such action or solution in situations like these, which means that there exists a loophole and the legislation should be fixed. […] You have to fix the legislation because […] essentially […] water can be transported out of Slovakia, […] so that, even if the government doesn't want to, it can be exported to Poland and it is not regulated by the law.[1131]

iv. On 23 February 2016:

> **[Prime Minister Fico:]** The protection of drinking water is a priority for the government; therefore, as of December 2014, the Constitution of the Slovak Republic has stipulated a constitutional ban on the export of water as a raw material by means of transport, e.g. by a tanker or pipeline. At that time we repeatedly warned that if there were no rules on the handling of drinking and mineral water, there might be uncontrolled exports of water to abroad. We had information about some attempts to do so already then, and that we were not making things up is confirmed by the fact that a complaint was filed with the European Commission by a Polish company, which tried to export mineral water from Slovakia using a pipeline and to bottle this mineral water in Poland and then sell it. We also knew about similar attempts concerning drinking water. This time, however, in southern Slovakia and in eastern Slovakia towards Hungary.[1132]

541. Against this background, it may well be that Legnava was an important concern of the Slovak Government in relation to raw water export. After all, GFT Slovakia was the first entity to raise the issue concretely by formally requesting authorization to engage in the cross-border exploitation of Slovak water. Yet, in the overall assessment, one should not lose sight of the fact that the constitutional change was primarily concerned with non-mineral water reserves in regions other than that of the Project. Prime Minister Fico himself stated that, if the Constitutional Amendment were to be repealed, it would "primarily [affect] the unprecedented drinking water reserves that [the Slovak Republic has in] Žitný ostrov".[1133] Moreover, for his part, Minister Žiga pointed out during his testimony that, as Minister of Environment, mineral water fell outside of his competence

[1131] Parliamentary Session, 9 July 2014, **C-35**, pp. 4-5.

[1132] Press Conference on Banning the Export of Drinking Water, 23 February 2016, **C-140**, p. 1.

[1133] Press Conference on Banning the Export of Drinking Water, 23 February 2016, **C-140**, p. 2.

and that, to the extent that he referred to the Project, he was using it as an example to illustrate his point that under the then-applicable legal situation no national regulation prohibited or regulated water exports.[1134] Thus, placed in context, the Tribunal considers that the Ministers' references to the Project do not signal targeting. Rather, they appear to denote an attempt to raise awareness and illustrate the reality of the risk of water export with an example, [1135] which appeared necessary to the extent that some MPs challenged[1136] or were unaware[1137] of the existence of such risk.

542. In any event, the Project was not the only cross-border undertaking in the Government's forethought. Prime Minister Fico also alluded to "similar attempts" to export raw drinking water to Hungary,[1138] presumably the VVS-ZKV venture[1139] and/or the other initiatives seeking to export water from Žitný ostrov (as described in the Water Report).[1140]

543. Moreover, the Slovak legislators appeared to have deemed the Project and the interest by foreign investors in Slovak water, particularly mineral water, as a secondary consideration. The record as a whole does not support the conclusion that Legnava was a central concern in the passing of the Constitutional Amendment. Nor does it suggest that the Project drove the Parliament to adopt the Constitutional Amendment.

544. For these reasons, the Tribunal determines that the Constitutional Amendment neither discriminated against nor targeted the Claimant or its investment in Slovakia.

[1134] Tr. 564:24 – 565:19, 567: 14-17 (Žiga).

[1135] Parliamentary Session, 2 July 2014, **C-35**, pp. 1-3; Parliamentary Session, 9 July 2014, **C-35**, p. 5; s*upra*, fn. 1128, 1129, 1131.

[1136] Parliamentary Session, 2 July 2014, **R-313**, pp. 2-3 (MP Chren); Parliamentary Session, 8 July 2014, **R-314**, p. 1 (MP Hraško); supra, ¶ 370

[1137] Parliamentary Session, 17 October 2014, **R-317**, pp. 1-2 (MP Mičovský); *supra*, fn.1106.

[1138] Press Conference on Banning the Export of Drinking Water, 23 February 2016, **C-140**, pp. 1-2; "Water could be spirited out of Slovakia to Poland and Hungary, the Prime Minister stated. Its export will be banned", Aktuality, 8 July 2014, **C-123**, p. 2; s*upra*, fn. 1132, 1130.

[1139] *Supra*, ¶¶ 521, 532.

[1140] Water Report, **R-37**, p. 11; *supra*, ¶ 524.

ii. Reasonability

545. The reasonableness of a State measure depends on whether it pursues a rational policy bearing a reasonable relationship with a legitimate public purpose.[1141] The Parties generally agree on this description of the standard.[1142]

(a) Public purpose

546. Investment treaty arbitration tribunals owe deference to States in determining what serves as a legitimate public purpose. Indeed, the "precise contours of public purpose […] lie within the internal constitutional and legal order of the State in question".[1143] As recognized by the *LIAMCO* tribunal, under international law, States are free to judge for themselves what they consider "useful or necessary for the public good".[1144] Hence, the presumption is that State conduct seeks to attain a legitimate common good.[1145]

547. According to the Respondent, the Constitutional Amendment falls within its powers to "regulate matters in the public interest through the protection of its natural resources, the environment, and the health of its people".[1146] In particular, the Slovak Republic asserts that the Constitutional Amendment sought to achieve the legitimate policy objectives of: (i) "ensur[ing] that Slovakia's finite water resources are adequately protected and preserved for the betterment of its people";[1147] (ii) "protecting and ensuring" the "safe", "appropriate", and "rational use" of Slovak water;[1148] and (iii) "preserv[ing] water resources in Slovakia against the effects of climate change".[1149]

548. By contrast, Muszynianka submits that the Respondent has failed to "invoke a consistent defense" to justify the Constitutional Amendment, as it "struggles to specify the public purpose" behind it.[1150] For the Claimant, there is a disconnect between the public

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[1141] *See e.g. AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, **RLA-35**, ¶ 10.1.1; *Invesmart B.V. v. The Czech Republic*, UNCITRAL, Award, 26 June 2009, **RLA-26**, ¶ 454; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, **RLA-94**, ¶ 693.

[1142] SoC, ¶ 549; SoD, ¶¶ 371-375.

[1143] *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17 (UNCITRAL), Award, 31 January 2014, **CLA-50**, ¶ 437.

[1144] *Libyan American Oil Company v. The Government of the Libyan Arab Republic*, Award, 12 April 1977, ¶ 241.

[1145] *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 294.

[1146] SoD, ¶ 19.

[1147] Rejoinder, ¶ 244.

[1148] SoD, ¶¶ 33, 376.

[1149] R-PHB, ¶ 40.

[1150] Reply, ¶ 890.

purpose invoked during the Constitutional Amendment's legislative process (which focused on preventing excessive extraction and uncontrollable export of water) and the Respondent's submissions in this arbitration.[1151]

549. The "Rationale Report", prepared by the Slovak Government to explain the content of the draft Constitutional Amendment and to justify its introduction to Parliament in August 2014, confirms that the objectives invoked by the Respondent in this arbitration for passing the Constitutional Amendment have remained consistent:

> Given its sensitive predisposition to vulnerability, as well as an increasing impact of the climate change and its expected negative impacts on the environment, waters included, it is necessary that the State protects, sustains and maintains its water resources as a valuable and irreplaceable raw material. […] Special attention will be paid to the protection and rational utilization of mineral, healing and geothermal groundwater and an emphasis will be placed on ensuring sufficient quantity and quality of waters for welfare and environmental services and business activities. […] There are applied principles of protection of health and life of people and animals, and the public safety – due to the fact that water, as a life-important element of the environment, is an irreplaceable raw material and natural wealth, which has strategic significance for the security of the State, the lack of which can endanger life and health of the citizens or put at risk fulfillment of basic functions of the State. […] In the interest of ensuring the protection of lives and health of people, of national security and in the interest of development of the society and of the State, the State must ensure sufficient quantity of good quality water for the citizens, industry, agriculture and other utilization, not only for present but for the future generations.[1152]

550. Environmental preservation, public health, and seeking to regulate the use of natural resources in an informed and optimal fashion all represent core State functions and thus legitimate policy objectives. Contrary to the Claimant's submissions,[1153] the record does not indicate that the Constitutional Amendment was discriminatory or was otherwise adopted in bad faith.[1154] Nor is the legitimacy of the public interest and the rationale underlying the Constitutional Amendment called into question, as argued by the Claimant,[1155] by the fact that Slovakia currently has "ample and sufficient water sources".[1156]

551. First, environmental protection is not the only public interest invoked. The *regulation* of the use of natural resources is a self-standing sovereign prerogative that is not necessarily correlated with the level of availability of the natural resource at issue. The

[1151] Reply, ¶¶ 523-524, 890.

[1152] Rationale Report, 20 August 2014, **R-33**, pp. 6, 8.

[1153] Reply, ¶¶ 47, 708

[1154] *Supra*, ¶¶ 515-544.

[1155] SoC, ¶¶ 280-282; C-PHB, ¶¶ 166-170.

[1156] SoC, ¶ 281.

same can be said of the protection of public health, which constitutes an independent State function. The Tribunal notes in this regard the Government's objective in seeking to situate the competence over water resource decisions within the central government, thereby taking it away from the local and regional levels of government.[1157]

552. Second, the sufficiency of water resources in Slovakia is contentious. As seen, during the debate of the Constitutional Amendment certain MPs questioned the availability of data in support of the "generally accepted and received truth" that "Slovakia is rich in groundwater sources".[1158] In any event, in the words of Minister Žiga, the fact that Slovakia may at present have sufficient reserves "does not mean that these sources are inexhaustible or invulnerable".[1159] Slovakia's groundwater resources are unevenly distributed throughout its territory,[1160] with one region presenting a "tight" water balance status already in 2011.[1161] As to surface waters, an overwhelming majority of the regions present either medium or high vulnerability in terms of water yield.[1162] According to Prof. Milan Lapin, the Respondent's climatology expert,[1163] these adverse effects will worsen due to the lower precipitation rates and temperature increases (leading to excessive evapotranspiration) resulting from climate change.[1164]

553. Third, in any event States need not wait for their natural resources to be at risk or depleted to take action. Precautionary measures are more than appropriate with respect to vital resources such as water, which are likely to become scarcer with time. This should be particularly uncontroversial in the present case, as even before the

[1157] *Supra*, ¶ 523.

[1158] Parliamentary Session, 17 October 2014, **R-317**, p. 3 (MP Kaník); *see also supra*, ¶ 528.

[1159] "Slovak water will not be exported: The Constitution has been amended to protect Slovak water!", Nový Čas, 22 October 2014, **C-125**, p. 1.

[1160] Water Report, **R-37**, p. 5 ("In general, it can be said that the distribution of groundwater in the territory of Slovakia is unequal and depends not only on climatic factors but also on geological conditions".).

[1161] Water Report, **R-37**, p. 8.

[1162] Miriam Fendeková, et al. Hydrological Drought in Slovakia and Forecast of its Development (Comenius University in Bratislava 2017), **R-100**, p. 251.

[1163] The Tribunal notes that the Claimant did not offer a rebuttal expert report to Prof. Lapin's expert testimony or called him for cross-examination. The Claimant limited its position to stating that "it would not enter into a scientific debate with the Respondent as to the existence and global consequences of climate change. Whilst, in general, the Claimant recognizes the importance of such discussions, it finds them to be of a negligible importance in the present case. For this reason, the Claimant chose not to address any climate-change based arguments in its submissions, and not to call to the Hearing the Respondent's expert witness on the issue, Professor Lapin" (C-PHB, ¶ 183; *see also* Reply, ¶¶ 509-511).

[1164] Lapin ER, **RER-1**, ¶¶ 7-12, 52-57.

Constitutional Amendment, underground, natural, spring and healing waters were already subject to a "privileged regime of regulation".[1165]

554. This being said, it is true that some of Minister Žiga's remarks insist more on the protection of the local economy. Both before and after the Constitutional Amendment, Minister Žiga stated:

> [T]he draft amendment to the Constitution, stipulates two exceptions from the ban on water transportation, transporting water bottled in the Republic of Slovakia, which is an exception in favour of the Slovak [water manufacturer?] industry, and of citizens in terms of their cross-border travels; as well as an exception for water as a material that is a humanitarian aid measure.[1166]
>
> The Slovak authorities had no basis in legislation to prohibit [an] activity [such as the Project] and could not support their stance with any specific regulation. As a result, the added value and jobs will be created in a different country, and in our country we will only pay for the abstraction [sic] of mineral water. [T]hose who will be bringing back and creating new jobs, and creating added value in Slovakia, will not be paying 200 euros per cubic metre. In fact, those who would like to take the water from that spring into a tank or install a pipeline there and transport it across the border, will be paying 200 euros per cubic metre of water.[1167]
>
> We want to protect water as a strategic raw material for the people of Slovakia and we want to prevent its export[.] […] They would have pumped water from us and the added value, employment and profit would have been created outside Slovakia. And this is precisely the kind of case we want to prevent[.][1168]
>
> We do not ban the exports in consumer packaging. It means that if a company wants to build a factory, business, bottling plant in the Slovak Republic, employ our people, produce added value here and to pay tax on such added value, we will even support such a company in its business activities. But, we are strictly against such a company coming here, drilling a well, building a pipeline from it and exporting water as a strategic raw material beneath the Poprad river or across the border and conducting commercial activities with such water there. So, basically, this is the fundamental position of the Slovak Republic and of the Ministry of Environment.[1169]

555. However, looking at the record as a whole, these statements do not appear to the Tribunal to be representative of the Constitutional Amendment's purposes. State intent is often the product of a mix of factors, including political compromises, partisan considerations, and competing interests. Accordingly, when a particular actor voices a distinct and perhaps arguably improper purpose, it does not mean that such motive is

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[1165] Potasch ER II, **RER-6**, ¶ 125(i).

[1166] Parliamentary Session, 17 October 2014, **C-35**, p. 7 (brackets in the translation provided by the Parties).

[1167] Parliamentary Session, 2 July 2014, **C-35**, p. 2. The Tribunal understands that the EUR 200 per cubic metre referred to by Minister Žiga is the payment envisaged by the initial draft amendment to the Act on Waters subsequently abandoned for the Constitutional Amendment.

[1168] "Will our drinking water be exported? There is no act governing the export of water", Pluska, 2 July 2014, **C-122**, p. 2.

[1169] Press Conference on Banning the Export of Drinking Water, 23 February 2016, **C-140**, p. 3. At the Hearing the Respondent's counsel made similar statements (*see* Tr. 91:24 – 92:2 (Anway))("All that Muszynianka needs to do in order to comply with the Constitutional Amendment is build a bottling plant in Legnava and export the Legnava water in bottles rather than through pipelines.").

reflective of the State's intention,[1170] nor does it indicate *per se* a breach of the international obligation at issue. This is particularly true in the present circumstances where, while adopted on an initiative of the Slovak Government, the challenged measure was not taken by the executive power, but was the product of a democratically elected legislature.

556. In this context, the Tribunal finds that, aside from Minister Ziga's statements,[1171] which he defended as being intended to illustrate the legal lacuna that concerned the Government (i.e., that, contrary to the view of some MPs that Slovak law already prohibited water exports, the Project showed that this was not the case), nothing else during the legislative process indicates that the creation of jobs or wealth in the country, or the generation of tax revenues, were central to the Constitutional Amendment's rationale or its objectives. Therefore, while an intent of developing the local economy may well have been involved, it is not such as to undermine the Constitutional Amendment's declared policy objectives of protection of the environment, public health, and water resources.[1172] In any event, the Claimant does not challenge the creation of jobs and wealth retention within Slovakia as unlawful, and rightly so. There is no question that value creation within its territory is a legitimate State policy. In and of itself, such a policy cannot constitute a breach of the BIT.[1173]

[1170] *See e.g. Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, ¶ 158; *see also Corn Products International Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, ¶ 137; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, 8 November 2010, Award, **CLA-90**, ¶ 427; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **CLA-28**, ¶ 8.23; *see also AES Summit Generation Limited and AES-Tisza Erömü Kft. v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, **RLA-35**, ¶¶ 10.3.23-10.3.24.

[1171] Similar statements were not made by Prime Minister Fico.

[1172] Indeed, the Rationale Report does not refer to economic development as one of the Constitutional Amendment's policy objectives.

[1173] The Tribunal considers in this respect that the evidence as a whole must be examined to identify the main objective(s) being pursued in relation to a particular measure. As such, it is not convinced by the dissenting opinion's reasoning which would impugn a measure which was driven by a set of accepted public policy and legislative motivations because one argument in support thereof is arguably inappropriate. The Tribunal notes in this regard that other international dispute settlement bodies have likewise had to wrestle with measures actuated by multiple motivations and have opted to focus on the principal objective of the measure. For instance, *see United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, Panel Report, 11 November 2012, ¶¶ 7.686, 7.691. In this case, the Panel examined the statements of individual legislators and found them unhelpful. The Panel considered that different constituencies and legislators may have different objectives, which nonetheless lead to the adoption of a measure. The Appellate Body upheld the Panel's approach (*See United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, Appelate Body Report, 29 June 2012 (adopted 23 July 2012), ¶¶ 430-431, 453).

(b) Reasonable connection with a public purpose, interest or objective

557. The next issue is whether the Constitutional Amendment was adopted "for" or bears a "reasonable relationship" with the legitimate public policy objectives of environmental (water) preservation, public health, and regulation of the use of natural resources.[1174] In answering this question, to use the words of *Paushok*, it is not the role of an arbitral tribunal to "weigh the wisdom of legislation".[1175] Hence, it is not dispositive whether the State measure at issue is a "poor instrument" to achieve the public objectives sought, or if there is "no evidence to the effect that they were in fact achieved".[1176] Instead, the relevant criterion for the reasonable connection test is whether the State measure represents a "potentially effective mean" to address the declared public purpose,[1177] or whether it is "at least capable of furthering" such purpose.[1178]

558. In other words, arbitral tribunals must pay deference to the choices States make when deciding how to implement policy objectives. Such deference or margin of appreciation makes sense because arbitral tribunals are not embedded within the host State and State authorities are better placed to assess national the conditions, needs, sensitivities, priorities, technical specificities and interests of the stakeholders.[1179]

559. In the present case, there are a number of elements indicating that the Constitutional Amendment was reasonable.

560. First, the Constitutional Amendment discourages water exports given the logistical and economic constraints of bottling the water in Slovakia. The costs of constructing and managing a bottling plant, and of bottling and transporting bottled water, appear higher than those associated with bulk water exports through pipelines or tankers to a location where bottling operations can benefit from synergies driving down total costs. The higher costs may in term have a bearing on the volume of water retained in Slovak territory.

[1174] *Supra*, ¶ 545.

[1175] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Republic of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, **CLA-54**, ¶ 316.

[1176] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Republic of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, **CLA-54**, ¶ 316.

[1177] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶ 306.

[1178] *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 296.

[1179] Caroline Henckels, Proportionality and Deference in Investor-State Arbitration:Balancing Investment Protection and Regulatory Autonomy (Cambridge University Press 2015), p. 37.

This establishes a reasonable connection between the Constitutional Amendment and the policy objective of water preservation.[1180]

561. In this respect, one may ask whether a stronger and thus more reasonable connection would exist if the Constitutional Amendment had prohibited the export of water entirely, i.e., if it had not carved out *inter alia* bottled water from its application.[1181] Yet, to the extent that, latest upon being bottled, mineral water becomes a good which is subject to the freedom of movement across the European internal market, not exempting it from the scope of the Constitutional Amendment may have resulted in a violation of EU law.[1182]

562. The Claimant objects that favoring the export of bottled water "has no impact on the volume of water extracted from sources".[1183] It submits that, as the "determination concerning the maximum exploitable amount of water from a given source is part of the permitting process and the matter in which the extracted water will be further transported has no bearing on this determination".[1184] However, as noted by the Respondent,[1185] a decision as to the maximum amount of exploitable water was only required with respect to mineral water, thus not covering the majority of Slovakia's water reserves (i.e., non-mineral water).

563. Second, by allowing exports in bottles only, the Constitutional Amendment prevents that underground water, which according to the Act on Waters is "primarily designated" for human consumption and drinking purposes,[1186] be exported for industrial purposes. As noted by Minister Žiga, in the Parliamentary debates, "it's hard to imagine for [underground] water to be used for something else than drinking" if bottled prior to export.[1187] The Claimant does not challenge that the Slovak Republic could determine the purpose for which water could be exported, and rightly so. Prior to the Constitutional

[1180] *Supra*, ¶ 547.

[1181] The Constitutional Amendment also exempted the cross-border transportation of water for personal consumption up to a certain point (i.e., 20 litres per person) and for humanitarian aid or emergency assistance. The reasonability of these exemptions is self-explanatory and in any event is not subject to dispute.

[1182] It is currently disputed before the competent EU institutions whether unbottled water is a good under EU law and, therefore, whether the Constitutional Amendment denotes a trade hindrance contrary to EU law. This Tribunal does not need to determine this issue to decide whether the Slovak Republic breached its obligations under the BIT (*see infra*, ¶¶ 580 *et seq*) and is in any event not constituted to resolve disputes pertaining to EU institutions alone.

[1183] C-PHB, ¶ 189.

[1184] C-PHB, ¶ 189.

[1185] R-PHB, ¶ 43(b).

[1186] Act on Waters, **R-187**, Art. 3(3).

[1187] Tr. 566:21-22 (Žiga).

Amendment, the Slovak Republic lacked mechanisms to control how water would be used after export.[1188] The Constitutional Amendment remedies this lack of control. By directing that water can only be exported in bottles and thus indirectly determining that exports are for drinking purposes alone, it reasonably advances the legitimate policy objective of regulating the rational use of Slovak water. At the same time, the Constitutional Amendment appears to rule out exports for industrial purposes. Contrary to the Claimant's submissions,[1189] this could have an impact on the total amount of Slovak underground water, thereby furthering the public purpose of water preservation.

564. Third, the Constitutional Amendment ensures that Slovak authorities are able to carry out all required safety and hygienic compliance tests in relation to the production of mineral water. The Tribunal has established that being the State from where the mineral water would be extracted, the Slovak Republic is the only one accountable under the EU Mineral Water Directive for the content and production of Slovak water *vis-à-vis* other Member States.[1190] To this effect, Slovakia must control that the mineral water's "original purity", "mineral content", "trace elements", and "other constituents", are preserved from extraction to bottling.[1191] These requirements seek, *inter alia*, to "protect the health of consumers".[1192] Requiring that mineral water be bottled prior to export enables the Inspectorate to guarantee, not only through remote supervision,[1193] but by way of on-site supervision,[1194] the "hydrogeological, chemical, physical, microbiological and biological" content of the water throughout the production process.[1195] Thereby, the Constitutional Amendment promotes the legitimate policy objective of public health. Notably, the protection of public health, particularly in the context of water transport, was a consideration cited in the Constitutional Amendment's Rationale Report.[1196]

[1188] C-PHB, ¶ 188.

[1189] C-PHB, ¶ 187

[1190] *Supra*, ¶¶ 391 *et seq*.

[1191] Mineral Water Directive, **R-40**, Art. 1, Annexes I, II.

[1192] Mineral Water Directive, **R-40**, Recital 5.

[1193] *Supra*, fn. 770.

[1194] Act on Mineral Waters, **R-35**, Arts. 44(2)(c) (The Inspectorate carries out the following within the supervision: […] on-site supervision at users of natural mineral sources […].); 45(1)(a) ("Members of the State Spa Committee, Inspectorate and persons appointed by the State Spa Committee to elaborate an opinion or statement are authorized, within the scope of their authorization, to: […] enter the plots, structures and facilities in order to collect data necessary for an inspection, regime monitoring and deficiencies detection".).

[1195] Act on Mineral Waters, **R-35**, Arts. 2(14),13(1)(h).

[1196] Rationale Report, 20 August 2014, **R-33**, p. 7 ("The proposed provision bans utilization of waters taken from water bodies located in the territory of the Slovak Republic for the purposes of transport of thus taken water, as a raw material, by means of transport, for example, by cisterns or pipelines across a State border from the territory of

565. For these reasons, the Tribunal finds that the Constitutional Amendment bears a reasonable relationship with the legitimate public policy objectives of water preservation, public health, and regulation of the use of natural resources, and, as a consequence, that it meets the reasonableness test under the FET standard.

iii. Proportionality

566. In order to satisfy the principle of proportionality, a State measure must be suitable to achieve a legitimate public purpose **(a)**; necessary to achieve the objective pursued in that no less burdensome or intrusive, yet feasible and equally effective measures exist **(b)**; and not excessive in consideration of the relative weigh of the interests at issue (i.e., proportionality *strictu sensu*) **(c)**.[1197] The Tribunal notes that neither Party has made submissions on the third step of the proportionality test, namely, proportionality *stricto sensu*. Nevertheless, to the extent that proportionality *stricto sensu* is indeed part of the standard, the Tribunal cannot forego its analysis.

(a) Suitability

567. A State measure is deemed suitable if it is rationally connected to the objective it pursues by being capable of advancing or having a causal relationship with that objective.[1198] The suitability test is thus materially indistinguishable from the reasonableness test, which the Tribunal has conducted above. The Claimant itself acknowledges that proportionality is "interconnected" with reasonableness[1199] Having affirmed that the Constitutional Amendment was reasonable, the Tribunal also accepts its suitability.

(b) Necessity

568. The Claimant only challenges the necessity of the Constitutional Amendment on the basis that Slovak law already incorporated a mechanism controlling the extraction of

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the Slovak Republic. In water transport it is necessary to preserve its preferential designation for use in the public interest, public safety and protection of health and life of people and animals in the territory of the Slovak Republic".).

[1197] *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award, 28 June 2017, ¶¶ 355, 394; *Electrabel S.A. v. The Republic of Hungary, ICSID Case No. ARB/07/19*, Award, 25 November 2015, **RLA-116**, ¶¶ 179-180; 2; Benedict Kingbury and Stephan W. Schil, *Public law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality*, in International Investment Law and Comparative Law (Oxford University Press 2010), pp. 38-40.

[1198] Caroline Henckels, Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy (Cambridge University Press 2015), p. 25; *see also* Carmen Martinez Lopez and Lucy Martinez, *Proportionality in Investment Treaty Arbitration and Beyond: An "Irresistible Attraction"?*, BCDR International Arbitration Review, Vol. 2(1), 2015, p. 263.

[1199] SoC ¶¶ 461-462.

underground water, i.e., the Maximum Quantities Decisions.[1200] That is correct, but it only applied to mineral water, not water in general,[1201] thus leaving the majority of the Slovak Republic's water resources unprotected. Moreover, as stressed by the Respondent, the decision on the maximum exploitable amount of mineral water "only ensures that a particular hydrogeological unit of water remains naturally renewable and does not take into account the overall water situation in the Slovak Republic".[1202]

569. Therefore, the Claimant has identified no less restrictive (yet available and equally effective) measures that the Respondent could have adopted as an alternative to the Constitutional Amendment. That burden lies on the investor. Host States cannot be expected to ex *officio* demonstrate, within a universe of options, that the measure at issue was the least restrictive and viable to achieve the intended public purpose.

570. This being so, given that mineral water represents only a small portion of Slovak water, the Tribunal has asked itself whether the Respondent should have carved out mineral water from the scope of the Constitutional Amendment or improved its maximum quantities decisions system to monitor the overall yield of Slovak water. At some point, the Respondent indeed considered such an arrangement. The Water Report (approved by Resolution No. 583/2012) envisaged conditioning the cross-border exploitation of Slovak water to a case-by-case approval process, which would in turn be subject to establishing that the water remaining within the Slovak Republic would be sufficient to satisfy national demand.[1203]

571. In the past, some investment tribunals have held that the necessity requirement was not fulfilled as soon as they had identified a possible alternative measure.[1204] The necessity test, however also demands that alternative measure to be available and equally effective. Without any empirical evidence proving that these conditions are satisfied, engaging in such a scrutiny would exceed the Tribunal's institutional capacity. It would blur the line between adjudication and policy-making, the latter being reserved to the State's legislative and regulatory organs. Thereby, it would fail to grant the deference owed to States on how to implement their policies. In any event, water preservation was

[1200] Reply, ¶ 526; Tr. 72:5 – 73:3 (Jeżewski).

[1201] *Supra*, ¶ 562.

[1202] R-PHB, ¶ 43(c).

[1203] Water Report, **R-37**, p. 13; *supra*, ¶ 66.

[1204] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, **RLA-91,** ¶ 323; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, **CLA-58**, ¶ 351; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, **CLA-57**, ¶ 309.

not the only public purpose pursued by the Constitutional Amendment. Accordingly, a potential alternative in terms of control over water extraction would not be dispositive of necessity in relation to the other public purposes involved.

572. For these reasons, the Tribunal finds that, on the record before it, the Constitutional Amendment meets the necessity test.

(c) Proportionality *stricto sensu*

573. Proportionality *stricto sensu* requires weighing the effects of a State measure on an investor's rights or interests and the significance of the purpose pursued by the measure. According to some, this third step "is apposite because an analysis that stops at the necessity-stage would allow restricting a right severely in order to protect a negligible public interest".[1205] Others sustain that it is questionable whether tribunals should at all engage in this form of analysis "due to arbitrators' lack of embeddedness in the state or region, the *ad hoc* nature of investment arbitration and the absence of an appellate facility".[1206]

574. On this backdrop, the Tribunal considers that it cannot forego this review, but in performing it, the Tribunal must exercise restraint. Consequently, proportionality *stricto sensu* would be lacking when a measure imposes an excessive burden on an investor's rights in relation to the aim of the measure.[1207]

575. Whatever the standard, the present case is clear-cut. The public purposes that prompted and were reasonably connected with the Constitutional Amendment, namely, environmental conservation, public health, and the regulation of natural resources, are far from negligible, as are the specific objectives they advanced: the protection and rational use of water. The vital importance of this non-renewable resource cannot be overstated, especially in an era of alarming climate change. By contrast, while the Claimant may have had a commercial interest in the (cross-border) exploitation of the Legnava Sources, it held no right or even a legitimate expectation to that effect. No

[1205] Benedict Kingsbury and Stephan W. Schill, *Public law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – the Concept of Proportionality*, in International Investment Law and Comparative Law (Oxford University Press 2010), p. 40.

[1206] Caroline Henckels, Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy (Cambridge University Press, 2015), p. 164.

[1207] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, **CLA-13**, ¶ 311; *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, **CLA-56**, ¶ 293. Or, as stated in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 249, ¶ 87, the "negative impact" is "manifestly excessive when measured against the protection afforded to the purpose invoked".

relevant private interest at issue therefore seems remotely capable of outweighing the public interests involved in the adoption of the Constitutional Amendment.

576. On this basis, the Tribunal finds that the Constitutional Amendment meets the proportionality test under the FET standard.

iv. Consistency

577. The Claimant submits that the Constitutional Amendment implied inconsistent treatment on two main accounts. On the one hand, it argues that the political process that led to the adoption of the Constitutional Amendment was not linear, given that as of the "critical date" of 8 July 2014, the Respondent targeted the Claimant.[1208] The Tribunal has already established that the primary and overarching concern behind the Constitutional Amendment, that is, the preservation of drinking water and underground water in general, remained the same both before and after the so-called "critical date".[1209] It has also held that the Constitutional Amendment did not discriminate against or target the Claimant.[1210]

578. On the other hand, the Claimant submits that, prior to this arbitration, the Slovak authorities (i.e., the Ministry of Environment, the Ministry of Finance, and the Direction of Government Legislation), as well as the Slovak SOLVIT Centre,[1211] had concluded that unbottled mineral water was a commodity under EU primary law.[1212] Consequently, pursuant to Article 35 of the TFEU, that water cannot now be the subject of quantitative

[1208] Reply, ¶¶ 484, 497-498.

[1209] *Supra*, ¶ 526.

[1210] *Supra*, ¶ 544.

[1211] *Supra*, ¶ 428.x.

[1212] Referring to Letter from SOLVIT Centre SR (Section of Government Legislation, Department of Law Approximation) to Dušan Čerešňak (General Director of Section of Water Bodies, Ministry of Environment), 28 May 2012, **C-171**; Letter from the Ministry of Environment to GFT Slovakia, 26 July 2012, **C-114;** Letter from Štefan German (Director General of the Section of the Government Legislation) to Vojtech Ferencz (Ministry of Environment), 14 November 2013, **C-173**; Letter from Peter Pellegrini (Ministry of Finance) to Vojtech Ferencz (Ministry of Environment), 22 November 2013, **C-174**; Record from dispute proceedings on collective objections to the Bill changing and amending Act no. 364/2004 Coll. on waters and on amending the Act of the Slovak National Council no. 372/1990 Coll. on offences as amended (the Water Act), as amended, and amending the Act of the National Council of the Slovak Republic no. 145/1995 Coll. on administrative fees as amended, 26 July 2013, **C-175**; Report from the bilateral meeting of the State Secretary of the Ministry of the Environment with the Cabinet of the Commissioner for the Environment, 8 July 2014, **C-176**; Information on draft bill modifying and supplementing Act No. 364/2004 Coll. on Water and modifying Act No. 372/1990 Coll. of the Slovak National Council on Infringements as amended (Water Act), and modifying and supplementing certain Acts – state by April 2014 issued by the Ministry of Environment, 28 April 2014, **C-178**.

export measures or measures with equivalent effect between Member States, such as the Constitutional Amendment.[1213]

579. The Respondent and its expert on EU food regulation Mr. O'Rourke strongly contest that unbottled water constitutes a commodity subject to EU rules on free movement of goods.[1214] Still, during the arbitration, the Respondent has paid little attention to the statements of the Slovak authorities and SOLVIT Centre invoked by the Claimant.[1215]

580. The CJEU has long stated that, under EU law, any item with an "intrinsic commercial value" constitutes a "good" for the purposes of the EU Treaties.[1216] Still, the intrinsic commercial value of an item is contingent on it being able to be "valued in money" and "capable, as such, of forming the subject of commercial transactions".[1217] As for mineral water as such, Slovak law precludes private parties from purchasing or selling mineral water prior to bottling.[1218] Under the Act on Mineral Waters, the Slovak Republic transfers the ownership of the water to an enterprise upon extraction pursuant to an exploitation permit and payment.[1219] To the extent that this transfer may be regarded as a commercial transaction, it would follow that Slovak natural mineral water acquires the status of "good" under EU law, at the earliest upon being extracted further to an exploitation permit and payment and latest upon being bottled.

581. In this context, it is noted that the relevance of national law in the determination of the commerciality of water is not disputed,[1220] and rightly so. Although the EU Water Framework Directive defines water generally speaking as a "commercial product", it immediately adds that water is not a product "like any other but, rather, a heritage which must be protected, defended and treated as such".[1221] In this regard, the EU

[1213] Reply, ¶¶ 350-352, 485-496.

[1214] R-PHB, ¶¶ 130-136; SoD, ¶¶ 29, 221; O'Rourke ER I, **RER-4**, ¶ 19; O'Rourke ER II, **RER-8**, ¶¶ 8-18.

[1215] R-PHB, ¶ 134.

[1216] Müller-Graff ER, **CER-3**, ¶ 9; *Commission of the European Communities v. Belgium*, CJEU Case C-2/90, Judgement, 9 July 1992, ¶ 23.

[1217] O'Rourke ER II, RER-8, ¶ 14; *Commission of the European Communities v. Italy*, CJEU Case 7/68, Judgment, 10 December 1968, **R-208**, ¶ B.1.

[1218] *Supra*, ¶ 359.

[1219] Act on Mineral Waters, **R-35**, Art. 3 ("Natural healing water and natural mineral water shall become the ownership of the natural person - entrepreneur or legal person that has extracted it from a natural healing source or natural mineral source based on mineral water exploitation permit issued hereunder and has made a payment for it".).

[1220] Müller-Graff ER, **CER-3**, ¶¶ 8-11.

[1221] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for the Community action in the field of water policy, **R-157**, Recital 1 ("Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such".).

Commissioner for the Environment confirmed that, while the EU Water Framework Directive "cannot be interpreted as a limitation to the perception of water as a commodity",[1222] it "falls within the powers of a member state to decide whether to treat water as a commercial product, however, under non-discriminatory terms for third parties and in accordance with the rules of the internal market".[1223]

582. On this basis, the Constitutional Amendment cannot constitute inconsistent treatment towards the Claimant. Lacking the Exploitation Permit, the water of the Legnava Sources remained underground and thus in Slovakia's full ownership. It can hardly be inconsistent for the Slovak Republic to dispose of a natural resource it fully owns and to allow its extraction and exploitation only for projects providing for bottling prior to export. While it might have been inconsistent to impose such a condition at a time when GFT Slovakia would already have an Exploitation Permit or held a legitimate expectation to receive one, that is not the situation here.

583. Having reached this conclusion, the Tribunal need not make a final determination as to whether and when natural mineral water is a good for the purposes of the EU Treaties prior to bottling, as the statements by the Slovak authorities and the SOLVIT Centre which Muszynianka invokes coincide with the analysis above.[1224]

584. For instance, on 26 July 2012, further to an earlier opinion rendered by the Slovak SOLVIT Centre,[1225] the Ministry of Environment informed GFT Slovakia that:

> [A]ny [natural] mineral water pumped out from the groundwater body cannot be considered to be an exclusive property of the Slovak Republic any further and the disposal rights of state administration bodies to such water cannot be regulated as the state, having granted the permit, transferred its rights to the holder of the permit subject to specified terms and conditions including payment and the natural mineral water has become goods that is subject to fundamental principles of free circulation of goods in the EU internal market.[1226]

585. In this regard, the Ministry of Environment concluded that it would be inappropriate to impose post-Exploitation Permit requirements to the exploitation of the Legnava

[1222] Report from the bilateral meeting of the State Secretary of the Ministry of the Environment with the Cabinet of the Commissioner for the Environment, 8 July 2014, **R-412**, p. 2.

[1223] Report from the bilateral meeting of the State Secretary of the Ministry of the Environment with the Cabinet of the Commissioner for the Environment, 8 July 2014, **R-412**, p. 2; R-PHB, ¶ 135.

[1224] *Supra*, ¶ 580.

[1225] Letter from SOLVIT Centre SR (Section of Government Legislation, Department of Law Approximation) to Dušan Čerešňak (General Director of Section of Water Bodies, Ministry of Environment), 28 May 2012, **C-171**.

[1226] Letter from the Ministry of Environment to GFT Slovakia, 26 July 2012, **C-114**, p. 3.

Sources, such as the conclusion of an inter-governmental agreement between the Slovak Republic and Poland.[1227]

586. Similarly, on 14 November 2013, the Slovak Direction of Government Legislation observed that the EU Commission consider[ed] "water as a good".[1228] This statement, unknown to GFT Slovakia at the time, was made in relation to cross-border trading and possible taxation of water exports, and thus assumed a post-permit extraction. The same view was shared by the Ministry of Finance, also unknown to GFT Slovakia contemporaneously.[1229]

587. The importance of first securing an Exploitation Permit under Slovak law for the water to qualify as a commodity under EU law was underscored in two reports issued in the context of the draft amendment to the Act on Waters. The first one, dated 26 July 2013, stated that "[t]he entity that owns or obtains a water exploitation permit (irrespective of the purpose of use) has, under the European legislation in force, the right to export water to the European Union countries".[1230] The second one, dated 28 April 2014, stated that "in accordance with the current provisions of national and European legislation", "water taken from a water source and supplied to the consumer (under an exploitation permit) for a fee is according to the [TFEU] (Art. 34 and Art. 35 of the Treaty), [a] good[] – a subject of commercial transactions". It went further to state that, "[t]herefore, a fundamental distinction should be made between the relation to water at its source [and the] relation to the abstracted water which becomes a commodity".[1231]

588. None of these statements could have suggested to GFT Slovakia or Muszynianka that the regulatory void on cross-border exploitation of water that existed before the Constitutional Amendment would remain unchanged. Nor could they have indicated that

[1227] The Tribunal notes that this letter was sent to GFT Slovakia in order to explain the reasons behind the REOP's change of position in the context of the Zoning Permit (*supra*, ¶ 46).

[1228] Letter from Štefan German (Director General of the Section of the Government Legislation) to Vojtech Ferencz (Ministry of Environment), 14 November 2013, **C-173,** p. 4.

[1229] Letter from Peter Pellegrini (Ministry of Finance) to Vojtech Ferencz (Ministry of Environment), 22 November 2013, **C-174.**

[1230] Record from dispute proceedings on collective objections to the Bill changing and amending Act no. 364/2004 Coll. on waters and on amending the Act of the Slovak National Council no. 372/1990 Coll. on offences as amended (the Water Act), as amended, and amending the Act of the National Council of the Slovak Republic no. 145/1995 Coll. on administrative fees as amended, 26 July 2013, **C-175**, p. 3.

[1231] Information on draft bill modifying and supplementing Act No. 364/2004 Coll. on Water and modifying Act No. 372/1990 Coll. of the Slovak National Council on Infringements as amended (Water Act), and modifying and supplementing certain Acts – state by April 2014 issued by the Ministry of Environment, 28 April 2014, **C-178**, pp. 1-2.

the Slovak Republic would forego its right to dispose of its own untapped natural resources in a legitimate manner by imposing pre-Exploitation Permit conditions.

589. Consequently, the Tribunal concludes that the Constitutional Amendment does not entail inconsistent treatment in breach of the FET standard.

e. The Exploitation Permit proceedings

590. The Claimant alleges that the State Spa Committee (i) failed to notify GFT Slovakia about the commencement of the proceedings; (ii) failed to give GFT Slovakia the possibility to comment on the evidence gathered prior to deciding on the Exploitation Permit; (iii) stayed the proceedings due to the lack of a Building Permit that was not necessary; and (iv) ignored the time limits of the Administrative Procedure Code so as to decide on the Exploitation Permit after the Constitutional Amendment and deny the Exploitation Permit on that basis.[1232] According to the Claimant, such conduct represents "significant violations" of Slovak administrative law.[1233]

591. The Tribunal has already established that a State's violation of its law can constitute a breach of the FET standard to the extent the conduct complained of is abusive or arbitrary.[1234] Indeed, the mere violation of domestic law does not necessarily entail a breach of international law[1235] and *vice-versa* the lawfulness of a measure under domestic law does not imply its lawfulness under international law.[1236] The Tribunal will therefore assess whether the measures impugned, be they compliant with Slovak administrative law or not, denote abusive or arbitrary treatment contrary to FET.

i. Notification of the commencement of the proceedings

592. Article 18 of the APC addresses the commencement of administrative proceedings and requires the authority to give notice to the parties of such commencement:

> (1) Proceedings shall commence based on the proposal of a party to the proceedings or the initiative of an administrative authority.
>
> (2) Proceedings shall commence on the day on which a party to the proceedings delivered their proposal to the relevant administrative authority. If a

[1232] Reply, ¶ 447.

[1233] Reply, ¶ 430.

[1234] *Supra*, ¶ 467.

[1235] *Chemtura Corporation v. Government of Canada*, PCA Case No. 2008-01 (UNCITRAL), Award, 2 August 2010, **RLA-73**, ¶ 215; *GAMI Investments, Inc. v. Government of the United Mexican States*, UNCITRAL, Final Award, 15 November 2004, ¶ 97.

[1236] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, **CLA-122**, ¶ 303.

proceeding commences based on the initiative of an administrative authority, the proceeding shall commence on the day on which this authority took the first step against a party to the proceeding.

(3) The authority shall notify all known parties to the proceedings of the commencement of a proceeding. If parties to the proceedings or their place of residence are not known, or if stipulated by a special regulation, the parties shall be notified of the commencement of the proceedings by a public notice.[1237]

593. The Claimant submits that the State Spa Committee failed to comply with Article 18(3) of the APC, as it never notified GFT Slovakia, the authorities affected by the Exploitation Permit application, and other unknown parties, about the commencement of the Exploitation Permit proceedings, thereby preventing them from raising any facts or objections with respect to such proceedings.[1238] The Respondent does not dispute that the State Spa Committee never served a notice pursuant to Article 18(3) of the APC.[1239]

594. As noted by Dr. Potasch, the purpose of Article 18(3) is to ensure that a party is aware of the existence of administrative proceedings so that it may exercise its procedural rights.[1240] Under Article 18(2) of the APC, when proceedings are initiated by a private party, they are deemed commenced upon the filing of the application. Here GFT Slovakia filed an application for an exploitation permit in December 2011.[1241] Hence, even without receiving the notice of the commencement, it knew of the proceedings and was thus in a position to exercise its rights. As a result, the purpose of Article 18(3) was met.[1242]

595. As a consequence, the State Spa Committee's failure to notify GFT Slovakia in accordance with Article 18(3) of the APC lacks the significance required to qualify as a FET breach. While still technically being an omission by the State Spa Committee, the Tribunal finds no evidence of arbitrary or abusive treatment.

[1237] Administrative Procedure Code, **C-98**, Art. 18.

[1238] Reply, ¶ 432, referring to Jakab ER, **CER-2**, ¶ 149.

[1239] Rejoinder ¶¶ 394-395.

[1240] Potasch ER II, **RER-6**, ¶ 177.

[1241] Exploitation Permit Application, 22 December 2011, **C-19** ; *supra*, ¶ 41.

[1242] In addition, to the extent a private party voluntarily takes part of an administrative proceeding, the notification requirement in Article 18(3) of the APC is not essential even if said proceeding is initiated by a public entity (*see* Judgment of the Supreme Administrative Court of the Czech Republic, 16 March 2004, File No. 7 A 163/2002 – 53, **R-263**). In this respect, the Tribunal notes that the Parties' Slovak law experts refer to Czech administrative law to interpret Slovak administrative law due to the similarities of both legal systems (see Jakab ER, **CER-2**, ¶ 96; Potasch ER II, **RER-6**, ¶¶ 74, 179, fn. 44).

ii. Opportunity to comment on the evidence gathered

596. Article 33(2) of the APC requires State authorities to give applicants the opportunity to comment prior to a final decision:

> The administrative authority is obliged to provide the parties to the proceedings and participating persons with the opportunity to comment on the grounds used to reach its decision and on how it was ascertained, or to propose the supplementation of the same, before the decision is issued.[1243]

597. According to the Claimant, GFT Slovakia was never given such an opportunity before the State Spa Committee denied the Exploitation Permit.[1244] Yet, as noted by the Respondent,[1245] the Claimant's allegation is simply at odds with the record.

598. The State Spa Committee based its rejection of the Exploitation Permit application exclusively on the Constitutional Amendment. In relevant part, the State Spa Committee's decision reads as follows:

> The request of GFT Slovakia […] to use [the Legnava Sources] is rejected because, pursuant to Art. 4(2) of the Constitution of the Slovak Republic […] effective as of 1 December 2014, the transport of [unbottled] water taken from water bodies located in the territory of the Slovak Republic across the borders of the Slovak Republic by means of transport or via pipeline is prohibited. [1246]

599. Before reaching this determination, on 9 December 2014, the State Spa Committee elicited GFT Slovakia's comments pursuant to Article 33(2) of the APC in the following terms:

> At its meeting on 8 December 2014 the Commission discussed the completed documentation for the above requirements, and reviewed the applicant's [Exploitation Permit] request […] with the reference to the fact that Article 4 (2) of the [Slovak Constitution] has changed with effect from 1 December 2014. The current wording is as follows: "*The transport of water withdrawn from water bodies located in the territory of the Slovak Republic across the border of the Slovak Republic by means of transportation or pipeline shall be prohibited; the prohibition does not apply to water for personal consumption, drinking water packed into consumer packages in the Slovak Republic and natural mineral water bottled in consumer packaging in the territory of the Slovak Republic and for the provision of the humanitarian aid and assistance in emergencies. Details about the conditions of transport of the water for human consumption and water to provide humanitarian aid and assistance in emergencies are determined by law*".
>
> Considering the above, the [State Spa Committee], in accordance with § 33 (2) of the [Administrative Procedure Code], calls on the on the applicant to express within 30 days from the receipt of this call whether he insists on the submitted application

[1243] Administrative Procedure Code, **R-206**, Art. 33(2); Jakab ER, **CER-2**, ¶ 172; Potasch ER II, **RER-6**, ¶ 167.

[1244] Reply, ¶ 445.

[1245] Rejoinder, ¶¶ 396-398.

[1246] Decision of the State Spa Committee, 26 January 2015, **C-25**, p. 1; *supra,* ¶ 61.

> in full or wishes to modify the application, because—due to the above reasons—it will not be possible to satisfy his initial application.[1247]

600. On 18 December 2014, GFT Slovakia confirmed that it insisted on the original terms of its application.[1248]

601. In other words, GFT Slovakia was afforded the opportunity to comment on the ground invoked by the State Spa Committee to deny the Exploitation Permit before the final decision and GFT Slovakia made use of it. Consequently, there can be no question of a breach of FET.

iii. The stay of the proceedings and Building Permit

602. On 8 February 2012, the State Spa Committee stayed the Exploitation Permit proceedings because GFT Slovakia's application did not meet the formal requirements of Article 11 of the Act on Mineral Water, and because of the "need to resolve" a "preliminary issue", namely, the possibility of viably constructing the water treatment plant and pipelines needed to transport the water from the Legnava Sources to the bottling plant in Poland. The State Spa Committee therefore requested GFT Slovakia to bring its application in conformity with Article 11 of the Act on Mineral Waters and to submit a Building Permit for the facilities necessary for the exploitation of the Legnava Sources.[1249]

603. On 1 August 2012, GFT Slovakia corrected and completed its Exploitation Permit application pursuant to Article 11 of the Act on Mineral Waters. On 19 September 2012, the State Spa Committee deemed GFT Slovakia's application complete with respect to the requirements of Article 11 of the Act on Mineral Waters. However, it continued the stay of the proceedings as the Building Permit was still outstanding.[1250] On 11 July 2014, GFT Slovakia submitted the Building Permit to the State Spa Committee.[1251]

604. It is not disputed that the State Spa Committee was right in staying the proceedings under Article 11 of the Act on Mineral Waters. Nor is it disputed that the State Spa Committee is empowered to stay the proceedings if a preliminary issue must be resolved before a decision can be taken over an application. The dispute is rather whether the

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[1247] Letter from the State Spa Committee to GFT Slovakia, 9 December 2014, **C-131** (italics in original); supra, ¶ 59.

[1248] Letter from GFT Slovakia to the State Spa Committee 18 December 2014, **C-132 / R-59**, *supra*, ¶ 60.

[1249] Decision of the State Spa Committee, 8 February 2012, **C-20**; *supra*, ¶¶ 42-43.

[1250] Letter from the State Spa Committee to GFT Slovakia, 19 September 2012, **C-94**; *supra*, ¶¶ 47-48.

[1251] Letter from GFT Slovakia to Inspectorate, 10 July 2014, **C-113 / R-55**.

State Spa Committee was correct in characterizing the need for a Building Permit as a preliminary issue to the issuance of the Exploitation Permit.

605. While Slovak law does not define the notion of "preliminary issue",[1252] administrative law doctrine suggests that a preliminary issue is a condition to the decision of a State authority over which condition that authority has no decision-making power.[1253]

606. Article 15 of the Act on Mineral Waters specifically allows the issuance of an Exploitation Permit before an applicant obtains a building permit.[1254] In particular, Article 15(1) addresses the situation where an Exploitation Permit holder (i.e., "source user") lacks the "relevant equipment to exploit" the sources. A source user in such situation must submit, the "project documentation for the construction of [the relevant] facility" within a year.[1255] On the basis of the project documentation, pursuant to Article 15(2), the State Spa Committee must issue a binding opinion regarding the "conditions of the facility location, construction, and operation […] in order to ensure that [the] natural mineral water sources [in question] are exploited in a permitted way".[1256] In accordance with Article 15(4), the binding opinion of the State Spa Committee is a "precondition for the issuance" of a Building Permit.[1257] It follows that a Building Permit is not a strictly necessary condition for the issuance of an Exploitation Permit.

607. Bearing this in mind, the question is whether the State Spa Committee's choice to nevertheless stay the proceedings pending the issuance of the Building Permit constituted a breach of FET. In the Tribunal's opinion, the answer is negative. Not only was the Building Permit in any event indispensable to execute the Project,[1258] but the Exploitation Permit application presented unprecedented legal and factual issues.

[1252] Jakab ER, **CER-2**, ¶ 158; Potasch ER II, **RER-6**, ¶ 144(i).

[1253] Jozef Sobihard, Administrative Procedure Code: Commentary, 6th ed. (Lura Edition 2013),**-Jackab-4**, p. 149 ("[A preliminary issue is] an issue on which the decision being the subject of administrative proceedings depends. However, the administrative authority before which the given administrative proceedings is ongoing does not have jurisdiction for its resolution, as this belongs to another administrative authority or court. It is therefore a question which may be the subject of a separate procedure".); Soňa Košičiarová, Administrative Law Process, 2nd ed (Heuréka 2017), **Jakab-4**, p. 215 ("From the theoretical and legal perspective, a preliminary issue means a question answer to which is a requirement for a decision in the administrative proceedings and, in addition, the answer does not fall within the competence of the administrative authority".).

[1254] C-PHB, ¶ 258.

[1255] Act on Mineral Waters, **R-35**, Art. 15(1).

[1256] Act on Mineral Waters, **R-35**, Art. 15(2).

[1257] Act on Mineral Waters, **R-35**, Art. 15(4).

[1258] *See infra*, ¶ 619.

608. Indeed, the State Spa Committee did not only need to assess, pursuant to Article 15(2) of the Act on Mineral Waters, whether the documentation for the location and construction of the mineral water treatment and connecting pipelines allowed the Legnava Sources to be "exploited in a permitted way".[1259] It was also to determine whether the construction of the facilities was viable from a technical and legal perspective.[1260] For instance, as noted by Dr. Potasch, the Project warranted the State Spa Committee "to wonder what building authorities would be competent to issue the construction permit(s), whether the Slovak and the Polish authorities would have a shared competence relating to the parts of the construction in their respective territories, [and] whether the Slovak or the Polish authority have priority when permitting the construction as a whole".[1261] Given the circumstances, including the State Spa Committee's duties to ensure the hygienic conditions of exploitation and of the final product under the Mineral Water Directive, the Tribunal finds that the State Spa Committee's requirement for a Building Permit as a "preliminary issue" and the consequent stay of the Exploitation Permit proceedings was at the very least reasonable; it was certainly not arbitrary, abusive, or otherwise contrary to FET.

609. In fact, before this arbitration, GFT Slovakia never questioned the stay of the Exploitation Permit proceedings due to the lack of a Building Permit. Although it had standing to do so, GFT Slovakia did not challenge the State Spa Committee's decisions of 8 February or 19 September 2012.[1262] To the contrary, before the Slovak courts, it insisted that its application met "all formal and material conditions" for an Exploitation Permit at the time when it submitted the Building Permit, impliedly accepting that it did not before.[1263] That position is an additional reason not to consider the State Spa Committee's request for a Building Permit as arbitrary or abusive.

[1259] Act on Mineral Waters, **R-35**, Article 15(2).

[1260] Potasch ER II, **RER-6**, ¶ 149.

[1261] Potasch ER II, **RER-6**, ¶ 146.

[1262] *Supra*, ¶¶ 602-603.

[1263] GFT's Action against the Ministry of Health, 18 November 2015, **R-28/R-414**, p. 2 ("The Claimant filled the application on 12 January 2012. Based on the request of the State Spa Committee dated 08 February 2012, the claimant supplemented his application on 01 August 2012 and on 11 July 2014 when it delivered the State Spa Committee a building permit for a pipeline under the river Poprad to Poland. On that day [11 July 2014] all formal and material conditions were met for the issuance of a decision and the State Spa Committee was supposed to issue this decision within 30 days, i.e., by 10 August 2014. However, the State Spa Committee issued this decision as late as on 26 January 2015, whereby it failed to meet the period laid down by law and thus this administrative body violated its obligation. If the State Spa Committee had acted in accordance with law and had issued the decision by 10 August 2014, the decision would have been issued at the time when the amended Article 4 (2) of the Constitution was not yet valid or effective, which means that at that time the application could have not been dismissed for being in conflict with the Slovak Constitution".); *supra*, ¶ 80.

iv. The non-compliance with the Administrative Procedural Code time limits

610. Article 49 of the APC sets out the time limits and rules under which Slovak administrative authorities must issue their decisions:

> (1) In simple matters, especially if it is possible to make a decision based on documentation submitted by a party to proceedings, the administrative authority shall decide without delay.
>
> (2) In other cases, unless otherwise provided for by a special law, the administrative authority shall be obliged to make a decision within 30 days of the commencement of a proceeding. In particularly difficult cases, it shall decide within 60 days. If given the nature of the matter, a decision cannot be made within this period, an appellate body (a body competent to decide about an appeal) may extend it for a reasonable period. If the administrative authority cannot make a decision within 30 or 60 days, it shall be obliged to notify the party to the proceedings thereof, and state the grounds.[1264]

611. It is common ground that GFT Slovakia's Exploitation Permit application constituted a "particularly difficult case" falling under Article 49(2) of the APC. Therefore, save for an extension by its "appellate body", namely the Ministry of Health, the State Spa Committee was required to decide GFT Slovakia's application by 22 December 2011. It is equally undisputed that the duration of a stay is not counted against the time limits set in Article 49 of the APC.

612. The Claimant challenges the legality of the State Spa Committee's decision of 19 September 2012 maintaining the stay of the Exploitation Proceedings for lack of a Building Permit.[1265] It argues that the running of the time-limit for the decision resumed as of 1 August 2012, i.e., the date when GFT Slovakia brought its application in conformity with Article 11 of the Act on Mineral Waters.[1266] As approximately 40 days had already elapsed between the filing of the application and the start of the stay,[1267] the State Spa Committee, so says Muszynianka, should have rendered its decision by 21 August 2012.[1268] Yet, in breach of Article 49 of the APC, the State Spa Committee withheld its decision until after the Constitutional Amendment.[1269] As the Constitutional Amendment was the only basis invoked to deny the Exploitation Permit, the Claimant

[1264] Administrative Procedure Code, **C-98**, Art. 49.

[1265] *Supra*, ¶ 437.i.

[1266] *Supra*, ¶¶ 603, 436.ii.

[1267] *Supra*, ¶¶ 41-43.

[1268] *Supra*, ¶ 436.ii.

[1269] *Supra*, ¶ 437.ii.

submits that, before the Constitutional Amendment the State Spa Committee should have issued the Exploitation Permit.[1270]

613. The Tribunal has difficulty accepting the Claimant's submission that the State Spa Committee should have decided GFT Slovakia's Exploitation Permit application by 21 August 2012, when GFT Slovakia argued in court that its application met "all formal and material conditions" for the issuance of the Exploitation Permit as of 11 July 2014.[1271] That said, it is clear that the State Spa Committee failed to meet the deadline set in Article 49 of the APC. It also failed to seek an extension from the Ministry of Health. If one accepts that the application was complete by 11 July 2014, the State Spa Committee had to issue its decision by either 31 July 2014 (if one counts the days elapsed before the stay) or 9 September 2014 (if one uses a full 60-day period). This is how the Regional Court in Bratislava assessed the situation in its decision on GFT Slovakia's motion to revoke the Exploitation Permit's denial:

> [T]he court cannot agree with the objection that the [State Spa Committee] failed to issue a decision within the legal 30 days deadline because the provision of Article 49(2) also specifies a 60 days deadline; the court, however, needs to agree with the objection that the [State Spa Committee] has failed to meet this and other duties as the content of the administrative file does not prove it had requested deadline extension to issue its decision nor has it notified the Claimant accordingly. If it failed to do so, then period of time since the very latest 60 days deadline had lapsed after the Claimant's application was completed in full, i.e. after 11 July 2014, may be judged as failure to act[.][1272]

614. According to the Respondent, under Slovak law the failure to comply with the APC's time limits does not affect the validity of the State Spa Committee's denial of the Exploitation Permit.[1273] Be that as it may, the evidence shows that the State Spa Committee sat on GFT Slovakia's application waiting for the precise formulation of the Constitutional Amendment to be decided. Between July 2014 and the denial of the Exploitation Permit in January 2015, the State Spa Committee only requested the District Office in Prešov to provide a copy of the opinion rendered by the Ministry of Environment in the proceedings leading to the issuance of the Building Permit.[1274] The District Office in Prešov provided that opinion the following day.[1275] Other than that, the State Spa

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[1270] Reply, ¶ 420.

[1271] GFT's Action against the Ministry of Health, 18 November 2015, **R-28/R-414**, p. 2; *supra*, fn. 1263.

[1272] Decision of the Regional Court in Bratislava, 28 February 2018, **R-252**, ¶ 118; The Regional Court's reasoning was upheld by the Supreme Court (*see* Cassation decision of the Supreme Court of the Slovak Republic, 20 February 2020, **R-420**, ¶ 58).

[1273] *Supra*, ¶ 452.

[1274] Letter from State Spa Committee to District Office in Prešov, 28 July 2014, **R-56**; Building Permit, **C-22**, p. 4, ¶ 20 (2nd bullet point).

[1275] Letter from District Office in Prešov to State Spa Committee, 29 July 2014, **R-57**.

Committee undertook no fact-finding activities or otherwise considered GFT Slovakia's application in any of its monthly sessions held on 11 August 2014, 22 September 2014, 13 October 2014, and 24 November 2014.[1276]

615. The State Spa Committee's delay and passivity was not accidental. Ms. Božíková was very straight forward in stating at the Hearing that the Ministry of Health ordered the State Spa Committee to halt the proceedings for GFT Slovakia' Exploitation Permit until the adoption of the Constitutional Amendment.[1277] Yet, at no point was GFT Slovakia informed of the Ministry of Health's order or of the State Spa Committee's willingness to comply. In fact, as of 11 July 2014, GFT Slovakia received no news at all from the State Spa Committee, which prompted it to file a complaint before the Supreme Court on the ground of the State Spa Committee's inactivity.[1278]

616. It is therefore evident that the Exploitation Permit proceedings were conducted in willful disregard of Slovak administrative law and the transparency expected from State authorities. No extension of time was sought pursuant to Article 49(2) of the APC, the Ministry of Health itself ordered that the decisional process be stopped, and the Respondent deliberately opted to keep GFT Slovakia entirely in the dark. In the Tribunal's view, such treatment was in breach of the FET standard.

617. The Tribunal having found a breach, questions arise regarding the consequences of the breach. In other words, the Tribunal must inquire into the element of causation, which is a requirement for damages to be payable. The Parties do not dispute that causation must be positively established.[1279] Causation is addressed in the present context rather than in a separate section later because of the close link with the facts discussed here.

618. Causation is conveniently assessed by looking at a counterfactual or but-for scenario, i.e., by removing from the facts the violative conduct. In this regard, had the State Spa Committee complied with the APC's time period prescriptions, it would have sought an extension under Article 49(2) of the APC and would most likely have received it until after the adoption of the Constitutional Amendment when it would have denied the Exploitation Permit.

[1276] Letter from GFT Slovakia to the State Spa Committee, 25 August 2015, **C-116**; Letter from the State Spa Commitee to GFT Slovakia, 2 September 2015, **C-117**; Reply, ¶ 422; *see also* Rejoinder, fn. 642.

[1277] Tr. 640:3-18 (Božíková); *supra*, ¶ 536.

[1278] GFT Slovakia complaint before the Supreme Court, 8 October 2014, **C-24**; *supra*, ¶¶ 58, 61.

[1279] *See* SoD, ¶¶ 488-489; Reply, ¶ 904.

619. Assuming a slightly different counterfactual where the State Spa Committee would not have sought or would not have been granted the extension, or the extension itself would somehow be objectionable, this would still not mean that the Project would have unfolded as intended. Irrespective of the State Spa Committee's reproachable conduct, GFT Slovakia was required to obtain the occupancy and water treatment permits to operate the water treatment plant and thus actually exploit the Legnava Sources. It could only have procured these two sets of permits upon the completion of the water treatment plant and connecting pipelines,[1280] which would have taken approximately eight months[1281] as of the Building Permit's effective date of 10 July 2014,[1282] that is until March 2015 (i.e., after the Constitutional Amendment entered into force). In this context, it is common ground between the Parties' Slovak law experts that the authorities competent to issue the occupancy and water treatment permits would have been compelled to deny them in light of the Constitutional Amendment,[1283] thereby precluding the Project as envisaged by Muszynianka.

620. Finally, and irrespective of the legality of the Constitutional Amendment, the Tribunal has already established that GFT Slovakia had no entitlement nor legitimate expectation to the Exploitation Permit.

621. In consequence, the Respondent has committed a breach of FET by the manner in which it conducted the latter part of the Exploitation Permit proceedings. However, this breach was inconsequential in the sense that it was not causal of any subsequent loss suffered by GFT Slovakia and the Claimant. Indeed, the Claimant's entire damage calculations are premised on the assumption that the Project would have proceeded as intended,[1284] which, as was seen, has not been established.

C. EXPROPRIATION

1. The Claimant's Position

622. The Claimant argues that its business plan, consisting of treating the extracted water in Slovakia and transporting it under the Poprad river for bottling in Poland, "was the only viable option" and "possible method to commercially benefit from" the Legnava

[1280] Jakab ER, **CER-2**, ¶ 138; Potasch ER II, **RER-6**, ¶ 196(vii).

[1281] Project Documentation for the Mineral Water Treatment Plant, July 2013, **R-230**, p. 2 ("The construction will start following the effective building permit is issued and with regard to the client's financial situation—anticipated start in March 2014, finish in November 2014").

[1282] Letter from GFT Slovakia to Inspectorate, 10 July 2014, **C-113/R-55**, p. 1**.**

[1283] Jakab ER, **CER-2**, ¶ 145; Potasch ER II, **RER-6**, ¶ 195.

[1284] *See* FTI ER I, **CER-1**, ¶¶ 2.3 *et seq*.; FTI ER II, **CER-6**, ¶¶ 2.2 *et seq*.

Sources".[1285] Building a bottling plant in the Slovak Republic in compliance with the Constitutional Amendment, would be impossible for two reasons.[1286] First, the Legnava region lacks the necessary road infrastructure allowing for the "daily transport of large amounts of bottled mineral water by heavy trucks as required by the Project".[1287] Second, the Legnava region is a "flood risk area" affected by "severe floods" in the past, particularly in 2010.[1288]

623. With respect to the infrastructure, the Claimant stresses that:

i. It is irrelevant whether other water producers are able to operate in the north of Slovakia. Their operations concern the Slovak domestic market only. Consequently, their transportation needs are less consequential than Muszynianka's. Moreover, it follows from the photographs presented by the Respondent that these producers make use of roads in dramatically better conditions than State Road 3138 and other secondary roads available to GFT Slovakia.[1289]

ii. Mr. Kundrát himself, Mayor of Legnava, confirmed in November 2011 that Legnava's road infrastructure could not support heavy vehicles.[1290] Jointly with Legnava's former Mayor, Mr. Ján Kičura, he stated in April 2012 that there was "no infrastructure [in Legnava] and therefore, [GFT Slovakia's] undertaking can be realized in no other way but the proposed one – by sharing the production between two countries".[1291] These statements stand

[1285] Reply, ¶¶ 65, 764.

[1286] Reply, ¶ 69.

[1287] Reply, ¶¶ 70-102; Krivoňák WS I, **CWS-7,** ¶ 7; Kacvinský WS I, **CWS-4,** ¶ 9; Zieliński WS II, **CWS-6,** ¶¶ 7-20; Mosur WS II, **CWS-5,** ¶¶ 11-12; Letter from Mayor of Legnava to GFT Slovakia, 14 November 2011, **C-62**; Letter from GFT Slovakia to the Inspectorate, 24 March 2010, **C-87**.

[1288] Reply, ¶¶ 103-115; Krivoňák WS I, **CWS-7,** ¶ 8; Kacvinský WS I, **CWS-4,** ¶ 12; Zieliński WS II, **CWS-6,** ¶ 18; Mosur WS II, **CWS-5,** ¶ 12; Statement of the Mayor of Legnava, 15 March 2018**, C-161**; Summary Report of the Slovak Water Management Company š.p. regarding the flood activity from 21 June 2001 to 6 August 2001 on the streams in the GMP report, ŠP, OZ Bodrog and Hornad watershed (excerpt)**C-162**; Summary report of the Slovak Water Management Company š.p. regarding the flood activity from 27 July 2004 to 31 December 2004 on streams and water works (excerpt), **C-163**, pp. 7, 15; Summary Report of the Slovak Water Management Company regarding the floods from 23 July 2008 to 22 September 2008(excerpt) **C-164**, p. 11; Summary Report of the Slovak Water Management Company š.p. on the course of the floods, their consequences and the measures taken on waterways in the administration SVP, š.p. Banská Štiavnica OZ Košice for the period 15 April 2010 to 16 November 2011 (excerpt), **C-165**, p. 3.

[1289] Reply, ¶ 78.

[1290] Reply, ¶¶ 80-81, referring to Letter from Mayor of Legnava to GFT Slovakia, 14 November 2011, **C-62**; *supra*, ¶ 40.

[1291] Reply, ¶ 96, quoting Letter from Mr. Ján Kičura and Mikuláš Kundrát to Prime Minister Fico, April 2012, **C-67.**

even today, as the road infrastructure in Legnava remains unimproved.[1292] In particular, the second stage of the reconstruction of the road to Legnava (14 km from Plavnica to Legnava), valued at € 160,000, "will not allow heavy transport in the region".[1293]

iii. The Slovak authorities failed to meet the assurances given to GFT Slovakia and Goldfruct that Legnava's infrastructure would be developed, including the renovation of State Road 3138,[1294] and the construction of a bridge over the Poprad river.[1295] This hindered GFT Slovakia's different alternatives for placing its bottling plant on Slovak soil.[1296]

iv. None of the alternatives indicated by the Respondent to overcome the deficiencies in Legnava's infrastructure are "reasonable or even possible to implement".[1297]

624. Regarding the flood risk, the Claimant submits that:

i. Legnava was explicitly mentioned as one of the municipalities in the Stará Ľubovňa district that was adversely affected by the floods occurring between June and August 2001,[1298] and between July and December 2004 (when Legnava was declared a Level III flood-risk, the highest in Slovakia).[1299]

ii. Legnava was also heavily affected by the floods in 2010. The situation deteriorated to such an extent that in June 2010 an emergency was declared in the whole district of Stará Ľubovňa, including Legnava.[1300] Mr. Kundrát explained that State Road 3138 was partially flooded and had to be closed

[1292] Reply, ¶¶ 98-100, referring to *supra*, ¶ 27.

[1293] Reply, ¶ 100, referring to Podtatranské noviny: "*The roads in our region will finally get fixed"*, 1 June 2017, **R-149**.

[1294] Reply, ¶¶ 85-88, referring to Zieliński WS II, **CWS-6**, ¶¶ 7, 9; Krivoňák WS I, **CWS-7**, ¶ 10; *supra*, ¶ 27.

[1295] Reply, ¶¶ 89-93, referring Zieliński WS II, **CWS-6**, ¶¶ 11, 13-14; Krivoňák WS I, **, CWS-7,** ¶ 11; *supra*, ¶¶ 28-30.

[1296] Supra, ¶¶ 94-97.

[1297] C-PHB, ¶ 388, *see also Infra*, ¶ 633.ii.

[1298] Reply, ¶ 106, referring to Summary Report of the Slovak Water Management Company š.p. regarding the flood activity from 21 June 2001 to 6 August 2001 on the streams in the GMP report, ŠP, OZ Bodrog and Hornad watershed (excerpt) **C-162**.

[1299] Reply, ¶ 106, referring to Summary report of the Slovak Water Management Company š.p. regarding the flood activity from 27 July 2004 to 31 December 2004 on streams and water works (excerpt)**, C-163**, pp. 7, 15.

[1300] Reply, ¶ 108, referring to Summary report Slovak Water Management Company š.p. on the course of the floods, their consequences and the measures taken on waterways in the administration SVP, š.p. Banská Štiavnica OZ Košice for the period 15 April 2010 to 16 November 2011(excerpt) **C-165**, p. 3.

to traffic, and that the land plots owned by GFT Slovakia, at one time contemplated as a possible location for the bottling plant (in proximity to Boreholes LH-2A and LH-5),[1301] were partially flooded as well.[1302] Witness evidence also indicates the considerable impact of the 2010 floods in the Legnava region.[1303]

iii. Admittedly, the Polish side of the border, including the Muszyna municipality, was also affected by the 2010 floods.[1304] However, unlike the Slovak authorities,[1305] the Polish authorities took all necessary measures to avoid this occurring again today.[1306]

625. Against this background, the Claimant submits that, by passing the Constitutional Amendment and consequently denying the Exploitation Permit, the Respondent made the enjoyment of its investment impossible.[1307] By doing so without offering compensation to Muszynianka, the Respondent breached Article 4(1) of the BIT.[1308]

626. The Claimant acknowledges that it still holds 100 percent of the shares in GFT Slovakia,[1309] as well as the underlying assets indirectly owned through that shareholding, such as the real estate and the right to carry out an "economic activity" incorporated in the "administrative decisions rendered by Slovak authorities".[1310] However, it submits that:

i. Despite having perhaps a nominal value at most (particularly the farmland purchased by GFT Slovakia),[1311] such bundle of rights has no use to

[1301] *Supra*, ¶ 28.

[1302] Reply, ¶ 109, referring to Statement of the Mayor of Legnava, 15 March 2018**, C-161**; *see also* the map attached to Statement of the Mayor of Legnava, 15 March 2018**, C-161**.

[1303] Reply, ¶¶ 110-111, referring to Krivoňák WS I, **CWS-7**, ¶ 9; Kacvinský WS I, **CWS-4**, ¶ 12; Zieliński WS II, **CWS-6**, ¶ 18; Mosur WS II, **CWS-5**, ¶ 12**.**

[1304] Reply, ¶ 112, referring to SoD, ¶ 126.

[1305] Reply, ¶ 112, referring to W Kacvinský WS I, **CWS-4,** ¶ 12.

[1306] Reply, ¶ 112, referring to Gazeta Krakowska: "The anti-flood banks in Muszyna will be finished in November" 7 September 2011, **C-167**; Mosur WS II, **CWS-5**, ¶ 12.

[1307] Reply, ¶¶ 765, 884.

[1308] SoC, ¶¶ 506-507, 509, 529.

[1309] Reply, ¶ 884.

[1310] Reply, ¶¶ 771, 779, 884.

[1311] Reply, ¶ 765.

Muszynianka,[1312] because it is "dependent on the possibility of transporting the water from the Legnava Sources with a pipeline to Muszyna".[1313]

ii. As a result of the Constitutional Amendment, neither the investment as a whole nor its parts can be disposed of, as no other potential investor could exploit the Legnava Sources as required by Slovakia's new legal framework.[1314]

iii. Therefore, the Respondent's measures have "irretrievably and permanently hindered" the Claimant's investment,[1315] by rendering it completely valueless.[1316]

627. The Claimant thus submits that the Respondent's interference with the enjoyment and use of its investment is equivalent to an expropriation in violation of Article 4(1) of the BIT. In the circumstances, the fact that Muszynianka still holds certain ownership rights is irrelevant.[1317]

628. Moreover, Muszynianka submits that the Respondent's unlawful denial of the Exploitation Permit constitutes another instance of interference with the Claimant's protected rights.[1318] Indeed, but for the Constitutional Amendment, the State Spa Committee was under an obligation to issue the Exploitation Permit. It would therefore be "manifestly unjust" to deny the Claimant protection under the BIT's expropriation standard only because the Respondent, by violating the BIT, refused to issue an "administrative decision granting the Exploitation Permit".[1319] This would lead to the

[1312] Reply, ¶ 765.

[1313] Reply, ¶ 771.

[1314] Reply, ¶ 765.

[1315] Reply, ¶ 766.

[1316] Reply, ¶ 784.

[1317] SoC, ¶¶ 475-482, referring to *Metalclad Corporation v. The United Mexican States,* ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, **CLA-9**, ¶ 103; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, **CLA-19**, ¶ 685; *Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award (redacted), 14 February 2012, **CLA-44**, ¶ 576; *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, **CLA-45,** ¶ 132; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, **CLA-46**, ¶ 107.

Reply, ¶¶ 782-799, referring to, *inter alia*, *Waste Management, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, **RLA-86**, ¶ 143; *PL Holdings S.A.R.L. v. Republic of Poland*, SCC Case No V2014/163, Partial Award, 28 June 2017, **CLA-103,** ¶ 320; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, **CLA-118,** ¶ 591;**;** *Quiborax S.A., Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, **RLA-29,** ¶ 239.

[1318] Reply, ¶ 802.

[1319] Reply, ¶ 803.

Respondent benefitting from its own wrongdoing in violation of general principles of law.[1320]

629. The Claimant further argues that the expropriation was unlawful, since the Respondent's measures were not taken in the public interest nor justified by any legitimate public purpose;[1321] were discriminatory, unreasonable and disproportionate;[1322] and were adopted in violation of due process.[1323] Regarding the latter, the Claimant stresses that the due process violation stems from the fact that the Respondent elevated the changes to its legal framework to the constitutional level. In doing so, it deprived Muszynianka or GFT Slovakia of any effective remedy against the amendment's expropriatory effects.[1324]

2. The Respondent's Position

630. The Respondent argues that the claim under Article 4(1) of the BIT is ill-founded for two reasons.[1325]

631. First, the Slovak Republic did not interfere with any of the assets invoked by Muszynianka. On the one hand, it is not controversial that Muszynianka retains full ownership of GFT Slovakia and that GFT Slovakia retains all of its underlying rights and assets.[1326] For this reason alone the claim must fail.[1327] On the other hand, GFT Slovakia was never granted the Exploitation Permit nor did it have any entitlement to it.[1328]

[1320] Reply, ¶ 803.

[1321] SoC, ¶¶ 504-517.

[1322] SoC, ¶¶ 518-522.

[1323] SoC, ¶¶ 523-528.

[1324] Reply, ¶¶ 816-819, referring to *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CLA-40**, ¶ 435; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, **CLA-34**, ¶ 499.

[1325] Rejoinder, ¶ 321.

[1326] Rejoinder, ¶ 322.

[1327] SoD, ¶ 400-405, referring to *Pope & Talbot Inc. v. Canada*, UNCITRAL/NAFTA, Interim Award, 26 June 2000, **CLA-49**, ¶ 102; *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Award, 16 December 2003, p. 33, **RLA-90**, p. 33**;** *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, **RLA-31**, ¶ 570**;** *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, **RLA--32**, ¶¶ 103,112; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, **RLA-27**, ¶¶ 233, 256**;** *ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5 (UNCITRAL), Award, 19 September 2013, **RLA-33**, ¶ 4.815**;** Zachary Douglas, *Property, Investment and the Scope of Investment Protection Obligations* in Zachary Douglas, Joost Pauwelyn, and Jorge Vinuales (eds), The Foundations of International Investment Law: Bringing Theory Into Practice, (Oxford University Press, 2014), **RLA-89,** p. 376**;** Rosalyn Higgins, *The Taking of Property by the State. Recent Developments in International Law* in Recueil des Cours. Collected Courses of the Hague Academy of International Law, 1982-III (Martinus Nijhoff Publishers, 1983), **RLA-88**, p. 271**.**

[1328] *Supra*, ¶¶ 446-449.

Consequently, it cannot seek protection against expropriation on the basis of non-existent rights.[1329]

632. Second, in any event, given that the Claimant's business plan is not the "one-and-only-one" to make economic use of the Legnava Sources, the Respondent did not substantially deprive or impair the Claimant's alleged investment.[1330] *A contrario*, the Claimant structured its investment as it now claims it "purely for commercial reasons".[1331] The Information Memorandum confirms this fact;[1332] it advised GFT Slovakia's potential purchasers that locating a water treatment plant in Slovakia and a bottling plant in Poland would make it "possible to […] reduce investment outlays" while using "favourable and formal legal conditions applicable in each country".[1333] It follows that the Claimant's allegations in relation to Legnava's lack of infrastructure and flood risk are "fiction".[1334] Rather, if it so chooses, the Claimant can still exploit the Legnava Sources in a manner consistent with Slovakia's current laws.[1335]

633. In respect of the allegedly deficient road infrastructure, the Respondent submits that:

i. At no point did the Slovak authorities make promises regarding the renovation of Legnava's infrastructure and/or the construction of a bridge over the Poprad river,[1336] which is shown by the Claimant's inability to provide documentary evidence of the alleged promises or assurances.[1337]

ii. Legnava's road infrastructure is sufficient for the community's needs.[1338] To the extent that it requires upgrading in order to cater to GFT Slovakia's

[1329] SoD, ¶ 399, Rejoinder, ¶¶ 376-380, referring to, *inter alia*, *EnCana Corporation v. Republic of Ecuador*, Award, 3 February 2006, **RLA-87**, ¶ 184**;** *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **RLA-30**, ¶ 581.

[1330] Rejoinder, ¶ 324.

[1331] Rejoinder, ¶ 324.

[1332] *Supra*, ¶¶ 49-50.i.

[1333] Rejoinder, ¶ 373, citing Information Memorandum, **C-55**, p. 26.

[1334] Rejoinder, ¶ 324.

[1335] Rejoinder, ¶¶ 324-325.

[1336] Rejoinder, ¶ 329, referring to Letter from the Chairman of the Prešov Self-Governing Region to Ministry of Finance, 15 November 2018, **R-339**, ("The Prešov Self-Governing Region as the owner and administrator of 2nd degree and 3rd degree roads has not granted any promise to the investor GFT Slovakia s.r.o. to build a road infrastructure that would include building of a cross-border bridge over the Poprad River or reconstruction of roads in the Malý Lipník area, Legnava, which would allow the investor to transport mineral water to Poland. The Prešov Self-Governing Region Office has no such record of any meetings held with the investor GFT Slovakia s.r.o., and no documentation exists in the form negotiation meeting minutes, written contracts, declarations, statements or any other documents relating to the investor GFT Slovakia, s.r.o.").

[1337] Rejoinder, ¶ 330.

[1338] Rejoinder, ¶ 331.

business needs, then, pursuant to Articles 18 and 19 of the Act No. 135/1961 Coll. on Roads, as amended ("Roads Act"),[1339] GFT Slovakia would have to bear the costs.[1340] However, it has chosen not to, in spite of the fact that the reconstruction of the 4.5 km stretch between Malý Lipník and Legnava (as required in December 2010)[1341] would have taken 37 months and cost EUR 10.7 million, i.e., a fraction of the claims in this arbitration.[1342] Other alternatives not considered by the Claimant, such as building a bridge or a light rail system connecting a bottling plant in Legnava[1343] with Muszynianka's site in Muszyna, would only cost EUR 3.2 to 5.1 million and would take 30 to 35 months.[1344]

iii. The Claimant's reliance on Mr. Kundrát's letter of November 2011 is inapposite.[1345] The Claimant's own witness evidence indicates that Goldfruct decided to opt for a bottling plant in Poland (as opposed to Slovakia) in 2009, i.e., 20 months *before* Mayor Kundrát's letter.[1346] Moreover, the letter refers to local roads, and not to State Road 3138.[1347]

iv. The Claimant has provided no evidence to support its allegations with respect to the other Slovak water bottlers in the area (i.e., Ľubovnianka, Budiš, and Sulinka).[1348]

[1339] Rejoinder, ¶ 326, referring to Roads Act, **R-232**, Article 18(9) ("If the motorway, road or local road needs to be removed due to another investment construction, the investor of this construction is obligated at his own expense and on behalf of the future owner or road administrator (the induced investment) to ensure a construction of replacement motorway, road or local road corresponding to the transport load"), 19(1)("Where, in connection with large building structures, mining works or landscaping that require a building permit or other permit under special regulations 7), a road shall be used whose structural and technical construction does not correspond to the traffic load intended to be used thereon, necessary adjustments or modifications must be done upon arrangements with the road's owner or road administrator. If the road adjustment or modification are not expedient or feasible, a new road which complies with the expected traffic load must be built up. The costs associated with the construction of a new road or modification of an existing road shall be borne by the person or entity triggering the need for the modifications").

[1340] Rejoinder, ¶¶ 327, 331-332, referring to Judgment of Regional Court in Banská Bystrica, Case No. 15Co/163/2013, 16 July 2014, **R-340.**

[1341] Rejoinder, ¶ 336, referring to Letter from GFT Slovakia to the Ministry of Environment, 10 December 2010,

C-86; supra, ¶ 27.

[1342] Rejoinder, ¶¶ 336-337, 339, 367, referring to Turinič (PRODEX) ER I, **RER-10**, ¶¶ 26, 146, 153.

[1343] *Supra*, ¶ 28.

[1344] Rejoinder, ¶ 363-370, referring to Turinič (PRODEX) ER I, **RER-10**, ¶¶ 26, 146.

[1345] *Supra*, ¶ 623.ii

[1346] SoD, ¶¶ 106, 117; Rejoinder, ¶ 347, Zielinski WS I, **CWS-3**, ¶ 29.

[1347] Rejoinder, ¶¶ 347-349.

[1348] *Supra*, ¶ 623.i; Rejoinder, ¶¶ 350-351.

634. As regards flood risk, the Respondent contends that Muszynianka's concern is a "made-for-arbitration story",[1349] and especially highlights the following aspects:

i. All of Muszynianka's evidence and submissions prior to its Reply framed the alleged risk of floods only in the context of the June 2010 flood.[1350] Still, the Claimant's current reliance on the 2001 and 2004 floods is self-defeating: it fails to explain why GFT Slovakia later considered building the bottling plant in proximity to boreholes LH-1 or LH-2A through LH-5.[1351]

ii. Be this as it may, the 2010 flood was not a consideration behind placing the bottling plant in Muszyna. The Information Memorandum, on which Muszynianka based its decision to acquire GFT Slovakia and so heavily relies in this arbitration, makes no mention of flood risk in Legnava.[1352]

iii. In any event, Legnava is not a flood-risk area, nor was it among the municipalities severely damaged by the June 2010 floods; it appears nowhere in the official reports on the floods.[1353] The letter by Mr. Kundrát relied upon by the Claimant does not say the contrary.[1354] First, it refers to "partial flooding", which does not equate to the devastation Muszynianka suggests took place in Legnava.[1355] Second, the image attached to Mr. Kundrát's letter does not reflect the alleged partial flooding of GFT Slovakia's property.[1356] Rather, it is a document prepared on GFT Slovakia's request that was included in the drawings "submitted for the water treatment plant".[1357]

[1349] Rejoinder, ¶ 353.

[1350] Rejoinder, ¶ 355, referring to SoC, ¶ 92; Letter from GFT Slovakia to the Ministry of Environment, 10 December 2010, **C-86**, p. 1.

[1351] Rejoinder, ¶¶ 359-360, 363.

[1352] Rejoinder, ¶ 356.

[1353] SoD, ¶¶ 119-122; Rejoinder, ¶ 358, referring to Preliminary flood risk assessment in the Slovak Republic, December 2011, **R-171**, pp. 62-66; Report on course of floods, their consequences and measures taken in the Stará Ľubovňa district in the period between 16 May 2010 and 16 July 2010, **R-172;** Report on course of floods, their consequences and measures taken in the Stará Ľubovňa district in the period between 14 July 2010 and 3 September 2010, **R-173**, p. 1**.**

[1354] *Supra*, ¶ 623.iii.

[1355] Rejoinder, ¶ 359.

[1356] *Supra*, fn. 1302.

[1357] Rejoinder, ¶ 362, referring to Project documentation for Zoning Permit, November 2010, **R-349**.

635. On this basis, the Respondent argues that it did not expropriate the Claimant's alleged investment.[1358] Further, it reiterates its position that the Constitutional Amendment is not discriminatory nor did it target the Claimant.[1359]

636. Last, with respect to the alleged due process violation,[1360] the Respondent states that the Claimant "appears to confuse the principles of due process in the implementation of a legislative measure with a denial of justice under international law".[1361] In this regard, it submits that, considering that the Claimant pursued its claims before the Slovak courts, and that the "permitting process was entirely fair",[1362] no denial of justice has occurred.[1363]

3. Analysis

637. Article 4(1) of the BIT reads as follows:

> Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measure having the same nature or an equivalent effect against investments belonging to investors of the other Contracting Party, unless the measures are taken in the public interest, on a nondiscriminatory basis and under due process of law and provided that provisions be made for effective and adequate compensation. […]

638. The Claimant submits that the Respondent indirectly expropriated its investment in the Slovak Republic by adopting the Constitutional Amendment and subsequently denying the Exploitation Permit. As is expressly recognized in Article 4(1) of the BIT, measures other than actual takings or formal transfers of property titles may be tantamount to expropriation. It is generally accepted that an indirect expropriation giving rise to a State's duty to compensate arises when the investor has been substantially deprived of its investment.[1364]

639. The Claimant's investment in the Slovak Republic lies in its shareholding in GFT Slovakia. It is common ground that the Claimant retains ownership of its shares in GFT Slovakia which still owns the land in Legnava and the know-how relating to the

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[1358] Rejoinder, ¶ 375.

[1359] Rejoinder, ¶ 381.

[1360] *Supra*, ¶ 629.

[1361] Rejoinder, ¶ 384.

[1362] Rejoinder, ¶ 384 ; *see also supra*, ¶¶ 450-451.

[1363] Rejoinder, ¶ 384; SoD, ¶¶ 475-479, referring to *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 2009-23 (UNCITRAL), Partial Award on the Merits, 30 March 2010, **RLA-99,** ¶ 244; Jan Paulsson, Denial of Justice in International Law, (Cambridge University Press, 4th edition, 2007), **RLA-100,** pp. 100, 108, 112**.**

[1364] *See e.g. Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, **CLA-49**, ¶ 102; *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, **RLA-29**, 16 September 2015, ¶ 238.

exploration, identification, and assessment of the Legnava Sources. These assets have value and can still be used and disposed of by the Claimant.

640. There is no doubt in the Tribunal's mind that the value of GFT Slovakia, if the Project could have been carried out as planned by the Claimant in terms of mixing and branding (a dubious assumption given the Tribunal's prior determinations), is considerably less as a consequence of the fact that Muszynianka's business plan cannot be carried out on a cross-border basis at all. It is also clear that, if Muszynianka were to decide to nevertheless exploit the Legnava Sources, it would have to do so in conformity with the Constitutional Amendment at significantly higher costs than it contemplated originally. However, these findings show no substantial permanent deprivation of the investment. The ownership of an asset does not *per se* confer the right to use that asset in the most profitable manner or any other particular way.[1365] This would have been different if GFT Slovakia had indeed acquired the right to use its assets in such a particular way, that is, if it had been authorized to exploit the Legnava Sources in accordance with the Project's initial design. In that case, an argument could have been made that passing the Constitutional Amendment without providing a transitory regime for holders of existing exploitation permits was constitutive of an expropriation. Be it as it may, this is not the situation here. The Claimant held no Exploitation Permit and, as was discussed earlier, had no entitlement or even a legitimate expectation to the issuance of that permit and there remains value in GFT Slovakia.

641. For these reasons, the Tribunal concludes that the Respondent has not expropriated the Claimant's investment. Consequently, it dispenses with the analysis of the legality of the expropriation.

D. IMPAIRMENT THROUGH UNREASONABLE OR DISCRIMINATORY MEASURES

1. The Parties' positions

642. The Claimant submits that the Respondent has breached the non-impairment standard in Article 3(1) of the BIT,[1366] as the Constitutional Amendment and the denial of the

[1365] *See Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, 8 June 2009, **RLA-75**, ¶ 357 ("Several NAFTA tribunals agree on the extent of interference that must occur for the finding of an expropriation, phrasing the test in one instance as, "the affected property must be impaired to such an extent that it must be seen as 'taken'" and in another instance as, "the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been 'taken' from the owner"".).

[1366] BIT, **C-1**, Art. 3(1) ("Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management maintenance, use, enjoyment, extension, sale and should it so happen, liquidation of such investments".).

Exploitation Permit "impaired" its investment through "unreasonable" and "discriminatory" measures.[1367] With respect to the existence of an impairment, it refers to its allegations on substantial deprivation and destruction of its investment in the context of expropriation.[1368] Similarly, in relation to reasonableness and discrimination, it relies on the position put forward under its other claims, including FET and expropriation.[1369]

643. The Respondent mirrors the Claimant's approach. It argues that the Constitutional Amendment did not impair Muszynianka's alleged investment, as the Claimant itself admits that the shareholding in GFT Slovakia and associated rights remain untouched.[1370] It further submits that the Constitutional Amendment was neither discriminatory nor unreasonable.[1371] Moreover, it argues that the denial of the Exploitation Permit was appropriate and reasonable, citing its position on the other claims and as confirmed by the Regional Court in Bratislava.[1372]

2. Analysis

644. Article 3(1) of the BIT reads as follows:

> Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and should it so happen, liquidation of such investments.

645. Arbitral tribunals have discussed the relationship between the non-impairment standard and the FET standard. For instance, the tribunal in *Impregilo* determined that the non-impairment standard was a "specification" of the "general requirement" to accord investors fair and equitable treatment.[1373] Similarly, the *Saluka* tribunal observed that the notions of "reasonableness" and "non-discrimination" are the same in the context of both the FET and non-impairment standards.[1374] In this regard, it determined that, "insofar as the standard of conduct is concerned", a violation of the non-impairment standard does

[1367] SoC, ¶¶ 546-552; Reply, ¶¶ 880 *et seq*.

[1368] SoC, ¶ 548; Reply, ¶¶ 884-887.

[1369] *See e.g.* Reply, ¶¶ 889, 893, 507 *et seq.*; C-PHB, ¶¶ 209 *et seq*.

[1370] SoD, ¶ 482.

[1371] SoD, ¶¶ 484-485.

[1372] Rejoinder, ¶¶ 387-390; *supra*, ¶ 81.

[1373] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, ¶ 333.

[1374] *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04 (UNCITRAL), Partial Award, 17 March 2006, **RLA-72**, ¶ 460.

not "differ substantially" from a violation of the FET standard.[1375] It added that the non-impairment standard "merely identifies more specific effects of such violation, namely, with regard to the operation, management, maintenance, use enjoyment or disposal of the investment by the investor".[1376]

646. The Tribunal concurs that reasonableness and non-discrimination imply the same obligations on behalf of the host State under the FET and non-impairment standards. This being so, while a FET breach exists irrespective of the harm it may have caused, the non-impairment standard, as its name indicates, implies the existence of an impairment, i.e., of harm.[1377] If there was no impairment then it serves no purpose to inquire into the reasonable and non-discriminatory nature of a measure.[1378]

647. A determination that the Slovak Republic has breached Article 3(1) of the BIT presupposes an impairment in the management, maintenance, use, enjoyment, extension, sale or liquidation of the investment. Contrary to the Respondent's submissions, the Treaty does not require that the impairment be substantial. The term to "impair" can be understood as to "hinder" or "harm". Accordingly, a mere "detrimental impact" on the investment is sufficient to satisfy the standard.[1379]

648. On this basis, the Tribunal has little doubt that the measures have impaired the use and enjoyment of the Claimant's investment in the Slovak Republic. Moreover, while the Tribunal has established that the Constitutional Amendment was neither unreasonable nor discriminatory,[1380] it has found that the Exploitation Permit proceedings were conducted in an arbitrary manner.[1381] As noted by the tribunal in *Glencore*, "all measures which are arbitrary are also unreasonable".[1382] The Tribunal is of the same view and therefore holds that the Respondent's behavior during the Exploitation Permit proceedings constitutes a breach of the non-impairment standard. However, for the

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[1375] *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04 (UNCITRAL), Partial Award, 17 March 2006, **RLA-72**, ¶ 461.

[1376] *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04 (UNCITRAL), Partial Award, 17 March 2006, **RLA-72**, ¶ 461.

[1377] *See e.g. CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, **RLA-91**, ¶ 290.

[1378] *See e.g. AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, **RLA-35**, ¶ 10.3.3.

[1379] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, **RLA-35**, ¶ 10.3.5.

[1380] *Supra*, ¶¶ 544, 565.

[1381] *Supra*, ¶ 616.

[1382] *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶ 1446.

reasons provided in the context of FET, that breach is not causal and thus cannot give rise to compensation.[1383]

E. CONCLUSION

649. The Tribunal thus reaches the conclusion that the manner in which the Slovak Republic conducted the administrative proceedings on GFT's Slovakia's application for the Exploitation Permit breached the FET and non-impairment standards in Articles 3(2) and 3(1) of the BIT. By contrast, the other violations alleged are not made out.

650. In this context, the Tribunal recalls that the Respondent invokes the police powers doctrine to preclude its responsibility under the Treaty. However, it only does so with respect to the Constitutional Amendment itself,[1384] for which no international responsibility has been established. It does not raise the police powers exception in relation to the conduct of the Exploitation Permit proceedings, for which the Tribunal has found breaches. As a result, the Tribunal will dispense with the analysis of the Parties' contentions on police powers.

651. Similarly, it will dispense with addressing quantum, since it has denied causation above in relation to the Treaty violations that have been admitted. Hence, such violations cannot give rise to damages.

X. COSTS

A. THE CLAIMANT'S POSITION

652. The Claimant submits that, pursuant to Articles 38 and 40(1) of the UNCITRAL Rules, the Tribunal must allocate all costs in accordance with the "cost follow the event" rule.[1385] Hence, should the Claimant prevail "both on jurisdiction and the merits", the Respondent must bear all arbitration, legal representation, assistance and other costs incurred by the Claimant regarding the "main" and "incidental proceedings".[1386] Alternatively, the Claimant submits that, should the Tribunal decide any differently on either jurisdiction or the merits, the Respondent should bear its own costs in any event. This is so, says the

[1383] *Supra*, ¶¶ 617-621.

[1384] *Supra*, ¶ 316.

[1385] C-Statement on Costs, ¶¶ 2, 5-12; C-Reply on Costs, ¶ 3.

[1386] C-Statement on Costs, ¶ 13.

Claimant, to the extent that its claims met the standard of "not being frivolous",[1387] and the arguments it advanced were "reasonable and justified by the circumstances".[1388]

653. As to the "main proceedings", the Claimant stresses that the Respondent's "entirely speculative" allegations on illegality caused unwarranted costs and prevented the arbitration from unfolding in an efficient and cost-effective manner.[1389] As to the "incidental proceedings", the Claimant recalls that the Respondent aggresivelly pursued a meritless challenge against Mr. Alexandrov (the Claimant's initial appointee), and did not prevail in its untimely requests for bifurcation and for the production of the Deloitte Report.[1390] According to the Claimant, these unfounded procedural spats resulted in the arbitration being considerably delayed and entailing important additional costs for which the Respondent must be held accountable.[1391]

654. The Claimant further submits that the costs claimed by the Respondent are unreasonable for three main reasons. First, the Respondent's legal fees are three times higher than those of the Claimant and, irrespective of the outcome of this arbitration, the Claimant should not be responsible for the Respondent's choice to engage a vast legal team. [1392] Second, the Respondent engaged a number of experts dealing with various issues, from climate change to civil engineering, whose expert opinions were often of questionable evidentiary value if any.[1393] Third, the Respondent impermissibly seeks reimbursement for legal and other expert opinions never submitted in this arbitration.[1394]

655. Lastly, the Claimant argues that it did not generate unnecessary costs notwithstanding the Respondent's allegations to the contrary:

i. The Claimant was not responsible for the fact that the first procedural hearing held on 12 May 2017 did not take place in-person at the Peace Palace, and

[1387] C-Statement on Costs, ¶ 13.

[1388] C-Statement on Costs, ¶ 13; C-Reply on Costs, ¶¶ 14.

[1389] C-Statement on Costs, ¶¶ 15-17.

[1390] C-Statement on Costs, ¶¶ 22-40.

[1391] C-Statement on Costs, ¶ 42.

[1392] C-Reply on Costs, ¶ 7.

[1393] C-Reply on Costs, ¶ 18, referring to the expert reports of (i) Prof. Lapin (**RER-1**); and (ii) Mr. Turinič – PRODEX (**RER-10**), claimed by the Respondent under the rubric of "Expert Fees and Expenses" (*see* R-Statement on Costs, Schedule A, § C).

[1394] C-Reply on Costs, ¶¶ 8-10, 18, referring to (i) a constitutional law analysis performed by Doc. JUDr. Peter Kresák, CSc.; (ii) an administrative law analysis performed by Prof. JUDr. Soňa Košičiarová, PhD; and (iii) a Slovak Hydrometeorological Institute analysis on climate change, claimed by the Respondent under the rubric of "Expert Fees and Expenses" and "Other Costs" (*see* R-Statement on Costs, Schedule A, §§ C, E).

therefore should not bear the Respondent's incurred travel and accommodation costs to and at The Hague.[1395]

ii. The Claimant's conduct during the document production phase was reasonable and in good faith.[1396] By contrast, out of the ten documents contained in the Respondent's privilege and confidentiality log, seven were not protected by privilege and their production was ordered with damaging consequences for the Respondent's case.[1397]

iii. The Claimant's engagement of Dr. Kucharski was reasonable given his professional experience and the Respondent has failed to identify a single inconsistency, calculation error or methodological flaw in his expert report.[1398]

iv. The Claimant was entitled to modify the amount of damages sought in this arbitration. That is common practice in international arbitration, more so to the extent that the heads damages remained unchanged.[1399]

656. Therefore, the Claimant requests the reimbursement of a total of PLN 14,648,884.73 (EUR 3,409,804.98),[1400] "increased by post-award compound interest as with respect to the Claimant's main request for compensation",[1401] broken down as follows:[1402]

A. Counsel and Legal Fees	
Counsel legal fees	PLN 8,818,876.09
Overhead costs (including travel expenses)	PLN 432,305.48
B. Internal Expenses (Muszynianka's Costs)	
Overhead costs (including travel expenses)	PLN 55,253.10
C. Expert Fees and Expenses	
Prof. Andrzej Szczepański	
Fees	PLN 6,048.00
Overhead costs (including travel expenses)	PLN 4,572.92
Prof. Jadwiga Szczepańska-Plewa	
Fees	PLN 6,048.00
Overhead costs (including travel expenses)	PLN 2,896.43

[1395] C-Reply on Costs, ¶¶ 21-26.

[1396] C-Reply on Costs, ¶¶ 27-29.

[1397] C-Reply on Costs, ¶¶ 30-32, referring to *inter alia*, Email correspondence between Jarmila Božíková and Mário Fraňo of the Legislative Department of the Ministry of Health, 29 July 2014, **C-158**.

[1398] C-Reply on Costs, ¶¶ 35-37.

[1399] C-Reply on Costs, ¶ 39.

[1400] Claimant's Updated Statement of Costs of 9 September 2020.

[1401] C-Reply on Costs, p. 11

[1402] C-Statement on Costs, ¶ 41; Claimant's Updated Statement of Costs of 9 September 2019, and 29 June and 9 September 2020.

Dr. Mieczysław Kucharski	
Fees	PLN 37,872.93
Overhead costs (including travel expenses)	PLN 4,929.61
FTI Consulting: Mr. James Nicholson, Mr. Emmanuel Grand	
Fees	PLN 2,171,439.01
Overhead costs (including travel expenses)	PLN 62,869.82
Dr. Radomir Jakab	
Fees	PLN 93,747.19
Overhead costs (including travel expenses)	PLN 10,108.91
Prof. Peter-Christian Müller-Graff	
Fees	PLN 129,750.00
Overhead costs (including travel expenses)	PLN 7,099.95
D. Witness Expenses	
Travel expenses of Mr. Marek Zieliński	PLN 3,325.69
Travel expenses of Mr. Pavol Kacvinský	PLN 6,923.04
Travel expenses of Mr. Dušan Krivoňák	PLN 6,923.04
E. Other Costs	
Deposit payments	EUR 540,000.00
Translation costs	PLN 438,031.37

B. THE RESPONDENT'S POSITION

657. The Respondent concurs with the Claimant that, pursuant to Articles 40(1) and 38 of the UNCITRAL Rules, "the costs of arbitration shall in principle be borne by the unsuccessful party",[1403] including the legal costs.[1404] It further submits that, while the Tribunal can apportion the costs between the Parties if reasonable in light of all circumstances,[1405] no such apportionment is warranted in the present case and the Claimant must bear all of the costs of this arbitration.[1406] This is so, says the Respondent, to the extent that its costs are reasonable in view of the complexity of the case,[1407] its conduct did not cause excessive costs or delay,[1408] and by contrast, the Claimant's conduct generated additional and unnecessary costs.[1409]

658. In particular, the Respondent submits that the Claimant:

i. Brought this case despite the fact that its business plan was illegal under EU, Slovak, and Polish law.[1410]

[1403] R-Statement on Costs, ¶ 3.

[1404] R-Statement on Costs, ¶ 4.

[1405] R-Statement on Costs, ¶ 3.

[1406] R-Statement on Costs, ¶¶ 3-4.

[1407] R-Statement on Costs, ¶¶ 6-8; R-Reply on Costs, ¶¶ 5-15.

[1408] R-Reply on Costs, ¶¶ 17-30.

[1409] R-Statement on Costs, ¶¶ 5, 19 *et seq*.

[1410] R-Statement on Costs, ¶ 20.

ii. Was responsible for the last-minute cancellation of the in-person procedural hearing scheduled to take place on 12 May 2017.[1411]

iii. Did not act with sufficient care during the document production phase and moreover failed to produce a substantial number of documents ordered in a timely manner.[1412]

iv. Consistently mischaracterized the evidence before the Tribunal regarding the alleged flood risk and insufficient road infrastructure in Legnava.[1413]

v. Engaged Dr. Kucharski to provide an expert opinion of Muszynianka's sales forecasts, notwithstanding the fact that Dr. Kucharski lacked relevant training in economics and demand forecasting.[1414]

vi. Made damage calculations that were a moving target throughout the proceedings.[1415]

659. In response to the Claimant's allegations on the reasonability of its costs, the Respondent submits that:

i. It was entitled to raise the illegality objection and to retain an expert to that end.[1416]

ii. The presentation of expert evidence, such as that of Prof. Lapin, was justified to underpin the rational policy behind the Constitutional Amendment.[1417] Moreover, while the opinion of some experts who had been retained were not filed in the form of an expert report, they served as a basis for the preparation of the Slovak Republic's briefs.[1418]

[1411] R-Statement on Costs, ¶ 21.

[1412] R-Statement on Costs, ¶¶ 22-24.

[1413] R-Statement on Costs, ¶ 25.

[1414] R-Statement on Costs, ¶ 26.

[1415] R-Statement on Costs, ¶ 27.

[1416] R-Reply on Costs, ¶¶ 18-25.

[1417] R-Reply on Costs, ¶ 8.

[1418] R-Statement on Costs, ¶ 17.

iii. The requests for bifurcation and production of the Deloitte Report, while unsuccessful, were neither unfounded nor frivolous.[1419]

iv. The challenge of Mr. Alexandrov was reasonable given his prior active role as counsel against the Slovak Republic and his statements accusing the Respondent of false allegations.[1420]

660. Therefore, the Respondent requests the reimbursement of a total of EUR 7,496,987.21,[1421] plus "interest […] on an amount to be determined by the Tribunal",[1422] broken down as follows:[1423]

A. Counsel and Legal Fees	
Counsel legal fees	EUR 5,914,465.00
Overhead costs (including travel expenses)	EUR 146,793.80
B. Internal Expenses	
Overhead costs (including travel expenses)	EUR 2,299.40
C. Expert Fees and Expenses	
Prof. Milan Lapin	
Fees	EUR 1,000.00
Doc. JUDr. PhDr. Peter Potásch, PhD.	
Fees	EUR 67,600.00
Overhead costs (including travel expenses)	EUR 827,00
Prof. RNDr. Zlatica Ženišová, PhD.	
Fees	EUR 4,600.00
Mr. Raymond O'Rourke	
Fees	EUR 14,250.00
Overhead costs (including travel expenses)	EUR 528.00
Dr. Richard Hern	
Fees	EUR 604,731.78
Overhead costs (including travel expenses)	EUR 1,991.50
PRODEX spol. s r. o.	
Fees	EUR 36,770.00
Overhead costs (including travel expenses)	EUR 996.00
Mgr. Daniel Marcin, PhD.	
Fees	EUR 1,225.00
Overhead costs (including travel expenses)	EUR 1,082.00
D. Witness Expenses	
Travel expenses of Mr. Peter Žiga	EUR 2,088.00
Travel expenses of Ms. Jarmila Božíková	EUR 933.00
E. Other Costs	
Deposit payments	EUR 540,000.00
Translation costs	EUR 85,520.98
Swiss law analysis performed by Kellerhals Carrard	EUR 20,065.55

[1419] R-Reply on Costs, ¶ 26.

[1420] R-Reply on Costs, ¶¶ 28-30.

[1421] Respondent's Updated Statement of Costs of 2 September 2020.

[1422] R-Reply on Costs, ¶ 31(b).

[1423] R-Statement on Costs, Schedule A; Respondent's Updated Statement of Costs of 3 September 2019, and 10 July and 2 September 2020.

Constitutional law analysis performed by Doc. JUDr. Peter Kresák, CSc.	EUR 40,000.00
Administrative law analysis performed by Prof. JUDr. Soňa Košičiarová, PhD.	EUR 2,700.00
Analysis of flood risks in Legnava region performed by Slovenský vodohospodársky podnik, štátny podnik	EUR 720.00
Analysis of climate change and its effects performed by Slovak Hydrometeorological Institute	EUR 5,800.00

C. ANALYSIS

661. Article 38 of the UNCITRAL Rules provides as follows:

> The arbitral tribunal shall fix the costs of arbitration in its award. The term 'costs' includes only:
>
> > *(a)* The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
> >
> > *(b)* The travel and other expenses incurred by the arbitrators;
> >
> > *(c)* The costs of expert advice and of other assistance required by the arbitral tribunal;
> >
> > *(d)* The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
> >
> > *(e)* The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
> >
> > *(f)* Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

662. Article 38 recognizes broadly three categories of costs and expenses: (i) Tribunal costs, comprising the fees and expenses of the Tribunal and the Secretary; (ii) Party costs, comprising the legal and witness/expert related costs incurred by the Parties; and (iii) administrative costs, comprising the fees and expenses of the PCA, including with regard to hearing and other expenses.

663. In the course of the arbitration, each Party made cost advances to the PCA in an amount of EUR 540,000.00.

664. During the arbitration the members of the Tribunal spent a total of 1,383.8 hours as follows: Prof. Robert G. Volterra 425.4 hours; Mr. J. Christopher Thomas QC 322.4 hours; and Prof. Gabrielle Kaufmann-Kohler 636 hours. The Parties agreed in the Terms of Appointment that the Tribunal's time would be compensated at an hourly rate of EUR 600, exclusive of VAT where applicable.[1424] Because of a shortfall in available funds

[1424] ToA, Art. 13, ¶¶ 55, 58.

following the last advance payment, the members of the Tribunal reduced their fees proportionately to each one's total fees. As a result, the arbitrators' fees are as follows: Prof. Robert G. Volterra EUR 237,116.88; Mr. J. Christopher Thomas QC EUR 179,703.21; and Prof. Gabrielle Kaufmann-Kohler EUR 354,503.75.

665. The Secretary of the Tribunal spent a total of 522.5 hours, which corresponds to fees of EUR 130,625.00 at the hourly rate of EUR 250 agreed in the Terms of Appointment.[1425]

666. The Tribunal and the Secretary have incurred expenses in the amount of EUR 27,235.86. The PCA's fees for the administration of the case amount to EUR 37,114.50. Other costs, relating in particular to the hearing expenses, catering, court reporting services, etc., amount to EUR 113,700.80. Therefore, the total costs of the proceedings amount to EUR 1,138,959.16, reduced to EUR 1,080,000.00. The PCA will provide the Parties with the case statement of account in due course.

667. Article 40 of the UNCITRAL Rules sets out the standard on the basis of which the Tribunal must determine the allocation of the above categories of costs:

> "1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable. […]"

668. Pursuant to the first sentence of Article 40(1) of the UNCITRAL Rules, the unsuccessful party shall in principle bear the costs of the arbitration. The Claimant has prevailed on jurisdiction; admissibility; the lawfulness of the Project's cross-border nature, of mixing the Legnava Sources among themselves, and of selling a product under the "Muszynianka-Legnava" trade name/description; and on its FET and non-impairment claims regarding the State Spa Committee's conduct during the Exploitation Permit proceedings. Yet, the Claimant was unable to establish causation and thus is not entitled to compensation for the Respondent's breaches of the Treaty. The Respondent has prevailed on the content of Muszynianka's mixing and branding plans; the law governing those plans; and the illegality of trading a product under the "*Muszynianka*" and "*Muszynianka Plus*" trade names/descriptions. The Respondent has also prevailed on expropriation and on the FET and non-impairment claims regarding legitimate

[1425] ToA, Art. 13, ¶ 56.

expectations, the entitlement to the Exploitation Permit, and the Constitutional Amendment.

665. Considering the outcome of the case, the complexity of the legal and regulatory issues involved, which could legitimately give rise to disagreements, and the fact that both Parties have conducted these proceedings in a professional and cost-effective manner, the Tribunal comes to the conclusion that it is most appropriate for each party to bear half of the costs of the proceedings (Tribunal, Secretary and PCA fees and expenses) and its own legal fees and other expenses incurred in connection with the arbitration.

XI. OPERATIVE PART

666. On the basis of the foregoing reasons, the Tribunal renders the following decision:

i. The Tribunal has jurisdiction over this dispute;

ii. The claims before it are admissible;

iii. The Slovak Republic has breached Articles 3(2) and 3(1) of the BIT by the manner in which it conducted the administrative proceedings on GFT Slovakia's application for the Exploitation Permit;

iv. Each party shall bear half of the costs of the proceedings.

v. Each Party shall bear the legal fees and other expenses which it incurred in connection with the arbitration.

vi. All other claims are dismissed.

Date: 7 October 2020

Place of arbitration: Geneva, Switzerland

Prof. Robert G. Volterra

Arbitrator

Subject to Partial Dissenting Opinion

Mr. J. Christopher Thomas QC

Arbitrator

Prof. Gabrielle Kaufmann-Kohler

Presiding Arbitrator