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

SPÓŁDZIELNIA PRACY "MUSZYNIANKA"

CLAIMANT

v.

THE SLOVAK REPUBLIC

RESPONDENT

PARTIAL DISSENTING OPINION
of
PROFESSOR ROBERT G. VOLTERRA

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

I. Introduction

1. One of the basic duties of an arbitrator is to sign the decisions and awards of the case in which she or he sits. That act of signing does not necessarily signify that the arbitrator agrees with all, most or even any of the contents of the decision or award. It does signify that the arbitrator confirms that the decision or award being signed is the official decision or award of the tribunal.

2. It does not matter whether the decision or award is reached by unanimity or majority or a mix of both. Each arbitrator on the tribunal has an obligation to all the parties to sign it. In the present case, the three arbitrators on the Tribunal have worked together integrally, actively, congenially and fully on all aspects of the work of the Tribunal, including in the drafting of the Award.[1]

3. There is usually no obligation on an arbitrator who does not agree with all or part of a decision or award to append to it a separate or dissenting opinion. Indeed, the point has been made that the arbitral process would be best served if arbitrators generally did not append separate or dissenting opinions. Despite noting this, in the present case, I have decided to append a partially dissenting opinion to the Award (the "**Partially Dissenting Opinion**"). I am pleased to do so in the spirit of collegiality that has been a pleasant hallmark of the work of the arbitrators in this case.

4. The duty of a tribunal established under an investment treaty is to apply the terms of that treaty. Except to the degree that the text of an investment treaty directs otherwise, a dispute arising under it must be resolved by reference to public international law. The decisions and awards in an investment treaty arbitration must thus look for direction to and be coherent with public international law.

5. Public international law is a generally coherent and self-contained legal system. Like most legal systems, its principles apply throughout its *corpus*. The sources of public international law are set out clearly in Article 38 the Statute of the International Court of Justice. Decisions and awards of investment treaty arbitration tribunals do not fall within Article 38 and are not a source of public international law.

6. There is no doctrine of "precedence" or *stare decisis* in public international law. The persuasive nature in public international law of decisions of prior tribunals stems from their coherence with the *corpus* of public international law. Even the decisions of the International Court of Justice are only binding as between the parties to a case and in respect of that particular case.[2]

7. These things being so, there is no legal basis for an investment treaty arbitration tribunal to adopt legal principles because they were adopted by other investment treaty tribunals. It matters not how many investment treaty arbitration tribunals have previously reached the same decision on a point of public international law. They cannot and have not thereby established or reinforced any principle of public international law. The term "investment treaty arbitration case law" is an oxymoron.

[1] This Partially Dissenting Opinion uses words and acronyms as defined in the Award, unless otherwise defined for ease of reference here.

[2] See the Statute of the International Court of Justice, 24 October 1945, 33 UNTS 993, Article 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

8. At paragraph 166, the Award sets out a view of the role of prior awards from other investment treaty arbitrations. The text states:

> "More specifically, [the Tribunal] 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."

This statement is not consistent with principles about the sources of public international law. It is not consistent with the principle that there is no system of precedence in public international law. This statement does not reflect or apply public international law.

9. The rational offered in the Award for deviating from public international law principles and applying an implicit *de facto* rule of precedence is provided at the end of paragraph 166:

> "The Tribunal adopts this approach with a view to promoting legal certainty and the rule of law."

However, misapplying fundamental principles of public international law like this achieves the opposite result. It undermines legal certainty and the rule of law. This is amplified by the irreconcilable contradiction between the Award's statement that there is no doctrine of "precedence" or *stare decisis* in public international law and its statement that a tribunal applying public international law "should follow legal principles applied in a consistent line of cases".[3]

10. There are no legitimate grounds, compelling or otherwise, for an investment treaty arbitration tribunal to adopt principles that were adopted by prior investment treaty arbitration tribunals in order to ensure "coherence" to "investment treaty law" or to the "system of investment treaty arbitration". Such an approach would reflect a misunderstanding of both the sources of public international law and the way in which public international law functions, as well as the placement of investment treaties within the *corpus* of public international law. Public international law and investment treaty arbitration are not comparable to the so-called *lex mercatoria*, resuscitated by commercial arbitration lawyers in modern times and developed through careful repetition in commercial arbitration awards by commercial arbitration lawyers.

11. In public international law, there is no sub-system called "investment treaty law" or "investment law". Public international law regulates the treatment by States within their territory of foreign nationals (traditionally termed "aliens", in public international law) and their property according to the rules of State Responsibility. Almost all substantive provisions in almost all investment treaties are codifications of the customary international law of State Responsibility, as it relates to the treatment of aliens and their property.

[3] The same contradiction arises in the following paragraph of the Award, paragraph 167: "[The Tribunal] 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."

12. There is also no such thing as a "system of investment treaty arbitration". The international community of sovereign States has not enacted any "system" for the resolution of investment treaty disputes. Investor-State dispute settlement includes negotiation, mediation, conciliation, municipal court litigation and much else than just investment treaty arbitration. Almost without exception, investment treaties that contain international arbitration as a dispute resolution option provide for one-off arbitrations to be decided by one-time tribunals. With very few exceptions, investment treaty tribunals are thus *ad hoc* bodies established by the consent of the States party to the treaty with the express and only purpose of resolving a dispute that has arisen under the specific terms of that treaty. There is thus no "system of investment treaty arbitration" to which "coherence" can be given.

13. Thus, if a decision or award of a tribunal established under an investment treaty is intended to contribute to the furtherance of legal certainty and the rule of law, it must be harmonious with the *corpus* of public international law and, most particularly, the law of State Responsibility. A decision or award of an investment treaty arbitration tribunal cannot be a source of public international law. It is of relevance to subsequent investment treaty arbitration tribunals only to the extent that it is harmonious with that *corpus* of public international law. If it is, then it might provide a useful guide or a confirmation for a tribunal. If it is not, then it cannot properly be a useful reference point. A series of investment treaty awards that are harmonious amongst themselves, but not harmonious with principles of public international law, does not transform public international law by sheer weight of numbers. Nor does the quantity of such erroneous cases somehow increase the persuasiveness of their common errors of law. To the extent that investment treaty tribunals have a responsibility beyond the immediate task of resolving the dispute at hand, it is to ensure the coherence of their work with the *corpus* of public international law, not to seek conformity with each other's decisions and awards.

14. The Award notes that my colleagues on the Tribunal have had the opportunity to read this Partial Dissenting Opinion. In turn, I have had the opportunity to participate fully in the drafting of the Award, including in relation to the issues raised in this Opinion. The Tribunal's discussion of all the issues, including those identified in this Opinion, have been collegial and pleasant. Nonetheless, as will be discussed below and as the reader will understand from reading the Award and this Opinion, the observations in this Opinion remain unchanged.

15. It is for these reasons that I have concluded that I have a responsibility to write a partially dissenting opinion in this case. It focuses exclusively on the issue of the Respondent's obligations under the BIT *vis-à-vis* the Claimant's investment that relate to the Respondent's promulgation of the Constitutional Amendment. In my view, the Award's treatment of this issue is not consistent with principles of public international law. I consider that I have a duty to both Parties (to each of which I owe equal obligations, as an arbitrator) to set out my understanding of the correct interpretation of the relevant public international law principles at issue, insofar as the Constitutional Amendment relates to the Claimant's investment. My sense of responsibility to do this for the Parties is underscored by the fact that the Claimant is still the owner of an investment in the Respondent. Public international law will therefore remain applicable to aspects of their ongoing relationship (and, indeed, to the relationship between the parties to the BIT) even after the issuance of the Award.

16. This Partially Dissenting Opinion is a skeletal roadmap designed to enable the Parties to follow my analysis efficiently. It is therefore deliberately concise. It does not reference every relevant source of customary and conventional international law. It does not address every aspect of the Award's analysis of the provisions of the BIT that apply to the promulgation of the Constitutional Amendment. It does not address questions of fact, except insofar as errors of law have led to relevant evidence on the record not being taken into account or analysed in the Award on this issue.

II. Overview

17. This Partially Dissenting Opinion does not reflect a difference of view amongst the arbitrators about the fundamental question of whether or not the Respondent violated the BIT in relation to the Claimant and its investment. The arbitrators are unanimous in their view that the Respondent engaged in a number of violations of the BIT, in relation to the Claimant and its investment. The arbitrators are also unanimous in their view that the Respondent failed to provide substantive protections and benefits under the BIT to the Claimant, as it was legally obligated to do under public international law. The arbitrators are thus also necessarily unanimous in their view that the Slovak Republic breached its public international law obligations to the Republic of Poland.

18. The Award sets out this unanimous view at paragraph 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.".

19. The Award also concludes that the conduct of the Respondent in promulgating the Constitutional Amendment has not breached the BIT. As noted above, I do not agree with this. In my view, such a conclusion is incompatible with a proper understanding of public international law and is inconsistent with the relevant evidence on the record of the case, as identified by that applicable law.

20. This Partially Dissenting Opinion does not challenge, nor is it inconsistent with, the unanimous views of the Tribunal that are set out above. Rather, in relation to the Constitutional Amendment, it briefly provides an understanding of certain aspects of the applicable public international law; identifies unchallenged and relevant evidence on the record of this case that must be taken into account and analysed in accordance with this law; and then applies that understanding of the law to the full set of relevant facts.

21. The Respondent has argued in this arbitration that the Constitutional Amendment was only intended to and did protect the environment and ensure its water resources by banning the export of water from its territory. However, a number of significant things are *prima facie* evident from the text of the Constitutional Amendment itself. First, the ban on the export of water is not absolute. Second, there is, *inter alia*, an exception made for mineral water (which is relevant to the Claimant's investment).

Third, the exception for mineral water only applies if it is industrially packaged for consumers in the territory of the Respondent. Each of these things is significant, not least because they have no rational connection with protecting the environment or preserving water resources by preventing the export of water. Rather, the unchallenged evidence on the record shows that the Respondent drafted these incongruous provisions into the Constitutional Amendment in order to pursue an entirely distinct policy related to its industrial development.

22. Public international law principles require that the full body of relevant evidence on the record of the case be used first to determine and then to evaluate the Respondent's conduct. In the present case, that relevant evidence comes directly from the Respondent and its responsible officials and agents. It is uncontroverted. It confirms that the conditionality on the export ban exception for mineral water was deliberate conduct on the part of the Respondent. It also establishes without contradiction that the Respondent intended that the conditional nature of the export ban exception would further its separate policy of job, value-added and tax creation.

23. This aspect of the Constitutional Amendment – the requirement that export ban exception be conditional on the mineral water being industrially processed in the Respondent's territory – has nothing to do with protecting the environment or preserving water supply in the territory of the Respondent. There is no evidence on the record that the Respondent even considered there to be a nexus between that condition and the protection of the environment or preservation of it water supply. Under public international law, that part of the Constitutional Amendment constitutes distinct conduct on the part of the Respondent, albeit combined within one single legislative instrument.

24. As a consequence, insofar as it relates to mineral water exports, and specifically for this case as it relates to the Claimant's investment, the Respondent's conduct in promulgating the Constitutional Amendment violated the BIT because it was (i) discriminatory; (ii) arbitrary and unreasonable; (iii) disproportionate; and (iv) inconsistent. This conclusion in no way impugns that part of the Constitutional Amendment which bans the export of water for environmental and conservation reasons.

III. An understanding of certain aspects of the applicable public international law

Rules of attribution and State Responsibility in public international law establish that evidence of State conduct includes public statements of policy and intention by responsible officials and agents

25. To establish State Responsibility for an internationally wrongful act, State conduct consisting of an action or omission must: (i) be attributable to the State under international law; and (ii) constitute a breach of international obligations of the State.[4] This subsection of the Partially Dissenting Opinion addresses the first branch of the standard, detailing how public statements made by State officials or agents to the State itself. The second branch of the standard is addressed below.

[4] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2011), Article 2.

26. Under public international law rules, States act "only by and through their agents and representatives."[5] It is well established that a responsible official or agent of the State can engage the State's Responsibility by making a (i) public or notorious declaration or undertaking (ii) where the State making the declaration intended that it should be bound according to its terms.[6] There is no requirement of any *quid pro quo* or subsequent acceptance or response.[7] Such unilateral statements can unquestionably constitute conduct of the State under public international law.[8] Of course, the State's official or agent must be (as per the International Law Commission's Draft Articles of State Responsibility) responsible and appropriately authorised in order for the unilateral declaration to bind the State under public international law.[9]

27. Public international law does not require a specific form for the unilateral statement (i.e., statements can be oral or written) but there must be "clear intention" on behalf of the State.[10] Examples of such statements include:[11]

    a. Official or diplomatic notes;[12]
    b. Public declarations or press statements;[13]
    c. Proclamations by a President or Prime Minister;[14] and
    d. Political speeches.[15]

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[5] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2011), Article 2 Commentary paragraph 5.
[6] For example, see *Nuclear Tests Case (New Zealand v. France)*, 1974 I.C.J. 457, December 20, paragraphs 44 and 51; James Crawford, et al. (eds), *Brownlie's Principles of Public International Law* (Oxford Scholarly Authorities on International Law, 9ed., 2019), page 401; and Víctor Rodríguez Cedeño and María Isabel Torres Cazorla, *Unilateral Acts of States in International Law* (Max Planck Encyclopedias of Public International Law, 2019), paragraphs 15 to 17.
[7] *Brownlie's Principles of Public International Law* (Oxford Scholarly Authorities on International Law, 9ed., 2019), page 403.
[8] For example, see *Nuclear Tests Case (New Zealand v. France)*, 1974 I.C.J. 457, December 20, paragraphs 51 and 53; James Crawford, et al. (eds), *Brownlie's Principles of Public International Law* (Oxford Scholarly Authorities on International Law, 9ed., 2019), pages 402 to 403; and Sir Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law: Volume I* (Oxford Scholarly Authorities on International Law, 9ed., 2008), page 1190.
[9] For example, see International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2011), Article 2 and Commentary; Chapter II Commentary paragraph 2; Article 4 and Commentary; Article 7 and Commentary; and Article 8 and Commentary; and Víctor Rodríguez Cedeño and María Isabel Torres Cazorla, *Unilateral Acts of States in International Law* (Max Planck Encyclopedias of Public International Law, 2019), paragraphs 15 to 16.
[10] *Nuclear Tests Case (New Zealand v. France)*, 1974 I.C.J. 457, December 20, paragraph 48.
[11] For example, see generally, Eighth report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur, 26 May 2005, UN Doc. A/CN.4/557.
[12] Víctor Rodríguez Cedeño and María Isabel Torres Cazorla, *Unilateral Acts of States in International Law* (Max Planck Encyclopedias of Public International Law, 2019), paragraph 18 (e.g. Colombia note of 1952).
[13] For example, see *Military and Paramilitary Activities (Nicaragua v. United States of America)*, 1986 I.C.J. 14, June 27, page 49 (the Court treated a press statement by President Reagan of the USA as an admission); and Víctor Rodríguez Cedeño and María Isabel Torres Cazorla, *Unilateral Acts of States in International Law* (Max Planck Encyclopedias of Public International Law, 2019), paragraphs 19 and 22 (a public declaration by the King of Jordan on 31 July 1988, waiving Jordan's claims to the West Bank territories, was considered binding.)
[14] *Nuclear Tests Case (New Zealand v. France)*, 1974 I.C.J. 457, December 20, paragraph 44.
[15] *Legal Status of Eastern Greenland (Denmark v. Norway)*, 1953 PCIJ Series A/B. No 53, April 5, page 71 (the Court accepted an oral unilateral declaration by the Norwegian Foreign Minister M. Ihlen as binding upon the Norwegian State).

28. Therefore, under basic principles of public international law, public and notorious statements made by the responsible minister of a government and the prime minister of a State can constitute relevant conduct of a State under public international law. They can also reflect that State's intention, in relation to its conduct.[16] This is particularly so for such statements made as expressions of State policy, intention or initiative. It follows from this that all such evidence is relevant and must be considered, when evaluating State conduct according to public international law.

The Respondent's categorisations of different types of water must be evaluated as such under public international law

29. The Constitutional Amendment identifies on its own terms five categories of water:

    i. Water taken from water bodies located in the territory of the Slovak Republic;
    ii. Water for personal consumption;
    iii. Drinking water;
    iv. Mineral water; and
    v. Water for humanitarian aid and emergencies.[17]

    Each of categories (ii) to (v) is a subset of category (i). Self-evidently, certain of these subset categories could overlap. The Claimant's investment, of course, relates to mineral water.

30. It is of legal significance that the Respondent itself identified these categories of water. Because of that, it is not necessary to engage in a factual or legal analysis of what types of water are alike with which other types of water, for the purposes of evaluating the intention or effect of the Respondent's conduct in relation to the BIT or for the purposes of establishing Responsibility under public international law. The Respondent itself has identified categories of types of water. Under public international law norms, it is necessary to analyse the Respondent's treatment of those categories, through its promulgation of the Constitutional Amendment, both as between categories and within individual categories.[18]

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[16] For example, see *Nuclear Tests Case (New Zealand v. France)*, 1974 I.C.J. 457, December 20, paragraphs 51 and 53; James Crawford, et al. (eds), *Brownlie's Principles of Public International Law* (Oxford Scholarly Authorities on International Law, 9ed., 2019), pages 402 to 403; and Víctor Rodríguez Cedeño and María Isabel Torres Cazorla, *Unilateral Acts of States in International Law* (Max Planck Encyclopedias of Public International Law, 2019), paragraph 27.

[17] Constitutional Amendment, Article 1(2), **RLA-18**.

[18] For example, see International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2011), Article 15 and its Commentary; *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Additional Facility Case No. ARB(AF)/00/2 (Naon, Fernandez Rozas, Bernal Verea), Award, 29 May 2003, paragraph 62, footnote 26 ("[w]hether it be conduct that continues in time, or a complex act whose constituting elements are in a time period with different durations, it is only by observation as a whole or as a unit that it is possible to see to what extent a violation of a treaty or of international law rises or to what extent damage is caused"); and *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6 (Vinuesa, Greenberg, Irarrázabal), Award, 31 July 2007, paragraph 95 ("[the allegations in relation to] Ecuador's acts and omissions after the entry into force of the BIT serve to affirm the Competence of this Tribunal to determine whether there was a violation of the BIT independently of whether those acts or omissions were composite or continuing.").

Two distinct acts of a State that seek to and do implement two distinct policies must be evaluated individually under public international law, even if they are accomplished at the same time or in the same instrument

31. The fact that two or more policies or acts are achieved by a State via implementation under one single legal instrument does not mean that the conduct of the State somehow merges into one single policy or act, with one being "dominant" or one being "submerged" into or "obscured" by another. Were this so, then a State would be able with ease to avoid what would otherwise be its State Responsibility under public international law merely by engaging in simultaneous conduct that "screened" or "sheltered" from scrutiny a violation of law behind a distinct act that does not violate of the law.[19] This would not be consistent with a proper understanding of public international law.

32. Not only that, it would be highly undesirable and indeed a dangerous invitation to moral hazard were there ever to be created a customary international law norm which accepted that a State could avoid its Responsibility merely by combining two actions. Such a deliberate sleight of hand is not consistent with public international law nor, indeed, with the rule of law generally.

33. For the same reason, under public international law, mere virtue-signalling by a State that is otherwise responsible for conduct intended to or effecting discrimination or other violations of public international law (for example, by sample-referencing "human rights" or "climate change") does not provide it with a scrutiny-free "get-out-of-jail" card.[20] It follows from this that distinct policies or acts must be considered independently, in terms of evaluating State Responsibility, regardless of whether they are effected through merged conduct.

Relevant legal standards under the FET provisions of the BIT

34. The purpose or intention behind a State's conduct is not the only legal reference point for evaluating its legality under public international law. A discriminatory purpose or intention is a relevant factor in evaluating allegedly discriminatory conduct. But intention is not a necessary precondition to a finding of discrimination by a State. On

[19] For example, see International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2011), Article 12 ("There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, *regardless of its origin or character*." Emphasis added); *Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 (Kaufmann-Kohler, Bernal Verea, Rowley), Award, 20 August 2007, paragraph 7.5.31 ("[i]t is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached"); James Crawford, et al. (eds), *Brownlie's Principles of Public International Law* (Oxford Scholarly Authorities on International Law, 9ed., 2019), pages 525 to 527 (e.g. "*Corfu Channel* involved a finding that Albania was, by reason of its failure to warn of the danger, liable for the consequences of mine-laying in its territorial waters even though it had not laid the mines."); and Heiner Bielefeldt, et al. (eds), *Freedom of Belief or Religion: An International Law Commentary* (Oxford Scholarly Authorities on International Law, 2016), page 316 ("[The Human Rights Committee and Special Rapporteurs] have clarified that — even when a (discriminatory) distinction is enshrined in the Constitution of a State — this mere fact does not render such a distinction reasonable and objective.")

[20] For example, see James Crawford, et al. (eds), *Brownlie's Principles of Public International Law* (Oxford Scholarly Authorities on International Law, 9ed., 2019), pages 525 to 527.

the contrary, it is a widely accepted principle of public international law that, to establish discrimination, it is sufficient that the effect of State conduct is discriminatory, regardless of the purpose or intention.

35. The discriminatory "intention or effect" formula is recognised across the *corpus* of public international law. This includes subject matters as diverse as, *inter alia*, the fields of international human rights law[21] and international trade law.[22] Under public international law, the Respondent's conduct must thus be examined for both its intention and its effect. Merely examining it for intention in "targeting" the Claimant and its investment is not sufficient.

36. The Award correctly identifies the legal standards for arbitrary and unreasonable, disproportionate, and inconsistent conduct by a State. This Partially Dissenting Opinion therefore incorporates them as set out there.

IV. Unchallenged and relevant evidence on the record of this case that must be taken into account

37. The relevant public international law rules about evidence of State conduct are outlined above. Applied to the case at hand, they confirm that there is evidence on the record of relevant State conduct related to the Respondent's promulgation of the Constitutional Amendment that has not been analysed in the Award. This includes evidence of statements by responsible senior officials made publicly to the Respondent's parliament and in public statements deliberately made at press conferences. Insofar as those authoritative statements express themselves as reflecting the Respondent's intentions and conduct, they must be considered as such for assessing issues of State Responsibility.[23] Under public international law, this evidence of the Respondent's conduct must be taken into account.

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[21] For example, see United Nations, *Human Rights Instruments Volume I – Compilation of General Comments and General Recommendations Adopted by Human Rights Bodies*, 27 May 2008, UN Doc. HRI/GEN/1/Rev.9, pages 82, 100, 128, 142, 158 and 205; and UN Expert Mechanism on the Rights of Indigenous Peoples, *Final Report on the study on indigenous peoples and the right to participate in decision-making*, 17 August 2011, UN Doc. A/HRC/18/42, Annex, paragraph 27 ("Consensus is not a legitimate approach if its intention or effect is to undermine the human rights of indigenous peoples.")

[22] For example, see Mitsuo Matsushita, et al., *The World Trade Organization: Law, Practice and Policy* (Oxford Scholarly Authorities on International Law, 3ed., 2015), page 768 ("mandatory or voluntary climate change technical regulations or standards must be non-discriminatory and must not be prepared or applied with the intention or effect of creating unnecessary obstacles to trade") referencing Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996; and *Agreement on Technical Barriers to Trade,* 1868 U.N.T.S. 120, entered into force, Articles 2.2 and 5.1.2 and Annex 3.E.

[23] For example, see International Law Commission, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations* (2006), Article 1 and Commentary; *Nuclear Tests Case (New Zealand v. France)*, 1974 I.C.J. 457, December 20, paragraphs 46 and 48; James Crawford, et al. (eds), *Brownlie's Principles of Public International Law* (Oxford Scholarly Authorities on International Law, 9ed., 2019), pages 402 to 403; Sir Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law: Volume I* (Oxford Scholarly Authorities on International Law, 9ed., 2008), pages 1189 to 1190; and Víctor Rodríguez Cedeño and María Isabel Torres Cazorla, *Unilateral Acts of States in International Law* (Max Planck Encyclopedias of Public International Law, 2019), paragraph 27.

38. The Award considers the Constitutional Amendment and the FET standard between paragraphs 513 and 589. That section of the Award relies upon certain evidence of the Respondent's conduct. In terms of this evidence, the Award recognises that, in press releases both before and after the Constitutional Amendment, Minister Žiga (one of the Respondent's relevant officials) stated:

> "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."[24]
>
> and
>
> "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."[25]

However, the Award's consideration of the relevant evidence stops at this point.

39. Perhaps more significantly, at paragraph 556, the Award states:

> "[A]side from Minister Ziga's statements, 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."

This statement does not accurately reflect the evidence that is considered to be relevant under public international law. There were more examples of similar conduct by the Respondent during the legislative process. Both Parties have submitted evidence to this effect on the record of this case. My colleagues on the Tribunal refer to certain of this evidence on the record. However, merely citing this evidence but still not examining it according to principles of public international law does not correct the incompatibility of this part of the Award with principles of public international law.

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[24] Pluska: *"Will our drinking water be exported? There is no act governing the export of water"*¸ 2 July 2014, **C-122**, p. 2.

[25] Press Conference on Banning the Export of Drinking Water, 23 February 2016, **C-140**, p. 3 (emphasis added).

40. For example, on 2 July 2014, in the midst of the legislative process,[26] during a parliamentary debate, Minister Žiga as responsible minister of the government, made what he himself expressly described as a statement to explain the government's intention as to the Respondent's policy going forward about the regulation of water in its territory. Minister Žiga referenced environmental protection and water's strategic importance for the State. He then gave an actual example to the parliament of what was the government's policy and the motive behind it. That example had nothing to do with environmental protection or water preservation.

41. In fact, the example that Minister Žiga gave to the parliament was actually that of the Claimant and its investment specifically:

> "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 [Claimant's investment], where the company attempted to build an underground pipeline under the Proprad 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. As a result, the added value and jobs will be created in a different country, and in our country we will we will only pay for the abstraction of mineral water."[27]

Clearly, the policy being referenced by the Respondent is economic nationalism and industrial growth.

42. A few sentences later on the same topic of situations such as the Claimant's investment, Minister Žiga once more refers the parliament to the Respondent's intention to support:

> "those who will be bringing back and creating new jobs, and creating added value in Slovakia"[28]

43. And then, giving further context and expression of the government's policy on water export, Minister Žiga went on to explain:

> "Water represents our national wealth and our national resource. I agree with this. We call it waters when it is underground; once water gets above the ground, it becomes a commodity."[29]

44. A week later, on 9 July 2014, Minister Žiga once more referenced specifically the Claimant and its investment as being a precise and actual example of the activity that

[26] As described in the Award paragraphs 74 and 75, the legislative process of the Respondent commenced with the government proposing an amendment to the Water Act and then the government shifted the legislative process into an amendment to the constitution. Here, the legislative process was one single policy initiative but, in any event, there is no distinction in public international law between such different means of a sovereign acting.
[27] C-35 page 2.
[28] C-35 page 2.
[29] C-35 page 2.

the Respondent's new policy was intended to stop.[30] Again, Minister Žiga declared that the policy was to stop all water exports except for "those who manufacture mineral water (and) bottle the mineral water or table water in Slovakia".[31]

45. On 17 October 2014, when speaking as the responsible minister for the government in the parliament during session No. 39, Minister Žiga referenced the proposed Constitutional Amendment and stated that one of the exceptions to the water export ban would be:

> "transporting water bottled in the Republic of Slovakia, which is an exception in favour of the Slovak [water manufacturer?] industry".[32]

The evidence thus establishes without contradiction that the Respondent, openly through its officials and agents as recognised by the norms of public international law, was repeatedly confirming its intended conduct of supporting those mineral water producers that built factories in its territory over those mineral water producers that did not build factories in its territory. It is difficult to imagine how the Respondent's intention in respect of this aspect of the Constitutional Amendment could have been expressed with greater clarity.

46. Thus, there is uncontroverted evidence on the record that the Respondent clearly, repeatedly and expressly stated that one of its intentions, in regulating the export of water, and specifically in relation to the export of mineral water, was to create jobs and add value in relation to a commodity under its control. The Respondent stated these policy objectives expressly during and after the legislative process. As recognised by public international law norms, the conduct of the Respondent therefore included not just ensuring a water supply for itself but also job creation, value adding and taxes for itself.

47. This was confirmed repeatedly by the Respondent even after the promulgation of the Constitutional Amendment. As set out in the previous section of this Partially Dissenting Opinion, under public international law rules, such policy communications by a State must be considered as part of a continuum and so confirmation of intention *post facto* is valid evidence of State conduct. It would not be consistent with public international law to restrict the evidence being considered on this point only to the Respondent's conduct during the legislative process.

48. For example, after the Constitutional Amendment had been passed by parliament, the Prime Minister of the Respondent and Minister Žiga held a press conference. In it, they reiterated many of the policy statements of the Respondent about the object and purpose of the Constitutional Amendment and the intentions of the Respondent in bringing into effect this regulation. Minister Žiga stated unequivocally:

> "We do not ban the exports [of water] in consumer packaging. It means that if a company wants to build a factory, business, bottling plant in the Slovak

[30] C-35 page 5.
[31] C-35 page 5.
[32] C-35 page 7.

> 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."[33]

Once again, it is difficult to imagine how such a statement of intent could have been made more clearly. And, once again, it is not consistent with public international law norms to dismiss this deliberate explanation of the Respondent's conduct as irrelevant and peripheral ruminations with no meaning.

49. Minister Žiga went even further, during his and the Prime Ministers' post-Constitutional Amendment public statements explaining the Respondent's intentions:

> "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 the Environment."[34]

Yet again, it is difficult to imagine how this could be clearer.

50. This Partially Dissenting Opinion has made detailed reference to this evidence of State conduct, even though it is a question of fact, because public international law requires it to be considered in the analysis of the Respondent's conduct for the purpose of assessing its State Responsibility under the BIT. The evidence on the record of the case, properly taken into account in a manner consistent with public international law norms, does not support any suggestion that the Respondent only made one relevant statement or that that statement was not important or that it does not show the position of the Respondent. Such a conclusion is untenable in the face of all the relevant evidence on the record.

51. It is notable that, during his examination at the hearing, Minister Žiga confirmed, *inter alia*, that when he spoke on the water issue in parliament and as a government minister, he was speaking in parliament as quoted above in his capacity as an agent of the Respondent presenting the policy of the Respondent.[35] He also confirmed that his references, to creating jobs, value-add and tax for Slovakia by making the Claimant specifically and others like it bottle water in Slovakia before exporting it, were examples of one of the factors behind the intention of the Respondent in promulgating the Constitutional Amendment.[36]

52. The Respondent further confirmed this position at the beginning of the hearing in this case. After introductions, the Respondent commenced its defence by stating candidly that:

> "All that [the Claimant] 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."[37]

[33] C-140 page 3.
[34] C-140 page 3.
[35] Hearing transcript page 558-7 to page 565-19.
[36] Hearing transcript page 558-7 to page 565-19.
[37] Hearing transcript page 91-24 to page 92-2.

There was no reference to any limitation for the Claimant's ability to export water. There was no nexus identified between the Claimant's ability to export water and protecting the environment or preserving water. There was just an invitation to the Claimant to build a bottling plant in the Respondent's territory. This statement by the Respondent made directly to the Tribunal cannot be ignored, under public international law norms.

53. Under public international law, the Respondent's various statements quoted above constitute authoritative, binding and indicative evidence of the Respondent's acts and intentions. Therefore, they must be considered in evaluating the Respondent's State Responsibility for its conduct in promulgating the Constitutional Amendment.

V. Application of the law to the full set of relevant facts

Rules of attribution and State Responsibility in public international law establish that evidence of State conduct includes public statements of policy and intention by responsible officials and agents

54. The public international law rules related to evidence of State conduct have been identified above. The evidence on the record of this case relevant to the issues raised by the Constitutional Amendment has been set out in the preceding section. That evidence establishes without challenge that the various public statements of the Respondent's Prime Minister and Minister Žiga are attributable to the Respondent as evidence of its conduct under public international law.[38]

55. As can be seen in the evidence, the Prime Minister and Minister Žiga were both acting in their official capacities as State representatives or agents.[39] This is confirmed by the particular language used, the repeated nature of the statements and the combined effect of two individuals at the highest levels of government issuing the same statements. On their own terms, the declarations go well beyond even general statements of policy.[40] As set out above, the application of public international law norms to the case at hand means that the public, notorious and intentional statements of the Respondent's Prime Minister and of Minister Žiga's about the Constitutional Amendment must be understood as State conduct. Insofar as those authoritative statements express themselves as reflecting the Respondent's intentions, they must be considered to be such.

56. To return once more to the relevant part of the Constitutional Amendment, it reads:

> "[…] 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

[38] *Nuclear Tests Case (New Zealand v. France)*, 1974 I.C.J. 457, December 20, paragraph 46; *Oppenheim's International Law: Volume I* (Oxford Scholarly Authorities on International Law, 9ed, 2008), page 1189.
[39] *Nuclear Tests Case (New Zealand v. France)*, 1974 I.C.J. 457, December 20, paragraph 44.
[40] *Oppenheim's International Law: Volume I* (Oxford Scholarly Authorities on International Law, 9ed. 2008), page 1189.

> 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."[41]

57. The Respondent has submitted in this arbitration that it promulgated the Constitutional Amendment in order to prevent the export of water from its territory, to protect the environment and ensure that sufficient water be kept within its territory for its own use. However, the Constitutional Amendment does more than that. If the Respondent intended that the Constitutional Amendment prevent the export of water from its territory, and nothing more, the relevant text would have read:

> "[…] 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."

That is, of course, not what the Constitutional Amendment states.

58. The Constitutional Amendment does not prevent the export, *inter alia*, of mineral water. The only requirement to export mineral water is that the water must have been subject to industrial processing within the Respondent's territory. Apart from that, the Constitutional Amendment places no limit on such export of water. The language of the Constitutional Amendment itself therefore confirms that the Respondent did not intend merely to prevent the export of water from its territory.

59. Although the language of the Constitutional Amendment alone is sufficient to establish this aspect of the Respondent's conduct, this conclusion is also confirmed by other evidence on the record. As noted above, the rules of public international law consider that the relevant acts of the Respondent in this case include the statements of the State officials who are responsible for its conduct, to whit the Prime Minister and Minister Žiga. The evidence on the record of this case confirms without contradiction that one of the objectives of the Respondent in promulgating the Constitutional Amendment was to create jobs, value-added and taxes for itself. The way that the Respondent decided to do this was by mineral water producers build factories in its territory for packaging the water, so that the jobs, value added and taxes did not go to other States. It is uncontroverted on the record of this case that the Respondent expressly intended this consequence of the Constitutional Amendment to fall upon the Claimant and its investment.

60. If the Respondent desired to retain as much water as possible within its territory, it logically would not have allowed these exceptions. Yet the character of the drinking and natural mineral water itself does not change, merely depending on whether or not it has been processed within the Respondent's territory. If 100 litres of natural mineral water leaves the Respondent's territory in bottles, casks, pipelines or trucks, 100 litres of natural mineral water still would have left the Respondent's territory. In addition, there is no evidence on the record that bottling mineral water in Slovakia as opposed to exporting mineral water via a pipeline would necessarily reduce the

[41] Constitutional Amendment, Article 1(2), **RLA-18**.

volume of mineral water that would be exported. These two issues were put directly to Minister Žiga, the relevant official of the Respondent, expressly during his examination at the hearing and he did not answer the questions asked.[42]

61. This demonstrates the dislocation between purported the objective and the means used to achieve it. Therefore, both the motive and the consequence of the requirement that such water be processed by consumer packaging in its territory before it can be exported must be examined. It must be borne in mind that this examination is not into the motivations of the Respondent to protect the environment and preserve water for itself. In no way does it question or challenge the policy choices and decisions of the Respondent in this respect. The statements in paragraphs 551, 552 and 553 of the Award about this are certainly correct understandings of public international law. Rather, the examination that must be conducted is about what the evidence says about the reason for the requirement of industrial processing of mineral water to take place inside the Respondent before the restrictions of the Constitutional Amendment are removed.

62. The Award accepts that this limited evidence from the record "insist more on the protection of the local economy" (paragraph 554). However, as noted above, it then concludes, at paragraph 555, that:

> "… looking at the record as a whole, these statements do not appear representative of the Constitutional Amendment's purposes."

As noted above, this conclusion cannot be reconciled with the record as a whole, certainly not the record as defined by public international law to include all the evidence of State conduct. This conclusion remains unchallenged by the Award when it deals with the evidence of this aspect of the Respondent's conduct.

63. It must be recalled, in this respect, that the Award confirms at paragraph 556 that it did not look at the record as a whole because it mis-states the evidence on the record, considered relevant under public international law:

> "[A]side from Minister Ziga's statements, 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"

64. As noted above, this statement in the Award about the evidence on the record of this case is incorrect as a matter of law and thus of fact. It does not include any analysis of the evidence of the Respondent's conduct that was set out in the previous section of this Partially Dissenting Opinion. The fact that Minister Žiga provided a *post-hoc* explanation of his statements when under examination at the hearing, when his testimony makes it clear that he had at that point realised the implications for the Respondent's case of his contemporary statements that were on the record, does not

[42] Hearing transcript, page 566-5 to page 567-1 and page 567-7 to page 568-2.

alter the relevance and meaning of the contemporary evidence on the record if public international law principles are applied.

65. Indeed, and perhaps even more significant, according to Minister Žiga's explanation at the hearing, the reason he identified the Claimant and its investment specifically in his contemporary comments was to demonstrate the *lacuna* in the law that allowed water to be exported without limit. This *lacuna* in the Respondent's ability to protect the environment and preserve water for itself had nothing whatsoever to do with the other policy being pursued of job, value-added and tax creation. Therefore, to the extent that it can be relied upon, Minister Žiga's *post-hoc* rationalisation at the hearing merely serves to emphasise the inescapable meaning of the contemporary evidence according to public international law principles.

66. As identified in the preceding section, the Prime Minister and Minister Žiga set out the Respondent's intentions and the purpose of the Constitutional Amendment clearly and in ways that engage the Respondent's State Responsibility under public international law. That conduct of the Respondent must be taken into account. The application of public international law principles requires Minister Žiga's public statements to be understood as reflecting the Respondent's intention, in relation to the Constitutional Amendment and thus also necessarily its intended treatment of mineral water exporters.

67. The evidence on the record of the case about this is clear and uncontroverted. It comes directly from the public record policy statements of the Respondent through the responsible State officials and agents. The reference in the Award to Minister Žiga's *post-hoc* rationalisation at the hearing for "targeting" the Claimant and its investments in his conduct leading up to the promulgation of the Constitutional Amendment, referred to in the amended text of the Award quoted above, is irrelevant to this issue of the other policy being pursued by the Respondent of job, value-added and tax creation. The record shows that they repeatedly, consistently and publicly identified economic nationalism as one of the motivations for the Respondent's promulgation of the Constitutional Amendment.

68. In this respect, the analysis in paragraphs 555 and 556 of the Award is not consistent with principles of public international law. Paragraph 555 states:

> "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 reflective of the State's intention, 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." (footnotes omitted)

The public international law principles related to State conduct, attribution and State Responsibility apply regardless of the various motivations and factors identified in

paragraph 555. The observation that State intent and conduct is the outcome of a variety of competing factors is trite and meaningless. The statement in paragraph 555 that "when a particular actor voices a distinct and perhaps arguably improper purpose, it does not mean that such motive is reflective of the State's intention, nor does it indicate *per se* a breach of the international obligation at issue" misses the point. It fails to identify the applicable public international law principles used to determine when conduct of relevant individuals (such as a prime minister or a responsible minister of government) constitutes conduct of a State for the purposes of attribution and State Responsibility under public international law. It is also basic public international law that the assessment of State conduct is made without distinction as to the mode of conduct (e.g., whether by legislation, constitutional amendment or other means; or whether by the legislative, judicial or executive branch of government). The final sentence of paragraph 555 is fundamentally inconsistent with basic principles of public international law. It is telling that the only citations used to support the implicit interpretations and explicit applications of public international law in paragraph 555 are other investment treaty arbitration awards and not sources of public international law.

69. Of equal concern is the Award's paragraph 556. For example, the paragraph ends with the following conclusion:

> "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."

This conclusion avoids addressing the issue that not only a policy objective itself but how it has been implemented must be examined. The consequence of this conclusion, were it consistent with public international law, *quod non*, would again be that States could avoid examination of their conduct provided that they explained it by referencing a motivation that was legitimate State policy.

70. The conclusions reached on this issue in the Award appear to rest on the citation and analysis that has been added in footnote 1173, following the circulation of the previous draft of this Partial Dissenting Opinion. Footnote 1173 states:

> "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 majority 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)."

This analysis implicitly fuses together the two policies contained in the Constitutional Amendment. It then implicitly concludes that, if one policy being pursued does not violate the public international law obligations of a State then the entirety of the State conduct "rides the coattails" of that one policy and is not liable to be examined. As noted above, this is not a principle of public international law. Such an approach would give States a "get out of jail free" card for violations of public international law, provided that they combined those violations with "a set of accepted public policy and legislative motivations". The "set of accepted public policy and legislative motivations" referenced in the footnote presumably refer to what in public international law terminology is identified as State conduct that does not engage the State's Responsibility. Yet, even were this statement in the Award consistent with public international law, *quod non*, the analysis to the facts at hand of this case can only stand if, under public international law, States were able to avoid scrutiny of their conduct provided that they combined conduct in ways that enabled them to reference other conduct that was not a breach of their public international law obligations.

71. The citations relied upon to support the analysis in the Award on this point are the panel reports from one World Trade Organisation dispute. Thus, once again, it is notable that the only citation in the Award to support its analysis is not a source of public international law.

72. In addition, these reports in fact do not support the analysis contained in the Award. What the cited text of those WTO panel reports say is consistent with public international law, as set out in paragraphs 24 to 27 of this Partial Dissenting Opinion, and not the Award. In those WTO reports, the panels concluded that statements of various irrelevant actors – irrelevant to assessing evidence under public international law because they were actors to which the public international law principles of State Responsibility would not attribute the conduct of the State – were not determinative of the panels' assessment of State conduct in that case. That conclusion is consistent with the description of the public international law principles set out in paragraphs 24 to 27 above. However, the relevant evidence in the present arbitration show entirely different facts from those in the WTO dispute. In the present arbitration, the relevant evidence on the record is not the conduct of irrelevant "individual legislators" or "constituencies". The evidence on the record of this arbitration is of the conduct of relevant persons, relevant because of their positions and responsibilities which, under principles of public international law, are such that their conduct constitutes the conduct of the Respondent. Thus, the holding of the WTO panels does not actually support the holding on this issue set out in the Award.

Evaluating the Respondent's treatment of different types of water under public international law

73. It is not necessary to engage in any complex analysis of what types of water are like what other types of water, for the purposes of evaluating in relation to the BIT the intention or effect of the Respondent's conduct. The Respondent has identified for itself categories of types of water. It is therefore is necessary to analyse the Respondent's treatment of them, both as between categories and within individual categories.

74. This Partially Dissenting Opinion analyses the Respondent's conduct in relation to these categories of water, in the sections below dealing with the application of the FET obligations in the BIT to the evidence on the record.

Two distinct acts of a State that seek to and do implement two distinct policies must be evaluated individually under public international law, even if they are accomplished at the same time or in the same instrument

75. The unchallenged and relevant evidence on the record of this arbitration confirms that the Respondent intended the Constitutional Amendment to be one instrument that implements two distinct acts to achieve two distinct, and indeed *prima facie* contradictory, policies: 1) preserving its water resources by banning water exports; and 2) increasing jobs, value-added and taxes through allowing water exports. It is also tenable under public international law norms to conclude that the Respondent can only have had one single intention or purpose in enacting the Constitutional Amendment and that the Constitutional Amendment similarly can have only one effect.

76. Each act is understood, under public international law, as being distinct from the other. The fact that they have been joined together to facilitate the Respondent's conduct or otherwise in one omnibus legal instrument does not diminish the requirement under public international law to evaluate each act of the Respondent on its own terms.

77. It is thus not tenable on the basis of the unchallenged evidence on the record to conclude otherwise than that the Respondent intended to, and did, achieve two distinct policies within the same instrument. One was the prevention of the export of water from its territory so as to ensure that sufficient water is kept within its territory for its own use. Another was the creation of jobs and wealth for itself. There is no question that both of these policies are legitimate for a State to pursue. There is nothing illegal about either of them, *per se*. However, what must then be examined, on the basis of all the evidence, is whether, in pursuing its job and wealth creation policy, the Respondent's conduct caused it to breach its obligations under the BIT. This is examined in the following sub-section.

Relevant legal standards under the FET provisions of the BIT

(i) Discriminatory treatment

78. The applicable law requires that the relevant acts of the Respondent be examined so as to determine both the intention and the effect of the Respondent's conduct. Either of them could engage the Respondent's State Responsibility under public international law, in relation to its obligations under the BIT *vis-à-vis* the Claimant.

In terms of discrimination, the relevant comparators are the types of water that have been categorised by the Respondent itself within the Constitutional Amendment. As noted above, mineral water has been identified as a distinct category of water by the Respondent, for the purposes of the Constitutional Amendment. It is necessary to consider whether there has been discrimination *de jure* or *de facto* within the mineral water category, not just between it and other water categories.

79. Paragraph 516 of the Award concludes that, because the Constitutional Amendment applies to every kind of water and does not distinguish between foreign and domestic producers, there is no *de jure* discrimination. It is true that the Constitutional Amendment does not distinguish between producers *de jure*. The Award then reasons in paragraphs 520 to 522 that there is no *de facto* discrimination because of its conclusion that the Respondent's only or primary purpose and intention in promulgating the Constitutional Amendment was to protect the environment and prevent the export of water from its territory. As noted above, this conclusion is contradicted by the evidence on the record and is not consistent with public international law rules.

80. The unchallenged evidence on the record of the case is that the Respondent intended to and did discriminate between the different categories of water. It also discriminated between mineral water bottled in its territory and mineral water not bottled in its territory. The former was granted an exemption from the export ban. The latter was not. The evidence on the record shows that this discrimination was intentional. If the Constitutional Amendment was nothing more than conduct by the Respondent to prevent the export of water, such an exemption would obviously not have been given. As it was, the Constitutional Amendment discriminates between bottled and unbottled mineral water.

81. The Constitutional Amendment treats different kinds of mineral water differently. Mineral water packaged in consumer packaging in the territory of the Slovak Republic is exempted from the export ban. Mineral water packaged in consumer packaging in the territory of the Slovak Republic is not exempted from the export ban. That is differentiated treatment that discriminates between things within the same category. The differentiated treatment is based on the geographical location of consumer packaging. The evidence on the record of the case provides uncontroverted and uncontested proof that the intention of the Respondent in this discriminatory treatment of mineral water was economic nationalism: the creation of jobs, value-added and tax for the Respondent.

82. The Award speculates in passing that perhaps requiring mineral water to be packaged inside the Respondent would reduce the likelihood of it being put to industrial use outside the country. In the first place, if the objective is to retain water within the Respondent's territory, its possible use once outside the Respondent's territory is irrelevant. In the second place, there is no evidence on the record of the case to support this speculation. In the third place, it is notable that the Respondent also allowed for exceptions on the export ban for personal consumption and humanitarian/emergency use that would be regulated by legislation. There is no explanation provided by the Respondent for the discriminatory treatment of these different categories of exempted water. It is simply untenable that the Respondent is able to control the export of those categories of water via regulation pursuant to

legislation but is unable to control the export of mineral water other than by requiring an industrial processing within its territory.

83. The Constitutional Amendment was discriminatory in both intention and effect, in respect of mineral water. The Award's factual determination of "no targeting" does not affect this conclusion. Had there been targeting, it might have constituted a further breach but its absence does not absolve the Respondent of its State Responsibility. The Respondent's conduct in promulgating the Constitutional Amendment in the way that it did (in the aspect of promoting its domestic industrial policy and not in the aspect of protecting the environment and ensuring its water supply) breached the BIT.

(ii) Arbitrary and unreasonable treatment

84. There is no evidence on the record that the Respondent even attempted to evaluate the possible effect of exempting bottled mineral water or exempting all mineral water from the export ban during the process of promulgating the Constitutional Amendment or otherwise. The *post-hoc* ruminations by Minister Žiga under examination about his intuition as to the limited amount of bottled mineral water that could be industrially produced within the Respondent's territory is without evidentiary support. This confirms that thee exemption given by the Respondent to bottled mineral water only is arbitrary and unreasonable.

85. There is nothing on the record that connects the requirement to process mineral water industrially in the territory of the Respondent with the Respondent's overall interest in protecting the environment and ensuring its water supply. There is no clear and logical nexus between the Respondent's stated objective in promulgating the Constitutional Amendment and this requirement. On the Respondent's own evidence, the requirement for industrially processing mineral water on its territory is unconnected with protecting the environment and ensuring its water supply.

86. The unchallenged evidence on the record shows that the exception for mineral water based not on need for water or protection of the environment, but on generating economic activity, jobs, a value-add commodity and tax in the Respondent State, has no connection with the Respondent's stated objective of the Constitutional Amendment. That confirms the arbitrary nature of the measure.

87. The export of mineral water is not logically connected to the preservation of the environment or the securing of water supply. An unlimited amount of water could be exported under the Constitutional Amendment, provided that factories were built in the respondent, Slovakians were given jobs, a value-added commodity in the Respondent (and not another country) and taxes were generated by the Respondent. This was confirmed by it at the beginning of the hearing in this case, when it confirmed that:

> "All that [the Claimant] 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."[43]

[43] Hearing transcript, page 91-24 to page 92-2.

88. In none of the references by the Respondent to the export of bottled mineral water was there ever any identification by the Respondent to the idea of limiting the volume of such exports. There was no reference to concern about the environment or ensuring water supplies for itself. The only references were repeatedly to building factories and conducting business activities to generate jobs, value-added and taxes.

89. The Award's finding of fact as to the Respondent's government directing the relevant licensing officials to delay the licensing decision of the Claimant's investment until after the promulgation of the Constitutional Amendment is notable, in this respect. The Award concludes that the Respondent did not target the Claimant or its investment, through this conduct. However, the Award does confirm that this conduct occurred because the Respondent was aware that the Constitutional Amendment would result in a denial of the Claimant's license.

90. In fact, that finding of fact is further confirmation that the Respondent violated the BIT by promulgating the Constitutional Amendment. The question of "targeting" is not relevant to this issue. What this finding of fact does establish is that the Respondent possessed a contemporaneous understanding of the effect of the Constitutional Amendment on the Claimant and its investment. It also establishes the specific intention of the Respondent for the Constitutional Amendment to have the effect, *inter alia*, of preventing the Claimant from exporting its mineral water without building a factory in the territory of the Respondent. It was not an unintended, unanticipated, coincidental by-product of the implementation of an unrelated policy.

91. The evidence on the record applied to the legal standard applicable under the BIT thus confirms the arbitrary and unreasonable nature of the Respondent's treatment of the Claimant and its investment. This conduct of the Respondent breached the BIT.

(iii) Disproportionate treatment

92. For the same reasons that the Constitutional Amendment exemption is arbitrary and unreasonable, it is also disproportionate. This conduct of the Respondent breached the BIT.

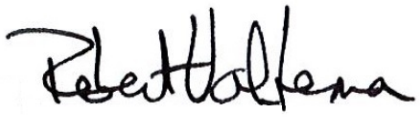
(iv) Inconsistent treatment

93. Allowing mineral water to be exported is inconsistent with preventing the export of water from the Respondent. Exempting only bottled mineral water but not unbottled mineral water is also inconsistent treatment and the rational for doing so (promoting industrial growth) is inconsistent with the environmental protection and water supply rational behind banning water exports. This conduct of the Respondent breached the BIT.

VI. Conclusion

94. Insofar as the conduct of the Respondent, by its promulgation of the Constitutional Amendment, is evaluated against all of the relevant evidence on the record by reference to the intention of the Respondent (as asserted in this arbitration) of

preventing the export of its water, the exemption being provided only for bottled mineral water is discriminatory, arbitrary and unreasonable, disproportionate and inconsistent. Insofar as the conduct of the Respondent is evaluated against all of the relevant evidence on the record by reference to its intention to pursue simultaneously the distinct policy of promoting jobs, value-added and tax for itself, it also violates the BIT on the same grounds. Either way, the conduct of the Respondent in promulgating the Constitutional Amendment (in the aspect of promoting its domestic industrial policy but not in the aspect of protecting the environment and ensuring its water supply) violated its obligations under the BIT *vis-à-vis* the Claimant and its investment.



Robert G. Volterra
7 October 2020