

**ARBITRATION UNDER THE AGREEMENT BETWEEN THE KINGDOM OF THE NETHERLANDS AND
THE REPUBLIC OF POLAND ON ENCOURAGEMENT AND RECIPROCAL PROTECTION OF
INVESTMENTS**

BETWEEN

**HORTHEL SYSTEMS B.V.
TESA BEHEER B.V.
POLAND GAMING HOLDING B.V.**

THE CLAIMANTS

And

THE REPUBLIC OF POLAND

THE RESPONDENT

FINAL AWARD

ARBITRAL TRIBUNAL

Mr. Laurent Lévy, President
Ms. Melanie van Leeuwen, Arbitrator
Mr. Christopher Thomas QC, Arbitrator

SECRETARY OF THE TRIBUNAL

Mr. David Khachvani

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ABBREVIATIONS

BIT	The Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments
BV	<i>Besloten vennootschap</i> , a type of Dutch private limited liability company
CJEU	The Court of Justice of the European Union
Reply	The Claimants' Reply, dated 22 February 2016
Dr.	Doctor
ER	Expert Report
EU	The European Union
EUR	Euro
Exh. C-	The Claimants' Exhibit
Exh. CLA-	The Claimants' Legal Authority
Exh. R-	The Respondent's Exhibit
Exh. RLA-	The Respondent's Legal Authority
FET	Fair and Equitable Treatment
GBGS	Global Betting & Gambling Consultants
GL1 Certificate	Certificate of operation for slot machines
Id.	<i>Ibidem</i>
ICC	The International Chamber of Commerce
ICJ	The International Court of Justice
ICSID	The International Centre for Settlement of Investment Disputes
ILC Articles	The International Law Commission Articles on State Responsibility
LIBOR	London Interbank Offered Rate
LLC	Limited liability company
LLP	Limited liability partnership

Ltd.	Limited
MOE	The Ministry of Economy of Poland
MOF	The Ministry of Finance of Poland
MP	Member of the Parliament
Mr.	Mister
Ms.	Miss
n.	Footnote
NAFTA	The North American Free Trade Agreement
p.	Page
pp.	Pages
PCA	The Permanent Court of Arbitration
PCIJ	The Permanent Court of International Justice
PLN	Polish Zloty
PM	Prime Minister
POG	<i>Podatek Od Gier</i> - a monthly lump sum tax on slot machines.
Prof.	Professor
Rejoinder	The Respondent's Rejoinder, dated
Reply	The Claimants' Reply, dated 22 February 2016
SoC	The Statement of Claim, dated 30 April 2015
SoD	The Statement of Defence, dated 30 September 2015
sp. z o. o.	<i>Spółka z ograniczoną odpowiedzialnością</i> , a Polish limited liability company
UK	The United Kingdom of Great Britain and Northern Ireland
UN	The United Nations
UNCITRAL	The United Nations Commission for International Trade Law
UNCTAD	The United Nations Commission on Trade and Development

US	The United States of America
v.	<i>versus</i>
VCLT	The Vienna Convention on the Law of Treaties
WIBOR	Warsaw Interbank Offered Rate
WS	Witness Statement
¶	Paragraph
§	Section

I. INTRODUCTION

A. THE PARTIES

1. The Claimants

1. The Claimants are Horthel Systems BV, Tesa Beheer BV and Poland Gaming Holding BV, companies incorporated under the laws of the Kingdom of the Netherlands (**Claimants**).
2. The Claimants are represented in this arbitration by Messrs. Max van Leyenhorst, Sander Oorthuys and Bart Wilton of Legaltree:

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And by Messrs. Maciej Laszczuk and Justina Szpara of Laszczuk I Wspolnicy:

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Email: maciej.laszczuk@laszczuk.pl
justyna.szpara@laszczuk.pl

2. The Respondent

3. The Respondent is the Republic of Poland (**Respondent** or **Poland**).
4. Until 18 October 2016, the Respondent was represented in this arbitration by Messrs. Wojciech Sadowski and Maciej Jamka of K&L Gates Jamka:

Pl. Malachowskiego 2
00-066 Warsaw
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T: +48 22 653 42 01
Email: maciej.jamka@klgates.com
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tomasz.sychowicz@klgates.com

5. The Respondent has been at all times represented by Mesdames Elzbieta Buczkowska and Joanna Jackowska-Majeranowska of the State Treasury Solicitors' Office:

ul. Hoża 76/78
00-682 Warsaw
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B. THE DISPUTE

6. The dispute arises out of Poland's measures affecting the low-stake gambling industry in which the Claimants' Polish subsidiaries and affiliates¹ operated. The Claimants contend that Respondent's introduction of excessive taxes on low-stake gambling, its refusal to renew the gambling permits, as well as other measures adopted under the 2010 Law on Gambling (**2010 Gambling Act**)² constituted, *inter alia*, an unlawful expropriation and unfair and inequitable treatment of the Claimants' investments in Poland, contrary to the Bilateral Investment Agreement between the Netherlands and Poland (**BIT** or **Netherlands-Poland BIT**).³ The Claimants claim damages for the alleged violations of the BIT.
7. The Respondent denies the claims. It raises preliminary objections to the jurisdiction of the Tribunal and the admissibility of the claims. In any event, according to Poland, the measures of which the Claimants complain constituted *bona fide* non-compensable regulation in full conformity with the BIT. The Respondent also rejects the Claimants' quantification of damages on several counts.

¹ See the Claimants' corporate chart in Poland below (¶149). Some of the Claimants' affiliate companies operating in the gambling market are not majority owned by any of the Claimants.

² **Exh. C-39.**

³ **Exh. CLA-4.**

C. THE PRAYERS FOR RELIEF

8. The Parties submitted the following prayers for relief in their last written briefs:
9. The Claimants in their Reply jointly requested the Tribunal to:
- a. declare that Poland breached the following provisions of the Treaty:
 - Article 3(1) by failing to ensure fair and equitable treatment of the Claimants' investments and/or by impairing, by unreasonable and/or discriminatory measures, the operation, management, maintenance, use and/or enjoyment of the Claimants' investments;
 - article 5 by taking measures depriving the Claimants of their investments without the conditions referred to in that Article being fulfilled;
 - b. order Poland to pay damages in the amount of [REDACTED] (as at 31 December 2016), [REDACTED] (as at 1 August 2016)⁴ or such other amount as the Tribunal shall deem just, net of any taxes or costs, to be increased with interest at a rate of [REDACTED] compounded quarterly, accruing over the period beginning on the date as per which the amount in damages is calculated, until the date payment is received;
 - c. order Poland to reimburse to Claimants [REDACTED] [REDACTED] to be increased [REDACTED] in costs incurred by them in the preparation and aid of the arbitral proceedings; and
 - d. order Poland to reimburse to Claimants their costs in respect of the arbitrators' fees and disbursements as well as the costs of their representation in the arbitral proceedings.
10. The Respondent in its Rejoinder requested the tribunal to:
- a. dismiss all of the Claimants' claims;
 - b. order each Party to bear the costs of the Co-Arbitrator appointed by them respectively and also all their own costs of representation in the arbitration;
 - c. order that the costs of the Presiding Arbitrator (i.e. his fees and expenses) and the other costs borne jointly by the Parties for purposes of this arbitration costs be borne by Claimants and Respondent in equal parts.

⁴ The claimed amount has been modified in an answer to the Tribunal's questions of 24 June 2016. The Claimants now request [REDACTED] see: Claimants' letter of 26 September 2016, ¶112.

D. THE JURISDICTIONAL CLAUSE

11. The Claimants invoke Article 8 of the Netherlands-Poland BIT as the basis for the jurisdiction of the Tribunal. The relevant part of the provision reads as follows:

1. Any dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure taken by the former Contracting Party with respect to the essential aspects pertaining to the conduct of business, such as the measures mentioned in Article 5 of this Agreement or transfer of funds mentioned in Article 4 of this Agreement, shall to the extent possible, be settled amicably between both parties concerned.

2. If such disputes cannot be settled within six months from the date either party request amicable settlement, it shall upon request of the investor be submitted to an arbitral tribunal. In this case the provisions of paragraphs 3-9 of Article 12 shall be applied mutatis mutandis. Nevertheless the President of the Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm shall be invited to make the necessary appointments.

E. THE SEAT

12. Pursuant to Article 2(1) of Procedural Order No. 1, the Arbitral Tribunal determined Geneva, Switzerland as the seat of this arbitration.

13. The Parties have agreed to hold the evidentiary hearing in The Hague, the Netherlands, without prejudice to the seat of arbitration.

F. THE LANGUAGE

14. Pursuant to paragraph 50 of the Terms of Appointment, the Parties agreed that the language of arbitration is English.

* * *

II. PROCEDURAL HISTORY

15. On 6 December 2013, the Claimants sent Poland a notice of dispute describing the disagreement under the BIT and requesting settlement negotiations. On 29 May 2014, the Deputy Minister of Finance, Mr. Kapica, responded that there were no grounds to enter into the settlement proposed by the Claimants.
16. On 9 June 2014, the Claimants dispatched a Notice of Arbitration to Poland. On 4 August 2014, they informed Poland of the appointment of Ms. Melanie van Leeuwen as an arbitrator.
17. On 3 September 2014, the Respondent wrote to Ms. van Leeuwen informing her of the appointment of K&L Gates as its representative in this Arbitration. On 9 September 2014, Poland followed up by appointing Mr. J. Christopher Thomas, QC as an arbitrator.
18. On 16 October 2014, Dr. Laurent Levy accepted his nomination by the two arbitrators as the president of the Tribunal and the Tribunal was constituted.
19. On 18 November 2014, after having consulted the Parties, the Tribunal wrote to the PCA requesting it to act as a fund holder in this arbitration. On the same date, the PCA confirmed its agreement to act in that capacity.
20. On 5 December 2014, the Tribunal and the Parties held a case management telephone conference. At the teleconference, the participants discussed the drafts of the Terms of Appointment and Procedural Order No. 1 which had been circulated by the Tribunal ahead of the teleconference.
21. On 11 December 2014, the Parties signed the Terms of Appointment and on 18 December 2014 the Tribunal issued Procedural Order No. 1 attaching the Procedural Calendar. Among other matters, the Tribunal determined Geneva, Switzerland to be the seat of this arbitration.
22. On 30 April 2015, the Claimants filed their Statement of Claim.
23. On 29 May 2015, the Respondent informed the Tribunal that it would raise preliminary objections to the jurisdiction of the Tribunal and/or admissibility of the claims, but did not intend to request bifurcation.
24. On 30 September 2015, the Respondent filed the Statement of Defence.

25. On 25 November 2015, following the Parties' exchanges on their respective document production requests, the Tribunal issued Procedural Order No. 2 ordering the Parties to produce certain requested documents on or before 21 December 2015.
26. On 30 December 2015, the Parties informed the Tribunal that they had comments on the compliance with the document production order and that they were endeavoring to resolve the difficulties without the assistance of the Tribunal, which could have become necessary in the absence of such resolution.
27. On 2 February 2016, the Respondent sent an email to the Claimants, copying the Tribunal, outlining its outstanding requests for document production. On 8 February 2016, the Claimants sent an email to the Respondent and the Tribunal, maintaining three outstanding document requests and rejecting the Respondent's additional requests.
28. On 17 February 2016, the Tribunal issued Procedural Order No. 3, disposing of the Parties' outstanding document production requests.
29. On 22 February 2016, the Claimants filed their Reply to the Statement of Defence. This was followed by the Respondent's Rejoinder on 21 April 2016.
30. On 2 May 2016 at 9 a.m. (CET), the Tribunal and the Parties held a telephone conference to discuss the organization of the evidentiary hearing.
31. From 31 May to 2 June 2016, the Tribunal and the Parties held the evidentiary hearing at the Peace Palace, The Hague, the Netherlands. The hearing was transcribed and recorded. The Parties agreed that no post-hearing briefs were necessary and that they would answer the Tribunal's questions in writing.
32. On 24 June 2016, the Tribunal sent a letter to the Parties posing its questions concerning the quantification of damages in the event of partial liability. The Tribunal invited the Parties to answer consecutively.
33. The Claimants responded to the Tribunal's questions on 22 July 2016. Poland replied on 19 August 2016, raising procedural objections and requesting an additional opportunity to address the matter.
34. On 25 August 2016, the Tribunal sent an email to the Parties, granting them an additional opportunity to address the questions in consecutive briefs. The Tribunal

clarified that the Parties could file quantum sheets prepared by their valuation experts.

35. On 12 September 2016, the Respondent filed the third quantum report of its valuation expert.
36. On 26 September 2016, the Claimants submitted their reply letter on the Tribunal's questions. This was followed by the Respondent's sur-reply and the fourth quantum report on 10 October 2016.
37. On 19 October 2016, the Respondent informed the Tribunal that it was no longer represented by K&L Gates Jamka.
38. On 15 November 2016, the Tribunal informed the Parties that it intended to close the proceedings and invited them to address any outstanding matters.
39. On 18 November 2016, upon the Tribunal's leave the Claimants filed their cost statements. The Respondent also submitted its cost statement to the Tribunal on 25 November 2016.
40. On 17 January 2017, the Tribunal declared the proceedings closed.

* * *

III. FACTUAL BACKGROUND

41. In this section, the Tribunal sets forth the main facts underlying the present dispute as they arise from the record. When it considers that a fact is not established, the Tribunal will so state, in particular, by noting that the fact is disputed or that it is alleged by one Party. It will refer to additional facts when needed in the context of its analysis. The Tribunal will lay down the relevant facts in a chronological order.

A. THE 1992 GAMBLING ACT AND THE 2003 AMENDMENT

42. Shortly after Poland underwent its transition into a market economy in the late 1980s, it introduced regulations governing gambling, betting and mutual wagering. In particular, on 29 July 1992, it enacted the Gaming and Betting Act (**1992 Gambling Act**).⁵ The 1992 Gambling Act extensively regulated high-stake gambling in casinos and saloons, but contained no rules governing low-stake gambling with gaming machines (*i.e.* slot machines) in public places. Based on general economic freedom, however, slot machines emerged on the Polish market.

43. The operation of slot machines remained unregulated until Poland amended the 1992 Gambling Act on 10 April 2003 (**2003 Amendment**).⁶ The 2003 Amendment expressly authorized low-stake gambling on slot machines outside of casinos and saloons. It contained, *inter alia*, the following regulations in this regard:

- In order for a game to be considered to be a “low-stake” game, the amount of the maximum stake for a single game could not exceed the equivalent of ██████████ ██████████ and the prize could not be higher than the equivalent ██████████ (Article 2.1.2.b). Otherwise, the activity would be considered as high-stake gambling and would not be authorized outside casinos and saloons.
- Low-stake slot machines could be “situated at gastronomic, commercial and service locations at least 100 meters from schools, educational institutions, social and medical welfare institutions and places of worship” (Article 30).
- In order to operate low-stake slot machines, a Polish company with a minimum share capital of ██████████ must obtain a permit from a tax chamber of the relevant province (voivodship). Additionally, each slot machine had to be tested, approved and sealed by a government-authorized testing institute and certified

⁵ Exh. C-4.

⁶ Exh. C-6.

by a GL1 certificate (**GL1 Certificate**). Permits were granted for 6 years and could be subsequently prolonged (Articles 15.4 and 36.1-3).

- In order to obtain a permit for low-stake gambling, an applicant had to demonstrate a right (ownership, lease or otherwise) on the location where the slot machines would be situated (Article 32.1.5). There could be no more than three slot machines per each address. One permit could, however, cover multiple addresses.
- A permitted company could not entrust to any other entity the performance of the permitted activity (Article 28.1).
- Slot machine operators were taxed at the flat monthly rate of [REDACTED]. The POG was subject to an annual increase by [REDACTED] until it would be fixed at [REDACTED] by 1 January 2005 (Article 45.a).

44. Shortly after the adoption of the 2003 Amendment, the Ministry of Finance (**MOF**) issued an ordinance for the implementation of the 1992 Gambling Act (**2003 Ordinance**).⁷ By way of the 2003 Ordinance the MOF delegated the power to test and approve slot machines to authorized testing institutes (**Testing Institutes**). Most Testing Institutes were formed as departments in public universities, such as the Warsaw University of Technology. As later confirmed by the Supreme Administrative Court of Poland, the 2003 Ordinance contemplated that a report issued by a Testing Institute was the basis for the admission or the exclusion of a slot machine from the market.⁸

45. The 2003 Gambling Act and the 2003 Ordinance were commonly considered to be beneficial for the development of the low-stake gambling industry considered as a whole. Since 2003, a number of companies applied for gambling permits and the number of registered slot machines increased quite rapidly year by year [REDACTED].⁹ By late 2009, there were more than [REDACTED] registered slot machines in Poland.¹⁰

⁷ Exh. R-42.

⁸ Judgment of the Polish Supreme Administrative Court, Case no. II GSK 1031/11, 29 November 2011, Exh. C-63, p. 5.

⁹ The 2009 Report of the Ministry of Finance, Exh. C-15, p. 17.

¹⁰ The 2011 Report of the Ministry of Finance, Exh. C-17, p. 11.

B. CLAIMANTS' BUSINESS IN POLAND

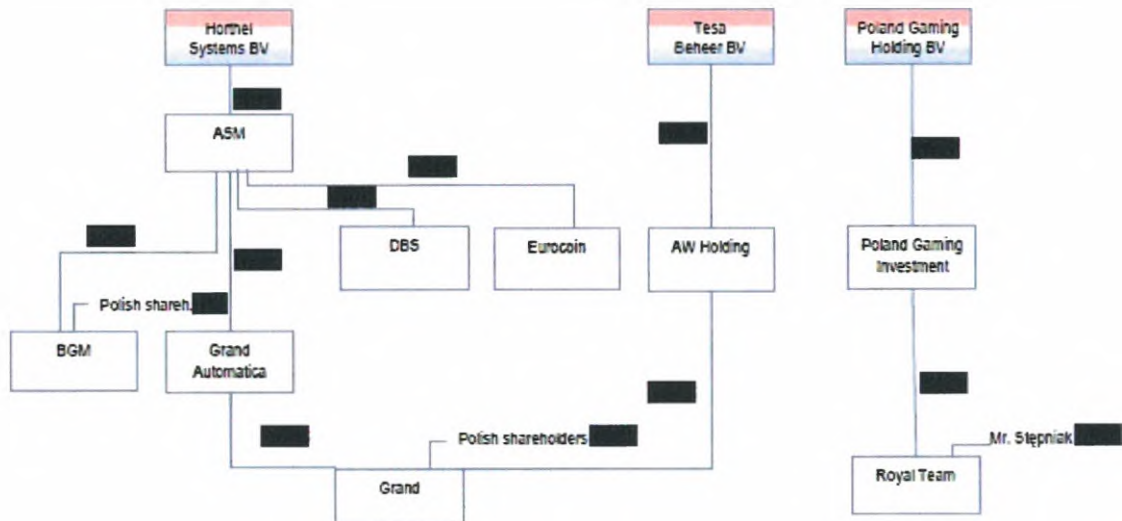
1. Corporate structure

46. By May 2004, Horthel Systems BV (**Horthel**) had acquired direct and indirect equity interests in Polish companies operating in the gambling industry. In particular, it acquired Grand Automatica sp. z o.o. (**Grand Automatica**), Grand sp. z o.o. (**Grand**), Eurocoin Polska sp. z o.o. (**Eurocoin**), DBS United Gaming Industries sp. z o.o. (**DBS**) and Bialystok Grand Manager sp. z o.o. (**BGM**). By that time, Grand had already obtained its first permit to operate slot machines.¹¹
47. Poland Gaming Holding BV (**PGH**) entered the Polish low-stake gaming market in 2006, when acting through its Polish subsidiary Poland Gaming Investment sp. z o.o. (**PGI**), ██████████ of the shares in Royal Team sp. z o.o. (**Royal Team**). By that time, Royal Team had already obtained its first permit to operate slot machines.¹²
48. Tesa Beheer BV (**Tesa**) entered the Polish low-stake gaming market in August 2008, when ██████████ of the shares in Polish Company AW Holding sp. z o.o. (**AW Holding**), which in turn held ██████████ of the shares in Grand.
49. The resulting corporate structure of the Claimants' Polish subsidiaries is represented in the following chart:¹³

¹¹ CM, ¶182.

¹² S ██████████ WS, ¶¶6, 12.

¹³ Extracts from the National Court Register, **Exh. C-13**. For ease of reference the Claimants' all the Polish companies where the Claimants' directly or indirectly owned shares will be referred to as the Claimants' Polish subsidiaries.



50. As seen, Horthel and Tesa are connected by their common indirect shareholding in Grand, while PGH has no corporate connection with the rest of the Claimants.

2. Slot machines

51. Out of the Claimants' Polish subsidiaries, Grand (from August 2003), Royal Team (from January 2005), Grand Automatica (from December 2008) and BGM (from August 2008) held permits to operate slot machines. The rest of the companies were either purely holding companies or rendered services and supplied slot machines to the operators.
52. Generally, slot machines operated in Poland offered two modes of gambling: a low stake mode and a high stake mode. After a player stakes up to the legally permitted amount [REDACTED] if he/she wins, he/she is awarded virtual points. Thereafter, the player has an option to terminate the game by transferring the virtual points to the credit meter and possibly restarting the game by staking again. This is the low mode option. He/she also has an option to transfer the virtual points to the so called "bank" and continue gambling with them, staking as many times as the amount of the virtual points allows. This is the high mode option, which was offered only by a certain category of slot machines, referred to as bank machines (**Bank Machines**).
53. The Parties diverge on whether Bank Machines complied with the statutory limitations on maximum stake [REDACTED] and maximum win [REDACTED]. For the Claimants, until they are transferred to the credit meter, the awarded virtual points cannot be considered as a win and thus the continuation of the game using such points should not be considered as staking. The Claimants note that the

Testing Institutes adopted this interpretation over the years and Polish public entities were well aware that the Bank Machines were operated in the market. The Respondent disagrees and considers that the high mode feature ran afoul of the 1992 Gambling Act because it constituted high-stake gambling. It refers to the Technical Conditions issued by the Ministry of Finance in 2003, Section [REDACTED] of which clarified that “[t]he collection of a stake (in cash or from credit) does not mean the beginning of a new game, but only continuation of the current one.”¹⁴ For the Respondent, this means that the game conducted with the use of the credit on the Bank Machine counter was a new game and should have complied with the stake limit.

54. The Claimants’ Polish subsidiaries gradually increased the number of slot machines and addresses at which they operated. In June 2009, they held permits for [REDACTED] machines.¹⁵ The Respondent states that Grand’s inventory and books contain discrepancies, which make it impossible to determine the number of machines Grand held and operated.¹⁶ Also, according to the Respondent, Grand engaged in a sham transaction of purchase of slot machines with a Dutch Company Cibra, owned by a twin brother of Mr. V [REDACTED] who was a key decision maker in the Claimants’ Polish subsidiaries.¹⁷ The purpose of the transaction was to put together the required paperwork for applications to register gambling machines.
55. Additionally, the Respondent asserts that Grand was holding permits for the benefit of other entities related to the Claimants and other shareholders of Grand. According to the Respondent, those entities, such as Ross (a company associated with the Claimants) were the actual operators of the slot machines registered in Grand’s name.¹⁸ For the Respondent, such an operating scheme was void and illegal under the 1992 Gambling Act, which prohibited the outsourcing of gambling activities to entities that did not hold a gambling permit.¹⁹

¹⁴ 2003 Technical Regulations, **Exh. R-140**.

¹⁵ Overview of the number of fruit machines, 2003-2015, **Exh. C-19**.

¹⁶ RCM, ¶¶346.2.

¹⁷ SoD, ¶¶132-133.

¹⁸ RCM, ¶¶330-333.

¹⁹ **Exh. C-6**, Article 28(1).

C. LEGISLATIVE AND ENFORCEMENT MEASURES IN 2003-2009

56. In the period between the adoption of the 2003 Amendment and the emergence of the dispute, Poland took a number of legislative and enforcement measures directed at the low-stake gambling industry.

1. Modifications of the 1992 Gambling Act

57. Since the 2003 Amendment, the 1992 Gambling Act was amended several times until it was eventually replaced by the contested 2010 Gambling Act. Most notably, the Parties refer to the following amendments or proposed modifications to the 1992 Gambling Act predating the present dispute:

- On 15 January 2004, the Law and Justice political party submitted a draft amendment to Parliament proposing to prohibit low-stake gambling entirely and impose further limitations on casinos.²⁰ The draft was never put to a vote.
- On 10 January 2007, the Ministry of Interior wrote to the MOF asking it to start working on the amendment of the 1992 Gambling Act, so that low-stake gambling machines would be deleted from the list of authorized gambling because of their social impact.²¹ No such amendment was put to a vote in Parliament.
- On 7 September 2007, Parliament enacted an amendment to the 1992 Gambling Act, raising the tax rate for the slot machines from ██████████ to ██████████ per machine per month.²²
- On 31 March 2009, the MOF circulated to other ministries a draft amendment to the 1992 Gambling Act, which contemplated a ██████ surcharge on gaming stakes.²³ This implied that each slot machine would have to be modified and then technically reexamined by a Testing Institute in order to guarantee the collection of the surcharge. Parliament never adopted the proposed amendment. However, the proposal gave rise to the so called

²⁰ Draft amendment of 15 January 2004, **Exh. R-43**.

²¹ **Exh. R-44**.

²² **Exh. C-5**, p.10.

²³ **Exh. C-18**.

lobbying scandal (or Gambling Gate), the circumstances of which will be summarized below (§III.D).

2. 2009 Ordinance

58. Apart from those proposed and accomplished amendments, Poland took a number of administrative measures relating to the implementation and enforcement of the 1992 Gambling Act.
59. On 24 February 2009, the MOF adopted a new Ordinance on the Conditions for the Organization of Games and Bets (**2009 Ordinance**).²⁴ Through the 2009 Ordinance the MOF resolved the earlier controversy on the legality of the high mode option of Bank Machines by obliging the Testing Institutes to regard the high mode option as an excess of the statutory limits for maximum stakes and wins. This meant that Bank Machines would no longer be approved by the Testing Institutes.
60. The MOF had circulated drafts of the 2009 Ordinance as early as in April 2008.²⁵ Between the release of the first drafts and the adoption of the ordinance in March 2009, the number of applications for the approval of slot machines increased drastically. This was the sector's reaction aimed at obtaining approvals for as many Bank Machines as possible before the ban on such machines took effect.

3. Testing of Slot Machines

61. Already in 2006, the supreme audit chamber of Poland opined that the 2003 Amendment did not provide effective mechanisms for controlling the market's compliance with the low-stake gambling regulations and, in particular, for overseeing the technical compliance of slot machines.²⁶ In an attempt to redress this deficiency, the Parliament amended the Act on Customs Service on 27 August 2009.²⁷ The amendment put the Customs Service in charge of issuing and renewing gambling permits (Article 197.5.a) and also authorized it to exercise control over the machines' compliance with the statutory requirements (Article 32.13). With the amendment's adoption, the regional chambers of the Customs Services (**Customs Chambers**) started testing the technical compliance of slot machines by conducting

²⁴ **Exh. C-64.**

²⁵ Draft ordinance from April 2008, **Exh. R-45.**

²⁶ Report, 5 August 2010, **Exh. C-9**, p.35.

²⁷ **Exh. R-52.**

on-the-spot experiments. The experiments sometimes resulted in a revocation of the registration of machines that had been previously certified by the Testing Institutes.

62. Polish courts diverged as to whether the 2009 amendment to the Customs Act gave the Customs Chambers the authority to revoke permits based on the results of on-the-spot experiments and without a negative report from a Testing Institute. On 29 November 2011, the Supreme Administrative Court of Poland held that an opinion of a Testing Institute was necessary for the revocation of the registration of a slot machine:

"[B]oth the admission of a machine or device into operation and use (registration) and the revocation of such registration require the performance, by an inspection unit, of a pre-registration inspection or a verifying inspection, respectively. In both these cases, the only basis for the authority's decision on the registration or revocation of the registration of a gaming machine or device may be evidenced in the form of an opinion of an inspection unit."²⁸

63. Throughout 2011 and 2012, the MOF issued a number of authorizations to different Customs Chambers to conduct examinations concerning the compliance of slot machines with the requirements of the 1992 Gambling Act.²⁹

64. From November 2009, the Customs Chambers started examining some of the slot machines owned by the Claimants' Polish subsidiaries. As a result, a number of permits were revoked:

- The Customs Chamber revoked Grand's permits 'Wrocław 2' and 'Wrocław 3', on 27 May 2011. The relevant slot machines had to be taken out of operation. However, after Grand filed an appeal against this decision at the Voivodeship Administrative Court of Wrocław, the Customs Chamber suspended its own decision and the slot machines could be re-installed.³⁰
- Grand's permit 'Zielona Góra 2' was similarly revoked on 27 May 2011. The Voivodeship Administrative Court of Gorzów subsequently annulled this decision by its judgment of 9 August 2011. The slot machines could thus be re-installed.

²⁸ Exh. C-63, p.5.

²⁹ Magazine *Uwazam Rze*, 8 July 2013, Exh. C-66, pp. 5-6.

³⁰ Letter of 27 June 2011 from the Customs Chamber to Grand, Exh. C-65.

- Grand's permits 'Poznań 3' and 'Poznań 4' were revoked on 21 March 2013. The Voivodeship Administrative Court of Poznań annulled this decision by its judgment of 21 May 2013. The slot machines could thus be re-installed.
- Grand's permit 'Kraków 1' was revoked in the autumn of 2014. The Claimants explain that due to the fact that the permit did not yield any meaningful income anymore and considering Grand's dire financial situation, no appeal against this decision was lodged.

4. Criminal Investigations

65. On 19 November 2009, the Office of the Białystok Public Prosecutor conducted raids at the offices of the Claimants' Polish subsidiaries, searching the premises and retrieving financial documentation. It emerged that the prosecutor started an investigation against various participants in the gaming industry, including Claimants' representatives.³¹ The Claimants were later informed that the investigation did not result in charges.³²

D. LOBBYING SCANDAL

66. In August 2009, the chief of the Central Anti-Corruption Bureau informed Prime Minister Tusk that certain high-ranking officials including the Minister of Sport, Mirosław Drzewiecki, were involved in lobbying allegedly on behalf of the gambling industry in order to avoid the introduction of the proposed [REDACTED] surcharge on gambling.³³ The Prime Minister vowed to take the ongoing legislative process for the amendment of the 1992 Gambling Act under his direct supervision.
67. On 26 August 2009, the Prime Minister met with the Minister of Finance, Jacek Rostowski, and Deputy Minister, Jacek Kapica, to enquire about the legislative process for the introduction of the gambling surcharge. He requested Deputy Minister Kapica to prepare a new draft amendment to the 1992 Gambling Act, which would raise charges on gambling higher than the previously contemplated [REDACTED]

³¹ *Rzeczpospolita*, **Exh. C-60**.

³² Letter of 19 October 2011 from UKS to Royal Team, **Exh. C-61**, p. 15; Letter of 16 July 2012 from UKS to Royal Team, **Exh. C-62**, p. 25.

³³ **Exh. C-27**.

According to the Prime Minister, the aim of such amendment was to raise more money for the upcoming Euro 2012 games to be held in Poland and Ukraine.³⁴

68. In parallel, on 11 September 2009, the Prime Minister requested the Central Anti-Corruption Bureau to investigate the alleged lobbying aimed at stalling the legislative process for the introduction of the gambling surcharge.
69. On 1 October 2009, an influential Polish daily, *Rzeczpospolita*, published portions of transcripts of certain conversations between politicians and representatives of the gambling industry revealing the allegedly wrongful lobbying.³⁵ Throughout the following weeks, the story received intensive media coverage, leading to a major political scandal.³⁶ This was followed by resignations of several public officials implicated in the lobbying scandal, including the Minister of Justice, Andrzej Czum, the Deputy Prime Minister, Grzegorz Schetyna, and the Minister of Sports, Mirosław Drzewiecky.³⁷
70. On 27 October 2009, Prime Minister Tusk held a press conference.³⁸ He vowed to “convince the Parliament ... [t]o outlaw gaming on machines outside casinos” and to increase the POG from ████████ to ████████ until the relevant permits expired. According to the Prime Minister, the work on the proposed amendment to the 1992 Gambling Act had been “obviously intensified after the gambling scandal” but the amendment was the result of the assumptions made by the government weeks before the scandal. In particular, he made reference to two assumptions: (1) that the forms of gambling posing high social threat of addiction, such as slot machines and video-lotteries, should be prohibited and (2) the remaining legal forms of gambling should be strictly controlled.

³⁴ *Id.*

³⁵ **Exh. C-22.**

³⁶ **Exhs. C-22, C-25, C-26, R-65.** The lobbying scandal was commonly referred to as “Gambling Gate”.

³⁷ *Warsaw Business Journal*, **Exh. C-29.**

³⁸ Transcript of the Prime Minister's press conference, 27 October 2009, **Exh. C-32.**

E. THE 2010 GAMBLING ACT

1. Legislative process

71. The day after the Prime Minister's press conference, the MOF published a 62-page statement of legislative intent, introducing the changes announced by the Prime Minister. The ministry invited comments from any interested parties within two days, by 30 October 2009.
72. The association for Polish gaming and gambling businesses (**Izba**), which represented the stakeholders from the gambling industry, issued a public statement criticizing the short time period allocated for comments. On 30 October 2009, Izba provided its substantive comments, highlighting the absence of an "objective and justified national interest that would vindicate the extraordinary mode of passing new legal regulations concerning such difficult and important economic and social issues that touch upon the freedom of conducting business activity and civic freedoms."³⁹
73. On Friday, 6 November 2009, the MOF published a draft bill and invited comments by Monday, 9 November 2009. Izba did not submit any comments but repeated its objection to the expedited manner in which the legislative process was progressing.
74. On 9 November 2009, the Committee of the Council of Ministers considered and approved the draft bill.⁴⁰ On 13 November 2009, the MOF submitted to the Parliament an impact assessment for the new bill.⁴¹ The ministry requested comments by Sunday, 15 November 2009.
75. Between 17 and 19 November 2009, Parliament adopted the final version of the 2010 Gambling Act in three readings with the approval of the Senate. The political parties represented in Parliament were virtually unanimous in supporting the bill. The President signed the bill on 26 November 2009 allowing it to enter into force from 1 January 2010.

³⁹ Letter of 30 October 2009 from Izba to the Deputy Minister Kapica, **Exh. C-43**.

⁴⁰ **Exh. C-48**.

⁴¹ **Exh. C-51**.

2. Main provisions

76. The 2010 Gambling Act contained provisions in line with the intentions announced earlier by the Prime Minister.⁴² In particular, the Parties refer to the following:

- *Ban on slot machines* - Under Article 14(1), slot machines were prohibited outside casinos. However, those machines for which permits had already been issued under the previous legal regime would remain on the market until the expiry of the relevant permits.
- *Tax increase* - Pursuant to Article 139(1), the monthly rate of the POG for the slot machines remaining in operation pursuant to previously issued permits, was increased from [REDACTED] to approximately [REDACTED]
- *No new permits* - Pursuant to Article 129(1), any application for a permit for the operation of slot machines outside casinos was to be denied, including those submitted before the entry into force of the 2010 Gambling Act. By the time the act took effect, *i.e.* as of 1 January 2010, the Claimants' Polish subsidiaries had 9 permit applications covering 741 new addresses pending. These applications were denied pursuant to the ban on permits introduced by the 2010 Gambling Act.
- *No prolongation of old permits* - Article 138(1) of the 2010 Gambling Act provided that any application for an extension of the existing permits for the operation of slot machines outside casinos was to be denied. A number of applications from the Claimants' Polish subsidiaries were denied based on this provision. The Claimants contend that the Customs Chambers intentionally waited for the 2010 Gambling Act to enter into force in order to deny the applications for the prolongation of permits that had been made before the act took effect.
- *No amendments to addresses allowed* – Before the introduction of the 2010 Gambling Act, the Claimants' Polish subsidiaries used to request and obtain amendments to the addresses for which the permits were issued, if for whatever reason an address became unprofitable or no longer suitable for slot machines. Obtaining the amendment to the address was easier than applying for an entirely new permit. Article 135(2) of the 2010 Gambling Act

⁴² Exh. C-39.

prohibited amending the permitted addresses, except where it was requested to reduce the overall number of addresses.

F. CJEU JUDGMENT AND LITIGATION IN POLAND

77. Poland is a Member State of the European Union (**EU**). Pursuant to the EU Directive 98/34, the EU Member States must notify the EU Commission of the adoption of any draft technical regulation.⁴³ A failure to comply with that duty renders such technical regulation inapplicable to individuals.⁴⁴
78. In the litigation proceedings before the Voivodship Administrative Court of Gdansk, Grand argued that the Customs Chamber could not invoke the 2010 Gambling Act as a basis for refusing the prolongation of its permits, because the 2010 Gambling Act had not been notified to the EU Commission. The administrative court referred the case for a preliminary ruling to the Court of Justice of the European Union (**CJEU**).
79. The CJEU rendered its judgment on 19 July 2012 (**CJEU Judgment**). It noted that Article 14(1) of the 2010 Gambling Act, which prohibits slot machines outside casinos “must be classified as a ‘technical regulation’” and should have been notified to the EU Commission before its adoption. The CJEU also noted that Articles 129,⁴⁵ 135⁴⁶ and 138⁴⁷ of the 2010 Gambling Act “are capable of constituting ‘technical regulations’ [...] in so far as it is established that those provisions constitute conditions which can significantly influence the nature or the marketing of the product concerned [slot machines], which is a matter for the referring court to determine.”⁴⁸
80. After the CJEU Judgment, certain Polish organs accepted that the provision prohibiting slot machines outside casinos (Article 14(1)) had become inapplicable.

⁴³ EU Directive 98/34, 22 June 1998, **Exh. C-70**, Article 1(11), 8.

⁴⁴ CJEU Judgment, Case No. C-194/94, 30 April 1996, **Exh. CLA-1**. According to the Court, a failure to notify a technical regulation is “a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals” (¶48).

⁴⁵ Mandating the refusal of permit applications registered before the 2010 Gambling Act entered into force.

⁴⁶ Prohibiting the change of addresses of slot machines.

⁴⁷ Prohibiting the extension of the existing permits.

⁴⁸ CJEU Judgment, Case No. C-213/11, 19 July 2012. **Exh. CLA-3**, ¶¶25, 40.

For instance, a prosecutor from the Zielona Gora Voivodship discontinued criminal proceedings launched against an entrepreneur charged for operating slot machines outside casinos.⁴⁹ As a result, a number of entities started operating slot machines in public places without a permit. They argued that since the CJEU Judgment rendered the relevant prohibition contained in Article 14(1) of the 2010 Gambling Act inapplicable, they could operate machines based on the general freedom of economic activity.

81. As for the applicability of the rest of the provisions (Articles 129, 135, 138) of the 2010 Gambling Act, the CJEU judgment gave rise to a continued controversy among various Polish entities. The Deputy Minister of Finance issued a note to the Prosecutor General that the CJEU Judgment did not find Articles 129, 135 and 138 to be technical regulations, and that those provisions continued to apply.⁵⁰
82. A number of Polish courts, however, took the opposite stand and quashed the Customs Chambers' decisions on refusal to grant permit prolongations and address amendments.⁵¹ According to the Administrative Court of Gdansk Voivodship, for instance, due to the failure to notify the EU Commission of the 2010 Gambling Act, Article 129, which mandated the refusal of permit applications, was rendered inapplicable. Consequently, the court held that the applications for slot machine permits should have been handled in accordance with the legal regime of the 2003 Amendment.⁵²
83. The Supreme Administrative Court adopted a different approach. It did not declare the relevant provisions of the 2010 Gambling Act inapplicable, but found that the legislature's failure to identify the purported irregularities in the gambling industry and to explain why the existing legal situation required "urgent repair" or "strengthening of State control," disproportionately interfered with the freedom of establishment and referred the matter to the Constitutional Tribunal with a request to determine whether the failure to comply with the procedural rules of the EU law rendered the 2010 Gambling Act unconstitutional.⁵³ In turn, the Criminal Chamber of

⁴⁹ Magazine *Uwazam Rze*, 8 July 2013, **Exh. C-66**.

⁵⁰ **Exh. C-72**.

⁵¹ Judgments of the Voivodship Administrative Court of Gdansk, 19 November 2012, **Exhs. C-55, C-56**.

⁵² Judgments of the Voivodship Administrative Court of Gdansk, 19 November 2012, **Exh. C-55**.

⁵³ Supreme Administrative Court Order, Case No. I KZP 15/13, 28 November 2013, **Exh. C-76**; Supreme Administrative Court Order, ¶ 5.4, Case No. II GSK 686/13, 15 January 2014, **Exh. C-74**.

the Supreme Court considered that the Polish common courts and other governmental bodies should have ignored the provisions which were not notified to the EU Commission.⁵⁴

84. The Constitutional Tribunal rendered its decision on 11 March 2015.⁵⁵ It ruled that a mere failure to notify the EU Commission of technical regulations does not infringe the Constitution and thus does not render the given regulations unconstitutional. The Court found the relevant provision of the 2010 Gambling Act⁵⁶ to be in compliance with the Constitution and in particular with the freedom of economic activity.
85. To resolve the controversy, the Government decided to reintroduce the relevant provisions of the 2010 Gambling Act, this time notifying the EU Commission. On 21 October 2014, the Council of Ministers adopted a proposal to amend the 2010 Gambling Act, reintroducing provisions essentially similar to those figuring in the CJEU Judgment. The proposal was notified to the EU Commission on 5 November 2014 and the Parliament adopted it on 19 November 2014.

G. CLAIMANTS' BUSINESS AFTER THE 2010 GAMBLING ACT

86. After the adoption of the 2010 Gambling Act, the Claimants' Polish subsidiaries continued to operate slot machines under the existing permits. Except for a few cases described above, the existing permits have not been revoked. However, pursuant to the 2010 Gambling Act, the Customs Chambers denied any application for new permits or for the renewal or modification (change of address) of the existing permits.⁵⁷
87. In 2010, most of the Claimants' Polish subsidiaries recorded net losses.⁵⁸ However, in 2011 and 2012, they managed to obtain profits.⁵⁹ Given that the existing permits gradually expired, the revenues started to decline. Currently, the Claimants' Polish subsidiaries no longer operate slot machines in Poland. They have terminated their contracts with external business partners and virtually all employees have been

⁵⁴ Supreme Court Order, Case No. II KK 55/14, 27 November 2014, **Exh. C-77**.

⁵⁵ **Exh. C-79**.

⁵⁶ The Court was addressed to assess the constitutionality of only Article 14 of the 2010 Gambling Act. Article 14 is the provision prohibiting slot machines outside casinos.

⁵⁷ **Exh. C-12, C-59**.

⁵⁸ Financial statements from 2010, **Exh. R-118**.

⁵⁹ Financial statements from 2011 and 2012, **Exhs. R-119, CRED-52, CRED-53, CRED-84**.

dismissed. Grand, Grand Automatica, Royal Team and Eurocoin had to gradually “discontinue their operations after 2009 as their permits lapsed.”⁶⁰ Grand and BGM were declared bankrupt respectively in February and July 2014.⁶¹ The last three slot machines were removed from operation in January 2015.

* * *

⁶⁰ Reply According to the Claimants, the rest of the subsidiaries were not engaged in the operation of slot machines and their value therefore depended on the value of those active subsidiaries.

⁶¹ Reply, ¶176.

IV. ANALYSIS

88. This part deals with preliminary matters (A), preliminary objections (B), liability (C), quantum (D) and costs (E). Wherever appropriate, it first sets out the parties' positions before going into the Tribunal's analysis.

A. PRELIMINARY MATTERS

89. This section addresses the scope of this Award (1), the relevance of previous decisions and awards (2) and the law applicable to jurisdiction, procedure and merits (3).

1. Scope of the Award

90. In Procedural Order No. 1, the Tribunal decided to join the proceedings on the preliminary objections, merits and quantum with the agreement of the Parties. Therefore, the present award finally disposes of the issues of jurisdiction, admissibility, liability and damages.

2. Relevance of Previous Decisions

91. Both Parties have relied on previous decisions or awards in support of their positions, either to conclude that the same solution should be adopted in the present case or in an effort to explain why this Tribunal should depart from that solution.
92. The Tribunal considers that it is not bound by previous decisions. At the same time, in its judgment it must pay due consideration to earlier decisions of international tribunals. Specifically, it believes that, subject to compelling grounds to the contrary, it has a duty to adopt principles established in a series of consistent cases. It further believes that, subject always to the text of the BIT and the circumstances of each particular case, it has a duty to contribute to the harmonious development of international investment law, with a view to meeting the legitimate expectations of the community of states and investors towards legal certainty and the rule of law.

3. Applicable Law

a. Law applicable on jurisdiction

93. It is common ground between the Parties that jurisdiction must be established under the BIT, Article 8 of which reads as follows:

1) Any dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure taken by the former Contracting Party with respect to the essential aspects pertaining to the conduct of business, such as the measures mentioned in Article 5 of this Agreement or transfer of funds mentioned in Article 4 of this Agreement, shall to the extent possible, be settled amicably between by the parties concerned.

2) If such dispute cannot be settled within six months from the date either party request amicable settlement, it shall upon request of the investor be submitted to an arbitral tribunal. In this case the provisions of paragraphs 3-9 of Article 12 shall be applied *mutatis mutandis*. Nevertheless the President of the Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm shall be invited to make the necessary appointments.⁶²

94. It is uncontroversial that the interpretation of the BIT and its jurisdictional requirements is governed by customary international law, the rules of treaty interpretation of which are codified in the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT). It is also common ground that the Tribunal has the power to rule on its own jurisdiction.⁶³

b. Law applicable on procedure

95. As to the law governing the procedure of this arbitration, the Parties agreed in the Terms of Appointment signed on 11 December 2014 on the following:

48. This arbitration shall be governed by (in the following order of precedence):
i. the "Netherlands-Poland BIT";
ii. The mandatory rules of the law on international arbitration applicable at the seat of the arbitration; [Swiss law⁶⁴]
iii. These Terms of Appointment, Procedural Order No. 1 and any amendments thereof.⁶⁵

⁶² Exh. CLA-3, Article 8.

⁶³ Article 186(1) of the Swiss Private International Law Act (PILA), applicable as *lex arbitri*, provides that "[t]he arbitral tribunal shall itself decide on its jurisdiction."

⁶⁴ Pursuant to Article 2(1) of Procedural Order No. 1, the seat of this arbitration is Geneva, Switzerland.

⁶⁵ Terms of Appointment, ¶48.

c. Law applicable on merits

96. As to the law applicable to the merits, Article 12(6) of the BIT contains the following provision:

The tribunal shall decide on the basis of respect for the law, including particularly this Agreement and other relevant agreements existing between the two Contracting Parties and the universally acknowledged rules and principles of international law.⁶⁶

97. It is uncontroversial that it is for the Tribunal to determine the law (whether national or international) applicable to each particular issue.⁶⁷ The Parties agreed in the Terms of Appointment that they “shall establish the content of the applicable law, being understood that the Arbitral Tribunal may, but is not required to, make its own inquiries into the content of the applicable law, subject to the mandatory procedural rules applicable to international arbitration at the seat of the arbitration.”⁶⁸
98. Therefore, when applying the law (whether national or international), the Tribunal is of the view that it is not limited to the arguments and sources invoked by the Parties. The principle *iura novit arbiter* allows the Tribunal to form its own opinion of the meaning of the law, provided that it does not surprise the Parties with a legal theory that was not subject to debate and that the Parties could not anticipate.⁶⁹

⁶⁶ Exh. CLA-3, Article 12(6).

⁶⁷ See, e.g., *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, ¶179.

⁶⁸ Terms of Appointment, ¶47.

⁶⁹ See, e.g., *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, ¶295 (“[...] an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, *sua sponte*, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it”). See also *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), Merits, Judgment, 25 July 1974, ¶18 (“[i]t being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court.”); *Albert Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Case, Award, 23 April 2012, ¶141; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶287.

B. PRELIMINARY OBJECTIONS

99. Subject to the defenses discussed below, there is agreement that the jurisdictional requirements are met, and rightly so. In particular, the Tribunal notes that the Respondent specifically refrained from raising the issue of the alleged illegality of the Bank Machines as a jurisdictional defence. Indeed, as the Respondent explains, such allegations that the Respondent further contests as a matter of merits would not affect the jurisdiction of the Tribunal, given that they relate to “certain patterns of conduct that appeared only after the investment was made” and not at the moment of making the investment, and these operations “were carried out not so much directly by Claimants as by their indirect Polish subsidiaries.”⁷⁰

1. Indirect Shareholding

100. The Parties diverge on the scope of the Claimants’ investment in Poland. The Respondent acknowledges that the Claimants have made an investment, but argues that such investment is limited to the Claimants’ shareholding in those subsidiaries where they own shares directly - *i.e.* ASM, AW Holding and PGI. For the Claimants, the distinction drawn by the Respondent between their direct and indirect subsidiaries is meaningless and without effect on the jurisdiction of the Tribunal.

a. Respondent’s position

101. The Respondent contends that the Claimants’ indirect shareholding in the relevant Polish companies does not qualify as an investment for three principal reasons:

102. First, unlike in other investment treaties entered into by Poland,⁷¹ the definition of investment contained in Article 1(a) of the BIT at hand does not include “indirect” investment. Thus, the indirectly held assets fall outside the definition of investment and are not protected by the Treaty.

103. Second, according to the Respondent, even if the BIT covered “indirect” investments, the Claimants’ indirect shareholding would still be outside its ambit, given that the concept of indirect investment refers to assets held by protected investors through companies established in third countries, but not to those held through the companies in the host state.

⁷⁰ SoD, ¶381.

⁷¹ The Netherlands-Egypt BIT, **Exh. RLA-6**; The Netherlands-Kuwait BIT, **Exh. RLA-7**; The Netherlands-Hong Kong BIT, **Exh. RLA-8**.

104. Therefore, the Respondent contends that the Claimants are only entitled "to enforce their rights related to the shares [owned directly] and/or their market value".⁷² The Respondent submits that the case law of international investment tribunals reinforces the idea that only a direct shareholder may "claim for any loss of value of its shares resulting from an interference with the assets or contracts of the company in which it owns the shares."⁷³
105. Third, the Respondent argues that any commitments assumed by a state *vis à vis* a local subsidiary of an investor may not be considered to be undertaken towards the investor and cannot thus give rise to claims based on legitimate expectations.⁷⁴
106. For all these reasons, the Respondent maintains that the only assets that can "properly be qualified as investments under Article 1(a) of the Treaty are ██████ shares in ASM held by Horthel, ██████ shares in AW Holding held by Tesa, and ██████ shares in Poland Gaming Investment held by Poland Gaming Holding BV."⁷⁵

b. Claimants' position

107. For the Claimants, the Respondent's defence on indirect shareholding is not helpful to contest the Tribunal's jurisdiction. Since the Respondent agrees that the shares in ASM, AW Holding and PGI qualify as investments under Article 1(a) of the Treaty, the Claimants are of the view that the argument about the scope of the investment pertains to the merits of the dispute.⁷⁶
108. Even if the Respondent's defence were jurisdictional, the Claimants contend that the BIT covers their indirect shareholding in the Polish subsidiaries. Article 1(a) of the BIT contains a broad definition of investment and there is nothing in the text of the Treaty or its preparatory history that would mandate restricting its scope by adding

⁷² SoD, 388, citing *Postová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, **Exh. RLA-13**, ¶229; *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, ICJ Reports 2010, **Exh. RLA-14**, ¶155.

⁷³ *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, **Exh. RLA-16**, ¶282.

⁷⁴ *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, **Exh. RLA-17**, ¶95.

⁷⁵ SoD, ¶392.

⁷⁶ Reply, ¶139.

qualifications such as “direct”.⁷⁷ A number of investment tribunals have rejected the bid to narrow down an otherwise broad definition of investment by the exclusion of indirect shareholding.⁷⁸

109. The Claimants further reject the Respondent’s argument that the protection of “indirect” investments only extends to indirect shareholding through entities incorporated in third states. Such contention, the Claimants say, is unsupported by the case law relied upon by the Respondent. So, for instance, in *BG v. Argentina*, the Tribunal rejected the objection based on indirect shareholding despite the fact that the claimant held shares in MetroGas SA through another Argentinian subsidiary.⁷⁹ Only in *HICEE v. the Slovak Republic* did the tribunal limit the scope of indirect investment to those made through a foreign subsidiary, given that the Dutch-Czech BIT specifically limited the definition of investment to “every kind of asset invested either directly or through an investor of a third State.”⁸⁰
110. For the Claimants, equally misconceived is the Respondent’s reliance on *Enkev v. Poland*, where the tribunal found that an indirect investor could not step into the shoes of the subsidiary to claim for indirect harm suffered directly by the subsidiary.⁸¹ According to the Claimants, they “do not purport to be standing in the shoes of their subsidiaries as regards the latter’s property.” Rather the Claimants attempt to vindicate their “own rights under the BIT in respect of their investment.”⁸²
111. Finally, according to the Claimants, the Respondent’s argument that commitments entered into *vis à vis* the local subsidiaries do not qualify as commitments to the parent companies ignores the difference between the scope of the protected investment and the scope of protection offered by the particular standard of the

⁷⁷ Reply, ¶152.

⁷⁸ *ConocoPhillips Petrozuata B.V. v. Venezuela*, ICSID Case No. ARB/07/30, 3 September 2013, **Exh. CLA-6**, ¶¶282-285; *Guaracachi America, Inc. and Rurelec Plc v. Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, **Exh. CLA-34**, ¶¶352-355.

⁷⁹ *BG Group Plc v. The Republic of Argentina*, Final Award, 24 December 2007, *Exh. RLA-010*, ¶¶ 1, 24-26, 112(a), 138.

⁸⁰ *HICEE B.V. v. the Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, **Exh. RLA-012**, ¶111.

⁸¹ *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, **Exh. RLA-015**, ¶307.

⁸² Reply, ¶158.

BIT.⁸³ Hence, even if the Respondent's argument were right, it would not serve to defeat the Tribunal's jurisdiction.

112. For all these reasons, the Claimants request the Tribunal to view their investment in Poland as a whole, to include their direct and indirect shareholding in the Polish subsidiaries, as well as the relevant assets of those subsidiaries, such as the gambling permits and real estate.

c. Analysis

113. Article 1(a)(ii) of the BIT provides that the term "investment" comprises "every kind of asset and more particularly, though not exclusively [...] rights derived from shares, bonds and other kinds of interests in companies and joint ventures".⁸⁴ It is common ground between the Parties that the Claimants' shares in ASM, AW Holding and PGI qualify as investments within the meaning of that provision. Therefore, the claims arising out of the Respondent's measures allegedly affecting the Claimants' direct shareholding in those entities indisputably falls within the jurisdiction of the Tribunal.
114. Nor is it disputed that the Claimants qualify as investors as defined by Article 1(b)(i) of the BIT, which provides that the term "investor" comprises "legal persons constituted under the law of [either] Contracting Party".⁸⁵ Indeed, it is established that the Claimants are properly constituted under the laws of the Netherlands.
115. The Respondent contends, however, that the shares in the Claimants' indirect subsidiaries, as well as the assets of those subsidiaries do not qualify as investments within the meaning of the BIT and the Claimants may not present claims for the measures affecting those indirectly owned assets. As the Tribunal understands it, the objection raises two principal questions: (i) whether assets should be owned directly by an investor in order for them to qualify as investments; and (ii) whether the direct ownership of an asset is required in order for the investor to bring claims arising out of the measures affecting such asset. The Tribunal will analyze those questions in turn.

⁸³ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, Exh. CLA-13, ¶218.

⁸⁴ Article 1(a)(ii) of the BIT, **Exh. CLA-4**.

⁸⁵ Article 1(b)(ii) of the BIT, **Exh. CLA-4**.

116. With respect to the first question, the Respondent contends that the absence of a reference to the direct or indirect nature of an investment in the BIT militates in favor of excluding indirect investments from the scope of the Treaty. The Tribunal is not convinced. Article 1(a) of the BIT contains a broad definition of “investment”. Unlike those contained in some other treaties, the provision does not specify whether the assets should be owned directly or indirectly by the investor in order for them to qualify as investments. In contrast, the Dutch-Czech BIT, analyzed in *HICEE BV v. the Slovak Republic*, limits the definition of “investment” to “asset[s] invested either directly or through an investor of a third State”.⁸⁶ The wording of the BIT at hand contains no similar limitation. In the absence of any language in the BIT limiting the nature of qualifying investments to directly held investments only, the Tribunal should interpret the term “investment” according to its ordinary meaning, in its context and in light of the object and purpose of the Treaty.⁸⁷
117. Investments can be, and often are, made indirectly through interposed enterprises. It is not unusual for investors to adopt a complex corporate structure for their foreign investments for a variety of reasons, including to obtain a more favorable taxation regime or to accommodate the needs of other shareholders. The ordinary meaning of the word “investment” as understood in the relevant business context is not thus limited to the assets directly owned by the investor.
118. Nor do the object and purpose of the BIT militate in favor of excluding indirect investments from the scope of the Treaty. According to the Preamble of the BIT, the intention of the Contracting Parties is to “create favourable conditions for investments by investors of either Contracting Party in the territory of the other Contracting Party” and to “intensify economic cooperation to the mutual benefit of both countries”. Such objectives can be achieved irrespective of whether an investor carries out its economic activities directly by acquiring title to each and every relevant asset or indirectly through its subsidiaries or holding companies. Therefore, absent specific language limiting the scope of the treaty to directly owned investments, the meaning of the term “investment” does not warrant excluding indirect investments from the Treaty’s scope of protection.

⁸⁶ *HICEE B.V. v. the Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, **Exh. RLA-012**, ¶111.

⁸⁷ Article 31(1), Vienna Convention on the Law of Treaties (1969).

119. The Respondent further argues that, even if the term “investment” in Article 1(1) of the BIT were found to encompass indirect investments, the concept of indirect investment should be understood to refer “only to assets held by protected investors through their subsidiaries established and/or operating in third countries”.⁸⁸ The Tribunal sees no support for this proposition in the language of the BIT, which unlike some other treaties,⁸⁹ contains no specific provision requiring the indirect investments to be made exclusively through third states. Such limitation is also unsupported by the ordinary meaning of the term “investment” interpreted in its proper context and in light of the object and purpose of the BIT. Indeed, investments are often made through interposed companies established in the host state or elsewhere alike. Similarly, the object and purpose of the BIT, as discussed above, does not warrant limiting the scope of the treaty to indirect investments made *via* entities established only in third states. The Tribunal therefore concludes that the broad definition of investment contained in the BIT encompasses investments made and owned directly by investors or indirectly through interposed entities located in the host state or elsewhere.
120. Such interpretation is supported by the consistent case law of investment treaty tribunals.⁹⁰ In *Guaracachi v. Bolivia*, for instance, the tribunal construed an unqualified definition of “investment” contained in the UK-Bolivia BIT to “naturally include ‘indirect investments’ through the acquisition of shares in a company”. According to the tribunal, “given that the purpose of the BIT is to promote and protect foreign investment, [it] would require clear language in order to exclude coverage of indirect investments”.⁹¹ Similarly, in *Siemens v. Argentina*, the tribunal reasoned that “a literal reading” of the broad unqualified definition of “investment” contained in the German-Argentine BIT, “does not support the allegation that the definition of investment excludes indirect investments.”⁹²

⁸⁸ Rejoinder, ¶171.2.

⁸⁹ *E.g.* Dutch-Czech BIT.

⁹⁰ *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997, **Exh. CLA-5**, ¶¶34-35; *ConocoPhillips Petrozuata B.V. v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, **Exh. CLA-6**, ¶¶282-285.

⁹¹ *Guaracachi America, Inc. and Rurelec Plc v. Bolivia*, Award, 31 January 2014, PCA Case No. 2011-17, **Exh. CLA-34**, ¶¶352-355.

⁹² *Siemens v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, **Exh. CLA-35**, ¶137.

121. The second facet of the Respondent's objection is that the Claimants can only present claims arising out of the measures affecting their rights derived from their direct shareholding in three holding companies and not the rights of these holding companies' subsidiaries. The Respondent quotes *Postova Banka v. the Hellenic Republic*, according to which "a shareholder of a company incorporated in the host State may assert claims based on measures taken against such company's assets that impair the value of the claimant's shares. Such claimant has no standing to pursue claims directly over the assets of the company, as it has no legal right to such assets."⁹³
122. The Tribunal agrees that the Claimants are only entitled to claim based on the loss that they suffered in their investment, *i.e.* reflective loss on the value of their shares and receivables from ASM, AW Holding and PGI. The Claimants seem to be in agreement with that proposition.⁹⁴ They do not purport to stand in the shoes of their direct or indirect subsidiaries. Rather, their claims relate to the harm that they themselves allegedly suffered as a result of the Respondent's measures.
123. The Respondent cites *Enkev v. Poland*, in which the tribunal disallowed the claimant's claims for any harm suffered by its Polish subsidiary.⁹⁵ At the same time, however, the tribunal allowed the claimant to bring claims "for indirect harm to itself suffered directly by its subsidiary".⁹⁶ Similarly, in the present case, the claims relate to the harm suffered directly by the Claimants as a result of the alleged measures affecting the economic value of their shares and the income receivable from their shareholding. The Claimants do not claim on behalf of their subsidiaries and the issue of standing does not thus arise. The Tribunal therefore finds the claims to be admissible.

⁹³ *Poštová banka, a.s. and ISTROKAPITAL SE v. the Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, **Exh. RLA-013**, ¶245.

⁹⁴ Reply, ¶158: "Claimants do not bring a claim on behalf of their subsidiaries. Claimants' claim is not based on a violation of rights of (merely) any particular subsidiary and Claimants do not purport to be standing in the shoes of their subsidiaries as regards the latter's property. Rather, Claimants bring a claim that is based on the violation by the RoP of Claimants' own rights under the BIT in respect of their investment" (footnotes omitted).

⁹⁵ *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, **Exh. RLA-015**, ¶313.

⁹⁶ *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, **Exh. RLA-015**, ¶307.

124. Finally, the Respondent argues that any commitments undertaken by Poland *vis à vis* the Claimants' Polish subsidiaries do not constitute a basis for the Claimants' legitimate expectations. This argument does not, however, concern the jurisdiction of the Tribunal or admissibility of the claims. The preliminary objection, as discussed and dismissed above, relates to the scope of the protected investment. The scope of legitimate expectations, on the other hand, is a matter pertaining to the merits of the dispute and will be addressed in the relevant part below.

125. Therefore, the Claimants' assets in Poland owned directly or indirectly, constitute protected investments under Article 1(1) of the BIT and the claims related to the harm suffered by the Claimants as a result of Poland's alleged measures against their investments are within the jurisdiction of the Tribunal.

2. Scope of Article 8(1)

126. The Parties diverge on the subject-matter scope of the dispute resolution clause contained in Article 8(1) of the BIT.

a. Respondent's position

127. The Respondent underscores that the BIT's jurisdictional clause contained in Article 8(1) is narrow,⁹⁷ in that it only encompasses measures taken with respect to the essential aspects pertaining to the conduct of business. Although the examples of such measures listed by Article 8(1), *i.e.* expropriation and imprisonment of funds, are not exhaustive, under the *ejusdem generis* rule of treaty interpretation they must be interpreted to set the threshold for other types of measures to come within the scope of the Tribunal's jurisdiction. Thus, Article 8(1) must be read to extend "only to

⁹⁷ Article 8(1) of the BIT reads as follows:

"1) Any dispute between one Contracting Party and an investor of the other Contracting Party relating to the effects of a measure taken by the former Contracting Party with respect to the essential aspects pertaining to the conduct of business, such as the measures mentioned in Article 5 of this Agreement or transfer of funds mentioned in Article 4 of this Agreement, shall to the extent possible, be settled amicably between by the parties concerned.

2) If such dispute cannot be settled within six months from the date either party request amicable settlement, it shall upon request of the investor be submitted to an arbitral tribunal. In this case the provisions of paragraphs 3-9 of Article 12 shall be applied *mutatis mutandis*. Nevertheless the President of the Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm shall be invited to make the necessary appointments." Article 5 of the Treaty is quoted below at ¶193.

disputes that concern measures taken by Respondent that produce effects comparable to expropriation or imprisonment of funds.”⁹⁸

128. The Respondent rejects the Claimants’ reliance on *Eureko v. Poland*, where the present BIT was interpreted to also apply to breaches of the fair and equitable treatment standard and the umbrella clause.⁹⁹ According to the Respondent, in that case, Poland had not raised a jurisdictional objection concerning the subject-matter scope of Article 8(1) and, in any event, the tribunal also found Poland to be in breach of Article 5 of the Treaty, since the measures in question had an expropriatory effect.
129. The Respondent considers that the subject-matter limitations of Article 8(1) of the BIT are not applicable in the present case, since the Claimants claim the deprivation of the entirety of the value of their investment. However, “should Claimants attempt to reformulate their case by attempting to prove a less severe impact of particular contested measures of Respondent on their investments, in particular under the fair and equitable treatment, or the non-impairment standard, such claims would most likely fall beyond the jurisdictional limits established in Article 8(1) of the treaty.”¹⁰⁰
130. In response to the Tribunal’s question at the hearing on whether Article 8(1) granted the Tribunal jurisdiction to entertain the claims of violations of Article 3(1) (FET) of the BIT, the Respondent answered that not all possible violations of Article 3(1) of the BIT are excluded from the scope of the Tribunal’s jurisdiction. Violations of FET which produce effects equivalent to expropriation or imprisonment of funds, such as the breach found in *CMS v. Argentina*, do fall within the scope of Article 8(1) of the BIT. On the other hand, the category of FET breaches which merely impair but do not result in the full destruction of the investment, such as for instance the breach found in *Micula v. Romania*, are outside the ambit of the Tribunal’s jurisdiction.¹⁰¹ Therefore, if the Tribunal finds isolated breaches of the FET or non-impairment standards, such as for instance revocation of a single permit or seizure of individual machines, such measures would be beyond the scope of Article 8(1) of the BIT.¹⁰²

⁹⁸ SoD, ¶402.

⁹⁹ *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, **Exh. CLA-18**, ¶260.

¹⁰⁰ SoD, ¶406.

¹⁰¹ Transcript, Day 1, 144:20-25.

¹⁰² Transcript, Day 3, 164:5-19.

b. Claimants' position

131. The Claimants oppose the Respondent's attempt to exclude the claims of violation of the fair and equitable treatment standard from the subject-matter scope of Article 8(1) of the BIT. According to the Claimants, Poland has unsuccessfully raised this argument in other arbitrations. Apart from *Eureko v. Poland*,¹⁰³ in *Enkev v. Poland* also, the tribunal rejected Poland's argument that the words "essential conduct of business" in Article 8(1) of the BIT are limited to "the proper functioning and the continuation of business, the engagement of employees and the ability to serve customers and to meet its shareholders' expectations."¹⁰⁴
132. In any event, according to the Claimants, the present dispute arises out of measures which indisputably concern the essential aspects of the conduct of the Claimants' business in Poland. In fact, the Claimants complain of Poland's ban on all gambling machines outside casinos, "in circumstances where Claimants' conduct of business was the operation of gaming machines outside casinos."¹⁰⁵
133. At the hearing the Claimants contended that not only the ban on gambling machines but other impugned measures of Poland also fall within the scope of the Tribunal's jurisdiction. According to the Claimants, the Respondent's measures "revoke[d] the basic conditions without which the investment cannot be maintained and could not have been made".¹⁰⁶
134. For these reasons, the Claimants request the Tribunal to reject the Respondent's jurisdictional objection concerning the subject-matter scope of Article 8(1) of the BIT.

c. Analysis

135. Article 8(1) of the BIT provides that the scope of the Tribunal's jurisdiction extends to "[a]ny dispute between one Contracting Party and an investor of the other Contracting Party with respect to the essential aspects pertaining to the conduct of

¹⁰³ *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, **Exh. CLA-18**, ¶234.

¹⁰⁴ *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, **Exh. RLA-015**, ¶139.

¹⁰⁵ Reply, ¶142.

¹⁰⁶ Transcript, Day 1, 65:14-16.

business, such as the measures mentioned in Article 5 of this Agreement or transfer of funds mentioned in Article 4 of this Agreement”.¹⁰⁷

136. The provision is not common in investment treaties and the case law on its interpretation is unsurprisingly scarce. The decisions invoked by the Parties provide limited guidance. In *Eureko v. Poland*, the tribunal provided no explanation as to the scope of Article 8(1) of the BIT, given that the tribunal found Poland’s measures to be expropriatory.¹⁰⁸ In *Enkev v. Poland*, the tribunal rejected all claims including the one for the alleged breach of FET, after accepting that it had jurisdiction. In doing so, the tribunal offered no reasoning as to the scope of Article 8(1) of the BIT.¹⁰⁹
137. It is common ground between the Parties that the jurisdiction of this Tribunal constituted under Article 8(1) of the BIT has a limited subject-matter scope compared to that of the tribunals constituted under the broad jurisdictional clauses of other treaties which provide jurisdiction over “any investment dispute”. The Parties, however, diverge on the nature of such limitation. The Respondent points to the phrase “such as”, which precedes the non-exhaustive list of possible measures that fall under the Tribunal’s jurisdiction pursuant to Article 8(1). According to the Respondent, the examples listed in the provision should be interpreted to set a gravity yardstick to assess the comparability of other types of measures, such as possible violations of the FET standard.
138. The Tribunal does not share such interpretation. The wording of Article 8(1) provides that in order for a dispute to fall under the Tribunal’s jurisdiction, it should relate to the effects of a measure taken “with respect to the essential aspects pertaining to the conduct of business”. The provision does not require the effects of the measure to be grave, but more precisely requires that the measure complained of must pertain to the “essential aspects of the conduct of business”. The focus is on whether the measure goes to the heart of the investor’s ability to carry on the investment’s business. A measure found not to have that connection to the core requirement of being able to carry on the business would fall outside of the Tribunal’s subject-matter jurisdiction. This conclusion is not altered by the non-exhaustive list of measures contained in the provision. The phrase “such as”, which

¹⁰⁷ Article 8(1) of the BIT, **Exh. CLA-4**.

¹⁰⁸ *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, **Exh. CLA-18**.

¹⁰⁹ *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award, 29 April 2014, **Exh. RLA-015**.

introduces the non-exhaustive list, qualifies the word “measure” and not the “effects of a measure”. Therefore, even if interpreted under the *ejusdem generis* rule, the non-exhaustive list cannot be said to set a gravity threshold for the effects of possible measures. Instead, for a measure to come under the Tribunal’s jurisdictional purview, it should affect (gravely or not) aspects of the investor’s business that are substantially essential for the conduct of business.

139. What is more, the exemplary measures contained in the provision do not necessarily produce grave effects. For instance, a cancellation of a single gambling permit would possibly come under the scope of Article 8(1), since it would constitute an expropriation listed as an example in the provision. However, the effect of such measure on the conduct of business is not necessarily graver than for instance that of a possible FET breach resulting from unjustified radical changes in the regulatory model governing the low-stake gambling business. Similarly, a limitation on the transfers of funds listed as one of the examples by Article 8(1) might produce grave effects or not, depending on its content: it would thus be difficult to determine what measures would be comparably grave to a restriction on the transfer of funds.
140. As a further example, an expropriation of a trademark which the investor had previously ceased to use in its business might not concern the essential aspects of the conduct of business, even if such trademark had a certain market value. Such measure would arguably fall outside the scope of Article 8(1) of the BIT irrespective of its expropriatory nature. Conversely, some measures might concern the essential aspects of conduct of business and thus fall under the Tribunal’s purview, but on the merits such measures might well be found not to be in breach of any of the requirements of the BIT.
141. Therefore, instead of generalizing the characteristics of the exemplary measures listed in Article 8(1) of the BIT, the provision should be interpreted based on the wording of its general part. Namely, in order for a measure to fall within the Tribunal’s jurisdiction, Article 8(1) requires that it concern the essential aspects of conduct of business, whether or not such measure pertains to the examples mentioned in the non-exhaustive list.
142. In the present case, the Claimants complain of a number of measures. These include the following:
 - The ban on low-stake gambling outside casinos, and thus the ban on issuing new permits for operating slot machines;

- The ban on renewing the existing permits;
- The ban on changing the addresses of the permitted locations of the slot machines;
- The increase of the POG to [REDACTED];
- The seizures of Bank Machines which had previously been approved by the Testing Institutes;
- The failure to take decisions in the prescribed time limit on the applications for the delivery of new permits and/or for the renewal of existing permits in the period between 27 October and 31 December 2009.

143. For the purposes of the jurisdictional enquiry, the Tribunal does not need to establish in this section of the Award whether the measures listed above indeed took place or whether they breached the BIT. Instead, the Tribunal ought to examine whether the measures, as alleged by the Claimants, would fall in the subject-matter scope of the jurisdictional provision of the BIT, *i.e.* whether those measures, if proven, would concern the essential aspects of the conduct of the Claimants' business. Whether the impugned measures occurred and breached the law will be examined subsequently.

144. It is undisputed that the Claimants' investment in Poland primarily related to the low-stake gambling industry. Each of the above measures concern different essential aspects of low-stake gambling. Some relate to taxes applicable specifically to the industry. Others introduce a ban on the conduct of the slot machine business or directly restrict the possibility of conducting such business. Viewed individually and collectively, it does not appear that any of the aspects affected by the measures complained of were insufficiently essential to the conduct of the low-stake gambling business so as to immediately fall outside of the Tribunal's jurisdiction.

145. The Tribunal is thus convinced that the measures impugned by the Claimants, whether or not qualified as a violation of the BIT, concern essential aspects of their low-stake gambling business. Therefore, the dispute concerning the lawfulness of those measures is within the Tribunal's jurisdiction.

C. LIABILITY

1. Expropriation

146. The Parties diverge on whether Poland's measures resulted in deprivation of the Claimants' investments, within the meaning of Article 5 of the BIT.

a. Claimants' position

147. The Claimants argue that Poland's measures constituted an indirect expropriation of their investments in Poland. According to them, the expropriation was also unlawful as it failed to meet the criteria of legality contemplated by Article 5 of the BIT.

i. Expropriatory effect

148. For the Claimants, the assessment of whether particular measures qualify as indirect deprivation of an investment must be done by looking at "the impact of the measures on the investor's ability to enjoy its investment and the duration of such impact."¹¹⁰ The Respondent's measures caused an instant decline in the revenues generated by their Polish business, eventually leading the Claimants' Polish subsidiaries to "bleed to death".¹¹¹

149. The Claimants, in particular, point to the following principal measures that cumulatively had an expropriatory effect:

- Poland's refusal to issue prolongations to existing permits (previously allowed under article 36 of the 2003 Amendment), which resulted in 12 permits, covering more than [REDACTED] locations, lapsing in 2010.¹¹²
- The refusal to grant new permits based on the applications submitted in 2008 and 2009, which resulted in 9 pending applications for new permits (covering [REDACTED] imminent new locations) being denied in 2010.¹¹³
- The prohibition to change addresses in the existing permits.

¹¹⁰ Permit applications, Reply, ¶170.

¹¹¹ Reply, ¶181.

¹¹² Overview of Permits and Covered Addresses as at 31 December 2009, **Exh. C-132**.

¹¹³ *Id.*

- The drastic rise in the POG, resulting in █████ machines being retrieved from the market in late December 2009 and an additional █████ machines in the first half of 2010 (a █████ decrease in the number of machines in seven months).¹¹⁴

150. As a result of the measures, Grand, Grand Automatica, Royal Team and Eurocoin had to gradually "discontinue their operations after 2009 as their permits lapsed."¹¹⁵ Grand and BGM¹¹⁶ were declared bankrupt respectively in February and July 2014. While Royal Team managed to stay profitable relatively longer, this was partly due to the fact that it had obtained permits relatively later (around 2006) and hence they lapsed later. Eventually, however, the full value of Royal Team also evaporated.

151. For the Claimants, it is irrelevant that the value of their investment did not disappear immediately after the 2010 Gambling Act entered into force. According to them, deprivation does not need to be instantaneous. It suffices that the loss of the value of the Claimants' entire investment in Poland was an eventual, foreseen and, in fact, intended result of Poland's measures.

152. For all these reasons, the Claimants conclude that Poland's measures resulted in the deprivation of the entirety of their investment in Poland, within the meaning of Article 5 of the BIT.

i. Public purpose

153. The Claimants reject the reasoning advanced by Poland as a justification for the contested measures.

154. First, as the Supreme Administrative Court reasoned, when the government enacted the 2010 Gambling Act, it did not sufficiently justify why the previous regulation "ceased to be a sufficient measure for the protection of society against gambling addiction."¹¹⁷ Indeed, neither the reasoning advanced at the time of the adoption of the 2010 Gambling Act nor that proposed by Poland's counsel in this arbitration justify the sudden decision to terminate the entire industry of low-stake gambling.

¹¹⁴ Overview of Operated Machines, 2003-2015, **Exh. C-19**.

¹¹⁵ According to the Claimants, the rest of the subsidiaries were not engaged in the operation of slot machines and their value therefore depended on the value of those active subsidiaries.

¹¹⁶ Reply, ¶176.

¹¹⁷ Supreme Administrative Court order, 15 January 2014, **Exh. C-74**, ¶5.4.

While the Claimants accept that the total cash-in in slot machines in 2009 reached [REDACTED] this does not entail [REDACTED] hours spent, as Poland suggests, but rather implicates an annual [REDACTED] hours. This number does not warrant Poland's conclusion that the gambling industry operated illegally, in excess of the statutory limits on maximum stakes.

155. Second, contrary to contemporaneous statements of certain Polish officials,¹¹⁸ the expropriatory measures cannot be said to be taken with a view to increasing tax returns. It has been in fact acknowledged by the MOF, that “[i]n 2011-2014, a decrease was recorded in gaming tax revenues from low-stakes machine gaming business, [as a] result of legislative changes”.¹¹⁹ The Respondent's argument that the excessive taxes imposed under the 2010 Gambling Act were comparable to the tax rate applicable on casinos also misses the point according to the Claimants as they did not structure their investment based on the taxes applicable to casinos.

156. Third, the Respondent's predominant argument that its measures aimed to redress the grave social problem of gambling addiction is equally unsubstantiated. Poland fails to provide any evidence to justify its statements that there was a sharp increase in “compulsive gambling, including among children”, and a noticeable “uptick in common crimes motivated with the need for resources for machine gaming.” In respect of the alleged social problem of gambling addiction, the Claimants advance, *inter alia*, the following arguments:

- The Respondent's calculation of the total amount spent on gambling by the Poles – [REDACTED] – is misleading as it ignores that [REDACTED] of that amount was paid out to the players. The actual amount spent on low-stake gambling [REDACTED] was in fact lower than the amount annually spent by the Poles on vodka alone.¹²⁰
- The Respondent's argument that the scale of the addiction problem posed by low-stake gambling warranted the termination of the entire industry cannot withstand scrutiny. As of 1 September 2009 only [REDACTED] were

¹¹⁸ Statements by the Minister Boni and the Deputy Minister Kapica, 18 and 9 November 2009, **Exhs. C-57, C-94**.

¹¹⁹ Report of the Ministry of Finance on the Implementation of the 1992 Gambling Act, 2015, **Exh. C-143**.

¹²⁰ Newsweek publication, **Exh. R-61**.

registered as gambling addicts.¹²¹ In fact, the Ministry of Health declared, in November 2009, that “there are currently no grounds to consider the phenomenon of gambling addiction to be a threat to public health”.¹²² In contrast, the number of Polish adults addicted to alcohol was estimated at [REDACTED]¹²³ In 2010, smoking caused approximately [REDACTED] in Poland.¹²⁴ While the Claimants do not deny that gambling involves a threat of addiction, considering the overall context, such threat never rose to the level that would justify the stark expropriatory measures taken by Poland.

- The government had virtually no scientific data on gambling addiction when it took the contested measures in late 2009. [REDACTED] admitted that “at that time there was no research conducted in Poland on the social influence of gambling.”¹²⁵ As for the later reports, they demonstrate that [REDACTED] of the problem gamblers were playing Totalizator Sportowy organized by a state-owned company (which continues to be in operation), as opposed to [REDACTED] corresponding to slot machine players.¹²⁶

157. Finally, Poland’s argument that its measures were informed by the social threat posed by low-stake gambling is belied by the fact that, less than two months prior to the adoption of the 2010 Gambling Act, the government did not consider the low-stake gambling such a social disaster, as it was in the process of preparing just an ordinary amendment to the 1992 Gambling Act. It was only after the political scandal related to the alleged lobbying broke that the government reversed its stand and took on the low-stake gambling industry.

¹²¹ Letter from 18 November 2009 from the Minister of Health to the Chairman of the Parliamentary Investigation Committee of the Sejm, **Exh. C-96**.

¹²² Letter from 18 November 2009 from the Minister of Health to the Chairman of the Parliamentary Investigation Committee of the Sejm, **Exh. C-96**.

¹²³ **Exh. C-145**.

¹²⁴ **Exh. C-146**.

¹²⁵ K [REDACTED] WS1, ¶34.

¹²⁶ **Exh. R-13**, p. 200.

ii. Proportionality

158. Even if the measures had a public policy goal, according to the Claimants, they were not proportional as they “extend[ed] beyond what was required to achieve that goal.”¹²⁷
159. It emerges from the contemporaneous statements of the Prime Minister and Deputy Minister of Finance that the social problem of gambling addiction was more remote than acute.¹²⁸ Claimants also point out that the fund that was created by the 2010 Gambling Act in order to fight gambling addiction has remained largely untouched. Therefore, the actual social problem, if any, did not warrant the sudden termination of the entire industry. In addition, the so called phase out opportunity offered by the 2010 Gambling Act was illusory. In this regard, the Claimants refer to the following:
- Although the existing permits were to remain in force in accordance with the 2010 Gambling Act, the increased tax burden and the conditions under which the machines were to be operated changed drastically and instantly resulted in the destruction of █████ of the market.
 - The 2010 Gambling Act banned any modification or swapping of permitted addresses. The Respondent’s argument that the right to alter addresses did not exist even under the 2003 Amendment, had been unequivocally and in a binding fashion rejected by the Supreme Administrative Court, which held in November 2009 that such right existed by virtue of Article 155 of the Polish Code of Administrative Procedure.¹²⁹ This finding was confirmed by the Constitutional Court, which noted that the 2010 Gambling Act banned changing permitted addresses, which was “a possibility provided for previously.”¹³⁰ Had the Government retained the possibility of changing addresses in the existing permits, the industry would have been able to better perform during the phase out period.
 - The government enacted the drastic legislative changes in an extraordinarily fast manner. So much so that it breached the applicable EU law. Had Poland followed the ordinary legislative path, in conformity with its obligations under

¹²⁷ Reply, ¶216.

¹²⁸ **Exhs. C-32 and C-149.**

¹²⁹ Judgment of the Constitutional Tribunal of Poland, 23 July 2013, **Exh. R-050**, p.14.

¹³⁰ *Id.*, p.1.

EU law, the slot machine operators would have had the opportunity to obtain new permits or prolongations of some of their permits. But, apparently, the government had no intention to accord the industry a real opportunity of a soft landing.

160. The Claimants further contend that Poland could have adopted other, more proportionate, measures in order to address the alleged public need. The government in fact ignored the alternative legislative proposal submitted by Izba, which suggested addressing the government's concerns without terminating the industry.¹³¹ The Claimants suggest that Poland's alleged concerns could have been addressed by a strict implementation of the stake and win limits and most importantly by limiting a maximum loss per hour. Additionally, the government could have imposed prohibitive penalties on irregular operation, such as the admission of minors or an excess of the statutory stake and win limits.
161. The Claimants also point out that Poland's measures fueled the illegal market. The Respondent concedes that "many illegal gambling machines are still to be found in establishments such as bars, pubs or petrol stations."¹³² In fact, the MOF advised in its annual report for the year 2013 to introduce legal devices under strict governmental control in order to "help to eliminate or limit the gray area [...] and to address players' attention towards other games with a much lower addictive potential".¹³³ This confirms the Claimants' position that the elimination of the legal low-stake gambling sector was disproportionate and even counter-productive to the proclaimed public purpose.

iii. Due process

162. According to the Claimants, the Parties are in agreement that Article 5 of the BIT requires due process to be observed in the context of deprivation of an investment. The Claimants invoke *ADC v. Hungary* to argue that the due process requirement is not limited to the domestic law and in fact mandates the availability of "[s]ome basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute" affording an

¹³¹ Exh. C-46.

¹³² SoD, ¶263.

¹³³ Ministry of Finance Report on the Implementation of the 2010 Gambling Act, 2014, Exh. R-10, p. 27.

investor “a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.”¹³⁴

163. The Claimants point to the following violations of due process:

- The very first notice that the sector would be terminated was given at the press conference by PM Tusk on 27 October 2009. Two months later, the 2010 Gambling Act entered into force. Even prior to that latter date, the Government effectively ceased to issue permits.
- As stated by Izba in its letter of 13 November 2009 to the MOF, “the Ministry of Finance did not commission – in the context of the preparation of the bill – any economic, sociological or legal analysis of the actual rationale behind the proposed legislative solutions and the social and legal consequences of their implementation.”¹³⁵
- The MOF gave only two days, from 28 to 30 October 2009, to the public to comment on the 62-page Assumptions for the 2010 Gambling Act.¹³⁶ Similarly, the public had only the weekend of 7-8 November 2009 to comment on the draft bill and the weekend of 14-15 November to react to the Impact Assessment.
- The comments made by the industry representatives were ignored. The only element taken from the comments sent by interested parties was to adjust the title of the act and to introduce a regulation on the Fund for Solving Gambling Problems.¹³⁷
- The Parliament adopted the bill in an accelerated reading. This is allowed only “in particularly justified cases.”¹³⁸ The Respondent’s argument that the bill had to be adopted fast because it contained tax measures which had to be enacted latest in November in order to apply from the following fiscal year is also ill-founded. The Respondent admits that the POG settlement period

¹³⁴ *ADC v. Hungary*, Award, 2 October 2006, **Exh. CLA-19**, ¶435.

¹³⁵ **Exh. C-46**, p. 2.

¹³⁶ Letter of 28 October 2009 from the Ministry of Finance, **Exh. C-40**.

¹³⁷ Draft bill submitted by the Prime Minister to the Sejm, 12 November 2009, **Exh. R-56**, p. 114.

¹³⁸ Article 51 of the Sejm’s Internal Rules of Procedure, **Exh. C-50**.

does not coincide with the fiscal year. Deputy Minister Kapica was informed of this fact by the Tax Policy Department on 12 October 2009.¹³⁹

164. Overall, the Respondent adopted the expropriatory measures contained in the 2010 Gambling Act without any meaningful exchange of views with interested parties and in complete ignorance of the views of the industry representatives.
165. Additionally, Poland continued to ignore due process after the adoption of the 2010 Gambling Act. Although the Claimants had an opportunity to challenge the Respondent's measures before judicial *fora* at both the domestic and the EU level, the Polish executive deliberately refused to comply with the decisions in favor of the Claimants' Polish subsidiaries. In particular, after the CJEU Judgment, which declared the provision prohibiting the machine gambling outside casinos inapplicable,¹⁴⁰ the Customs Chambers continued to deny applications for permits.¹⁴¹ Deputy Minister Kapica was quoted as asserting that "[t]his judgment does not change anything."¹⁴² The government also ignored the 2011 decision of the Supreme Administrative Court according to which a negative report from an authorized Testing Institute was necessary in order to withdraw the registration of a slot machine.
166. Therefore, Poland took the expropriatory measures without according the Claimants due process as required by Article 5 of the BIT.

iv. Discrimination

167. The Claimants argue that the measures were discriminatory in that all gaming businesses operating outside casinos were banned, with the exception of the gaming business of state-owned Totalizator Sportowy.¹⁴³
168. According to the Claimants, Totalizator Sportowy had lost market share, compared to the years before 2009 because of the popularity of slot machines.¹⁴⁴ Banning slot

¹³⁹ Exh. C-156.

¹⁴⁰ CJEU Judgment, Case No. C-194/94, 30 April 1996, Exh. CLA-1.

¹⁴¹ Letters from the Customs Chambers to the Claimants, 11 February 2014, Exh. C-80, 12 May 2014, Exh. C-81.

¹⁴² Weekly Magazine *Uwazam Rze*, 8 July 2013, Exh. C-66, p. 4.

¹⁴³ Press Conference by PM Tusk, Exh. C-32, p. 2.

¹⁴⁴ SoC, ¶98.

machines, but not games organized by Totalizator Sportowy, would result in the state-owned company regaining its share in the Polish gaming market.

v. *Compensation*

169. It is undisputed that Poland has offered no compensation to the Claimants or their Polish subsidiaries. The Claimants argue that the obligation to compensate is one of the cumulative requirements for the lawfulness of expropriation under the express wording of the BIT. Such express language, the Claimants say, overrules any customary international law rules that may dictate the opposite.
170. The Claimants rely on a number of decisions, including *Santa Elena v. Costa Rica*¹⁴⁵ and *Von Pezold v. Zimbabwe*,¹⁴⁶ where the tribunals considered compensation to be due to make an expropriation lawful, irrespective of whether the other criteria of lawfulness of expropriation were met. Therefore, given that the Respondent has not offered compensation for its expropriatory measures, the expropriation was unlawful.

b. **Respondent's position**

i. *Expropriatory effect*

171. According to the Respondent, in order for measures to be considered expropriatory, there should be an exercise of the *puissance publique* resulting in the total and lasting deprivation of the value of the investment. The Respondent relies on a number of investment awards, including *Telenor*,¹⁴⁷ *Burlington Resources*,¹⁴⁸ *GAMI*¹⁴⁹ and *Electrabel*¹⁵⁰ to argue that measures merely affecting the market value

¹⁴⁵ *Compañía del Desarrollo de Santa Elena, S.A. v. the Republic of Costa Rica*, Final Award, 17 February 2000, **Exh. CLA-41**, ¶72.

¹⁴⁶ *Von Pezold et al v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, **Exh. CLA-46**, ¶¶496, 498.

¹⁴⁷ *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, **Exh. RLA-24**, ¶67.

¹⁴⁸ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, **Exh. CLA-13**, ¶398.

¹⁴⁹ *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL Award, 15 November 2004, **Exh. RLA-025**, ¶¶123, 132.

¹⁵⁰ *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, **Exh. RLA-028**, ¶6.53.

of the property or the investor's ability to generate profits do not constitute indirect expropriation, if "nonetheless, the market value of the investment remained positive."¹⁵¹ Thus, for the Respondent, the Claimants have to prove that the value of their investment was reduced to zero in the aftermath of the measures. In addition, an investment must be viewed as a whole and thus for an expropriation to be established, the annihilation of the value of certain assets does not suffice. According to the Respondent, the Claimants failed to demonstrate that the entirety of their investment lost its value.

172. First, the only protected investment established for the purposes of the present case is the shareholding in ASM, AW Holding and PGI. While this factor is not critical for the purely holding companies such as AW Holding and PGI, for ASM it is determinative, since that company also carried out other commercial activities such as selling of gambling and vending machines. Most of the historic losses of that company derive from the poor performance of its business line before the 2010 Gambling Act. As for ASM, the 2013 financial statements of its subsidiary DBS show that the company retains positive value and holds valuable real properties.¹⁵² The condition of the Claimants' other subsidiaries was similar; they managed to continue profitable operations or even increased their value after the contested measures.¹⁵³
173. Second, the Claimants failed to establish the causal link between the measures and the alleged deprivation of the value of their investments. The Respondent submits that the effects of the increase of the POG were largely absorbed by the bar owners at the addresses of which the Claimants' Polish subsidiaries operated. That some of the slot machines had to be removed after the 2010 Gambling Act only indicates that those machines were operated at unprofitable addresses. Moreover, the 2010 Gambling Act did not deprive the Claimants of the permits that had already been granted beforehand.
174. Overall, the Claimants have failed to discharge their burden to prove that the contested measures caused the full deprivation of the value of their investment in Poland.

¹⁵¹ SoD, ¶420.

¹⁵² DBS Financial Statement 2013, **Exh. R-109**.

¹⁵³ SoD, ¶¶428-430.

ii. Bona fide, non-compensable regulation

175. The Respondent contends that the contested measures constituted *bona fide* regulations, which do not give rise to the right to claim compensation. It relies on a number of decisions,¹⁵⁴ where investment tribunals recognized the state's sovereign right under general international law to enact non-discriminatory regulations for a public purpose, in accordance with due process of law, without incurring the duty to compensate even where the value of the investment was lost as a result of such regulations.
176. According to the Respondent, states have a wide margin of discretion when it comes to controversial industries like gambling. Poland's sovereign decision to restrict gambling to casinos, to raise POG and to impose other restrictions on the operators who already held gambling permits, were regulatory measures, which, as discussed in the following subsection, complied with the criteria of non-compensable *bona fide* measures.

iii. Public purpose

177. The Respondent refers to the official explanatory note appended to the draft 2010 Gambling Act,¹⁵⁵ which highlighted the following three principal goals for the regulatory reform:
- To provide a regulatory model that would be adequate to the size, structure and technological advancements in the gambling market in Poland;
 - To cure the existing deficiencies and enhance the controlling and law enforcement powers of the state; and

¹⁵⁴ *E.g. Invesmart v. Czech Republic*, Award, 26 June 2009, **Exh. RLA-031**, ¶499: "It is now well established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare"; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, **Exh. RLA-032**, ¶258; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, **Exh. RLA-033**, ¶103: "Governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this."

¹⁵⁵ Justification of the 2010 Gambling Act, 12 November 2009, **Exh. R-56**, pp. 63-64.

- To respond to the emerging adverse social effects of gambling on the population, including minors.

178. According to the Respondent, all these goals were legitimate. In addition, the circumstances in the Polish gambling market warranted the government taking decisive measures.
179. First, the illegal practices on the market, such as the usage of Bank Machines, warranted the regulatory response. The Claimants' assertion that Poland knew about the Bank Machines and the authorized Testing Institutes approved them does not estop Poland from taking policy measures but only strengthens the Respondent's argument that a fundamental change was necessary in the regulatory system.
180. Nor does the discontinuance of certain criminal proceedings against the representatives of the Claimants implicate that the market operated legally. The Respondent argues that the decision of the Appeal Prosecutor of Bialystok to discontinue the criminal proceedings was based on the fact that (i) in light of the divergent views on the legality of the Bank Machines, the willful wrongful conduct from the Claimants' representatives could not be proven beyond reasonable doubt and (ii) those representatives did not carry out the conduct in their personal capacity.¹⁵⁶ The Respondent points out that this does not disprove the existence of the wrongful practices on the market. Rather, the Prosecutor clearly notes in its decision that the machines seized "operated against the restrictions with regard to the maximum stakes".¹⁵⁷
181. Second, the Respondent submits that the low-stake gambling market was tainted by activities such as tampering of meters and illegal modifications of the approved software and that the Claimants' Polish subsidiaries were no exception. As seen from the decision of discontinuance of the Appeal Prosecutor of Bialystock, certain machines seized from BGM operated by a winning ratio of [REDACTED] which was a result of tampering.¹⁵⁸
182. Third, the irregular conditions are highlighted even by the information supplied by the Claimants and their expert. Namely, they argue that the aggregate amount of

¹⁵⁶ Exh. C-106, p. 72.

¹⁵⁷ *Id.* p. 73.

¹⁵⁸ *Id.* pp. 19-20.

money that Poles spent on low-stake gambling in 2009 was [REDACTED] [REDACTED]. Assuming that the maximum single stake requirement [REDACTED] has been observed, and provided that a single game lasted in average 5 seconds¹⁵⁹ this translates into [REDACTED] hours spent. This is equivalent to up to [REDACTED] each spending [REDACTED] yearly in front of machines. This calculation is conservative as it does not take into account the games played by means of the amounts won.

183. From the above the Respondent infers that either: (i) the maximum stakes were obeyed and hence low-stake gambling was a colossal social problem in Poland, mandating immediate radical steps being taken by Respondent, or (ii) the maximum stakes were not obeyed and hence there was a massive law infringement problem, such as related to the use of the machines by minors and high-stake gambling, equally justifying a strong regulatory action. It is most likely, however, that there was a combination of both (i) and (ii) and the law infringement and a grave social problem existed simultaneously.
184. Fourth, the Respondent takes issue with the projections made by Hermes, the Claimants' damages expert. It submits that absent Poland's measures, the number of slot machines in Poland would reach [REDACTED] by 2016, and that the average monthly cash-box of each machine would amount to [REDACTED]. This results in an annual amount of almost [REDACTED] inserted into slot machines, in turn entailing up to [REDACTED] more time spent on gambling than in 2009. This means that "the Polish population would need to become possessed by some collective madness". It is simply implausible to suggest that there would be no regulatory response from the government in the face of such phenomenon.
185. Overall, the Respondent concludes that the actual conditions and future prospects of the low-stake gambling market, even under the Claimants' own assumptions, fully warranted the measures taken by Poland. The Respondent does not deny that the lobbying scandal "was a catalyst that accelerated the adoption of the 2010 Gambling Act."¹⁶⁰ This does not, however, nullify the public purpose that the measure pursued.¹⁶¹

¹⁵⁹ The typical playing rate for gamblers is between 4 to 10 seconds, see: N. Dowling, et al. "Electronic gambling machines: are they the 'crack-cocaine' of gambling", January 2005, **Exh. R-60**, p. 40.

¹⁶⁰ Rejoinder, ¶150.

¹⁶¹ SoD, ¶450.

iv. Discrimination

186. The Respondent submits that the contested legislative reform applied to the entire industry of the low-stake gambling and was thus in no way discriminatory. The measures were blind to nationality and were applied equally to Polish and foreign-controlled enterprises.
187. The Claimants failed to demonstrate that there was a comparable entity in like circumstances which received any preferential treatment under the 2010 Gambling Act or the related measures. In fact, the Claimants admit multiple times that the measures affected the whole industry.¹⁶² As for Totalizator Sportowy, it operates on a different segment of the gambling market (lotteries) where, unlike in the slot machine industry, no serious law infringements were reported. Moreover, the 2010 Gambling Act prohibited video lotteries, which were supposed to be included into the Totalizator Sportowy's monopoly. Thus, the Claimants failed to demonstrate that the contested measures drew any unjustified distinction between the Claimants' subsidiaries and other entities in like circumstances.

v. Due process

188. The Respondent submits that, under international law, the standard for establishing a breach of due process is high. In reliance on decisions of international adjudicatory bodies, including the ICJ in *ELSI*,¹⁶³ it contends that in order to establish a breach of due process, a manifest injustice rather than a mere violation of certain rules of procedure is required.¹⁶⁴ Moreover, a claim for a violation of due process will not be made out if the affected individual had access to effective judicial review of the contested measures.¹⁶⁵

¹⁶² SoC, ¶¶ 232, 233.

¹⁶³ *Case Concerning Elettronica Sicula S.p.A. (ELSI) (US v. Italy)*, ICJ Judgment, 20 July 1987, **Exh. RLA-36**, ¶128; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, **Exh. RLA-043**, ¶437.

¹⁶⁴ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, **Exh. RLA-034**, ¶97.

¹⁶⁵ *Marion and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/08/1, Award, 16 May 2012, **Exh. RLA-44**, ¶277.

189. According to the Respondent, the Claimants failed to meet the high threshold of proving a violation of due process. In this regard the Respondent advances the following arguments:
190. First, the Respondent argues that the Claimants' allegation that Poland passed the 2010 Gambling Act without sufficient public consultations is not enough to establish a violation of due process.
- Public consultations of legislative acts, says the Respondent, "are a relatively new phenomenon" and are not required under international law. This was affirmed in *Paushok v. Mongolia*, where the tribunal held that a lack of public consultations does not amount to a violation of due process as "[l]egislative assemblies in all countries regularly adopt legislation within a very short time and, sometimes, without debates, especially if there is urgency and there is unanimity of views among parliamentarians."¹⁶⁶
 - Even under Polish law, there is no requirement of a minimum duration of public consultations. The non-binding guidelines, called "Seven Rules of Consultation" on which the Claimants rely, were adopted only in 2013 by the Minister of Administration and Digitalization, and do not bind the Parliament or the Counsel of Ministers. Such guidelines cannot confer upon individuals a right to be consulted before the adoption of the contemplated legislation.
 - In any event, the record shows that Poland consulted the relevant stakeholders before the adoption of the 2010 Gambling Act. During 19 days, from 28 October 2009 when the stakeholders were asked to provide comments until 16 November 2009 when the 2010 Gambling Act was adopted, the industry could submit comments, and it did so. The government gave such comments due consideration. The MOF, in its letter of 5 November 2009 to the Legislative Centre clearly requested the result of the consultations to be reflected in the 2010 Gambling Act.¹⁶⁷ A letter of 13 November 2009¹⁶⁸ and a transcript of the Parliamentary Session of 18

¹⁶⁶ *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, **Exh. RLA-023**, ¶304.

¹⁶⁷ **Exh. R-121**.

¹⁶⁸ **Exh. C-46**.

November 2009¹⁶⁹ further show that the industry representatives had an opportunity to present their views directly to the Parliament.

191. Second, the Respondent alleges that Claimants' argument that Poland violated due process by failing to notify the relevant provisions of the 2010 Gambling Act to the EU Commission is invalid. In view of the notification obligation under Directive 98/34/EC, Poland undertook a thorough review of the provisions of the draft 2010 Gambling Act. As a result, it extracted from the draft bill certain provisions that it considered due to be notified and duly notified them to the EU Commission.¹⁷⁰ Based on a *bona fide* assessment, the government considered the rest of the provisions not to constitute technical regulations and thus did not notify them. It is true that, in 2012 "the CJEU took a view that differed from Poland's position" and concluded that certain provisions limiting or gradually rendering gambling on slot machines impossible ought to have been notified to the EU Commission.¹⁷¹ This does not, however, mean that Poland breached due process of law. Poland acted at all times in good faith. Any genuine error in the procedural aspects of the EU law cannot serve to establish a manifest injustice, as required by the standard of due process under international law.
192. Finally, the Respondent points out that the Claimants and their Polish subsidiaries had access to effective mechanisms of judicial review. The Claimants themselves refer to a number of decisions, including the CJEU Judgment and the decision of the Supreme Administrative Court,¹⁷² rendered in favor of the Claimants' interests. There could be no better evidence that the judicial system based on the rule of law works properly in Poland. In such circumstances, the Claimants may not invoke the last resort standard of due process under international law.

¹⁶⁹ **Exh. C-57.**

¹⁷⁰ SoD, ¶¶ 212, 487, referring to Letter of 3 November 2009 from the Ministry of Economy to the Legislative Centre, **Exh. R-67**; Letter of 6 November 2009 from the Ministry of Foreign Affairs to the Legislative Centre, **Exh. R-68**.

¹⁷¹ **Exh. CLA-3**, dispositive.

¹⁷² Judgment of the Polish Supreme Administrative Court, Case no. II GSK 1031/11, 29 November 2011, **Exh. C-63**.

c. Analysis

193. Article 5 of the BIT reads as follows:

Neither Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:

- a) the measures are taken in the public interest and under due process of law;
- b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;
- c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the real value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned in any freely convertible currency accepted by the claimants.

194. The first question that arises is whether the measures in question constituted a deprivation of the Claimants' investments. If the answer to this question is in the negative, the measures will fall outside the scope of Article 5 of the BIT and the Tribunal will not need to consider whether these measures pertain to the category of non-compensable regulation or otherwise comply with the criteria of lawfulness contained in that provision.

195. It is common ground between the Parties that the Claimants' investments have not been directly taken. Rather, the Claimants contend that the Respondent indirectly expropriated their investments by measures which resulted in substantial and lasting deprivation of the value of their business in Poland.

196. The Parties seem to agree that an investment can be indirectly expropriated through substantial deprivation of its value as a result of governmental measures.¹⁷³ The Respondent itself relies on case law in support of the argument that if an exercise of *puissance publique* results in the substantial and lasting deprivation of the value of the investment, the investment should be deemed expropriated. For instance, in *Telenor v. Hungary*, the tribunal found that there is an indirect expropriation where "the measures of which complaint is made substantially deprive the investment of economic value."¹⁷⁴ Similarly, in *Burlington v. Ecuador*, the tribunal considered the loss of the economic value of the investment to be determinative:

¹⁷³ Reply, ¶170; SoD, ¶416; Rejoinder, ¶188.

¹⁷⁴ *Telenor Mobile Communications A.S. v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, **Exh. RLA-24**, ¶63.

[W]hat appears to be decisive, in assessing whether there is a substantial deprivation, is the loss of the economic value or economic viability of the investment. [...] What matters is the capacity to earn a commercial return. After all, investors make investments to earn a return. If they lose this possibility as a result of a State measure, then they have lost the economic use of their investment.¹⁷⁵

197. Thus, the Parties largely agree that the full deprivation of the economic value of an investment as a result of governmental measures amounts to indirect expropriation. The Tribunal thus cannot but analyze whether the Respondent's measures as a whole deprived the Claimants' investments of their value and thus resulted in indirect expropriation.
198. Poland's measures that the Claimants allege to constitute indirect expropriation were primarily contained in the 2010 Gambling Act, which entered into force on 1 January 2010. In particular, under the 2010 Gambling Act, the Claimants' Polish subsidiaries were no longer able to obtain low-stake gambling permits or to request the extension of then existing permits. The Claimants contend that after the lapse of the existing permits the value of their investments disappeared. They do not contest, however, that their investments retained a certain, albeit significantly reduced value after the 2010 Gambling Act took effect. In particular, the Claimants contend that, immediately after the measures, they lost █████ of the value of their business, while the rest was lost in the following years as the existing permits expired.¹⁷⁶
199. The following chart submitted by the Claimants shows that after the 2010 Gambling Act entered into force, the Claimants continued operating a reduced number of gambling machines, which number continued reducing between the entry into force of the 2010 Gambling Act to zero in January 2015, when the last slot machines were taken out of business.

¹⁷⁵ *Burlington Recourses Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012, **Exh. CLA-13**, ¶397.

¹⁷⁶ Reply, ¶179.



200. The Claimants also admit that their Polish subsidiaries continued to generate cash flows in the aftermath of Poland's contested measures until the relevant permits expired.¹⁷⁷
201. The Claimants explain, however, that the deprivation of the entirety of the value of their investment was an eventual result of Poland's measures, as a result of which they were deprived of the "ability to enjoy [their] investment".¹⁷⁸
202. The Tribunal is not convinced. It is undisputable that the Claimants' shares retained a certain value after the measures were passed. Throughout the period when the existing permits remained in force, cash flows were forthcoming and if desired, the Claimants could have sold their shares. While the selling price and the sales conditions would be significantly different to what they would have been prior to the measures, the sale would still be possible. Therefore, the contested measures did not deprive the Claimants of the ability to use or dispose of their shares.
203. The eventual evaporation of the value of the shares was a result of the expiration of the existing gambling permits. Those permits would have expired irrespective of whether Poland had passed the 2010 Gambling Act or not. As for the possible new permits or renewal of the existing permits, the Claimants do not contend that they had any acquired right to request such. While the right to request an extension of a

¹⁷⁷ Financial statements from 2011 and 2012, **Exhs. R-119, CRED-52, CRED-53, CRED-84**; Graph of income development of Royal Team, **Exh. C-142**.

¹⁷⁸ Reply, ¶170.

permit existed under the 2003 Amendment,¹⁷⁹ this was not an acquired right of a permit-holder. Therefore, Poland's decision not to renew or grant new permits cannot be considered to be expropriatory as there existed no right to such renewed or new permits and thus no such right could possibly be expropriated.¹⁸⁰

204. The Claimants' Polish subsidiaries only had acquired rights over the existing permits. The Respondent concedes as much when it says that "permits issued under the 1992 Gambling Act carried certain rights for their holders. Those rights were protected under the Polish Constitution and international law, including as the 'acquired rights' doctrine."¹⁸¹ The Claimants accept that the 2010 Gambling Act did not directly deprive the Claimants of their acquired rights in the gambling permits.¹⁸² That being said, some of the measures interfered with the exercise of the rights granted under the respective permits. In particular, such interference arguably resulted from (i) the prohibition of the change of addresses within a permit;¹⁸³ (ii) the introduction of the provision mandating the revocation of a permit if the gambling operations were conducted illegally;¹⁸⁴ and (iii) the increase in the POG.¹⁸⁵ In order to complete the analysis on whether the Respondent's measures were expropriatory, the Tribunal should examine whether the Claimants' Polish subsidiaries' acquired rights in their permits were impaired such as to amount to an indirect taking of such rights.
205. The prohibition to change the permitted addresses does not fully qualify as a limitation on the exercise of the acquired rights of a permit-holder. The addresses were contained in a gambling permit.¹⁸⁶ The alteration of the addresses within a permit was previously allowed under Article 155 of the Code of Administrative

¹⁷⁹ Article 36(3) of the 2003 Gambling Act, **Exh. C-6**.

¹⁸⁰ *Emmis International holding, B.V., Emmis Radio Operating, B.V. and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. V. Republic of Hungary*, ICSID Case No. ARB12/2, Award, ¶168.

¹⁸¹ SoD, ¶236(3).

¹⁸² Reply, ¶169.

¹⁸³ Article 135.2 of the 2010 Gambling Act, **Exh. C-39**.

¹⁸⁴ *Id.*, Article 138.3.

¹⁸⁵ *Id.*, Article 139.1.

¹⁸⁶ Example of a gambling permit, **Exh. C-10**, pp. 2-4.

Procedure.¹⁸⁷ This provision lays out a general regime for changing the terms of a license or a permit and reads as follows:

A final decision by which a party has acquired rights can at any time with the consent of the party be revoked or amended by a public administration authority which issued it, if special provisions do not forbid such revocation or amendment and if this is in the public interest or the legitimate interests of the party.¹⁸⁸

206. It requires no long explanation that a general administrative law right to change the very terms of a permit does not derive from the permit itself and cannot thus be deemed as an acquired right of a permit-holder. Thus, the measure prohibiting the change of addresses in the permits did not deprive the Claimants of any of the rights acquired through the permit.
207. Nor does the rule providing for a revocation of a permit in case of violation of the rules of gambling operation affect the acquired rights of a permit-holder. A permit does not give the permit-holder a right to act in contravention of the conditions of the applicable law or the permit itself. Thus, the rules of the revocation of permits introduced by the 2010 Gambling Act did not interfere with any acquired rights of the Claimants' subsidiaries.
208. The only possible interference that could have resulted in the deprivation of the acquired rights of the permit-holders is the increase in the POG. In theory, if a change in tax regime renders a permitted activity economically impossible, it may be argued that the use of the acquired right, *i.e.* the right to engage in the permitted activity, is impaired in such a way that it amounts to a taking of such right. It emerges from the record, however, that the increase in the POG did not have such effect on the business of the Claimants' Polish subsidiaries. It is undisputed that the Claimants' Polish subsidiaries had to remove a large number of machines from the market, as their operation was no longer economically justified under the increased POG. This did not, however, render the permitted activity impossible or unfeasible *per se*. The Claimants' Polish subsidiaries in fact continued to operate a number of machines for a profit until the expiry of the respective permits.¹⁸⁹ The increase in the POG did not thus constitute an expropriatory interference with the Claimants' Polish subsidiaries' acquired rights.

¹⁸⁷ **Exh. C-152.**

¹⁸⁸ Judgment of the Constitutional Tribunal of Poland, 23 July 2013, **Exh. R-050**, p.14.

¹⁸⁹ Reply, ¶182; Financial statements from 2011 and 2012, **Exhs. R-119, CRED-52, CRED-53, CRED-84**; Graph of income development of Royal Team, **Exh. C-142.**

209. Therefore, Poland did not deprive the Claimants' Polish subsidiaries of their acquired rights in the permits. Nor did the contested Governmental measures result in a sufficiently substantial deprivation of the value of the Claimants' investments, given that in the aftermath of the measures, the investments retained value, no infringement of the Claimants' investments' ownership and control of the gambling machines existed (in that the investments were free to deploy them elsewhere, subject to applicable local law) and the Claimants could have chosen to dispose of the investments.

210. Having reached the conclusion that Poland's measures were not expropriatory, the Tribunal need not examine whether they may qualify as non-compensable regulation or whether or not the criteria of lawfulness of expropriation under Article 5 of the BIT are met. The Tribunal will now move to the claims concerning the alleged violations of other standards of the BIT.

2. Fair and Equitable Treatment

211. The Parties diverge on whether Poland's measures violated the fair and equitable treatment (FET) standard contained in Article 3(1) of the BIT.

a. Claimants' position

i. Legitimate expectations

212. The Claimants submit that Poland's reversal of the legal framework governing low-stake gambling was contrary to their legitimate expectations and thus violated Article 3(1) of the BIT. They in particular refer to the following provisions of the repealed 2003 Amendment, which had created expectations based on which the Claimants had decided to invest in Poland:

- Slot machines could be operated in public places, except in the proximity of schools, churches, *et cetera*.
- Permits would be issued for six years and a permit-holder could subsequently apply for a prolongation of the permit by another six years. If such application met all the criteria, it would have to be issued. Thus, Article 36 of the 2003 Amendment gave investors a legitimate expectation, if not a statutory guarantee, that the permits could be obtained for at least 12 years, if all the criteria were met.

- The POG was initially minimal and would rise gradually to [REDACTED] and to [REDACTED]
- Operators of gaming machines could freely switch permitted addresses from one permit to another, enabling the investor to make the most efficient and economically viable use of its permits.

213. The Claimants reject the Respondent's argument that the 2003 Amendment could not create the expectation of stability since it had been hastily adopted. This argument is belied by the fact that the government did not consider the revocation of the 2003 Amendment until October 2009, despite the fact that the same political coalition comprised the government since 2007. Poland's sudden and complete reversal of the legal regime governing the low-stake gambling infringed the stability and predictability of the legal environment and thus contradicted the Claimants' legitimate expectations.

ii. No rational policy

214. According to the Claimants, in order for a measure to be considered reasonable under the FET standard it must have an underlying rational public policy objective and there must be "an appropriate correlation between an alleged public policy objective and the measure taken."¹⁹⁰

215. The Claimants contend that Poland's decision to urgently ban slot machines in 2009 was not justified by legitimate public policy objectives. Had Poland really had any such objectives it would have addressed them earlier than 2009. The Claimants in particular reject the purported objectives put forward by Poland based on the following arguments:

- The alleged social problem of gambling addiction affected only [REDACTED] of the Polish population according to the official data on registered gambling addicts. Poland did not undertake any preparatory research to meaningfully assess the risks associated with slot machines. It spontaneously decided to destroy the entire industry without collecting any data on the alleged social problem.

¹⁹⁰ Reply, ¶275.

- The contested measures were not motivated by the considerations of combatting law infringements as Poland suggests. The 2009 Ordinance had already addressed the issue of the Bank Machines, allegedly operating above the permitted stake and win limits.¹⁹¹ Similarly the alleged problem of insufficient control over the technical compliance of the machines had been addressed by the 2009 amendments to the Customs Act.¹⁹² Those problems could not thus serve as a justification for the 2010 Gambling Act.
- Raising more taxes could not have been the objective either. It was acknowledged by Poland that the measures aimed at terminating the entire industry of low-stake gambling would and in fact did decrease the taxation income for the state.

216. Instead, the Claimants argue, the drastic measures were aimed at gaining a political benefit for PM Tusk, whose intention was to come across firmly against the gambling industry and restore public confidence in his government before the upcoming elections.¹⁹³

iii. Unreasonable measures

217. The Claimants contend that the manner in which the Respondent adopted and implemented the 2010 Gambling Act was unreasonable and contrary to the FET standard.

218. First, Poland refused to give the low-stake gambling industry sufficient advance notice of the measures. If the measures were indeed motivated by the alleged unlawfulness of Bank Machines, Poland already had information in 2007 that [REDACTED] of such machines were active in the market. The operators were kept in the dark about the consequences of the operation of Bank Machines. Had the Claimants been informed in a timely fashion, they would not have continued to make heavy investments in Poland throughout 2008 and 2009, including acquiring the office and warehouse building in Niepruszewo,¹⁹⁴ submitting the 21 permit applications in 2008

¹⁹¹ **Exh. C-64.**

¹⁹² **Exh. R-52**, Article 32.13.

¹⁹³ Reply, ¶284.

¹⁹⁴ SoC, ¶93.

– 2009¹⁹⁵ [REDACTED] and making the [REDACTED] [REDACTED] for new Bank Machines in early 2009 (to be used in late 2009 and in the subsequent years).¹⁹⁶

219. Second, the hasty enactment of the 2010 Gambling Act was achieved by giving inappropriately short deadlines to the stakeholders to express their views, by failing to notify the EU Commission and by failing to hold meaningful consultations. This prevented the operators of slot machines from limiting their losses. In addition, the government started to apply the provisions of the 2010 Gambling Act even before it entered into force. Namely, no permits were issued or prolonged even though the relevant applications were made before the 2010 Gambling Act entered into force. Even after Polish courts had held that permit applications pending prior to the entry into force of the 2010 Gambling Act were to be decided under the rules in force in 2009,¹⁹⁷ the executive continued to refuse to do so.¹⁹⁸
220. Third, contrary to Poland's arguments, the failure to notify the EU Commission was not "an innocent error". Rather, after being warned by the Ministry of Economy (**MOE**)¹⁹⁹ and again by the Deputy Minister of Finance, Mr. Kapica,²⁰⁰ the government decided not to notify the relevant provisions in order to avoid a postponement of the entry into force of the act "by at least a year".²⁰¹ This violation of the EU law constitutes, by definition, a breach of international law and evidences a breach of good legislative procedure and the principle of legality.
221. Fourth, the government is persevering in the 2010 Gambling Act, despite the fact that it is clearly deficient and could not withstand the judicial scrutiny. In fact, the 2010 Gambling Act resulted in a growing unregulated market. Furthermore, due to

¹⁹⁵ **Exh. C-132.**

¹⁹⁶ Reply, ¶408.

¹⁹⁷ Judgment of the Voivodship Administrative Court of Gransk, 19 November 2012, **Exh. C-55**; Judgment of the Voivodship Administrative Court of Gransk, 19 November 2012, **Exh. C-56**.

¹⁹⁸ Letter of 11 February 2014 from the Customs Chamber of Kielce to Grand, **Exh. C-80**; Letter of 12 May 2014 from the Customs Chamber of Poznan to Grand, **Exh. C-81**.

¹⁹⁹ **Exh. R-67**, where the Ministry of Economy stated that "the Commission instructs members states that the notification obligation applies not only to gaming machines but also provisions concerning rules of those games."

²⁰⁰ Letter of 6 November 2009 from Mr. Kapica to the President of the Governmental Centre of Legislation, **Exh. R-68**.

²⁰¹ Memo of 27 August 2009 from the Deputy Minister Kapica to PM Tusk, **Exh. C-121**, p. 4.

the deficient legislative path, a number of provisions concerning the prohibition of low-stake gambling were declared inapplicable by the CJEU and Polish courts.²⁰² Despite these decisions, the Polish executive persisted in impounding machines, revoking permits and refusing permit prolongations.²⁰³

222. Fifth, Poland initiated results-oriented controls of slot machines, which resulted in impounding of a number of machines held by the Claimants' Polish subsidiaries. As a whistleblower report shows, the government tasked its agencies "to make life difficult for businesses in order to induce them to give up low-stake gambling machine operation themselves before the end of the period for which they had received the permit."²⁰⁴ The officials, who had no appropriate training, tested machines by simply playing them. This resulted in revocation of the relevant permits, despite the Supreme Administrative Court's clear finding that a negative report of an authorized Testing Institute was necessary for such revocation.²⁰⁵
223. The Claimants contend that the above violations should be assessed as a whole and not individually. Poland's composite conduct aimed at destroying the low-stake gambling industry breached the FET standard contained in Article 3(1) of the Treaty.

b. Respondent's position

i. No legitimate expectations

224. In reliance on the case law of investment tribunals, Poland contends that legitimate expectations may only be created if (i) they are undertaken by the government specifically and individually *vis à vis* the investor, (ii) not later than at the time of making the investment, and (iii) the investor reasonably relied on such representations.
225. The Respondent submits that the Claimants have failed to demonstrate that they had legitimate expectations which were frustrated by Poland's measures. In

²⁰² Voivodeship Administrative Court in Gdansk dated 19 November 2012, **Exhs. C-55 C-56**; Order from the Supreme Administrative Court dated 15 January 2014, **Exh. C-74**; Judgment of the Supreme Court dated 28 November 2013, **Exh. C-76**; Judgment of the District Court in Gorzów Wielkopolski dated 22 September 2014, **Exh. C-75**; Judgment of the Supreme Court dated 27 November 2014, **Exh. C-77**.

²⁰³ Reply, ¶¶257, 307.

²⁰⁴ Whistle-blower's letter, 1 December 2009, **Exh. C-67**; SoC, ¶217.

²⁰⁵ Judgment of the Supreme Administrative Court, 29 November 2011, **Exh. C-63**.

particular, any term of the 2003 Amendment was not a specific and individual commitment to the Claimants or their subsidiaries. Additionally, the Government has never undertaken not to alter the law. In fact, the Claimants should have been well aware that the 2003 Amendment was unlikely to remain intact for the following reasons:

- Since its adoption, a number of Polish entities, including the Police Headquarters,²⁰⁶ the Legislative Council,²⁰⁷ the Supreme Audit Office²⁰⁸ and the Parliamentary Investigative Committee²⁰⁹ opined that the 2003 Amendment contained substantial defects and needed to be amended.
- In fact, before it was repealed by the contested 2010 Gambling Act, Poland had modified the 2003 Amendment a number of times.²¹⁰ Additionally, in 2008, the POG rate was increased from the maximum amount of ██████ envisaged by the 2003 Amendment to ██████. The Claimants' argument that they had a legitimate expectation that the taxation terms of the 2003 Amendment would remain intact is at odds with their stand not to contest the 2008 increase in the POG.

226. Moreover, at least Horthel has been present in Poland since 1998 when it purchased the ██████ shares in ASM.²¹¹ Thus, the 2003 Amendment, which was introduced 5 years after the Claimants invested in Poland cannot serve as a source of legitimate expectations on which the investment was based.

ii. Rational policy

227. The Respondent argues that it introduced the 2010 Gambling Act in pursuit of a rational policy. In particular, as seen from its explanatory note, the 2010 Gambling Act aimed at redressing (i) the illegal operation of the gambling market, (ii) the adverse social effects of gambling addiction, including among minors, and (iii) the

²⁰⁶ Exhs. R-2, CRED-2.

²⁰⁷ Exh. CRED-40.

²⁰⁸ Exh. R-1.

²⁰⁹ Exh. C-9.

²¹⁰ Rejoinder, ¶231.3; Exh. R-43.

²¹¹ Rejoinder, ¶231.1.

insufficient state control over the market's operation. All these aims were legitimate and derived from the rational analysis of the situation on the market.

228. It is undeniable that the gambling industry was tainted by a number of illegal practices, including wrongdoing by Testing Institutes, tampering with slot machines and devising means by which operators could exceed the maximum stake and win limits prescribed by the law. Nor should it give rise to any controversy that gambling bore grave social consequences associated with addiction and criminal activities.
229. The Respondent rejects the Claimants' argument that the measures were taken as a result of the lobbying scandal. Although the public news about the wrongful lobbying put the gambling problem into the spotlight and created a rare momentum to cure the problem, this does not alter the fact that the measures were solely motivated by public policy considerations.

iii. Reasonableness

230. The Respondent submits that there was an appropriate relationship between the contested measures and the policy objectives pursued by Poland. In this regard, it rejects the allegations raised by the Claimants:
231. First, the Claimants were informed about the proposed enactment of the 2010 Gambling Act in October 2009, which is more than two months before its entry into force. More importantly, they were given a meaningful transition period during which their existing permits continued to be valid and they had an opportunity to adapt to the new regulations.
232. Second, the Claimants' contention that Poland failed to notify the EU Commission of the adoption of the 2010 Gambling Act does not prove the unreasonableness of the measures. The MOE in fact conducted a good faith assessment and extracted certain provisions from the draft bill in order to separately notify them.
233. Third, the Claimants' dissatisfaction with the fact that the Respondent maintains the legal regime of the 2010 Gambling Act is misplaced. The 2010 Gambling Act succeeded in eliminating illegal operations in the market and the adverse social consequences of gambling. It also increased the effectiveness of the governmental control over the industry.

234. Fourth, the Claimants' protest in relation to Poland's control on gambling locations is also without merit. Such controls were necessary for ensuring the industry's compliance with the existing legal framework. Contrary to the Claimants' assertions, all controllers received training before the tests started.²¹² In any event, given that the Bank Machines were illegal, the controllers were right in questioning their compliance with the 1992 Gambling Act.
235. For these reasons, the Respondent's measures were appropriate in pursuit of its public policy and fully complied with its obligation to provide FET under the Treaty.

c. Analysis

236. Article 3(1) of the BIT requires the investments to be treated fairly and equitably in the following terms:

"Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party [...]."

237. The BIT contains no definition of the terms "fair" and "equitable". The Parties rely on a number of decisions of international investment tribunals to define the scope of the FET standard. Based on the structure of the Parties' respective arguments, the Tribunal will analyze the claims concerning the alleged violation of the FET standard in three parts. First, it will assess whether Poland's measures impaired the Claimants' legitimate expectations (i). Second, the Tribunal will turn to the issue of rational justification of the Respondent's conduct (ii). Finally, it will assess the reasonableness of the measures (iii).

i. Legitimate expectations

238. The Parties do not dispute that legitimate expectations are protected under the FET standard. The Respondent contends, however, that expectations "must origin (*sic*) in the [...] specific individualized promise" and the investor's reliance on such promise should be reasonable.²¹³ The Tribunal agrees. Indeed, the case law of international investment tribunals suggests that, save in rare circumstances, legitimate expectations are generated through specific, individualized undertakings of a state.

²¹² M ████████ WS, Exh. RWS-2, ¶¶44-46.

²¹³ Rejoinder, ¶229.

For instance, in *El Paso v. Argentina*, the tribunal reasoned that a commitment should be specific to give rise to legitimate expectations:

[A] commitment can be considered specific if its precise object was to give a real guarantee of stability to the investor. Usually general texts cannot contain such commitments, as there is no guarantee that they will not be modified in due course.²¹⁴

239. Similarly, according to *Waste Management v. Mexico II*, the expectations arise out of specific representations made by the host state and relied upon by an investor:

In applying [the FET] standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.²¹⁵

240. General statutory norms thus do not give rise to legitimate expectations unless they contain a specific commitment of stability. In the present case, the Claimants seek to rely on Poland's various acts as purported sources for their legitimate expectations. These include the provisions of the 2003 Amendment, as well as the terms of the gambling permits.

241. As explained above, the Tribunal considers that general normative acts do not, as a rule, give rise to legitimate expectations, given that the state retains the power to amend its own acts. The 2003 Amendment did not contain any stabilization guarantee. Nor did the Claimants otherwise obtain such a guarantee. The repeal of the 2003 Amendment thus cannot itself be considered as a breach of legitimate expectations. Whether or not such change of legislation was justified by legitimate objectives is a different matter and will be analyzed in the subsequent sub-section.

242. That being said, the Claimants' Polish subsidiaries did obtain specific commitments from Poland with respect to the terms of their gambling permits. By issuing such permits, Poland undertook to allow the Claimants' Polish subsidiaries to carry out the permitted activity within the specific time period and in accordance with the terms of the permit.

243. The Respondent recognizes that the Claimants' Polish subsidiaries had acquired limited rights under their permits.²¹⁶ It argues, however, that the Claimants may not

²¹⁴ *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶377.

²¹⁵ *Waste Management, Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 3 April 2004, ¶98.

²¹⁶ See supra ¶¶170-171. SoD, ¶236(3).

rely on the undertakings made by Poland *vis à vis* their subsidiaries. The Tribunal finds this distinction artificial and unjustified under the text of the Treaty and its object and purpose. Article 3(1) of the BIT requires the fair and equitable treatment of investments of investors. As explained in the relevant section above, the scope of the term “investment” in the BIT is not limited to the assets directly owned by the investor. Undertakings in connection with an investment, whether or not directly owned, are capable of creating legitimate expectations. Thus, when the Claimants established an investment by obtaining gambling permits through their subsidiaries, they legitimately expected that the terms of the permits would be adhered to.

244. Poland further argues that the existence of legitimate expectations should be assessed at the moment when the investment is made; and since most gambling permits were obtained after the Claimants first invested in Poland, they cannot generate legitimate expectations. The Tribunal agrees that legitimate expectations should be related to the investment and not to each and every decision concerning the implementation of the investment.²¹⁷ That being said, it is impossible to point to a specific moment of making of one or more investments which are a result of multiple decisions and transactions.²¹⁸ As explained by the *Frontier Petroleum* tribunal:

[When] investments are made through several steps, spread over a period of time [...] legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development, or reorganisation of the investment.²¹⁹

245. The Claimants' acquisition of the gambling permits was more than a mere executory decision and was a central element of their investment in Poland. The Tribunal already concluded (Section IV.B.1) that the Claimants' investment is not limited to the directly owned shares but also encompasses the indirectly held assets such as the gambling permits. The time of making of the Claimants' investments in Poland cannot thus be circumscribed simply to the acquisition of shares in relevant Polish subsidiaries without consideration of the permits granted to engage in a regulated sector of the economy. Therefore, Poland's representations made with respect to those permits generated investment-backed legitimate expectations.

²¹⁷ *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, ¶495.

²¹⁸ *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, ¶¶9.3.13-17.

²¹⁹ *Frontier Petroleum v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, ¶287.

246. The Claimants contend that they had the following legitimate expectations: (a) Slot machines could be operated in public places, except in the proximity of restricted areas such as schools and churches; (b) Operators of gaming machines could freely switch permitted addresses from one permit to another, enabling the investor to make the most efficient and economically viable use of its permits; (c) Permits would be issued for six years and a permit-holder could subsequently apply for a prolongation of the permit by another six years. If such application met all the criteria, it would have to be issued; (d) The POG was initially minimal and would rise gradually at a reasonable rate; (e) The slot machines with the so called “Bank” function, which were approved by the Testing Institutes, would remain in operation for the period of time contemplated by the relevant permits.

247. The Tribunal will analyze each of these arguments in turn.

(a) Ban on slot machines outside casinos

248. The rule allowing the placement of slot machines in public areas was introduced by the 2003 Amendment.²²⁰ As explained above, general rules of law do not generate legitimate expectations because they can be repealed or amended by the state. Poland’s decision to prohibit gambling outside casinos did not thus breach the Claimants’ legitimate expectations. The Claimants themselves concede as much when they say that “any country has wide discretion in either allowing or disallowing gaming and gambling.”²²¹ By disallowing gambling outside casinos, Poland did not breach any specific guarantee undertaken in connection with the Claimants’ investments. The only specific guarantee that the Claimants received in connection with the operation of the slot machines in public places was the one contained in their subsidiaries’ gambling permits. It is undisputed, however, that pursuant to Article 129(1) of the 2010 Gambling Act, the existing gambling permits stayed in force and the Claimants’ Polish subsidiaries were not banned from continuing to operate the permitted slot machines until the relevant permits expired.²²² The ban on gambling did not thus breach the Claimants’ legitimate expectations.

²²⁰ Article 30 of the 2003 Amendment, **Exh. C-6**.

²²¹ Reply, ¶11.

²²² **Exh. C-39**.

(b) Ban on changing addresses

249. As discussed above, the possibility to change permitted addresses derived from Article 155 of the Code of Administrative Procedure and was not an acquired right of a permit-holder. What is more, even under Article 155 of the Code of Administrative Procedure, while the permit-holders could seek to change the terms of their permits, they had no unconditional entitlement that such a change would be approved. In the early years of the low-stake gambling market, Polish courts diverged on whether permit-holders could alter the registered addresses. The divergence was settled on 3 November 2009 by the explanatory resolution of the Supreme Administrative Court, which confirmed that a permit-holder could request changes of permitted addresses pursuant to Article 155 of the Code of Administrative Procedure.²²³ As the Court made it clear, however, a private party had no unconditional right to changing the permitted addresses because granting any such request remained at the discretion of the relevant administrative organ:

The consent of the party, although necessary, is not a sufficient condition for a change (repeal) of a decision under Article 155 of the Code of Administrative Procedure.

[...]

A change (repeal) of a decision in accordance with this procedure is possible for reasons of public interest or legitimate interests of the party. [...] The requirements of public interest or legitimate interests of the party must be determined and assessed in the case at hand.²²⁴

250. Thus, not even under Article 155 of the Code of Administrative Procedure did the Claimants have any unconditional entitlement to changing addresses in the permit. In any event, even if such right existed under general administrative law, this would not amount to a specific governmental representation capable of generating legitimate expectations. Poland's ban on changing addresses did not therefore contravene the Claimants' legitimate expectations.

(c) Ban on the renewal of the permits

251. The low-stake gambling permits were issued for the initial period of six years. Pursuant to Article 36 of the 2003 Amendment, the permit-holders could request the renewal of the permits for another six years. For the Claimants, this provision "gave investors the legitimate expectation, if not the statutory guarantee, that permits could

²²³ Exh. C-152, p. 9.

²²⁴ *Id.*

be obtained (provided only that all criteria were met) for at least 12 years.”²²⁵ The Tribunal is not convinced. While the Government might have been under an obligation to renew the permits if all the criteria were met under the 2003 Amendment, it was under no obligation to maintain the legal regime of the 2003 Amendment. Under the Treaty, Poland retained the right to alter the legal regime and to ban the renewal of the existing permits so long as it respected the acquired rights under the existing permits. The right to renewal was not among the acquired rights of permit-holders, but was a legal right conferred upon slot machine operators by the then existing legal regime.

252. To conclude that the right to renewal was an acquired right of a permit-holder would mean that a 6-year permit was effectively a 12-year permit. No such conclusion is warranted by the wording of the relevant permits, which are clear in defining their term of validity by 6 years and make no mention of any right to renewal.²²⁶ Therefore, the Claimants had no legitimate expectation with respect to the renewal of the existing permits.

(d) Increase in the POG

253. It is common ground between the Parties that the 2010 Gambling Act enacted a sharp rise in the POG to [REDACTED]. It is also undisputed that the tax increase was applicable to the machines operating under the already existing permits. As discussed above, general provisions of law, such as the provision of the 2003 Amendment setting the POG rate, do not normally create legitimate expectations. In this case as well, Poland was in principle entitled to bring change to the taxes applicable to the low-stake gambling industry.
254. That being said, by issuing the relevant gambling permits, Poland specifically undertook *vis à vis* the permit-holders to allow the permitted activity for six years. This undertaking would be rendered illusory if in the meantime Poland could change the taxes applicable to the industry in a manner that would fundamentally alter the economic conditions of the permitted activity. Indeed, if on the one hand a state specifically undertakes to allow a given economic activity for a specific period of time, it cannot on the other hand change the applicable taxation regime so as to deprive such activity of its economic basis.

²²⁵ Reply, ¶273(b).

²²⁶ Example of a gambling permit, **Exh. C-10**.

255. When acquiring the permits, the permit-holders legitimately expected not only that the permitted activity would be allowed as a formal matter but also that it would remain viable as a matter of economics. This is not to suggest that a permit or a license to engage in a particular business constitutes a stabilization guarantee for the laws applicable to that business. The government retains the power to change its laws and regulations. What matters is the degree at which such changes will affect the government's earlier specific promise to allow the permitted activity.
256. Furthermore, although the increase in the POG was a taxation measure on its face, it was not in fact aimed at increasing the state's revenues. The legislative history of the 2010 Gambling Act shows that the Parliamentary Commission was well aware that the increase in the POG would not result in an increase of budgetary revenues, since the tax would cause a large number of permitted machines to stop operating.²²⁷ And so it happened. In the first half of 2010, after the substantial increase of the POG as of 1 January 2010, the economics of the operations fundamentally changed and the Claimants withdrew █████ slot machines out of a total of █████ machines deployed.²²⁸ Thus, while on its face, the 2010 Gambling Act did not appear to ban the exercise of the acquired rights of the permit-holders, it achieved that result in large part through that drastic taxation measure.
257. The Respondent argues that the Claimants' Polish subsidiaries withdrew some part of the machines already towards the end of 2009. According to Poland, those machines were removed due to shareholders' disputes and other internal problems within the Claimants' group. While that may or may not have been the case, it remains undisputed that a large portion of the machines were withdrawn as a result of the POG increase after the 2010 Gambling Act entered into force. The exact number of machines withdrawn for the reason of the POG increase is a matter for the quantum and not liability.
258. Poland further argues that in sensitive industries like gambling, high taxes are to be expected and that by increasing the POG it brought the charges applicable to the low-stake gambling in line with the tax rate applicable to casinos and saloons. The Tribunal does not find these arguments availing in the particular circumstances of this case. The Parties do not seem to dispute that low-stake gambling is not comparable to gambling at saloons and casinos in terms of the stakes involved or

²²⁷ Bulletin of the Parliamentary Commission, 18 November 2009, **Exh. C-57**.

²²⁸ SoC, 223, **Exh. C-19**.

revenues generated. The Claimants would not thus reasonably expect that the tax rate applicable to low- and high-stake gambling would be equalized. In fact, the 2003 Amendment contemplated a gradual moderate increase in the POG up until 2006. Thereafter, the POG rose only once more in 2008, but still somewhat moderately.²²⁹ The drastic increase to [REDACTED] is far outside the diapason of the previous changes and cannot be divorced from the circumstances surrounding its promulgation, which were designed to bring the low-stakes gambling industry as it had existed since 2003 to an end. In the Tribunal's view, it was designed to hasten the industry's exit and having regard to the division of revenues previously negotiated with the customers in light of the previous taxation regime the new POG rendered the use of many existing permitted machines economically unviable. Such an increase could thus not have been reasonably foreseen when the Claimants invested in the Polish low-stake gambling industry and acquired specific rights under the gambling permits.

259. Therefore, by drastically increasing the POG in 2010, Poland breached its previous commitment to allow the low stake gambling pursuant to the terms of the gambling permits. Such conduct was "a measure taken by the former Contracting Party with respect to the essential aspects pertaining to the conduct of business" within the meaning of Article 8(1) of the Treaty and impaired the Claimants' acquired rights under the permits to operate pursuant to the permits' terms for the duration of their terms in contravention with the Claimants' legitimate expectations and thus constituted a violation of Article 3(1) of the BIT. In finding so, the Tribunal does not opine on how much would be a reasonable or justified increase in the POG. It is the part of the quantum analysis to establish the more likely tax increase in the absence of Poland's breach of the BIT.

(e) Impounding of Bank Machines

260. The Claimants contend that Poland breached the FET standard by testing and impounding slot machines with so called "Bank" function, while such machines had been previously approved by the Testing Institutes. The Respondent argues that the Bank Machines allowed stakes and wins higher than permitted by law and should have been removed from the market. It remains, however, that for years, the Testing Institutes, which were authorized by law and by the Ministry of Finance to test and approve slot machines had been approving Bank Machines. The Claimants do not

²²⁹ It increased from [REDACTED] from 2003 to 2006, and to [REDACTED] in 2008.

deny that, like other operators, their Polish subsidiaries operated Bank Machines. It was not until the 2009 Ordinance that the Ministry of Finance issued a clear instruction to the Testing Institutes to discontinue approving Bank Machines.²³⁰

261. As the Respondent suggests, the 2003 Amendment might have established a deficient procedure for the issuance of permits for slot machines in that it allowed Testing Institutes to approve machines without undertaking any meaningful examination. This argument might well justify Poland's decision to reform the system in 2010 and will be discussed in the following sub-section when addressing the rational policy justification for the 2010 Gambling Act.

262. That being said, Poland could not put the burden resulting from the mending of its deficient regulatory oversight entirely on specific private operators who had legitimate expectations to which the state subscribed while that deficient regulatory system was executory. When they entered the Polish market, the Claimants' subsidiaries could not but operate under the existing rules, as applied by the Testing Institutes, to which the Ministry of Finance had delegated the testing and certification of the slot machines for compliance with the law. As the state-authorized Testing Institutes were routinely approving Bank Machines, the Claimants' only option to stay competitive in the market was to seek the necessary approvals and operate Bank Machines.²³¹ Even if the Claimants believed that the Bank Machines "pushed the envelope" of compliance with the provisions of the 2003 Amendment, they sought and relied on the certification of the Testing Institutes, which were specifically authorized by the state to test the compliance of slot machines.²³² When they did so, they received positive reports.²³³

263. During the hearing, the Respondent's witness Ms. M [REDACTED] noted that in her opinion an operator was under a duty to retest an already approved machine if it discovered that the machine was paying out more than the permitted amount as a

²³⁰ **Exh. C-64.**

²³¹ See supra ¶195.

²³² As the Claimants admitted in their Reply, "...as in any competitive market, the interpretation applied by the testing institutes was used to the extent possible in order to operate gaming machines that were most appealing to players. Any operator that would not do so would naturally lose revenue because of players choosing competitors' machines instead." Reply, ¶7.

²³³ In this regard, the Tribunal notes that the Respondent has not alleged, much less proven, that the Claimants or their subsidiaries obtained the approvals by corruption.

single win.²³⁴ The Tribunal does not share this understanding. If a particular machine has been approved by the authority and in accordance with the procedure contemplated by law, the operator is under no obligation to retest the machine except in cases of a material change in the circumstances upon which the approval was granted, such as a breaking of the seal or a need for change in the approved software.

264. An approval from a Testing Institute and the subsequent issuance of the permit gave the operator a specific assurance that the approved machine would be allowed to operate under the terms of the permit. Such understanding was shared by the Supreme Administrative Court of Poland, which confirmed that the authorities could not bypass an approval of the machine issued by a Testing Institute.²³⁵ Thus, based on the approvals of the machines and the relevant permits, the Claimants had a legitimate expectation that their Bank Machines would be allowed to operate on the market for the permitted period of time.
265. It is undisputed that Customs Chambers conducted *ad hoc* testing which resulted in seizures of a number of slot machines held by the Claimants' Polish subsidiaries. The Claimants submit that in some cases the reason for the seizures was that the machines were operating by the Bank function, irrespective of the fact that such machines had been approved by the Testing Institutes. As explained above, such conduct, if proven, would be contradictory to the approvals issued by the Testing Institutes, as well as to the terms of the permits and thus would breach the Claimants' legitimate expectations.
266. That being said, the Claimants have not proffered any evidence showing that the Customs Chambers revoked the machines for the sole reason that they operated with the Bank function. It is undisputed that the Customs Chambers also discovered a number of other irregularities, such as broken seals and altered software. It was for the Claimants to show in which specific cases the authorities revoked the registration of the machines purely by reason of the Bank function. The record does not contain the specific decisions on revocation of the machine registrations. Nor does it show how many of the revoked machines (if any) were indeed revoked due to the Bank function. Under these circumstances, the Tribunal cannot but find that

²³⁴ Transcript, Day 2, 25:6-11.

²³⁵ Judgment of the Polish Supreme Administrative Court, Case no. II GSK 1031/11, 29 November 2011, **Exh. C-63**, p. 5.

the Claimants failed to discharge their burden of proving the alleged violation of the Treaty.

ii. Rational policy

267. It is common ground between the Parties that the FET standard requires that governmental measures be taken in furtherance of public policy objectives.
268. The Tribunal agrees with the Respondent that a sovereign state deserves a degree of deference in its determinations of public policies. As stated by the *LIAMCO* tribunal, a state is “free to judge for itself what it considers useful or necessary for the public good.”²³⁶ Indeed, policy-making and choosing between conflicting or competing demands, often in situations of less-than-perfect information, is an inherent function of the government and except in clear cases of abuse, treaty tribunals ought to respect the government’s policy preferences.²³⁷ A number of tribunals have found that it is not for them to second-guess the policy choices of governments.²³⁸

²³⁶ *Libyan Am. Oil Co. (LIAMCO) v. Libyan Arab Republic*, 20 I.L.M.1, Award, 1977, p. 58.

²³⁷ *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶¶294-96.

²³⁸ The point was first made in *S.D. Myers Inc. v. Canada*, where it was stated in the course of considering the NAFTA’s fair and equitable treatment standard, that the standard does not create an:

[. . .] open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes...”

The tribunal also noted that its determination: “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.” *S.D. Myers, Inc. v. Canada*, Partial Award of 13 November 2000, ¶¶ 261, 263.

This approach has been quoted with approval by other tribunals. For example, in *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3 and *Talsud S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award of 16 June 2010, Part VI, ¶ 26(d) the tribunal observed:

[. . .] as to “deference”, the Tribunal accepts the Respondent’s submissions to the effect that this Tribunal should not exercise “an open-ended mandate to second-guess government decision-making”, in the words of the arbitration tribunal in S.D.

269. In the present case, the Respondent contends that it aimed at eliminating gambling addiction and related effects of increased crime and impoverishment. The Tribunal defers to Poland's choice of those objectives as legitimate. The Claimants agree that gambling can become addictive and its impact to individual lives should not be understated.²³⁹ They complain, however, that Poland failed to investigate the adverse effects of machine gambling prior to introducing the 2010 Gambling Act. According to the Claimants, the available data did not show that "gambling addiction was an area of concern in Poland."²⁴⁰ In this regard, they rely on the 2009 letters from the Ministry of Health, which confirm a low number of registered gambling addicts in Poland at the time.²⁴¹ Poland admits that it had no empirical data on the scale of the machine gambling addiction when taking the measures. Its key witness, Mr. K [REDACTED] stated that at that time "there was no research conducted in Poland on the social influence of gambling"²⁴² and the government relied on sporadic evidence of individual cases of gambling addiction and its adverse consequences, including those witnessed by customs law enforcement officials during inspections of low-stake gambling operations at bars and other establishments.²⁴³

Myers. Accordingly, in assessing the Respondent's conduct later in this Award, this Tribunal accords to the Respondent a generous measure of appreciation, applied without the benefit of hindsight.

Likewise, in *Cargill Inc. v. United Mexican States*, the tribunal, having also endorsed *Myers'* approach, observed: "an actionable finding of arbitrariness must not be based simply on a tribunal's determination that a domestic agency or legislature incorrectly weighed the various factors, made legitimate compromises between disputing constituencies, or applied social or economic reasoning in a manner that the tribunal criticizes." ICSID Case No. ARB(AF)/05/2, Award of 18 September 2009, ¶292; see also *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL Award of 17 March 2006, ¶284:

Even though Article 3 obviously leaves room for judgment and appreciation by the Tribunal, it does not set out totally subjective standards which would allow the Tribunal to substitute, with regard to the Czech Republic's conduct to be assessed in the present case, its judgment on the choice of solutions for the Czech Republic's. As the tribunal in *S.D. Myers* has said, the "fair and equitable treatment" standard does not create an "open-ended mandate to second-guess government decision-making".

²³⁹ Reply, ¶209.

²⁴⁰ Reply, ¶210.

²⁴¹ **Exhs. C-96 and C-144.**

²⁴² K [REDACTED] WS1, ¶34.

²⁴³ See S [REDACTED] Witness Statement, **Exh. RWS-4**, ¶22; Transcript, Day 2, 84:24-85:9, and M [REDACTED] RWS-2; Transcript, Day 2, 5:13-7:15.

270. Be that as it may, the Tribunal is not to judge Poland's diligence in choosing its policies. As explained above, Poland deserves a degree of deference in this regard. While the Treaty prohibits arbitrary decision-making, it does not set standards of diligence for the Contracting States in choosing their policy objectives. The Tribunal fails to see arbitrariness in Poland's decision to eliminate gambling addiction, even though such decision was taken based on information on individual cases and not an empirical research.

271. The Claimants further argue that the government's and specifically PM Tusk's underlying objective was to cope with political consequences of the Lobbying Scandal by appearing tough on the gambling industry in order to "restore public confidence in his government".²⁴⁴ The Tribunal is not convinced that such political motivations, even if proven, would undermine the legitimacy of the chosen objectives. Elected politicians often take decisions based on considerations of public countenance. Such decisions are not illegitimate for the sole reason that they are dictated by the prevailing popular opinion. As explained by the *Electrabel* tribunal:

[P]olitics is what democratic governments necessarily address; and it is not, ipso facto, evidence of irrational or arbitrary conduct for a government to take into account political or even populist controversies in a democracy subject to the rule of law.²⁴⁵

272. In addition, the 2010 Gambling Act was not an individual decision of PM Tusk. Rather it was approved by the Cabinet of Ministers and ultimately adopted by a vast Parliamentary majority.²⁴⁶ The Tribunal is hence convinced that Poland's proclaimed objective to eliminate gambling addiction and the related adverse social effects was legitimate.

273. That being said, a finding that the choice of a given policy is legitimate does not end the enquiry. It should also be established that the contested measures were taken in furtherance of the chosen policy objectives. In other words, there should be a reasonable or logical nexus between the measures in question and the proclaimed public policy objectives.²⁴⁷ The Tribunal should thus also examine whether the 2010

²⁴⁴ Message of 3 November 2009 from the US embassy in Warsaw to the US Secretary of State, (WikiLeaks), **Exh. C-34**.

²⁴⁵ *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶¶8.23.

²⁴⁶ Rejoinder, ¶¶215-217.

²⁴⁷ *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶¶294-96.

Gambling Act and other contested measures served the proclaimed public policy objective to eliminate gambling addiction and the resulting social consequences. The idea is not to judge the actual efficiency of the measures in achieving the designated objective and to intervene if the Tribunal thinks that there were better options that should have been employed by the state. Rather, it should be analyzed whether the measures were taken in furtherance of the chosen policy objectives and were at least capable of achieving such objectives.

274. The 2010 Gambling Act prohibited machine gambling and established a phase-out period for the existing slot machine operators. In this sense, the nexus between Poland's proclaimed policy objectives and the 2010 Gambling Act is apparent. The Claimants argue that the ban on slot machines in fact contributed to the growth of the gray market which is harder to control and poses a greater hazard of addiction, tax evasion and criminal activities. The Respondent does not deny the existence of the gray market in Poland. This does not, however, render the 2010 Gambling Act illegitimate. As explained above, the Treaty does not mandate the Tribunal to test the efficiency of the governmental measures. Even if the ban on gambling machines did not succeed in eliminating the adverse social effects of gambling addiction, this would not amount to a violation of the FET standard. It suffices that the ban on gambling bore a reasonable nexus with the proclaimed public policy objectives. It is unsurprising that some operators would seek to exploit the unsatisfied demand for gambling resulting from the ban and it is common for governments to continue to have to take other related legislative, regulatory, or enforcement steps against something which is sought to be prohibited.
275. A further objective of the 2010 Gambling Act was to redress deficiencies of the existing regulatory system. The Claimants agree that the 2003 Amendment contained a number of gaps. During Ms. M [REDACTED] cross-examination, the Claimants' counsel sought her admission multiple times that the 2003 Amendment did not provide clear definitions of the terms "Stake", "Game" and "Win".²⁴⁸ This allowed Testing Institutes to adopt interpretations favorable to the industry and which regulators, the executive and indeed Parliament could consider were not what was intended by the liberalization effected in 2003. It is also undisputed that under the approval system designed by the 2003 Amendment, Testing Institutes had a direct financial incentive to attract more operators by issuing positive rather than negative reports. This undermined their independence and made them prone to

²⁴⁸ Transcript, Day 2, pp. 32-33.

making one-sided decisions. The Respondent adduced evidence that a small number of institutes who not coincidentally were responsible for issuing the largest numbers of certifications even went so far as to issue approvals without having examined the machines and in some cases before they were even imported into Poland.²⁴⁹ The Claimants do not contest these inherent flaws in the regulatory system. They contend, however, that they had no choice but to adapt to the system in order to survive in the competitive market. This argument does not, however, alter the fact the 2003 Amendment was deficient in multiple respects and a government could reasonably conclude that it called out for change.

276. The Claimants further contend that the 2010 Gambling Act was unnecessary as the 2009 Ordinance had already addressed the issue of Bank Machines that were allegedly operating above the permitted stake and win limits.²⁵⁰ Similarly, according to the Claimants, the alleged problem of insufficient control over the technical compliance of the machines had been addressed by the 2009 amendment to the Customs Act.²⁵¹ The Tribunal is not convinced. The Claimants did not dispute that prior to the entry into force of the 2009 Ordinance, the gambling industry managed to obtain authorizations for a number of Bank Machines exceeding their then current needs, which would allow them to operate over the following years. The 2009 Ordinance could not therefore fully remedy the situation in the market. Nor could the 2009 amendment to the Customs Act offer a definitive solution of the problems related to the operation of Bank Machines. It is true that the 2009 amendment allowed the Customs Chambers to conduct *ad hoc* testing of slot machines. However, the Customs Chambers had neither the administrative nor the financial resources individually to control over [REDACTED] then operating in the market. The Tribunal therefore accepts Poland's position that a more systemic solution, such as the one proposed by the 2010 Gambling Act, was warranted.

iii. Reasonable measures

277. The Claimants argue that the manner in which the 2010 Gambling Act and the related measures were adopted and implemented were unreasonable. They impugn several aspects of Poland's measures which will be dealt with in turn below.

²⁴⁹ SoD ¶¶85-91; Exhs. C-15, R-034, R-040, and R-112.

²⁵⁰ Exh. C-64.

²⁵¹ Exh. R-52, Article 32.13.

(a) *Legislative Process*

278. The Parties diverge on whether the legislative process leading to the promulgation of the 2010 Gambling Act was reasonable. The Claimants do not contest that the legally prescribed time limits for the adoption of legislation were met. They argue, however, that Poland failed to conduct meaningful public consultations and inflicted unreasonable damage to the slot machine operators by the hasty enactment of the controversial 2010 Gambling Act.
279. The Tribunal is unconvinced that the pace of the adoption of the 2010 Gambling Act can itself rise to the level of a Treaty breach. Although the legislative process was unprecedentedly short, it did not violate the legally prescribed time limits. It is obvious given the FET standard's generality of phrasing and its inclusion in treaties between states of markedly different governmental structures and legal and political cultures that it cannot purport to prescribe how states' legislative processes should operate, let alone prescribe how a state should, if at all, engage in public consultations. Public consultations are far from being a universal practice. Even in representative democracies, parliaments can adopt legislation very quickly and without consulting the stakeholders, especially if the constitution and applicable laws do not require such consultation.²⁵² Indeed, as stated by the *Paushok* tribunal, an absence of public consultations does not amount to a treaty violation as "[l]egislative assemblies in all countries regularly adopt legislation within a very short time and, sometimes, without debates, especially if there is urgency and there is unanimity of views among parliamentarians."²⁵³
280. In the present case, Poland gave time, albeit short, to the relevant stakeholders to express their views before its adoption of the 2010 Gambling Act. In fact, a major representative of the gambling industry, Izba, not only used the opportunity to criticize the proposed legislation but managed to elaborate an alternative draft proposal to amend the 1992 Gambling Act.²⁵⁴ It is true that the proposal did not go through and Poland only implemented a very limited number of changes proposed by the stakeholders. Holding public consultations does not, however, oblige the government to necessarily share the proposals arising in the course of that process.

²⁵² The Claimants have not pointed to any contemporaneous law that would require public consultations.

²⁵³ *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, **Exh. RLA-023**, ¶304.

²⁵⁴ Letter of 30 October 2009 from Izba to the Deputy Minister Kapica, **Exh. C-43**; See also **Exh. C-46**.

More so when the parliament is virtually unanimous in adopting the originally proposed act.

281. Thus, the limited public consultations and the speed with which Poland adopted the 2010 Gambling Act did not breach the Treaty standard of FET.

(b) EU Notification

282. The Parties diverge on whether Poland's alleged failure to notify the EU Commission of certain provisions of the 2010 Gambling Act constituted a breach of the FET standard. The Claimants contend that a breach of the EU law is by definition a breach of international law for which Poland should be held liable. The Respondent argues that its failure to notify the EU Commission was a genuine error not amounting to a violation of the Treaty.

283. The Tribunal recalls that its mandate in this arbitration is limited to resolving the legal dispute concerning Poland's alleged violations of the BIT.²⁵⁵ It cannot, therefore, examine Poland's compliance with international law in general and the EU law in particular, unless it is established that such violation is also capable of amounting to a breach of the BIT. The BIT does not contain a blanket provision requiring the Contracting States to observe their international law obligations and giving an investor standing to challenge alleged breaches of any and all such obligations. The Claimants do not provide authority that would suggest that the FET standard requires such general compliance with international obligations, many of which (such as those enforced by the European Court of Justice whose judgment is relied upon by the Claimants in this case²⁵⁶) contain their own mechanisms for ensuring compliance therewith. If such were the case, the scope of the BIT would necessarily have to be drafted in a markedly broader and more explicit fashion. Absent clear language in the Treaty requiring a tribunal to determine a Contracting Party's compliance with the full range of its international obligations, the Tribunal cannot assume that the Contracting States undertook such an all-encompassing commitment under the BIT.

²⁵⁵ Relief Sought by the Claimants, paragraph 42 of the Terms of Appointment.

²⁵⁶ As regulated by the Treaty on the Functioning of the European Union, which provides a self-contained mechanism for the settlement of disputes and compliance between the European Commission and a Member, where that Member is accused by the Commission of failing to fulfil an obligation required under EU law.

284. In any event, even if the violation of the notification requirement were to fall within the BIT's ambit, EU law itself contemplates the consequences of a violation of that requirement within the legal order established by the Treaty of Rome, as it was called at the time when the corresponding directive was issued.²⁵⁷ Namely, if the violation is established, the un-notified norms cease to apply.²⁵⁸ Thus, the notification requirement of the EU Directive 98/34 does not envisage an individual's right to seek redress for the state's failure to notify a piece of legislation.
285. A separate question is whether Poland may be held liable under the Treaty for persevering in its application of the provisions of the 2010 Gambling Act which had been declared inapplicable for a lack of notification. In this regard, the Tribunal agrees with the Claimants that Poland's alleged noncompliance with the CJEU Judgment, if established, might arguably amount to a violation of the principles of the rule of law and thus the FET standard.
286. That being said, the CJEU Judgment is clear that the issue of applicability of the un-notified provisions is "a matter for the referring court to determine."²⁵⁹ The court has not declared the provisions of the 2010 Gambling Act inapplicable. It was left to Poland and specifically to its judiciary to form its own opinion on the matter. It is true that the CJEU ruled that Article 14(1) of the 2010 Gambling Act, which prohibits gambling on slot machines outside casinos "must be classified as a 'technical regulation'" and should have been notified to the EU Commission.²⁶⁰ It did not, however, declare that the provision was inapplicable.
287. The CJEU Judgment resulted in conflicting decisions of the Polish courts. A number of courts quashed decisions from the Customs Chambers refusing to grant permit prolongations and address amendments.²⁶¹ The Administrative Court of Gdansk Voivodship, for instance, opined that the relevant provisions of the 2010 Gambling

²⁵⁷ EU Directive 98/34, 22 June 1998, **Exh. C-70**, Article 1(11), 8.

²⁵⁸ CJEU Judgment, Case No. C-194/94, 30 April 1996, **Exh. CLA-1**. According to the Court, a failure to notify a technical regulation is "a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals" (¶48).

²⁵⁹ CJEU Judgment, Case No. C-213/11, 19 July 2012. **Exh. CLA-3**, ¶¶25, 40.

²⁶⁰ Mandating the refusal of permit applications registered before the 2010 Gambling Act entered into force.

²⁶¹ Judgments of the Voivodship Administrative Court of Gdansk, 19 November 2012, **Exhs. C-55, C-56**.

Act were inapplicable and thus the applications for permits should have been decided in accordance with the legal regime of the 2003 Amendment.²⁶²

288. The Supreme Administrative Court adopted a different approach. Instead of declaring the relevant provisions of the 2010 Gambling Act inapplicable, it rather addressed a request to the Constitutional Tribunal to determine whether the failure to comply with the EU procedural rules rendered the 2010 Gambling Act unconstitutional.²⁶³ In turn, the Criminal Chamber of the Supreme Court considered that the Polish common courts and other governmental bodies should have ignored the provisions which were not notified to the EU Commission.²⁶⁴
289. The government put the controversy to an end when it decided in 2014 to re-notify the contested provisions and thus reestablish the integrity of the 2010 Gambling Act.²⁶⁵
290. Poland's failure to notify the EU Commission created uncertainty in the gambling market and made the 2010 Gambling Act less efficient. The FET standard does not, however, require that kind of efficiency. Nor does it condemn judicial or administrative organs for diverging in their interpretations of normative acts. To do so would be to require a degree of judicial consistency (or to put it another way, judicial intolerance of divergent views of individual courts) that, to the Tribunal's knowledge, is not exhibited in any of the principal legal systems of the world.²⁶⁶ As

²⁶² Judgments of the Voivodship Administrative Court of Gdansk, 19 November 2012, **Exh. C-55**.

²⁶³ Supreme Administrative Court Order, Case No. I KZP 15/13, 28 November 2013, **Exh. C-76**; Supreme Administrative Court order, Case No. II GSK 686/13, 15 January 2014, **Exh. C-74**.

²⁶⁴ Supreme Court order, Case No. II KK 55/14, 27 November 2014, **Exh. C-77**.

²⁶⁵ See ¶¶81-85 above.

²⁶⁶ The fact-specific nature of legal disputes, combined with inevitable diversity of judicial decision-making and opinion within national legal systems, is reflected in international law's treatment of the acts of the judiciary when applying the denial of justice rule. The rule does not permit an international tribunal to act as a court of appeal for the review of determinations of national law, nor does it permit an international tribunal to review national court decisions for substantive denial of justice. As Paulsson noted in his treatise on Denial of Justice, "...in modern international law there is no place for substantive denial of justice. Numerous international awards demonstrate that the most perplexing and unconvincing national judgments are upheld on the grounds that international law does not overturn determinations of national judiciaries with respect to their own law." Jan Paulsson, *Denial of Justice in International Law*, (CUP, 2005) p. 82. For a recent example, see *Philip Morris Brands Sarl, Philip Morris Products S.As. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, where the tribunal observed at ¶528 that: "...arbitral tribunals should not act as courts of appeal to find a denial of justice, still less as bodies charged with improving the judicial architecture of the State."

explained above, a Treaty breach could be arguably established if it were found that Poland's executive organs acted in contravention with specific judicial decisions. The Claimants have not, however, established that the Customs Chambers or any other administrative organs continued applying the provisions of the 2010 Gambling Act when ordered differently by a court decision in a specific case. That different district courts disagreed on the consequences of Poland's failure to notify the relevant provisions cannot rise to the level of a Treaty breach.

(c) *Impounding of Machines*

291. The Claimants complain of the *ad hoc* testing and seizures of slot machines conducted by the Customs Chambers. They argue that the customs officials lacked required qualifications to conduct the tests. The Respondent rejects the allegation, stating that the tests were conducted in full compliance with the existing legislation.
292. It is undisputed that a sovereign state has full authority to control compliance with its existing laws and regulations. The Treaty does not in any way restrict Poland's ability to adopt reasonable measures to ensure that the legal conditions for a particular economic activity are met. In this regard, the Tribunal recalls that the 2009 amendment to the Customs Act authorized the customs officials to conduct *ad hoc* testing of the machines. The impugned examinations conducted by the Customs Chambers thus had a normative legal basis. The Tribunal fails to see anything unreasonable in the manner in which the examinations were conducted.
293. The Claimants assert that the testing consisted solely in playing the machines. They fail to explain, however, why that would be unreasonable. It appears to the Tribunal that a number of purported irregularities, such as excesses of the stake and win limits, can be detected by simply playing a machine. In any event, as Ms. M ██████ testified in her witness statement, the customs officials in fact received instructions on how to test the machines.²⁶⁷ This was confirmed during her cross-examination at the hearing.²⁶⁸
294. A separate question is whether the Government had the authority to revoke permits pursuant to negative results of *ad hoc* examinations. Polish courts had diverged on this matter up until the Supreme Administrative Court found in November 2011 that a negative report of an authorized Testing Institute was necessary to revoke a

²⁶⁷ M ██████ WS, ¶144.

²⁶⁸ Transcript, Day 2, 26:10-14.

permit.²⁶⁹ Prior to that, the Customs Chambers had revoked a number of permits of the Claimants' subsidiaries. This included Grand's permits 'Wrocław 2' and 'Wrocław 3', and 'Zielona Góra 2' revoked on 27 May 2011. After Grand appealed before the respective Voivodship courts, the revocation decisions were either repealed by the Customs Chamber or quashed by the courts.²⁷⁰ The Claimants have not referred to any instance when the Customs Chambers failed to implement the relevant rulings of the Polish courts. Thus, if the Customs Chambers exceeded their authority by revoking permits without a negative report from a Testing Institute, this was redressed within the Polish legal system and the consequences of the initial excess of authority are not apparent.²⁷¹ The Tribunal therefore concludes that the revocation of permits as a result of *ad hoc* testing did not breach the FET standard.

(d) Preemptive Application of the 2010 Gambling Act

295. The Claimants contend that Poland's administrative organs effectively started applying the provisions of the 2010 Gambling Act prior to its entry into force. In particular, they allege that the Customs Chambers ceased issuing permits or prolonging existing ones as from PM Tusk's announcement of the war on gambling on 27 October 2009. The Respondent states that the Customs Chambers had discretion to prolong the legally prescribed time limit for the issuance of permits and thus could have waited until the entry into force of the new law.
296. It is undisputed that the FET standard guarantees legal certainty and the rule of law. This entails that executive organs should not withhold benefits contemplated by the applicable legal regime. This does not mean that any violation of domestic law will amount to a breach of the FET standard. However, when an administrative organ deliberately refuses to act in accordance with the existing legal regime, the principle of legality and the rule of law are implicated and the conduct can be found to constitute a Treaty violation.
297. That being said, the Claimants do not contend that the authorities exceeded the legally prescribed time limits for making their decisions on the issuance or

²⁶⁹ Judgment of the Supreme Administrative Court, 29 November 2011, **Exh. C-63**.

²⁷⁰ See ¶31 above.

²⁷¹ As the tribunal in *EnCana Corporation v. Republic of Ecuador* found: "Under a bilateral investment treaty executive agencies must be able to take positions on disputable questions of local law, provided that they act in good faith, the courts are available to resolve the resulting dispute, and judicial decisions adverse to the executive are complied with." *EnCana Corporation v. Republic of Ecuador*, Final Award, footnote 138.

prolongation of the permits. Pursuant to Article 36(4) of the 2003 Gaming Act, the holder of a permit was entitled to apply for prolongation no later than six months prior to the expiration of the permit and no sooner than a year before the expiration date of the permit. The Claimants rather contend that the Customs Chambers deliberately withheld their decisions until the entry into force of the 2010 Gambling Act. This is an allegation which requires supporting evidence.

298. The Claimants primarily rely on the whistle-blower letter of an unidentified director of a Special Tax Supervision Department published by the gambling industry affiliated magazine - Interplay.²⁷² The letter mentions in vague terms that “[t]he Customs Chamber has suspended issuing any decisions as well.” Leaving aside the evidentiary value of such document’s reliance on an anonymous source, the letter does not support the allegation that the Customs Chambers made a deliberate decision not to abide by the applicable law. The mere fact that they “suspended issuing any decisions” does not prove that they acted against the provisions of the 2003 Amendment, much less that they did so intentionally. Indeed, when they considered that the applicable law left no discretion, the Customs Chambers made decisions on the permit applications prior to the entry into force of the 2010 Gambling Act.²⁷³
299. The Claimants further invoke Izba’s letter of 30 October 2009 denouncing the refusals to grant permits “even when such permit should be issued under the law still in force.”²⁷⁴ This letter is dated only three days after PM Tusk’s press-conference and cannot therefore be describing the Polish authorities’ conduct that allegedly took place until the entry into force of the 2010 Gambling Act on 1 January 2010. In addition, it emerges from the record that there have been no actual refusals from the Customs Chambers during this period. Rather, the allegation concerns the Customs Chamber’s purported deliberate standstill on making decisions, whether positive or negative. As described above, no credible evidence of such intentions seems to be available.
300. The Claimants also rely on Mr. S [REDACTED] who explains in his witness statement that certain permit applications on which he had received positive responses from the Customs officials over the phone were subsequently not issued and eventually

²⁷² Exh. C-67.

²⁷³ V [REDACTED] WS, ¶135, admitting that the Kraków 1 permit was prolonged on 18 December 2009.

²⁷⁴ Letter of 30 October 2009 from Izba to Deputy Minister Kapica, Exh. C-43, ¶2.

rejected upon the entry into force of the 2010 Gambling Act. This statement, even if factually accurate, would not suffice to prove the Customs Chambers' deliberate refusal to apply the applicable law.

301. The Claimants admit that the authorities would customarily extend the initial 6-month deadline for the issuance of the permits due to the hurdles arising out of the internal procedure or the need for clarifications.²⁷⁵ That is why there was nothing unusual in the Customs Chambers taking longer than 6 months in the period of the alleged standstill. This is more so, given that in the period of the alleged standstill the Customs Chambers had just taken over the duty of issuing gambling permits from the Tax Chambers.²⁷⁶ This change into the Customs Act, which took effect from 31 October 2009,²⁷⁷ would necessarily affect the speed and efficiency of the permitting process. In these circumstances, a mere delay in issuance of the permits, which the Claimants agree is not itself a violation of the then applicable law, does not suffice to establish Poland's intention deliberately to withhold the benefits of the 2003 Amendment to the machine operators.
302. The Claimants' contention that the authorities imposed a standstill over the issuance of permits is further belied by the fact that during the period between PM Tusk's press-conference and the entry into force of the 2010 Gambling Act the Customs Chambers did dispose of some permit applications. For example, the Claimants admit that their Kraków 1 permit was prolonged on 18 December 2009.²⁷⁸
303. Therefore, the Tribunal does not find evidence in the record sufficient to establish Poland's deliberate decision to introduce a standstill on the issuance of gambling permits upon applications made prior to the entry into force of the 2010 Gambling Act.

²⁷⁵ The Claimants' letter of 22 July 2016 in response to the Tribunal's questions, ¶37.

²⁷⁶ SoD, ¶567.

²⁷⁷ Amendment to the Customs Act, **Exh. R-52**.

²⁷⁸ V [REDACTED] WS, ¶35 (supra fn. 274).

3. Impairment

a. Claimants' position

304. The Claimants agree with the Respondent that the obligation not to impair investments by unreasonable measures contained in Article 3(1) of the BIT overlaps with the obligation to ensure FET. They thus rely on the facts underlying their FET claim. The Claimants request the Tribunal to find that the above mentioned measures – if not individually, then at least in the aggregate – (i) were unreasonable, and (ii) clearly impaired the Claimants' investment.²⁷⁹

b. Respondent's position

305. For the Respondent, the Claimants' general statement that the measures were unreasonable and impaired their investment does not suffice to establish a violation of Article 3(1) of the BIT. Poland disagrees with the Claimants and maintains that the contested measures were reasonable because they were taken in good faith and in pursuit of important public policy objectives. The Claimants' allegation on the breach of the non-impairment standard should thus fail.²⁸⁰

c. Analysis

306. In light of the Parties' agreement that the standard of non-impairment overlaps with FET and in particular with the requirement of reasonableness discussed above, the Tribunal will not examine Poland's compliance with that standard separately. The Tribunal does not consider that evaluating the measures already tested under the broader FET standard would lead to a different result. It suffices to state that Poland's measure found to be in breach of the FET standard also breach the non-impairment standard contemplated by Article 3(1) of the BIT.

²⁷⁹ Reply, ¶314.

²⁸⁰ Rejoinder, ¶¶247-249.

D. QUANTUM

307. The Parties disagree on the valuation of damages allegedly suffered by the Claimants as a result of the Respondent's measures. The Claimants rely on the expert report of Dr. Pieter Christiaan van Prooijen RV and Dr. Inge-Lisa Toxopeus-de Vries RA of Hermes Advisory BV (**Hermes**) to quantify the injury, while the Respondent rebuts the Claimants' calculation in reliance on the expert report of Mr. Timothy Hart CPA CFE of Credibility International LLC (**Hart**). The Claimants' quantification of damages was initially based on the premise that the Tribunal would find all of the impugned measures to be unlawful. However, the Claimants requested to "be allowed to submit a revised damages report, tailor-made to the specific breaches established by the Tribunal" if it were to find "that no deprivation took place and that the Claimants' investment was impaired only to a limited extent".²⁸¹
308. After the evidentiary hearing, the Tribunal formed a preliminary view that Poland could be held liable for certain but not all measures complained of by the Claimants. As a result, on 24 June 2016, the Tribunal sought the Parties' assistance in quantifying damages arising out of the relevant potential breaches of the BIT. More precisely, it posed the following questions to the Parties:

"Premise for the Questions:"²⁸²

- (i) If the Tribunal establishes that Poland's following measures breached the BIT:
- The increase in the POG to [REDACTED] instead of a more moderate increase;
 - The seizures of some slot machines in relation to their so-called "Bank" function, although such machines had been approved by Testing Institutes; to avoid any ambiguity, the question does not relate to machines that would not have been seized for that reason but for others, e.g. because of an alleged tampering with the approved machines like adjusting/tweaking their software;
 - The failure to take decision in the legally prescribed time limit on the applications for new permits and/or for renewing old permits in the period between 27 October and 31 December 2009.

²⁸¹ Reply, ¶315.

²⁸² The Tribunal takes note of the Claimants' statement that if the liability is partially established, the Claimants are ready to supply the amended quantification of damages, Reply, ¶315.

(ii) And, if the Tribunal finds that Poland's other conduct, including the following, did not constitute a violation of the BIT:

- The legislative process leading to the adoption of the 2010 Gambling Act, including the alleged absence of the notification to the EU Commission;
- The ban on gambling outside casinos, and thus the ban, as of 1 January 2010, on issuing new permits for operating slot machines;
- The ban, as of 1 January 2010, on renewing the existing permits;
- The ban, as of 1 January 2010, on changing the addresses of the permitted locations.

Questions:

1. But for the (assumedly) unlawful measures in section (i) above, but considering the (assumedly) lawful measures in section (ii), what would be the amount of the net cash flows (*i.e.* sums distributable to the shareholders) earned by the Claimants' Polish subsidiaries in the period from 1 January 2010 until the expiry of their last permits? Is there enough evidence in the record to perform such valuation? If so, please, cite/quote the sources in the record used to calculate that amount.

2. Should interest accrue on such amount(s)? If so, from what date(s) and at what rate?

The above questions do not constitute or otherwise indicate a definitive ruling on liability. Such ruling, if any, will be contained in the decision, which the Tribunal will render in due course. At the same time, the questions should not prompt the Parties to reargue the matters already addressed in their written pleadings and during the evidentiary hearing. The Claimants are requested to provide short answer to the above questions (possibly with a valuation sheet) on or before **22 July 2016**. The Respondent then shall have an opportunity to reply by **19 August 2016**. The Parties shall not introduce new documentary evidence or legal authorities with their respective answers.²⁸³

309. On 22 July 2016, the Claimants responded with a revised valuation sheet. On 29 August 2016, the Respondent replied with procedural objections to the Tribunal's letter and also with a number of arguments on jurisdiction, liability and quantum. To address the Respondent's concerns, the Tribunal allowed the Parties to exchange another round of briefs, and specifically intimated that the Respondent could

²⁸³ The Tribunal's letter of 24 June 2016 to the Parties.

introduce its own valuation sheet if it so wished. The Parties used that opportunity. In particular, the Respondent introduced a revised valuation report by Mr. Hart and the Parties then exchanged their final consecutive briefs on 29 September and 10 October 2016. Poland continued to maintain its objections to the procedure resulting from the Tribunal's letter of 24 June 2016.

310. The Tribunal will first address Poland's procedural objections (1). It will then identify the expert opinion on which it will base its quantum analysis (2). It will analyse specific value indicators in order to arrive at the appropriate valuation of the damages suffered by the Claimants as a result of Poland's unlawful measure (3). Finally, the Tribunal will also cover the issue of interest (4).

1. Procedural Objections

311. The Respondent advances a number of objections to the procedure resulting from the Tribunal's 24 June 2016 questions on quantum. The Tribunal will deal with them in turn.

a. Alleged reformulation of the Claimants' case

312. First, the Respondent contends that the Tribunal breached Poland's right to be heard in adversarial proceedings pursuant to Article 32 of the UNCITRAL Arbitration Rules and Article 182(3) of the 18 December 1987 Swiss Federal Private International Law Act (**PILA**). In particular, according to Poland, the Tribunal undertook an inquisitorial function by reformulating the Claimants' case by asking its questions on quantum.²⁸⁴

313. The Tribunal considers this objection unsubstantiated. Assuming *arguendo* that arbitrators should not engage into "*inquisitorial*" conduct and that this Tribunal would have done so, it would remain as discussed in the relevant sections above, that each of the measures that were pointed to in the Tribunal's 24 June 2016 letter were alleged by the Claimants to constitute a breach of the BIT.²⁸⁵ Hence, the measures referred to in the Tribunal's letter and more importantly, the measure that the Tribunal subsequently found to be in breach of the BIT (*i.e.* the POG increase)²⁸⁶ formed part of the legal dispute between the Parties. Moreover, the issue is not

²⁸⁴ Respondent's letter of 10 October 2016, ¶¶4-6.

²⁸⁵ See *supra* Section IV.C.2(c).

²⁸⁶ *Id.*

whether the Parties did discuss these questions, which they actually did, but rather whether the Tribunal in addressing them in this Award would surprise the Parties. Given the Tribunal's questions in its letter of 24 June 2016, the Respondent cannot be surprised with the content of the damages finding in this Award.

314. The Respondent argues that the Claimants' primary case hinged on the expropriation of their investment in Poland and the claims of violation of other lesser standards of treatment were "peripheral".²⁸⁷ It acknowledges however that pursuant to paragraph 3.2 of Procedural Order No. 1 it is the first exchange of written submissions where the Tribunal should seek guidance as to the extent of each Party's claims and arguments.²⁸⁸ The relief section of the Statement of Claim is instructive in this regard. The Claimants unequivocally request the Tribunal to declare that Poland breached the following provisions of the Treaty:

- Article 3(1) by failing to ensure fair and equitable treatment of the Claimants' investments and/or by impairing, by unreasonable and/or discriminatory measures, the operation, management, maintenance, use and/or enjoyment of the Claimants' investments;
- Article 5 by taking measures depriving the Claimants of their investments without the conditions referred to in that Article being fulfilled.²⁸⁹

315. The Tribunal could not disregard the claims concerning the violation of the FET standard for the sole reason that they were allegedly pleaded peripherally. By rejecting the Claimants' primary claim on expropriation and finding a violation of the FET standard, the Tribunal fulfilled its mandate to fully resolve the existing legal dispute between the Parties. For the same reasons, the Tribunal's questions concerning the quantification of damages resulting from that violation have not unduly expanded or otherwise reformulated the Claimants' case. Rather, they were intended to ensure that the Tribunal was given sufficient expert evidence and further submissions from the Parties so as to enable it to determine the damages proximately caused by the measure found to constitute a breach of the Treaty.

²⁸⁷ Respondent's letter of 19 August 2016, ¶20.

²⁸⁸ Respondent's letter of 10 October 2016, ¶18.

²⁸⁹ SoC, ¶449.

b. Alleged unequal treatment

316. The Respondent further complains that the Tribunal's questions gave the Claimants an opportunity to reargue their damages case, while no similar opportunity was offered to the Respondent with respect to the arguments on jurisdiction and liability.
317. This argument is hard to follow. At the outset of this Arbitration, the Parties agreed on a procedural calendar according to which no bifurcation between the liability and quantum was envisaged.²⁹⁰ By that time, the Respondent knew that the Claimants were complaining of a number of measures under multiple treaty standards.²⁹¹ It would have been inefficient if not impossible to require the Claimants to put forward specific valuations for all the different combinations of breaches that the Tribunal could have possibly found. The Respondent's argument that the Claimants already had an opportunity to fully address the quantum²⁹² is therefore misconceived. Given the nature of the present proceedings which have been integrated on jurisdiction, liability and quantum, the Claimants did not have a reasonable opportunity to put forward their quantification of damages for multiple liability scenarios. It would be formalistic and possibly incompatible with the notion of a fair hearing if the Tribunal were to reject the Claimants' claim for damages without giving them a proper opportunity to put forward their valuation based on the Tribunal's preliminary liability assumptions.
318. In fact, acknowledging that their primary valuation case could not cover all the scenarios of partial liability, the Claimants offered both in their Statement of Claim and in the Reply to submit a revised damages report, tailor-made to the specific breaches established by the Tribunal.²⁹³ The Respondent has rightly made no specific objection to that proposition and no such objection would be justified.
319. Therefore, by agreeing to proceedings where the liability and quantum phases were integrated and by not objecting to the Claimants' proposition to offer an updated valuation, Poland accepted the possibility that the Tribunal would require an updated valuation of damages if it were to find a partial liability. The Tribunal's questions of 24 June 2016 did nothing but that. This was the logical and procedurally coherent

²⁹⁰ Paragraph 1 of Procedural Order No. 1.

²⁹¹ Section 3.1 of the Terms of Appointment.

²⁹² Respondent's letter of 10 October 2016, ¶16.

²⁹³ See: Reply, ¶315.

way forward for the Tribunal after it preliminarily identified that only some of the Respondent's measures were capable of constituting breaches of the BIT and that the expropriation finding (the most far-reaching of the breaches alleged in this case) could not be made. Rather than risking misusing and possibly misinterpreting the relevant expert reports by assuming a different set of legal findings than those on which those reports were actually premised, the Tribunal chose to give the Parties and their experts themselves an opportunity to point the quantum evidence relevant in light of its preliminary thinking on a possible liability finding. At the same time, in order to preserve efficiency, for which the Parties chose not to bifurcate the proceedings, the Tribunal made it clear that no additional documentary evidence was to be introduced. Such solution allowed all Parties to properly put forward their case without overly complicating the agreed procedure.

c. Alleged denial of the opportunity to be heard

320. The Respondent initially complained of a lack of opportunity to be heard in connection with the Tribunal's questions on quantum. Even if that concern had been justified, it would have been cured by the Tribunal's subsequent directions to allow the Parties to exchange additional briefs together with valuation reports. Indeed, the Parties took full advantage of this opportunity. The Respondent in particular submitted two additional expert reports.

321. The Tribunal considers that the two exchanges of briefs and expert reports ensured that the Parties had a reasonable opportunity to answer the Tribunal's questions, as well as to address the position of the opposing side. In its last submission of 10 October 2016, the Respondent did not reiterate its request to cross-examine anew the Claimants' quantum expert.²⁹⁴ In any event, in light of the Tribunal's finding in the following subsection, such cross-examination would not have been useful.

2. Hermes v. Credibility

322. In their submissions on quantum, the Parties each rely on the opinion of their valuation experts. The Respondent criticizes the Claimants' expert on multiple grounds. Most importantly, it points to the direct financial incentive that Hermes has in the Claimants' success in this Arbitration. The Respondent does not make a request to declare the Hermes' report inadmissible. Rather, it questions its reliability.

²⁹⁴ Such request was initially made at paragraph 3 of the Respondent's letter of 19 August 2016.

323. At the hearing, counsel for Poland and the Tribunal sought clarifications with respect to the remuneration scheme of Hermes. In response, Dr. Toxopeus de Vries of Hermes made it clear that a part of Hermes' financial remuneration for its expert services is contingent upon the Claimants' success in this arbitration.²⁹⁵ In particular, a part of the payment for Hermes' services will be forthcoming if the Claimants are awarded more than approximately [REDACTED]. Dr. van Prooijen of Hermes expressed the view that this incentive did not affect the independence and impartiality of the Claimants' experts. According to him, the threshold of [REDACTED] is so low that it would only prompt Hermes to be conservative in its quantification of damages, given that it would "prefer for something to be paid out instead of nothing."²⁹⁶
324. Be that as it may, the Tribunal does acknowledge that the Claimants' experts indeed might have a financial incentive in determining the amount of damages. This is the case even if, as Dr. van Prooijen suggests, Hermes' interest was to be conservative. It is not desirable for an independent expert to have a financial incentive tied to any particular threshold of the amount of damages that might be forthcoming.
325. In addition, the overall outcome of Hermes' valuation appears to be overstated when scrutinized *vis à vis* basic value indicators found in the record. In particular, the Tribunal has difficulties accepting Hermes' report at face value in light of the following factors :
- Before receiving the Tribunal's questions of 24 June 2016, Hermes initially valued the Claimants' damages sustained as a result of an alleged unlawful expropriation and multiple violations of the BIT at a figure lower than their current valuation.²⁹⁷ This is counterintuitive and calls for an explanation. Indeed, in case of unlawful expropriation, the Claimants would be entitled not only to the net cash flows in the period 2010-2015, but in addition to the fair market value that their business would have had but for all the measures, including the ban on gambling. In contrast, in the current partial liability scenario, they are only entitled to the net cash flows that they would have generated in the period of 2010-2015 absent Poland's limited breach of the FET standard. Neither Claimants nor Hermes have offered any credible

²⁹⁵ Transcript, Day 2, 137:3-8.

²⁹⁶ Transcript, Day 2, 134:12-13.

²⁹⁷ Hermes 2 and 3, Valuation Sheets.

explanation as to why the overall amount of damages is higher upon the present liability finding as compared to the damages where all other impugned measures were also found to be in breach of more than one standard of treatment under the BIT.

- The final figure achieved by Hermes assumes that the Claimants' Polish subsidiaries would have significantly increased their market share from 2010 to 2015, while the historical data shows that in reality, they have consistently lost market share from [REDACTED]. The Claimants' explanation that they would have increased their average utilization ratio compared to the rest of the market is belied by the historical data available for the period 2010 and 2013, which shows that the average utilization ratio for the Claimants fell, while that of the remaining market rose.²⁹⁸
- The Claimants do not adequately oppose Mr. Hart's contention that their aggregate debt and equity investment in Poland was approximately [REDACTED]. Therefore, Hermes' valuation of the Claimants' cash flows at [REDACTED] means that the Claimants would have achieved a cumulative return of [REDACTED] irrespective of the fact that they would have been operating in a phase-out mode and their business would lose its value towards the end of 2015. The Tribunal has not found any credible substantiation in the record for such an unprecedented rate of return.
- In addition, the Claimants admit in their letter of 26 September 2016 that Hermes' final valuation sheet regrettably still contains a substantial number of inaccuracies and factual errors.²⁹⁹

326. In these circumstances, and considering that no similar issues of independence and reliability arose with respect to the Respondent's valuation expert, the Tribunal deems it prudent to base its quantum analysis on the valuation sheet offered by Mr. Hart. This does not mean, however, that it will adopt all the assumptions made by Mr. Hart. Instead, in the subsequent section, it will analyze the most crucial inputs of his valuation sheet, taking into account the Parties' positions. In addition, given that the Tribunal does not take the Hermes valuation sheet as the basis for its quantum

²⁹⁸ Hart 3, Figure 3.4.

²⁹⁹ Claimants' letter of 26 September 2016, Section G.

analysis, the Respondent's pleadings criticizing Hermes' reliability as well as its unpursued request to "recross"-examine Hermes' experts become irrelevant.

3. Net Cash Flows but for the Measures

327. It is common ground between the Parties that in case of Poland's partial liability for the breach of the FET standard, the award of damages should in principle be confined to "a delta between the cash-flows in the actual and the 'but for' scenario".³⁰⁰ Therefore, the object of the valuation is the supplemental cash flows that the Claimants would have generated in 2010-2015 absent the drastic increase in POG.
328. In this regard, Mr. Hart's initial proposal to quantify the damages by reference to the amounts invested by the Claimants (*i.e.* the sunk costs approach) does not appear appropriate. The Tribunal understands that the amount of sunk costs can be used as a proxy for the valuation of the FMV of an enterprise, where its track record or the available data does not permit the FMV to be calculated based on suitable methods, such as the discounted cash flows (DCF) analysis. In the present case, however, the object of valuation is not the FMV of the Claimants' enterprises in Poland, given that those enterprises would have lost their value even absent the unlawful measure. For this reason, the sunk costs cannot constitute an appropriate measure of damages sustained by the Claimants as a result of Poland's internationally wrongful act. Instead, as explained above, the Claimants should be awarded the supplemental net cash flows that they would have generated in 2010-2015 but for the drastic increase of the POG rate.
329. Moreover, the Parties appear to be in agreement that the Tribunal has an inherent discretion in determining the amount of damages. The Respondent argues that such discretion "cannot relieve Claimant from its burden of proving loss, its extent and the causal link".³⁰¹ The Tribunal agrees that the burden of proving damages and their extent lies with the Claimants. That being said, the standard of proof varies depending on the issue at stake. When it comes to quantification of loss, no mathematical precision can be required or indeed achieved. Instead, the amount of loss may be estimated based on a multiplicity of assumptions. The Tribunal has to test that those assumptions are reasonably substantiated with facts and do not produce hypothetical results.

³⁰⁰ Respondent's letter of 10 October 2016, ¶16.

³⁰¹ *Id.*

330. Therefore, taking Mr. Hart's valuation sheet as a starting point, the Tribunal will examine the reasonableness of its main assumptions and inputs. In doing so, it will briefly summarize the Parties' respective positions.

a. POG rate in 2010-2015

331. In its questions of 24 June 2016, the Tribunal asked the Parties to provide a valuation of damages caused by, inter alia, Poland's "increase in the POG to [REDACTED] [REDACTED] *instead of a more moderate increase.*"³⁰² The reference to "a more moderate increase" has not been coincidental. Even before the Tribunal's questions, the Claimants conceded in their initial quantum analysis that the POG rate would likely raise to a certain moderate extent in the "but for" scenario.³⁰³ Hence, the amount of damages cannot be calculated on the assumption that absent Poland's wrongful act, the POG rate would remain unchanged. Such assumption would unduly overstate the amount awarded to the Claimants.

332. Yet, the Respondent complains that the Tribunal may not assess what "a more moderate increase in POG" would be since that would amount to an improper interference into "how Respondent should have exercised its sovereign regulatory powers in the field of taxation."³⁰⁴

333. The Tribunal finds this argument unconvincing. The application of the FET standard is quintessentially an appraisal of the impact of the state's measure in light of all relevant circumstances. Reference to prior POG increases in order to discern how the state increased the rate from time to time is one such consideration because it provides some guidance on what the state has seen fit to do in prior instances and thus gives the Tribunal a standard against which this particular increase can be evaluated. Another consideration is how the POG increase at issue comported with the other measures taken by the state. A third consideration is the revenue-generating effect (or not) of the taxation measure. On the facts of the present case, the POG seems to the Tribunal to have been taken not to increase the state's revenue but rather to make it uneconomic or much less economic for existing operators to continue their operations and thus to foster their departure from the sector ahead of the State's lawful prohibition thereof. In other words, the POG

³⁰² Emphasis added.

³⁰³ Reply, ¶411.

³⁰⁴ Respondent's letter of 19 August 2016, ¶156.

increase cannot be examined in isolation of the other lawful measures and the Tribunal's assessment of its financial impact by reference to the historical development of the POG is not an "improper interference" in the state's regulatory powers.


334. Thus, the Tribunal will estimate a more moderate POG increase that would not have engaged the Respondent's international responsibility in the period 2010 and 2015 based on the factual circumstances brought forward by the Parties. Mr. Hart argues that the Claimants failed to provide enough factual evidence to allow such estimation.³⁰⁵ The Tribunal considers this criticism unjustified. As early as in their pre-hearing pleadings, the Claimants have produced information regarding the increase in the POG between 2003 and 2008. This information should allow the identification of the pattern of POG increases. In addition, the record contains evidence demonstrating intentions and positions of various governmental stakeholders as to the POG rate. The Tribunal considers this information sufficient to allow a reasonable estimation of a reasonably foreseeable increase in POG in the "but for" scenario for the period between 2010 and 2015.
335. While the Parties appear to agree that the POG rate would not likely remain unchanged in 2010-2015, they diverge on the probable extent of the forthcoming increase. As a benchmark, the Claimants refer to the pattern of increases in POG in the period between 2003, when the tax was introduced, and 2008, when the tax last rose before the increase effected by the 2010 Gambling Act. The Respondent, on the other hand, suggests that the POG rate would likely be equalized with the rate applicable to gambling in casinos and therefore eventually rise to [REDACTED]
336. As the Tribunal noted at paragraph 258 above, different economic and social consequences attach to gambling at casinos and saloons on the one hand and at slot machines in bars, convenience stores and petrol stations on the other. It is unrealistic to assume that Poland would equalize the taxation rates applicable to these two different activities, especially, given that in 2010-2015 the slot machine industry would be operating in a phase-out mode.
337. For these reasons, the Tribunal considers the POG increase assumed in the Claimants' valuation to be more realistic. It has thus modified the relevant inputs in Mr. Hart's valuation sheet.

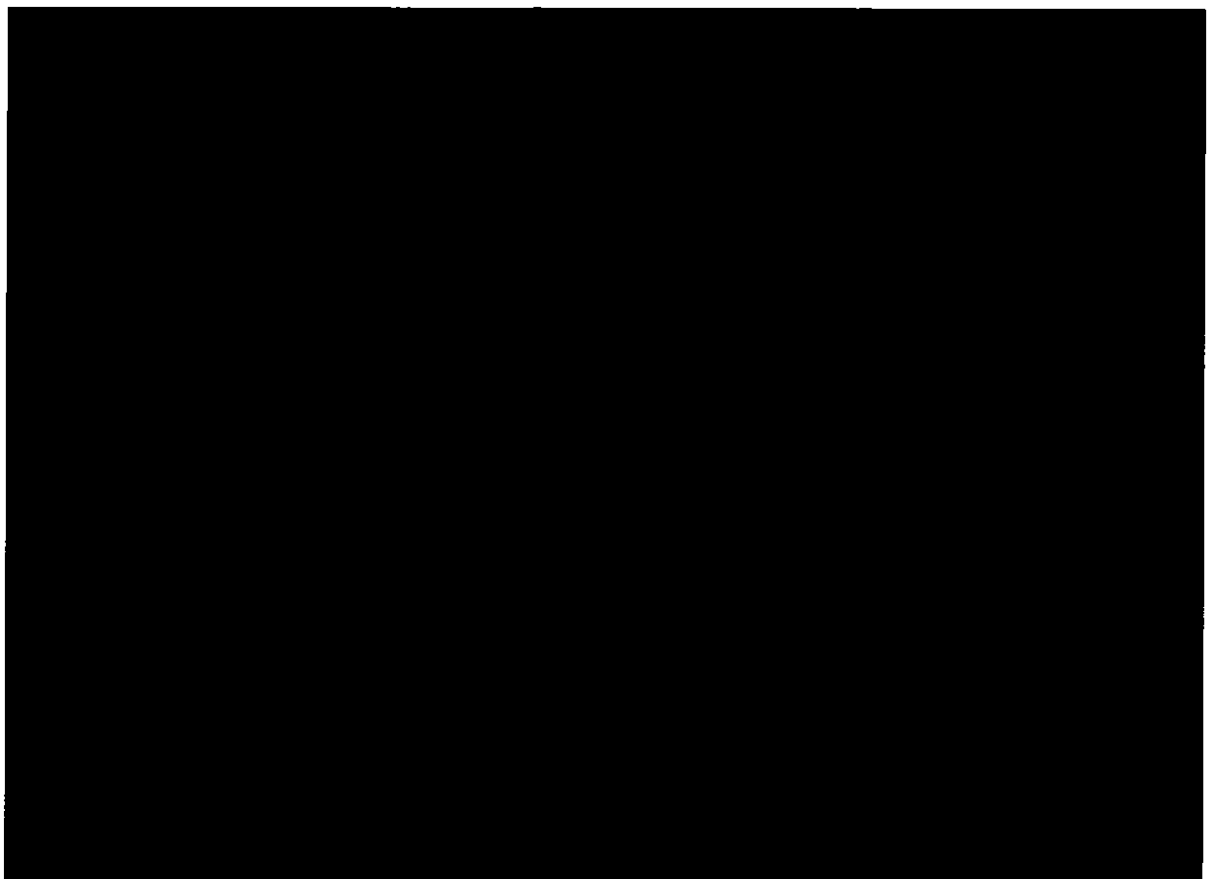
³⁰⁵ Hart 3, ¶21.

b. Number of machines

338. The Tribunal first notes that the Parties diverge on the number of permits that the Claimants' Polish subsidiaries would be operating under between 2010 and 2015. In particular, they disagree on whether Poland would have granted the prolongation applications and if so how many of them. As the Tribunal explained in the liability analysis, the Claimants have not put forward enough evidence to warrant finding a breach of the BIT based on the allegedly retroactive application of the 2010 Gambling Act. Therefore, the discussion on the number of permits is rendered irrelevant. The Tribunal will assume that no additional permits would or should have been granted.
339. The Parties further diverge on the number of machines per location (*i.e.* the utilization ratio) that the Claimants' Polish subsidiaries would achieve but for the unlawful increase in the POG. The Tribunal is not convinced by the Claimants' suggestion that the average utilization ratio would be as high as 2.1. As Mr. Hart underscores, this is the highest average utilization ratio that the market has ever achieved. A conclusion that the Claimants' Polish subsidiaries would attain such a high utilization ratio in the "but for" scenario is unreasonable for the following reasons.
340. First, the historic data shows that the market's average utilization ratio heavily fluctuated as shown in the below grid.³⁰⁶

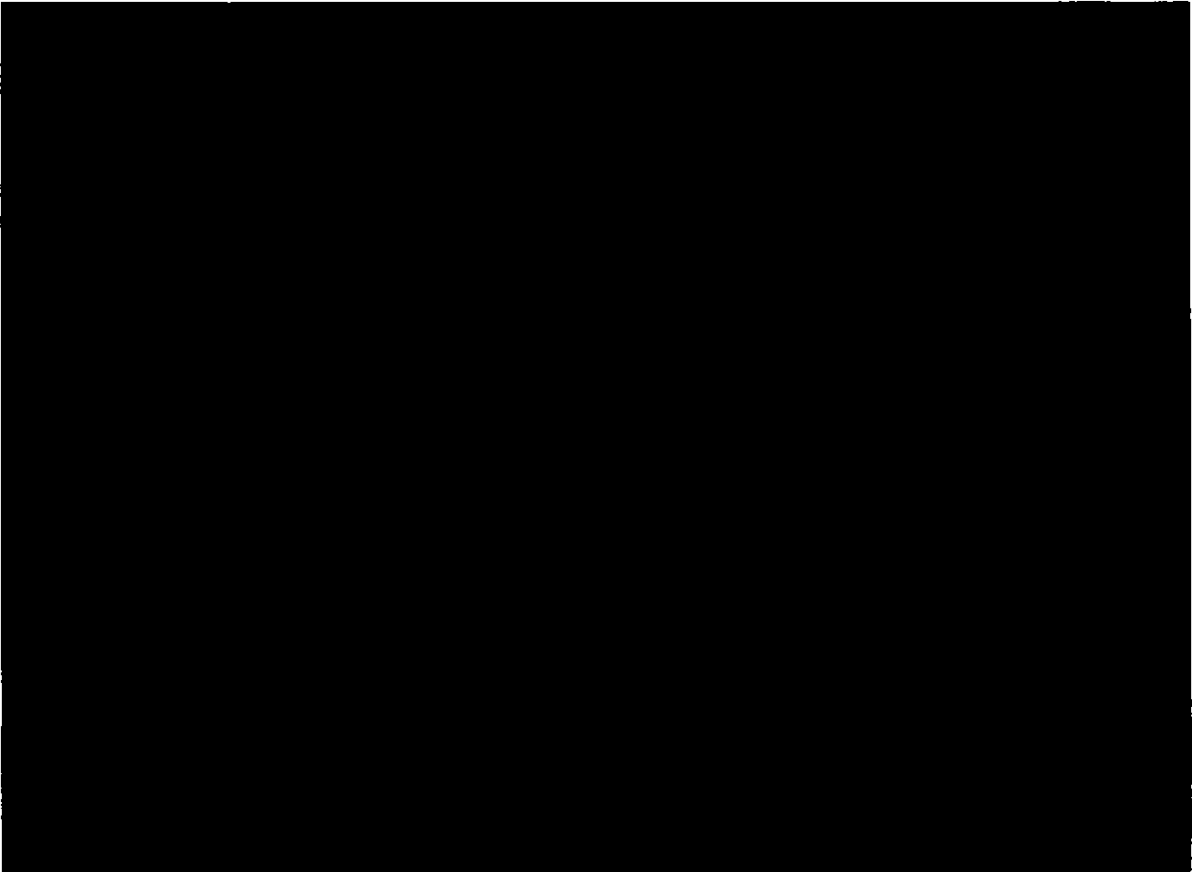
³⁰⁶ Hart 3, Figure 3.1; SOD, Table 1; The change in the number of machines per location between





341. It would be unreasonable to assume that the Claimants' average utilization ratio would remain at all time high (never previously achieved) throughout the valuation period.
342. Second, the Claimants admittedly suffered from internal problems related to some shareholder disputes and have in fact never achieved an average utilization ratio comparable to the rest of the market. As Mr. Hart explains, the actual data from 2010-2013 shows that the utilization ratio for the addresses operated by the Claimants' Polish subsidiaries decreased from [REDACTED] while the market average rose from [REDACTED]. This is shown in the graph below:³⁰⁷

³⁰⁷ Hart 3, Figure 3.4.



343. The Tribunal finds no effective substantiation in the record for the assumption that the Claimants would have achieved that all time highest average utilization ratio in circumstances where they failed to keep up with the moderate increase of the market average between 2010 and 2013.
344. The Parties further diverge on whether the Claimants would buy new machines during the phase-out period. The Claimants argue that they would have done so in order to attract customers at their most valuable locations. The Tribunal cannot accept this argument. If the Claimants' Polish subsidiaries had the potential to buy and install new machines to increase the utilization ratio of their addresses during the phase-out period, it is not understood why they did not do so in the actual case between 2010 and 2015. The record does not show that the POG increase which the Tribunal found to be in breach of the Treaty should have prevented them from doing so. Thus, it would be unrealistic to assume that the Claimants' Polish subsidiaries would achieve a greater utilization ratio of their addresses in the "but for" scenario.
345. Moreover, given the Tribunal's finding that Poland was entitled to ban any future introduction of Bank Machines into the market, it should be assumed that the

Claimants' Polish subsidiaries would not be allowed to obtain new approvals for the Bank Machines.

346. In these circumstances, the Tribunal will follow Mr. Hart's assumption according to which the Claimants' Polish subsidiaries would not have introduced additional machines in the phase-out period.

c. Average cashbox

347. The Parties diverge on the average gross monthly amount that the Claimants' slot machines would have generated (*i.e.* the cash box) in the phase-out period. The Claimants rely on the data of the Ministry of Finance from 2010 to 2013 showing the average monthly cash box on the market to have risen to approximately [REDACTED]. They assume that the average cash box would be that high in the "but for" scenario.
348. The Tribunal notes that the market managed to achieve this amount of cash box in circumstances of a drastic POG increase, which was found to be in breach of the Treaty and should not therefore form part of the "but for" analysis. The Parties do not dispute that the higher POG rate translates into fewer machines on the market; and the fewer the machines on the market - the higher the average cash box (assuming that all other circumstances remain equal). The average cash box produced in the circumstances of the POG being [REDACTED] cannot therefore be transposed into the "but for" scenario where the POG raise is assumed to be lower. It therefore appears more appropriate to the Tribunal to rely on the average cash box assumed by Mr. Hart.
349. This said, taking Mr. Hart's assumed average cash box would not be fully accurate either, given that his assumption is also based on somewhat higher POG rates, which the Tribunal discarded at section IV.D(3)(a) above. This discrepancy is however neutralized by the fact that at Section IV.D(3)(b), the Tribunal assumed the number of machines to remain unchanged despite the lower rate of the POG increase. As the Parties agree, there is a near inverse-proportionate relationship between the POG and the number of machines, as well as between the number of machines and the average cash box.³⁰⁸ Hence, the Tribunal's conservative assumption that the number of machines would not increase irrespective of the milder POG increase should roughly balance out the reliance on Mr. Hart's assumed

³⁰⁸ Respondent's letter of 10 October 2016, ¶76.

average cash box. While this assumption may not produce mathematically precise results, it will be more appropriate than the Tribunal itself recalculating both the average cash box and the number of machines.

350. For these reasons, the Tribunal will leave Mr. Hart's assumed average cash box and the number of machines unchanged in the valuation sheet.

d. Cost savings

351. The Parties dispute whether the Claimants' Polish subsidiaries would have managed to save certain costs in the phase-out period. The Claimants contend that if they knew that they were operating in the phase-out mode they would have saved on expenses such as salaries of certain employees tasked with obtaining new permits.³⁰⁹

352. The Tribunal fails to see in the record how the "but for" scenario would have offered more saving opportunities to the Claimants' Polish subsidiaries in comparison to the actual scenario in which they lived through in 2010-2015. In both scenarios, they operated under the phase-out mode, knowing that no additional permits would be granted after the expiry of the existing ones. The Tribunal finds no credible explanation as to why the Claimants' Polish subsidiaries could not manage to save the same costs in the actual scenario that they would have allegedly saved in the "but for" world. This part of Mr. Hart's valuation sheet will therefore remain unchanged.

e. Discount

353. The Parties disagree on the applicability of a discount to the foregone cash flows in the period between 2010 and 2015. The Respondent suggests that the discount rate should be applied in order to factor in the risk that those cash flows may not have materialized.

354. The Tribunal understands that a discount is appropriate where one determines the net present value of the future cash flows in order to account for the future risks. In the present case, however, the object of valuation is not the future cash flows. Rather, the Tribunal should award cash flows that the Claimants would have in all probability generated in the past period of 2010-2015. In order to account for any

³⁰⁹ Claimants' letter of 22 July 2016, ¶¶82-83.

risks that prevailed in this period, instead of applying a discount rate, the experts could point to specific events (such as for instance market fluctuations) that would affect the cash flows. The Respondent has not pointed to any particular event between 2010 and 2015 that would have prevented the Claimants from earning the cash flows as calculated by the relevant indicators.

355. The Tribunal is of the opinion that no discount is warranted in the given circumstances. Therefore, it selects the “no discount” option found in Mr. Hart’s valuation sheet.
356. As a result of putting the above inputs in Mr. Hart’s valuation sheet, the Tribunal arrives at the conclusion that the net cash flows that the Claimants lost due to Poland’s unlawful measure amount to [REDACTED]. As the Claimants clarified at the hearing, they do not request the tribunal to allocate the awarded amount among the different Claimants.³¹⁰ Therefore, the Tribunal will award the overall sum to all of the Claimants jointly.

4. Interest

357. It is common ground between the Parties that interest is due. However, they diverge on the applicable interest rate, the starting date(s) of the accrual of interest and the compounding rate. The Tribunal will deal with each of these three questions in turn.
358. With respect to the interest rate, the Claimants contend that the lost cash flows should accrue interest at Poland’s statutory interest rate of [REDACTED]. The Respondent on the other hand proposes the [REDACTED] as the most commonly used rate in investor-state arbitration decisions, or if the amount is awarded in [REDACTED] – its equivalent [REDACTED].
359. It is undisputed that the mandate of the present Tribunal derives from the BIT, which is an international treaty. Consequences of violations of international treaties are governed by international law. The Parties do not seem to disagree with that as they both refer to the international law standard of full reparation throughout their pleadings.³¹¹ In international law, interest is compensatory in nature and is aimed at reestablishing the situation that would have existed absent the internationally wrongful act. Therefore, the Tribunal is not obliged to apply the statutory rate of any

³¹⁰ Transcript, Day 1, 4:12 – 5:5.

³¹¹ See e.g., Claimants’ Letter of 26 September 2016, ¶34; Respondent’s letter of 10 October 2016, ¶17.

state unless it is convinced that the Claimants would have benefitted from that rate but for Poland's unlawful measure.

360. With that caveat in mind, the Tribunal sees no connection between the damage sustained by the Claimants on the one hand and Poland's statutory interest rate on the other. In assessing the appropriate interest rate, the Tribunal should estimate how the Claimants would have invested the relevant amounts had they been available. There is no evidence that the Claimants would have generated a return on their cash flows at Poland's statutory interest rate.

361. Furthermore, it should be borne in mind that the purpose of full reparation is not to reward an injured party for a risk that it has never undertaken.³¹² The rate proposed by the Respondent is relatively risk free and has been commonly adopted by international investment tribunals.³¹³ The Tribunal will therefore opt for the [REDACTED] as the more appropriate rate among those proposed by the Parties.

362. With respect to the interest starting date, the Claimants argue that interest should accrue on the principal cash flow amounts from the last day of the relevant year in which those amounts would have been earned, or from the first day of the following year.³¹⁴ The Respondent states that interest should only accrue from the date of the award, since until that date Poland has no knowledge that it has violated the BIT. If this argument is not shared, Poland alternatively agrees with the Claimants' proposed approach that interest should accrue from the first day of the next year with respect to damages for each year.³¹⁵

363. It is well established in the practice of international tribunals that pre-award interest is necessary to fully compensate the loss caused by treaty violations.³¹⁶ The Respondent's expert shares this opinion.³¹⁷ The responsibility of a state to repair the

³¹² *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶440.

³¹³ *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011, **Exh. RLA-058**, ¶352; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, **Exh. RLA-059**, ¶137.

³¹⁴ Claimants' Letter of 26 September 2016, ¶85.

³¹⁵ Respondent's letter of 19 August 2016, ¶157.

³¹⁶ See, e.g. *Funnekotter v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, ¶115.

³¹⁷ Hart 3, ¶92, where Mr. Hart states that "[p]re-judgment interest is generally applied to account for time value of money."

consequences of its internationally wrongful act arises immediately upon the commission of that act and not after its declaration by any adjudicatory body. Indeed, unlike in municipal legal systems where there is always a competent court of law, in international law it may well be that there is no adjudicatory body that has jurisdiction over a particular internationally wrongful act. This cannot mean that the responsibility does not accrue for the commission of that act. Instead, the state responsibility is automatic and independent of any adjudicatory process. Thus, Poland is under a duty to compensate for the time value of money from the date(s) when the Claimants would have earned the relevant amounts but for the unlawful measure. Therefore, the Tribunal shares the Claimants' suggestion to calculate interest from the first day of the year following the year in which the relevant cash flows would have been generated.

364. With respect to compounding, the Parties do not dispute that compound interest is a commonly accepted practice. They disagree on the period of compounding. As the Tribunal decided to apply the [REDACTED] rate, it is logical for it to be compounded semi-annually.
365. Therefore, the Claimants' foregone annual cash flows should accrue interest from the first day of the year following the year in which the relevant cash flows would have been generated but for Poland's unlawful measure, at the rate of [REDACTED] [REDACTED] compounded semi-annually. The Tribunal was unable to find in Mr. Hart's valuation sheet some assistance to calculate interest. It will therefore provide specific rules for such calculation in the Operative Part of this Award.³¹⁸

* * *

³¹⁸ In doing so, the Tribunal deems it reasonable to assume that the components of cash, net working capital and debt be distributed pro rata with respect to the net cash flows earned in each of the six years from 2010 to 2015. The components are found at cells D48, D49 and D50 of Appendix B to Mr. Hart's valuation sheet.

E. COSTS

366. The Parties disagree on the allocation of costs. The Claimants request that the Tribunal order the Respondent to reimburse their arbitration and representation costs (including expert costs), as well as the costs that they incurred for the preparation of their claims and for the litigation in Polish courts.³¹⁹ They acknowledge, however, that pursuant to Article 12(9) of the BIT “[e]ach Party shall bear the cost of the arbitrator appointed by itself and its representation. The cost of the chairman as well as the other costs will be borne in equal parts by the Parties.” To trump this provision, the Claimants invoke the most-favored-nation treatment clause found in Article 3(2) of the BIT. In addition, they note that Article 12(9) of the BIT, which is applicable in inter-state disputes, only applies to investor-state disputes *mutatis mutandis*; and thus appropriate modifications can be made to it when applying to the present case. The Respondent rejects the Claimants’ arguments and vouches for a strict application of Article 12(9) of the BIT.
367. The Tribunal does not deem it necessary to determine whether by virtue of the most-favored-nation treatment clause or otherwise it has any discretion in allocating costs in a manner other than provided by Article 12(9) of the BIT. Even if such discretion existed, there is no need to exercise it in light of the circumstances of the present case. While the Claimants prevailed on the preliminary objections and a part of liability, the Respondent defended itself successfully against most of the claims and convinced the Tribunal on the reliability of its quantum expert report. Therefore, the outcome of the dispute does not warrant unequal allocation of costs, including any extra-arbitration costs.
368. Nor does the procedural behavior of the Parties mandate a different conclusion. The Tribunal is only thankful to the Parties and their Counsel for the cooperative spirit and commitment towards the efficient conduct of these proceedings.
369. In these circumstances, the Tribunal will not order the costs to be allocated any differently from what is contemplated by Article 12(9) of the BIT.

* * *

³¹⁹ Reply, ¶1442 *et seq.*

V. OPERATIVE PART

370. Due to the above reasons, the Tribunal renders the following final award:

- i. The Respondent's preliminary objections to the jurisdiction of the Tribunal and/or admissibility of the claims are dismissed;
- ii. Poland has breached Article 3.1 of the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investments;
- iii. Poland shall pay to the Claimants [REDACTED]
[REDACTED]
together with interest at the rate of the 6-month WIBOR (Warsaw Interbank Offered Rate) [REDACTED] compounded semi-annually for the following principal amounts and from the following dates until the payment in full:
 - a) For the principal amount of [REDACTED] - from 1 January 2011;
 - b) For the principal amount of [REDACTED] - from 1 January 2012;
 - c) For the principal amount of [REDACTED] - from 1 January 2013;
 - d) For the principal amount of [REDACTED] - from 1 January 2014;
 - e) For the principal amount of [REDACTED] - from 1 January 2015;
 - f) For the principal amount of [REDACTED] - from 1 January 2016.
- iv. Each Party shall bear the costs and expenses of the arbitrator appointed by itself and its representation, as well as any costs incurred in the preparation and aid of the arbitral proceedings. The costs and expenses of the President and the Secretary of the Tribunal, as well as other common administrative expenses as contained in the PCA's Statement of Account dated 9 February 2017 shall be borne in equal parts by the Parties.
- v. All other objections, claims and requests for relief are dismissed.

Seat of Arbitration: Geneva, Switzerland

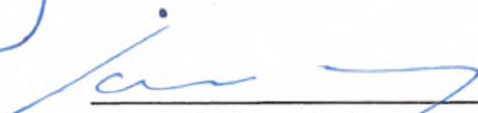
Signatures:



Ms. Melanie van Leeuwen



Mr. Christopher Thomas, QC



Dr. Laurent Lévy

Date of dispatch to the Parties: 16 / 02 /2017