

**IN THE MATTER OF AN ARBITRATION UNDER THE
ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW 1976**

PCA Case No. 2019-18

OLYMPIC ENTERTAINMENT GROUP AS

(“Claimant”)

v.

UKRAINE

(“Respondent” and together with the Claimant, the “Parties”)

AWARD

The Arbitral Tribunal

Professor Michael Pryles AO PBM
Mr J. Christopher Thomas QC
Mr Neil Kaplan CBE QC SBS (Presiding Arbitrator)

Secretary to the Tribunal

Dr Noam Zamir

Registry

Permanent Court of Arbitration

Date: 15 April 2021

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List of Defined Terms

Claimant <i>see also OEG</i> <i>see also Olympic</i>	Olympic Entertainment Group AS
CMU Decree	Decree of the Cabinet of Ministers No. 494 on Measures to Increase the Level of Public Safety
FET	Fair and equitable treatment
FPS	Full protection and security
FTI	FTI Consulting LLP
Gambling Ban Law <i>see also Law on the Prohibition of Gambling</i>	Law No. 38/2009 “On the Prohibition of Gambling Business in Ukraine” adopted on 15 May 2009
Hearing	The hearing on all issues held between 13 and 20 December 2020 on the Zoom videoconference platform
Law on the Prohibition of Gambling <i>see also Gambling Ban Law</i>	Law No. 38/2009 “On the Prohibition of Gambling Business in Ukraine” adopted on 15 May 2009
Licensing Conditions	Licensing Conditions adopted by Order No. 40/374 of the State Committee for Regulatory Policy and Entrepreneurship of Ukraine and the Ministry of Finance of Ukraine dated 18 April 2006
Licensing Law	Law of Ukraine No. 1775-III “On Licensing of Certain Commercial Activities” dated 1 June 2000
March Draft Law on the Prohibition of Gambling	Draft Law No. 4268 “On Prohibition of the Gambling Business in Ukraine” dated 26 March 2009
Maxbet	The Maxbet Group, a gambling operator in Ukraine
MFU	Ministry of Finance of Ukraine
MFU Order	Order of the Ministry of Finance of Ukraine No. 650 dated 8 May 2009
New Gambling Law	Law of Ukraine No. 768-IX “On State Regulation of Organization and Operation of Gambling” dated 14 July 2020

OCU	Olympic Casino Ukraine LLC
OEG <i>see also Claimant</i> <i>see also Olympic</i>	Olympic Entertainment Group AS
Olympic <i>see also Claimant</i> <i>see also OEG</i>	Olympic Entertainment Group AS
Parties	The Claimant and the Respondent
Pledge Agreement	Movable Property Pledge Agreement No. 020609-PM between the Claimant and OCU dated 2 June 2009
Rejoinder	Respondent's Rejoinder dated 17 July 2020
Respondent	Ukraine
SOC	Claimant's Statement of Claim dated 21 June 2019
SOD	Respondent's Statement of Defence dated
SOR	Claimant's Statement of Reply dated 22 May 2020
Trade Patent Law	Law of Ukraine No. 98/96-BP "On Patenting of Certain Types of Entrepreneurial Activity" dated 23 March 1996
Treaty	Agreement between the Government of the Republic of Estonia and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments, dated 15 February 1995
UNCITRAL Rules	1976 Arbitration Rules of the United Nations Commission on International Trade Law

A. Introduction

1. A dispute has arisen between the Claimant and the Respondent concerning the Claimant's alleged investment in Ukraine in the gambling industry in respect of which the Claimant filed a Notice of Arbitration on 5 November 2018, pursuant to Article 8 of the Agreement between the Government of the Republic of Estonia and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments, dated 15 February 1995 ("**Treaty**").
2. The subject matter of the dispute concerns alleged breaches of the Treaty by the Respondent.
3. In accordance with Article 8(b) of the Treaty, these proceedings were conducted under the 1976 Arbitration Rules of the United Nations Commission on International Trade Law ("**UNCITRAL Rules**").

I. The Parties

4. The Claimant is Olympic Entertainment Group AS ("**Olympic**" or "**OEG**"), a company established under the laws of Estonia. The Claimant operated gambling-related companies and property in Ukraine.
5. The Claimant is represented in these proceedings by Denis Lysenko, Pavlo Byelousov, Myroslava Savchuk and Iryna Glushchenko of AEQUO Law Firm, 32/2 Moskovska Street, 15th floor, 01010 Kyiv, Ukraine; and Luis Gonzalez Garcia of Matrix Chambers, Griffin Building, Gray's Inn, London WC1R 5LN, United Kingdom.
6. The Respondent is Ukraine.
7. The Respondent is represented in these proceedings by Maksym Kodunov, Ivan Lishchyna, Michael Siroyezhko and Anna Tyshchenko of the Ministry of Justice of Ukraine, 13 Horodetsкого Street, 01001 Kyiv, Ukraine; Timothy Otty QC of Blackstone Chambers, Blackstone House, Temple, London EC4Y 9BW, United Kingdom; Hussein Haeri, Tatiana Menshenina, Camilla Gambarini, Diana Tarnavskaia, Natalia Faekova and Iuliia Zozulia of Withers LLP, 20 Old Bailey, London EC4M 7AN, United Kingdom; and Yulia Atamanova of LCF Law Group, Volodymyrska 47, of 3, Kyiv 01001, Ukraine.

II. The Tribunal

8. Professor Michael Pryles AO PBM was appointed as a co-arbitrator by the Claimant in its Notice of Arbitration, dated 5 November 2018, pursuant to Article 3.4(b) of the UNCITRAL Rules. Professor Pryles' contact details are as follows:

Professor Michael Pryles AO PBM
Suite 304
521 Toorak Road, Toorak
Victoria 3142
Australia

9. Mr J. Christopher Thomas QC was appointed as a co-arbitrator by the Respondent on 4 December 2018. Mr Thomas' contact details are as follows:

Mr J Christopher Thomas QC
1200 Waterfront Centre, 200 Burrard Street
P.O. Box 46800, Vancouver, BC
V7X 1T2
Canada

10. Mr Neil Kaplan CBE QC SBS was appointed as the Presiding Arbitrator in this matter on 29 December 2018, by the co-arbitrators. Mr Kaplan's contact details are as follows:

Mr Neil Kaplan QC CBE SBS
Suite 1906, Level 19
644 Chapel Street
COMO Office Tower
South Yarra, 3141
Melbourne, Victoria
Australia

11. Dr Noam Zamir was appointed as Tribunal Secretary. His appointment was approved by the Claimant on 13 March 2019 and by the Respondent on 22 March 2019.

B. Procedural History

12. The procedural history is a matter of record. The main procedural events are contained in Appendix 1 to this Award, which should be read with, and which forms part of, this Award.

13. The hearing on all issues in this arbitration was held between 13 and 20 December 2020 on the Zoom videoconference platform (“**Hearing**”). The following individuals attended the Hearing:

Tribunal

Mr Neil Kaplan CBE QC SBS (Presiding Arbitrator)
Professor Michael Pryles AO PBM
Mr J Christopher Thomas QC

Dr Noam Zamir (Tribunal Secretary)
Mr Joris Bertrand (Assistant to Mr Kaplan)

Claimant

Mr Aleksandr Kostjuevitš
Mr Aare Reinsalu
Party Representatives

Mr Luis Gonzalez Garcia
Matrix Chambers

Mr Pavlo Byelousov
Mr Denys Lysenko
Ms Myroslava Savchuk
Ms Iryna Glushchenko
Ms Anna Konovalova
Mr Oleksandr Kushch
Ms Kateryna Ilieva
Ms Nataliia Savula
Ms Nataliia Abramovych
AEQUO Law Firm

Mr Ilja Šterenber
Mr Meelis Pielberg
Fact Witnesses

Mr James Nicholson
Mr Alexander Davie
Dr Olexander Martinenko
Expert Witnesses

Ms Leona Josifidis
Mr Freddie Hurford
Ms Daryna Ushchapivska
Assistants to Expert Witnesses

Respondent

Mr Ivan Lishchyna
Ms Anna Tyshchenko
Ms Yulia Dikhtiiievaska
Mr Georgiy Grabchak
Ministry of Justice

Mr Timothy Otty QC
Blackstone Chambers

Mr Hussein Haeri
Ms Camilla Gambarini
Dr Robert Kovacs
Dr Aniruddha Rajput
Ms Natalia Faekova
Ms Christina Liew
Ms Iuliia Zozulia
Ms Lily-May Austen
Withers LLP

Ms Yulia Atamanova
Ms Valeria Lada
Mr Dmytro Kaba
LCF

Mr David Clifton
Mr Geoffrey Senogles
Expert Witnesses

Ms Svetlana Ksenofontova
Assistant to Expert Witness

Permanent Court of Arbitration

Ms Helen Brown
Mr Benjamin Craddock

Court Reporter

Mr Trevor McGowan

Opus 2

Mr Rohan Kondel
Mr Fabian Sadler

C. Factual Background of the Dispute

14. The Tribunal will begin by summarising the factual background which led to the dispute. The summary is not exhaustive and is not intended to be a complete chronology. It contains only those facts which the Tribunal considers to be of relevance in order to set the matters in issue in this arbitration into context. To the extent deemed appropriate, additional facts will be addressed in other sections of the Award.

Claimant's alleged investment

15. As explained by the Claimant,¹ between 2004 and 2008, gaming activities in Ukraine were regulated by the following legislative instruments: the Law of Ukraine dated 1 June 2000 No. 1775-III “On Licensing of Certain Commercial Activities” (“**Licensing Law**”),² the Law of Ukraine dated 23 March 1996 No. 98/96-BP “On Patenting of Certain Types of Entrepreneurial Activity” (“**Trade Patent Law**”)³ and a number of special by-laws, including among others the Licensing Conditions adopted by Order No. 40/374 of the State Committee for Regulatory Policy and Entrepreneurship of Ukraine and the Ministry of Finance of Ukraine dated 18 April 2006 (“**Licensing Conditions**”).⁴
16. The Claimant submits that its investment in Ukraine began on 10 June 2004 when, through its locally incorporated company, Olympic Casino Ukraine LLC (“**OCU**”), the

¹ Claimant's Statement of Claim dated 21 June 2019 (“**SOC**”), para. 15.

² Exhibit C-81, Licensing Law.

³ Exhibit C-82, Trade Patent Law.

⁴ Exhibit C-83, Licensing Conditions.

Claimant developed and operated several gaming facilities in Ukraine.⁵ The Respondent, on the other hand, argues that the Claimant had communicated in specific terms in an official public document that “*Ukrainian operations were set up from scratch in May 2003*”.⁶ According to the Respondent, it was a requirement of Ukrainian law for gambling halls, which are a form of gambling establishment, to obtain gambling licences from the Kyiv City Administration. The Respondent claims that the Claimant “*consistently trumpeted that its business was based from 2004 on gambling halls in Kyiv and that it also ran casinos in Kyiv at that time.*”⁷ However, according to the Respondent, the Claimant did not have the required gambling licences and therefore the Claimant failed to make an “*investment*” “*in accordance with the laws and regulations*” as required by the Treaty. Therefore, the Tribunal has no jurisdiction.

17. The Claimant denies the Respondent’s argument in relation to jurisdiction and submits as follows:⁸

[...] In 2004, the only gambling activities that were subject to licensing under the 2000 Licensing Law were “totalizators and gambling establishments”. All other types of gambling other than casinos or gambling establishments were not subject to licencing. This included slot machines in shared premises. During 2004-2005, OCU’s operations consisted of slot machines in shared premises. Thus, Olympic was not required under the existing regulations to obtain a license to operate its slot machines in Ukraine. During the period of March 2005 to April 2006 there was a gap in the law which prevented gambling activities without a license. However, the Supreme Court of Ukraine declared that it was not illegal to conduct activities without a license “if the person who was engaged in such activities could not obtain a license in the prescribed manner (no licensing authority was created, no licensing conditions were determined”. In April 2006, the Ministry of Finance was appointed as the licensing authority. Olympic acquired all the required licenses as provided by law. All 2006 licenses have been exhibited in this arbitration. There cannot be any doubt that the Claimant has operated in accordance with the law in Ukraine at all times.

18. The Tribunal will address the dispute in relation to the Claimant’s investment and the Tribunal’s jurisdiction in the relevant section on jurisdiction below.

⁵ SOC, paras 3, 42 (citing Exhibit C-26, Registration Certificate of Olympic Casino Ukraine; Exhibit C-7, Olympic Casino Ukraine Excerpt from State Register); Claimant’s Statement of Reply dated 22 May 2020 (“SOR”), para. 4.

⁶ Respondent’s Rejoinder dated 17 July 2020 (“Rejoinder”), paras 42, 45 (citing Exhibit R-1, Olympic Entertainment Group AS, Offering 14,000,000 Ordinary Shares, p. 61).

⁷ Rejoinder, para. 7.

⁸ SOR, para. 322.

19. It is not disputed that the Claimant provided significant loans to OCU to finance its expansion and to develop its gaming facilities in Ukraine. The Respondent, as explained in more detail below, submits that these loans demonstrate that OCU was effectively bankrupt and that in any case the Claimant is not entitled to any compensation.
20. In 2006, the then newly appointed licensing authority – the Ministry of Finance of Ukraine (“**MFU**”) – issued licenses to the Claimant’s subsidiaries authorizing them to conduct gambling activities (including gambling halls and casinos) throughout Ukraine.

Ukraine’s draft law concerning gambling and the Law on the Prohibition of Gambling

21. From 1998 until 2009 at least 36 draft laws related to gambling regulation were submitted to the Parliament.⁹ The majority of these draft laws were submitted by individual MPs and not by the government.¹⁰ As highlighted by the Claimant, none of these draft laws envisaged a full and immediate ban of the gambling industry.¹¹
22. The roots of the gambling ban, which is the subject matter of this arbitration, go back to 26 March 2009, when Draft Law No. 4268 on the Prohibition of Gambling in Ukraine was registered with the Verhovna Rada (“**March Draft Law on the Prohibition of Gambling**”).¹² The draft law provided that “[t]he gambling business shall be prohibited in Ukraine”.¹³ An exception was made for “the activities for organizing and holding lotteries, contests, games, drawings that are not classified as public gambling games, as well as to domestic gambling games”.¹⁴ The draft law also attached criminal responsibility for engaging in gambling and did not have any provisions regarding compensation for gambling license holders.¹⁵ Importantly, and in contrast to the impugned law which this arbitration concerns, the draft law provided for a transitional/grace period for the law to come into force that would run for approximately 8 months until 1 January 2010.¹⁶

⁹ SOR, para. 130.

¹⁰ SOR, para. 130.

¹¹ SOR, para. 130.

¹² Exhibit C-45, Draft Law of Ukraine “On Prohibition of the Gambling Business in Ukraine” dated 26 March 2009.

¹³ Exhibit C-45, Article 2.

¹⁴ Exhibit C-45, Article 2.

¹⁵ Exhibit C-45, Article 3.

¹⁶ Exhibit C-45, Section II.1.

23. On 10 April 2009, the Chief Scientific and Expert Department of the Verkhovna Rada issued an opinion concerning the March Draft Law on the Prohibition of Gambling, stating *inter alia* as follows:¹⁷

Having considered the draft law, the Chief Scientific and Expert Department does not affirm its adoption. First of all, this may be explained in view that a general ban (even temporarily) on economic activities related to the organization of gambling will lead to their criminalization, in particular, by a surge in a number of illegal gambling establishments and increasing corruption. It should be noted that the draft law proposes dividing gambles into public and domestic ones so that the same game (for example, roulette or totalizators) may be both public and domestic. In our view, this will complicate significantly bringing to justice those who are held liable for organizing public gambling. Another negative consequence from adopting the said draft law will be the “shadowing” of the relevant business affecting the replenishment of the state budget of the country.

24. On 7 May 2009, nine people died from a fire in a small gambling hall, unrelated to the Claimant, in the city of Dnipropetrovsk. According to the Claimant, this incident, “*provided the perfect excuse to Prime Minister Tymoshenko to be seen as a strong politician and a supporter of the people by immediately suspended [sic] all gambling operations in Ukraine*”.¹⁸ On the same day, the Cabinet of Ministers issued the Decree on Measures to Increase the Level of Public Safety (“**CMU Decree**”), which set off a series of previously unscheduled checks at gambling facilities.¹⁹ The CMU Decree, which was issued reportedly as a response to the fire in Dnipropetrovsk,²⁰ obliged, *inter alia*, the MFU to take measures for the sake of the security of Ukrainian citizens.
25. On 8 May 2009, the MFU issued an order (“**MFU Order**”), by which it suspended all gambling licenses until 7 June 2009 with immediate effect.²¹ According to the Claimant, the MFU Order was issued in complete disregard for the conditions to suspend or terminate a license under the Licensing Law.²²
26. On 12 May 2009, one business day after the adoption of the MFU Order suspending all gambling licenses, the draft of the law “On the Prohibition of Gambling Business in

¹⁷ Exhibit C-370, Opinion of the Chief Scientific and Expert Department of the Verkhovna Rada of Ukraine On the Draft Law of Ukraine “On Prohibition of Gambling Business in Ukraine” 10 April 2009.

¹⁸ SOC, para. 6.

¹⁹ Exhibit C-46, Decree of the Cabinet of Ministers No. 494.

²⁰ Exhibit C-43, The Cabinet of Ministers Press Release (“*Yuliya Tymoshenko will initiate the removal of all gambling facilities from residential places*”).

²¹ Exhibit C-59, Order of the Ministry of Finance of Ukraine No. 650.

²² SOR, para. 5.

Ukraine” (“**Gambling Ban Law**” or “**Law on the Prohibition of Gambling**”) was registered with the Verkhovna Rada.²³ This draft was to a large extent the same as the March Draft Law on the Prohibition of Gambling. However, this new draft had one important difference. While the draft of 26 March 2009 provided for a transitional period of approximately 8 months, the new draft of 12 May 2009 did not include any transitional period. Instead, the new version of the draft law envisaged that the law would come into force “*from the day of its publication*”.

27. On 15 May 2009, the Verkhovna Rada decided, by 196 votes, to consider the draft law in an expedited procedure. This meant that there would be almost no debate concerning the draft legislation.²⁴ On the same day, the Verkhovna Rada **adopted** the Gambling Ban Law by 406 votes in the first reading and by 340 votes in the second reading.²⁵
28. On 4 June 2009, the President of Ukraine, exercising his power under Article 94 of the Constitution of Ukraine, decided to veto the Gambling Ban Law.²⁶ The President stated, *inter alia*, that:²⁷

While supporting the need for a strict state regulation of holding of gambling activities, organization and maintenance of betting houses, gambling establishments, in particular, restriction of the territories where gambling business zones may be located, as well as minimization of negative social consequences of this activity, I cannot agree with the concept proposed by the above Law to solve this problem as violating a number of provisions of the Constitution of Ukraine.

The Law submitted for signing bans gambling business and participation in gambling games (Article 2), establishes liability for violation of this Law by business entities that organize and hold gambling games on the territory of Ukraine (Article 3) and cancels licences for gambling activities as of the effective date of the Law, and terminates further issuance of such licences (Part 2 of Article 4). This Law shall enter into force on the day of its publication and shall be effective until adoption of the special legislation providing for the right to do gambling business in specially established gambling zones (Part 1 of Article 4).

An instantaneous implementation of such provisions may result in a mass liquidation of gambling establishments and, as a consequence, mass dismissal of their

²³ Exhibit C-60, Law No. 38/2009 “On the Prohibition of Gambling Business in Ukraine”, adopted 15 May 2009 (“**Gambling Ban Law**”).

²⁴ SOC, para. 72 (citing Exhibit C-110, Rules of Procedure of Verkhovna Rada dated 19 September 2008, Article 31; Exhibit C-111, Transcripts of 35th hearing dated 15 May 2009 of Verkhovna Rada of Ukraine; Exhibit C-112, Transcripts of 50th hearing of Verkhovna Rada of Ukraine dated 11 June 2009).

²⁵ SOC, para. 81; Exhibit C-54, Results of the Verkhovna Rada voting for Gambling Ban Law.

²⁶ SOC, para. 86. See Exhibit C-56, Submission of the President of Ukraine with proposals to the Draft Gambling Ban Law dated 15 May 2009.

²⁷ Exhibit C-56, Submission of the President of Ukraine with proposals to the Draft Gambling Ban Law dated 15 May 2009.

employees who join the ranks of the unemployed (approximately 200 thousand people). So, this will result in a violation of the constitutional right of citizens to work, including the possibility to earn a living by work they are free to choose (Part 1 of Article 43), and the right to an adequate standard of living for themselves and their families (Article 48).

At the same time, it is a violation of the rights of entrepreneurs organizing gambling games that will suffer significant losses as a result of the ban on gambling, which is a violation of the constitutional provision binding the state to ensure protection of all subjects of the right of ownership and business entities (Part 4 of Article 13 of the Constitution of Ukraine).

As noted above, the Law cancels licences for gambling activities as of its effective date. However, neither the Law of Ukraine “On Licensing of Certain Types of Business Activity”, which provides for licensing of organization and maintenance of betting houses, gambling establishments (paragraph 29 of Article 9), nor other laws provide for the grounds for cancellation (invalidation) of licences such as ban on a certain type of activity, and, accordingly, the issue of reimbursement for the cost of a licence that is cancelled early without violation of licence terms and conditions by the licensee. In addition, the Law does not take into account the issue of trade patents that were obtained in the manner established by the Law of Ukraine “On Patenting of Certain Types of Entrepreneurial Activity” for each individual gambling place (slot machine, gambling table), and the cost of which was paid by business entities or their structural (standalone) units to provide gambling services. [...]

It also should be noted that organizers of gambling games have entered into agreements related to carrying out such business activities, in particular, rent agreements for the relevant premises, which, upon entry of the Law into force, have to be terminated because of the ban on gambling business, which will result in significant financial losses of entrepreneurs carrying out gambling business as they must ensure fulfilment of their obligations under such agreements due to the forced unilateral repudiation thereof.

Thus, the enactment of the Law will result in a narrowing of the content and scope of the rights of everyone to work, free choice of work, possibility to earn a living by the work they are free to choose, right to an adequate standard of living for themselves and their families, which is contrary to Part 3 of Article 22 of the Constitution, according to which the adoption of new laws or amendments to the effective laws may not narrow the content and scope of the existing rights and freedoms. In Part 2 of Article 3 of the Constitution of Ukraine, under which the State is responsible to a person for its actions, the protection of human rights is the principal responsibility of the State.

29. On 11 June 2009, the Verkhovna Rada overruled the President’s veto by 390 votes and approved the Gambling Ban Law.²⁸
30. On 25 June 2009, the Gambling Ban Law entered into force.²⁹ As explained above, it did not contain a grace period for gaming license holders or any provisions regarding

²⁸ SOC, para. 98; SOD, para. 145.

²⁹ Exhibit C-60, Gambling Ban Law. According to Article 4, the law comes “into force from the day of its publication and shall remain in effect until the adoption of special legislation on gambling business in specially

compensation for license holders. The law also attached criminal responsibility to engaging in the gambling business after 25 June 2009. The main provisions of the Gambling Ban Law are as follows:³⁰

Article 1. Terms and Definitions

As used in this Law, the following terms shall have the following meanings:

1) gambling business - activities of gambling organization and operation in casinos, on gambling machines, at bookmaker's offices, and in electronic (virtual) casinos, undertaken for profit;

2) gambling game - any game requiring the player to make a wager that enables it to receive a prize and the result of which depends on chance partially or completely.

The gambling games shall exclude:

lotteries;

creative contests, sports competitions, etc., regardless of whether or not their terms and conditions promise any monetary or property winnings by chance; [...]

[additional exceptions are stated in article 1(2)]

3) gambling organizers - individuals and legal entities engaged in business activities associated with gambling organization and operation for profit;

4) gambling organization and operation - the activities of gambling organizers intending to create the conditions and environment for gambling and prize awarding;

5) gamblers - individuals with full civil capacity who play gambling games.

Article 2. Prohibition of the Gambling Business in Ukraine

The gambling business and participation in gambling games shall be prohibited in Ukraine.

Article 3. Liability for Infringing this Law

Any business entities that are found to be organizing and conducting gambling activities in Ukraine shall be subjected to financial sanctions in the form of a fine equaling eight thousand minimum wages, with confiscation of the gambling equipment, and the profit (income) from such gambling operations shall be seized and transferred to the State Budget of Ukraine.

designated gambling zones". The law was published in an official gazette on 25 June 2009; Exhibit C-44. See also SOC, para. 98 and footnote 136; SOD, para. 145.

³⁰ Exhibit C-60, Gambling Ban Law.

The sanctions mentioned in part one of this Article shall be imposable by a court decision adopted on a lawsuit initiated by state tax authorities.

Article 4. Final Provisions

1. This Law shall come into force from the day of its publication and shall remain in effect until the adoption of special legislation on gambling business in specially designated gambling zones.

2. From the effective date of this Law, the issuance of gambling organization and operation licenses in Ukraine shall be discontinued, and the licenses issued to business entities before the effective date of this Law shall be deemed invalidated.

[...]

4. The Cabinet of Ministers of Ukraine shall have three months from the effective date of this Law to:

develop a draft law on the gambling organization and operation activities in specially designated gaming zones and submit it to the Verkhovna Rada of Ukraine for consideration;

propose to the Verkhovna Rada of Ukraine amendments to the legislation of Ukraine to align it with this Law;

bring its regulatory acts into compliance with this Law;

adopt the regulatory acts required for the implementation of this Law;

ensure that ministries and other central bodies of executive power revise and repeal their regulatory acts which are in conflict with this Law.

31. According to the Claimant, as a result of the Gambling Ban Law, it was forced by law to close down its business immediately.³¹ On 3 July 2009, OCU decided to begin liquidation proceedings for itself and for most of its subsidiaries.³² On 12 August 2009, the Claimant's Ukrainian subsidiaries (except for one subsidiary) filed for bankruptcy.³³ On 3 January 2012, the dissolution of OCU was registered. Furthermore, the Claimant argues that due to the above-mentioned actions by the Respondent, the "*Claimant's investment was destroyed on 25 June 2009 [...] the Claimant's investment had to face bankruptcy*

³¹ SOC, para. 209.

³² Exhibit C-117, Minutes No. 45 of the General (Extraordinary) Meeting of Members of Olympic Casino Ukraine dated 3 July 2009. See SOC, para. 102.

³³ Exhibit C-118, Press release "*Bankruptcy petition of OEG Ukrainian subsidiaries*", Olympic Entertainment Group Website; Exhibit C-61, Resolution of the Commercial Court of Kyiv on adjudging OCU to be a bankrupt; Exhibit C-62, Ruling of the Commercial Court of Kyiv on instituting bankruptcy proceedings of Ukraine Leisure Company; Exhibit C-63, Resolution of the Commercial Court of Kyiv on adjudging Eldorado Leisure Company to be a bankrupt. See SOC, para. 103.

and the Claimant was forced to terminate its operations in Ukraine resulting in a complete loss of its investments and expected future profit.”³⁴

32. The Respondent, on the other hand, submits that the Claimant started the liquidation proceedings already on 9 June 2009, i.e., before the Gambling Ban Law even entered into effect on 25 June 2009 and while the President’s veto of the Law was still in effect.³⁵ This, according to the Respondent, demonstrates that there was no causal relationship between the Gambling Ban Law and the Claimant’s loss. Therefore, as the Claimant’s loss is not attributable to measures taken by the Respondent, the Claimant is not entitled to damages.³⁶

Maxbet’s negotiations with the Claimant

33. Between March and May 2009, the Claimant conducted negotiations with the Maxbet Group (“**Maxbet**”), which was another somewhat larger gambling operator in Ukraine in 2004-2009,³⁷ regarding the sale of the Claimant’s business in Ukraine. According to the Claimant, by 12 May 2009, the Claimant and Maxbet were discussing the details of a share purchase agreement (SPA) under which Maxbet agreed to pay a price of EUR 15 million for the Claimant’s assets in Ukraine.³⁸ However, the negotiations ceased at or around the time of the adoption of the Gambling Ban Law of 15 May 2009, which is discussed in the following paragraphs. As explained below under the section concerning damages, the Claimant relies on the alleged Maxbet offer both for its primary claim and its alternative claim for damages. On the other hand, the Respondent submits that the Maxbet offer was highly speculative and no reliance can rationally be placed on it for the purposes of determining the Claimant’s entitlement to damages or for quantum calculations.

³⁴ SOC, para. 104.

³⁵ Respondent’s closing slides on Causation and Quantum of 20 December 2020, slide 6 (referring to Exhibit C-FTI-2, OEG Annual Report 2009 dated 6 April 2010, p. 38 [D3/2]); Respondent’s post-hearing brief, para. 33.

³⁶ See, e.g., Transcript, Day 8, 62:3-7, 94:11-14.

³⁷ SOC, *Dramatis Personae*, p. 7.

³⁸ SOC, paras 273-284 (referring, inter alia, to Exhibit C-221, Emails between Mr Antti Perli and Mr Jacob Katz from 10 May 2009 to 12 May 2009; Exhibit C-222, Email from Mr. Andri Avila dated 7 May 2009).

Attempts to settle the Parties' dispute and the commencement of these proceedings

34. From July 2009 until December 2017, the Claimant attempted to settle its dispute with the Respondent through negotiations.³⁹ During these negotiations the legality of the Claimant's operation in Ukraine was not disputed by the Respondent. On 26 December 2017, the Ministry of Justice of Ukraine sent a letter to the Claimant communicating its decision not to compensate the Claimant.⁴⁰
35. On 5 November 2018, the Claimant commenced these arbitration proceedings by filing its Notice of Arbitration.⁴¹
36. During the course of these arbitration proceedings, on 14 July 2020, the Verkhovna Rada enacted the Law "On State Regulation of Organization and Operation of Gambling" (the "New Gambling Law"), establishing the zoning system originally contemplated by the Gambling Ban Law.⁴²

D. Relief Requested

I. Claimant's Request for Relief

37. The Claimant requests that the Tribunal issue an award:⁴³
- (1) *Declaring that the 2009 Gambling Ban Law constitute an indirect expropriation of the Claimant's investments in violation of Article 5 of the Treaty;*
 - (2) *Declaring Ukraine in breach of Article 2(1), Article 2(2) and Article 3 of the Treaty;*
 - (3) *Declaring that the objection to the jurisdiction is without merits and must be dismissed;*
 - (4) *Ordering Ukraine to pay compensation on the full reparation basis of the Claimant's losses suffered as a result of Ukraine's violations listed above in the amount of no less than Euro 12,404,000.00 (twelve million four hundred and four thousand);*

³⁹ SOC, para. 142.

⁴⁰ Exhibit C-142, Letter from the Ministry of Justice of Ukraine to Olympic dated 26 December 2017.

⁴¹ Notice of Arbitration dated 5 November 2018.

⁴² Respondent's post-hearing brief, para. 26; Exhibit C-434, Law of Ukraine No. 768-IX "On State Regulation of Organization and Operation of Gambling" dated 14 July 2020.

⁴³ SOR, para. 639.

- (5) *Alternatively to relief set out in item (4) above, ordering Ukraine to pay compensation on the full reparation basis of the Claimant's losses suffered as a result of Ukraine's violations listed above in the amount to be calculated as (i) Euro equivalent of US Dollars 15 (fifteen) million at the USD-EUR exchange rate effective as of the date of the Tribunal's award as referenced at Bloomberg website <https://www.bloomberg.com/markets/currencies>, less (ii) Euro 2,596,000.00 (two million five hundred and ninety six thousand) being the aggregate amount of loss actually recovered by the Claimant;*
- (6) *Ordering Ukraine to pay interest on any amount awarded under item (4) above, or alternatively under item (5) above, at the rate of 12-month LIBOR +4%, compounded annually, accruing from 25 June 2009 until (and inclusive of) the date of the Tribunal's award;*
- (7) *Ordering Ukraine to pay post-award interest on any amount awarded under item (4) above, or alternatively under item (5) above, at the rate of 12-month LIBOR +4%, compounded annually, accruing on the outstanding amount from the date of the Tribunal's award until payment in full;*
- (8) *Ordering Ukraine to pay all costs incurred in connection with these arbitration proceedings, including the costs of the arbitration and of the Permanent Court of Arbitration as well as the legal and other expenses incurred by the Claimant including the fees of its legal counsel, experts and consultants, to be specified later with interest thereon at a reasonable rate.*
- (9) *Ordering any other further relief that the Tribunal deems just and appropriate.*

II. Respondent's Request for Relief

38. The Respondent requests that the Tribunal:⁴⁴

- (a) *Declare that it lacks jurisdiction *ratione materiae* to hear the Claimant's claims and hence dismiss its claims;*
- (b) *Dismiss all the Claimant's claims on the merits;*
- (c) *Dismiss all the Claimant's claims for lack of causation;*
- (d) *Dismiss all the Claimant's claims for compensation; and*
- (e) *Order the Claimant to reimburse the Respondent for all costs, fees and expenses incurred in relation to these proceedings. In the alternative, each party should bear their own costs of legal representation and assistance and the remaining "costs of arbitration" should be shared equally by the Parties.*

⁴⁴ Respondent's post-hearing brief, para. 81. See in comparison – Respondent's Statement of Defence dated 10 January 2020 ("SOD"), para. 339; Rejoinder, para. 463.

E. Jurisdiction

39. At the outset, it is important to note that the Tribunal has had the benefit of extensive written and oral submissions from the Parties. The Tribunal sees no need to summarise each and every submission made by the Parties in the following sections of the Award. For the avoidance of doubt, all submissions of the Parties have been carefully considered by the Tribunal in reaching its decision.
40. According to the Parties, the following provisions of the Treaty are relevant to the Respondent's jurisdictional objection:

Article 1:

The term "investment" shall comprise every kind of asset invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the law and regulations of the latter and shall include, in particular, though not exclusively:

- (a) movable and immovable property as well as any other property rights in rem such as mortgages, liens, pledges, and similar rights;*
- (b) shares, stocks and debentures of companies or any other form of participation in a company;*
- (c) claims to money or to any performance having an economic value associated with an investment;*
- (d) intellectual property rights, including copyrights, trade and service marks, patents, industrial designs, technical processes, know-how, trade secrets, trade names and goodwill associated with an investment;*
- (e) any rights conferred by laws or under contract and any licenses and permits pursuant to law, including the concessions to search for, extract, cultivate or exploit natural resources.*

Any alteration of the form in which assets are invested shall not affect their character as investment provided that such an alteration is made in accordance with the laws of the Contracting Party in the territory of which the investment has been made.

1. Respondent's Position

41. The Respondent submits that the Tribunal does not have jurisdiction over this dispute because the Claimant did not make a qualifying "investment" "in accordance with Ukrainian law" within the meaning of Article 1(1) of the Treaty.
42. According to the Respondent, pursuant to Article 1(1) of the Treaty, qualifying investments must be made in accordance with the laws and regulations of the host state.

The Respondent argues that the Claimant failed to satisfy the burden of proof that it had obtained the gambling licenses and trading patents, which were required for lawful conduct of gambling activities in Ukraine, at the time that it made its alleged “investment”. In this regard, the Respondent argues as follows:⁴⁵

The Claimant on its own admission stated that it did not have a licence, arguing that it was not required to have it because OCU had its gambling operations in cafés or bars. OCU had not obtained the required local licence to operate its gambling operations in Ukraine in compliance with Ukrainian law when it entered the market in 2004. The fact that the Claimant did not make its purported “investment” in accordance with the laws and regulations of Ukraine –strikingly by failing to secure a gambling licence for its gambling operations – means that the Tribunal has no jurisdiction in this case under the Treaty given the clear jurisdictional requirement set forth in Article 1(1) of the Treaty.

First, the Claimant attempts to argue ex post facto that it did not need a licence to operate at the time of its entry into the Ukrainian market, alleging that it was merely operating slot machines in cafés or bars. This is despite the fact that the Claimant has itself consistently taken the position, up until the Reply, that it operated gambling halls and casinos.

However, [...] the Claimant's arguments are not credible in light of the evidence showing that they had in fact operated gambling halls / establishments in 2004 and thus needed a licence under Ukrainian law, which it failed to have on its own admission.

[...]

Second, the Claimant argued that, as long as there was no illegality specifically in relation to its equity and financing to OCU and intellectual property rights, the Tribunal has jurisdiction over the dispute. Such an argument is misconceived.

The Respondent observes that there is no requirement under international investment treaty law that the illegality must specifically relate to the “contribution” by the investor. Instead, the Tribunal should look at the illegality in the context of the alleged investment.

Specifically, in the context of the present dispute, without the requisite license under the applicable domestic licensing laws, the Claimant's gambling operations in Ukraine through OCU had no value. Indeed, the Claimant's claim in this case centres on the licences of its Ukrainian subsidiaries and the earnings it says they would have made while the licences were current, not least since the Claimant substantially recovered its subsidiaries' assets or their sale value and thus cannot now claim for that.

⁴⁵ Rejoinder, paras 199-205. See also Respondent’s post-hearing brief, paras 14-16.

43. Accordingly, the Respondent submits that the Claimant’s alleged investment in Ukraine was not a protected investment under the Treaty, and therefore the Tribunal does not have jurisdiction over this dispute.

2. Claimant’s Position

44. The Claimant rejects the Respondent’s jurisdictional objection.

45. The Claimant submits that Article 1(1) of the Treaty provides “a broad and non-exhaustive list of the types of assets that qualify as ‘investments’”.⁴⁶ According to the Claimant, these assets include, “Olympic’s subsidiaries, equity contribution into the shared capital of its subsidiary, the OCU, loans, and equipment exported by Olympic to Ukraine, acquired intellectual property rights, possessed movable and immovable tangible property in 24 gambling establishments. Clearly all these assets qualify as investments.”⁴⁷

46. According to the Claimant, the “[b]urden of proof for allegations of investments made not ‘in accordance with the law’ of the host state lies with the host state”.⁴⁸ In any case, the Claimant maintains that each of its assets and rights constitutes a covered investment made in accordance with Ukrainian legislation. In this regard, the Claimant submits as follows:⁴⁹

It is important to note that the Respondent does not deny that Olympic’s shareholding in OCU, the equity contribution into the share capital of OCU, the financing provided to OCU, the acquired intellectual property rights, constitute a covered investment under Article 1(1) of the Treaty. Given that there is no dispute that all these assets qualify as investments, the Tribunal has jurisdiction over this claim.

Furthermore, the Claimant has demonstrated that:

- *Olympic registered and established its Ukrainian subsidiary according to the requirements of the Ukrainian laws;*
- *Olympic properly transferred loans to OCU under the loan agreements;*
- *the Claimant’s Ukrainian subsidiaries properly obtained all required licenses and trade patents to operate its business in*

⁴⁶ SOR, para. 305.

⁴⁷ SOR, para. 305.

⁴⁸ SOR, para. 317.

⁴⁹ SOR, paras 319-320.

*Ukraine in full compliance with the Ukrainian Licensing Law,
the Licensing Conditions and the Trade Patent Law.*

47. Furthermore, the Claimant submits as follows:⁵⁰

It is nonsensical to assume that an experienced and sophisticated gambling operator in the EU, investing millions of euros in Ukraine would have deliberately avoided applying for such straightforward formal administrative requirement that only costed less than 40 euros for 5 years to obtain. In any event, for the sake of discussion, the alleged irregularity even if proven, does not constitute a breach of a fundamental principle of Ukrainian law.

48. Finally, the Claimant avers that the Respondent's submissions also contradict its duty of good faith in these proceedings. In this regard, the Claimant submits as follows:⁵¹

[...] the Respondent's argumentation also contradicts its duty of good faith in these proceedings. The Claimant conducted its business in a public and lawful manner in Ukraine during 5 years and the 2009 Gambling Ban Law immediately put a halt to its business in Ukraine. The Respondent, who had a sovereign duty to administer and enforce the laws in the territory of Ukraine, was perfectly aware of OEG's operation in Ukraine and its compliance with the necessary regulations. Furthermore, there is overwhelming evidence of the lengthy discussions between OEG and the Respondent at the highest level after the introduction of the 2009 Gambling Ban Law and never in the course of them did the question of legality arise [sic]. Thus, any allegations of the Respondent regarding illegality of OEG's investment were created for the purpose of making an artificial argument in this arbitration, are inconsistent with its previous position, and shall be precluded as being a distraction from the real facts of this case.

3. The Tribunal's Decision

49. To ascertain whether the investment was illegal, the Tribunal has to decide precisely what the investment was. The Treaty contains a very wide definition of "investment". Article 1 of the Treaty states that the "term 'investment' shall comprise every kind of asset invested in connection with economic activities by an investor of one Contracting Party in the territory of the other Contracting Party [...] in particular, though not exclusively [...]." The Treaty then sets forth an open-list of examples of investments, including "movable and immovable property", "shares, stocks", and "intellectual property".

50. The Claimant invested substantial sums in Ukraine. Among other things, the Claimant established OCU in 2004 and provided equity contributions of cash and gambling equipment for the total amount of around EUR 4.1 million into the charter capital of

⁵⁰ Claimant's post-hearing brief, para. 50.

⁵¹ SOR, para 324.

OCU.⁵² The Claimant also invested EUR 28.6 million as a shareholder loan to OCU.⁵³ In 2007, this loan was used, *inter alia*, to expand the Claimant's operation by acquiring Eldorado Group, a Ukrainian casino operator, for around EUR 9.2 million.⁵⁴ In addition, the Claimant acquired trade patents for its gambling equipment in Ukraine and for its intellectual property rights.⁵⁵

51. In the Tribunal's view, the above investments constitute, *inter alia*, "immovable property", "shares", "intellectual property rights" and "claims to money or to any performance having an economic value" pursuant to Article 1 of the Treaty. Accordingly, they clearly fall within the definition of "investment" under Article 1 of the Treaty.
52. However, Article 1 of the Treaty also requires that the investment be invested "in accordance with the law and regulations" of the host states.
53. The Respondent does not suggest that the Claimant's investments described above were made in contravention of any Ukrainian law. There are many treaties that only recognise investments if approval is first given by the host state. There is no such provision in the Treaty.
54. In the Tribunal's view, it is thus crystal clear that the actual investment made was lawful under Ukrainian law. This case is fundamentally dissimilar to a case such as *Fraport* where the initial investment was found to be illegal because it was made in violation of the Philippine Anti-Dummy Law, which prohibited foreign intervention in the management, operation, administration, or control of a public utility.⁵⁶ In other words, in the *Fraport* case, the facts concerned the illegality of the initial investment itself, which was, *inter alia*, Fraport's equity investments in a public utility (i.e., the "Philippines

⁵² See SOC, para. 148; Exhibit C-7, Olympic Casino Ukraine Excerpt from State Register.

⁵³ SOC, para. 148.

⁵⁴ Exhibit C-98, Agreement of the Sale and Purchase of Corporate rights of Alea Private Company dated 17 September 2007; Exhibit C-99, Agreement of the Sale and Purchase of Corporate rights of Ukraine Leisure Company dated 17 September 2007; Exhibit C-100, Agreement of the Sale and Purchase of Corporate rights of Eldorado Leisure Company dated 17 September 2007, Exhibit C-42, Olympic's Consolidated unaudited interim financial report for the 12 months and 4th quarter of 2007, p. 30. See SOC, para. 48.

⁵⁵ Claimant's Skeleton Submissions, para. 6.

⁵⁶ See Exhibit RLA-5, *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award of 10 December 2014, para. 444.

International Air Terminals Co., Inc.” [“PIATCO”]) and in Philippine companies that had ownership interests in PIATCO.⁵⁷

55. In the present case, the illegality upon which the Respondent relies is that when the Claimant began its operations in Ukraine, it lacked certain licences claimed by the Respondent to be necessary to operate a gambling establishment, and thus it argues that this rendered the whole venture unlawful. As the Respondent puts it, the “*Claimant had operated a gambling hall /establishment in 2004 on its entry into the Ukrainian market for which a licence was required under domestic law.*”⁵⁸
56. The Tribunal is of the view that the Respondent did not establish that the Claimant had acted in an unlawful manner, which would support the Respondent’s submission that the Tribunal has no jurisdiction. The Tribunal notes the Claimant’s submission that it only operated slot machines in bars and cafes. Such operation, as confirmed by the Claimant’s regulatory expert, Dr Martinenko, was not subject to licensing and was therefore legal.⁵⁹ On the other hand, the Respondent did not bring any documentary evidence to establish that the Claimant had operated gambling establishments that were subject to the licencing requirement during the relevant period.⁶⁰
57. Furthermore and most significantly, the Claimant’s operations were never a secret. On the contrary, they were under continuous scrutiny of various state organs at the local and national levels. The Tribunal considers that if the Claimant was operating illegally, this illegality was bound to be discovered in all those years that it operated and paid its taxes. Similarly, after the enactment of the Gambling Ban Law, the Parties were engaged in settlement negotiations for years. During this time, the Respondent never raised any questions in relation to the legality of the Claimant’s investment.

⁵⁷ See Exhibit RLA-5, *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award of 10 December 2014, paras 337-338.

⁵⁸ Rejoinder, para. 202.

⁵⁹ See for example, Transcript, Day 4, 8:18-23; 11:25-12:5.

⁶⁰ Transcript, Day 7, 71:8-15.

58. Finally, it is important not to lose sight of the nature of the alleged illegality of the Claimant's investment. In this regard, the Tribunal notes with approval the award in *Rumeli v Kazakhstan*, in which the tribunal stated as follows:⁶¹

[...] *in order to receive the protection of a bilateral investment treaty, the disputed investments have to be in conformity with the host State laws and regulations. On the other hand, as was determined by the arbitral tribunal in the Lesi case, investments in the host State will only be excluded from the protection of the treaty if they have been made in breach of fundamental legal principles of the host country.*
[emphasis added]

59. In the same vein, in *Desert Line Projects LLC v The Republic of Yemen*, the tribunal held as follows:⁶²

In State practice in the BIT area, the phrase "according to its laws and regulations" is quite familiar. Moreover, it has been well traversed by arbitral precedents [...] which make clear that such references are intended to ensure the legality of the investment by excluding investments made in breach of fundamental principles of the host State's law, e.g. by fraudulent misrepresentations or the dissimulation of true ownership.

60. It is important to note that the alleged required licence would only cost the Claimant in the region of less than EUR 40.⁶³ The fine for a failure to possess the required licence was merely between EUR 8 and 13.⁶⁴ While there was a possibility of confiscation of gambling equipment, at the discretion of the law enforcement authority and subsequently the court, there was no additional serious sanction, such as the closure of the gambling site.⁶⁵ This underscores the Claimant's submission that even if there was any illegality, there was no breach of a fundamental principle of Ukrainian law which would preclude the jurisdiction of the Tribunal. Therefore, even if assuming *arguendo* that the Claimant failed to have a licence during the first years of its activity, the Tribunal doubts that this *de minimis* breach would have precluded the establishment of the Tribunal's jurisdiction and deprived the Claimant of the protection of the Treaty.

⁶¹ CLA-32, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasy on Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, para. 319.

⁶² CLA-48, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008, para. 104.

⁶³ Claimant's post-hearing brief, para. 50.

⁶⁴ Claimant's post-hearing brief, para. 49. See also Exhibit OPM-08, Code of Ukraine on Administrative Offences (as of 31 March 2005), Article 164 (1); Transcript, Day 7, 46:3-9.

⁶⁵ Transcript, Day 7, 46:3-9; Claimant's post-hearing brief, para. 49.

F. Merits

61. The Claimant alleges that the Respondent violated its obligations under the Treaty. According to the Claimant, the Respondent:

- (I) Expropriated the Claimant's investment without compensation;
- (II) Failed to provide the Claimant's investment with fair and equitable treatment ("FET") and maintain favourable conditions for the Claimant's investment;
- (III) Failed to provide the Claimant's investment with full protection and security ("FPS").

I. Expropriation

62. Article 5 of the Treaty provides as follows:⁶⁶

Investments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose. The expropriation shall be carried out under due process of law, on a non-discriminatory basis and shall be accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before expropriation or before the impending expropriation became public knowledge. The compensation shall include interest calculated on the LIBOR basis from the date of expropriation, shall be made without delay, be effectively realizable and be freely transferable in a freely convertible currency.

1. Claimant's Position

63. The Claimant argues that Article 5 of the Treaty prohibits direct and indirect expropriations unless the conditions for lawful expropriation are met.⁶⁷ According to those conditions, the expropriation must be (1) "for a public purpose"; (2) carried out on a "non-discriminatory basis"; (3) in accordance with the requirement of due process of law; and (4) accompanied by "payment of prompt, adequate and effective compensation".

64. The Claimant submits that the Gambling Ban Law amounted to an indirect expropriation of its investment. According to the Claimant, the Gambling Ban Law "substantially and negatively affected its investment and deprived it of the use and benefit of its investments

⁶⁶ Exhibit C-1, Treaty, Article 5(1).

⁶⁷ SOC, paras 192, 198.

*thus frustrating its vested rights, including Olympic's economic rights and reasonably expected economic benefits from its investment thus frustrating its vested rights".*⁶⁸

65. Moreover, the Claimant avers that the Gambling Ban Law caused the total annihilation of its investment. In the Claimant's words, "[o]n 25 June 2009, the gambling ban was permanent, irreversible and resulted in the bankruptcy of the Claimant's investment".⁶⁹ The Claimant also argued that the Gambling Ban Law had "*the effect similar to a formal expropriation: it revoked Olympic's valid licenses, forcing it to cease all activities in Ukraine which deprived its investments of all utility and deprived Olympic of the benefit which it could have expected from its investments*".⁷⁰
66. The Claimant objects to the Respondent's submission that the total ban on gambling was intended to be temporary. According to the Claimant, the "*Government never had the intention to put forward any new draft law for discussion in Parliament [and] [n]o draft law was ever submitted by the Government to the Parliament.*"⁷¹ Moreover, the Claimant argues that even if the ban was meant to be temporary, the Gambling Ban Law should be considered expropriatory due to its effect on the Claimant's investment.⁷²
67. According to the Claimant, the Respondent's expropriation of the Claimant's investment was unlawful because it failed to satisfy the conditions of Article 5(1) of the Treaty.⁷³ In this regard, the Claimant makes the following submissions.
68. The Claimant argues that the expropriation was motivated by populist political reasons and was not in the public interest. Among other things, the Claimant submits as follows:⁷⁴

The Respondent failed to provide evidence, let alone a prima facie explanation, of how legal gambling services in Ukraine posed a serious and immediate threat to "public morals" and "health". The government of Ukraine submitted no evidence to the Ukrainian parliament linking a threat to morality or public health with the supply of gambling services. The Ukrainian parliament did not rely on any specific scientific evidence linking morality or even crime with gambling services.

⁶⁸ SOR, para. 353.

⁶⁹ SOR, para. 359.

⁷⁰ Claimant's post-hearing brief, para. 43.

⁷¹ Claimant's post-hearing brief, para. 42.

⁷² Claimant's post-hearing brief, para. 42 (referring to CLA-50, *Olin Holdings Limited v State of Libya*, ICC Case No. 20355/MCP, Final Award of 25 May 2018, para. 165).

⁷³ SOC, para. 199.

⁷⁴ SOC, paras 206, 210-211.

Furthermore, a mere reference to the words “public health” or “morality” does not satisfy the requirement of public interest. [...]

[...]

In reality, the abrupt and radical total prohibition of gambling of 15 May 2009 was not linked to a genuine public interest. The circumstances surrounding the temporary ban of 7 May 2009 and the issuance of the total prohibition just three business days later (i.e. 15 May 2009), clearly show that the Gambling Ban Law came about as a result of an opportunistic political manoeuvre from Prime Minister Tymoshenko and members of parliament to gain the support of voters in the upcoming presidential election and gain favours from the Russian President Vladimir Putin, who was interested in having Russian gambling operators succumb to the 2009 Russian restrictions on gambling rather than fleeing to the neighbouring Ukraine to enjoy business opportunities. In the Russian Federation they had been legally preparing to restrict gambling since 2006 and the restriction was to come into effect on 1 July 2009 and gambling operators would have to operate in zones far remote from Russian touristic and business cities.

It is important to note that the total prohibition of casinos came at the time of a hugely contentious presidential election where Prime Minister Tymoshenko was one of the main contenders for the Presidency of Ukraine. According to some polls, the majority of working-class people were against casinos. Then the fire in a casino on 7 May 2009 which killed 7 people mounted pressure on the government to take an extravagant action against all casinos. The Prime Minister Tymoshenko used the accident, as tragic as it was, as the opportunity to (i) be seen as a moral political leader on the side of the people, and (ii) gain political support from voters in the upcoming presidential elections by imposing a total ban on gambling operations with immediate effect at a time where the parliament was under intense political and media pressure when by the time of the elections the fact of the ban would be remembered and the adverse consequences would not be seen yet, (iii) make favours for the Russian President Vladimir Putin by making sure, mere days before the restriction of gambling in the Russian Federation, that the Ukrainian market would be closed to Russian operators and would not undermine Russia’s plans to have gambling zones in distant rural areas. As President Yushchenko pointed out, the Gambling Ban Law was a “populist” measure by Prime Minister Tymoshenko.

69. Moreover, the Claimant submits that the expropriation was not conducted in accordance with due process of law. According to the Claimant, the Gambling Ban Law “*was adopted without (i) a proper debate in the Ukrainian parliament, (ii) giving prior notice to the Claimant, and (iii) regard for the industry’s reasonable concerns about the draft law*”.⁷⁵
70. Furthermore, the Claimant argues that the expropriation was not accompanied by the payment of prompt, adequate and effective compensation.⁷⁶

⁷⁵ SOC, para. 217.

⁷⁶ SOC, paras 222-224.

71. In relation to the Respondent's reliance on the police powers doctrine, the Claimant avers that the Respondent has failed to prove the fulfilment of the strict conditions of the police powers doctrine, including the conditions of (i) *bona fide* regulation for the protection of public health and (ii) proportionality.⁷⁷
72. In relation to *bona fide* regulation for the protection of public health, the Claimant submits as follows:⁷⁸

[...] the Gambling Ban Law was adopted for purely political reasons. No deficiencies in safety/security in the Claimant's (or any other operator) gambling halls had been found or even looked for at the time the Cabinet of Ministers ordered the suspension of all licenses. No evidence or scientific research had been conducted by the authorities or members of parliament showing that legal gambling posed a risk to human health and morality, let alone a serious one. No evidence that experts had recommended the government or members of parliament that urgent measures such as a total ban had to be put in place urgently to protect the population from all types of gambling with the exception of lottery.

The suspension of all licences and the total prohibition on gambling with immediate effect were not justified by any evidence of serious risk to health and morality caused by legal and responsible gambling operations or other risks to society.

73. In relation to proportionality, the Claimant argues that the Respondent's Gambling Ban Law was disproportionate. In this regard, the Claimant submits, *inter alia*, as follows:⁷⁹

[...] the Respondent shut down a lucrative industry in which legal operators had valid licenses, employed thousands of people and paid taxes to the state budget. Furthermore, the total ban only aggravated uncontrolled and illegal gambling, putting at a higher risk vulnerable people. As explained, there is no appropriate correlation between the alleged public purpose and the measure adopted to achieve it.

2. Respondent's Position

74. At the outset, the Respondent argues that its adoption of the Gambling Ban Law was a valid exercise of the state's police powers under international law and thus cannot constitute a breach of Article 5 of the Treaty.⁸⁰ According to the Respondent, the state's police powers are well-established under customary international law, which must be considered when interpreting the Treaty in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("VCLT"), which provides that the interpretation of

⁷⁷ SOR, para. 378.

⁷⁸ SOR, paras 381-382.

⁷⁹ SOR, para. 395.

⁸⁰ Respondent's post-hearing brief, para. 17.

a treaty should take into account “[a]ny relevant rules of international law applicable in the relations between the parties.”⁸¹

75. The Respondent argues that “in order to determine if a measure is a legitimate exercise of the State's police powers, as opposed to being an expropriatory taking, the question is one of the nature of the measure, not the effects.”⁸² In the same vein, the Respondent submits as follows:⁸³

The Restatement (Third) of the Foreign Relations Law of the United States (“Third American Restatement”), which has been considered and applied by numerous arbitral tribunals in drawing a distinction between a State's police powers and expropriation, also focuses on the measure as opposed to its effects. The Third American Restatement states as follows:

“[a] state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory.”

Later tribunals like the Methanex v USA tribunal have developed the test for a valid exercise of police powers and set out the following elements which must be satisfied:

- a. the measure must be bona fide;*
- b. for a public purpose;*
- c. non-discriminatory; and*
- d. accomplished with due process.*

76. The Respondent claims that the Gambling Ban Law was a valid exercise of police powers because it was a *bona fide* measure, which was adopted for a public purpose of addressing the serious public health and morality issues stemming from gambling in Ukraine.⁸⁴ In addition, the Respondent avers that the Gambling Ban Law enjoyed overwhelming democratic and political support, and it was also non-discriminatory and accomplished with due process.⁸⁵
77. Moreover, according to the Respondent, the Gambling Ban Law was not intended to prohibit all gambling operations indefinitely. The Respondent refers to Article 4 of the Gambling Ban Law and submits that the law was intended to be of temporary effect and

⁸¹ See Rejoinder, para. 218.

⁸² Rejoinder, para. 226.

⁸³ Rejoinder, paras 228-229.

⁸⁴ Rejoinder, para. 232.

⁸⁵ Rejoinder, para. 232.

required the CMU to present legislation, which would create gaming zones and lift the total ban on gambling within 3 months.⁸⁶ However, the Claimant was not interested in the creation of the gaming zones because its operations were concentrated inside of Kyiv's urban areas.⁸⁷

78. More specifically, in relation to the argument that the Respondent exercised its regulatory powers *bona fide* for a public purpose of the Gambling Ban Law, the Respondent submits, *inter alia*, as follows:⁸⁸

The salient point is that with regard to regulatory measures for a public purpose, the role of an international tribunal is not to second-guess or to review a State's decisions in good faith. That is particularly the case when the measure at stake relates to a sensitive domain, such as gambling. [...]

The World Health Organisation ("WHO") has confirmed that gambling is an international public health issue and the 2018 ICD-11 list recognises "gambling disorder" as an addictive, impulse control health disorder. Here, there is clearly a public interest, in particular public health and public morality, sought to be addressed by the Respondent's Law on the Prohibition of Gambling. [...]

As the Respondent already noted in the Statement of Defence, the high degree of deference that should be accorded to a State in the context of the regulation of gambling is enhanced when the State's measure is taken by a democratically elected legislature, such as the Verkhovna Rada.

79. Furthermore, in relation to the public purpose of the Gambling Ban Law, the Respondent avers as follows:⁸⁹

The Claimant does not dispute that the protection of public health and morality are legitimate public purposes. [...]

As the Respondent has illustrated [...], several independent research papers, surveys, newspaper articles and the numerous letters that local and regional State authorities sent to both the President of Ukraine and the Prime Minister evidence the serious public health and morality concerns related to the widespread of gambling and slot machines in Ukraine at the relevant time. These demonstrate the public health rationale behind the Law on the Prohibition of Gambling.

⁸⁶ Respondent's post-hearing brief, para. 20; Transcript, Day 1, 69:25-70:10 (Respondent's counsel: "*The June legislation did not envisage the permanent or irreversible prohibition of gambling in Ukraine. On the contrary, it imposed a temporary prohibition, and established a specific and express obligation on the Cabinet of Ministers to introduce further legislation providing for gambling zones in Ukraine within a specific and express timeframe of only three months. That was an obligation, furthermore, which any interested party, such as the Claimant or OCU, would have been able to enforce through the courts, had they only chosen to do so.*"), 110:20-11:12.

⁸⁷ Respondent's post-hearing brief, para. 20; Clifton II Expert Report, para. 37.

⁸⁸ Rejoinder, paras 246-248.

⁸⁹ Rejoinder, paras 249, 251-252.

This concern about public health is plainly evidence in considering the legislative and other documents relating to the Law on the Prohibition of Gambling.

80. In relation to the Respondent's compliance with the due process requirement, the Respondent submits as follows:⁹⁰

OEG knew of several attempts to reform the gambling industry in Ukraine, even prior to its entry into Ukraine, including discussions of absolute prohibition and creation of special zones. OEG had notice from March 2009 of draft legislation aimed at prohibiting gambling in Ukraine. The content of the March 2009 and the June 2009 Legislation was identical, save for a different implementation period.

Not only were the proceedings in the Verkhovna Rada in relation to the adoption of the June 2009 Legislation publicly available, but the expedited procedure was not unusual. In May– June 2009, no less than 139 draft laws were considered under the same procedure. The Verkhovna Rada routinely and lawfully used the expedited procedure as a legislative tool to enable the Verkhovna Rada to manage its schedule.

The President's veto – lobbied for by OEG – meant that Ukraine's legal system ensured that OEG had at least six weeks' notice of the legislation before the final version of the June 2009 Legislation came into effect. The Verkhovna Rada's overturn of the veto was not exceptional and the President could have challenged the June 2009 Legislation in the Constitutional Court, but decided not to do so. OCU could have challenged the CMU to bring forward legislation to establish special gambling zones before local courts. OEG preferred to commence liquidation proceedings even before the enactment of the June 2009 Legislation and almost immediately bring a claim against Ukraine.

81. In relation to the requirement of non-discrimination, the Respondent submits that the Respondent exercised its police powers without discriminating against the Claimant. The Respondent highlights that the exclusion of lotteries from the Gambling Ban Law was not discriminatory because the issuance and holding of lotteries are different types of gambling.⁹¹
82. Concerning the Claimant's argument regarding proportionality, the Respondent argues that proportionality is not a part of the test for a valid exercise of police powers.⁹²

⁹⁰ Respondent's post-hearing brief, paras 22-24.

⁹¹ Rejoinder, paras 275-276.

⁹² Rejoinder, para. 233. See also Rejoinder, para. 235 (“*In any event, the Claimant accepts that zoning restrictions would have been a responsible and reasonable response notwithstanding that as pointed out by the Respondent's expert: ‘if enacted, Draft Law number 7306 dated 17 June 2001 (Exhibit C-333) would have had the effect of restricting the location of businesses of the type that the Claimant intended to operate in Ukraine to the territory of the Autonomous Republic of Crimea. [...] As the Claimant has acknowledged, other draft laws proposed to restrict the organisation and operation of gambling to territories specifically designated for gambling. Had any of those been enacted, it would have had similar effect on the Claimant as the 2009 gambling ban, given the focus of the Claimant's Ukrainian business on Kyiv's urban areas.’*” [citing Clifton II Expert Report, paras 36-37]).

However, in any case, the Gambling Ban Law was a reasonable and proportional response to the problem of gambling in light of the special zoning system.⁹³

83. Furthermore, the Respondent claims that even if the Gambling Ban Law is not covered under the police powers doctrine, there was no expropriation at the date of the Gambling Ban Law because it was a temporary ban which was anticipated to be followed by the creation of special zones outside of residential areas.⁹⁴ This anticipation was fulfilled by the New Gambling Law in July 2020.⁹⁵ In this regard, the Respondent's counsel submitted at the Hearing as follows:⁹⁶

[...] it's also important to emphasise that it's no answer here to say, "Oh, well, the cabinet in fact failed to bring forward gambling zone legislation, so the prohibition became de facto permanent by default, and Article 4 of the law can therefore be disregarded". It's no answer because the Claimant bases its case on both treaty breach and damages on the situation as it stood on 25th June 2009, before the three-month period had even commenced.

And it's no answer because, as I've already said, and as we've explained in the Rejoinder [...] OCU could have compelled the introduction of such legislation by recourse to Article 17 of the Code of Ukraine on Administrative Procedure. That provision [...] relates to an administrative court remedy which could have led to an order requiring the cabinet to act, had it been invoked.

As the Tribunal will see, Article 17(1) expressly gives the administrative courts jurisdiction over disputes in respect of omissions on the part of government authorities. As we've explained in the Rejoinder, this was a commonly used jurisdiction where the Cabinet of Ministers failed to comply with time limits for action set out in legislation, and it was a jurisdiction which allowed the court to order the cabinet to make remedial action.

84. Finally, as addressed in more detail in the section on causation and quantum below, the Respondent submits the Tribunal should dismiss the Claimant's claims "*for lack of causation as Ukraine did not cause the alleged breaches of the Treaty. In the "but-for" world, OCU was headed for failure of its own making.*"⁹⁷

3. The Tribunal's Decision

85. The Claimant's submissions in relation to the alleged expropriation of its investment all relate to one source: the Gambling Ban Law. As its first line of defence, the Respondent

⁹³ Respondent's post-hearing brief, footnote 28.

⁹⁴ Respondent's post-hearing brief, para. 26; Transcript, Day 1, 110:20-111:12.

⁹⁵ Respondent's post-hearing brief, para. 26; Exhibit C-434, Law of Ukraine No. 768-IX "On State Regulation of Organization and Operation of Gambling" dated 14 July 2020.

⁹⁶ Transcript, Day 1, 76:17-77:19.

⁹⁷ Respondent's post-hearing brief, para. 42.

submits that there could be no expropriation as the Gambling Ban Law was a valid exercise of the police powers of the state. It is therefore necessary to first examine the conditions of the police powers doctrine and to then consider whether the Gambling Ban Law met those conditions.

86. The Tribunal notes that the Treaty does not expressly include any reference to the police powers doctrine, according to which some *bona fide* regulatory acts of the state shall not be considered expropriatory and shall not require compensation. However, the Parties agree that the police powers doctrine is applicable in the present case. Their dispute is only whether the Gambling Ban Law met those conditions necessary to be considered part of the police powers of the state. Therefore, the Tribunal need not address in detail the inclusion of customary rules, like the police powers doctrine, in investment treaties that do not provide for them explicitly. It is sufficient to note that the Tribunal accepts the observation made in the *Saluka* case, in which the tribunal noted as follows:⁹⁸

The Tribunal acknowledges that Article 5 [concerning expropriation] of the Treaty in the present case is drafted very broadly and does not contain any exception for the exercise of regulatory power. However, in using the concept of deprivation, Article 5 imports into the Treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order. In interpreting a treaty, account has to be taken of “any relevant rules of international law applicable in the relations between the parties” – a requirement which the International Court of Justice (“ICJ”) has held includes relevant rules of general customary international law.

It is now 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.

[...]

In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary international law today.

87. As noted above, the Respondent cited *Methanex* and stated that the test for a valid exercise of police powers is comprised of the following elements: (i) the measure must be *bona fide*; (ii) for a public purpose; (iii) non-discriminatory; and (iv) accomplished with due

⁹⁸ Exhibit RLA-31, *Saluka Investments B.V. v The Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, paras 254-255, 262. See also Exhibit RLA-53, *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award of 29 May 2003, para. 119.

process. The Claimant does not dispute these elements. However, the Claimant submits that proportionality forms a part of the conditions for the valid exercise of the police powers doctrine. The Respondent disagrees.

88. The Tribunal notes that the condition of proportionality was not mentioned in The Third American Restatement,⁹⁹ nor was it mentioned in the famous Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens, which states as follows:¹⁰⁰

An uncompensated taking of property of an alien or a deprivation of the use or enjoyment of property of an alien which results from [...] the action of the competent authorities of the State in the maintenance of public order, health, or morality [...] shall not be considered wrongful, provided:

(a) it is not a clear and discriminatory violation of the law of the State concerned;

(b) it is not the result of a violation of any provision of Articles 6 to 8 of this Convention [denial of justice];

(c) it is not an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; and

(d) it is not an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.

89. However, subsequent tribunals have regarded proportionality as one of the conditions for a valid exercise of the police powers doctrine. In the *Tecmed* award, in determining whether regulatory actions are to be regarded as expropriation, the tribunal, considered whether regulatory actions and measures were “*proportional to the public interest presumably protected*”.¹⁰¹ Similarly, in the *Philip Morris* award, in which the tribunal regarded proportionality as part of the police powers test, the tribunal, composed of the

⁹⁹ Exhibit RLA-96, Restatement (Third) of Foreign Relations Law (1987), para. 712.

¹⁰⁰ Exhibit CLA-15, Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), Article 10(5).

¹⁰¹ Exhibit RLA-59, *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award of 29 May 2003 para. 122. See Exhibit RLA-74, *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Award of 31 October 2011, para. 241 (stating that “*If general regulations are unreasonable, i.e. arbitrary, discriminatory, disproportionate or otherwise unfair, they can, however, be considered as amounting to indirect expropriation if they result in a neutralisation of the foreign investor’s property rights.*”); Exhibit RLA-32, *Marfin Investment Group Holdings SA and others v Republic of Cyprus*, ICSID Case No. ARB/13/27, Award of 26 July 2018, paras 981-983.

late Professor Piero Bernardini, Mr Gary Born and Judge James Crawford, noted as follows:¹⁰²

As indicated by earlier investment treaty decisions, in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken bona fide for the purpose of protecting the public welfare, must be non-discriminatory and proportionate.

90. Having considered the Parties' submissions and the different authorities, the Tribunal is of the view that the condition of proportionality must be included in the test for a valid exercise of the police powers doctrine. Proportionality has become an important factor in international investment law and the substantive protections that it provides for investors.¹⁰³ It is bound up in the concepts of fairness and equity which are commonly reflected in the substantive standards included in investment treaties. In the Tribunal's view, it may well be said that proportionality can be regarded as part of the "*principles of justice recognized by the principal legal systems of the world*" or at least a factor to be considered under the condition of "*abuse of the powers*" in the words of the Harvard Draft Convention. Therefore, for the Gambling Ban Law to be considered a valid exercise of the police powers of the Respondent, it must be proportionate.
91. After setting out the relevant test, the Tribunal now turns to the question of whether the Gambling Ban Law was a valid exercise of the police powers of the Respondent.
92. The Claimant has advanced various submissions to the effect that the Gambling Ban Law was purely political and that it was neither for public purpose nor was it made in good faith. The Tribunal has some sympathy for the Claimant's submissions. The evidence before the Tribunal shows that in the expedited process adopted by Parliament, which by definition reduced the period for deliberation as to the merits and demerits of the proposed legislation, the legislators had little in the way of empirical evidence before them that

¹⁰² Exhibit RLA-2, *Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, para. 305.

¹⁰³ See e.g., *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award of 5 October 2012, para. 404 ("[...] the Tribunal observes that there is a growing body of arbitral law, particularly in the context of ICSID arbitrations, which holds that the principle of proportionality is applicable to potential breaches of bilateral investment treaty obligations"). See also proportionality in the context of the fair and equitable treatment standard: Exhibit CLA-40, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006), para. 195; Exhibit CLA-31, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, para. 109.

would have assisted them in crafting a legislative solution to the problem that was said to face the country.

93. In this regard, it is important to emphasise that the Tribunal does not expect the members of any parliament to critically analyse every aspect of whatever studies might be available to parliament. Nor is the Tribunal blind to the fact that law-making is a process of balancing policy alternatives, purely political considerations, and other factors, a process that can seem very distant from, perhaps even antithetical to, the scientific method. However, before taking action which would effect radical change for the gambling industry and rendering illegal that which was hitherto legal, it is not unreasonable to expect that the legislature would at least reasonably consider and discuss some of the evidence.
94. Nevertheless, the submission by a claimant that a law was not passed for a public purpose and in good faith cannot be accepted lightly. As noted by the Respondent, the Gambling Ban Law was passed with wide support from politicians from all over the political spectrum. It is evident that the issue of gambling and the problems that are related to it were previously debated in Ukraine. Indeed, more than 35 draft laws that sought to address the problem of gambling were debated in the Ukrainian parliament in between the years of 1998 and 2009.¹⁰⁴ Moreover, the Claimant's submissions regarding the political motives behind the Gambling Ban Law were based more on speculation than on concrete evidence.
95. Therefore, having considered the Parties' submissions, the Tribunal considers that it is not in a position to hold that the Gambling Ban Law was adopted in bad faith. Moreover, on the basis of the available evidence, the Tribunal accepts the Respondent's submission that the Gambling Ban Law was passed for reasons of public health and morality as estimated by a large cross-section of legislators.¹⁰⁵ Specifically, the Gambling Ban Law appears to have been meant to address the problem of ubiquitous gambling which had escaped the existing legislative regime and evidently had assumed nuisance proportions, a problem which the Tribunal appreciates is serious and that states have a right to address in an appropriate manner. In the same vein, the Tribunal stresses that the protection of

¹⁰⁴ SOR, para. 130.

¹⁰⁵ Respondent's post-hearing brief, para. 4.

public health and morality is a worthy and important cause which lies close to the heart of public policy for all states. International tribunals, which lack in-depth knowledge of local conditions, ought to be wary of second-guessing an elected legislature's appraisal of those local conditions. But that does not prevent a tribunal from evaluating how the measure that lawmakers selected comports with the state's international obligations.

96. The Tribunal now turns again to the issue of proportionality. In addressing the question of proportionality, the Tribunal finds it appropriate to refer again to the *Tecmed* award, in which the tribunal accurately noted as follows:¹⁰⁶

[...] the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State in light of Article 5(1) of the Agreement to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not. [emphasis added]

97. As noted above, the Tribunal accepts the Respondent's submission that the Gambling Ban Law was passed for reasons of public health and morality. The Tribunal further accepts that there is a reasonable link between the protection of public health and morality and the Gambling Ban Law, regardless of how excellent or ill-advised a measure it may have been. However, the Tribunal must also consider the effect of the Gambling Ban Law. It cannot be denied that such effect was severe. The Gambling Ban Law not only wiped out the Claimant's investments, a point that the Tribunal discusses later in the Award, it also resulted in the "destruction of an entire sector of the economy", as stated in the explanatory note to the new law on gambling, which legalised gambling in Ukraine in

¹⁰⁶ Exhibit RLA-59, *Técnicas Medioambientales Tecmed SA v The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award of 29 May 2003, para. 122.

2020.¹⁰⁷ Moreover, the Tribunal notes that the explanatory note states that among the “consequences of the sudden and uncontested ban on the gambling business” was the “development of the shadow market without the possibility of effective government regulation”.¹⁰⁸ The damaging effect of the Gambling Ban Law was already predicted at the time of its adoption. The Ukrainian president at the time, Mr Yushchenko, warned that the instantaneous implementation of the Gambling Ban Law “may result in a mass liquidation of gambling establishments and, as a consequence, mass dismissal of their employees who join the ranks of the unemployed (approximately 200 thousand people).”¹⁰⁹ However, the Ukrainian government chose to ignore Mr Yushchenko’s warning, and the prime minister at the time, Ms Tymoshenko, referred to the presidential veto as “an unparalleled situation when the national leader does not care about the spirituality of the nation”.¹¹⁰ Similarly, according to a press release of the Cabinet of Ministers, Ms Tymoshenko praised the political parties “that made it possible to overrule the corrupted Presidential veto and set the State free from mafia-style gambling business.”¹¹¹ Other politicians used similar and even harsher language, for example, stating that gambling “has become an epidemic that can be compared with AIDS and tuberculosis”.¹¹²

98. Moreover, the Gambling Ban Law did not envisage any compensation or transitional mechanism for the affected investors. Indeed, this was one of the reasons that prompted the Minister of Justice in Ukraine at the time to condemn it as unlawful.¹¹³ In the same vein, the Ukrainian president at the time also claimed that the law was unlawful while stating, *inter alia*, that the law “is a violation of the rights of entrepreneurs organizing gambling games that will suffer significant losses as a result of the ban on gambling,

¹⁰⁷ See Exhibit C-435, Explanatory Note to Draft Law of Ukraine No. 2285-d “On State Regulation of Organization and Operation of Gambling”, 14 January 2020; Exhibit C-434, Law No 768-IX “On the State Regulation of Organization and Operation of Gambling” dated 14 July 2020.

¹⁰⁸ Exhibit C-435, Explanatory Note to Draft Law of Ukraine No. 2285-d “On State Regulation of Organization and Operation of Gambling” dated 14 January 2020.

¹⁰⁹ Exhibit C-56, Submission of the President of Ukraine with proposals to the Draft Gambling Ban Law dated 15 May 2009, p. 2.

¹¹⁰ Exhibit C-47, The Cabinet of Ministers of Ukraine Press Release “Yuliya Tymoshenko: Gambling Ban is a victory of spirituality” dated 15 June 2009.

¹¹¹ Exhibit C-48, The Cabinet of Ministers of Ukraine Press Release “Prime-Minister's commentary regarding the overrule of President's Gambling Ban Veto” dated 11 June 2009.

¹¹² Exhibit C-52, Article “All Bets Are Off - Russia and Ukraine Ban Gambling”, James Marson, TIME dated 2 July 2009 (citing a “parliamentary deputy from Ukrainian Prime Minister Yulia Tymoshenko’s party”).

¹¹³ Exhibit C-114, Liga.net “Ministry of Justice Warned Yushchenko the Ban on Gambling Business Will Cause Problems”, Article in Liga.net (news agency) dated 26 May 2009.

*which is a violation of the constitutional provision binding the state to ensure protection of all subjects of the right of ownership and business entities.”*¹¹⁴ Indeed, after the adoption of the Gambling Ban Law, no compensation was provided to the Claimant for its losses.

99. The Tribunal was troubled not only by the severe impact of the Gambling Ban Law on the Claimant’s investments but also by its immediate effect. As stated above in the Factual Background of the Dispute, the Gambling Ban Law entered into immediate effect. Foreign investors, and local investors for that matter, were not consulted. There was no adjustment period. There was no dialogue of any substance with those businesses who would be immediately affected by the ban. Had there been an adjustment period, the gambling business sector could have mitigated some losses or negotiated an amelioration of the ban on acceptable terms. However, the ban’s immediate entry into force deprived the gambling business sector of that opportunity. Moreover, as explained in more detail below, once the Gambling Ban Law entered into effect, the Claimant’s investments, specifically Olympic’s licensing rights, were immediately extinguished. While the Respondent’s expert, Mr David Clifton, has highlighted that various states, including Brazil, Israel and India, prohibit certain gambling activities,¹¹⁵ he could not refer the Tribunal to even one example where the whole gambling industry was dismantled with immediate effect.¹¹⁶ The Respondent did not bring any current or former government witnesses to explain the need for a total ban with immediate effect.
100. The Tribunal did consider the Respondent’s submission that the Gambling Ban Law was proportional in light of the special gambling zoning system, which was envisaged in Article 4 of the Gambling Ban Law. Although the Law contemplated the establishment of a new regime within three months, this zoning system was not established until the adoption of the New Gambling Law in July 2020. The Tribunal cannot be expected to ignore the reality as it existed immediately after the adoption of the Gambling Ban Law. Indeed, in order to properly establish the existence of expropriation, tribunals must look

¹¹⁴ Exhibit C-56, Submission of the President of Ukraine with proposals to the Draft Gambling Ban Law dated 15 May 2009, p. 2.

¹¹⁵ Transcript, Day 4, 76:25-77:1.

¹¹⁶ The expert’s only related example was Kazakhstan. But even there the law did not have an immediate effect: “Ah, well, with immediate effect, I’ll come back to that. I’m thinking of the ban in Kazakhstan, which, from memory, there were 15 days before it came into effect” (Transcript, Day 4, 93:1-3).

into the effects of the impugned measure. Such examination requires the Tribunal to look beyond the date of the impugned measure. In the present case, such examination also leads the Tribunal to reject the submission that the special zoning system (that was in the event *not* established within the three month period as contemplated by the Gambling Ban Law) was proportional.

101. In light of the above, the Tribunal decides that the Gambling Ban Law cannot be regarded as a proportionate measure, and it was therefore not a valid exercise of the police powers doctrine.
102. Having established that the Gambling Ban Law was not a valid exercise of the police powers doctrine, the Tribunal moves on to the next question: whether the Respondent indirectly expropriated the Claimant's investment.
103. The Tribunal notes that Article 5 of the Treaty provides protection from direct and indirect unlawful expropriation. This is clear from the wording of the Article which states in part that “[i]nvestments of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation [...] in the territory of the other Contracting Party except for [...]”. [emphasis added]
104. The test for indirect expropriation has been widely discussed by investment tribunals. For the purposes of the present case, it is sufficient to state that the benchmark for testing indirect expropriation is whether a measure taken by the state results in a substantial deprivation of the value, use or enjoyment of the investor's investment. In this regard, for example, in the *Burlington* award, the tribunal stated as follows:¹¹⁷

When assessing the evidence of an expropriation, international tribunals have generally applied the sole effects test and focused on substantial deprivation. By way of example, one may cite Pope & Talbot v. Canada, where the tribunal stated that “under international law, expropriation requires a ‘substantial deprivation’”, or Occidental v. Ecuador, where in relation to tax measures, the tribunal referred to the same “criterion of ‘substantial deprivation’ under international law [...].” In Archer Daniels v. Mexico, the tribunal noted that “expropriation occurs if the interference is substantial.”

¹¹⁷ CLA-49, *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012, paras 396-398.

When a measure affects the environment or conditions under which the investor carries on its business, what 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. In this sense, some tribunals have focused on the use and enjoyment of property. The loss of viability does not necessarily imply a loss of management or control. 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.

Most tribunals apply the test of expropriation, however it is phrased, to the investment as a whole. Applied to the investment as a whole, the criterion of loss of the economic use or viability of the investment implies that the investment as a whole has become unviable. The measure is expropriatory, whether it affects the entire investment or only part of it, as long as the operation of the investment cannot generate a commercial return.

105. Similarly, in the *Philip Morris* award, the tribunal held that:¹¹⁸

[...] in order to be considered an indirect expropriation, the government's measures interference with the investor's rights must have a major adverse impact on the Claimants' investments. As mentioned by other investment treaty decisions, the State's measures should amount to a "substantial deprivation" of its value, use or enjoyment, "determinative factors" to that effect being "the intensity and duration of the economic deprivation suffered by the investor as a result of such measures."

106. Applying the above to the facts of the present case, the Tribunal considers that the present case is a textbook example of indirect expropriation.

107. Once the Gambling Ban Law entered into effect on 25 June 2009, with the exception of several activities such as lotteries and sports competitions, gambling was outlawed in accordance with Article 2 of the Law. The licences of the different gambling facilities were revoked in accordance with Article 4(2) of the Law. The licences were the linchpin of the Claimant's business: with no licence, there could be no operations. And with no operations, there could be no ability to generate cash flows. The direct taking of the licences thus amounted to an indirect taking of the Claimant's investments in Ukraine. Specifically, with regard to the Claimant, immediately upon the Gambling Ban Law's entry into force, the Claimant lost the possibility to earn a commercial return from its investments, which were all dependent on the legality of gambling in Ukraine. Moreover, in accordance with Article 4(2) of the Gambling Ban Law, the Claimant's licencing rights were revoked, indeed the licences had to be physically surrendered to the authorities, as

¹¹⁸ Exhibit RLA-2, *Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, para. 192 (citing *Telenor Mobile Communications AS v Republic of Hungary*, Award of 13 September 2006, paras 65 and 70).

acknowledged by the Respondent's counsel.¹¹⁹ Therefore, in the Tribunal's view, the intensity of the deprivation was extreme. The Gambling Ban Law did not simply substantially deprive the value of the Claimant's investments, it destroyed them as much as it destroyed "*an entire sector of the economy.*"¹²⁰

108. In contrast to the Respondent's submission, the Tribunal is of the view that the Gambling Ban Law was not a mere temporary ban of gambling. The Gambling Ban Law had long term effects which resulted in the permanent indirect expropriation of the Claimant's investments. Despite the reference to special gambling zones outside of residential areas in Article 4 of the Gambling Ban Law, as stated above, no zones were actually established until the adoption of the New Gambling Law in July 2020 – 11 years later. Therefore, from June 2009 until July 2020, with a few exceptions, gambling was prohibited in Ukraine. In that sense, the Claimant was right to act quickly and liquidate its investments without waiting in vain for Ukraine to create the zoning system. In this regard, the Tribunal considers that the Claimant was entitled to have no confidence that the then current government would in fact set up gambling zones within the three-month period. During the three months ban period the Claimant would have had to incur all its expenses without generating any income. As it is the Respondent's case that the Claimant was in fact already in a precarious financial position, the ban might, on that view, be seen as the nail in the coffin.
109. Furthermore, the Tribunal considers that the Respondent's argument that the Claimant cannot succeed because it failed to go to court to force the Government to include zones for gambling completely lacks merit and must be rejected. There is not the slightest indication that such proceedings had any chance of success. Further, there is no indication as to when such proceedings would have been fully concluded, and the Tribunal is satisfied that the Claimant could not lawfully have continued in business during such time bearing in mind its solvency.
110. The Respondent's next line of defence concerns its submissions on causation, according to which the Tribunal should dismiss the Claimant's claims "*for lack of causation as*

¹¹⁹ Transcript, Day 7, 54:12-14 (Respondent's counsel stating that "*it is correct that on 25th June 2009 the Claimant's licences were formally revoked*").

¹²⁰ Exhibit C-435, Explanatory Note to Draft Law of Ukraine No. 2285-d "On State Regulation of Organization and Operation of Gambling" dated 14 January 2020, p. 1.

Ukraine did not cause the alleged breaches of the Treaty [...].¹²¹ In this regard, the Respondent's counsel stated at the Hearing that "*if [the Tribunal] agree[s] with us that there was no causation because this business would not have survived in the but-for world, then quantum necessarily doesn't arise. It's only if you are not with us on that that I will come on to deal, as an alternative, with quantum*".¹²²

111. The Tribunal will address the Respondent's claim on causation in the relevant section on causation and quantum below. However, at this stage, it is sufficient to note that the Tribunal was not persuaded by the Respondent's submission. Whether the Claimant's investments would have failed in any case at some time in the but-for world is not known. What is established by the facts of this case is that after the Gambling Ban Law the Claimant was right to understand that its gambling activities in Ukraine, and therefore its investments, were over.
112. Having established that the Respondent indirectly expropriated the Claimant's investment, it is clear that such indirect expropriation was unlawful as it was not conducted in accordance with Article 5 of the Treaty. Specifically, the expropriation was not "*accompanied by provisions for the payment of prompt, adequate and effective compensation*".
113. Accordingly, the Tribunal accepts the Claimant's request for relief and declares that the Gambling Ban Law, which entered into effect on 25 June 2009, constituted an indirect expropriation of the Claimant's investments in violation of Article 5 of the Treaty.
114. Finally, the Tribunal wishes to emphasise that it has not reached its decision lightly. The Tribunal agrees with the dictum of the tribunal in *Invesmart v Czech Republic* that:¹²³

[...] when testing regulatory decisions against international law standards, the regulators' right and duty to regulate must not be subjected to undue second-guessing by international tribunals. Tribunals need not be satisfied that they would have made precisely the same decision as the regulator in order for them to uphold such decisions.

¹²¹ Respondent's post-hearing brief, para. 42.

¹²² Transcript, Day 8, 96:25-97:5.

¹²³ Exhibit RLA-27, *Invesmart, BV v Czech Republic*, UNCITRAL, Award of 26 June 2009, para. 501.

115. In the same vein, the Tribunal agree with the *Pauschok* award, in which it was held that:¹²⁴

Actions by legislative assemblies are not beyond the reach of bilateral investment treaties. A State is not immune from claims by foreign investors in connection with legislation passed by its legislative body, unless a specific exemption is included in the relevant treaty.

On the other hand, the fact that a democratically elected legislature has passed legislation that may be considered as ill-conceived, counter-productive and excessively burdensome does not automatically allow to conclude that a breach of an investment treaty has occurred. If such were the case, the number of investment treaty claims would increase by a very large number. Legislative assemblies around the world spend a good part of their time amending substantive portions of existing laws in order to adjust them to changing times or to correct serious mistakes that were made at the time of their adoption. A claim for a breach under an investment treaty has to be proven by claimants under the specific rules established in that treaty.

116. In the present case, the Tribunal has no intention of second guessing the decision of the parliament of Ukraine. There is no dispute that Ukraine was entitled to ban gambling. However, in light of Ukraine's international obligations under the Treaty, Ukraine was not entitled to indirectly expropriate the Claimant's investments overnight and without any compensation. Such behaviour was a clear breach of the Treaty, and, as explained in the section on causation and quantum, the Respondent must compensate the Claimant for that breach.

II. Fair and Equitable Treatment and the Obligation to Encourage and Create Favourable Conditions for Foreign Investments

117. Article 2 of the Treaty provides as follows:¹²⁵

1. Each Contracting Party shall encourage and create favourable conditions in its territory for investments of investors of the other Contracting Party and shall admit such investments in accordance with its laws and regulations.

2. Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.

1. Claimant's Position

118. The Claimant submits that Article 2(1) of the Treaty confers an obligation on the host state to "*create favourable conditions*" for foreign investors. This obligation means that

¹²⁴ Exhibit RLA-21, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v Government of Mongolia*, Award on Jurisdiction and Liability of 28 April 2011, paras 298-299.

¹²⁵ Exhibit C-1, Treaty, Article 2.

Ukraine must provide a stable, predictable and transparent legal and business framework.¹²⁶

119. The Claimant explains the content of Article 2(2) of the Treaty, which provides for the FET standard, by relying on Professor Schreuer's study, which concluded that the FET standard covers a number of concrete elements, including (i) lack of arbitrariness; (ii) stability and predictability that respect the investor's legitimate expectations; (iii) to act in good faith; (iv) transparency; (v) procedural propriety and due process; and (vi) prohibition of coercion and harassment.¹²⁷ In addition, the Claimant argues that the FET standard includes the obligation not to cause damage to investments through exorbitant or disproportionate measures.¹²⁸
120. According to the Claimant, the Respondent breached (i) the obligation to provide a stable and predictable legal framework in accordance with Article 2(1) of the Treaty, and (ii) the FET standard under Article 2(2) of the Treaty. In this regard, the Claimant submits that:¹²⁹

[...] Ukraine did not make changes to the legal framework or replaced a regime with another regime – it obliterated the entire legal framework in a matter of days. No respect for those operators with valid licenses, like Olympic, no transitional period provided, no advance notice to investors, no compensation offered let alone provided. Ukraine's radical and disproportionate actions breached its treaty obligations to maintain favourable conditions for Olympic's investment.

121. In addition, the Claimant argues that the Respondent breached the FET standard by failing to protect the Claimant's legitimate expectations. In this regard, the Claimant submits as follows:¹³⁰

Since its entry to the Ukraine's market (sic) in 2004 Olympic had relied on the legal framework and expected to run gambling business smoothly as there were no legal obstacles for operating the gambling business in Ukraine back then and nothing indicated that such business will be closed soon. In 2006, the Ministry of Finance issued to Olympic's subsidiaries all necessary licenses to conduct gambling business. The Licencing Law provided that the licences would not be revoked at the discretion of the authorities let alone Parliament. Therefore, (and this is the fundamental point) Olympic had the legitimate expectation that the licenses would

¹²⁶ SOC, para. 162.

¹²⁷ SOC, para. 167; Exhibit CLA-5, Schreuer, "Fair and Equitable Treatment in Arbitral Practice", pp. 373-374.

¹²⁸ SOC, para. 169 (citing Exhibit CLA-3, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg)*, *SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Final Award of 15 February 2018, paras 570-573).

¹²⁹ SOC, para. 164.

¹³⁰ SOR, paras 406-408 (citing Martinenko Report, Section 5.3, para. 82).

remain operational and would be effectively prolonged “for as long as they would keep filing applications for the issuance of such licenses without defects that would allow the licensing authorities to reject applications under the Licensing Law”. By unlawfully suspending Claimant’s licenses on by the CMU Decree [...] and MFU Order [...] and by adopting the 2009 Gambling Ban Law effectively revoking the Claimant’s licenses, Ukraine frustrated the legitimate expectations of Olympic. Simply put, Ukraine failed to honour the expectation created by the licenses and the Licencing Law, let alone the general legal framework at that time.

Furthermore, the 2009 Gambling Ban Law was contrary to the government’s own policy towards gambling. It cannot be seriously disputed that the Government of Ukraine abandoned its policy written down in Draft Law 3535. A policy of responsible and balanced reform, one which protected licence holders. Interestingly, the Respondent has failed to explain the reasons for this drastic change in policy by the Government.

It cannot be seriously disputed that the Licencing Law (which provided for the grounds for revocation) and the licenses issued pursuant to that licenses create legitimate expectations.

122. In addition, the Claimant argues that the conduct of the Respondent was not transparent and failed to respect the Respondent’s obligation to accord due process. In this regard, the Claimant submits, *inter alia*, as follows:¹³¹

Ukraine does not deny that the fair and equitable treatment obligation encompasses principles of procedural fairness. The principles of transparency and due process are embodied in the principal legal systems adhering to the rule of law

[...]

The Tribunal will have noted that Ukraine has little to say in respect to Olympic’s claim on lack of transparency and due process. It should be noted that the Respondent does not deny that (i) no prior notice was given to the Claimant prior to the suspension of its licenses; (ii) that Olympic learned of the suspension on the very same day the order was issued; (iii) no notice was given to Olympic prior to the adoption of the 2009 Gambling Ban Law; and (iv) Olympic was forced to shut down its operations immediately when the Law was finally adopted on 25 June 2009.

The Tribunal will also note that:

a. No scientific research or assessment of public health risks associated with gambling was ever conducted by any governmental authority or parliamentary committee (in sharp contrast with the facts in Philip Morris v Uruguay and Methanex v USA).

b. No opportunity was given to the industry and Olympic to engage in a dialogue with the Government or Parliament during the debate of the draft Prohibition Ban Law.

¹³¹ SOR, paras 425, 430-431, 436.

c. No proper discussion or debate was conducted in Parliament.

d. No proper response was ever issued in relation to the President's veto.

[...]

Finally, the 2009 Gambling Ban Law was contrary to even the most conservative notion of due process. The law was passed without any proper discussion in government or the Verkhovna Rada. The Respondent says that the expedited procedure is contemplated in the law, therefore, legal. The Respondent misses the point. Although technically it was a procedure envisaged in the law, Ukraine has failed to provide evidence that all other laws adopted in the month of May 2009 were conducted under the expedited procedure. It has also failed to justify why it had to be passed in such a fast-track procedure considering that gambling operations were at the time suspended thus no immediate risk to public health.

123. Furthermore, the Claimant submits that the Respondent's actions were unreasonable and disproportionate. According to the Claimant:¹³²

The suspension of licences and the 2009 Gambling Ban Law were arbitrary, unreasonable and disproportionate because: (i) the gambling ban was not subjected to any scientific analysis; (ii) was politically motivated; (iii) contradicted the existing government's policy on gambling reform; (iv) it was not properly debated in parliament, nor the industry consulted; (v) imposed a heavy burden on licence holders, (vi) the burden placed on the Claimant was not necessary to achieve the proclaimed goal (at the relevant time more reasonable means were discussed), (vii) the burden imposed for the sake of the good result far outweighed the positive result that it yielded (the problem of negative effects of gambling was not solved but exacerbated). Ukraine places its benefit or purportedly protecting public health as higher than the benefit of investors, without consideration to the need to balance conflicting benefits and match its aim to its end result. This stance would be a simple Leviathanian "end justifies the means" if the end was not as futile as in this case.

Strikingly, for those politicians who first promoted a total ban on gambling in March 2009, the 2009 Gambling Ban Law would have been arbitrary even for their standards. The initial draft of the 2009 Gambling Ban Law dated 26 March 2009 provided for a transitional period for the 2009 Gambling Ban Law to come into force, which would have run for approximately 8 months until 1 January 2010. However, on 12 May 2009, three (3) days before the adoption of the 2009 Gambling Ban Law, the provision on the transitional period was deleted without explanation. Instead the new version of the law draft envisaged that the law would come into force "from the day of its publication". The mere fact that such an important provision was scratched out in three days before the Parliamentary consideration serves a perfect illustration of the arbitrary changes in the regime introduced at that time.

¹³² SOR, paras 434-435.

124. Finally, the Claimant avers that the Respondent has breached the FET standard by acting in bad faith. In this regard, the Claimant submits that Ukraine has acted in bad faith in multiple ways:¹³³

The incendiary statements made by Prime Minister Tymoshenko against a legal business, calling gambling as an industry that is “destroying the Ukrainian nation”; the parliamentary deputy from the Prime-Minister’s party, comparing gambling with “AIDS” and “tuberculosis”, and the author of the draft 2009 Gambling Ban Law comparing gambling with “drugs, tuberculosis and alcoholism”. These incendiary statements shows a lack of intention to assess the reform of the gambling legal and business framework in an objective and facts-based manner. It is clear that the authorities and politicians had made up their minds about what to do with the gambling industry before any evidence, debate or recommendation by experts on public health and addiction was presented to them.

No prior notice, engagement or dialogue with the Claimant or the gambling industry association about the potential suspension and later total prohibition of gambling operations with immediate effect. This shows the bad faith conduct of the authorities by not giving to the industry an opportunity to defend itself or submit comments to the draft 2009 Gambling Ban Law prior to the adoption of the measures.

Adopting the extraordinary fast-track legislative process (only three days) to register, review, discuss, debate and approve the 2009 Gambling Ban Law. This is clearly a bad faith action to trigger the immediate revocation of all licences by law decree in breach of the Licencing Law.

Abruptly repealing the existing legal framework with no transitional period. This shows the lack of intention to consider the rights and effects that the total prohibition would bring to operators with existing valid licences. And, completely ignoring the legitimate concerns raised by the Respondent’s own Head of State in his veto to the 2009 Gambling Ban Law. No response whatsoever to the veto was ever produced by the government or parliament.

2. Respondent’s Position

125. The Respondent denies that it has breached the FET standard under the Treaty.
126. In relation to the Claimant’s reliance on Article 2(1) of the Treaty and the obligation to create predictable and stable conditions for the investment, the Respondent argues that the Claimant did not have legitimate expectations that the regulatory regime would remain unchanged when it started its gambling operations in Ukraine. In this regard, the Respondent submits as follows:¹³⁴

¹³³ SOR, paras 421-424.

¹³⁴ Rejoinder, paras 283, 285-286 (citing Exhibit RLA-108, *Antaris Solar GmbH and Dr. Michael Göde v Czech Republic*, PCA Case No. 2014-01, Award of 2 May 2018, para. 360(6)).

[...] in order to rely on legitimate expectations, the Claimant should have enquired in advance regarding the prospects of change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of Ukraine. Specifically, where there are no specific undertakings by the host State, the onus is on the investor to “inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State.”

[...]

The Claimant was aware of the concerns surrounding the problems of gambling in Ukrainian society and the possibility of regulation to restrict or prohibit it. Gambling was a serious public health and social problem in Ukraine and there had been longstanding attempts to legislate gambling in Ukraine. In fact, one of the draft laws published as early as 17 June 2001 proposed to restrict the location of businesses of the type that the Claimant intended to operate in Ukraine to the territory of the Autonomous Republic of Crimea. The effect of such a law on the Claimant, had it been adopted, would have been similar to the Law on the Prohibition of Gambling, given that the focus of the Claimant's Ukrainian business was on Kyiv's urban areas.

In any event [...] the Claimant was well aware of the possibility of a prohibition on gambling. Further, as the Respondent's expert notes, in the circumstances in which the Claimant started its operations in Ukraine in 2004 – where there was no unified legislation dealing with gambling and the regulation on gambling was exceptionally light – the Claimant should have been alerted of the need to conduct due diligence enquiries and risk assessments for business planning purposes before starting operations in Ukraine. The Claimant however chose not to conduct appropriate due diligence and risk assessment before entering the Ukrainian market and thus assumed the risk of any adverse regulatory changes. Thus, it cannot now be said that the Claimant had a legitimate expectation that the regulatory regime in Ukraine regarding gambling would not change.

127. In the same vein, the Respondent denies the Claimant's argument that the Respondent breached the FET standard by failing to protect the Claimant's legitimate expectations. According to the Respondent:¹³⁵

[...] the Claimant should not be considered to have any legitimate expectation that the legal regime on gambling in Ukraine would not be changed or that the Law on the Prohibition of Gambling would never be adopted.

[...]

[...] In the present case, the Claimant started its operations in Ukraine in 2004. At that time, it is now undisputed – despite the Claimant's earlier suggestions to the contrary – that the Claimant had not obtained or even applied for any licenses. Therefore, there could not possibly be any legitimate expectations regarding the

¹³⁵ Rejoinder, paras 293, 295, 298.

renewal in perpetuity of its licences because OCU did not have any licences, as the Claimant has admitted.

[...]

The Claimant has failed to produce any evidence of any assurances given by the Respondent which would have given rise to a legitimate expectation that its licences would be renewed in perpetuity. Instead, the Claimant relies solely on the expert opinion of Dr. Martinenko to argue that as long as a company complied with the requirements of the laws, the government would renew its gambling licence. However, in Dr. Martinenko's opinion the renewal of the Claimant's licences is conditioned on the applications not containing any defects allowing the licencing authorities to reject them. There is simply no guarantee or expectation that the Claimant's licences would necessarily be renewed in perpetuity.

128. In relation to the Claimant's claim concerning transparency and due process, the Respondent argues that it has acted transparently and in accordance with due process. In the same vein, the Respondent submits as follows:¹³⁶

The adoption of the Law on the Prohibition of Gambling was adopted in a transparent manner. The Law on the Prohibition of Gambling was published in draft in March 2009 before it was adopted by the Verkhovna Rada and was accompanied by an Explanatory Note setting out the rationale for the law. All proceedings in the Verkhovna Rada in relation to the adoption of the Law on the Prohibition of Gambling were publicly available, as is evidenced by the fact that the Claimant has been able to obtain them.

[...]

[...] the Law on the Prohibition of Gambling was adopted in accordance with due process, transparency and in compliance with all the legislative and procedural requirements of the Verkhovna Rada.

The Claimant argues that due process and transparency require that it be notified of the measure in advance. The Claimant had advanced notice of the Respondent's intention to adopt the law. [Referring to the March Draft Law on the Prohibition of Gambling of 26 March 2009]

129. In addition, the Respondent denies that it acted arbitrarily. The Respondent submits as follows:¹³⁷

In relation to arbitrariness, the Global Telecom v Canada tribunal, quoting Crystallex v Venezuela, observed that the notion of arbitrariness is essentially where a measure "is not based on legal standards but on excess of discretion, prejudice or

¹³⁶ Rejoinder, paras 308, 310-311.

¹³⁷ Rejoinder, paras 313-314, 316, 318-319 (citing Exhibit RLA-116, *Global Telecom Holding S.A.E. v Canada*, ICSID Case No. ARB/16/16, Award of 27 March 2020, para. 561; Exhibit RLA-2, *Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, para. 418).

personal preference, and taken for reasons that are different from those put forward by the decision maker.”

The Respondent has demonstrated that the Law on the Prohibition of Gambling was adopted bona fide for a public purpose and in accordance with the rule of law. In this regard, the Philip Morris v Uruguay tribunal noted in the context of determining whether the challenged measure was arbitrary that “[s]ubstantial deference is due in that regard to national authorities’ decisions as to the measures which should be taken to address an acknowledged and major public health problem.”

[...]

Moreover, as explained by the Respondent's expert in his reports, from a survey of various countries, it is evident that countries have adopted a range of measures in relation to gambling and there is a wide spectrum of options available to a State in terms of the regulation of gambling.

The Respondent's choice to restrict gambling via the Law on the Prohibition of Gambling is one option on the spectrum and has been chosen by the Respondent, as indeed it has by numerous other countries as diverse as Brazil, Israel, India and Kyrgyzstan.

Further as noted by the Respondent's expert, gambling is not a “normal” product in light of its implication on sensitive issues of public health and morality. Given the nature of gambling and the public health issues it implicated, public opinion is also a legitimate factor regarding the policy decisions in this area and the majority of Ukrainian public opinion was undoubtedly against gambling.

In view of the foregoing, the Respondent's adoption of the Law on the Prohibition of Gambling was not arbitrary.

130. The Respondent also argues that it acted in good faith. In this regard, the Respondent submits as follows:¹³⁸

As a preliminary matter, the Claimant bears the high burden of proof in demonstrating that the Law on the Prohibition of Gambling was not adopted in good faith. “[T]he standard for proving bad faith is a demanding one, in particular if bad faith is to be established on the basis of circumstantial evidence.” This is precisely the situation here where the Claimant is relying on circumstantial evidence in its bid to allege bad faith on the part of the Respondent. The Claimant has not even come close to proving that the Respondent acted in bad faith.

As to the specific allegations raised by the Claimant:

a. It is misleading to suggest that the opinions expressed by Prime Minister Tymoshenko and the author of the Law on the Prohibition of Gambling regarding the issues of gambling in Ukraine amount to evidence of bad faith. Indeed, the words used by Prime Minister Tymoshenko and the author of the Law on the Prohibition of Gambling

¹³⁸ Rejoinder, paras 302-303 (citing Exhibit RLA-110, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award of 27 August 2009, para. 143).

clearly demonstrated their view that gambling raised serious public health and morality concerns.

b. The Respondent has shown that the Claimant, both directly and as a member of the “Ukrainian Association of Gambling Personalities”, lobbied the President of Ukraine in a bid to stop the Law on the Prohibition of Gambling. Thus the Claimant was clearly aware of and engaged regarding the Law on the Prohibition of Gambling, preferring to focus its lobbying efforts through the President of Ukraine.

c. [...] the Law on the Prohibition of Gambling was adopted following the legal framework in place in Ukraine. As held in Indian Metals v Indonesia, the principle of good faith cannot preclude the State from amending its law.

131. In addition, while the Respondent denies that proportionality is part of the FET standard,¹³⁹ as stated above, the Respondent contends that the Gambling Ban Law was proportional.¹⁴⁰

3. The Tribunal’s Decision

132. The Tribunal is of the view that the Gambling Ban Law and its effect of destroying the Claimant’s investment clearly support the conclusion that there was a breach of the FET standard. In particular, in addition to the disproportionate effect of the Gambling Ban Law, it frustrated the Claimant’s legitimate expectation that, absent any infractions of the legal framework, its subsidiary would enjoy the use and benefit of its licences until their expiration, by revoking the Claimant’s licences without any compensation. However, in light of the Tribunal’s decision concerning the Respondent’s unlawful expropriation, as detailed above, the Tribunal considers that it need not make any decision in relation to the alleged breach of the FET standard as it has no bearing on the quantum or the Claimant’s entitlement to its requested relief.

III. Full Protection and Security

133. Article 2.2 of the Treaty provides that “[i]nvestments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and **shall enjoy full protection and security in the territory of the other Contracting Party**”. [emphasis added]

¹³⁹ Rejoinder, footnote 512 (“*The concept of proportionality developed under the ECtHR jurisprudence has not been widely applied or adopted as part of the FET standard*”).

¹⁴⁰ See para. 82 above, and Transcript, Day 1, 110:14-113:12.

1. Claimant's Position

134. The Claimant avers that the obligation to provide “*full protection*” extends to regulatory and legal protection in accordance with international law. This obligation also includes due process and procedural propriety.¹⁴¹

135. The Claimant argues that the Respondent breached its obligation to provide “*full protection*”. In this regard, among other things, the Claimant submits as follows:¹⁴²

[...] the Respondent's conduct clearly amounted to a breach of regulatory and full legal protection. As of 7 May 2009, the Respondent increased the number of controls and inspections to the Claimant's casino facilities pursuant to the Order. This was followed by the adoption of the Gambling Ban Law which contradicted more than 6 six years of consistent regulatory and government policy. It was done in complete disregard to the fact that the Claimant had valid licenses to operate at least two more years. There was no public consultation period, no prior notice was given to the Claimant so it could prepare for the total prohibition. The total prohibition was unilateral and constituted an abusive use of the powers of the State with no regard whatsoever to the legal rights of the Claimant under the valid licenses it held. The Gambling Ban Law had the malicious purpose of annihilation of the entire gambling industry in Ukraine from one day to the other. This is a breach of the obligation to provide full protection to the Claimant's investment in Ukraine.

136. In addition, the Claimant submits that the Respondent breached its FPS obligation by encouraging injury to the Claimant's investment. In this regard, the Claimant submits as follows:¹⁴³

[...] the Respondent actively encouraged such economic injury to the Claimant's investments with several statements to the population against gambling. Prime Minister Tymoshenko and other high-ranking officials made inflammatory and irresponsible statements against the gambling industry that, in the Claimant's submission, amount to harassment. For example, she declared that: “[gambling] is destroying the Ukrainian nation on a moral level.”

Mr. Valeriy Pysarenko, a parliamentary deputy from the Prime-Minister's party Batkivshchyna, stated that: “Gambling has become an epidemic that can be compared with AIDS and tuberculosis”.

These statements created a negative environment during the period of 7 May to 25 June 2009 which resulted in the annihilation of Olympic's gambling business activity in Ukraine.

¹⁴¹ SOC, para. 226.

¹⁴² SOC, para. 229.

¹⁴³ SOR, paras 447-449 (citing Exhibit C-52, Article “*All Bets Are Off - Russia and Ukraine Ban Gambling*”).

2. Respondent's Position

137. The Respondent submits that the FPS standard only extends to the duty of the host state to grant physical protection to the Claimant's investment. In support of its argument that the FPS standard extends only to physical protection, the Respondent highlights the weight of authority in support of this position. Furthermore, the Respondent submits that the FPS standard developed in the context of physical safety and security and this original meaning of the FPS standard should not be departed from.¹⁴⁴

138. Finally, the Respondent submits as follows:¹⁴⁵

In any event, even if the Tribunal considers that the FPS standard does extend to regulatory and legal protections, arbitral tribunals have found that the FPS protection does not protect against a State's police powers. In the present case, the Respondent has shown that its adoption of the Law on the Prohibition of Gambling was a legitimate exercise of its police powers and thus is not a breach of the FPS standard.

The Claimant also attempted to make the argument that the FPS standard was breached because the Respondent allegedly harassed the Claimant by actively encouraging economic injury to the Claimant's investments with statements to the population against gambling. This argument is without merit. The statements the Claimant referred to derive from one single article reporting comments by Prime Minister Tymoshenko and Mr Valeriy Pysarenko. This can hardly amount to harassment, much less a breach of the FPS standard.

3. The Tribunal's Decision

139. In light of the Tribunal's decision concerning the Respondent's unlawful expropriation, as detailed above, the Tribunal need not examine the Claimant's claim in relation to the alleged breach of the FPS standard and the obligation to create predictable and stable conditions for the investment.

G. Causation and Quantum

140. Article 31 of the ILC Articles on State Responsibility provides that:¹⁴⁶

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

¹⁴⁴ Rejoinder, para. 322.

¹⁴⁵ Rejoinder, paras 328-329.

¹⁴⁶ Exhibit CLA-46/RLA-61, ILC Articles on State Responsibility, Article 31.

2. *Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*

141. Article 36(2) of the ILC Articles on State Responsibility provides that “[t]he compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”

1. Claimant’s Position

142. The Claimant submits that the Respondent must pay full compensation for the loss of value of the Claimant’s investment and any other “*financially assessable damage*” in order to eliminate the consequences of the unlawful expropriation. In this regard, the Claimant submits, *inter alia*, as follows:¹⁴⁷

It is important to differentiate between the principles governing the compensation due for a lawful and unlawful expropriation because a wrongdoer should not benefit from its own wrong. [...]

The compensation for an unlawful expropriation must account not only for the loss of an asset in the past but the investor’s loss of choice that is protected by the BIT to hold the asset and sell it at some time in the future (the investor’s choice if the State does not expropriate) or to invest the amount that would have been paid by the State at the time the asset was lawfully expropriated (the investor’s choice if the State does expropriate).

The distinction between the standard of compensation for lawful and unlawful expropriations was explained by the Siemens v Argentina tribunal:

The key difference between compensation under the Draft Articles and the Factory at Chorzów case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account “all financially assessable damage” or “wipe out all the consequences of the illegal act” as opposed to compensation “equivalent to the value of the expropriated investment” under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages.

143. In light of the above, the Claimant requests that the Tribunal order the Respondent to pay compensation, on the basis of full reparation for the Claimant’s losses suffered as a result

¹⁴⁷ SOC, paras 240-242 (citing Exhibit CLA-19, *Siemens A.G v The Argentine Republic*, ICSID Case No. ARB/02/8, Award of 17 January 2007, para. 352).

of the Respondent's violations of the Treaty, in the amount of no less than EUR 12,404,000. The Claimant's quantum expert has explained this calculation as follows:¹⁴⁸

We understand that an award of damages is usually intended to put the claimant, so far as monetary compensation is able, in the financial position that it would have been in had the complained-of breach or breaches not occurred.

The loss in this matter can therefore be calculated as the difference between: (1) the actual position in which, following the introduction of the Gambling Ban, OEG liquidated OCU and recovered a small proportion of its investments in Ukraine; and (2) the but for (or counterfactual) position in which none of the CMU Decree, the MFU Order or the Gambling Ban were passed, and OEG would have continued to hold the market value of its Ukrainian operations in this hypothetical scenario.

In the actual position, OEG recovered EUR 2.6 million after the CMU Decree was passed [...]

In calculating OEG's losses, we have adopted EUR 15 million as the value of the OCU Group in the 'but' for position. This figure is the midpoint of the result of our DCF valuation of EUR 18.7 million and the Maxbet offer for the OCU Group as agreed by OEG on 9 April 2009 of USD 15 million, or EUR 11.4 million as at that date.

[...]

Deducting the amount of EUR 2.6 million received by OEG since the introduction of the CMU Decree from EUR 15 million leaves OEG with a loss of EUR 12.4 million before interest.

We have calculated interest applicable to OEG's losses at a rate of LIBOR+4% of EUR 7.6 million.

144. In the alternative, the Claimant requests that the Tribunal order the Respondent to pay compensation on the basis of full reparation for the Claimant's losses suffered as a result of the Respondent's Treaty violations, to be calculated as (i) Euro equivalent of US Dollars 15 (fifteen) million at the USD-EUR exchange rate effective as of the date of the Tribunal's award, as referenced on the Bloomberg website,¹⁴⁹ less (ii) Euro 2,596,000.00 (two million five hundred and ninety six thousand), being the aggregate amount of loss actually recovered by the Claimant.¹⁵⁰ This alternative compensation claim is based on the Claimant's submission that "*the enterprise value of OCU Group implied by the Maxbet offer was at least USD 15 million*".¹⁵¹

¹⁴⁸ Nicholson and Davie II Expert Report, paras 2.39-2.42, 2.45-2.46.

¹⁴⁹ SOR, para. 625 (citing <https://www.bloomberg.com/markets/currencies>).

¹⁵⁰ SOR, para. 639(5).

¹⁵¹ SOR, para. 620.

145. In addition, the Claimant requests pre-award interest at the rate of 12-month LIBOR + 4%, compounded annually, accruing from 25 June 2009 until (and inclusive of) the date of the Tribunal's award. In the same vein, the Claimant requests post-award interest on any amount awarded to them at the rate of 12-month LIBOR + 4%, compounded annually, accruing on the outstanding amount from the date of the Tribunal's award until payment in full.¹⁵²
146. Finally, the Claimant also denies the Respondent's arguments in relation to causation. According to the Claimant, before the Gambling Ban Law, OCU was financially stable, and did not have major liabilities towards third parties, i.e., creditors other than OEG.¹⁵³ Therefore, there is clear causation between the Claimant's loss and the Gambling Ban Law. In relation to the specific dates of the liquidation process of OCU, the Claimant contends as follows:¹⁵⁴

As follows from [C-117], OEG as OCU Group's shareholder decided to liquidate its Ukrainian subsidiaries on 3 July 2009 in view of the adoption of Gambling Ban Law. Importantly, it was a decision approved and signed by Mr Avila, member of the Management Board and CEO, on behalf of the parent company, but not "the decision of the subsidiary, OCU, on 3rd July" as Respondent mistakenly suggested.

Also, Mr. Pielberg during his cross-examination confirmed that liquidation process began on 3 July 2009.

OEG's 2009 Annual Report refers to the adoption (on 15 May 2009) and publication (on 25 June 2009) of Gambling Ban Law, cancellation of licenses and termination of the activities of all casinos as the reason for OEG's decision to liquidate the Ukrainian subsidiaries. As evident from the context of the discussion and references to enactment of Gambling Ban Law it is only fair to assume that 9 June 2009 is a typo. As Mr. Davie commented, "we know that the EGM, which seems to be the first step in the liquidation process, took place on 3rd July. So there's at least a possibility that that date [9 June] is an error."

As follows from the OEG's webpage official announcement [C-MP-8], Claimant reopened its Ukrainian subsidiaries in June 2009. As Mr. Davie explained, "[...] we can see from the weekly reports that OCU was continuing to trade after that date [9 June]. So it certainly didn't enter into liquidation as at that date."

2. Respondent's Position

147. At the outset, the Respondent claims that even if the Tribunal finds that there has been a breach of the Treaty, the Claimant is not entitled to any compensation because any losses

¹⁵² SOR, para. 639(6), (7).

¹⁵³ Claimant's post-hearing brief, paras 149-150.

¹⁵⁴ Claimant's post-hearing brief, paras 153-156.

suffered by the Claimant were not caused by measures adopted by the Respondent. According to the Respondent, the Claimant's investment was a failure well before the Gambling Ban Law was enacted. In this regard, the Respondent highlights that causation is a basic legal requirement that is reflected in the express words of Article 31(1) of the ILC Articles on State Responsibility, which provides for an obligation to make reparation "for the injury caused by the internationally wrongful act."

148. In the same vein, the Respondent submits as follows:¹⁵⁵

[...] at the time when the Law on the Prohibition of Gambling was implemented, the OCU Group was effectively insolvent. The OCU Group was loss-making and highly overleveraged with its liabilities massively exceeding their assets and had repeatedly defaulted in paying its significant and ever-increasing interest debts as they fell due. Its filing for bankruptcy, almost immediately following the implementation of the Law on the Prohibition of Gambling, was all but inevitable independently from the adoption of the Law on the Prohibition of Gambling.

As a result, the international law requirement that for a State to be responsible for damage, the damage must have been caused by its internationally wrongful conduct, is not met. Any losses suffered by the Claimant were not a consequence of the Respondent's actions. The Claimant's investment had already collapsed. The Claimant has failed to demonstrate that the Law on the Prohibition of Gambling, or any other acts of the Respondent, caused the Claimant's alleged losses.

*Moreover, the Claimant's argument that its rush to liquidate was forced by the enactment of the Law on the Prohibition of Gambling is contradicted by its own evidence which indicates that OEG commenced the liquidation process of all subsidiaries of the OCU Group on 9 June 2009, two weeks **before** the Law on the Prohibition of Gambling came into force (on 25 June 2009).*

The Claimant has failed to meet the necessary test for causation because prior to the adoption of the Law on the Prohibition of Gambling, the OCU Group was already essentially insolvent. [...] [emphasis in the original]

149. The Respondent denies the Claimant's submission that the reference to the date of 9 June 2009 is a "typo". According to the Respondent, the signed OEG Annual Report, in which the date 9 June 2009 was stated, was audited by PriceWaterhouseCoopers, and the subsequent OCU shareholders' meeting in July 2009 was held to operationalise the 9 June decision for OCU.¹⁵⁶

¹⁵⁵ Rejoinder, paras 331-334.

¹⁵⁶ Respondent's post-hearing brief, para. 33 (referring to Exhibit C-FTI-2, OEG Annual Report 2009 dated 6 April 2010, p. 38; Exhibit C-383, Minutes of the General (Extraordinary) Meeting of OCU Members dated 3 July 2009).

150. Accordingly, the Respondent claims that the Tribunal should dismiss the Claimant's claims "for lack of causation as Ukraine did not cause the alleged breaches of the Treaty. In the 'but-for' world, OCU was headed for failure of its own making."¹⁵⁷ In addition, as the Respondent's counsel stated at the Hearing, "if [the Tribunal] agree[s] with us that there was no causation because this business would not have survived in the but-for world, then quantum necessarily doesn't arise. It's only if you are not with us on that that I will come on to deal, as an alternative, with quantum".¹⁵⁸
151. In relation to quantum, the Respondent argues that the approach taken by the Claimant's quantum expert, FTI Consulting LLP ("FTI"), in quantifying the damages is fundamentally flawed in multiple respects. This, according to the Respondent, has the effect of grossly inflating the Claimant's alleged damages.¹⁵⁹ In this regard, the Respondent submits as follows:¹⁶⁰

FTI's primary valuation approach based on a DCF analysis is imprecise and inapplicable. First, there is not a sufficient track record to make the application of a DCF to the OCU Group anything other than speculative and moreover a DCF approach is inapt as the OCU Group was no longer a going concern. Second, the use of negotiations with Maxbet as a reliable reference of value of the OCU Group is inappropriate and misguided. Third, FTI's failure to identify any comparable transactions to assess the appropriateness of its valuation highlights the unreliability of FTI's overall approach. Finally, FTI failed to make the correct deductions from the damages claimed.

*As Senogles' Second Expert Report explains, when appropriate valuation methodologies are applied and account is taken of the fact that the Claimant either recovered or sold the assets of the OCU Group, **the value of the Claimant's residual investment at the valuation date was EUR 1,268,785.** [emphasis added]*

152. Furthermore, the Respondent objects to the Claimant's alternative damages claim and argues that relying on abortive Maxbet's pre-due diligence offer "*to approximate a value for the OCU Group is inappropriate for multiple reasons.*"¹⁶¹
153. Finally, the Respondent objects to the Claimant's request for interest at the rate of LIBOR + 4%. The Respondent argues that LIBOR +2% is the standard practice and the interest rate predominantly applied by international tribunals.¹⁶² It is therefore the Respondent's

¹⁵⁷ Respondent's post-hearing brief, para. 42.

¹⁵⁸ Transcript, Day 8, 96:25-97:5.

¹⁵⁹ Rejoinder, para. 346.

¹⁶⁰ Rejoinder, paras 347-348.

¹⁶¹ Respondent's Skeleton Submissions, para. 58.

¹⁶² Rejoinder, para. 460.

case that, should any damages be awarded, the Tribunal should impose a rate of 12-month LIBOR +2%.

3. The Tribunal's Decision

154. As decided above, the Respondent has breached its obligations under the Treaty by indirectly expropriating the Claimant's investment on 25 June 2009 without compensation.

155. Article 5 of the Treaty provides that expropriation "must be accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before expropriation or before the impending expropriation became public knowledge." However, as this provision deals with compensation for lawful expropriation, the Tribunal resorts instead to the relevant principles of customary international law as set out by the Permanent Court of International Justice in the *Chorzów Factory* case:¹⁶³

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.

156. The Parties have submitted expert reports that provided starkly contrasting evaluations of the Claimant's investment. At the heart of the Respondent's case lies the claim that the Claimant was insolvent or about to be insolvent at the time of the expropriation. As argued by the Respondent's counsel at the hearing:¹⁶⁴

[...] the true cause of the Claimant's desire to exit Ukraine at a loss from 2008 was its failed venture. It lacked a buyer and it lacked cash to meet costs, and a liquidation scenario was therefore inevitable.

The Claimant now say they were a distressed seller. The problem is that they had no buyer. [...] And a distressed company was not going to withstand the circumstance that they had created for themselves, was not going to be able to navigate the choppy

¹⁶³ Exhibit CLA-30, *Case concerning the Factory at Chorzów (Germany v Poland)*, PCIJ Series A No. 13, Judgment of 13 September 1928, p. 47.

¹⁶⁴ Transcript, Day 8, 61:13-62:2.

waters into which they had placed themselves, and was going to be going over a precipice. And it's a question of when, not if.

157. On this basis, the Respondent contends that the Claimant is not entitled to any compensation. In the alternative, the Respondent argues that:¹⁶⁵

[...] the only appropriate metric for compensation is the liquidation value of assets that were not recovered, plus the prorated residual value of the licences for which payment was made. The unrecovered liquidation value of the OCU Group, after accounting for amounts owed to third parties such as wage arrears and third party claims as well as loan repayments made to OEG, is EUR 1,268,785.

158. Having reviewed the evidence, the Tribunal notes that there is no doubt that the Claimant's investment was not a highly successful venture at the time it was indirectly expropriated. Even the Claimant's quantum experts, Mr James Nicholson and Mr Alexander Davie of FTI, assert that while the Claimant invested nearly EUR 33 million in Ukraine, the value of the investment was only EUR 15 million at the time of the unlawful expropriation.¹⁶⁶ The Claimant's experts attribute this decline in the value of the investment to the depreciation of the Ukrainian currency, the hryvnia, as a result of the global financial crisis and to the underperformance of the investments made by OEG in OCU.¹⁶⁷

159. However, the Tribunal cannot accept the Respondent's basic submission that "*a liquidation scenario was [...] inevitable*". The Respondent's position on OCU's inevitable liquidation was mainly based that the fact that OCU owed around EUR 28.6 million to the Claimant, which could have called in the loan. As the Respondent's quantum expert, Mr Geoffrey Senogles of Senogles & Co., Chartered Accountants, explained, "*[t]he liabilities of OCU exceeded the assets in 2008 by a figure of roughly €14 million. Very limited cash balances. And in the but-for world, there was a slow and uncertain path to revenue recovery, and therefore recovery to anywhere near profit.*"¹⁶⁸

160. The Claimant did not try to argue that it was in a position in 2009, or in the immediate future, to pay back the loan. Neither did the Claimant argue that OEG's loan was not a real loan. Instead, the Claimant argued, *inter alia*, that "*the shareholder loan would have*

¹⁶⁵ Respondent's post-hearing brief, para. 75.

¹⁶⁶ Transcript, Day 5, 8:8-11.

¹⁶⁷ Transcript, Day 5, 8:11-13.

¹⁶⁸ Transcript, Day 6, 7:16-20. See also Transcript, Day 6, 11:25-12:2.

*had an impact on viability of OCU only if OEG decided to call such debt in, which it would have done only in case such actions would not diminish value of its investment.”*¹⁶⁹

161. Having reviewed the Parties’ submissions, the Tribunal considers there is no doubt that OEG’s loans to OCU were, in the words of the Respondent’s quantum experts, “*commercially arranged loans between the shareholder and the subsidiary, and they needed to be repaid.*”¹⁷⁰ Moreover, OEG’s public share issuance document explicitly stated that its “*transactions with related parties*” were “*all concluded on arm’s length basis*”.¹⁷¹ Therefore, the Tribunal cannot ignore the loans when assessing OCU’s financial condition at the time of the unlawful expropriation. However, OEG’s loan to OCU cannot be regarded as a third-party loan. This point is crucial, as explained by the Claimant’s quantum expert:¹⁷²

Loans owed to a shareholder are very different from loans owed to a third party because the interests of a third party in deciding whether to liquidate a company or put it into bankruptcy are very different from the interests of a shareholder in deciding whether to put a company into bankruptcy.

162. The Tribunal notes that the Respondent’s quantum expert also acknowledged that while shareholder loans must be repaid, these loans are different from loans granted by third parties.¹⁷³
163. The Tribunal considers that OEG made the loans to OCU as part of its investment in Ukraine. It had an interest in keeping its subsidiary afloat, at least until it could be sold. The Tribunal agrees with the Claimant’s quantum experts who opined that “*the shareholders in OEG would expect OEG to maximise the value of its investment. And if starving OCU of cash or forcing OCU into liquidation would destroy value – which, on our analysis, it would have destroyed significant value – then that would be an irrational action for OEG to take.*”¹⁷⁴ Even the Respondent’s quantum expert acknowledged that he has “*rarely*” witnessed cases where shareholder loans were called in thereby forcing the

¹⁶⁹ Claimant’s post-hearing brief, para. 62.

¹⁷⁰ Transcript, Day 6, 27:7-8.

¹⁷¹ Exhibit R-1, Olympic Entertainment Group AS, Offering 14,000,000 Ordinary Shares, p. 101.

¹⁷² Transcript, Day 5, 9:9-15.

¹⁷³ Transcript, Day 6, 26:6-10 (“*Q. There are certainly differences between third-party debt and intra-group debt; you would agree? A. Well, yes, yes, there are differences, but they all need to be repaid; at least in the world that I live in, Mr Lysenko.*”)

¹⁷⁴ Transcript, Day 5, 63:5-10.

company into liquidation.¹⁷⁵ In the present case, the Tribunal notes that in January 2009, the Claimant's CEO, Andri Avila, explicitly confirmed that OEG had "*no intention to require immediate settlement of debts from LLC 'Olympic Casino Ukraine' nor are we going to charge it with fines or penalties for delays in settlement of any existing credit.*"¹⁷⁶ Indeed, the Tribunal agrees with the Claimant's observation that it would be "*difficult to conceive of a situation in which OEG – OCU's parent company would exercise this right [to call in the debt] to the detriment of its financial position.*"¹⁷⁷

164. In light of the above, the Tribunal accepts the opinion of the Claimant's quantum expert that OEG's loan should not be used to establish that OCU was a company in distress or, as the Respondent has put it, that liquidation was inevitable.
165. The Claimant's quantum experts showed that at the time of the measure's taking, OCU had recovered somewhat, if fitfully, from the impact of the global financial crisis on Ukraine.¹⁷⁸ OCU's revenues were growing consistently in the period up to 2009. The number of casinos that OCU was operating was also growing. Similarly, the average number of weekly visitors from July 2008 up until the months preceding the Gambling Ban Law was growing. In the last three months before the Gambling Ban Law, OCU's revenue in hryvnia was 20% higher than it was in those same months one year before. This figure is noteworthy considering that the first quarter of 2009 was the worst quarter for Ukraine's economic performance during these years.¹⁷⁹ Also, it is important to note that OCU successfully operated, without any cash injections from OEG, from November 2008 until July 2009.¹⁸⁰
166. Furthermore, bearing in mind that EBITDA is but one indicator of financial health of a company, the Tribunal notes that the Claimant's quantum experts also showed that OCU was profitable when measured at the level of EBITDA. OCU generated positive EBITDA

¹⁷⁵ Transcript, Day 6, 26:20-24.

¹⁷⁶ Exhibit C-379, Letter from Olympic Entertainment Group to auditors, who audited Olympic Casino Ukraine LLC No. 7 dated 30 January 2009 attached to email from Ms Kristi Liinak to Ms Helen Babuk dated 30 January 2009.

¹⁷⁷ SOR, para. 231.

¹⁷⁸ Transcript, Day 5, 11:17-13:11.

¹⁷⁹ Transcript, Day 5, 12:18-19.

¹⁸⁰ Exhibit C-117, Minutes No. 45 of the General (Extraordinary) Meeting of Members of Olympic Casino Ukraine dated 3 July 2009.

every year from 2006. There was positive EBITDA in February, March and April 2009. Specifically, in April 2009 there was a 32% profit margin.¹⁸¹

167. Therefore, the Tribunal rejects the Respondent's submissions on quantum and that liquidation of the Claimant's investment was inevitable. The unlawful indirect expropriation was the proximate causal factor that led to the Claimant's investment being wiped out. In the Tribunal's view, had the ban not been implemented, OCU, a very small player in the gambling sector, would have continued along without any real prospect of repaying the large loan owed to its parent. OEG itself well understood this; hence its decision months previously to put the company up for sale. There is no question whatsoever that OEG would have had to take a rather severe 'hair cut' when exiting Ukraine and as the Maxbet evidence shows, no informed buyer would have agreed to buy OCU if it had to assume repayment of its debt. But, and this is the key point, OCU had machines, locations, staff and customers and therefore it still held some value. Accordingly, the Tribunal is of the view that the Respondent's approach of assessing the Claimant's investment on liquidation value or book value is not appropriate. The Claimant's investment was an operating business with hopes of improved performance and the assessment of the investment must include its fair market value, which includes the expected performance in the future. However, as explained below, the Tribunal cannot accept, *in toto*, the Claimant's valuation of its investment as it fails to discount various matters, including OEG's loans, which placed a heavy burden on OCU. However, before assessing the Claimant's valuation of its investment, for the avoidance of doubt, the Tribunal notes that it has considered the Respondent's submissions on the date of liquidation.
168. As noted above,¹⁸² in support of its position, *inter alia*, the Respondent placed particular emphasis on the argument that the Claimant allegedly started the liquidation process on 9 June 2009. The Respondent relied on the OEG Annual Report 2009 dated 6 April 2010,¹⁸³ and referred to the Minutes of the General (Extraordinary) Meeting of OCU Members dated 3 July 2009.¹⁸⁴ The Claimant denied the Respondent's argument and

¹⁸¹ Transcript, Day 5, 13:8-9.

¹⁸² See above paras 32 and 148.

¹⁸³ Exhibit C-FTI-2, OEG 2009 Annual Report, p. 38.

¹⁸⁴ Exhibit C-383, Minutes of the General (Extraordinary) Meeting of OCU Members dated 3 July 2009.

submitted that the decision to begin liquidation proceedings for OCU and for most of its subsidiaries was only made on 3 July 2009.¹⁸⁵

169. Having reviewed the evidence, the Tribunal notes that the OEG Annual Report 2009 indeed states that “*OEG commenced the liquidation process of all subsidiaries of the Ukraine segment at [sic] 9 June 2009*”. However, the report also refers explicitly to the Gambling Ban Law and states that the liquidation process commenced “*due to*” the Gambling Ban Law and the fact that the “*activities of casinos were prohibited and all licences issued to casino companies were cancelled*”. There is nothing in the Minutes of the General (Extraordinary) Meeting of OCU Members dated 3 July 2009 which refers to 9 June 2009 or which supports the Respondent’s position that OCU was insolvent regardless of the Gambling Ban Law. On the contrary, the minutes show that the decision to liquidate was taken “*in view of the adoption*” of the Gambling Ban Law as “*it was impossible to continue the operations*”. Furthermore, Mr Meelis Pielberg, a member of the management board and the head of casino operations at OEG, confirmed that the liquidation process began on 3 July 2009.¹⁸⁶ Accordingly, the Tribunal accepts the Claimant’s submission that the liquidation process started due to the Gambling Ban Law and only after the Gambling Ban Law entered into effect.
170. The Tribunal now returns to the issue of quantum. As explained above,¹⁸⁷ the Claimant’s quantum experts adopted EUR 15 million as the value of OCU in the but for position. The Claimant’s quantum experts then deducted EUR 2,596,000 million due to the sums that OEG recovered and concluded that the Claimant is entitled to EUR 12,404,000 before interest.¹⁸⁸ In the alternative, the Claimant claims the Euro equivalent of US Dollars 15 million at the USD-EUR exchange rate effective as of the date of the Tribunal’s award, as referenced on the Bloomberg website, less EUR 2,596,000, being the aggregate amount of loss actually recovered by the Claimant. This alternative claim is based on the Maxbet offer.

¹⁸⁵ Exhibit C-117, Minutes No. 45 of the General (Extraordinary) Meeting of Members of Olympic Casino Ukraine dated 3 July 2009.

¹⁸⁶ Transcript, Day 3, 56:25-57:5.

¹⁸⁷ See above, para. 143.

¹⁸⁸ See above, para. 143.

171. Unsurprisingly, the Tribunal does not accept either Party's expert's valuation. However, having rejected the liquidation value approach, it has to estimate damages starting from some point. It recalls that the valuation by the Claimant's quantum experts of EUR 15 million is the approximate midpoint of their DCF valuation of EUR 18.7 million and the Maxbet offer of USD 15 million. In addition, the Claimant's valuation of EUR 15 million is more or less consistent with contemporaneous valuation benchmarks, as explained by the Claimant's quantum experts:¹⁸⁹

The amount of EUR 15 million is:

(1) below the result of our DCF valuation;

(2) below Hansabank's DCF valuation of OCU of EUR 18 million prepared around March 2009;

[...]

(4) above the USD 15 million Maxbet offer agreed on 9 April 2009. We observe that (i) OEG appears to have been under some pressure to raise finance from the sale of the OCU Group to invest in other markets and so may have agreed an offer below its market value; and (ii) the OCU Group's financial performance in April 2009, which was not known as at the date of the agreed offer, was strong;

(5) consistent with the amount of EUR 15 million described as the Maxbet offer in correspondence between the parties' legal representatives on 10 May 2019;

(6) consistent with the amount of EUR 14-15 million which Hansabank advised OEG would be a reasonable price for the OCU Group in March 2009; and

(7) consistent with the net asset value of EUR 14.6 million attributed to OEG's Ukrainian operations in its 2008 annual report, after deducting the shareholder loan.

172. The Tribunal cannot lose sight of the fact that some of these estimates were arrived at for the purposes of the potential sale of OCU. In all the circumstances, in the Tribunal's view, the Claimant's valuation of its investment and the calculations made by the Claimant's quantum experts are not unreasonable as a starting point. However, the Tribunal considers that the Claimant's valuation, including its alternative valuation, must be discounted due to the following factors.

173. First, as already found above, OCU was in a difficult financial situation. OEG's loan, although a shareholder loan, was still a very significant financial liability that required

¹⁸⁹ Nicholson and Davie II Expert Report, para. 2.43.

that all free cash flows generated be devoted to servicing it. Based on OCU's financial performance, it would be a very long time indeed before OCU would be in a position to declare a dividend to its shareholder. While the Tribunal accepts the Claimant's position that this loan does not establish that OCU was on the brink of insolvency, the Tribunal cannot accept the approach of the Claimant's quantum experts who simply disregarded it.¹⁹⁰ In addition, the Tribunal notes the very limited available cash that OCU had at its disposal. As observed by the Respondent's quantum expert, "*OCU Group had [...] less than one week's average cash in its bank at the end of 2008. Well, that is an extremely dicey, vulnerable situation for any business to be in.*"¹⁹¹ Furthermore, as noted by the Respondent, the Claimant did not submit sufficient contemporaneous business plans or financial projections to demonstrate anticipated future cash flows and profits.¹⁹² Moreover, the Claimant's quantum experts, in their DCF calculations, assumed that OCU's licences would have been renewed.¹⁹³ While the Tribunal considers that it is reasonable to assume that the licences would have continued in the absence of a breach, it is important to take into account in the damage calculations that, as acknowledged by the Claimant's counsel,¹⁹⁴ the Respondent did not have any obligation to issue new licences after the expiry of the same in 2011.¹⁹⁵

174. Second, the Tribunal agrees with the Claimant that the Maxbet offer is an important factor which should be considered in valuing the Claimant's investment. In the Tribunal's experience it is very rare indeed that the company being valued for the purpose of a treaty breach to have been subject to even a provisional offer so close in time to the value date. The Tribunal has considered carefully the Respondent's various submissions to the effect that the Maxbet offer "*is murky and unreliable*".¹⁹⁶ However, in the Tribunal's view,

¹⁹⁰ See, e.g., Transcript, Day 5, 105:17-106:21.

¹⁹¹ Transcript, Day 6, 12:17-20.

¹⁹² Respondent's post-hearing brief, para. 43.

¹⁹³ Nicholson and David II Expert Report, para. 5.13.

¹⁹⁴ Transcript, Day 7, 29:13-20 ("*Dr Thomas: Is it possible for the state to say, 'We really need to clamp down on this because this is a real social problem'? And in the course of doing that, can they take measures which may respect existing rights, but say that future grants of rights will be curtailed? MR GONZALES GARCIA: Yes. Yes, we accept that. We accept that as long as the rights of existing investors are protected.*")

¹⁹⁵ Transcript, Day 8, 98:9-19 (see Respondent's counsel arguing that "*with regard to licenses, a DCF wouldn't help the Claimant in any event, because Mr Garcia accepted that Ukraine could curtail the issuance of new licences which would have expired in 2011. So his point was that it would be a breach to cancel the licences mid-term, but he accepted that Ukraine would not have to issue any new licences after that. So it would have been Ukraine's prerogative on any analysis, and as accepted by counsel for the Claimant, to not issue new licences for gambling once the existing licences had lapsed.*")

¹⁹⁶ Respondent's post-hearing brief, p. 13.

Maxbet was a willing prospective buyer just before the unlawful expropriation, albeit one which had not yet been given access to OCU's confidential financial information so as to be able to conduct due diligence. Therefore, the price that Maxbet was willing to pay for OCU is a relevant indicator of value. While there is no direct evidence that explains Maxbet's decision not to go ahead with the deal, the Tribunal is of the view that this decision was most likely driven by the CMU Decree and the Gambling Ban Law. This is demonstrated by the fact that the discussions over the terms of sale and purchase agreement between OEG and Maxbet were ongoing as of 12 May 2009,¹⁹⁷ just a few days after the CMU Decree of 7 May 2009 and a few days before the passing of the Gambling Ban Law in the first and second readings.¹⁹⁸ In this regard, the Tribunal notes the following explanation of the Claimant's quantum experts concerning the negotiations between OEG and Maxbet and their relevance hereto:¹⁹⁹

These negotiations were ongoing as of January 2009 and were well advanced by May 2009. OEG was being advised by an investment bank and external lawyers, and an SPA had been drafted and was undergoing detailed negotiation. We see that in red-line versions of the SPA that were going back and forth between the parties.

The timeline here shows the exchanges, which were quite intensive, between the parties, particularly from the date that an NDA was signed in January 2009 and some significant information was shared about OCU's financials in particular. And the graphic shows the convergence on price to what looks like an agreed price of €15 million as of 9th April 2009.

Negotiations continue in detail up to -- I think it's 12th May 2009, which is the last exchange we have. The CMU decree was a couple of days before, and it seems -- well, one possible inference, I know it's disputed, but one possible inference is that the negotiations ceased because of the CMU decree and the anticipation of the Gambling Ban Law.

The \$15 million price from MaxBet was offered not just in the light of the information that they had received through the NDA -- and indeed some information was publicly available about OCU's operations because OEG was a listed company at all relevant times -- but also MaxBet was operating in Ukraine, was two and a half times bigger than the OCU Group. So, it's reasonable to assume that in any case it was well informed as to the particular sites that OCU was operating, the nature of those sites, the growth prospects for those sites in the particular segments, those sites they were targeting, the risks of OCU and the gambling market more generally.

So, we interpret this agreed price between the parties as being a well-informed agreed price, although due diligence -- and particularly legal due diligence -- was still to be performed.

¹⁹⁷ Exhibit C-423, Email from Mr. Antti Perli to Mr. Andri Avila dated 12 May 2009.

¹⁹⁸ See above, paras 24 and 27.

¹⁹⁹ Transcript, Day 5, 17:4-18:14.

175. The Tribunal is well aware that international law seeks to avoid undue speculation when seeking to estimate cashflows that might be generated out of a transaction which was almost, but not finally, consummated. Had the Maxbet negotiation stood alone, it would not have been a satisfactory proxy for valuing OCU. In the end, the Tribunal has to start its valuation exercise somewhere and it accepts the Respondent's point that there are important factors which must be taken into account when considering the Maxbet offer. Among them, the Tribunal notes that the price of the Maxbet offer could have changed after the due diligence exercise, to which the deal was subject. Mr Nicholson himself noted that the purchase price generally goes down (rather than up) after due diligence is conducted. Furthermore, it may well be that Maxbet would have decided not to sign an agreement with OEG due to disclosures made in the due diligence process. Moreover, the provisionally agreed upon purchase price concerned two distinct assets: OCU shares and an international trademark owned by OEG. Although the Tribunal accepts the Claimant's view that it is reasonable to assume that relevant trademarks only concerned the Ukrainian market,²⁰⁰ the Tribunal also accepts that it is possible, although less likely, that the international trademarks may have also concerned other countries. Therefore, the Tribunal is of the view that the Maxbet offer, while indicative of a possible value, must be subject to some deduction, from the lowest price offered by Maxbet, to account for the various uncertainties concerning this offer and the related negotiations.
176. Third, as noted above, the Claimant's quantum experts deducted EUR 2,596,000 for the sums that the Claimant managed to recover. The Respondent submits that the Claimant also recovered additional sums and therefore there is a risk of double recovery. In this regard, the Respondent refers to the Movable Property Pledge Agreement No. 020609-PM of 2 June 2009 between the Claimant and OCU (the "**Pledge Agreement**"),²⁰¹ in which the Claimant secured its receivables under the Loan Agreement No. 2 of 16 February 2005,²⁰² and submits as follows:²⁰³

OEG retained full possession of its assets via its shareholding in OCU and the Pledge Agreement and was free to realise their value. This included OCU's equipment.

²⁰⁰ See Claimant's post-hearing brief, paras 91-107.

²⁰¹ See Exhibit R-25, Moveable Property Pledge Agreement No. 020609-PM between Olympic Entertainment Group AS and Olympic Casino Ukraine; SOD, paras 96-98; Respondent's post-hearing brief, paras 67-74.

²⁰² Exhibit C-27, Loan Agreement No. 2 of 16 February 2005.

²⁰³ Rejoinder, paras 421-424.

In the Statement of Defence, the Respondent raised an issue of the significant discrepancy between the pledged assets valuation as at 2 June 2009 in the Pledge Agreement and the valuation as at the dates of the Acts of Transfer, about two months later.

Clause 1.4 of the Pledge Agreement values all of the pledged assets at EUR 10.1 million. Yet, the total value of property transferred by the Acts of Transfer was EUR 1.4 million. Some of the slot machines valued in the Pledge Agreement at over EUR 10,000 were transferred at EUR 10 each, that is to say only 0.1% of the original value.

It is the Respondent's position that the valuation in the Pledge Agreement should be used as the measure of value extracted by the Claimant from its Ukrainian subsidiaries. Therefore, EUR 9,993,104 should be deducted from the claimed damages figure.

177. In this regard, the Respondent's counsel argued at the hearing as follows:²⁰⁴

The Claimant has already recovered €10.6 million in value from the OCU Group -- that's crucially important -- both of equipment and cash. And that's a similar sort of figure that was being discussed with MaxBet. There is a real risk of double recovery here. They've gotten the equipment back -- the equipment was clearly part of the MaxBet discussion -- and there is also cash repayment. So they've taken away €10.6 million, and now they're looking to ask the Tribunal to give them more.

178. The Claimant denies the Respondent's submissions. Among other things, the Claimant's counsel argued at the hearing that:²⁰⁵

The asset values in the pledge agreement generally correspond to the book values of the equipment prior to any impairment due to the 2009 Gambling Ban Law.

Therefore, it would not be appropriate to value assets transferred from OCU to OEG by reference to the pledge agreement, comprising book values as calculated prior to the 2009 Gambling Ban Law. Instead, the equipment transferred from OCU to OEG should be transferred based on documents reflecting very material adjustments necessitated both by the second-hand nature of the equipment at hand and made inevitable after the passage of the Gambling Ban, just as FTI did in its second report.

The Claimant calculated the recovered amount based on reliable documents, including an arm's length transaction with a third-party buyer, ISMS, based in Hong Kong; the annex to the attorneys' report which reflected the value of other assets sold by OCU; and independent valuation reports prepared by Ukrainian certified valuer, all reflecting the contemporaneous value of the transferred property following the 2009 Gambling Ban.

179. In the Tribunal's view, the Claimant is correct that the value of the assets transferred from OCU to OEG had declined significantly as a result of the Gambling Ban Law. This is

²⁰⁴ Transcript, Day 8, 126 :9-18. See also Respondent's post-hearing brief, paras 67-74.

²⁰⁵ Transcript, Day 8, 45:1-23.

supported not only by the second report of the Claimant's quantum experts and related evidence, but also by contemporaneous evidence – an audit report, on which the Respondent's quantum expert also relied, where the auditors noted that “*taking account of the provisions of the Gambling Ban Law No. 1334 VI dated 15 May 2009, the majority of the Company's fixed assets are gambling equipment, meaning that such fixed assets became non-liquid and unsaleable.*”²⁰⁶ Therefore, the Tribunal does not accept the Respondent's position that there is a need to deduct EUR 9,993,104 from the Claimant's damages. However, at the same time, the Tribunal cannot ignore the risk of some limited double recovery, in light of the high difference between the valuation in the Pledge Agreement and the amount that the Claimant claims was actually recovered. Accordingly, the Claimant's damages, both in their primary claim and in the alternative claim in relation to the Maxbet offer, must be discounted.

180. Having considered the above, the Tribunal notes that the valuation of the investment in the context of awarding compensation is not an exercise which admits of scientific accuracy. As stated by the tribunal in *Vivendi Universal SA v Argentina*, “*the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science.*”²⁰⁷ In the same vein, the tribunal in *Crystallex International Corporation v Venezuela* stated that:²⁰⁸

[...] an impossibility or even a considerable difficulty that would make it unconscionable to prove the amount (rather than the existence) of damages with absolute precision does not bar their recovery altogether. Arbitral tribunals have been prepared to award compensation on the basis of a reasonable approximation of the loss, where they felt confident about the fact of the loss itself. In the Tribunal's view, this approach may be particularly warranted if the uncertainty in determining what exactly would have happened is the result of the other party's wrongdoing.

These principles should also be applied with regard to the proof of loss of profits, which is the crucial issue in this case as far as the determination of quantum is concerned.

²⁰⁶ Exhibit R-SEN-2-b, Auditors Report of Financial Statement of Olympic Casino Ukraine for the First Six Months of 2009, page 3, para. 4. See also SOR, para. 611.

²⁰⁷ Exhibit RLA-82, *Compañía de Aguas del Aconquija SA, Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Award of 20 August 2007, para. 8.3.16.

²⁰⁸ Exhibit RLA-50, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, paras 871-872.

181. Similarly, the Tribunal notes with approval the statement made by the tribunal in *Gold Reserve Inc v Venezuela*:²⁰⁹

[...] while a claimant must prove its damages to the required standard, the assessment of damages is often a difficult exercise and it is seldom that damages in an investment situation will be able to be established with scientific certainty. This is because such assessments will usually involve some degree of estimation and the weighing of competing (but equally legitimate) facts, valuation methods and opinions, which does not of itself mean that the burden of proof has not been satisfied. Because of this element of imprecision, it is accepted that tribunals retain a certain amount of discretion or a “margin of appreciation” when assessing damages, which will necessarily involve some approximation. The use of this discretion should not be confused with acting on an ex aequo et bono basis, even if equitable considerations are taken into account in the exercise of such discretion. Rather, in such circumstances, the tribunal exercises its judgment in a reasoned manner so as to discern an appropriate damages sum which results in compensation to Claimant in accordance with the principles of international law that have been discussed earlier.

182. The Tribunal recalls its view that due to the Respondent’s unlawful expropriation, the Claimant’s investment was destroyed. In the Tribunal’s view, the fact that the Claimant suffered damage is beyond any doubt. The Tribunal has decided to discount the Claimant’s claim for damages to take into account the uncertainty of the Maxbet transaction as a reliable comparable. It will also take as a reasonable starting point the sum of USD 15 million not EUR 15 million and will of course give credit for the sums realised. In the light of the Tribunal’s discretion to award damages and considering the various factors stated above that are relevant in the Tribunal’s view for assessing the Claimant’s investment, the Tribunal decides that the Claimant is entitled to a compensation in the amount of EUR 7,500,000.

183. In addition, the Tribunal considers that the Claimant is entitled to receive pre-award and post-award interest on the compensation awarded to it as to ensure full reparation. In this regard, the Tribunal notes Article 38 of the ILC Articles on State Responsibility, which provides as follows:

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

²⁰⁹ *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 19 September 2014, para. 686 (cited in Exhibit RLA-50, *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of 4 April 2016, footnote 1252).

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

184. The Respondent did not dispute the Claimant's entitlement to interest. Instead, as noted above, the Respondent argues that the Tribunal should impose a rate of 12-month LIBOR + 2%.
185. In the Tribunal's view, in order to achieve full reparations, which "*wipe out all the consequences of the illegal act*", the Claimant's request for interest at the rate of 12-month LIBOR + 4%, compounded annually, is reasonable. In this regard, the Tribunal notes that interest at the rate of LIBOR + 4% was also adopted by various tribunals.²¹⁰ Accordingly, the Tribunal decides that the Respondent shall pay interest on the sum of EUR 7,500,000 at the rate of 12-month LIBOR + 4%, compounded annually, accruing from 25 June 2009 until (and inclusive of) the date of this Award. In addition, the Respondent shall pay post-award interest at the rate of 12-month LIBOR + 4%, compounded annually, accruing on the outstanding amount from the date of this Award until payment in full.

H. Costs

186. In accordance with the directions of the Tribunal, both Parties served their costs schedules on 26 January 2021.
187. The total costs claimed by the Claimant is EUR 2,781,684. It is important to note that this total includes EUR 72,300 and USD 350,000, being the Respondent's share of the first and second deposits which were unpaid by the Respondent. These were paid by the Claimant in August 2019 and February 2021. The total costs claimed by the Respondent is USD 2,345,865.
188. The Tribunal notes that Article 40(1) of the UNCITRAL Rules provides that the "costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case". With respect to the costs of legal representation and assistance, Article 40(2) of the

²¹⁰ E.g., Exhibit, CLA-42, *OI European Group B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award of 10 March 2015, paras 393-944; Exhibit CLA-43, *Ron Fuchs v The Republic of Georgia*, ICSID Case No. ARB/07/15, Award of 3 March 2010, paras 659-661; Exhibit CLA-44, *Rusoro Mining Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016, para. 838.

UNCITRAL Rules provides that “the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.”

189. In accordance with Article 40 of the UNCITRAL Rules, the Tribunal sees no reason why it should depart from the principle that costs follow the event. This rule is well established. The Tribunal nevertheless retains the discretion to assess a reasonable sum to be paid by the losing party and may take into account the conduct of the Parties and the amount awarded compared to the amount claimed.
190. The amount claimed by the Claimant in these proceedings was EUR 12,404,000. The Claimant has been successful as to EUR 7,500,000. It is true that this is less than the sum claimed, but it is far from a trivial sum. The Tribunal has not been informed of any offer to settle this dispute for more than the sum awarded. It is not infrequent that tribunals award less than the sum claimed.
191. Accordingly, the Tribunal does not think it appropriate to reduce the recoverable costs solely on the ground that the Claimant has received less than it claims. Its claim was always moderate and the assessment of damages in these cases is not an easy task.
192. The total number of hours charged by the Claimant is 10,022 whereas the total charged by the Respondent is 3,770. The Tribunal notes that from its experience it is not unusual for claimants to spend more time, and in most cases more money, than respondents. However, the hourly rate charged by the Claimant is less than the Respondent’s hourly rates.
193. The Tribunal is entitled to give regard to the fact that this arbitration was conducted in English, which is not the first language of most of the Claimant’s counsel.
194. As to the way in which this arbitration has been conducted, no criticism can be levelled at either party. Both sets of counsel conducted the case politely and effectively and to the extent that counsel’s submissions have not found favour with the Tribunal this is not to be taken as any implied criticism of counsel who at all times advanced their clients’ cases zealously and with professionalism. Both Parties provided excellent cooperation to the

Tribunal and the hearing, although virtual, was conducted most effectively. Everybody kept to their agreed and allotted time. The Tribunal is grateful for the cooperation and assistance given by both sets of counsel.

195. The Claimant complains that the Respondent has not paid its share of the deposits requested by the PCA. The Claimant has been forced to pay these amounts on behalf of the Respondent and hopes that it will recover these sums from the Respondent. Such sum is indeed included in the Award on costs.

196. Taking everything into account, the Tribunal sees no reason why, in the exercise of its undoubted wide discretion as to costs, it should not order the Respondent to pay the Claimant's costs (which will include the deposits paid to the PCA for itself and the Respondent) in the sum of EUR 2,750,000.

I. Interest

197. The Claimant seeks interest "*at a reasonable rate*" on any costs awarded to it.²¹¹ The Tribunal sees no reason, and none has been advanced, as to why the Award should not carry interest.

198. Accordingly, as to the costs awarded, this sum will also carry simple interest at a rate of LIBOR + 4% per annum from the date of the Award until payment.

II. Costs of Arbitration

199. The Claimant deposited a total of USD 859,447.23 to cover the costs of arbitration.²¹² After discharging all fees and expenses of this arbitration, any sum outstanding to the credit of the Parties to this arbitration in the accounts of the PCA, shall be paid to the Claimant's solicitors in part the satisfaction of the order for costs made herein.

200. The Tribunal notes the final costs of the arbitration are USD 543,154.40. In accordance with Article 38 of the UNCITRAL Rules, the fees and expenses of the Tribunal are fixed as follows:

²¹¹ See above, para. 37.

²¹² The Claimant made deposits in Euros, which were converted into US Dollars upon receipt by the PCA.

- a) Mr Neil Kaplan – USD 172,886.85;
 - b) Professor Michael Pryles – USD 132,160.00
 - c) Mr J. Christopher Thomas – USD 109,620.00
201. Other Tribunal costs, including court reporting services for the Hearing, hearing facility expenses for the first procedural meeting, bank and currency conversion costs, couriers, communication and printing expenses amount to USD 56,416.53.
202. The fees and expenses of Dr Noam Zamir, the Tribunal Secretary, amount to USD 36,320.00. The fees and expenses of the PCA amount to USD 35,751.02.
203. Accordingly, the costs of the arbitration, including all items set out in paragraphs (a), (b) and (c) of Article 38 of the UNCITRAL Rules amount to USD 543,154.40. As noted above, the Tribunal decides that the Claimant's share of the costs of the arbitration be borne by the Respondent. The sum outstanding to the credit of the Parties to this arbitration in the accounts of the PCA for the purposes of paragraph II above is USD 316,292.83.
204. The other expenses referred to in Article 38(e) of the UNCITRAL Rules are all set out in the Parties' respective costs schedules of 26 January 2021 referred to above.

I. DISPOSITIVE

205. Having carefully considered the Parties' arguments in their written and oral pleadings, and having deliberated, for the reasons stated above, the Tribunal unanimously decides and declares as follows:
- a) The Tribunal has jurisdiction and the Respondent's jurisdictional objection is dismissed;
 - b) The Gambling Ban Law constituted an indirect expropriation of the Claimant's investments in violation of Article 5 of the Treaty;
 - c) The Respondent shall pay damages to the Claimant in the sum of EUR 7,500,000. In addition, the Respondent shall pay pre-award interest on this sum at the rate of 12-

month LIBOR + 4%, compounded annually, accruing from 25 June 2009 until (and inclusive of) the date of this Award;

- d) The Respondent shall pay post-award interest at the rate of 12-month LIBOR + 4%, compounded annually, accruing on any outstanding amount stated in the preceding paragraph from the date of this Award until payment in full;
- e) The Respondent shall pay the Claimant's costs in the sum of EUR 2,750,000. In addition, the Respondent shall pay simple interest thereon at the rate of LIBOR + 4% per annum from the date of this Award until payment in full;
- f) The sum outstanding to the credit of the Parties to this arbitration in the accounts of the PCA in the amount of USD 316,292.83 shall be paid to the Claimant's solicitors in part the satisfaction of the order for costs made herein; and
- g) All of the Parties' other claims and requests for relief are rejected.

* * *

Seat of Arbitration: London

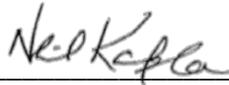
Date: 15 April 2021



Professor Michael Pryles AO PBM



Mr J Christopher Thomas QC



Mr Neil Kaplan CBE QC SBS
Presiding Arbitrator

APPENDIX I – PROCEDURAL RECORD

DATE	PROCEDURAL FACTS
5 November 2018	The Claimant submits its Notice of Arbitration in which it appoints Professor Michael Pryles AO as co-arbitrator pursuant to Article 3.4(b) of the 1976 UNCITRAL Rules.
4 December 2018	The Respondent appoints Mr J. Christopher Thomas QC as co-arbitrator.
29 December 2018	The co-arbitrators appointed Mr Neil Kaplan CBE QC SBS as the presiding arbitrator.
29 January 2019	The Parties sign the Tribunal’s Terms of Appointment.
March 2019	The appointment of Dr Zamir as Tribunal Secretary in accordance with his Terms of Appointment dated 5 February 2019, was approved by the Claimant on 13 March 2019 and by the Respondent on 22 March 2019.
8 May 2019	The Presiding Arbitrator, on behalf of the Tribunal, together with the Tribunal’s Secretary, holds a procedural meeting with the Parties in London.
10 May 2019	The Tribunal issues Procedural Order No. 1.
21 June 2019	The Claimant submits its Statement of Claim.
10 January 2020	The Respondent submits its Statement of Defence.
21 February 2020	The Parties submit their disputed requests for production of documents to the Tribunal.
5 March 2020	The Tribunal issues Procedural Order No. 2.
24 April 2020	By consent, the Tribunal issues Procedural Order No. 3 which amends the Procedural Timetable as set out in Procedural Order No. 1.
23 May 2020	The Claimant submits its Statement of Reply.

DATE	PROCEDURAL FACTS
17 July 2020	The Respondent submits its Rejoinder.
7 August 2020	The Parties provide notification of the witnesses and experts to be called for cross-examination at the Hearing.
21 August 2020	The Parties agree to hold the Hearing via videoconference between 13 and 20 December 2020.
1 November 2020	The Parties submit the Quantum Experts' Joint Statement, prepared by the Claimant's experts Mr Nicholson and Mr Davie and the Respondent's expert Mr Senogles.
3 November 2020	The Claimant requests the Tribunal to admit new documents into the record in response to new arguments and evidence that the Respondent submitted with its Rejoinder dated 17 July 2020 as well as in furtherance of new developments material to the case.
6 November 2020	The Respondent objects to the Claimant's request of 3 November 2020.
11 November 2020	The Claimant responds to the Respondent's objection of 6 November 2020.
17 November 2020	The Tribunal issues Procedural Order No. 4, which accepts the Claimant's application of 3 November 2020.
23 November 2020	The Claimant submits the Confirmation of the Witness Statements of Mr Meelis Pielberg.
27 November 2020	The Respondent applies to introduce two new legal authorities into the record.
30 November 2020	The Claimant objects to the Respondent's application of 27 November 2020.
1 December 2020	The Tribunal accepts the Respondent's application of 27 November 2020.

DATE	PROCEDURAL FACTS
2 December 2020	The Parties submit their respective Skeleton Submissions.
4 December 2020	The Respondent submits an amended version of its Rejoinder with corrected references to legal authorities.
5 December 2020	The Tribunal issues Procedural Order No. 5.
11 December 2020	<p>The Claimant applies to introduce two further legal authorities into the record, responsive to the new legal authorities submitted by the Respondent on 27 November 2020.</p> <p>The Tribunal advises the Parties that it will hear and decide the Claimant’s application of 11 December 2020 at the Hearing.</p>
13-20 December 2020	The Hearing is held on jurisdiction, merits and quantum via the videoconferencing platform Zoom.
6 January 2021	The Respondent provides its own amended versions of Annexes C, D and E to the Claimant’s Reply, as requested by the Tribunal during the Hearing.
12 January 2021	The Claimant provides its comments on the amended versions of Annexes C, D and E to the Claimant’s Reply submitted by the Respondent on 6 January 2021.
12 January 2021	The Parties submit their respective post-hearing briefs.
15 January 2021	Further to leave granted by the Tribunal, the Respondent provides its response to the Claimant’s comments of 12 January 2021.
26 January 2021	The Parties submit their respective costs schedules.