REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

VOLUME XXIII

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REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

VOLUME XXIII

UNITED NATIONS – NATIONS UNIES

TABLE OF CONTENTS

TABLE DES MATIÈRES

PART II

PART III

FOREWORD

The present volume is made up of three arbitration cases, namely, the Southern Bluefin Tuna cases between New Zealand and Japan and between Australia and Japan, the dispute concerning access to information under article 9 of the OSPAR Convention between Ireland and the United Kingdom, and the case concerning the Bank for International Settlements (private individuals versus the Bank).

This publication was originally conceived in 1948 as a collection of international awards or decisions rendered between States, including cases involving espousing or respondent Governments on behalf of individual claimants. Some awards between a State and an international organization or other entity entrusted with international functions were also included. However, awards between a private individual or body and a State or international organization were omitted. The present volume includes an award rendered in a case between private individuals (i.e. former shareholders) and the Bank for International Settlements. This award is included because it addresses questions of general international law and not merely the interests of the private individuals concerned.

In accordance with the practice followed in this series, awards in English or French are published in the original language. Those in both languages are published in one of the original languages. Awards in other languages are published in English. A footnote indicates when the text reproduced is a translation made by the Secretariat of the United Nations.

This volume, like volumes IV to XXII, was prepared by the Codification Division of the Office of Legal Affairs.

AVANT-PROPOS

Le présent volume réunit trois affaires soumises à l'arbitrage : l'affaire du thon à nageoire bleue, qui a opposé la Nouvelle-Zélande au Japon et l'Australie au Japon : le différend concernant l'accès à l'information prévu par l'article 9 de la Convention pour la protection du milieu marin de l'Atlantique du Nord-Est (Convention OSPAR), qui a opposé l'Irlande au Royaume-Uni; et l'affaire concernant la Banque des règlements internationaux, qui a opposé des actionnaires privés à la Banque.

La présente publication a été conçue en 1948 comme un recueil de sentences ou de décisions internationales rendues dans des affaires opposant des États, y compris des affaires dans lesquelles des gouvernements prenaient fait et cause pour des particuliers ou se portaient défendeurs à leur place. Elle pouvait inclure les sentences rendues dans des affaires opposant un État à une organisation internationale ou autre entité ayant des fonctions internationales. Elle excluait toutefois les sentences rendues dans des affaires opposant un particulier ou un organisme privé à un État ou à une organisation internationale. Or, le présent volume comprend une sentence rendue dans une affaire opposant des particuliers (qui sont d'anciens actionnaires) à la Banque des règlements internationaux. Si cette affaire a été incluse, c'est parce qu'elle traite de questions de droit international général et non pas simplement des intérêts des particuliers concernés.

Conformément à la pratique du *Recueil*, les sentences rendues en anglais ou en français sont publiées dans la langue originale. Celles qui ont été rendues dans ces deux langues sont publiées dans l'une ou l'autre des deux. Les sentences rendues dans d'autres langues sont publiées en anglais. Lorsque le texte reproduit est une traduction du Secrétariat de l'Organisation des Nations Unies, il en fait mention dans une note de bas de page.

Le présent volume, comme les volumes IV à XXII, a été établi par la Division de la codification du Bureau des affaires juridiques.

PART I

Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility

Decision of 4 August 2000

Affaire du thon à nageoire bleue entre l'Australie et le Japon et entre la Nouvelle-Zélande et le Japon, sentence sur la compétence et la recevabilité

Décision du 4 août 2000

SOUTHERN BLUEFIN TUNA CASE BETWEEN AUSTRALIA AND JAPAN AND BETWEEN NEW ZEALAND AND JAPAN, AWARD ON JURISDICTION AND ADMISSIBILITY, DECISION OF 4 AUGUST 2000

AFFAIRE DU THON À NAGEOIRE BLEUE ENTRE L'AUSTRALIE ET LE JAPON ET ENTRE LA NOUVELLE-ZÉLANDE ET LE JAPON, SENTENCE SUR LA COMPÉTENCE ET LA RECEVABILITÉ, DÉCISION DU 4 AOÛT 2000

First Arbitral Tribunal constituted under Part XV ("Settlement of Disputes"), Annex VII ("Arbitration") of the United Nations Convention of the Law of the Sea (UNCLOS).

Mootness: resolution of one salient aspect of a dispute is not sufficient to dispose of the dispute and render the case moot.

Jurisdiction: claims must reasonably relate to, or be capable of being evaluated in relation to, the legal standards of the treaty; the Tribunal must decide whether the "real dispute" reasonably (and not just remotely) relates to the obligations set forth in the treaties whose breach is alleged; *lex specialis* versus parallelism of treaties both in their substantive content and their dispute settlement provisions; conclusion of an implementing convention does not necessarily vacate or exhaust the obligations imposed by a framework convention; a single dispute arises under both UNCLOS and the 1993 Convention for the Conservation of Southern Bluefin Tuna consistent with UNCLOS (article 311(2) and (5)) and the Vienna Convention on the Law of Treaties (article 30(3); the 1993 Convention excludes any further dispute settlement procedure under UNCLOS; the Tribunal is without jurisdiction to rule on the merits of the dispute.

Premier tribunal arbitral constitué conformément à l'annexe VII (« Arbitrage ») de la partie XV (« Règlement des différends ») de la Convention des Nations Unies sur le droit de la mer.

Défaut d'objet : La résolution d'un aspect important d'un différend ne suffit pas pour régler ce dernier et rendre l'affaire sans objet.

Compétence : Les demandes doivent présenter un lien raisonnable avec les normes juridiques énoncées dans le traité ou pouvoir être appréciées par rapport à ces normes; le Tribunal doit décider si le « véritable différend » entretient un rapport raisonnable (et non pas simplement lointain) avec les obligations énoncées dans les conventions dont la violation est alléguée; la *lex specialis* contre le parallélisme des traités, tant en ce qui concerne leur contenu spécifique qu'en ce qui concerne leurs dispositions relatives au règlement des différends; la conclusion d'une convention d'application n'annule ou n'éteint pas nécessairement les obligations imposées par une convention-cadre; un seul et même différend relève à la fois de la Convention des Nations Unies sur le droit de la mer et de la Convention de 1993 pour la conservation du thon à nageoire bleue, conformément à la Convention des Nations Unies sur le droit de la mer [art. 311(2) et (5)] et à la Convention de Vienne sur le droit des traités [art. 30(3)]; la Convention de 1993 exclut toute nouvelle procédure de règlement du différend sur le fondement de la Convention des Nations Unies sur le droit de la mer; le Tribunal n'est pas compétent pour se prononcer sur le fond du différend.

Southern Bluefin Tuna Case
Australia and New Zealand v. Japan
Award on Jurisdiction and Admissibility
August 4, 2000
rendered by
the Arbitral Tribunal
constituted under Annex VII of the
United Nations Convention on the Law of the Sea

the Arbitral Tribunal being composed of:

Judge Stephen M. Schwebel, President
H.E. Judge Florentino Feliciano
The Rt. Hon. Justice Sir Kenneth Keith, KBE
H.E. Judge Per Tresselt
Professor Chusei Yamada

I. *Procedural History*

1. On August 31, 1998, Australia and New Zealand delivered to Japan identical diplomatic notes formally notifying Japan of the existence of a dispute between Australia and New Zealand on the one hand, and Japan on the other, concerning the conservation and management of Southern Bluefin Tuna. On July 15, 1999, Australia and New Zealand each delivered to Japan a Statement of Claim and Grounds on Which it is Based. Australia and New Zealand thereby commenced these arbitration proceedings against Japan under Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS").[1]

2. Pending the constitution of this Arbitral Tribunal under Annex VII of UNCLOS, Australia and New Zealand, on July 30, 1999, each filed a request for the prescription of provisional measures with the International Tribunal for the Law of the Sea ("ITLOS").

3. On August 9, 1999, at the invitation of the President of ITLOS, Japan filed a single statement in response to Australia's and New Zealand's requests. Japan's statement raised objections to the jurisdiction of ITLOS on the basis that this Arbitral Tribunal would not, once constituted, have jurisdiction *prima facie* to decide the dispute.

4. On August 16, 1999, ITLOS issued an Order joining the two requests for provisional measures, thus permitting common oral argument and a

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[1] "UNCLOS" initially referred to the United Nations Conference on the Law of the Sea, but the term has come to be used to refer to the United Nations Convention on the Law of the Sea, prepared by UNCLOS III, and is so used in this Award.

common order to be issued in regard to both requests. A hearing on the requests for provisional measures was held by ITLOS in Hamburg on August 18, 19 and 20, 1999.

5. On August 27, 1999, ITLOS issued an Order finding that, *prima facie*, this Arbitral Tribunal would have jurisdiction and prescribing certain provisional measures.

6. Following appointments in due course, this Arbitral Tribunal was constituted, composed as indicated above.

7. On January 19, 2000, the Parties met on procedural matters with the President of the Tribunal at The Hague. As a result of these consultations, agreement was reached on a schedule for filing of pleadings on preliminary objections to jurisdiction raised by Japan, and a hearing on jurisdiction was scheduled in Washington, D.C. in early May 2000, at the facilities of the World Bank.[2] Following consultation with the other members of the Arbitral Tribunal, the President subsequently set the hearing on jurisdiction for May 7 through May 11, 2000, to which the Parties agreed.

8. At the January 19, 2000 meeting with the President of the Tribunal, the Parties agreed that the Tribunal would appoint a Registrar, who would supervise the provision of services of a secretariat. The Parties stated that they would welcome the appointment for this purpose of an appropriate official of the International Centre for Settlement of Investment Disputes ("ICSID"). Following consultations with the Secretary-General of ICSID, the President of the Tribunal wrote to ICSID's Secretariat[3] on February 3, 2000 to ask whether ICSID would be prepared to make its officials and facilities available for the proceeding. By letter of that same day, ICSID replied with its acceptance. Mrs. Margrete L. Stevens and Messrs. Alejandro A. Escobar and Antonio R. Parra were the ICSID officials who were designated to serve as co-secretaries of the Tribunal.

9. In subsequent correspondence between ICSID and the Parties, the tasks that ICSID was to perform in connection with the proceeding were elaborated. ICSID would serve as Registrar; be the official channel of communication between the Parties and the Arbitral Tribunal; make arrangements for keeping a record (including verbatim transcripts) of the hearing on jurisdiction; make other arrangements as necessary for the hearing on jurisdiction; and, from the funds advanced to it by the Parties, pay the fees of the members of the Arbitral Tribunal, reimburse their travel and other expenses in connection with the proceedings, and make other payments as required.

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[2] The Parties also agreed at their January 19, 2000 meeting with the President that the language of the proceeding shall be English, and on the distribution between them of the costs of the proceeding and on the remuneration to be offered to the members of the Arbitral Tribunal.

[3] All further references herein to ICSID refer to the ICSID Secretariat.

10. On February 11, 2000, Japan filed its memorial on its preliminary objections to jurisdiction. By letter of that same day, ICSID forwarded copies of Japan's memorial to the members of the Arbitral Tribunal.

11. Upon the filing of Japan's memorial on preliminary objections, the Parties exchanged correspondence expressing their disagreement about the title to be given to the proceedings. Australia and New Zealand proposed the title, "Southern Bluefin Tuna Cases." Japan initially proposed the title, "Cases concerning the Convention for the Conservation of Southern Bluefin Tuna" or, in the alternative, "Australia and New Zealand v. Japan." On February 17, 2000, the President of the Tribunal informed the Parties that, until the Tribunal had had the opportunity to meet to consider and dispose of the matter, both the title proposed by Australia and New Zealand and the alternative title proposed by Japan would be used together. At the opening of the hearing on jurisdiction on May 7, 2000, the President announced that, in view of the wish of Australia and New Zealand to be considered as a single party in the proceeding, of Japan's lack of objection, and of the Parties' agreement to continue using the provisional title of the proceeding, the title would be: "Southern Bluefin Tuna Case – Australia and New Zealand v. Japan."

12. On February 22, 2000, Australia and New Zealand filed copies of a dossier of documents used in the proceedings on provisional measures before the ITLOS. Copies were transmitted to Japan and to each member of the Arbitral Tribunal under cover of ICSID's letter to the parties of February 23, 2000.

13. On March 31, 2000, Australia and New Zealand filed a joint Reply on Jurisdiction. Copies of the Reply were transmitted to the members of the Tribunal and to Japan under cover of ICSID's letter of April 3, 2000.

14. On April 3, 2000, an agenda on preliminary matters was distributed to the Parties in anticipation of the hearing on jurisdiction. Observations on the draft agenda were received from Australia and New Zealand and from Japan.

15. A hearing on jurisdiction was held at the seat of ICSID at the World Bank headquarters in Washington, D.C., from May 7 through May 11, 2000. The President announced certain preliminary procedural matters agreed to by the Parties, including the name of the case, public access to the hearing, release of the provisional transcript of the hearing on ICSID's web site, and video recording of the hearing.

16. Japan presented its oral arguments on its objections to jurisdiction and on issues of admissibility on May 7. Australia and New Zealand then presented their oral arguments on jurisdiction and admissibility on May 8. Following a one-day interval, Japan presented its rebuttal arguments on May 10. Australia and New Zealand then presented their surrebuttal arguments on May 11, 2000. Simultaneous interpretation into Japanese was provided at the hearing.

17. The Agent and counsel of Japan who addressed the Tribunal were as follows:

Shotaro Yachi, Agent for Japan, Director-General of the Treaties Bureau, Ministry of Foreign Affairs, Tokyo

Nisuke Ando, Professor of International Law, Doshisha University and Professor Emeritus, Kyoto University

Sir Elihu Lauterpacht, Q.C., C.B.E.

Shabtai Rosenne, Member of the Israel Bar, Member of the Institute of International Law

Vaughan Lowe, Chichele Professor of Public International Law, All Souls College, University of Oxford.

18. The Agents and counsel of Australia and New Zealand who addressed the Tribunal were as follows:

Bill Campbell, Agent for Australia, First Assistant Secretary, Office of International Law, Attorney-General's Department, Canberra

Tim Caughley, Agent for New Zealand, International Legal Adviser and Director of the Legal Division of the Ministry of Foreign Affairs and Trade, Wellington

James Crawford, Whewell Professor of International Law, University of Cambridge

Bill Mansfield, Barrister, Wellington

Henry Burmester Q.C., Chief General Counsel, Office of the Australian Government Solicitor, Canberra

Mark Jennings, Senior Adviser, Office of International Law, Attorney-General's Department, Canberra

Elana Geddis, Legal Adviser, Legal Division of the Ministry of Foreign Affairs and Trade, Wellington

Rebecca Irwin, Principal Legal Officer, Office of International Law, Attorney-General's Department, Canberra

Andrew Serdy, Executive Officer, Sea Law, Legal Branch, Department of Foreign Affairs and Trade, Canberra.

19. At the hearing on jurisdiction, each Party submitted copies of a binder of materials for assistance of the members of the Arbitral Tribunal. Japan, in addition, submitted a single set of four binders containing the texts of the treaties referred to in Annex 47 of Japan's memorial on jurisdiction. The provisional verbatim transcript for each day of hearings was on the same day distributed electronically to the Parties and ICSID. On the morning following

each day of hearings, each Party received from ICSID a paper copy of the verbatim transcript and audio recordings for that day. Copies of the transcript were likewise provided by ICSID to each member of the Tribunal, and they were posted on ICSID's website.

20. On May 10, 2000, the Arbitral Tribunal addressed a number of questions to the Parties arising from their pleadings and oral presentations. Both Parties indicated that they would subsequently answer the Tribunal's questions in writing. On May 26, 2000, each Party submitted to ICSID its respective answers to the questions of the Arbitral Tribunal, together with their respective corrections to the verbatim transcript made of the hearing. By letter of that same date, ICSID forwarded copies of the Parties' answers and corrections to the members of the Tribunal and copies of each Party's answers and corrections to the other Party.

II. *Background to the Current Proceedings*

21. Southern Bluefin Tuna (*Thunnus maccoyi*, hereafter sometimes designated "SBT") is a migratory species of pelagic fish that is included in the list of highly migratory species set out in Annex I of the United Nations Convention on the Law of the Sea. Southern Bluefin Tuna range widely through the oceans of the Southern Hemisphere, principally the high seas, but they also traverse the exclusive economic zones and territorial waters of some States, notably Australia, New Zealand and South Africa. They spawn in the waters south of Indonesia. The main market for the sale of Southern Bluefin Tuna is in Japan, where the fish is prized as a delicacy for sashimi.

22. It is common ground between the Parties that commercial harvest of Southern Bluefin Tuna began in the early 1950s and that, in 1961, the global catch peaked at 81,000 metric tons ("mt"). By the early 1980s, the SBT stock had been severely overfished; it was estimated that the parental stock had declined to 23-30% of its 1960 level. In 1982, Australia, New Zealand and Japan began informally to manage the catching of SBT. Japan joined with Australia and New Zealand in 1985 to introduce a global total allowable catch (hereafter, "TAC") for SBT, initially set at 38,650 mt. In 1989, a TAC of 11,750 tons was agreed, with national allocations of 6,065 tons to Japan, 5,265 tons to Australia and 420 tons to New Zealand; Japan, as the largest harvester of SBT, sustained the greatest cut. But the SBT stock continued to decline. In 1997, it was estimated to be in the order of 7-15% of its 1960 level. Recruitment of SBT stock – the entry of new fish into the fishery – was estimated in 1998 to be about one third of the 1960 level. The institution of total allowable catch restrictions by Japan, Australia and New Zealand to some extent has been offset by the entry into the SBT fishery of fishermen from the Republic of Korea, Taiwan and Indonesia, and some flag-of-convenience States. Whether, in response to TAC restrictions, the stock has in fact begun to recover is at the core of the dispute between Australia and New

Zealand, on the one hand, and Japan, on the other. They differ over the current state and recovery prospects of SBT stock and the means by which scientific uncertainty in respect of those matters can best be reduced.

23. In 1993, Australia, Japan and New Zealand concluded the Convention for the Conservation of Southern Bluefin Tuna (hereafter, the "1993 Convention" or "CCSBT"). The provisions most pertinent to these proceedings are the following:

"Recalling that Australia, Japan and New Zealand have already taken certain measures for the conservation and management of southern bluefin tuna;

"Paying due regard to the rights and obligations of the Parties under relevant principles of international law;

"Noting the adoption of the United Nations Convention on the Law of the Sea in 1982;

"Noting that States have established exclusive economic or fishery zones within which they exercise, in accordance with international law, sovereign rights or jurisdiction for the purpose of exploring and exploiting, conserving and managing the living resources;

"Recognising that southern bluefin tuna is a highly migratory species which migrates through such zones;

"... Recognising that it is essential that they cooperate to ensure the conservation and optimum utilization of southern bluefin tuna;"

The Parties agreed *inter alia* that:

Article 3

The objective of this Convention is to ensure, through appropriate management, the conservation and optimum utilisation of southern bluefin tuna.

Article 4

Nothing in this Convention nor any measures adopted pursuant to it shall be deemed to prejudice the positions or views of any Party with respect to its rights and obligations under treaties and other international agreements to which it is party or its positions or views with respect to the law of the sea.

Article 5

1. Each Party shall take all action necessary to ensure the enforcement of this Convention and compliance with measures which become binding under paragraph 7 of Article 8.

2. The Parties shall expeditiously provide to the Commission for the Conservation of Southern Bluefin Tuna scientific information, fishing catch and effort statistics and other data relevant to the conservation of southern bluefin tuna and, as appropriate, ecologically related species.

3. The Parties shall cooperate in collection and direct exchange, when appropriate, of fisheries data, biological samples and other information relevant for scientific research on southern bluefin tuna and ecologically related species.

4. The Parties shall cooperate in the exchange of information regarding any fishing for southern bluefin tuna by nationals, residents and vessels of any State or entity not party to this Convention.

Article 6

1. The Parties hereby establish and agree to maintain the Commission for the Conservation of Southern Bluefin Tuna (hereinafter referred to as "the Commission").

* * *

Article 7

Each Party shall have one vote in the Commission. Decisions of the Commission shall be taken by a unanimous vote of the Parties present at the Commission meeting.

Article 8

1. The Commission shall collect and accumulate information described below:

a. scientific information, statistical data and other information relating to southern bluefin tuna and ecologically related species;

b. information relating to laws, regulations and administrative measures on southern bluefin tuna fisheries;

c. any other information relating to southern bluefin tuna.

2. The Commission shall consider matters described below:

a. interpretation or implementation of this Convention and measures adopted pursuant to it;

b. regulatory measures for conservation, management and optimum utilisation of southern bluefin tuna;

c. matters which shall be reported by the Scientific Committee prescribed in Article 9;

d. matters which may be entrusted to the Scientific Committee prescribed in Article 9;

e. matters which may be entrusted to the Secretariat prescribed in Article 10;

f. other activities necessary to carry out the provisions of this Convention.

3. For the conservation, management and optimum utilisation of southern bluefin tuna:

a. the Commission shall decide upon a total allowable catch and its allocation among the Parties unless the Commission decides upon other appropriate measures on the basis of the report and recommendations of the Scientific Committee referred to in paragraph 2(c) and (d) of Article 9; and

b. the Commission may, if necessary, decide upon other additional measures.

4. In deciding upon allocations among the Parties under paragraph 3 above the Commission shall consider:

a. relevant scientific evidence;

b. the need for orderly and sustainable development of southern bluefin tuna fisheries;

c. the interests of Parties through whose exclusive economic or fishery zones southern bluefin tuna migrates;

d. the interests of Parties whose vessels engage in fishing for southern bluefin tuna including those which have historically engaged in such fishing and those which have southern bluefin tuna fisheries under development;

e. the contribution of each Party to conservation and enhancement of, and scientific research on, southern bluefin tuna;

f. any other factors which the Commission deems appropriate.

5. The Commission may decide upon recommendations to the Parties in order to further the attainment of the objective of this Convention.

6. In deciding upon measures under paragraph 3 above and recommendations under paragraph 5 above, the Commission shall take full account of the report and recommendations of the Scientific Committee under paragraph 2(c) and (d) of Article 9.

7. All measures decided upon under paragraph 3 above shall be binding on the Parties.

8. The Commission shall notify all Parties promptly of measures and recommendations decided upon by the Commission.

9. The Commission shall develop, at the earliest possible time and consistent with international law, systems to monitor all fishing activities related to southern bluefin tuna in order to enhance scientific knowledge necessary for conservation and management of southern bluefin tuna and in order to achieve effective implementation of this Convention and measures adopted pursuant to it.

10. The Commission may establish such subsidiary bodies as it considers desirable for the exercise of its duties and functions.

Article 9

1. The Parties hereby establish the Scientific Committee as an advisory body to the Commission.

2. The Scientific Committee shall:

a. assess and analyse the status and trends of the population of southern bluefin tuna;

b. coordinate research and studies of southern bluefin tuna;

c. report to the Commission its findings or conclusions, including consensus, majority and minority views, on the status of the southern bluefin tuna stock and, where appropriate, of ecologically related species;

d. make recommendations, as appropriate, to the Commission by consensus on matters concerning the conservation, management and optimum utilisation of southern bluefin tuna;

e. consider any matter referred to it by the Commission. ...

5.

a. Each Party shall be a member of the Scientific Committee and shall appoint to the Committee a representative with suitable scientific qualifications who may be accompanied by alternates, experts and advisers. ...

* * *

Article 13

With a view to furthering the attainment of the objective of this Convention, the Parties shall cooperate with each other to encourage accession by any State to this Convention where the Commission considers this to be desirable.

* * *

Article 16

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a

view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

* * *

Article 20

Any Party may withdraw from this Convention twelve months after the date on which it formally notifies the Depositary of its intention to withdraw.

24. In May 1994, the Commission established by the 1993 Convention set a TAC at 11,750 tons, with the national allocations among Japan, Australia and New Zealand set out above. There has been no agreement in the Commission thereafter to change the TAC level or allotments. Japan from 1994 sought an increase in the TAC and in its allotment but any increase has been opposed by New Zealand and Australia. While the Commission initially maintained the TAC at existing levels due to this impasse, since 1998 it has been unable to agree upon any TAC. In the absence of a Commission decision, the Parties in practice have maintained their TAC as set in 1994. At the same time, Japan pressed in the Commission not only for a TAC increase, initially of 6000 tons and then of 3000 tons in its allotment, but also for agreement upon a joint Experimental Fishing Program ("EFP"), whose particular object would be to gather data in those areas where fishing for SBT no longer took place, with a view to reducing scientific uncertainty about recovery of the stock. Japan sought agreement upon its catching 6000 EFP tons annually, for three years, for experimental fishing, in addition to its commercial allotment; it subsequently reduced that request to 3000 tons, also the same amount that it sought by way of increase in its TAC. While the Commission in 1996 adopted a set of "Objectives and principles for the design and implementation of an experimental fishing program," it proved unable to agree upon the size of the catch that would be allowed under the EFP and on modalities of its execution. However, Australia, Japan and New Zealand are agreed on the objective of restoring the parental stock of Southern Bluefin Tuna to its 1980 level by the year 2020.

25. At a Commission meeting in 1998 Japan stated that, while it would voluntarily adhere to its previous quota for commercial SBT fishing, it would commence a unilateral, three-year EFP as of the summer of 1998. Despite vigorous protests by Australia and New Zealand over pursuance of any unilateral EFP, Japan conducted a pilot program with an estimated catch of 1,464 mt. in the summer of 1998.

26. In response, Australia and New Zealand formally requested urgent consultations and negotiations under Article 16(1) of the 1993 Convention. Despite intensive efforts within this framework to reach agreement on an experimental fishing program for 1999, an accord was not achieved. At a meeting in Canberra May 26-28, 1999, Australia was advised that, unless it accepted Japan's proposal for a 1999 joint experimental fishing program, Japan would recommence unilateral experimental fishing on June 1; and New Zealand was similarly so informed. Neither Australia nor New Zealand found Japan's proposal acceptable. While differences about the dimension of EFP tonnage had narrowed, they maintained that Japan's EFP was misdirected and that its design and analysis were fundamentally flawed. In their view, Japan's EFP did not justify what they saw as the significant increased risk to the SBT stock. They informed Japan that, if it recommenced unilateral experimental fishing on June 1, 1999 or thereafter, they would regard such action as a termination by Japan of negotiations under Article 16(1) of the 1993 Convention. Japan, which resumed its EFP on June 1, 1999, replied that it had no intention of terminating those negotiations. It maintained that independent scientific opinion had advised the Commission that Japan's EFP proposals were soundly conceived.

27. On June 23, 1999, Australia restated its position that the dispute did not relate solely to Japan's obligations under the 1993 Convention, but also involved its obligations under UNCLOS and customary international law. It considered that there had been a full exchange of views on the dispute for the purposes of Article 283(1) of UNCLOS, which provides that, "When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."

28. Also on June 23, 1999, Japan stated that it was ready to have the dispute resolved by mediation under the provisions of the 1993 Convention. Australia replied that it was willing to submit the dispute to mediation, provided that Japan agreed to cease its unilateral experimental fishing and that the mediation was expeditious. Japan responded that the question of its unilateral EFP could be discussed in the framework of mediation. On July 14, 1999, Japan reiterated its position that its experimental fishing was consistent with the 1993 Convention and that it could not accept the condition of its cessation in order for mediation to proceed. Japan declared that it was ready to have the dispute resolved by arbitration pursuant to Article 16(2) of the 1993 Convention, indicating however that it was not prepared to halt its unilateral EFP during its pendency though it was prepared to resume consultations about it. Thereafter Australia notified Japan that it viewed Japan's position as a rejection of Australia's conditional acceptance of mediation, and that Australia had decided to commence compulsory dispute resolution under Part XV of UNCLOS. It followed that it did not accept Japan's proposal for arbitration pursuant to Article 16(2) of the Convention. Australia emphasized

the centrality of Japan's obligations under UNCLOS and under customary international law to the dispute and the need for those obligations to be addressed if the dispute were to be resolved. Australia reiterated its view that the conduct of Japan under the 1993 Convention was relevant to the issue of its compliance with UNCLOS obligations and may be taken into account in dispute settlement under Part XV of UNCLOS. Pending the constitution of the arbitral tribunal to which the dispute was being submitted under UNCLOS's Annex VII, Australia announced its intention to seek prescription of provisional measures under Article 290(5) of UNCLOS, including the immediate cessation of unilateral experimental fishing by Japan.

29. As the preambular references in the 1993 Convention quoted above confirm, the 1993 Convention was prepared in light of the provisions of the 1982 United Nations Convention on the Law of the Sea and the relevant principles of international law. UNCLOS had not come into force in 1993, and in fact did not come into force for the three Parties to the instant dispute until 1996, but the Parties to the 1993 Convention regarded UNCLOS as an umbrella or framework Convention to be implemented in respect of Southern Bluefin Tuna by the adoption of the 1993 Convention.

30. In reliance upon provisions of UNCLOS and of general international law, including UNCLOS provisions for settlement of disputes (Part XV of UNCLOS), Australia and New Zealand thus sought in 1999 to interdict pursuance of Japan's unilateral EFP. They requested the establishment of an arbitral tribunal pursuant to Annex VII of UNCLOS, and sought provisional measures under Article 290(5) of UNCLOS, which provides:

> "Pending constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea ... may prescribe ... provisional measures if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures ..."

31. The Applicants' Statement of Claim filed in invoking arbitration under UNCLOS Annex VII maintained that the dispute turned on what the Applicants described as Japan's failure to conserve, and to cooperate in the conservation of, the SBT stock, as manifested, *inter alia*, by its unilateral experimental fishing for SBT in 1998 and 1999. The Applicants stated that the dispute concerned the interpretation and application of certain provisions of UNCLOS, and that the arbitral tribunal will be asked to take into account provisions of the 1993 Convention and the Parties' practice thereunder, as well as their obligations under general international law, "in particular the precautionary principle."

32. The provisions of UNCLOS centrally invoked by Australia and New Zealand were the following:

Article 64
Highly migratory species

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.

2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

Article 116
Right to fish on the high seas

All States have the right for their nationals to engage in fishing on the high seas subject to:

(a) their treaty obligations;

(b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67; and

(c) the provisions of this section.

Article 117
Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas

All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

Article 118
Cooperation of States in the conservation and management of living resources

States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

Article 119
Conservation of the living resources of the high seas

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:

(a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;

(b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis

through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.

3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

33. In seeking provisional measures, Australia and New Zealand among other contentions argued that Article 64, read in conjunction with other provisions of UNCLOS, imposes an obligation on Japan, as a distant water State whose nationals fish for SBT, to cooperate with Australia and New Zealand, as coastal States, in the conservation of SBT. The Commission established under the 1993 Convention is "the appropriate international organization" for the purposes of Article 64. Japan's unilateral actions defeat the object and purpose of the 1993 Convention. In such a case, the underlying obligations of UNCLOS remain. While the 1993 Convention was intended as a means of implementing the obligations imposed by UNCLOS in respect of highly migratory fish species, it is not a means of escaping those obligations. Australia and New Zealand contended that Japan's conduct also placed it in violation of Articles 116, 117, 118, and 119, *inter alia* by failing to adopt necessary conservation measures for its nationals so as to maintain or restore SBT stock to levels which can produce the maximum sustainable yield, by ignoring credible scientific evidence presented by Australia and New Zealand and by pursuing a course of unilateral action in its exclusive interest contrary to their rights as coastal States while enjoying the benefits of restraint by Australia and New Zealand, with discriminatory effect upon nationals of the Applicants. They requested the prescription of provisional measures requiring that Japan immediately cease experimental fishing for SBT; that Japan restrict its SBT catch to its national allocation as last agreed in the Commission, subject to reduction by the amount of catch taken in pursuance of its unilateral EFP; that the Parties act consistently with the precautionary principle pending a final settlement of the dispute; and that the Parties ensure that no action is taken to aggravate their dispute or prejudice the carrying out of any decision on the merits.

34. Japan challenged the contentions of Australia and New Zealand on the facts and the law. It contended that it was Australia and New Zealand who had frustrated the functioning of the CCSBT Commission and regime. It maintained that the gravamen of the claims asserted concern the 1993 Convention, not UNCLOS, and that those claims turned not on issues of law but matters of scientific appreciation. Article 290(5) of UNCLOS contemplates the imposition of provisional measures by the International Tribunal for the Law of the Sea ("ITLOS") only if the arbitral tribunal would have *prima facie* jurisdiction over the underlying dispute. Article 288(1) of UNCLOS gave an arbitral tribunal jurisdiction over any dispute concerning the interpretation or application of UNCLOS, a treaty not actually the basis of the Applicants' claims. The Applicants in August 1998 specifically invoked dispute resolution under the 1993 Convention, not UNCLOS; they had treated the dispute as one arising under the CCSBT, and sought consultations not

under UNCLOS but under Article 16 of the 1993 Convention. The procedures under the 1993 Convention had not been exhausted; the Parties were required to continue to seek resolution of their dispute pursuant to those procedures. Nor had the procedural conditions for arbitration under UNCLOS been met; Australia and New Zealand had not attempted to reach a settlement in good faith, or even exchange views, in accordance with the provisions of UNCLOS Part XV. No irreparable damage threatened. Article 64 of UNCLOS merely created an obligation of cooperation, and prescribed no specific principles of conservation or concrete conservation measures. It was doubtful that the precautionary principle had attained the status of a rule of customary international law. The Applicants' actions to thwart settlement under Article 16 of the CCSBT were "abusive" and "redolent of bad faith". For all these reasons, Japan argued that the proposed Annex VII arbitral tribunal lacked jurisdiction *prima facie* and that hence ITLOS lacked authority to prescribe provisional measures. The only remedy that made sense, if there were to be any, would be to call on Australia and New Zealand to resume negotiations under the 1993 Convention with a view to reaching agreement on the TAC, annual quotas, and the continuation of the EFP on a joint basis, with the assistance of independent scientific advice. In the event that ITLOS should make a finding of *prima facie* jurisdiction, Japan asked for counter-provisional measures prescribing that Australia and New Zealand urgently and in good faith recommence negotiations with Japan for a period of six months to reach a consensus on outstanding issues between them, including a protocol for a continued EFP and the determination of a TAC and national allocations for the year 2000.

III. *Provisional Measures Prescribed by ITLOS*

35. Australia and New Zealand requested provisional measures on July 30, 1999. The International Tribunal for the Law of the Sea held initial deliberations on August 16 and 17 and noted points and issues that it wished the Parties specially to address; oral hearings were conducted at five public sittings on August 18, 19 and 20. On August 27, 1999, ITLOS issued an Order prescribing provisional measures. Its salient *consideranda* and conclusions merit quotation:

> 40. *Considering* that, before prescribing provisional measures under article 290, paragraph 5, of the Convention, the Tribunal must satisfy itself that *prima facie* the arbitral tribunal would have jurisdiction;
>
> 41. *Considering* that Australia and New Zealand have invoked as the basis of jurisdiction of the arbitral tribunal article 288, paragraph 1, of the Convention which reads as follows:
>
> > *A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part;*
>
> 42. *Considering* that Japan maintains that the disputes are scientific rather than legal;

43. *Considering* that, in the view of the Tribunal, the differences between the parties also concern points of law;

44. *Considering* that, in the view of the Tribunal, a dispute is a "disagreement on a point of law or fact, a conflict of legal views or of interests" (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2,* p. 11), and "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328);

45. *Considering* that Australia and New Zealand allege that Japan, by unilaterally designing and undertaking an experimental fishing programme, has failed to comply with obligations under articles 64 and 116 to 119 of the Convention on the Law of the Sea, with provisions of the Convention for the Conservation of Southern Bluefin Tuna of 1993 (hereinafter "the Convention of 1993") and with rules of customary international law;

46. *Considering* that Japan maintains that the dispute concerns the interpretation or implementation of the Convention of 1993 and does not concern the interpretation or application of the Convention on the Law of the Sea;

47. *Considering* that Japan denies that it has failed to comply with any of the provisions of the Convention on the Law of the Sea referred to by Australia and New Zealand;

48. *Considering* that, under article 64, read together with articles 116 to 119, of the Convention, States Parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species;

* * *

50. *Considering* that the conduct of the parties within the Commission for the Conservation of Southern Bluefin Tuna established in accordance with the Convention of 1993, and in their relations with non-parties to that Convention, is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea;

51. *Considering* that the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna;

52. *Considering* that, in the view of the Tribunal, the provisions of the Convention on the Law of the Sea invoked by Australia and New Zealand appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded;

53. *Considering* that Japan argues that recourse to the arbitral tribunal is excluded because the Convention of 1993 provides for a dispute settlement procedure;

54. *Considering* that Australia and New Zealand maintain that they are not precluded from having recourse to the arbitral tribunal since the Convention of 1993 does not provide for a compulsory dispute settlement procedure entailing a binding decision as required under article 282 of the Convention on the Law of the Sea;

55. *Considering* that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea;

56. *Considering* that Japan contends that Australia and New Zealand have not exhausted the procedures for amicable dispute settlement under Part XV, section 1, of the Convention, in particular article 281, through negotiations or other agreed peaceful means, before submitting the disputes to a procedure under Part XV, section 2, of the Convention;

57. *Considering* that negotiations and consultations have taken place between the parties and that the records show that these negotiations were considered by Australia and New

Zealand as being under the Convention of 1993 and also under the Convention on the Law of the Sea;

58. *Considering* that Australia and New Zealand have invoked the provisions of the Convention in diplomatic notes addressed to Japan in respect of those negotiations;

59. *Considering* that Australia and New Zealand have stated that the negotiations had terminated;

60. *Considering* that, in the view of the Tribunal, a State Party is not obliged to pursue procedures under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted;

61. *Considering* that, in the view of the Tribunal, the requirements for invoking the procedures under Part XV, section 2, of the Convention have been fulfilled;

62. *Considering* that, for the above reasons, the Tribunal finds that the arbitral tribunal would *prima facie* have jurisdiction over the disputes;

63. *Considering* that, according to article 290, paragraph 5, of the Convention, provisional measures may be prescribed pending the constitution of the arbitral tribunal if the Tribunal considers that the urgency of the situation so requires;

64. *Considering*, therefore, that the Tribunal must decide whether provisional measures are required pending the constitution of the arbitral tribunal;

65. *Considering* that, in accordance with article 290, paragraph 5, of the Convention, the arbitral tribunal, once constituted, may modify, revoke or affirm any provisional measures prescribed by the Tribunal;

66. *Considering* that Japan contends that there is no urgency for the prescription of provisional measures in the circumstances of this case;

67. *Considering* that, in accordance with article 290 of the Convention, the Tribunal may prescribe provisional measures to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment;

68. *Considering* that Australia and New Zealand contend that by unilaterally implementing an experimental fishing programme Japan has violated the rights of Australia and New Zealand under articles 64 and 116 to 119 of the Convention;

69. *Considering* that Australia and New Zealand contend that further catches of southern bluefin tuna, pending the hearing of the matter by an arbitral tribunal, would cause immediate harm to their rights;

70. *Considering* that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment;

71. *Considering* that there is no disagreement between the parties that the stock of southern bluefin tuna is severely depleted and is at its historically lowest levels and that this is a cause for serious biological concern;

72. *Considering* that Australia and New Zealand contend that, by unilaterally implementing an experimental fishing programme, Japan has failed to comply with its obligations under articles 64 and 118 of the Convention, which require the parties to cooperate in the conservation and management of the southern bluefin tuna stock, and that the actions of Japan have resulted in a threat to the stock;

73. *Considering* that Japan contends that the scientific evidence available shows that the implementation of its experimental fishing programme will cause no further threat to the southern bluefin tuna stock and that the experimental fishing programme remains necessary to reach a more reliable assessment of the potential of the stock to recover;

74. *Considering* that Australia and New Zealand maintain that the scientific evidence available shows that the amount of southern bluefin tuna taken under the experimental fishing programme could endanger the existence of the stock;

75. *Considering* that the Tribunal has been informed by the parties that commercial fishing for southern bluefin tuna is expected to continue throughout the remainder of 1999 and beyond;

76. *Considering* that the catches of non-parties to the Convention of 1993 have increased considerably since 1996;

77. *Considering* that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna;

78. *Considering* that the parties should intensify their efforts to cooperate with other participants in the fishery for southern bluefin tuna with a view to ensuring conservation and promoting the objective of optimum utilization of the stock;

79. *Considering* that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna;

80. *Considering* that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock;

81. *Considering* that, in the view of the Tribunal, catches taken within the framework of any experimental fishing programme should not result in total catches which exceed the levels last set by the parties for each of them, except under agreed criteria;

82. *Considering* that, following the pilot programme which took place in 1998, Japan's experimental fishing as currently designed consists of three annual programmes in 1999, 2000 and 2001;

83. *Considering* that the Tribunal has taken note that, by the statement of its Agent before the Tribunal on 20 August 1999, Japan made a "clear commitment that the 1999 experimental fishing programme will end by 31 August";

84. *Considering*, however, that Japan has made no commitment regarding any experimental fishing programmes after 1999;

85. *Considering* that, for the above reasons, in the view of the Tribunal, provisional measures are appropriate under the circumstances;

86. *Considering* that, in accordance with article 89, paragraph 5, of the Rules, the Tribunal may prescribe measures different in whole or in part from those requested;

87. *Considering* the binding force of the measures prescribed and the requirement under article 290, paragraph 6, of the Convention that compliance with such measures be prompt;

***

90. *For these reasons*,

THE TRIBUNAL,

1. *Prescribes*, pending a decision of the arbitral tribunal, the following measures:

By 20 votes to 2,

(a) Australia, Japan and New Zealand shall each ensure that no action is taken which might aggravate or extend the disputes submitted to the arbitral tribunal;

* * *

By 20 votes to 2,

(b) Australia, Japan and New Zealand shall each ensure that no action is taken which might prejudice the carrying out of any decision on the merits which the arbitral tribunal may render;

* * *

By 18 votes to 4,

(c) Australia, Japan and New Zealand shall ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocations at the levels last agreed by the parties of 5,265 tonnes, 6,065 tonnes and 420 tonnes, respectively; in calculating the annual catches for 1999 and 2000, and without prejudice to any decision of the arbitral tribunal, account shall be taken of the catch during 1999 as part of an experimental fishing programme;

* * *

By 20 votes to 2,

(d) Australia, Japan and New Zealand shall each refrain from conducting an experimental fishing programme involving the taking of a catch of southern bluefin tuna, except with the agreement of the other parties or unless the experimental catch is counted against its annual national allocation as prescribed in subparagraph (c);

* * *

By 21 votes to 1,

(e) Australia, Japan and New Zealand should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna;

* * *

By 20 votes to 2,

(f) Australia, Japan and New Zealand should make further efforts to reach agreement with other States and fishing entities engaged in fishing for southern bluefin tuna, with a view to ensuring conservation and promoting the objective of optimum utilization of the stock.

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36. It should be observed that, while the Order of ITLOS was not unanimous, no Member of the Tribunal disputed "the view of the Tribunal" that "the provisions of the Convention on the Law of the Sea invoked by Australia and New Zealand appear to afford a basis on which the jurisdiction of the arbitral tribunal might be founded" (paragraph 52). It so held despite Japan's contention that recourse to the arbitral tribunal "is excluded because the Convention of 1993 provides for a dispute settlement procedure" (paragraph 53). It noted the position of Australia and New Zealand "that they are not precluded from having recourse to the arbitral tribunal since the Convention of 1993 does not provide for a compulsory dispute settlement procedure entailing a binding decision as required under article 282 of the Convention on the Law of the Sea" (paragraph 54). It held that, "in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2 of

the Convention on the Law of the Sea" (paragraph 55). For the above and other reasons quoted, "the Tribunal finds that the arbitral tribunal would *prima facie* have jurisdiction over the disputes" (paragraph 62).

37. It is these holdings of the International Tribunal for the Law of the Sea that were the particular focus of controversy in these proceedings. The Agents and counsel of Australia, New Zealand and Japan plumbed the depths of these holdings with a profundity that the time pressures of the ITLOS processes did not permit. In any event, the ITLOS holdings upheld no more than the jurisdiction *prima facie* of this Tribunal. It remains for it to decide whether it has jurisdiction to pass upon the merits of the dispute.

IV. *Japan's Position on the Lack of Jurisdiction and Inadmissibility*

38. In its written and oral pleadings, Japan has advanced a multiplicity of reasons why, in its view, this Tribunal lacks jurisdiction over the merits of the dispute. Its contentions may be summarized as follows:

(a) The core of the dispute lies in disagreement concerning, as the Applicants' Statement of Claim puts it, "Japan's failure to conserve, and to cooperate in the conservation of, the SBT stock, as manifested, *inter alia*, by its unilateral experimental fishing for SBT in 1998 and 1999". Neither customary international law nor UNCLOS requires Japan or any other State to proceed with an EFP only with the agreement of the other two States Parties to the 1993 Convention. Any such obligation can only be derived from the CCSBT itself. The dispute necessarily is one concerning the interpretation and implementation of the CCSBT and not a dispute concerning the interpretation or application of UNCLOS. The question of an EFP has been in dispute for five years within the CCSBT Commission. Urgent consultations about Japan's unilateral EFP were requested by the Applicants within the framework of the CCSBT. The negotiations to resolve that dispute took place within the framework of the CCSBT, as did their claimed termination. Any other international rights and obligations asserted are relevant only because of their bearing upon a dispute under the CCSBT, as the Applicants themselves recognized. Belated invocation of UNCLOS and customary international law by the Applicants is an artifice to enable the Applicants to seek provisional measures from ITLOS and to evade the consensual requirements of Article 16 of the 1993 Convention. It is not sustained by the factual history of the dispute. It is significant that, when the dispute first arose, the Applicants protested in the context only of the CCSBT and made no mention of UNCLOS; their original characterization of the dispute is the clearest indication of what the Parties themselves really thought. The Statement of Claim, while cast in terms of UNCLOS, in substance depends upon allegations of breach of the CCSBT; the relief sought by the Applicants in respect of the EFP and TAC is intelligible only within the framework of the CCSBT. The Applicants claiming the dispute to fall within UNCLOS does not

make it so; rejection of that claim by Japan does not give rise to a dispute under UNCLOS; "whether there exists an international dispute is a matter for objective determination" as the International Court of Justice has repeatedly held. In the words of the Court, "the complaint should indicate some genuine relationship between the complaint and the provisions invoked ..." The Statement of Claim does not.

(b) While UNCLOS was concluded in 1982 and the CCSBT in 1993, UNCLOS did not come into force until 1994 and was not ratified by all three of the Parties to these proceedings until 1996. It follows that the CCSBT alone regulated relations among Australia, New Zealand and Japan in respect of SBT for some 26 months. The advent of UNCLOS could not have increased the density of treaty relations between the Parties in respect of SBT in as radical a manner as Australia and New Zealand now assert. Rather the governing treaty in respect of SBT is not UNCLOS but the CCSBT.

(c) However, if UNCLOS is regarded as the earlier treaty and as the framework or umbrella convention that sets out broad principles that in practice are to be realized by the conclusion and application of specific implementing agreements, then the CCSBT is the exemplar of such an implementing agreement. It then is not only the *lex posterior* but the *lex specialis*. In accordance with generally accepted principles, the provisions of a *lex specialis* not only specify and implement the principles of an anterior framework agreement; they exhaust and supplant those principles as long as the implementing agreement remains in force. The provisions of UNCLOS on which the Applicants rely, Article 64 and 116-119, are fully covered by the more specific provisions of the CCSBT. The function of the CCSBT is to fulfill and implement UNCLOS and discharge its obligations in respect of SBT by providing the necessary institutional structure which UNCLOS contemplates and the substantive detail that amplifies the outlines laid down in UNCLOS. "There is no penumbra of obligation under UNCLOS that extends beyond the circle of commitment established by CCSBT." The *lex specialis* prevails substantively and procedurally, and hence it – i.e., Article 16 of the 1993 Convention – determines jurisdiction. While it is in theory possible that a given act may violate more than one treaty, on the facts of this case, that is not possible.

(d) The failure of Australia and New Zealand to bring suit against Korea, Taiwan and Indonesia under UNCLOS suggests that the real dispute at issue is under the 1993 Convention, to which none of those States are, at any rate, yet, party. It demonstrates the realization of the Applicants that the CCSBT is the only effective legal link between them and Japan in relation to SBT.

(e) Article 311 of UNCLOS, concerning its relation to other conventions and international agreements, is consistent with Japan's analysis.[4] The 1993 Convention is compatible with UNCLOS and does not detract from the enjoyment of rights thereunder; the 1993 Convention is expressly permitted by Article 64 of UNCLOS.

(f) Article 282 of UNCLOS gives no nourishment to the Applicants' position, since the instant dispute concerns not the interpretation or application of UNCLOS but the interpretation and implementation of the 1993 Convention.[5]

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[4] Article 311 provides:

> Article 311
> *Relation to other conventions and international agreements*
>
> 1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.
>
> 2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
>
> 3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
>
> 4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.
>
> 5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.
>
> 6. States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof.

[5] UNCLOS Article 282 provides:

> Article 282
> *Obligations under general, regional or bilateral agreements*
>
> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.

(g) In accordance with Article 280 of UNCLOS,[6] the Parties to these proceedings are free to settle a dispute between them concerning the interpretation or application of UNCLOS by any peaceful means of their own choice; if it is assumed for the sake of argument that the instant dispute arises under UNCLOS as well as the CCSBT (which Japan denies), the Parties have chosen the means set out in Article 16 of the CCSBT. The Parties may so agree "at any time", either before or after a dispute has arisen.

(h) The terms of Article 281 of UNCLOS are also consistent with the position of Japan.[7] If, *arguendo*, it were to be assumed that a dispute under the CCSBT could also be a dispute under UNCLOS, then Article 16 of the CCSBT fits precisely into Article 281(1). The Parties to the CCSBT have agreed to settlement by a peaceful means of their own choice, namely, whatever method indicated in Article 16 they agree to pursue. Such agreement excludes any further procedure, because the Parties to the 1993 Convention have made it clear in Article 16(2) that no dispute shall be referred to the International Court of Justice or to arbitration without their consent.

(i) A very large number of treaties that relate to the law of the sea have dispute settlement provisions which have no compulsory element. If the approach of Australia and New Zealand in espousing the governance of the dispute settlement provisions of UNCLOS were to apply to these treaties, parties to those treaties who had no intention of entering into compulsory jurisdiction would find themselves so bound. Japan cited among a number of examples the International Convention for the Regulation of Whaling. An old but still important convention, it contains no dispute settlement provisions. If the approach of the Applicants were to be accepted, it would be open to any Party to UNCLOS to bring proceedings against a whaling State under UNCLOS Part XV by alleging that an action was a breach of an UNCLOS

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[6] UNCLOS Article 280 provides:

> Article 280
> *Settlement of disputes by any peaceful means chosen by the parties*
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> Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

[7] UNCLOS Article 281 provides:

> Article 281
> *Procedure where no settlement has been reached by the parties*
>
> 1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
>
> 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

provision. It is improbable that in becoming party to UNCLOS, States so intended. Other treaties, entered into after UNCLOS came into force, have dispute settlement clauses similar to that in Article 16 of the CCSBT, or, at any rate, clauses that lack compulsory sanction. Clearly the parties chose to avoid, and not implicitly to undertake, obligations for compulsory adjudication or arbitration, i.e., the intention was to exclude recourse to the compulsory jurisdiction of UNCLOS. It cannot reasonably be presumed that States concluded treaties containing such clauses which are useless because they are overridden by UNCLOS Part XV. But where States intend UNCLOS procedures of peaceful settlement to govern, they so provide, notably in the Agreement of 1995 for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. If this Tribunal were to find that UNCLOS Part XV overrides the specific terms of Article 16 of the CCSBT, it would profoundly disturb the host of dispute settlement provisions in treaties – whether antedating or postdating UNCLOS – that relate to matters embraced by UNCLOS.

(j) The Applicants argue that UNCLOS establishes a "new and comprehensive legal regime for all ocean space", a vital element of which is "mandatory" settlement of disputes. But in fact the peaceful settlement provisions of UNCLOS are flexible and are designed to afford Parties great leeway in their choice of means of peaceful settlement.

39. Japan in the alternative argued that, if, contrary to its view, the Tribunal were to find that the dispute is one concerning the interpretation or application of UNCLOS, it should nevertheless decline to pass upon the merits of the case because the Applicants had failed to meet the conditions governing such recourse set out in UNCLOS. Its principal contentions may be summarized as follows:

(a) Article 280 of UNCLOS [8] empowers the Parties to a dispute concerning the interpretation or application of UNCLOS to agree "at any time'' to settle their dispute by any peaceful means of their own choice. "At any time" means just that, i.e., it embraces not only disputes that have arisen but disputes that may arise. By adhering to Article 16 of the CCSBT, the Parties to the instant case had chosen the peaceful means listed therein, which do not include compulsory arbitration pursuant to Part XV of UNCLOS.

(b) Article 281 of UNCLOS[9] is critical. Since the Parties had agreed by Article 16 to seek settlement of their dispute by their chosen peaceful means, UNCLOS recourse was open "only where no settlement had been reached by recourse to such means". But in this case, the Applicants had failed to exhaust such means, namely, Japan's proposals for mediation and arbitration under the 1993 Convention. They failed to continue to seek resolution of the dispute in

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[8] Quoted above
[9] Quoted above

accordance with Article 16. Instead they resorted to "abusive exploitation" of the compulsory procedures of UNCLOS. Moreover, Article 281 further conditions access to UNCLOS procedures; access applies only where "the agreement between the parties does not exclude any further procedure". Japan maintains that, "The agreement between the parties, Article 16 of CCSBT, does exclude further procedure beyond what is stipulated in paragraph 1 without the consent of all the parties to the dispute. This means that CCSBT excludes further procedures, including the compulsory procedures of UNCLOS without the consent of the parties." Indeed the Applicants' request to ITLOS for provisional measures was itself a violation of the 1993 Convention, which excludes recourse to compulsory settlement procedures without the consent of all parties to the dispute.

(c) Article 282 of UNCLOS[10] provides that, if there is a procedure open to the parties that entails a binding decision, that procedure shall apply in lieu of UNCLOS procedures. The phrase in Article 282 "or otherwise" was understood when drafted and adopted to relate to reference to the International Court of Justice pursuant to declarations adhering to its jurisdiction under the Optional Clause. Japan, Australia and New Zealand all are bound by such declarations, but the Applicants have not applied to the Court. That is inconsistent with their obligations under Article 282 (even though, Japan acknowledged, it would have objected to the Court's jurisdiction had Australia and New Zealand invoked it, on grounds of reservations to the Optional Clause.)

(d) Article 283 of UNCLOS requires the Parties to a dispute to proceed expeditiously to an exchange of views regarding its settlement.[11] In all the diplomatic correspondence exchanged between the Parties to this dispute, there is no mention of conducting negotiations in accordance with Article 283. Nothing in Article 283 moreover envisages as conclusive a unilateral determination by one Party that negotiations (which actually took place under Article 16 of the CCSBT) are terminated.

40. Japan further argued, again in the alternative, that, should the Tribunal find that it has jurisdiction over the instant dispute, and should it find that

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[10] Quoted above.

[11] Article 283 provides:

> Article 283
> *Obligation to exchange views*
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> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.
>
> 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.

Australia and New Zealand have complied with the conditions for recourse under UNCLOS (both of which findings Japan contests), it should nevertheless hold that the dispute is inadmissible. The grounds for challenging admissibility were as follows:

(a) Article 16 was fashioned to deal with the kinds of disputes likely to arise under the 1993 Convention, namely, questions of scientific judgment. Such questions are not justiciable. While an ad hoc reference to arbitration such as Japan proposed within the framework of the CCSBT would have permitted the agreed identification of the precise matters over which the Parties differ, and the construction of a tribunal and a procedure specially adapted to deal with such scientific questions, that proposal was immediately rejected by Australia and New Zealand. The essentially scientific character of the instant dispute is apparent from the remedies sought. It is also shown by the reasons cited by Australia and New Zealand for contesting Japan's experimental fishing program. All turn on matters of scientific, not legal, judgment. There is no controversy about general conservation duties. The dispute is only over the accuracy of particular scientific predictions and judgments concerning SBT. That is why it is not susceptible of legal judgment.

(b) The Applicants' Statement of Claim fails to specify precisely what the case against Japan is. Its vague and elusive reference to articles of UNCLOS is insufficient. There is a failure to identify a cause of action.

(c) The dispute is in any event moot. Japan has now accepted a catch limit for its EFP of 1500 mt. That is the exact figure proposed by Australia in 1999. The Applicants' complaints center upon contentions that Japan is taking an EFP catch above the level of the national quotas agreed in the CCSBT for 1997. But now they are in agreement on what that EFP catch should be, so the case is moot. Not only has Japan committed itself to observe a limit of 1500 mt. in its EFP for the remaining two experimental fishing programs. It has undertaken to pay back all excess catches above the 1500 limit. It has also committed itself to a reduction in catch limits if the results of the EFP show that a reduction is required to safeguard the SBT stock. Japan, as the largest fisher and by far the largest consumer of Southern Bluefin Tuna, has the strongest interest in ensuring the survival of a healthy SBT stock.

V. *The Position of Australia and New Zealand on the Presence of Jurisdiction and the Admissibility of Their Claims*

41. The arguments of Australia and of New Zealand in support of this Tribunal's jurisdiction and of the admissibility of their claims were no less multifaceted than were those of Japan to the contrary. The following contentions were made, among others.

(a) The International Tribunal for the Law of the Sea was unanimous in its finding that this Tribunal has *prima facie* jurisdiction. The Applicants accept that this Tribunal is not bound to hold in favor of its jurisdiction over the merits by the finding of ITLOS concerning jurisdiction *prima facie*. Yet there was not a trace of doubt in the reasoning of ITLOS that such *prima facie* jurisdiction exists. The conclusion of 22 judges of ITLOS cannot be summarily disregarded, and their reasoning and holdings are significant in several respects. ITLOS found that the dispute is not only one of scientific appreciation: "the differences between the parties also concern points of law". ITLOS, in holding that "the conduct of the parties within the Commission for the Conservation of Southern Bluefin Tuna established in accordance with the Convention of 1993 ... is relevant to an evaluation of the extent to which the parties are in compliance with their obligations under the Convention on the Law of the Sea" and in concluding that "... the fact that the Convention of 1993 applies between the parties does not exclude their right to invoke the provisions of the Convention on the Law of the Sea in regard to the conservation and management of southern bluefin tuna ..." did not accept Japan's central substantive contention that the dispute is solely one under the CCSBT. Moreover, ITLOS rejected Japan's principal procedural contention by holding that: "... the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea ..." ITLOS observed that negotiations between the Parties were considered by Australia and New Zealand as being under the 1993 Convention "and also under the Convention on the Law of the Sea ..." As to their treating those negotiations as terminated, ITLOS held that "... a State Party is not obliged to pursue procedures under Part XV, section 1 of the Convention when it concludes that the possibilities of settlement have been exhausted ..." It concluded that "the requirements for invoking the procedures under Part XV, section 2 of the Convention have been fulfilled."

(b) UNCLOS established a new and comprehensive legal regime for all ocean space. The importance of the obligations it contains were such "that their acceptance was seen as critically dependent upon the establishment of an effective, binding and compulsory system for resolving all disputes concerning the interpretation and application of the Convention as a whole." As the first President of the Third United Nations Conference on the Law of the Sea put it, "The provision of effective dispute settlement procedures is essential for stabilizing and maintaining the compromises necessary for the attainment of agreement on a convention. Dispute settlement procedures will be the pivot upon which the delicate equilibrium must be balanced." That dispute settlement system is set out in Part XV of the Convention, under which these proceedings have been brought. Part XV is mandatory and comprehensive. Section 2 of Part XV is entitled "Compulsory Procedures Entailing Binding Decisions," and framed so as to "not permit evasion". The key provision in respect of fisheries is Article 297(3), which specifies that, "Disputes concerning the interpretation or application of the provisions of this

Convention with regard to fisheries shall be settled in accordance with section 2 ..." with only one exception, concerning the sovereign rights of a coastal State in its exclusive economic zone.[12] That exception is not in point in these proceedings. Thus UNCLOS seeks to establish "an overarching, mandatory regime for the regulation of, and resolution of disputes concerning, the law of the sea, which itself includes conservation and management of fisheries, which in turn includes highly migratory species such as SBT." When the drafters wanted to exclude any provision of UNCLOS from the scope of compulsory dispute settlement under Part XV, they did so expressly by exclusions which do not apply in the instant case. These provisions indicate that this Tribunal should sustain the effectiveness and comprehensive character of the UNCLOS dispute settlement regime, and reject arguments lending themselves to evasion of its provisions.

(c) It is common ground between the Parties that there is a dispute, and that it concerns the conservation and management of Southern Bluefin Tuna. Japan however contends that it is purely a scientific dispute over questions of scientific judgment. But the dispute involves questions of principle and of the legal obligations of the Parties as well. Article 297(3) of UNCLOS would be devoid of meaning if disputes concerning questions of scientific fact and opinion were not justiciable. Nor is the dispute only about scientific disagreement. It is about the way a party to UNCLOS and to a regional fishing agreement may behave in circumstances of scientific uncertainty or management disagreement. The Applicants maintain that Japan has not only failed to take the necessary action to conserve the SBT stock; it has endangered that stock by an experimental fishing program that was unilateral, contained a high component of commercial fishing and did not comply with agreed guidelines for experimental fishing. The dispute is about the primacy of conservation over exploitation of a seriously depleted stock. The Applicants consider that Japan is exploiting the stock with unnecessary risk and is thereby in breach of its obligations under Articles 64 and 116-119 of UNCLOS. Such a dispute, on the meaning and content of the obligations

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[12] Article 297(3) provides:

> 3. (a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

contained in those articles, in Article 300[13], and on relevant underlying principles of international law, is a legal dispute. It is a dispute over obligations to cooperate set out in those UNCLOS articles, obligations that comprise serious, substantive obligations which cannot be, or at any rate, have not been, overridden by the 1993 Convention. These obligations of conduct are, in the view of Australia and New Zealand, being violated by Japan, whereas Japan has consistently denied that claim. Since the two sides "hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations", there is a legal dispute between the Parties over the interpretation and application of UNCLOS (and the Applicants cited a number of judgments and opinions of the International Court of Justice in support of the quoted phrase, found in *Interpretation of Peace Treaties with Bulgaria,Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 74).

(d) There is a dispute over the interpretation or application of a given treaty if the actions complained of can reasonably be measured against the standards or obligations prescribed by that treaty. The International Court of Justice has repeatedly analyzed the issue by comparing the substance of the dispute with the terms of the obligations set out in the treaty. It has also held that the fact that a party did not refer to that treaty in exchanges with another party does not debar it from invoking the compromissory clause of that treaty before the Court. That one party maintains that a dispute falls within the scope of the treaty and the other denies it is not enough to bring the dispute within the treaty and its compromissory clause; it is for objective judicial or arbitral process to determine whether the dispute falls within the provisions of the treaty. Whether a treaty is applicable may however be a question concerning its interpretation or application provided that the treaty crosses the threshold of potential applicability.

(e) In fact, the present dispute does concern the interpretation or application of UNCLOS. The essence of the Applicants' claim is that Japan has failed to conserve and cooperate in the conservation of SBT stock, as particularly shown by its unilateral EFP. In so doing, Japan has placed itself in breach of its obligations under international law, specifically those of Articles 64 and 116-119 of UNCLOS. Those provisions lay down norms applicable to this case, by which the lawfulness of Japan's actions can be evaluated. Article 64 imposes an obligation on Japan to cooperate in achieving the conservation

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[13] Article 300 provides:

> Article 300
> *Good faith and abuse of rights*
>
> States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

and sustainable management of SBT. Article 118 requires Japan to cooperate with the Commission established by the Convention on the Conservation of Southern Bluefin Tuna. Where that Commission is at an impasse, the underlying obligations of UNCLOS provide a standard by which the lawfulness of unilateral conduct can be evaluated. Similarly Article 117 imposes on Japan the obligation to take and cooperate with other States in taking such measures for their nationals as may be necessary for the conservation of the living resources of the high seas. By the import of Article 119, a State may not engage in unilateral additional fishing of a seriously depleted stock where scientific evidence indicates that so doing may threaten its recovery. The right of the nationals of a State to fish on the high seas, expressed by Article 116, is there conditioned by their treaty obligations, including those of UNCLOS (and the Applicants cite the authoritative *University of Virginia Commentary on the United Nations Convention on the Law of the Sea*, Part VIII, p. 286 for the conclusion that "treaty obligations" as used in Article 116 includes obligations under the 1982 Convention). The meaning of Article 116 is that the right of high seas fishing is qualified. But the effect of Japan's argument is that it alone can decide whether there is to be a TAC, it alone can decide how much it will fish, and it alone can decide what limits it will accept. The effect of Japan's argument is that once a State becomes party to a regional agreement, it has, in so doing, effectively fulfilled and discharged its UNCLOS obligations regarding co-operation in the conservation of the relevant high seas resource. The Applicants contend that, "This is the old anarchy returned in procedural guise." They reject Japan's reading of the meaning of the pertinent provisions of UNCLOS, from which it follows that there is a dispute between the Parties over the interpretation and application of provisions of UNCLOS.

(f) Australia and New Zealand invoked provisions of UNCLOS in the course of the dispute. Their formal notices to Japan of the existence of a legal dispute on August 31, 1998 cited the 1993 Convention, UNCLOS and customary international law, including the precautionary principle. Australia's diplomatic note of September 11, 1998 declared that it was not possible or ever contemplated that matters concerning the 1993 Convention should be isolated from related international obligations; indeed those of UNCLOS are recognized in the preamble to the 1993 Convention. Allegations of Japan's breach of obligations under UNCLOS recur in the subsequent diplomatic exchanges.

(g) Australia and New Zealand had made the required efforts to settle the dispute by peaceful means. Article 281 of UNCLOS affords arbitral jurisdiction "only where no settlement has been reached by recourse to such means". No settlement has in fact been reached. Negotiations over the best part of a year had been extensive and intensive as indicated above and in detail in the pleadings. Those negotiations embraced not only the substance of the dispute but procedures for resolving it. The nature and manner of Japan's ultimatum of May 1999, and its insistence on resuming unilateral

experimental fishing on its own terms a few days later, was unacceptable and, when implemented, were rightly regarded as tantamount to termination of negotiations. The Applicants invoked the holding of ITLOS that "... a State Party is not obliged to pursue procedures under Part XV, Section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted." A Party whose unilateral action is the subject of dispute cannot block recourse to compulsory dispute settlement by continuing to offer negotiations when all reasonable efforts have shown that such negotiations will not resolve the issue. Japan's proposals for mediation and arbitration pursuant to Article 16 of the CCSBT had not been accepted because they contained no undertaking to suspend experimental fishing during their pendency and no specific proposal for the procedure or powers of the proposed arbitration. Without suspension of the EFP the arbitration would have been precluded effectively from dealing with the issue at the center of the dispute. Australia and New Zealand had no choice but to seek a definitive solution of the dispute through arbitral proceedings under UNCLOS. Article 282 of UNCLOS does not mean that this dispute shall be submitted to an alternative procedure, because that article refers only to a procedure "that entails a binding decision", as the circular procedure – or "menu" of settlement options – set out in CCSBT Article 16 does not. Moreover Article 16 deals with disputes under the CCSBT, not with disputes under UNCLOS.

(g) [sic] The Japanese argument that the CCSBT, as the subsequent treaty that implements UNCLOS, has exhausted and eclipsed the obligations of UNCLOS, is unpersuasive. The 1993 Convention does not "cover" the relevant obligations of the Parties under UNCLOS. The mere existence of the sort of appropriate international organization referred to in UNCLOS Article 64 – such as the CCSBT – does not discharge relevant UNCLOS obligations, which rather require the Members of the organization to participate and cooperate in that organization's work. Or, to take Article 117, nothing in the 1993 Convention imposes the duty to cooperate with other parties that is established by Article 117. Nor are the obligations of Article 119 "covered" by clauses of the CCSBT; there is nothing in the latter which requires the parties to ensure that conservation measures and their implementation do not discriminate against the fishermen of any State. The 1993 Convention was intended to be a means of implementing UNCLOS obligations in respect of highly migratory species, not a means of escaping those obligations. The CCSBT was not intended to derogate from UNCLOS, in particular from Part XV; nothing in the terms of the 1993 Convention or its preparatory work so indicate. It is true that Japan declined to accept proposals made during the drafting of the CCSBT for compulsory arbitration under that Convention. But nothing was ever said about derogating from the comprehensive and binding procedures of Part XV of UNCLOS in relation to UNCLOS obligations. Reliance on the principles of *lex posterior* and *lex specialis* is misplaced, not only because those principles apply only when two legal instruments conflict, but because Article 311 of UNCLOS itself regulates relationships with

implementing conventions such as the 1993 Convention. The terms of paragraph 4 of Article 311 do not affect international agreements "expressly permitted" by other articles of UNCLOS; and Article 64 calls for the conclusion of instruments such as the CCSBT. But an organization cannot be "permitted" by Article 64 if it gives any single State a veto over decision-making which extends to the performance of UNCLOS obligations themselves. The purpose of establishing international organizations under Article 64 is to ensure conservation and promote optimum utilization of highly migratory species, not to prejudice those objectives. The better view is that the 1993 Convention is covered not by paragraph 4 but by paragraph 2 of Article 311; it is clearly "compatible" with UNCLOS (the latter conclusion is common ground between the Parties). That is the normal interpretation of one treaty that refers to an earlier one that it purports to implement. Nor does Article 16 of the 1993 Convention opt out of Part XV of UNCLOS for any dispute concerning the interpretation or application of the 1993 Convention even if the dispute is also one concerning the interpretation or application of UNCLOS. Article 16 does not say so; there is no indication in its *travaux* that this was intended; and such an interpretation would be inconsistent with the presumption of parallelism of compromissory clauses.

(h) Just as there may be more than one treaty among the same States relating to the same subject matter, there may be compromissory clauses in more than one treaty that are not necessarily inconsistent. Such jurisdictional clauses do not cancel out one another; rather they are cumulative in effect. It is common for a particular dispute to be covered by several bases of jurisdiction, e.g., under the Optional Clause of the International Court of Justice, under a bilateral treaty and under a multilateral treaty, and each may provide for a distinct dispute settlement body. The presumption of parallelism of jurisdictional clauses is of long standing, it is entrenched in the case-law of that Court, and was not challenged before Japan's counsel thought of so pleading in the current case.

(i) Article 16 of the CCSBT cannot be viewed as a choice of means under Article 280 of UNCLOS. Properly interpreted, Article 280 refers to an agreement between parties to "a" dispute, after that dispute has arisen, to settle it by a peaceful means that they choose. In any event, Article 16 is not an agreement covering disputes concerning the interpretation or application of UNCLOS. Even if it were, the preconditions of Article 281 are not met by Article 16. It does not in terms exclude further recourse to Part XV, an explicit requirement of Article 281. The precondition cannot be met impliedly and it certainly is not met expressly by the language of paragraph 2 of Article 16.

(j) Thus Section 1 of Part XV of UNCLOS gives States complete control over the means of settlement of any dispute arising under UNCLOS provided that they agree to effective alternate means. If they do not, Section 2 comes into operation. Article 286 provides that, "... any dispute concerning the interpretation or application of this Convention shall, where no settlement has

been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." Pursuant to Article 287, as neither the Applicants nor Japan have accepted a particular settlement procedure, they are taken to have accepted arbitration in accordance with Annex VII. This Tribunal accordingly has been constituted pursuant to that Annex.

(k) UNCLOS, with the WTO, is one of the great general regulatory treaties of our time. Both treaties provide for mandatory dispute resolution. Both foster specialized arrangements and regional agreements. This case confronts the workability of mandatory dispute settlement in giving effect to the essential principles of the general treaty. If Japan is right, the provisions of UNCLOS for mandatory dispute settlement are "a paper umbrella which dissolves in the rain". If Japan is right, by entering into the 1993 Convention, the Parties opted out of the dispute settlement provisions of UNCLOS, and indeed UNCLOS as a whole in its governance of SBT, without putting any secure equivalent in its place. That cannot be so. Article 311 of UNCLOS asserts the primacy of UNCLOS over other treaties; UNCLOS is a regime; and disputes arising under that regime are governed by Part XV. Part XV does not override dispute settlement provisions of other treaties, but this Tribunal does have jurisdiction over claims concerning the interpretation and application of UNCLOS. The dispute settlement provisions of UNCLOS afford parties considerable flexibility. The one thing that they cannot do is to exclude Part XV in advance of a dispute without substituting another form of settlement entailing a binding decision. As to the substance of the relationship between UNCLOS and the CCSBT, the former expressly imposes obligations to co-operate in the conservation of migratory fish, the latter subjects any implied obligation of co-operation to the veto of one State. The contention that the 1993 Convention "covers" and thus eclipses the obligations in respect of SBT of UNCLOS is wrong in fact, and the principle of "coverage" is unknown to international law. The array of modern standards of international law has been achieved by a process of accretion and cumulation, not by erosion and reduction. Only where there is actual inconsistency between two treaties do questions of exclusion arise, and that is not the instant case. Even if the 1993 Convention completely covered all relevant obligations of UNCLOS, it would not supersede them; there would simply be a parallelism of obligations, not unusual in international practice. Moreover the 1993 Convention is meant to implement UNCLOS not supplant it; and the presumption that implementing agreements should suppress head agreements cannot be right as a matter of legislative policy. The same approach applies to peaceful settlement clauses. Article 16 of the 1993 Convention is not a procedure for peaceful settlement but a menu of options. Far from excluding any other procedure, it excludes no possible procedure at all. Moreover Article 16 does not address disputes under UNCLOS; it simply says that disputes under the 1993 Convention may be solved in any way on which the parties agree. It is not a negative dispute clause in respect of UNCLOS itself.

To so read it would conflict with the terms of Article 4 of the 1993 Convention, because it would prejudice the standing position of Australia and New Zealand favoring compulsory dispute settlement.[14] Each party to the 1993 Convention has a double veto. It can veto the TAC or the adoption of other binding measures, and it can veto any form of dispute settlement. In such event, the Parties are thrown back on to UNCLOS itself, onto its express provisions for co-operation and for binding dispute settlement in respect of fisheries. If Japan is right, then the parties to implementation agreements will be accountable to third parties for breach of governing general principles of the head agreement but not to each other. If Japan is right, the three States concerned cooperating informally would be accountable to each other for breach of UNCLOS principles but not accountable once they conclude a treaty embodying the principles of their cooperation. It follows for these and other reasons that the analysis of Japan cannot be right. The Applicants do not argue that the dispute settlement provisions of UNCLOS govern those of other agreements, including the 1993 Convention. But if it is accepted that there is a dispute under UNCLOS, then they have the right to have that dispute resolved by UNCLOS dispute settlement procedures.

(l) The reason why legal procedures under UNCLOS have been brought against Japan alone is that there is dispute with Japan alone. Negotiations are in train with third States about reducing their catch of Southern Bluefin Tuna, and progress is being made. It would not be politic at this juncture to turn to legal procedures. The Applicants' difficulties with Japan are ripe for dispute settlement whereas differences with third parties are not. Third States are not necessary parties in the proceedings against Japan; no finding as to their legal obligations is needed for decision on claims against Japan.

(m) While welcoming the new spirit of compromise accompanying Japan's latest proposal for an experimental fishing program, that proposal does not make the proceedings moot. The differences between the Parties are not limited to tonnage of tuna taken in an EFP. The quality of the EFP is a central issue. There has as yet been no agreement between the Parties nor a binding unilateral commitment on the part of Japan that resolves the issues between them.

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[14] Article 4 of the CCSBT provides:

> Nothing in this Convention nor any measures adopted pursuant to it shall be deemed to prejudice the positions or views of any Party with respect to its rights and obligations under treaties and other international agreements to which it is party or its positions or views with respect to the law of the sea.

VI. *The Final Submissions of the Parties*

42. Japan, as Respondent, in maintaining its Preliminary Objections on jurisdiction and admissibility, made the following final Submissions:

> This Tribunal should adjudge and declare,
> first, that the case has become moot and should be discontinued; alternatively,
> second, that the Tribunal does not have jurisdiction over the claims made by the Applicants in this case; alternatively,
> third, that the claims are not admissible.

43. Australia and New Zealand, as Applicants, in rejecting the Respondent's Preliminary Objections, made the following final Submissions:

> one, that the Parties differ on the question whether Japan's EFP and associated conduct is governed by UNCLOS;
> two, that a dispute thus exists about the interpretation and application of UNCLOS within the meaning of Part XV;
> three, that all the jurisdictional requirements of that Part have been satisfied; and
> four, that Japan's objections to the admissibility of the dispute are unfounded.

VII. *The Paramount Questions and the Answers of the Tribunal*

44. The Preliminary Objections raised by Japan and the arguments advanced in support of them, and the rejection of those Preliminary Objections by Australia and New Zealand and the arguments advanced in support of that rejection, present this Tribunal with questions of singular complexity and significance. The Tribunal is conscious of its position as the first arbitral tribunal to be constituted under Part XV ("Settlement of Disputes"), Annex VII ("Arbitration") of the United Nations Convention on the Law of the Sea. The Parties, through their written pleadings and the oral arguments so ably presented on their behalf by their distinguished Agents and counsel, have furnished the Tribunal with a comprehensive and searching analysis of issues that are of high importance not only for the dispute that divides them but for the understanding and evolution of the processes of peaceful settlement of disputes embodied in UNCLOS and in treaties implementing or relating to provisions of that great law-making treaty.

45. Having regard to the final Submissions of the Parties, the Tribunal will initially address the contention that the case has become moot and should be discontinued. The relevant arguments of the Parties have been set forth above (in paragraphs 40(c), 41(m)). In short, Japan maintains that the essence of the dispute turns on its pursuance of a unilateral experimental fishing program; that the contentious element of that program is its proposal to fish 1800 mt. of Southern Bluefin Tuna; that in the course of exchanges between the Parties in that regard, Australia had in 1999 proposed an EFP limit of 1500 mt.; that Japan is now prepared to limit its EFP catch to 1500 mt.; hence that the Parties are in accord on what had been the focus of their dispute, with the result that it has been rendered moot. Australia and New Zealand reply that the proposed acceptance of an EFP of 1500 tons of tuna was an offer made in

the course of negotiations which is no longer on the table; and that in any event their dispute with Japan over a unilateral EFP is not limited to the quantity of the tonnage to be fished but includes the quality of the program, i.e., the design and modalities for its execution, which they maintain is flawed.

46. In the view of the Tribunal, the case is not moot. If the Parties could agree on an experimental fishing program, an element of which would be to limit catch beyond the de facto TAC limits to 1500 mt., that salient aspect of their dispute would indeed have been resolved; but Australia and New Zealand do not now accept such an offer or limitation by Japan. Even if that offer were today accepted, it would not be sufficient to dispose of their dispute, which concerns the quality as well as the quantity of the EFP, and perhaps other elements of difference as well, such as the assertion of a right to fish beyond TAC limits that were last agreed. Japan now proposes experimentally to fish for no more than 1500 mt., but it has not undertaken for the future to forego or restrict what it regards as a right to fish on the high seas for Southern Bluefin Tuna in the absence of a decision by the Commission for the Conservation of Southern Bluefin Tuna upon a total allowable catch and its allocation among the Parties.

47. The Tribunal will now turn to the fundamental and multifaceted issues of jurisdiction that divide the Parties. Putting aside the question of mootness, it is common ground that there is a dispute, and that the core of that dispute relates to differences about the level of a total allowable catch and to Japan's insistence on conducting, and its conduct of, a unilateral experimental fishing program. What profoundly divides the Parties is whether the dispute arises solely under the 1993 Convention, or whether it also arises under UNCLOS.

48. The conflicting contentions of the Parties on this question are found in paragraphs 38 (a) (d) and 41 of this Award. An essential issue is, is the dispute with which the Applicants have seized the Tribunal a dispute over the interpretation of the CCSBT, or UNCLOS, or both? That the Applicants maintain, and the Respondent denies, that the dispute involves the interpretation and application of UNCLOS does not of itself constitute a dispute over the interpretation of UNCLOS over which the Tribunal has jurisdiction. In the words of the International Court of Justice in like circumstances, "in order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty ... pleaded ... do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain ..." (*Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, para. 16.) In this and in any other case invoking the compromissory clause of a treaty, the claims made, to sustain jurisdiction, must reasonably relate to, or be capable of being evaluated in relation to, the

legal standards of the treaty in point, as determined by the court or tribunal whose jurisdiction is at issue. "It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both Parties ... The Court will itself determine the real dispute that has been submitted to it ... It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence ..." (*Fisheries Jurisdiction Case (Spain v. Canada), I.C.J. Reports 1998*, paragraphs 30-31.) In the instant case, it is for this Tribunal to decide whether the "real dispute" between the Parties does or does not reasonably (and not just remotely) relate to the obligations set forth in the treaties whose breach is alleged.

49. From the record placed before the Tribunal by both Parties, it is clear that the most acute elements of the dispute between the Parties turn on their inability to agree on a revised total allowable catch and the related conduct by Japan of unilateral experimental fishing in 1998 and 1999, as well as Japan's announced plans for such fishing thereafter. Those elements of the dispute were clearly within the mandate of the Commission for the Conservation of Southern Bluefin Tuna. It was there that the Parties failed to agree on a TAC. It was there that Japan announced in 1998 that it would launch a unilateral experimental fishing program; it was there that that announcement was protested by Australia and New Zealand; and the higher level protests and the diplomatic exchanges that followed refer to the Convention for the Conservation of Southern Bluefin Tuna and to the proceedings in the Commission. The Applicants requested urgent consultations with Japan pursuant to Article 16(1) of the Convention, which provides that, "if any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved ..." Those consultations took place in 1998, and they were pursued in 1999 in the Commission in an effort to reach agreement on a joint EFP. It was in the Commission in 1999 that a proposal by Japan to limit its catch to 1800 mt. under the 1999 EFP was made, and it was in the Commission that Australia indicated that it was prepared to accept a limit of 1500 mt. It was in the Commission that Japan stated, on May 26 and 28, 1999 that, unless Australia and New Zealand accepted its proposals for a joint EFP, it would launch a unilateral program on June 1. Proposals for mediation and arbitration made by Japan were made in pursuance of provisions of Article 16 of the CCSBT. In short, it is plain that all the main elements of the dispute between the Parties had been addressed within the Commission for the Conservation of Southern Bluefin Tuna and that the contentions of the Parties in respect of that dispute related to the implementation of their obligations under the 1993 Convention. They related particularly to Article 8(3) of the Convention, which provides that, "For the conservation, management and optimum utilization of southern bluefin tuna: (a) the Commission shall decide upon a total allowable catch and its allocation

among the Parties ..." and to the powers of a Party in a circumstance where the Commission found itself unable so to decide.

50. There is in fact no disagreement between the Parties over whether the dispute falls within the provisions of the 1993 Convention. The issue rather is, does it also fall within the provisions of UNCLOS? The Applicants maintain that Japan has failed to conserve and to cooperate in the conservation of the SBT stock, particularly by its unilateral experimental fishing for SBT in 1998 and 1999. They find a certain tension between cooperation and unilateralism. They contend that Japan's unilateral EFP has placed it in breach of its obligations under Articles 64, 116, 117, 118 and 119 of UNCLOS, for the specific reasons indicated earlier in this Award (in paragraphs 33 and 41). Those provisions, they maintain, lay down applicable norms by which the lawfulness of Japan's conduct can be evaluated. They point out that, once the dispute had ripened, their diplomatic notes and other demarches to Japan made repeated reference to Japan's obligations not only under the 1993 Convention but also under UNCLOS and customary international law.

51. Japan for its part maintains that such references were belated and were made for the purpose of permitting a request to ITLOS for provisional measures. It contends that the invoked articles of UNCLOS are general and do not govern the particular dispute between the Parties. More than that, Japan argues that UNCLOS is a framework or umbrella convention that looks to implementing conventions to give it effect; that Article 64 provides for cooperation "through appropriate international organizations" of which the Commission is an exemplar; that any relevant principles and provisions of UNCLOS have been implemented by the establishment of the Commission and the Parties' participation in its work; and that the *lex specialis* of the 1993 Convention and its institutional expression have subsumed, discharged and eclipsed any provisions of UNCLOS that bear on the conservation and optimum utilization of Southern Bluefin Tuna. Thus Japan argues that the dispute falls solely within the provisions of the 1993 Convention and in no measure also within the reach of UNCLOS.

52. The Tribunal does not accept this central contention of Japan. It recognizes that there is support in international law and in the legal systems of States for the application of a *lex specialis* that governs general provisions of an antecedent treaty or statute. But the Tribunal recognizes as well that it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention. The

broad provisions for the promotion of universal respect for and observance of human rights, and the international obligation to co-operate for the achievement of those purposes, found in Articles 1, 55 and 56 of the Charter of the United Nations, have not been discharged for States Parties by their ratification of the Human Rights Covenants and other human rights treaties. Moreover, if the 1993 Convention were to be regarded as having fulfilled and eclipsed the obligations of UNCLOS that bear on the conservation of SBT, would those obligations revive for a Party to the CCSBT that exercises its right under Article 20 to withdraw from the Convention on twelve months notice? Can it really be the case that the obligations of UNCLOS in respect of a migratory species of fish do not run between the Parties to the 1993 Convention but do run to third States that are Parties to UNCLOS but not to the 1993 Convention? Nor is it clear that the particular provisions of the 1993 Convention exhaust the extent of the relevant obligations of UNCLOS. In some respects, UNCLOS may be viewed as extending beyond the reach of the CCSBT. UNCLOS imposes obligations on each State to take action in relation to its own nationals: "All States have the duty to take ... such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas" (Article 117). It debars discrimination "in form or fact against the fishermen of any State" (Article 119). These provisions are not found in the CCSBT; they are operative even where no TAC has been agreed in the CCSBT and where co-operation in the Commission has broken down. Article 5(1) of the CCSBT provides that, "Each Party shall take all action necessary to ensure the enforcement of this Convention and compliance with measures which become binding ..." But UNCLOS obligations may be viewed not only as going beyond this general obligation in the foregoing respects but as in force even where "measures" being considered under the 1993 Convention have not become binding thereunder. Moreover, a dispute concerning the interpretation and implementation of the CCSBT will not be completely alien to the interpretation and application of UNCLOS for the very reason that the CCSBT was designed to implement broad principles set out in UNCLOS. For all these reasons, the Tribunal concludes that the dispute between Australia and New Zealand, on the one hand, and Japan on the other, over Japan's role in the management of SBT stocks and particularly its unilateral experimental fishing program, while centered in the 1993 Convention, also arises under the United Nations Convention on the Law of the Sea. In its view, this conclusion is consistent with the terms of UNCLOS Article 311(2) and (5), and with the law of treaties, in particular Article 30(3) of the Vienna Convention on the Law of Treaties.[15]

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[15] Article 30(3) of the Vienna Convention on the Law of Treaties provides:

> When all the parties to an earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty

53. This holding, however, while critical to the case of the Applicants, is not dispositive of this case. It is necessary to examine a number of articles of Part XV of UNCLOS. Article 286 introduces section 2 of Part XV, a section entitled, "Compulsory Procedures Entailing Binding Decisions". Article 286 provides that, "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section". Article 286 must be read in context, and that qualifying context includes Article 281(1) as well as Articles 279 and 280. Under Article 281(1), if the States which are parties to a dispute concerning the interpretation or application of UNCLOS (and the Tribunal has just held that this is such a dispute) have agreed to seek settlement of the dispute "by a peaceful means of their own choice", the procedures provided for in Part XV of UNCLOS apply only (a) where no settlement has been reached by recourse to such means and (b) the agreement between the parties "does not exclude any further procedure".

54. The Tribunal accepts Article 16 of the 1993 Convention as an agreement by the Parties to seek settlement of the instant dispute by peaceful means of their own choice. It so concludes even though it has held that this dispute, while centered in the 1993 Convention, also implicates obligations under UNCLOS. It does so because the Parties to this dispute – the real terms of which have been defined above – are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.

55. Article 16 is not "a" peaceful means; it provides a list of various named procedures of peaceful settlement, adding "or other peaceful means of their own choice." No particular procedure in this list has thus far been chosen by the Parties for settlement of the instant dispute. Nevertheless – bearing in mind the reasoning of the preceding paragraph – the Tribunal is of the view that Article 16 falls within the terms and intent of Article 281(1), as well as Article 280. That being so, the Tribunal is satisfied about fulfillment of condition (a) of Article 281(1). The Parties have had recourse to means set out in Article 16 of the CCSBT. Negotiations have been prolonged, intense and serious. Since in the course of those negotiations, the Applicants invoked UNCLOS and relied upon provisions of it, while Japan denied the relevance of UNCLOS and its provisions, those negotiations may also be regarded as fulfilling another condition of UNCLOS, that of Article 283, which requires that, when a dispute arises between States Parties concerning UNCLOS' interpretation or application, the parties to the dispute shall proceed

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applies only to the extent that its provisions are compatible with those of the later treaty.

expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. Manifestly, no settlement has been reached by recourse to such negotiations, at any rate, as yet. It is true that every means listed in Article 16 has not been tried; indeed, the Applicants have not accepted proposals of Japan for mediation and for arbitration under the CCSBT, essentially, it seems, because Japan was unwilling to suspend pursuance of its unilateral EFP during the pendency of such recourse. It is also true that Article 16(2) provides that failure to reach agreement on reference of a dispute to the International Court of Justice or to arbitration "shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above". But in the view of the Tribunal, this provision does not require the Parties to negotiate indefinitely while denying a Party the option of concluding, for purposes of both Articles 281(1) and 283, that no settlement has been reached. To read Article 16 otherwise would not be reasonable.

56. The Tribunal now turns to the second requirement of Article 281(1): that the agreement between the parties "does not exclude any further procedure". This is a requirement, it should be recalled, for applicability of "the procedures provided for in this Part," that is to say, the "compulsory procedures entailing binding decisions" dealt with in section 2 of UNCLOS Part XV. The terms of Article 16 of the 1993 Convention do not expressly and in so many words exclude the applicability of any procedure, including the procedures of section 2 of Part XV of UNCLOS.

57. Nevertheless, in the view of the Tribunal, the absence of an express exclusion of any procedure in Article 16 is not decisive. Article 16(1) requires the parties to "consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice." Article 16(2), in its first clause, directs the referral of a dispute not resolved by any of the above-listed means of the parties' "own choice" for settlement "to the International Court of Justice or to arbitration" but "with the consent in each case of all parties to the dispute". The ordinary meaning of these terms of Article 16 makes it clear that the dispute is not referable to adjudication by the International Court of Justice (or, for that matter, ITLOS), or to arbitration, "at the request of any party to the dispute" (in the words of UNCLOS Article 286). The consent in each case of all parties to the dispute is required. Moreover, the second clause of Article 16(2) provides that "failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above". The effect of this express obligation to continue to seek resolution of the dispute by the listed means of Article 16(1) is not only to stress the consensual nature of any reference of a dispute to either judicial settlement or arbitration. That express obligation equally imports, in the Tribunal's view, that the intent of Article 16 is to remove proceedings under

that Article from the reach of the compulsory procedures of section 2 of Part XV of UNCLOS, that is, to exclude the application to a specific dispute of any procedure of dispute resolution that is not accepted by all parties to the dispute. Article 16(3) reinforces that intent by specifying that, in cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided for in an annex to the 1993 Convention, which is to say that arbitration contemplated by Article 16 is not compulsory arbitration under section 2 of Part XV of UNCLOS but rather autonomous and consensual arbitration provided for in that CCSBT annex.

58. It is plain that the wording of Article 16(1) and (2) has its essential origins in the terms of Article XI of the Antarctic Treaty; the provisions are virtually identical. In view of the States that concluded the Antarctic Treaty – divided as they were between some States that adhered to international adjudication and arbitration and a Great Power that then ideologically opposed it – it is obvious that these provisions are meant to exclude compulsory jurisdiction.

59. For all these reasons, the Tribunal concludes that Article 16 of the 1993 Convention "exclude[s] any further procedure" within the contemplation of Article 281(1) of UNCLOS.

60. There are two other considerations that, to the mind of the Tribunal, sustain this conclusion. The first consideration is the extent to which compulsory procedures entailing binding decisions have in fact been prescribed by Part XV of UNCLOS for all States Parties to UNCLOS. Article 286, in providing that disputes concerning the interpretation or application of UNCLOS "shall ... where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under [Article 287]", states that that apparently broad provision is "subject to section 3" of Part XV. Examination of the provisions comprising section 3 (and constituting interpretive context for sections 1 and 2 of Part XV) reveals that they establish important limitations and exceptions to the applicability of the compulsory procedures of section 2.

61. Article 297 of UNCLOS is of particular importance in this connection for it provides significant limitations on the applicability of compulsory procedures insofar as coastal States are concerned. Paragraph 1 of Article 297 limits the application of such procedures to disputes concerning the exercise by a coastal State of its sovereign rights or jurisdiction in certain identified cases only, i.e.: (a) cases involving rights of navigation, overflight, laying of submarine cables and pipelines or other internationally lawful uses of the sea associated therewith; and (b) cases involving the protection and preservation of the marine environment. Paragraph 2 of Article 297, while providing for the application of section 2 compulsory procedures to disputes concerning marine scientific research, exempts coastal States from the obligation of submitting to such procedures in cases involving exercise by a coastal State of its rights or discretionary authority in its exclusive economic zone (EEZ) or its

continental shelf, and cases of termination or suspension by the coastal State of a research project in accordance with article 253. Disputes between the researching State and the coastal State concerning a specific research project are subject to conciliation under annex V of UNCLOS. Under paragraph 3 of Article 297, section 2 procedures are applicable to disputes concerning fisheries but, and this is an important "but", the coastal State is not obliged to submit to such procedures where the dispute relates to its sovereign rights or their exercise with respect to the living resources in its EEZ, including determination of allowable catch, harvesting capacity, allocation of surpluses to other States, and application of its own conservation and management laws and regulations. Complementing the limitative provisions of Article 297 of UNCLOS, Article 298 establishes certain optional exceptions to the applicability of compulsory section 2 procedures and authorizes a State (whether coastal or not), at any time, to declare that it does not accept any one or more of such compulsory procedures in respect of: (a) disputes concerning Articles 15, 74 and 83 relating to sea boundary delimitations or historic bays or titles; (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities by a coastal State. Finally, Article 299 of UNCLOS provides that disputes excluded by Article 297 or exempted by Article 298 from application of compulsory section 2 procedures may be submitted to such procedures "only by agreement of the parties to the dispute".

62. It thus appears to the Tribunal that UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions. This general consideration supports the conclusion, based on the language used in Article 281(1), that States Parties that have agreed to seek settlement of disputes concerning the interpretation or application of UNCLOS by "peaceful means of their own choice" are permitted by Article 281(1) to confine the applicability of compulsory procedures of section 2 of Part XV to cases where all parties to the dispute have agreed upon submission of their dispute to such compulsory procedures. In the Tribunal's view, Article 281(1), when so read, provides a certain balance in the rights and obligations of coastal and non-coastal States in respect of settlement of disputes arising from events occurring within their respective Exclusive Economic Zones and on the high seas, a balance that the Tribunal must assume was deliberately established by the States Parties to UNCLOS.

63. The second consideration of a general character that the Tribunal has taken into account is the fact that a significant number of international agreements with maritime elements, entered into after the adoption of UNCLOS, exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedures. Many of these agreements effect such exclusion by expressly requiring disputes to be resolved by mutually agreed procedures, whether by negotiation and

consultation or other method acceptable to the parties to the dispute or by arbitration or recourse to the International Court of Justice by common agreement of the parties to the dispute. Other agreements preclude unilateral submission of a dispute to compulsory binding adjudication or arbitration, not only by explicitly requiring disputes to be settled by mutually agreed procedures, but also, as in Article 16 of the 1993 Convention, by requiring the parties to continue to seek to resolve the dispute by any of the various peaceful means of their own choice. The Tribunal is of the view that the existence of such a body of treaty practice – postdating as well as antedating the conclusion of UNCLOS – tends to confirm the conclusion that States Parties to UNCLOS may, by agreement, preclude subjection of their disputes to section 2 procedures in accordance with Article 281(1). To hold that disputes implicating obligations under both UNCLOS and an implementing treaty such as the 1993 Convention – as such disputes typically may – must be brought within the reach of section 2 of Part XV of UNCLOS would be effectively to deprive of substantial effect the dispute settlement provisions of those implementing agreements which prescribe dispute resolution by means of the parties' choice.

64. The Tribunal does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS and to a fisheries treaty implementing it would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction, having particular regard to the provisions of Article 300 of UNCLOS. While Australia and New Zealand in the proceedings before ITLOS invoked Article 300, in the proceedings before this Tribunal they made clear that they do not hold Japan to any independent breach of an obligation to act in good faith.

65. It follows from the foregoing analysis that this Tribunal lacks jurisdiction to entertain the merits of the dispute brought by Australia and New Zealand against Japan. Having reached this conclusion, the Tribunal does not find it necessary to pass upon questions of the admissibility of the dispute, although it may be observed that its analysis of provisions of UNCLOS that bring the dispute within the substantive reach of UNCLOS suggests that the dispute is not one that is confined to matters of scientific judgment only. It may be added that this Tribunal does not find the proceedings brought before ITLOS and before this Tribunal to be an abuse of process; on the contrary, as explained below, the proceedings have been constructive.

66. In view of this Tribunal's conclusion that it lacks jurisdiction to deal with the merits of the dispute, and in view of the terms of Article 290(5) of UNCLOS providing that, "Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional measures ...", the Order of the International Tribunal for the Law of the Sea of August

27, 1999, prescribing provisional measures, shall cease to have effect as of the date of the signing of this Award.

67. However, revocation of the Order prescribing provisional measures does not mean that the Parties may disregard the effects of that Order or their own decisions made in conformity with it. The Order and those decisions – and the recourse to ITLOS that gave rise to them – as well as the consequential proceedings before this Tribunal, have had an impact: not merely in the suspension of Japan's unilateral experimental fishing program during the period that the Order was in force, but on the perspectives and actions of the Parties.

68. As the Parties recognized during the oral hearings before this Tribunal, they have increasingly manifested flexibility of approach to the problems that divide them; as the Agent of Japan put it, "strenuous efforts which both sides have made in the context of the CCSBT have already succeeded in narrowing the gap between the Parties." An agreement on the principle of having an experimental fishing program and on the tonnage of that program appears to be within reach. The possibility of renewed negotiations on other elements of their differences is real. Japan's counsel, in the course of these hearings, emphasized that Japan remained prepared to submit the differences between the Parties to arbitration under Article 16 of the 1993 Convention; Japan's Agent observed that, "That would allow the Parties to set up procedures best suited to the nature and the characteristics of the case." Japan's counsel affirmed Japan's willingness to work with Australia and New Zealand on the formulation of questions to be put to a CCSBT Arbitration Tribunal, and on the procedure that it should adopt in dealing with those questions. He restated Japan's willingness to agree on the simultaneous establishment of a mechanism in which experts and scientists can resume consultation on a joint EFP and related issues. The agent of Japan stated that, not only is its proposal to cap its EFP at 1500 mt. on the negotiating table; negotiations on the appropriate design for the EFP are already underway.

69. Counsel for Australia pointed out that the ITLOS Order already had played a significant role in encouraging the Parties to make progress on the issue of third-party fishing. The Agents of Australia and of New Zealand declared that progress in settling the dispute between the Parties had been made. They expressed the hope that progress would continue and stated that they will make every attempt to ensure that it does; they "remain ready to explore all productive ways of finding solutions".

70. The Tribunal recalls that Article 16(2) prescribes that failure to reach agreement on reference to arbitration shall not absolve the parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1; and among those means are negotiation, mediation and arbitration. The Tribunal further observes that, to the extent that the search for resolution of the dispute were to resort to third-party procedures, those listed in Article 16 are labels that conform to

traditional diplomatic precedent. Their content and *modus operandi* can be refined and developed by the Parties to meet their specific needs. There are many ways in which an independent body can be configured to interact with the States party to a dispute. For example, there may be a combination or alternation of direct negotiations, advice from expert panels, benevolent supervision and good offices extended by a third-party body, and recourse to a third party for step-by-step aid in decision-making and for mediation, quite apart from third-party binding settlement rendered in the form of an arbitral award. Whatever the mode or modes of peaceful settlement chosen by the Parties, the Tribunal emphasizes that the prospects for a successful settlement of their dispute will be promoted by the Parties' abstaining from any unilateral act that may aggravate the dispute while its solution has not been achieved.

71. Finally, the Tribunal observes that, when it comes into force, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which was adopted on August 4, 1995 and opened for signature December 4, 1995 (and signed by Australia, Japan and New Zealand), should, for States Parties to it, not only go far towards resolving procedural problems that have come before this Tribunal but, if the Convention is faithfully and effectively implemented, ameliorate the substantive problems that have divided the Parties. The substantive provisions of the Straddling Stocks Agreement are more detailed and far-reaching than the pertinent provisions of UNCLOS or even of the CCSBT. The articles relating to peaceful settlement of disputes specify that the provisions relating to the settlement of disputes set out in Part XV of UNCLOS apply *mutatis mutandis* to any dispute between States Parties to the Agreement concerning its interpretation or application. They further specify that the provisions relating to settlement of disputes set out in Part XV of UNCLOS apply *mutatis mutandis* to any dispute between States Parties to the Agreement concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks.

72. FOR THESE REASONS

The Arbitral Tribunal

By vote of 4 to 1,

1. Decides that it is without jurisdiction to rule on the merits of the dispute; and,

Unanimously,

2. Decides, in accordance with Article 290(5) of the United Nations Convention on the Law of the Sea, that provisional measures in force by

Order of the International Tribunal for the Law of the Sea prescribed on August 27, 1999 are revoked from the day of the signature of this Award.

73. Justice Sir Kenneth Keith appends a Separate Opinion.

(*Signed*)
Stephen M. Schwebel
President of the Arbitral Tribunal

(*Signed*)
Margrete L. Stevens
Co-Secretary of the Arbitral Tribunal

Washington, D.C.
August 4, 2000

SEPARATE OPINION OF JUSTICE SIR KENNETH KEITH

1. While I agree with much of the Award, I have the misfortune to disagree with my colleagues on one critical issue. I have accordingly prepared this opinion.

Each of the treaties in issue in this case sets up substantive obligations and obligations relating to peaceful settlement. The parallel and overlapping existence of the obligations arising under each treaty is fundamental in this case. I conclude that the one has not excluded or in any relevant way prejudiced the other.

2. This Tribunal has jurisdiction under section 2 of Part XV of UNCLOS "where no settlement has been reached by recourse to section 1" (article 286). Section 1 begins by imposing an obligation on States Parties:

> Article 279
> *Obligation to settle disputes by peaceful means*
>
> States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter.

3. Section 1 then saves the rights of States Parties to choose their own means of peaceful settlement and to settle the dispute by that means:

Article 280
Settlement of disputes by any peaceful means chosen by the parties

Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice.

That provision, like article 281, depends on the Parties first agreeing to and then using a "peaceful means of their own choice". Article 281 however proceeds on the basis that the agreed procedure has failed:

Article 281
Procedure where no settlement has been reached by the parties

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit.

4. The two main issues which this provision raises in the circumstances of this case are:

(a) Have the Parties "agreed to seek settlement of the dispute by a peaceful means of their own choice" – that is by way of article 16 of the CCSBT or some other agreed means?

(b) Does article 16 "exclude any further procedure"? (Japan invoked no other basis for its "exclusion" contention.)

5. While my answer to question (a) is No so far as article 16 is concerned, I agree that there is a good argument that in their diplomatic exchanges the Parties did agree to attempt to settle the dispute by negotiation.

6. I do not however take that latter aspect of question (a) any further. Rather, I give my primary attention to question (b) on the assumption (rejected in paragraph 8 below) that article 16 is an "agreement" in terms of article 281(1). I answer question (b) No. The consequence is that, to my mind, that bar to the tribunal's jurisdiction is not established.

7. Article 16 of the CCSBT is as follows:

Article 16

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.

8. Paragraph (1) requires the parties to consult about methods of dispute resolution – those listed or others of their own choice – but it does not itself oblige them to apply any particular method. In that it is like articles 283 and 284 of UNCLOS, which require an exchange of views about methods and empower the making of an invitation to conciliation. Like article 280 (a savings provision), article 283, article 284 and in particular article 16(1), do not of themselves amount to an "agree[ment] to seek settlement of the dispute by a peaceful means of their own choice". Paragraph (2) of article 16 is also not an agreement on a method. Reference to the International Court or to arbitration must be separately agreed to in respect of the particular dispute, and the final part of the paragraph too does not itself amount to an agreement on one of the methods referred to in paragraph 1. Further, as discussed in paragraphs 15 and 16, article 16 applies only to disputes concerning the CCSBT and does not necessarily extend to disputes concerning UNCLOS.

9. The Parties in their written and oral submissions have given greater attention to the second issue – whether article 16 "excludes" any further procedure, including the compulsory binding procedures under section 2 of Part XV. As already indicated, I give my principal attention to that issue.

10. My reasons for concluding that article 16 does not exclude any further procedure and in particular the compulsory binding procedures under section 2 of Part XV are to be found in the ordinary meaning of the terms of the two treaties read in their context and in the light of their objects and purposes.

11. Part of the context is provided by the distinct and overlapping substantive obligations of UNCLOS and the CCSBT, a matter recognised by the Award. That parallelism and lack of full coincidence also exists for the two sets of procedures for the peaceful means for the settlement of disputes concerning each treaty which they each set up. The Award indeed recognises a longstanding and widespread parallelism of dispute settlement obligations as well as of substantive obligations. Three relevant categories of substantive obligations can be usefully distinguished:

(1) those which exist under both treaties;

(2) those which exist only under the CCSBT (such as the obligation to meet Secretariat budget obligations); and

(3) those which do or may exist only under UNCLOS; the Award mentions, for instance, the obligations of (a) each State, under article 117, to take such measures for their nationals as may be necessary for the conservation of the living resources of the high seas; and of (b) the three CCSBT Parties owed to third States.

Australia and New Zealand invoke UNCLOS procedures in respect of 1 and 3. Their contention is that the disputes between them and Japan concern "the interpretation or application of [the specified provisions of] this Convention [UNCLOS]".

12. That the disputes may or may not also concern the interpretation or implementation of the CCSBT is beside the point. Subject to the critical

question stated in paragraph 4(b) – does article 16 "exclude" further procedures - the separate set of UNCLOS peaceful settlement obligations exists along with and distinct from the provisions of article 16.

13. But does article 16 "exclude" the UNCLOS set of obligations? It does not say that it does. It could have, given the timing of the drafting of the two treaties as the preamble reflects. Next, it does not say that disputes concerning the CCSBT must be resolved *only* by procedures under it and *must not* be referred to any tribunal or other third party for settlement. Again it could have said that, as treaty parties have. But does it impliedly exclude the UNCLOS procedures?

14. To do that, article 16 would have to be capable of dealing with *all* the disputes relating to Southern Bluefin tuna arising between CCSBT parties and concerning the interpretation and application of the relevant provisions of UNCLOS. And, as well, it would have to *exclude* (impliedly) the UNCLOS procedures. I consider those two points in turn.

15. If it is the case, as the Award indicates, that Australia and New Zealand have appropriately invoked obligations which are not covered by the CCSBT it would be surprising were procedures for settlement of disputes *concerning that Convention* to be able to apply to disputes arising beyond it. To recall its terms, article 16 is about a "dispute ... between two or more parties concerning the interpretation or implementation of this Convention". The parties are obliged under paragraph 1 of article 16 to "consult ... with a view to having *the dispute* resolved" in one of the listed ways or through other peaceful means of their own choice. Under paragraph 2 of the article "any dispute of *this character*" – to repeat, concerning the interpretation or implementation of the CCSBT – not so resolved may then be referred to the International Court of Justice or to arbitration in accordance with the Annex if all parties agree. Finally, if the parties do not agree, they are not absolved from "the responsibility of continuing to seek to resolve *it*" – again the dispute as characterised – "by any of the various peaceful means referred to in paragraph 1 ...". On their face, those provisions, which, to repeat, do not in any event themselves amount to an agreed choice one or more of peaceful means of settlement, do not exclude means to which the parties have separately agreed in respect of disputes concerning the interpretation or application of *other* treaties. What they do say is that the binding or indeed any non-binding procedures listed apply only if the parties agree. If any procedure is agreed to, that procedure applies to disputes concerning the interpretation or implementation (perhaps a wider word than "application") *of the CCSBT*.

16. It is important to consider the possible scope of such an agreed procedure under the CCSBT. Take as an example a failure by the Commission to meet its obligation to fix the total allowable catch. In that situation, the issue of "implementation" which Parties might agree to put to the arbitral tribunal, given the objective (stated in article 3) of conservation and optimum

utilisation through appropriate management, would be that the Tribunal decide, in place of the Commission, the TAC and its allocation among the parties (article 8(3)). They might also agree that the decisions would be binding on them, as are the decisions of the Commission (see articles 8(7) and 5). In the course of the current dispute the Japanese authorities have indeed appeared to be willing to contemplate such a binding reference to scientific experts, this too in the context of a failure by the Commission to fix the TAC. Such a reference appears to fall clearly within the scope of article 16 and the arbitration annex. It can be compared with the power of UNCLOS Parties to agree that a court or tribunal *which already has jurisdiction under Part XV(2)* may decide *ex aequo et bono* (article 293(2)). As with that very broad power, so too with a power to make decisions about the TAC and its allocation, a matter at the heart of "the implementation" of the CCSBT, it is hardly remarkable that the Parties did not give a general open ended consent to binding arbitration in advance. To anticipate a matter mentioned later, judicial or arbitral powers in respect of the interpretation or application of the relevant provisions of UNCLOS invoked in this case would be more confined. By retaining that freedom in respect of such matters as fixing the TAC under the CCSBT the parties are not, in my view, expressing any purpose at all in relation to their quite distinct obligations under UNCLOS. The same point could probably be made about many, if not all, of the many dispute settlement provisions of maritime treaties to which the tribunal was referred. The provisions do not appear to me to help in the interpretation of article 281(1). In terms of their possible interpretative role, those adopted since 1982 do not for instance meet the strict standard reflected in article 31(3)(b) of the Vienna Convention on the Law of Treaties. The essential point is that the two treaty regimes (including their settlement procedures) remain distinct. The UNCLOS provisions are not to be seen in any sense as being part of, or being read into the other treaty system. The UNCLOS dispute means have no application to it – unless of course the Parties through the other treaty have so agreed : article 288(2).

17. I return to the wording of article 281(1) of UNCLOS. The requirement is that the Parties have agreed to *exclude any* further procedure for the settlement of the dispute concerning UNCLOS. The French and Spanish texts have the same wording and structure. They require opting out. They do not require that the Parties positively agree to the binding procedure by opting in, by contrast to other provisions of Part XV: articles 282, 284(2) and (4) and 288(2).

18. The word *any* in the final phrase of article 281(1) is also significant since it requires the exclusion to be of any other procedure available between the Parties such as those under the compulsory jurisdiction of the International Court or other treaties for the peaceful settlement of disputes. As the Virginia Commentary (para 281.5) puts it, the phrase "envisages the possibility that the Parties, in their agreement to resort to a particular procedure, may also specify that this procedure shall be an exclusive one and that no other procedure

(including those under Part XV) may be resorted to". Such strong and particular wording would appear to be required, given the presumption of the parallel and overlapping existence of procedures for the peaceful settlement of disputes appearing in international judicial practice and the general law of treaties, as stated for instance in article 30(3) of the Vienna Convention on the Law of Treaties.

19. The need for clear wording to exclude the obligations to submit to the UNCLOS binding procedure, beyond the wording found in article 16, is further supported by other particular provisions of Part XV and by the pivotal role compulsory and binding peaceful settlement procedures played and play in the preparation and scheme of UNCLOS.

20. Article 282, the very next provision to that at centre stage, does indeed give preference to another agreed peaceful settlement procedure over Part XV, but it gives that preference only if that procedure "entails a binding decision"; and of course the terms of article 16 by themselves do not. As well, that preference can be reversed if the parties to the dispute so agree. As already mentioned, that requirement to agree to opt into the UNCLOS process is to be contrasted with the opting out for which article 281(1) calls.

21. The structure of Part XV and three elements of section 3 of that Part also contribute to an understanding of article 281(1) and the compulsory binding procedures of section 2 of Part XV. They too are part of the relevant context. Section 1, "General Provisions", begins with the obligation of the State Parties to settle UNCLOS disputes by peaceful means (article 279). Within that overall obligation, which is supported by obligations to exchange views about means of settlement (article 283) and the availability of a conciliation procedure (article 284 and Annex V), the emphasis of the section is on the Parties' freedom of choice of means (articles 280-282). If the Parties' chosen means does not lead to a settlement then one Party can submit the dispute to "Compulsory Procedures Entailing Binding Decisions", to quote the heading to section 2 (article 286). That power is however in turn subject to section 3 of the Part, "Limitations and Exceptions to Applicability of Section 2".

22. That structure itself supports the need for States to include clear wording in their agreements if they are to remove themselves from their otherwise applicable compulsory obligations arising under section 2 to submit to procedures entailing binding decisions. So, too, does the detail of section 3 which (1) enables States to opt out of certain otherwise compulsory, binding processes, (2) provides for non-binding processes in certain circumstances, and (3) limits the extent of the third party review of certain State actions. States may opt out of the binding section 2 procedures – for example in respect of military activities (article 298(1)(b)) and certain maritime delimitation disputes (article 298(1)(a)), with the qualification in the latter case (but not the former) that compulsory (non-binding) conciliation is then available. Conciliation, rather than binding adjudication or arbitration, is also

available in respect of the exercise by a coastal State of rights and discretions in relation to marine scientific research in its exclusive economic zone and on its continental shelf. Further, in considering those matters, the conciliation commission cannot call in question the exercise of two specific discretions exercisable by the coastal State (article 297(2)). Coming closer to the subject matter of the present dispute, a coastal State is not obliged to accept the submission to settlement under section 2 of fisheries disputes relating to its sovereign rights with respect to living resources within its exclusive economic zone, but again compulsory conciliation is available, although only on the limited basis that coastal state has "manifestly" failed to comply with its conservation and management obligations or has "arbitrarily" refused to determine the TAC or its allocation. But, significantly, the general run of fisheries disputes, such as the present, is not subject to those limitations and exceptions. Section 2, it is expressly said, *continues to apply* to them in full (article 297(3)).

23. Finally, in terms of the object and purpose of UNCLOS as a whole, I refer to the widely stated and shared understanding, expressed throughout all the stages of the Conference which prepared the Convention, about the critical central place of the provisions for the peaceful settlement of disputes. The States at that Conference moved decisively away from the freedom which they generally have in their international relations not to be subject in advance to dispute settlement processes, especially processes leading to binding outcomes. The processes in significant part were not to be optional and, in general, third party binding decisions were to be available at the request of any party to the dispute.

24. At its first session the Conference had before it a paper containing drafts, among other things, on (i) the obligation to settle disputes under the Convention by peaceful means; (ii) the settlement of disputes by means chosen by the parties; (iii) the obligation to resort to a means resulting in binding decisions (the alternatives being arbitration, a Law of the Sea Tribunal, or the International Court of Justice); (iv) the possibility of special procedures in functional areas such as fishing, seabed, marine pollution or scientific research; and (v) possible exceptions or reservations. A co-chair of the working group which prepared the paper made the following points in introducing it to the Conference:

> (i) that the settlement of disputes by effective legal means would be necessary in order to avoid political and economic pressures; (ii) that uniformity in the interpretation of the Convention should be sought; (iii) while the advantages of obligatory settlement of disputes are thus recognized, a few carefully defined exceptions should be allowed; (iv) that the system for the settlement of disputes must form an integral part and an essential element of the Convention, an optional protocol being totally inadequate; and (v) with well-defined legal recourse, small countries have powerful means available to prevent interference by large countries, and the latter in turn could save themselves trouble, both groups gaining by the principle of strict legality which implies the effective application of the agreed rules. (Virginia Commentary XV.4)

25. The President of the Conference, Ambassador H S Amerasinghe, in 1976 prepared an informal single negotiating text on the Settlement of Disputes. He explained his initiative in this way:

> Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise [embodied in the whole UNCLOS text] will disintegrate rapidly and permanently. I should hope that it is the will of all concerned that the prospective convention should be fruitful and permanent. Effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of a treaty will be interpreted both consistently and equitably. (A/CONF.62/WP.9/Add.1, 31 March 1976, para 6)

26. Throughout the negotiating process there were to be seen the essential elements of what became Part XV: the basic obligation of peaceful settlement, the freedom of parties to choose their own means (both in section 1), the backstop of compulsory, binding procedures (section 2), and precise limits on, and exceptions to, those procedures (section 3).

27. Ambassador T T B Koh, who succeeded to the Presidency of the Conference, in speaking at the final session in 1982 answered in the affirmative his question whether the Conference had produced a comprehensive constitution for the oceans which would stand the test of time. Among his reasons was the following:

> The world community's interest in the peaceful settlement of disputes and the prevention of use of force in the settlement of disputes between States have been advanced by the mandatory system of dispute settlement in the Convention.

He also stressed that the Convention forms an integral whole. States cannot pick what they like and disregard what they do not like. (Published in United Nations, *The Law of the Sea. Official Text of the United Nations Convention on the Law of the Sea*; from statements made on 6 and 11 December 1982.)

28. The Japanese delegation had no doubt spoken for many when, early in the process, it similarly

> Emphasize[d] the necessity of making the general obligation to settle disputes an integral part of the future convention. In his delegation's view, the solution adopted at the First United Nations Conference on the Law of the Sea in 1958, in the form of an Optional Protocol of Signature, was insufficient and unacceptable. (6 April 1976, 60th meeting, paragraph 56).

29. The authoritative Virginia Commentary captures the essence, by introducing its discussion of Part XV with this sentence:

> One of the significant achievements of the Third United Nations Law of the Sea Conference was the development of a comprehensive system for the settlement of the disputes that may arise with respect of the interpretation or application of the 1982 UN Convention on the Law of the Sea. (paragraph XV.1)

The Commentary goes on to contrast earlier "less successful" attempts, in the 1930 League of Nations codification process and at the 1958 Conference also criticised by the Japanese delegation in 1976.

30. The objects and purposes of UNCLOS in general and its comprehensive, compulsory and where necessary, binding dispute settlement provisions in particular, along with the plain wording of its article 281(1) and of article 16 of the CCSBT lead me to the conclusion that the latter does not "exclude" the jurisdiction of this tribunal in respect of disputes arising under UNCLOS.

31. The possibly quite different subject matter of an arbitration under article 16 of the CCSBT relating to the "implementation" of that Convention (see paragraph 15 above) both supports that conclusion and suggests the possible limits on an assessment by a tribunal of a State's actions by reference to its obligations under articles 64 and 117-119 of UNCLOS and on any relief which might be available were a breach to be established. But such limits do not at this stage, to my mind, affect this tribunal's jurisdiction.

32. I have accordingly voted in favour of holding that this Tribunal has jurisdiction and against the contrary decision of the Tribunal. Given the majority position, I agree of course with the revocation of the order for provisional measures.

PART II

Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland, Final Award

Decision of 2 July 2003

Différend opposant l'Irlande au Royaume-Uni de Grande-Bretagne et d'Irlande du Nord concernant l'accès à l'information prévu par l'article 9 de la Convention pour la protection du milieu marin de l'Atlantique du Nord-Est (Convention OSPAR), Sentence définitive

Décision du 2 juillet 2003

DISPUTE CONCERNING ACCESS TO INFORMATION UNDER ARTICLE 9 OF THE OSPAR CONVENTION BETWEEN IRELAND AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, FINAL AWARD, DECISION OF 2 JULY 2003

DIFFÉREND OPPOSANT L'IRLANDE AU ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD CONCERNANT L'ACCÈS À L'INFORMATION PRÉVU PAR L'ARTICLE 9 DE LA CONVENTION POUR LA PROTECTION DU MILIEU MARIN DE L'ATLANTIQUE DU NORD-EST (CONVENTION OSPAR), SENTENCE DÉFINITIVE, DÉCISION DU 2 JUILLET 2003

Tribunal constituted pursuant to the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic ("the OSPAR Convention").

Applicable Law: The "rules of international law" to be applied by such a Tribunal include the OSPAR Convention as well as customary international law and general principles unless and to the extent that the Parties have created a *lex specialis* not inconsistent with a relevant *jus cogens*. Other instruments may be considered if the OSPAR Convention contains a direct *renvoi* thereto; for purposes of interpretation under article 31 of the Vienna Convention on the Law of Treaties; and to avoid anachronistic results inconsistent with current international law when construing an international instrument concluded in an earlier period ("actualisation or contemporization" of an international instrument).

Jurisdiction and admissibility: The primary purpose of using similar language in the two legal instruments concerned (i.e. OSPAR Convention and EU Directive 90/313) is to create uniform and consistent legal standards in the field of the protection of the marine environment, and not to create precedence of one set of legal remedies over the other. The competence assigned by international law to a national system does not exclude the responsibility of a State for the inadequacy of such a system or the failure of its competent authorities to act as prescribed by an international obligation or implementing legislation.

Article 9(1) of the OSPAR Convention: Disclosure of information is an obligation of result rather than merely providing access to a domestic regime directed at obtaining the required result (majority decision).

Article 9(2) of the OSPAR Convention: The scope of information subject to the obligation of disclosure (i.e. "information...on the state of the maritime area") includes information concerning existing or prospective activities or measures affecting or likely to affect adversely the maritime area—available information, in contrast to a general freedom of information statute. Ireland's claim for information does not fall within article 9(2) of the OSPAR Convention and, consequently, Ireland's claim that the United Kingdom breached its obligations under Article 9 of the OSPAR Convention does not arise (majority decision).

Tribunal constitué en application de la Convention de 1992 pour la protection du milieu marin de l'Atlantique du Nord-Est (« la Convention OSPAR »).

Droit applicable : Les « règles de droit international » que doit appliquer un tel tribunal comprennent la Convention OSPAR ainsi que le droit international coutumier et les principes généraux, sauf dans la mesure où les parties ont créé une *lex specialis* qui n'est pas incompatible avec un *jus cogens* pertinent. D'autres instruments peuvent être pris en compte dans les cas suivants : si la Convention OSPAR y renvoie directement; aux fins d'interprétation conformément à l'article 31 de la Convention de Vienne sur le droit des traités; et afin d'éviter des résultats anachroniques incompatibles avec l'état actuel du droit international lorsque l'on interprète un

instrument international conclu à une époque antérieure (« actualisation ou contemporanisation » d'un instrument international).

Compétence et recevabilité : Le fait d'utiliser des formulations identiques dans les deux instruments juridiques concernés (la Convention OSPAR et la directive 90/313 de l'Union européenne) a pour principal objectif de créer des normes juridiques uniformes et cohérentes dans le domaine de la protection du milieu marin, et non pas de faire en sorte que l'une des séries de voies de recours l'emporte sur l'autre. La compétence assignée par le droit international à un système national n'exclut pas la responsabilité de l'État concerné si ce système national est inadéquat ou si les autorités compétentes dudit État manquent à une obligation prescrite par un instrument international ou par ses textes d'application.

Article 9.1 de la Convention OSPAR : La mise à disposition des informations est une obligation de résultat à laquelle on ne satisfait pas en se contentant de donner accès à un régime national visant à obtenir le résultat requis (décision de la majorité).

Article 9.2 de la Convention OSPAR : Les informations soumises à l'obligation de mise à disposition (c'est-à-dire « toute information ... concernant l'état de la zone maritime ») comprennent les informations concernant les activités ou les mesures affectant ou susceptibles d'affecter la zone maritime – c'est-à-dire l'information disponible et non pas seulement celle qui relève d'un régime général de liberté d'information. La demande d'information de l'Irlande n'entre pas dans le champ d'application du paragraphe 2 de l'article 9 de la Convention OSPAR et, en conséquence, l'allégation de l'Irlande selon laquelle le Royaume-Uni aurait violé les obligations qui lui incombent en vertu de l'article 9 de cette convention n'est pas fondée (décision de la majorité).

Table of Contents

Tribunal:

Professor W. Michael Reisman, Chairman
Dr. Gavan Griffith QC
Lord Mustill

I. INTRODUCTION

1. This matter concerns a dispute between Ireland as claimant and the United Kingdom of Great Britain and Northern Ireland ("the United Kingdom") as respondent, determined by a Tribunal constituted pursuant to the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic ("the OSPAR Convention").[1] The issue concerns access to information as defined by the OSPAR Convention. Ireland has requested access to information redacted from reports prepared as part of the approval process for the commissioning of a Mixed Oxide Plant ("the MOX Plant") in the United Kingdom, based on Ireland's understanding of Article 9 of the OSPAR Convention. The United Kingdom has declined to provide the information requested based on its understanding of the OSPAR Convention.

II. THE OSPAR CONVENTION

2. The OSPAR Convention comprises 34 articles, five annexes and three appendices. Under Article 14(1), "[t]he Annexes and Appendices form an integral part of the OSPAR Convention." Article 14(2) provides: "The Appendices shall be of a scientific, technical or administrative nature."

3. Article 1 sets out definitions, to be considered as necessary in the course of this award. Article 2 provides:

> **GENERAL OBLIGATIONS**
>
> 1. (a) The Contracting Parties shall, in accordance with the provisions of the Convention, take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected.
>
> (b) To this end Contracting Parties shall, individually and jointly, adopt programmes and measures and shall harmonise their policies and strategies.
>
> 2. The Contracting Parties shall apply:
>
> (a) the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even

[1] Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, 32 ILM 1069 (1992). Ireland and the United Kingdom are both Parties to the OSPAR Convention.

when there is no conclusive evidence of a causal relationship between the inputs and the effects;

(b) the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter.

3. (a) In implementing the Convention, Contracting Parties shall adopt programmes and measures which contain, where appropriate, time limits for their completion and which take full account of the use of the latest technological developments and practices designed to prevent and eliminate pollution fully.

(b) To this end they shall:

(i) taking into account the criteria set forth in Appendix 1, define with respect to programmes and measures the application of, *inter alia*,

- best available techniques
- best environmental practice

including, where appropriate, clean technology;

(ii) in carrying out such programmes and measures, ensure the application of best available techniques and best environmental practice as so defined, including, where appropriate, clean technology.

4. The Contracting Parties shall apply the measures they adopt in such a way as to prevent an increase in pollution of the sea outside the maritime area or in other parts of the environment.

5. No provision of the Convention shall be interpreted as preventing the Contracting Parties from taking, individually or jointly, more stringent measures with respect to the prevention and elimination of pollution of the maritime area or with respect to the protection of the maritime area against the adverse effects of human activities.

4. Article 3 provides:

POLLUTION FROM LAND-BASED SOURCES

The Contracting Parties shall take, individually and jointly, all possible steps to prevent and eliminate pollution from land-based sources in accordance with the provisions of the Convention, in particular as provided for in Annex I.

5. Article 4 provides:

> **POLLUTION BY DUMPING OR INCINERATION**
>
> The Contracting Parties shall take, individually and jointly, all possible steps to prevent and eliminate pollution by dumping or incineration of wastes or other matter in accordance with the provisions of the Convention, in particular as provided for in Annex II.

6. Article 9 provides:

> **ACCESS TO INFORMATION**
>
> 1. The Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months.
>
> 2. The information referred to in paragraph 1 of this Article is any available information in written, visual, aural or data base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention.
>
> 3. The provisions of this Article shall not affect the right of Contracting Parties, in accordance with their national legal systems and applicable international regulations, to provide for a request for such information to be refused where it affects:
>
> (a) the confidentiality of the proceedings of public authorities, international relations and national defence;
>
> (b) public security;
>
> (c) matters which are, or have been, *sub judice*, or under enquiry (including disciplinary enquiries), or which are the subject of preliminary investigation proceedings;
>
> (d) commercial and industrial confidentiality, including intellectual property;
>
> (e) the confidentiality of personal data and/or files;
>
> (f) material supplied by a third party without that party being under a legal obligation to do so;

> (g) material, the disclosure of which would make it more likely that the environment to which such material related would be damaged.
>
> 4. The reasons for a refusal to provide the information requested must be given.

7. Article 10 establishes a Commission of representatives of each of the Contracting Parties, sets out its duties, and, with respect to those duties, authorizes the Commission to "*inter alia*, adopt decisions and recommendations in accordance with Article 13." Article 13(1) states that "[d]ecisions and recommendations shall be adopted by unanimous vote of the Contracting Parties." If unanimity is not attainable, decisions may be taken by a three-quarters majority vote of the Contracting Parties and will become binding on those voting for it, if, at the end of 200 days after its adoption the number of Contracting Parties who have notified the Executive Secretary that they are unable to accept the decision does not reduce the number of those accepting the decision to below three-quarters of the Contracting Parties to the OSPAR Convention.

8. The provisions for amendment of the OSPAR Convention, addition and amendment of annexes, and addition and amendment of appendices are not relevant to the issues in dispute in this case.

9. Article 28 provides that no reservations may be made to the Convention.

10. Article 31 provides for the continuing force of decisions, recommendations, and all other agreements adopted under the Oslo and Paris Conventions[2] to the extent that they are compatible with the OSPAR Convention and have not been terminated by its procedures.

11. Article 32 of the OSPAR Convention provides:[3]

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[2]The Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo), 932 UNTS 3 (1972), and the Convention for the Prevention of Marine Pollution from Land-based Sources (Paris), 13 ILM 352 (1974).

[3] It should also be noted that the last preambular paragraph of the Rules of Procedure for this Tribunal (the "Rules of Procedure for the Tribunal Constituted Under the OSPAR Convention Pursuant to the Request of Ireland dated 15th June 2001") provides:

> Whereas the Applicant and the Respondent (together, the 'Parties') have decided that the procedure of the arbitration of the Dispute shall be in accordance with the following rules (the 'Rules'), which shall replace Articles 32(4) to 32(10) of the OSPAR Convention, insofar as they do not impair the rights of other States Parties to the OSPAR Convention.

The OSPAR Tribunal Rules of Procedure may be found on the website of the Permanent Court of Arbitration (hereinafter "PCA") at www.pca-cpa.org.

SETTLEMENT OF DISPUTES

1. Any disputes between Contracting Parties relating to the interpretation or application of the Convention, which cannot be settled otherwise by the Contracting Parties concerned, for instance by means of inquiry or conciliation within the Commission, shall at the request of any of those Contracting Parties, be submitted to arbitration under the conditions laid down in this Article.

2. Unless the Parties to the dispute decide otherwise, the procedure of the arbitration referred to in paragraph 1 of this Article shall be in accordance with paragraphs 3 to 10 of this Article.

3. (a) At the request addressed by one Contracting Party to another Contracting Party in accordance with paragraph 1 of this Article, an arbitral tribunal shall be constituted. The request for arbitration shall state the subject matter of the application including in particular the Articles of the Convention, the interpretation or application of which is in dispute.

(b) The applicant party shall inform the Commission that it has requested the setting up of an arbitral tribunal, stating the name of the other party to the dispute and the Articles of the Convention the interpretation or application of which, in its opinion, is in dispute. The Commission shall forward the information thus received to all Contracting parties to the Convention.

4. The arbitral tribunal shall consist of three members: each of the parties to the dispute shall appoint an arbitrator; the two arbitrators so appointed shall designate by common agreement the third arbitrator who shall be the chairman of the tribunal. The latter shall not be a national of one of the parties to the dispute, nor have his usual place of residence in the territory of one of these parties, nor be employed by any of them, nor have dealt with the case in any other capacity.

5. (a) If the chairman of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the President of the International Court of Justice shall, at the request of either party, designate him within a further two months' period.

(b) If one of the parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other party may inform the President of the International Court of Justice who shall designate the chairman of the

arbitral tribunal within a further two months' period. Upon designation, the chairman of the arbitral tribunal shall request the party which has not appointed an arbitrator to do so within two months. After such period, he shall inform the President of the International Court of Justice who shall make this appointment within a further two months' period.

6. (a) The arbitral tribunal shall decide according to the rules of international law and, in particular, those of the Convention.

(b) Any arbitral tribunal constituted under the provisions of this Article shall draw up its own rules of procedure.

(c) In the event of a dispute as to whether the arbitral tribunal has jurisdiction, the matter shall be decided by the decision of the arbitral tribunal.

7. (a) The decisions of the arbitral tribunal, both on procedure and on substance, shall be taken by majority voting of its members.

(b) The arbitral tribunal may take all appropriate measures in order to establish the facts. It may, at the request of one of the parties, recommend essential interim measures of protection.

(c) If two or more arbitral tribunals constituted under the provisions of this Article are seized of requests with identical or similar subjects, they may inform themselves of the procedures for establishing the facts and take them into account as far as possible.

(d) The parties to the dispute shall provide all facilities necessary for the effective conduct of the proceedings.

(e) The absence or default of a party to the dispute shall not constitute an impediment to the proceedings.

8. Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its expenses, and shall furnish a final statement thereof to the parties.

9. Any Contracting Party that has an interest of a legal nature in the subject matter of the dispute which may be affected by the decision in the case, may intervene in the proceedings with the consent of the tribunal.

10. (a) The award of the arbitral tribunal shall be accompanied by a statement of reasons. It shall be final and binding upon the parties to the dispute.

(b) Any dispute which may arise between the parties concerning the interpretation or execution of the award may be submitted by either party to the arbitral tribunal which made the award or, if the latter cannot be seized thereof, to another arbitral tribunal constituted for this purpose in the same manner as the first.

12. Annex I deals with the prevention and elimination of pollution from land-based sources. Article 2 of this annex establishes obligations with respect to them.

13. Article 3 of Annex II provides:

1. The dumping of all wastes or other matter is prohibited, except for those wastes or other matter listed in paragraphs 2 and 3 of this Article.

2. The list referred to in paragraph 1 of this Article is as follows:

(a) dredged material;

(b) inert materials of natural origin, that is solid, chemically unprocessed geological material the chemical constituents of which are unlikely to be released into the marine environment;

(c) sewage sludge until 31st December 1998;

(d) fish waste from industrial fish processing operations;

(e) vessels or aircraft until, at the latest, 31st December 2004.

3. (a) The dumping of low and intermediate level radioactive substances, including wastes, is prohibited.

(b) As an exception to subparagraph 3(a) of this Article, those Contracting Parties, the United Kingdom and France, who wish to retain the option of an exception to subparagraph 3(a) in any case not before the expiry of a period of 15 years from 1st January 1993, shall report to the meeting of the Commission at Ministerial level in 1997 on the steps taken to explore alternative land-based options.

(c) Unless, at or before the expiry of this period of 15 years, the Commission decides by a unanimous vote not to continue the exception provided in subparagraph 3(b), it shall take a decision pursuant to Article 13 of the

> Convention on the prolongation for a period of 10 years after 1st January 2008 of the prohibition, after which another meeting of the Commission at Ministerial level shall be held. Those Contracting Parties mentioned in subparagraph 3(b) of this Article still wishing to retain the option mentioned in subparagraph 3(b) shall report to the Commission meetings to be held at Ministerial level at two yearly intervals from 1999 onwards about the progress in establishing alternative land-based options and on the results of scientific studies which show that any potential dumping operations would not result in hazards to human health, harm to living resources or marine ecosystems, damage to amenities or interference with other legitimate uses of the sea.

14. The United Kingdom's signature was accompanied by the following declaration:[4]

> The Government of the United Kingdom of Great Britain and Northern Ireland declares its understanding of the effect of paragraph 3 of Article 3 of Annex II to the Convention to be amongst other things that, where the Commission takes a decision pursuant to Article 13 of the Convention, on the prolongation of the prohibition set out in subparagraph (3)(a), those Contracting Parties who wish to retain the option of the exception to that prohibition as provided for in subparagraph (3)(b) may retain that option, provided that they are not bound, under paragraph 2 of Article 13, by that decision.

III. FACTUAL BACKGROUND

15. British Nuclear Fuels, plc ("BNFL"), a public limited company wholly owned by the United Kingdom, owns and operates a licensed nuclear enterprise at Sellafield in Cumbria. In 1993, BNFL applied to the local authority for permission to build a MOX Plant to process spent nuclear fuels by retrieving and blending separated plutonium oxide and uranium oxide into pellets to be reused as fuel in nuclear reactors. BNFL prepared and submitted Environmental Statements to the relevant authorities,[5] as required by United Kingdom law.[6] Relevant consents to build the Plant were given in 1994, and construction was completed in 1996.

16. Each of Ireland and the United Kingdom is a Party to the Treaty Establishing the European Atomic Energy Community ("EURATOM"),[7]

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[4] The declaration may be found at www.ospar.org, where a note from the OSPAR Secretariat follows the declaration:

> Following the entry into force of OSPAR Decision 98/2 on Dumping of Radioactive Waste on 9 February 1999, subparagraphs (b) and (c) of paragraph 3 of Article 3 of Annex II to the Convention ceased to have effect.

[5] Ireland's Memorial, Annex 9. The Parties' written pleadings are available at www.pca-cpa.org. Annexes are on file at the offices of the PCA.

[6] UK Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI No. 1199).

[7] Treaty Establishing the European Atomic Energy Community ("EURATOM"), 25 March 1957, 298 UNTS 167.

which includes a comprehensive regulatory system for planning for the disposal of radioactive waste. Article 37 of EURATOM provides:

> Each Member State shall provide the Commission with such general data relating to any plan for the disposal of radioactive waste in whatever form as will make it possible to determine whether the implementation of such plan is liable to result in the radioactive contamination of the water, soil or airspace of another Member State.
>
> The Commission shall deliver its opinion within six months, after consulting the group of experts referred to in Article 31.

In *Saarland v. Minister for Industry*, the European Court explained the purpose of the Article 37 procedure as follows:

> [t]he purpose of Article 37, within the context of environmental protection, is to provide the Commission with comprehensive information on every plan for disposal and every activity liable to cause accidental discharges of waste, so that it is in a position to assess the repercussions thereof on the environment in the other Member States. [8]

17. On 2 August 1996, the United Kingdom submitted the data required under Article 37 to the European Commission. On 25 February 1997, the European Commission delivered its opinion under Article 37, including the conclusions:

> (a) The distance between the plant and nearest point on the territory of another Member State, in this case Ireland, is 184 km;
>
> (b) Under normal operating conditions, the discharge of liquid and gaseous effluents will be small fractions of present authorized limits and will produce an exposure of the population in other Member States that is negligible from the health point of view;
>
> (c) Low-level solid radioactive waste is to be disposed to the authorized Drigg site operated by BNFL plc. Intermediate level wastes are to be stored at the Sellafield site, pending disposal to an appropriate authorized facility;
>
> (d) In the event of unplanned discharges of radioactive waste which may follow an accident on the scale considered in the general data, the doses likely to be received by the population in other Member States would not be significant from the health point of view.
>
> In conclusion, the Commission is of the view that the implementation of the plan for the disposal of radioactive wastes arising from the operation of the BNFL Sellafield mixed oxide fuel plant, both in normal operation and in the event of an accident of the type and magnitude considered in the general data, is not liable to result in radioactive contamination, significant from the point of

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[8] Case 187/87, *Saarland and Others v. Minister for Industry, Post and Telecommunications and Tourism and Others* (reference for a preliminary ruling from the *tribunal administratif*, Strasbourg), [1988] ECR 5013, at p. 5018.

> view of health, of the water, soil or airspace of another Member State.[9]

18. Although the Article 37 procedure fulfilled a critical part of the United Kingdom's international legal obligations with respect to the environmental consequences of commissioning, there were further requirements under EURATOM and United Kingdom law to be met before the MOX Plant could be commissioned and operated. Relevantly, the domestic agency approving the Plant was required to ensure whatever environmental detriments it might cause were economically justified. In its most recent formulation, Directive 96/29 EURATOM provided in Article 6(1) that:

> Member States shall ensure that all new classes or types of practice resulting in exposure to ionizing radiation are justified in advance of being first adopted or first approved by their economic, social or other benefits in relation to the health detriment they may cause. [10]

19. Although the relevant United Kingdom statute, the United Kingdom Radioactive Substances Act 1993, does not, in terms, require such justification, in *R v. Secretary of State for the Environment and others ex parte Greenpeace Ltd.*,[11] Potts J. held (as explained in a later case) that "there was a legal obligation to justify any activity resulting in exposure to ionizing radiation in accordance with the then operative Directive, namely Euratom 80/836." [12]

20. Accordingly, over a period of eight weeks in 1997, the United Kingdom Environment Agency ("the Agency") held a public consultation on the economic justification of the MOX Plant at Sellafield.[13] This initial public consultation emerged as the first of five such consultations.

21. By its letter of 5 February 1997 inviting views, the Agency stated:

> The Agency considers that the issues associated with uranium commissioning may be separated from those associated with full operation and are simpler in nature, since no plutonium is involved. BNFL has also stated that the total activity discharged would be very small, amounting to less than 0.0000001% of the total activity discharged from the Sellafield site.[14]

The Agency enclosed a document entitled "Radioactive Substances Act 1993 Explanatory Memorandum for the Consultation on Justification and Uranium

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[9] European Commission Opinion under Article 37 EURATOM, 1997 OJ (C 86) 3. *See* United Kingdom's Counter-Memorial, Annex 9 (Vol. II).

[10] Directive 96/29 EURATOM, Article 6(1), 1996 OJ (L 159) 1. Several documents cited below refer instead to an earlier version of this directive – namely, Directive 80/836 EURATOM, 1980 OJ (L 246) 1.

[11] *R v. Secretary of State for the Environment and others ex parte Greenpeace Ltd.*, [1994] 4 All ER 352.

[12] *R (Friends of the Earth Ltd. and Greenpeace Ltd.) v. Secretary of State for the Environment, Food and Rural Affairs and Secretary of State for Health*, [2001] EWHC Admin. 914, at para. 8.

[13] As argued by Counsel for the United Kingdom, Oral Hearing Transcript (hereinafter "Transcript"), Day 2 Proceedings, pp. 64-66. Transcripts are available at www.pca-cpa.org.

[14] Letter from I.T. Porter, Environment Agency to statutory consultees (February 5, 1997), at Tab 1, p. 2, *in* SMP Consultation Documents Bundle ("SMP Bundle"), on file at the offices of the PCA.

Commissioning of Sellafield MOX Plant (SMP)," which explained in its introduction that:

> [a]ll practices giving rise to radioactive waste must be justified, i.e. the benefits of the practice must outweigh the detriments. The manufacture of fuel in the Sellafield MOX Plant (SMP) is a new practice on the Sellafield site. The need for the Agency to consider justification in advance of the commissioning and operation of SMP arises from EU Council Directive of 15 July 1980, which lays down the basic safety standards for the health protection of the general public and workers against dangers of ionizing radiation (the Euratom Directive).... [15]

The Agency went on to explain that those issues did not have to be part of the application because no change in the estimated radiological impact of the predicted operational releases was anticipated and no change in permitted levels was being requested. Rather, the focus would be on economic justification.[16] Nonetheless, data on projected aerial and liquid discharges was included. [17]

22. Another enclosure with the 5 February letter was an undated document entitled "Sellafield MOX Plant (SMP)," which had been transmitted to the Agency by BNFL under a covering letter of 27 January 1997. The transmittal letter identified the document as "the public consultation document" covering commercial and dose aspects. In discussing waste management, the document referred to "effluent arisings" which would "be conditioned as necessary to make them suitable, after monitoring, for discharge to sea." [18]

23. The Government of Ireland participated in this first of the public consultations as a "respondent." In its submission dated 4 April 1997, Ireland stated that it "opposes the commissioning of the MOX Plant on the grounds that it will perpetuate the nuclear fuel reprocessing industry in Britain," and that it deemed "objectionable and unacceptable" the "additional radioactive marine discharges from Sellafield into the Irish Sea arising from MOX production."[19] Ireland went on to raise several specific concerns about the proposed MOX Plant, including one that "the quality of information available for consultation is deficient in many respects."[20]

24. The initial consultations were followed by a further round of public consultations because "several respondents ... were concerned that BNFL had not provided in the public domain sufficient commercial information to justify the commissioning and operation of the plant."[21] Further, other respondents

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[15] "UK Environment Agency, Radioactive Substances Act 1993, Explanatory Memorandum for the Consultation on Justification and Uranium Commissioning of Sellafield Mox Plant (SMP), British Nuclear Fuels plc at Sellafield", *in* SMP Bundle, at Tab 1, p. 3, para. 1.3 (1997).

[16] *Id.*, at p. 4, para. 1.6.

[17] *Id.*, at p. 11, para. 6.2.

[18] "Sellafield MOX Plant (SMP)", attachment to Letter from Robert Anderson of BNFL to the UK Environment Agency (January 27, 1997), *in* SMP Bundle, at Tab 1, p. 13.

[19] Ireland's Memorial, Annex 4, at No. 2

[20] *Ibid.*

[21] Letter from UK Environment Agency to Friends of the Earth (January 14, 1998), *in* SMP Bundle, at Tab 2.

had raised concerns about whether "the movements of MOX fuel from the SMP by air, sea or land"[22] could be carried out safely, and still other respondents raised non-proliferation and other security concerns.[23]

25. In preparation for the second consultation, the Agency asked BNFL to provide additional information in the form of a business case that could be independently examined. It invited prominent financial consultants to tender for the work and selected the PA Consulting Group, London ("PA") to carry out a detailed assessment.[24] As the Agency's Explanatory Memorandum under the Radioactive Substances Act explained, in addition, "PA was requested to identify if there were areas of the economic case that were not commercially sensitive which could be published in the public domain."[25]

26. PA submitted the full version of its report ("the PA Report") to BNFL and, pursuant to the Agency's request, then considered what data should be redacted. After consulting with BNFL about redactions, PA made recommendations, which were reviewed and finally determined by the Agency, and reflected in a public version of the PA Report released in December 1997 ("the 1997 PA Report"). PA gave a detailed explanation of the basis for redactions from its full report on "commercial confidentiality" grounds under section 4(2) of the United Kingdom's Environmental Information Regulations (1992) ("the 1992 Regulations"),[26] and stated:

> 1.3. COMMERCIAL CONFIDENTIALITY ISSUES
>
> PA was asked to provide the Agency with an independent view on the validity of BNFL's assertion that elements of the economic case for the SMP are commercially sensitive, and therefore that certain information therein should be withheld from the public domain. The Environmental Information Regulations 1992 (section 4(2)) provide that for the purposes of those regulations 'information relating to matters to which any commercial or industrial confidentiality attaches' may be treated as confidential. PA therefore identified a series of specific criteria to determine the information the placing of which in the public domain could prejudice the commercial interests of BNFL. Information should not be placed in the public domain if it would:
>
> 1. Allow or assist competitors to build market share or to benchmark their own operations.
>
> 2. Allow or assist competitors to attack the BNFL customer base and erode business profitability.

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[22] "UK Environment Agency, Explanatory Memorandum for a Further Public Consultation on the Application by BNFL for the Commissioning and Operation of the Mixed Oxide Fuel Plant at its Sellafield site in Cumbria", *in* SMP Bundle, at Tab 2, p. 4, para. 2.2 (1998).

[23] *Id.*, at p. 4, para. 2.3.

[24] *Id.*, at pp. 1-2.

[25] *Id.*, at p. 2.

[26] UK Environmental Information Regulations 1992 (SI No. 1992/3240).

3. Allow or assist new competitors to enter the market.

4. Allow customers or competitors to understand the specific economics and processes of the BNFL MOX fuel fabrication business.

5. Breach contractual confidentiality requirements with customers or vendors.

In addition, information should not be placed in the public domain that would breach security and safeguards requirements with respect to plutonium quantities, locations and movements.

Given the issue of commercial confidentiality, and using the criteria set out above, two parallel reports have been prepared. The version for the Environment Agency contains information commercially confidential to BNFL; in the public domain report PA has replaced this information with a box in which is outlined the nature of the confidential information that has been removed and the reason, in terms of the criteria set out above, for the removal. In addition, in certain instances, specific financial, production or customer data in the full report have been deleted or replaced by a word such as 'significant' or 'minor' in the public domain version. These represent the only differences between the texts of the full version and the public domain version. This approach enables the placing in the public domain of information that allows public review of the robustness of the BNFL economic case, without prejudicing the commercial interests of BNFL.[27]

27. In the second public consultation, Ireland submitted a detailed statement which was critical of parts of the reasoning of the 1997 PA Report. Although it did not then object to or mention any of the redactions from the published version of the PA Report, Ireland's submission concluded:

> [T]he PA Consulting report has failed to fulfil the purpose of this further consultation as set out in the Environment Agency's letter of 14 January, 1998, namely, to provide in the public domain sufficient commercial information to justify the commissioning and operation of the plant.[28]

28. After consultations, in October 1998 the Agency released a draft decision which found that "[t]he assessed radiation doses to members of the public as a consequence of discharges from the MOX Plant have negligible radiological significance," [29] and that the balance between benefits and detriments was "broadly neutral" in terms of radioactive discharges, waste

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[27] "PA Consulting Group, Environment Agency Final Report – Public Domain Version; Assessment of BNFL's Economic Case for the Sellafield MOX Plant", *in* SMP Bundle, at Tab 2, pp. 1-1 to 1-6 (1997).

[28] Ireland's Memorial, Annex 4, at No. 3.

[29] "UK Environment Agency, Radioactive Substances Act 1993, Document Containing the Agency's Proposed Decision on the Justification for the Plutonium Commissioning and Full Operation of the MOX Plant, BNFL plc. at Sellafield", *in* SMP Bundle, Tab 2, at para. 22 (1998).

management, health and safety operations on the MOX Plant's transport, safety of the MOX fuel in reactors, radiological impact, sustainable development and proliferation of nuclear weapons and the plutonium stockpile. [30] The decision then considered the question of economic justification, which it found compelling.

29. Among others, Ireland made further representations,[31] whereafter a decision was taken in June 1999 at the ministerial level to release a new version of the PA Report, with some of the redacted material restored, and to hold a third round of consultations. The Department for the Environment, Transport and the Regions ("DETR") and the Ministry of Agriculture, Fisheries and Food ("MAFF") invited fresh comments "on the material concerning the economic case for the [MOX] plant."[32]

30. Ireland again submitted comments. By letter of 30 July 1999, Ireland elaborated upon its earlier objections and requested "an unedited and full copy of the PA Report." [33] Among other things, Ireland argued that "the information made available in the June 1999 version of the PA Report does not provide a basis for concluding that the MOX Plant is 'justified' within the meaning of Directive 80/836 EURATOM (as amended)." Ireland also raised the issue of compliance with EC Directive 90/313/EEC ("Directive 90/313")[34] on Freedom of Access to Environmental Information, and reserved its right

> to invoke – *inter alia* in relation to intensified international transportation associated with the MOX plant – procedures and substantive requirements under *inter alia* ... the 1992 OSPAR Convention.

31. The process of review was interrupted in 1999 when BNFL discovered that fuel pellet diameter readings at the MOX demonstration facility had been falsified and reported this fact to the nuclear installation inspectorate.

32. The OSPAR Convention was first raised by Ireland in connection with the redacted information in the PA Report on 25 May 2000, when it wrote to DETR, invoking Article 9 in requesting information redacted from the published PA Report.[35] On 27 October 2000, DETR responded that "the UK Government does not wish to prejudice the commercial interests of an enterprise by disclosing commercially confidential information."[36]

33. In March 2001, a fourth consultation process commenced, now under Directive 96/29 EURATOM (*see* para. 18 above), which had come into force in May 2000. In the consultation paper issued by DETR and the Department of Health in March 2001, potential respondents were invited to comment on

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[30] *Id.*, at para. 31.
[31] Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 69.
[32] Letter from UK DETR & MAFF (June 11, 1999), *in* SMP Bundle, at Tab 3.
[33] Ireland's Memorial, Annex 4, at No. 4.
[34] Directive 90/313/EEC, 1990 OJ (L 158) 56.
[35] Ireland's Memorial, Annex 4, at No. 9.
[36] *Id.*, at No. 10.

BNFL's economic case, as revised in light of the data falsification incident, and an updated MOX market review.[37]

34. Ireland filed a detailed submission dated 22 May 2001. Ireland concluded:

> It is the view of the Irish Government that the information contained in the Consultation Papers and the absence of critical information relating to primary economic factors including critical data relating to other cost factors such as transportation and security, makes it impossible for the reader to assess the justification of the [proposed MOX Plant]....
>
> The Irish Government in its submissions in regard to the previous Consultation Rounds sought the unedited and full copy of the then PA Consulting Report. In the absence of this information ... the Irish Government is reserving its right to pursue legal measures for the release of the information.[38]

35. Further, in the spring of 2001, BNFL prepared a new confidential document for departmental and ministerial consideration setting out the economic justification for the MOX Plant. Following a new public tender in April 2001, the consulting firm Arthur D. Little ("ADL") was appointed "to analyse the business case and to report on the responses to the public consultation exercise on it."[39] The terms of reference for ADL also included an instruction to form its own view as to what material should be redacted on the grounds of commercial sensitivity. ADL submitted a full version of its Report to Ministers, along with a proposed redacted public version, to which BNFL objected. The final decision about redactions in the published version was made at the Ministerial level, and the redacted ADL Report was released to the public in July 2001.[40] The transmittal letter from the Department of the Environment, Food and Rural Affairs ("DEFRA") (which had taken over responsibilities in this area from DETR) and the Department of Health stated that "[t]he published version excludes only that information whose publication would cause unreasonable damage to BNFL's commercial operations or to the economic case for the MOX plant."[41]

36. A fifth public consultation ensued in August 2001. In a letter dated 7 August 2001, Ireland requested an unredacted version of the ADL Report in order "to make an independent analysis of the economic justification of the proposed [MOX] plant."[42] Ireland also restated its opposition to the MOX Plant, but did not comment in detail on the published version of the ADL Report.

37. On 3 October 2001, a decision was issued approving the manufacture of MOX at Sellafield.[43] Greenpeace, a non-governmental organization,

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[37] "UK Department of Health and DETR, British Nuclear Fuels plc. – Sellafield Mixed Oxide Plant: A Consultation Paper", *in* SMP Bundle, at Tab 4, p. 5, para. 10 (2001).

[38] Ireland's Memorial, Annex 4, at No. 13.

[39] Letter from UK Department of Environment, Food, and Rural Affairs ("DEFRA") and Department of Health (July 27, 2001), *in* SMP Bundle, at Tab 5.

[40] United Kingdom's Counter-Memorial, para. 2.22.

[41] *Supra* note 39.

[42] Ireland's Memorial, Annex 4, at No. 15.

[43] Ireland's Memorial, Annex 5.

challenged the decision in the United Kingdom courts, but its application for review was rejected,[44] and failed on appeal.[45] Ireland separately applied to the International Tribunal for the Law of the Sea ("ITLOS") for provisional measures restraining the United Kingdom from commissioning the Plant in a request which, after a hearing, was rejected.[46]

38. Against the background of these events, Ireland contended that the United Kingdom was obliged to make the information redacted from the consultation Reports available under Article 9 of the OSPAR Convention. On 15 June 2001 Ireland requested that an arbitral tribunal be constituted under Article 32 to determine its dispute with the United Kingdom concerning the United Kingdom's refusal to make available information redacted from the published versions of the PA Report and relating to the proposed MOX Plant. In its request, Ireland stated that it had previously notified the United Kingdom that a dispute had arisen as to the interpretation and application of the OSPAR Convention and that Ireland had sought to settle the dispute through bilateral diplomatic means and by raising the matter with the OSPAR Commission. A Statement of Claim was also filed.

39. In its letter dated 7 August 2001 (submitted in the context of the fifth consultation), Ireland had stated: "In the event that a copy of the full [ADL] report is not provided Ireland reserves its right to amend and extend its application in the OSPAR arbitration filed on 15 June last to include the information omitted from the ADL Report."[47] By letter dated 5 September 2001, DEFRA asserted that the information excised from the public version of the ADL Report did not fall within the scope of Article 9(2).[48] By reply of 26 September 2001, the Agent for Ireland objected to DEFRA's assertion that the ADL Report did not fall within the scope of Article 9(2), and noted its intention to amend the relief sought in the Statement of Claim to include disclosure of the full unredacted ADL Report.[49]

IV. THE CLAIMS AND SUBMISSIONS OF THE PARTIES AND QUESTIONS RAISED FOR DETERMINATION BY THE TRIBUNAL

40. The formal claims of Ireland and the United Kingdom ("the Parties") were set forth in their written pleadings.

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[44] *See supra* note 12.

[45] *Friends of the Earth Ltd. & ANR, The Queen on the Application of v. Secretary of State for the Environment, Food and Rural Affairs & ORS*, [2001] EWCA Civ. 1847.

[46] *The MOX Plant Case (Ireland v. United Kingdom)*, Request for Provisional Measures, Order Dated December 3, 2001, International Tribunal for the Law of the Sea, Case No. 10. Available from www.itlos.org.

[47] Ireland's Memorial, Annex 4, at No. 15.

[48] *Id.*, at No. 17.

[49] *Id.*, at No. 16.

41. On the basis of Article 9 of the OSPAR Convention, Ireland, in its Memorial requested

> full disclosure of two reports commissioned by the United Kingdom Government in the context of the authorisation of a new facility at Sellafield for the production of mixed oxide (MOX) fuel ... in order to be in a better position to consider the impacts which the commissioning of the MOX plant will or might have on the marine environment ... [and] to be able to assess the extent of the compliance by the United Kingdom with its obligations under ... the OSPAR Convention, the 1982 United Nations Convention on the Law of the Sea ... and various provisions of European Community law, including in particular Council Directive 96/29 Euratom ....[50]

42. In its final prayer, Ireland requested the Tribunal to order and declare:

> (1) That the United Kingdom has breached its obligations under Article 9 of the OSPAR Convention by refusing to make available information deleted from the PA Report and ADL Report as requested by Ireland.
>
> (2) That, as a consequence of the aforesaid breach of the OSPAR Convention, the United Kingdom shall provide Ireland with a complete copy of both the PA Report and the ADL Report, alternatively a copy of the PA Report and the ADL Report which includes all such information the release of which the arbitration tribunal decides will not affect commercial confidentiality within the meaning of Article 9(3)(d) of the OSPAR Convention.
>
> (3) That the United Kingdom pay Ireland's costs of the proceedings.

43. The United Kingdom refused to disclose the full Reports, contending in its Counter-Memorial that:

> First, Article 9 of the OSPAR Convention does not establish a direct right to receive information. Rather it requires Contracting Parties to establish a domestic framework for the disclosure of information. This the United Kingdom has done ....
>
> Second, in the event that the United Kingdom is wrong in this reading of Article 9, Ireland must show that the information it requests is information within the scope of Article 9(2) of the Convention. It has failed to show that this is the case . . . the information in question is insufficiently proximate to the state of the maritime area or to measures or activities affecting or likely to affect it. It is not information within the scope of Article 9(2) of the Convention ....
>
> Third, in the event that the United Kingdom is wrong on this point, Article 9(3)(d) of the Convention affirms the right of the Contracting Parties, in accordance with their national legal systems and applicable international regulations, to provide for a request for information to be refused on grounds of commercial confidentiality. The United Kingdom has legislated to this effect. Its refusal to disclose the particular information requested by Ireland is consistent with both national law and applicable international regulations.[51]

44. In its final prayer, the United Kingdom requested the Tribunal:

> (1) to adjudge and declare that it lacks jurisdiction over the claims brought against the United Kingdom by Ireland and/or that those are inadmissible;
>
> (2) to dismiss the claims brought against the United Kingdom by Ireland;
>
> (3) to reject Ireland's request that the United Kingdom pay Ireland's costs, and instead to order Ireland to pay the United Kingdom's costs.

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[50] Ireland's Memorial, para. 2.

[51] United Kingdom's Counter-Memorial, paras. 1.4, 1.5, 1.6.

45. It thus appears to the Tribunal that three sequential questions are raised for determination by the Tribunal, namely:

(1) Does Article 9(1) of the Convention require a Contracting Party to disclose, or to set up a procedure to disclose, "information" within the meaning of Article 9(2)?

(2) If so, does the material the disclosure of which Ireland has requested constitute "information" for the purposes of Article 9 of the Convention?

(3) If so, has the United Kingdom redacted and withheld any and what information requested by Ireland contrary to Article 9(3)(d)?

46. After a review of the procedural history of the case and the question of applicable law, the Tribunal will return to consider these questions.

V. PROCEDURAL HISTORY

47. Ireland designated Mr. David J. O'Hagan, Chief State Solicitor, as its Agent. The United Kingdom so designated Mr. Michael Wood, Legal Adviser, Foreign and Commonwealth Office ("FCO").

48. Pursuant to Article 32(4) of the OSPAR Convention, Ireland appointed Dr. Gavan Griffith QC and the United Kingdom appointed Lord Mustill as arbitrators. On 30 October 2001, they designated Professor W. Michael Reisman as chairman.

49. The Parties decided jointly to appoint the International Bureau of the Permanent Court of Arbitration ("PCA") as the registry for the arbitration and to designate The Hague as the seat of the arbitration. They also appointed Ms. Bette E. Shifman, Deputy Secretary-General of the PCA, as Registrar, and Ms. Anne Joyce, Deputy General Counsel, as Secretary, to the Tribunal.

50. On 30 November 2001, Ireland applied to the Tribunal to amend the relief it had requested in paragraph 50 of its Statement of Claim to embrace information the existence of which it was not previously aware. By letter of 7 December 2001, the United Kingdom stated that it would have no objection in principle to Ireland so extending its claim without prejudice to any question of jurisdiction or admissibility which the United Kingdom might wish to raise in due course. However, the United Kingdom contended that the manner in which Ireland had applied to amend the relief sought was "inadequate."

51. A preliminary meeting of the Tribunal with the Parties was held in London on 8 December 2001. The Parties were represented by Ms. Christina Loughlin, Deputy Agent for Ireland, and Mr. Michael Wood, and by counsel, with other Party representatives, the Registrar, and the Secretary also present.

52. At the meeting, the Party-appointed arbitrators first declared that each shared and had shared chambers with counsel appearing for both Parties, but that each believed that this fact did not constitute grounds for recusal. The Parties agreed, and had no objection.

53. The Tribunal then considered issues raised by a draft of the Rules of Procedure ("the Rules"), proposed by the Parties in accordance with Article

32(2) of the OSPAR Convention, as an alternative to the procedures outlined in Article 32(4) to (10).

54. The Tribunal also set a timetable for submissions and hearings, with Ireland's Memorial to be submitted on 8 March, the United Kingdom's Counter-Memorial on 7 June, Ireland's Reply on 19 July, and the United Kingdom's Rejoinder on 30 August 2002. It was conditionally agreed that hearings would be at The Hague during the week of 21 October 2002.

55. The Tribunal also gave leave to Ireland to amend its Statement of Claim by 15 December 2001. These amended claims were filed and served in proper form over the period late December 2001 to early January 2002.

56. Acting under Article 32(6)(b), on 12 December 2001, the Tribunal transmitted proposed Rules to the Parties for comments. Ireland had no comments. The United Kingdom proposed several changes, which were accepted by Ireland. The final text of the Rules was adopted by the Tribunal in its *Decision No.1* of 21 February 2002.

57. The Parties filed their respective written pleadings (with statements and other documents as annexes) within the agreed time limits noted in paragraph 54 above.

58. In addition to documentary annexes, Ireland filed two successive reports by Mr. Gordon MacKerron. The United Kingdom filed successive reports by Dr. Geoffrey Varley and witness statements by Jeremy Rycroft, and one report by Mr. David Wadsworth.

59. By a joint letter of 4 October 2002, the Parties addressed several agreed procedural matters, including requirements for confidentiality and a decision that (apart from confidential matters) the hearings should be open to the public and transcripts publicly available.

60. The Parties disagreed on the sequencing of argument and examination of witnesses. Ireland requested that each side should in turn present its entire case (including witnesses). The United Kingdom requested opening arguments to be followed by the examination of all witnesses. In separate letters dated 7 October 2002, Ireland argued that its approach reflected the traditional way in which inter-State proceedings are conducted and would assist the Tribunal in forming a view of the issues as a whole, and the United Kingdom argued that bifurcation of the hearing would facilitate the United Kingdom's cross-examination of Ireland's witness and would allow for the joinder of arguments at an earlier stage of the proceeding.

61. As a separate issue, in its letter dated 4 October 2002, Ireland requested the Tribunal to make arrangements for access by its independent counsel to the information redacted from the PA and ADL Reports. The United Kingdom replied on 8 October 2002 that this matter would best be addressed at the hearing.

62. In its letter of 8 October 2002, the United Kingdom also indicated that it might wish to refer to certain information contained in a Memorial

submitted by Ireland in connection with parallel proceedings against the United Kingdom under Annex VII to the United Nations Convention on the Law of the Sea ("UNCLOS Annex VII Tribunal").

63. On 9 October 2002, these several issues were taken up in a telephone conference with the Chairman and the Agents, and counsel. The Chairman noted with approval the agreed issues advised in the Parties' joint letter of 4 October 2002. Further, it was agreed that the Parties would jointly request the UNCLOS Annex VII Tribunal to permit the disclosure in the OSPAR proceedings of material from Ireland's Memorial. This consent was later forthcoming.

64. The issue of access by counsel to the information redacted from the PA and ADL Reports was also discussed. Ireland requested that the issue be resolved before the hearing to allow Ireland sufficient time to prepare its case. The United Kingdom indicated that it was not necessarily opposed to such a review, but contended that the procedure envisioned in Article 14(4) of the Rules required one of the Parties first to tender the material. The United Kingdom also noted that there were a variety of ways of limiting disclosure of the information, including confining it to the Tribunal.

65. On 12 October 2002, the Tribunal issued its *Decision No. 2 – Conduct of the Hearings and Access to Unredacted Versions of the PA and ADL Reports*, which directed that the hearings would be conducted over the course of eight sessions of approximately 3 hours each, between 21 and 25 October. Ireland would present its entire case (including witnesses) in the first three sessions, the United Kingdom over the following three. Each side would have one session for closing submissions.

66. Subject to several conditions, *Decision No. 2* also provided for access to the unredacted PA and ADL Reports by the Tribunal, and by independent counsel for Ireland upon them signing confidentiality undertakings. Further conditions were that counsel's access would be solely at the PCA, with no copies to be made, and that Ireland could apply to the Tribunal for permission to make the redacted material available to its other counsel and witnesses.

67. By letter dated 14 October 2002, Ireland applied for permission to make the unredacted material available to Mr. Rory Brady, the Attorney General of Ireland (who appeared as counsel for Ireland), and Mr. Gordon MacKerron.

68. By letter dated 17 October 2002, the United Kingdom proposed certain additional security arrangements for examination of the unredacted PA and ADL Reports by independent counsel for Ireland, and requested the Agent for Ireland to confirm the United Kingdom's understanding that the confidentiality under takings provided by such independent counsel "are given also to the United Kingdom and to BNFL, and are given with the agreement of Ireland."

69. By letter dated 18 October 2002, Ireland confirmed that the confidentiality undertakings were given with the agreement of Ireland and

could be taken as undertakings to the United Kingdom as well as to the Tribunal. Ireland noted that BNFL was "not a Party to these proceedings and the documents in question are the property of the United Kingdom Government and not of BNFL." With respect to the security arrangements proposed by the United Kingdom, Ireland objected to the United Kingdom's request that Ireland's independent counsel not be permitted to make any copy or note of the excised data.

70. On 18 October 2002, the eve of the hearing, the Tribunal issued its *Decision No.3 – Procedures for Access to Unredacted Versions of the PA and ADL Reports*, which provides:

> 1. The Arbitral Tribunal acknowledges receipt of the documents tendered by the United Kingdom pursuant to paragraph 4 of its Decision No. 2 of 12 October 2002, and takes note of the letters from the United Kingdom and Ireland of 17 October 2002 and 18 October 2002, respectively.
>
> 2. In its letter, the United Kingdom requested confirmation from Ireland that it agrees to the confidentiality undertakings by independent counsel, and that such undertakings extend to the United Kingdom and to BNFL. The Arbitral Tribunal notes Ireland's statement in its letter that it agrees to the undertakings and that such undertakings extend to the United Kingdom as well as to the Tribunal. The Arbitral Tribunal further notes Ireland's agreement to abide by a Tribunal decision of confidentiality with respect to BNFL. The Tribunal notes that the undertakings of confidentiality submitted by independent counsel are general and hence avail all those whose confidential information is made available thereunder.
>
> 3. Independent counsel for Ireland may take notes during the course of its review of the above documents and may retain those notes for the duration of the hearing. However, no copies of such notes will be made, and the notes and their substance will be subject to the same confidentiality restrictions as those imposed on the unredacted copies of the PA and ADL reports. Any notes taken will be returned to the Secretary of the Tribunal at the end of the hearing and will be destroyed.

71. Prior to the opening of the hearings on Monday 21 October 2002, Ireland modified its original request concerning access to the unredacted PA and ADL Reports to exclude the Attorney General. The Agents for Ireland and the United Kingdom briefly presented arguments in closed session of the Tribunal for and against extending such access to Mr. MacKerron.

72. The Tribunal on 21 October 2002 issued its *Decision No. 4 – Access for Mr. MacKerron to Unredacted Versions of the PA and ADL Reports*, which provides:

> With respect to Ireland's application under Decision No. 2, the Tribunal does not at this stage order access to the unredacted versions of the PA and ADL reports to be given to Mr. MacKerron. If it should develop in the course of the proceeding that this presents difficulties for the Tribunal to reach a decision, it will reconsider this matter on its own initiative.

73. The hearings in the Small Court Room at the Peace Palace in The Hague ran over extended sessions from the morning of 21 to the afternoon of 25 October 2002. The Tribunal was addressed by the Agents for the Parties and by counsel as follows:

For Ireland:

Mr. Rory Brady (Attorney General)
Mr. Eoghan Fitzsimons (Senior Counsel)
Professor Philippe Sands (Counsel).

For the United Kingdom:

Dr. Richard Plender, QC (Counsel)
Mr. Daniel Bethlehem (Counsel)
Mr. Samuel Wordsworth (Counsel).

74. The following witnesses were also called and questioned by the Parties:

For Ireland:

Mr. Gordon MacKerron.

For the United Kingdom:

Dr. Geoffrey Varley
Mr. Jeremy Rycroft
Mr. David Wadsworth.

75. On 24 October 2002, the Tribunal met with Agents and counsel in chambers to consider procedural matters. After a further bench conference on that day, it was agreed that the final submissions on 24 and 25 October would be focused on the issues concerning Article 9(2) and 9(1) of the OSPAR Convention. Further, it was agreed that, if the Tribunal were to uphold any of the United Kingdom's objections, its award would be final, and no further hearings would be necessary. Alternatively, if the Tribunal were to issue an award rejecting the United Kingdom objections, a further hearing on the issues of confidentiality of the redacted information would be held (without further written submissions being filed).

76. On 24 January 2003, the Tribunal issued its *Decision No. 5 – Tribunal Request for Party Views* in which it requested the views of the Parties on an aspect of Article 9(2) that had not been addressed in the submissions:

> The third category of Article 9(2) of the OSPAR Convention refers to 'any available information ... on activities or measures introduced in accordance with the Convention'. In their submissions, the Parties did not examine the potential relevance, if any, of this category of Article 9(2) to the question of the scope of Article 9. Without prejudice to its final decision on this matter, the Tribunal would appreciate the views of the Parties on this question ....

The Parties submitted their responses to this question within the time limits set by the Tribunal.

77. With the concurrence of the Parties, transcripts of the oral hearings (with the exception of a brief closed session wherein parts of the redacted information were discussed) as well as the filed pleadings, the Rules of

Procedure, and five procedural Decisions, have been made available at the PCA website: www.pca-cpa.org.

VI. THE TRIBUNAL'S FINDINGS

78. For the reasons set out below, the Tribunal:

(i) by unanimous decision rejects the United Kingdom's request that the Tribunal find that it lacks jurisdiction over the dispute;

(ii) by unanimous decision rejects the United Kingdom's request that Ireland's claims are inadmissible;

(iii) by majority decision rejects the United Kingdom's submission that the implementation of Article 9(1) is assigned exclusively to the competent authorities in the United Kingdom and not to a tribunal established under the OSPAR Convention;

(iv) by majority decision finds that Ireland's claim for information does not fall within Article 9(2) of the OSPAR Convention; and

(v) by majority decision finds that as a consequence, Ireland's claim – that the United Kingdom has breached its obligations under Article 9 of the OSPAR Convention, by refusing, on the basis of its understanding of the requirements of Article 9(3)(d), to make available information – does not arise.

VII. APPLICABLE LAW

79. This part of the Tribunal's decision is supported by a majority comprising Professor Reisman and Lord Mustill.

1. INTERPRETATION

80. The OSPAR Convention has two authentic languages and the United Kingdom made reference to the French text of the OSPAR Convention for clarification of certain provisions. However, neither Party has alleged a discrepancy between the English and French texts for the current dispute.

81. The Parties agree that the OSPAR Convention governs the arbitration. Although the United Kingdom is Party to the Vienna Convention on the Law of Treaties ("Vienna Convention"),[52] Ireland is not, but, nonetheless, has relied upon its interpretation provisions.[53] The Parties also are agreed that the interpretation provisions of the Vienna Convention govern the construction of the OSPAR Convention.[54]

82. Articles 31 and 32 of the Vienna Convention are relevant:

Article 31 – General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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[52] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

[53] Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 23-24.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 – Supplementary means of interpretation

1. Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

83. As set out in paragraph 11 above, Article 32(6)(a) of the OSPAR Convention provides that "[t]he arbitral tribunal shall decide according to the rules of international law and, in particular, those of the OSPAR Convention." [55] In dealing with general obligations, Article 2 of the OSPAR Convention provides in section 2(1)(a) that all possible steps shall be taken, "in accordance with the provisions of the Convention."

84. It should go without saying that the first duty of the Tribunal is to apply the OSPAR Convention. An international tribunal, such as this Tribunal, will also apply customary international law and general principles unless and to the extent that the Parties have created a *lex specialis*. Even then, it must defer to a relevant *jus cogens* with which the Parties' *lex specialis* may be inconsistent.

85. Ireland's submission is of a different order, namely the applicability of other conventional international law. The absence of an additional phrase in Article 2 of the OSPAR Convention (set out in para. 3 above) on the order of "and in accordance with international law" does not mean that the OSPAR Convention intended to discharge the Parties to it *inter se* from other obligations that they may have assumed under other international instruments

[55] Identical language is repeated in Article 19 of the Rules of Procedure for the OSPAR Tribunal.

or under general international law. However, it does mean that the competence of a tribunal established under the OSPAR Convention was not intended to extend to obligations the Parties might have under other instruments (unless, of course, parts of the OSPAR Convention included a direct *renvoi* to such other instruments). Interpreting Article 32(6)(a) otherwise would transform it into an unqualified and comprehensive jurisdictional regime, in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal established under the OSPAR Convention. Here, there is no indication that the Parties to the OSPAR Convention have, in their individual capacities, submitted themselves to such a comprehensive jurisdictional regime with respect to any other international tribunal. Nor is it reasonable to suppose that they would have accepted such a jurisdictional regime through the vehicle of the OSPAR Convention.

86. The Tribunal's interpretation is reinforced by the explicit reference in Article 9(3) of the OSPAR Convention to "applicable international regulations". The explicit incorporation of other regulations in Article 9(3) imports that, when this was not done for other provisions of the OSPAR Convention, there was no implied intention to extend the competence of the Tribunal to other parts of international conventional law.

2. THE SINTRA MINISTERIAL STATEMENT

87. Beyond the OSPAR Convention, Ireland relied in support of its claims upon the Sintra Ministerial Statement of 1998,[56] where the Ministers agreed:

> to prevent pollution of the maritime area from ionizing radiation through progressive and substantial reductions of discharges, emissions and losses of radioactive substances, with the ultimate aim of concentrations in the environment near background values for naturally occurring radioactive substances and close to zero for artificial radioactive substances.

The Ministers also noted "the concerns expressed by a number of Contracting Parties about the recent increases in technetium discharges from Sellafield and their view that these discharges should cease." The Statement continued "that the United Kingdom Ministers have indicated that such concerns will be addressed in their forthcoming decisions concerning the discharge authorisations for Sellafield." The Statement welcomed

> The announcement of the UK Government that no new commercial contracts will be accepted for reprocessing spent fuel at Dounreay, with the result of future reductions in radioactive discharges in the maritime area.

88. Subsequently, the OSPAR Commission (with the United Kingdom abstaining) issued its Decisions 2000/1 and 2001/1 with respect to non-reprocessing of spent nuclear fuel. By operation of Article 13, the United Kingdom is not bound by the two Commission decisions. They cannot be considered as governing law for this arbitration.

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[56] *See* Ireland's Memorial, Annex 8. Also available from www ospar org.

89. However, for other reasons the Sintra Statement may have created binding obligations for the United Kingdom. The International Court of Justice ("ICJ") held in the *Nuclear Tests* case that unilateral declarations accompanied by an intention to be bound may create binding obligations:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made with the context of international negotiations, is binding.[57]

90. It is arguable that the United Kingdom's commitment with respect to reprocessing spent fuel at Dounreay announced in the Sintra Ministerial Statement may have created an international obligation on its part and in relation to the other states represented at the Ministerial meeting. But the question of whether the United Kingdom is under an obligation with respect to reprocessing spent fuel at Dounreay as a consequence of the announcement referred to in the Sintra Ministerial Statement is not relevant to the different question here of access to information about the activities at Sellafield.

91. The more general goals of the Sintra Ministerial Statement were plainly exhortatory. That matter aside, it appears to the Tribunal that the Sintra Ministerial Statement is not a decision or even a recommendation within the meaning of Article 13 of the OSPAR Convention.

92. Neither Article 9(1) nor Article 9(2) refers specifically to any other bodies of substantive conventional international law to which the Tribunal should have recourse.

3. "APPLICABLE INTERNATIONAL REGULATIONS"

93. Article 9(3)(d) states that Parties have the right to refuse a request for information that qualifies under Article 9(2) "in accordance with their national legal systems and applicable international regulations" where the information affects "commercial and industrial confidentiality, including intellectual property . . . ."

94. Ireland acknowledged that the relevant national legal system applicable to Article 9(3) was English law.

95. Further, the Parties agreed that the 1992 Regulations (*see* para. 26 above), which give effect to Directive 90/313 (*see* para. 30 above), apply as the legislative component of the relevant national legal system. However, the Parties did not agree on their interpretation.

96. The Parties disagreed, in a number of ways, as to the reference of "applicable international regulations" in Article 9(3). Ireland contended that

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[57] *Case Concerning Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, 1974 ICJ Rep. 253, at p. 266, para. 43.

"applicable international regulations" means "international law and practice".[58] The United Kingdom proposed a strict textual interpretation and submitted that there are no "applicable international regulations" for Article 9(3)(d) of the OSPAR Convention other than Directive 90/313, which was implemented in UK law.

97. On its broader submission, Ireland relied upon the Rio Declaration,[59] in particular Principle 10, and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the "Aarhus Convention"), which entered into force on 30 October 2001.[60] The United Kingdom replied that the Rio Declaration was not a treaty and that the Aarhus Convention has been ratified by neither Ireland nor the United Kingdom.

98. In its Reply, Ireland submitted that "'regulations' include all the instruments relating to the environment and access to information referred to in detail in Ireland's Memorial...", and that such instruments are to be interpreted in light of "the evolving international law and practice on access to environmental information."[61]

99. A jurisdictional clause may incorporate international law *in statu nascendi*. For example, the Special Agreement between Libya and Tunisia of 10 June 1977, submitting to the ICJ their continental shelf boundary dispute, incorporated as applicable law international maritime norms that had not yet become *lex lata*. Article 1 provided that:

> the Court shall take its decision according to equitable principles, and the relevant circumstances which characterize the area, as well as the new accepted trends in the Third Conference on the Law of the Sea.[62]

When the Parties have so empowered an international arbitral tribunal, it may apply norms that are not *lex lata*, if, in the tribunal's judgment, the norms have been accepted and are soon likely to become part of the international *corpus juris*. But the arbitral tribunal then applies them because of the Parties' instructions, not because they are "almost" law.

100. As long as it is not inconsistent with *jus cogens*, Parties may also instruct a tribunal to apply a *lex specialis* that is not part of general international law at the time. But the OSPAR Convention does not incorporate such a reference. Without such an authorization, a tribunal established under the OSPAR Convention can not go beyond existing law. This is not to say that a tribunal cannot apply customary international law of a recent vintage, but that it must in fact be customary international law.

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[58] Ireland's Memorial, para. 117.

[59] Declaration of the UN Conference on Environment and Development, 31 ILM 874 (1992).

[60] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 38 ILM 517 (1999).

[61] Ireland's Reply, para. 42.

[62] *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, 1982 ICJ Rep. 18, at p. 23.

101. Although the issue does not arise, the Tribunal agrees with Ireland's proposal to "draw on current international law and practice in considering whether a 'commercial confidentiality' exception to a request for information may be invoked," but only insofar as such law and practice are relevant and hence admissible under Article 31 (3)(b) and (c) of the Vienna Convention. However, the Tribunal has not been authorized to apply "evolving international law and practice" and cannot do so. In this regard, the Tribunal would note that the ICJ in its decision in the *Gabcíkovo-Nagymaros* case, was not, as Ireland argued,[63] proposing that it – and arguably other international tribunals – had an inherent authority to apply law *in statu nascendi*. The ICJ said:

> new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.[64]

102. The issue here is one of interpretation in good faith, as required by Article 31(1) of the Vienna Convention, if not by an essential ingredient of law itself. A treaty is a solemn undertaking and States Parties are entitled to have applied to them and to their peoples that to which they have agreed and not things to which they have not agreed.

103. Lest it produce anachronistic results that are inconsistent with current international law, a tribunal must certainly engage in *actualisation* or contemporization when construing an international instrument that was concluded in an earlier period.[65] Oppenheim, after restating the so-called law of inter-temporality (i.e., that an instrument is to be interpreted in the light of the general rules of international law in force at the time of its conclusion), adds the qualification that "in some respects the interpretation of a treaty's provisions cannot be divorced from developments in the law subsequent to its adoption."[66] But the reference in the Court's *dictum* and the doctrinal statement in Oppenheim based upon it is to developments in *law*. Wholly apart from the question of the need for actualization of a treaty made scarcely ten years earlier, the Court's reference in *Gabcíkovo-Nagymaros* is to new *law* "in a great number of *instruments*" [italics supplied] and not material that has not yet become law. As stated, a tribunal must also adjust application of a treaty insofar as one of its provisions proves inconsistent with a *jus cogens* that subsequently emerged. The present case does not raise questions of *jus cogens*.

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[63] *See* Ireland's Reply, para. 42.

[64] *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, 1997 ICJ Rep., at p. 7, para. 140.

[65] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep., at p. 3.

[66] OPPENHEIM 'S INTERNATIONAL LAW, NINTH EDITION, at 1281-1282 (Sir Robert Jennings and Sir Arthur Watts eds., Longman, 1996).

104. For these reasons, the Tribunal cannot accept Ireland's proposal that the Aarhus Convention or that "draft proposals for a new EC Directive" be applied.[67]

105. Nonetheless, the Tribunal may apply, where appropriate, other extant international agreements insofar as they are admissible for purposes of interpretation under Article 31 of the Vienna Convention.

VIII. FINDINGS WITH RESPECT TO ARTICLE 9(1)

1. THE PARTIES' ARGUMENTS

106. It is to be recalled that Article 9(1) provides:

> The Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months.

107. As noted in Part IV above, in its Counter-Memorial, the United Kingdom challenged the jurisdiction of the Tribunal and the admissibility of Ireland's claims:

> Article 9 of the OSPAR Convention does not establish a direct right to receive information. Rather, it requires Contracting Parties to establish a domestic framework for the disclosure of information. This the United Kingdom has done.[68]

The United Kingdom contended that Article 9(1) of the OSPAR Convention only requires Contracting Parties to "ensure that their competent authorities are required to make available the information described in Article 9(2)," and that the provision does not create a direct obligation to supply particular information. Hence, the only cause of action for a breach of Article 9 would be a failure to provide a domestic regulatory framework dealing with the disclosure of information.[69]

108. The United Kingdom also submitted that the OSPAR Convention is primarily concerned with securing adoption by Parties of programs and measures to prevent and eliminate pollution and protect the maritime environment and that once a State has done that, in accord with the OSPAR Convention, it has discharged its treaty obligations.[70]

109. In addition to its textual analysis, the United Kingdom looked to the *travaux préparatories* which, it contended, show that Article 9(1) derives from Article 3(1) of Directive 90/313 and that the wording in the OSPAR Convention was amended in order to secure conformity with that directive.[71] The United Kingdom emphasized that, under Article 249 of the EC Treaty, a

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[67] *See* Ireland's Reply, para. 42.
[68] United Kingdom's Counter-Memorial, para. 1.4.
[69] *Id.*, para. 3.4.
[70] *Id.*, paras. 3.8-3.9.
[71] *Id.*, para. 3.9.

"Directive" is a term of art, meaning a measure which "shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."[72] The United Kingdom contended that, by enacting the 1992 Regulations, it had taken the legislative or administrative measures required by the OSPAR Convention, and had thereby fulfilled all of its requirements under the OSPAR Convention. It must follow that Ireland had no cause of action.[73]

110. In its Reply, Ireland submitted that Article 9(1) obliged the United Kingdom to ensure that its competent authorities make Article 9(2) information available to Ireland and that, in this instance, the competent authority is the United Kingdom Government itself.[74] In answer to the contention that the only forum in which Ireland could bring its claim with respect to non-performance under Article 9(1) would be a domestic forum, Ireland noted that the concession by the United Kingdom that Ireland would be entitled to complain to the European Commission or the European Court of Justice ("ECJ") confirmed that such a violation of the OSPAR Convention is actionable at the international level. Moreover, Ireland contrasted Article 4 of Directive 90/313, from which Directive Article 9(1) was drawn, which specifically directs a person who considers that his request has been unreasonably refused to seek judicial or administrative review in accordance with the relevant national legal system, with Article 9(1), which had no such limitations on recourse to national decision makers.[75]

111. Ireland further contended that the obligation of Contracting Parties to "ensure that their competent authorities are required to make available" certain information, this provision constitutes an "obligation of result," rather than an obligation, as the United Kingdom submitted, "to provide for a domestic regulatory framework dealing with the disclosure of information."[76] Ireland further argued that its case was not "premised on the basis that it has a direct right to the information under Article 9(1)."[77]

112. Ireland also asserted that

– Ireland is a "natural or legal person" within the meaning of Article 9(1) of the OSPAR Convention,[78] and

– The entity to which Ireland's request was directed, DETR, and its successor entity, DEFRA, are "competent authorities," also within the meaning of Article 9(1).[79]

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[72] *Id.*, para. 3.11.
[73] *Id.*, paras. 3.11-3.13.
[74] Ireland's Reply, para. 7.
[75] *Id.*, paras. 8-9.
[76] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 39.
[77] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 38.
[78] *Ibid.*
[79] Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 38-39; Day 4 Proceedings, pp. 14-23.

113. With respect to the possibility of recourse to domestic courts, Ireland stated:

> Article 9 of the OSPAR Convention is an unincorporated convention; it is not part of English law and it cannot be invoked before the English courts.[80]

Regarding possible alternative legal actions involving the Commission of the European Communities or the ECJ, Ireland argued that:

- While such approaches may be available to Ireland, it is up to Ireland to decide in which forum to seek a remedy,[81] and

- The United Kingdom's recognition of a potential cause of action before the ECJ under the freedom of information provisions of Directive 90/313 undercuts the United Kingdom's contention that Ireland has no cause of action before the Tribunal under the nearly identical language of Article 9 of the OSPAR Convention.[82]

114. The United Kingdom argued in answer that the requirement to make information available "to any natural or legal person"

> . . . makes no sense if the obligation of the Contracting Party is to make available specific information on request. This is a treaty. A natural or legal person other than an OSPAR Party has no standing under the Convention.[83]

115. The United Kingdom also submitted that its interpretation of Article 9(1) is dictated by the need to give effect to all the words in the provision; is consistent with the language and structure of Article 9(3); and also is consistent with the object and purpose of the OSPAR Convention, namely "the adoption by Contracting Parties of programmes and measures to prevent and eliminate pollution and protect the maritime area."[84]

116. In its Rejoinder, the United Kingdom distinguished between Ireland's right to receive information under domestic law and its right under international law.[85] According to the United Kingdom, Ireland is entitled to repair to this Tribunal to secure United Kingdom compliance with its obligations under Article 9 to ensure that its competent authority shall be required to make available the kind of information found in Article 9(2). But if the United Kingdom legislation (and, presumably, its administrative implementation) is sufficient, under the OSPAR Convention, a grievance of Ireland with respect to a particular decision must be resolved at the national level.[86]

117. The United Kingdom also revisited its reference to the *travaux préparatories* (noted in para. 109 above), noting the relationship between the drafting of Article 9(1) and (2) and the language of Directive 90/313 to argue

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[80] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 41.
[81] Counsel for Ireland, Transcript, Day 4 Proceedings, pp. 18-24.
[82] Ireland's Reply, paras. 8-9; Counsel for Ireland, Transcript, Day 4 Proceedings, pp. 21-22.
[83] Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 76.
[84] *Id.*, pp. 76-77
[85] United Kingdom's Rejoinder, para. 12.
[86] *Id.*, para. 14.

that, as a matter of both the plain language of the Directive as well as EU law and practice, the Directive was clearly not intended to create a direct right of access to information by EU Member States. In the United Kingdom's view, it followed from these circumstances that the nearly identical formulation adopted in Article 9 signalled the Contracting Parties' intention to create a similarly circumscribed obligation, namely one limited to putting in place the required domestic legislation.[87]

2. THE TRIBUNAL'S DECISION WITH RESPECT TO JURISDICTION UNDER ARTICLE 9(1)

118. The United Kingdom has characterized its objection to Ireland's claim under Article 9(1) as going to the lack of jurisdiction of the Tribunal and/or being inadmissible. However, in the unanimous view of the Tribunal the question posed by Ireland with respect to Article 9(1) is not one of jurisdiction or admissibility, but one of substance, namely what is the purport of Article 9(1) under the facts of this case.

119. The remaining holding with respect to Article 9(1) is supported by a majority comprising Dr. Griffith and Lord Mustill.

120. As noted above (para. 109), Regulation 3 of the 1992 Regulations giving effect to Directive 90/313 is relied upon by the United Kingdom as constituting its compliance under domestic law with the requirements of Article 9(1).[88] The United Kingdom contends that the mandated regime under domestic law is not required to be expressed as being pursuant to the OSPAR Convention obligation.[89] The Tribunal agrees that the standard may be satisfied in a form such as the 1992 Regulations, which are otherwise justified under Directive 90/313.

121. Although, as asserted by the United Kingdom and not contested by Ireland, it would be a proper subject for this Tribunal's jurisdiction, it is no part of Ireland's claims in this dispute that there are defects within the domestic regime to the extent that the 1992 Regulations fall below the standards required by Article 9(1).

122. For the purpose of this issue of construction of Article 9(1), the Tribunal assumes that the redacted information sought by Ireland is of a sort required to be disclosed.

123. The issue remains one of interpretation of public international law, namely whether, as the United Kingdom contends, the obligation of a Contracting Party under Article 9(1) is completely discharged by putting in place an appropriate domestic regulatory framework so that disputes about specific applications of the obligations under Article 9 are to be exclusively determined within the municipal law of the Contracting Party. Should this be the case, the appropriate forum for Ireland with respect to its claims that

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[87] *Id.*, para. 13.
[88] *See* United Kingdom's Counter-Memorial, para. 3.12.
[89] Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 85.

information to which it was entitled under the OSPAR Convention was improperly withheld will be found in the United Kingdom municipal system.

124. If Article 9(1) is to be interpreted as maintained by Ireland, then this Tribunal may exercise its jurisdiction to consider the merits of the refusal of the United Kingdom's competent authorities to disclose information contained in the PA and ADL Reports, provided that such information falls within the definition of Article 9(2) of the OSPAR Convention.

125. Consistently with Article 31 of the Vienna Convention, the Parties have focused their arguments on the treaty text to determine the meaning of the Article 9(1) obligation.[90] The Tribunal applies this approach to examine the terms of Article 9(1) in the context of the entire Article 9 and the OSPAR Convention.

126. The Tribunal first examines the meaning of the obligation in the context of the OSPAR Convention regime, taking into account its objects and purposes and also the fact that a dispute settlement clause is incorporated by Article 32. In confirmation of this analysis the Tribunal also is guided by Article 32(6)(a) to analyze the relevant rules of international law that inform the meaning of the obligation of Article 9(1), and in particular (the now superseded) Directive 90/313.

127. Article 9 is an access to information provision that must be taken to articulate the Contracting Parties' intentions as expressed within the framework of the general objectives and the particular other provisions of the OSPAR Convention. As much as do the other operative articles of the OSPAR Convention, the disputes clause, Article 32, applies Article 9 as an enforceable obligation in its particular subject matter. Its provisions for disclosure of defined information must be taken to have an intended bite beyond being an expression of aspirational objectives for the domestic laws of the Contracting Parties.

128. The main purpose of the OSPAR Convention is the protection of the marine environment and the elimination of the marine pollution in the North-East Atlantic. The objectives of the OSPAR Convention are set out in its Preamble and include, *inter alia*, obligations

- to protect the marine and other environments;
- to prevent and eliminate pollution;
- to prevent and punish infringements;
- to assist a Contracting Party;
- to conduct research; and
- to prevent dumping.

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[90] *See, e.g.*, United Kingdom's Counter-Memorial, paras. 3.1-3.3; United Kingdom's Rejoinder, para. 14; Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 23-24.

129. For the achievement of these aims the framers of the OSPAR Convention have carefully applied differential language to provide for stipulated levels of engagement of treaty obligation to achieve these objectives. There is a cascading standard of expression providing for the particular obligations imposed on a Contracting Party. For example, there are mandatory provisions that provide for Contracting Parties:

- to take some act ("shall apply", "shall include", "shall undertake", "shall co-operate" or "shall keep");

- actively to work towards an objective ("take all possible steps", "implement programs", "carry out programs");

- to deal with issues of planning for the objective ("establish programs", "adopt", "define", "draw up", "develop", "take account of"); and

- to take measures ("take", "adopt", "plan", "apply", "introduce", "prescribe", "take into account").

At a lesser level of engagement, other provisions provide for information to be dealt with ("collect", "access information") or that systems be set up ("provide for", "establish").

130. When read as a whole (including the Annexes), it is plain to the Tribunal that the entire text discloses a carefully crafted hierarchy of obligations or engagement to achieve the disparate objectives of the OSPAR Convention. Those who framed the OSPAR Convention expressed themselves in carefully chosen, rather than in loose and general, terms. They plainly identified matters for mandatory obligation for action by Contracting Parties, as in

- Article 5 ("The Contracting Party shall take");

- Article 6 ("The Contracting Party shall ... undertake");

- Article 7 ("The Contracting Party shall co-operate ..."); and

- Article 8 ("The Contracting Party shall establish ...", "The Contracting Party shall have regard ...").

131. Further, requirements for Contracting Parties to ensure a result are not confined to Article 9(1). Importantly, the general obligations expressed in Article 8(2) and embraced under Article 2(3)(b)(ii) are that the Contracting Parties shall ". . . ensure the application of best available techniques and best environmental practice ...." Similarly, Article 4(1) of Annex II dealing with dumping requires that the Contracting Parties shall "ensure" the required result and, under Article 10(1), shall "ensure compliance" by vessels or aircraft. Likewise, Article 5(1) of Annex III demands that the Contracting Parties shall "ensure" that their competent authorities implement the relevant applicable decisions, recommendations, and all other agreements adopted under the OSPAR Convention.

132. The issue for determination is whether the requirement in Article 9(1) "to ensure" the obligated result, mandates a result rather than merely a municipal law system directed to obtain the result.

133. In the context of the language used within Article 9, it remains for the Tribunal to discern the extent of the comprised obligation. Whatever its particular replication of Directive 90/313, what does appear plain to the Tribunal is that the obligation expressed in Article 9(1) by the requirement that a Contracting Party "shall ensure" the stipulated result is a reflection of a deliberate rather than a lax choice of vocabulary. It illustrates the application of a chosen (and strong) level of expression, deftly applied by the drafters to the particular and, to them, important subject matter of disclosure of information to any persons, whether nationals or not, who request it. It is expressed at the higher level of obligation, and when applying it in the complex of the provisions on disclosure of information embraced by the scheme of Article 9, the Tribunal sees no reason to read its particular language in a way that is discordant with the structure and use of language in the entire OSPAR Convention. The search is for conformity of meaning within the OSPAR Convention.

134. On that approach, the Tribunal finds that the obligation is to be construed as expressed at the mandatory end of the scale. The applied requirement of Article 9(1) is read by the Tribunal as imposing an obligation upon the United Kingdom, as a Contracting Party, to ensure something, namely that its competent authorities "are required to make available the information described in paragraph 2 ... to any natural legal [sic] person, in response to any reasonable request."

135. It appears to the Tribunal that to accept the expression of the requirement "to ensure" a result as expressed at the lesser level of setting up a regime or system directed to obtain the stipulated result under the domestic law of the Contracting Party, as is contended by the United Kingdom, would be to apply an impermissible gloss that does not appear as part of the unconditional primary obligation under Article 9(1). In contrast, a limitation of this sort is expressly embraced in the scheme of Article 9(3) providing for exceptions of disclosure expressed by reference to criteria to be imposed by the Contracting Parties "in accordance with their national legal systems." The fact that Article 9(3) engages such a limitation by reference to domestic law forecloses the possibility that Article 9(1) silently and similarly limits the obligation upon a Contracting Party to that of putting in place a domestic legal regime providing for disclosure in compliance with the Article 9 obligations.

136. A further matter that militates in favor of this interpretation is the fact that Article 9(1) identifies the objective criteria that should be met when a request to provide information is received by the competent authorities of a Contracting State. Hence, compliance by a Contracting State with these criteria may itself become a separate subject matter of arbitration under Article 32.

137. For these reasons in this aspect it appears to the Tribunal that Article 9(1) is advisedly pitched at a level that imposes an obligation of result rather than merely to provide access to a domestic regime which is directed at obtaining the required result.

138. In adopting this construction the Tribunal gives full effect to the terms of Article 9(1), including particularly the requirement that as a Contracting Party the United Kingdom "shall ensure that their competent authorities are required to make available the information." The Tribunal applies, rather than excises, this clause as the defining part of the obligation.

139. The Tribunal derives further support for its mere textual analysis of Article 9(1) from the relevant rules of international and European Union law.

140. The Parties are in agreement on the origins of Article 9(1) as derived from, and closely following, the language of Directive 90/313.[91] As noted above, in support of its position the United Kingdom refers to the notion of a directive as defined in Article 249 of the EC Treaty as a measure which shall be "binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."[92] The United Kingdom submits that by adopting the language of the Directive, "the Contracting Parties to the OSPAR Convention evinced their intention to adopt the same approach",[93] namely that a State's only obligation is "to take such legislative or administrative measures as may be appropriate to achieve the stated objective."[94]

141. In considering these contentions the Tribunal first notes that the adoption of a similar or identical definition or term in international texts should be distinguished from the intention to bestow the same normative status upon both instruments. The complex of instruments whose wording was used by the drafters may include unilateral statements, position papers, declarations, recommendations, and the like. While the language of such sources might be instrumental to the extent that it allows one to trace and understand the origins of specific treaty terms, their normative value should not be attributed to similarly worded legal obligations imposed by that treaty. As the ITLOS has helpfully observed in its Order of 3 December 2001:

> [E]ven if the OSPAR Convention, the EC Treaty and the Euratom Treaty contain rights or obligations similar to or identical with the rights and obligations set out in [UNCLOS], the rights and obligations under those agreements have a separate existence from those under [UNCLOS].

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[91] United Kingdom's Counter-Memorial, para. 3.9. *See also* Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 24-25; Counsel for the United Kingdom, Transcript, Day 2 Proceedings, pp. 78-79; Counsel for Ireland, Transcript, Day 4 Proceedings, p. 21.

[92] *See* Article 249 of the Treaty Establishing the European Community ("EC Treaty"), 2002 OJ (C 325), as cited in the United Kingdom's Counter-Memorial, para. 3.11.

[93] United Kingdom's Counter-Memorial, para. 3.11.

[94] United Kingdom's Rejoinder, para. 13.

Further,

> [T]he application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.[95]

142. Each of the OSPAR Convention and Directive 90/313 is an independent legal source that establishes a distinct legal regime and provides for different legal remedies. The United Kingdom recognizes Ireland's right as an EU Member State to challenge the implementation of the Directive in the United Kingdom's domestic legal system before the ECJ.[96] Similarly, a Contracting Party to the OSPAR Convention, with its elaborate dispute settlement mechanism, should be able to question the implementation of a distinct legal obligation imposed by the OSPAR Convention in the arbitral forum, namely this designated Tribunal.[97]

143. Pursuant to Article 4 of Directive 90/313, legal action against a State in breach is to be pursued domestically. However, and in contrast, the OSPAR Convention contains a particular and self-contained dispute resolution mechanism in Article 32, in accordance with which this Tribunal acts. Article 9(1) does not provide for an exception to the OSPAR disputes clause by referring, for instance, to an exclusive municipal remedy, and is therefore as subject to review by an arbitral tribunal as any other provision of the OSPAR Convention. The similar language of the two legal instruments, as well as the fact that the 1992 Regulations are an implementing instrument for both Directive 90/313 and the OSPAR Convention, does not limit a Contracting Party's choice of a legal forum to only one of the two available, i.e. either the ECJ or an OSPAR tribunal. Nor, contrary to the United Kingdom's contention, does it suggest that the only cause of action available to Ireland is confined exclusively to those provided for by Directive 90/313 and implementing legislation. The primary purpose of employing the similar language is to create uniform and consistent legal standards in the field of the protection of the marine environment, and not to create precedence of one set of legal remedies over the other.

144. The proposed reading of Article 9(1) also is consistent with contemporary principles of state responsibility. A State is internationally responsible for the acts of its organs. On conventional principles, a State covenanting with other States to put in place a domestic framework and review mechanisms remains responsible to those other States for the adequacy of this framework and the conduct of its competent authorities who, in the exercise of their executive functions, engage the domestic system.

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[95] *Id.*, para. 51.

[96] United Kingdom's Counter-Memorial, paras. 3.13-3.15.

[97] In 2001 the ITLOS was confronted with a similar situation. In response to the jurisdictional objections raised by the United Kingdom, it remarked that "since the dispute before the Annex VII arbitral tribunal concerns the interpretation or application of the [UNCLOS] and no other agreement, only the dispute settlement procedures under the Convention are relevant to that dispute." *See The Mox Plant Case, supra* note 46, para. 52.

145. Amongst others, this submission is confirmed by Articles 4 and 5 of the International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts,[98] providing for rules of attribution of certain acts to States. On the international plane, acts of "competent authorities" are considered to be attributable to the State as long as such authorities fall within the notion of state organs or entities that are empowered to exercise elements of the governmental authority. As the ICJ stated in the *LaGrand* case, "the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be."[99]

146. It follows as an ordinary matter of obligation between States, that even where international law assigns competence to a national system, there is no exclusion of responsibility of a State for the inadequacy of such a national system or the failure of its competent authorities to act in a way prescribed by an international obligation or implementing legislation. Adopting a contrary approach would lead to the deferral of responsibility by States and the frustration of the international legal system.

147. In support of its interpretation of Article 9(1), Ireland invoked the *LaGrand* case, to contend that the ICJ found that Article 36(1)(b) of the Vienna Convention on Consular Relations[100] created an obligation of result, and that "the failure to provide consular access at the national level gave rise to a dispute over which the International Court of Justice had jurisdiction."[101] Although there are obvious differences in the direct and indirect references to the relevant competent authorities between Article 9(1) of the OSPAR Convention and Article 36(1)(b) of the Vienna Convention on Consular Relations, one Tribunal member (Dr. Griffith) finds some independent support in *LaGrand* for these conclusions. However, the Tribunal's position on the more direct issues of textual interpretation make it unnecessary to invoke such other matters of confirmatory support.

148. For these reasons the Tribunal rejects the contention of the United Kingdom based on Article 9(1), and determines that upon its proper construction Article 9(1) requires an outcome of result, namely that information falling within the meaning of Article 9(2) (and not excluded under Article 9(3)) is in fact disclosed in conformity with the Article 9 obligation imposed upon each Contracting Party.

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[98] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission, 53rd Session, Supp. No. 10, UN Doc. A/56/10, 44 (2001).

[99] *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, 1999 ICJ Rep. 9, at p. 16, para. 28.

[100] Vienna Convention on Consular Relations, 24 April 1963, 596 UNTS 261.

[101] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 43. Ireland also submitted that "the ICJ made it clear that its function was to review the merits of whether the United States had complied with obligations to ensure consular access to an individual in the United States, a German national." *Id.*, at p. 35.

IX. FINDINGS WITH RESPECT TO ARTICLE 9(2)

1. THE PARTIES' ARGUMENTS

149. In its Memorial, Ireland proposed a broad scope to Article 9(2), so as not to require a Party claiming information under Article 9(1) to demonstrate that the information sought relates directly to activities that adversely affect the maritime area. Ireland contended:

> Ireland submits that this is the wrong approach. The correct approach is to look at the information *as a whole*. The purpose of the PA and ADL Reports is to examine the justification of the MOX Plant. That Plant makes possible an activity – MOX Production – which will undoubtedly have an adverse impact on the maritime area covered by the OSPAR Convention. The omitted information relates closely to various important aspects of that activity, and contributed to the determination whether that activity should be permitted. It would be unduly restrictive to read Article 9(2) as referring only to *environmental* information about such an activity.[102]

Thus Ireland claimed that "every aspect of the omitted information [in the PA and ADL Reports] is covered by Article 9(2)."[103]

150. Ireland relied, for its proposed interpretation, on the broad definition of "environmental information" in the Aarhus Convention. That treaty, Ireland argued, is not a progressive development in the law concerning access to environmental information. Rather, the reference to "cost-benefit and other economic analyses and assumptions used in environmental decision-making" in Article 2(3) of the Aarhus Convention "makes clear that which was implicit" in the OSPAR Convention,[104] and should, Ireland submitted, be applied by virtue of Article 31(3)(c) of the Vienna Convention.[105] Ireland contended that this interpretation was applied by the ECJ in *Mecklenburg v. Kreis Pinneberg – Der Landrat ("Mecklenburg").*[106]

151. Ireland contended further that it is clear from the context in which the Reports were prepared – notably, that they were commissioned by United Kingdom Government departments of state with responsibilities for the environment, apparently to comply with Directive 90/313 and its implementing regulations – that they contain information which is appropriately labeled "environmental." Ireland argued that it

> does not dispute ... that the information relates to a commercial activity, the operation of the MOX plant .... But the question of whether the information has a commercial character is not dispositive of whether it falls within Article 9(2) .... It is self evident, we say, that the PA and ADL reports are information on activities or measures adversely affecting or likely to affect the maritime area of the Irish Sea.[107]

152. In response to the United Kingdom's argument that the information requested is not "directly and proximately related" to activities or measures

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[102] Ireland's Memorial, para. 98.
[103] *Id.*, at para. 99.
[104] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 52.
[105] Ireland's Memorial, para. 101.
[106] C-321/96, *Mecklenburg v. Kreis Pinneberg - Der Landrat*, [1999] 2 CMLR 418, 435.
[107] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 48.

adversely affecting or likely to affect the maritime area, Ireland argued that such a test is not part of Article 9(2), and that, in any event, "without the ADL report there would be no discharges from the MOX plant into the Irish Sea. It is hard to think how that report cannot even according to that test be direct and proximate."[108]

153. In its Counter-Memorial, the United Kingdom submitted that Ireland's contention "that all information relating to the production of MOX will be information that comes within the scope of Article 9(2)" does not address the relevant question.[109] According to the United Kingdom, that relevant question is not whether MOX production will affect the maritime area, because "all such information has been in the public domain for many years."[110] According to the United Kingdom, the information which is contemplated in Article 9(2) is "information on activities or measures adversely affecting or likely to affect the maritime area."[111] This narrower reading prevents the OSPAR Convention from being used to conduct "fishing expeditions."[112] Thus, the United Kingdom argued

> Article 9 of the OSPAR Convention cannot be used to secure disclosure of any and all information concerning undertakings some aspects of the operations of which may touch upon the state of the maritime area.[113]

The United Kingdom contended that, for the purpose of identifying information covered by Article 9, one must identify the relevant activity "adversely affecting or likely to affect" the maritime area to which the information must relate. "In the instant case, the relevant activity would be the discharging of radioactive elements from the MOX Plant into the maritime area," and not the MOX Plant per se, "which in many of its aspects has nothing whatsoever to do with the maritime area."[114]

154. The United Kingdom asserted that the OSPAR Convention is not a "freedom of information treaty," and if it "had been intended to secure disclosure of any and all information of whatever nature on an activity whose operations affected or potentially affected the state of the maritime area, clearer language would have been used."[115]

155. With respect to the definition (cited by Ireland) of "environmental information" in Article 2(3) of the Aarhus Convention, the United Kingdom stated that this treaty is not in force for either Ireland or the United Kingdom, nor have its provisions been adopted in an EC directive. Moreover, the United Kingdom argued, the language in the Aarhus Convention concerning economic information used in environmental decision making is "new" and is

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[108] *Id.*, p. 50.
[109] United Kingdom's Counter-Memorial, para. 4.2.
[110] *Id.*, para. 4.7.
[111] *Id.*, para. 4.3.
[112] *Ibid.*
[113] *Id.*, para. 4.4.
[114] Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 86.
[115] *Id.*, at p. 87.

perceived that way in a number of official documents published by the European Union and United Kingdom Government.

156. The United Kingdom argued that the *Mecklenburg* case is not on point, particularly because the ECJ in that case was interpreting language from a part of Directive 90/313 that does not have a precise equivalent in the OSPAR Convention.

157. In response to the question posed to the Parties by the Tribunal in *Decision No. 5*, Ireland stated that the words "activities and measures" in the third category of Article 9(2) confirm that the words in the second category of Article 9(2) are to be given a "broad meaning" and that "[t]he third category may therefore assist in the proper interpretation of the extent of the type of information envisaged by Article 9(2), including the scope of the first and second categories."[116] Ireland also submitted that the words

> 'activities or measures introduced in accordance with the Convention' implies that the second category includes (but is not limited to 'activities or measures not in accordance with the Convention.') [underlining in original]

Finally, Ireland submitted that the third category supported the view that "the drafters foresaw and provided for one State Party being entitled to make a request to another State Party under Article 9."[117]

158. In response to the question posed to the Parties by the Tribunal in *Decision No. 5*, the United Kingdom submitted that the third category of Article 9(2), "like the first category, forms part of the context to be taken into account in interpreting the second category" and that "there must be a direct relationship between the information, on the one hand, and the state of the maritime area (as defined in Article 1(a) of the OSPAR Convention), on the other."[118]

2. THE TRIBUNAL'S DECISION WITH RESPECT TO THE CLAIMS RELATING TO ARTICLE 9(2)

159. The United Kingdom has characterized its objection to Ireland's claim under Article 9(2) as going to the lack of jurisdiction of the Tribunal and/or being inadmissible. In the unanimous view of the Tribunal, however, the question posed by Ireland with respect to Article 9(2) is not one of jurisdiction or admissibility, but one of substance, viz. what is the purport of Article 9(2) under the facts of this case.

160. The remaining holding with respect to Article 9(2) is supported by a majority comprising Professor Reisman and Lord Mustill.

161. The Tribunal has not been requested to issue an advisory opinion as to the abstract meaning of Article 9(2) of the OSPAR Convention, but rather

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[116] Letter from the Agent for Ireland to the Secretary of the Tribunal (February 21, 2003), on file at the PCA.

[117] *Ibid.*

[118] Letter from the Agent for the United Kingdom to the Secretary of the Tribunal (February 21, 2003), on file at the PCA.

to apply the provision to a specific controversy about 14 categories of information redacted from the PA and ADL Reports. In its Memorial, Ireland identified those 14 categories as information relating to:

(A) Estimated annual production capacity of the MOX facility;

(B) Time taken to reach this capacity;

(C) Sales volumes;

(D) Probability of achieving higher sales volumes;

(E) Probability of being able to win contracts for recycling fuel in 'significant quantities';

(F) Estimated sales demand;

(G) Percentage of plutonium already on site;

(H) Maximum throughput figures;

(I) Life span of the MOX facility;

(J) Number of employees;

(K) Price of MOX fuel;

(L) Whether, and to what extent, there are firm contracts to purchase MOX from Sellafield;

(M) Arrangements for transport of plutonium to, and MOX from, Sellafield;

(N) Likely number of such transports.[119]

It will be recalled that in its Amended Statement of Claim, the first relief which Ireland sought was an order and declaration that the United Kingdom had breached its obligations under Article 9 of the OSPAR Convention "by refusing to make available information deleted from the PA Report and the ADL Report." Ireland's second prayer for relief was, in effect, for an order for the provision by the United Kingdom of those parts of the PA and ADL Reports that had been redacted or, contingently, those parts that had been redacted but that did not affect commercial confidentiality within the meaning of Article 9(3)(d). The specific issue before the Tribunal is whether the redacted portions of the PA and ADL Reports, viewed as categories, constitute "information" within the meaning of Article 9(2). The Tribunal distinguishes here between the categories of redaction and the content of those categories. A determination under Article 9(3)(d) would require a detailed examination of the *content* of the various categories of redaction. A determination under Article 9(2) requires only an examination of the

[119] Ireland's Memorial, para. 75. Ireland also provided more detailed lists of specific items deleted from the PA and ADL Reports in its Memorial Annexes 3 and 3 B, respectively.

categories of redaction, in order to determine whether they fall within the definition of "information" in Article 9(2).

162. As will be recalled, Article 9(2) provides:

> The information referred to in paragraph 1 of this Article is any available information in written, visual, aural or data-base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention.

163. Article 9(2), whose chapeau is "Access to Information," establishes the scope of information to which, subject to specific enumerated rights of refusal in Article 9(3), the obligation in Article 9(1) relates. The scope of the information in the provision is not environmental, in general, but, in keeping with the focus of the OSPAR Convention, "the state of the maritime area." It is manifest to the Tribunal that none of the above 14 categories in Ireland's list can plausibly be characterized as "information ... on the state of the maritime area." The Tribunal could, thus, rest its decision on the fact that none of the material in the 14 categories falls within the definition of "information" in Article 9(2).

164. In response to this, Ireland's submission of what might be called an interpretative theory of "inclusive causality" would overcome this difficulty. Ireland argued, it will be recalled,

> without the ADL report there would be no discharges from the MOX plant into the Irish Sea. It is hard to think how that report cannot even according to that test be direct and proximate.[120]

Under an interpretative theory of inclusive causality, anything, no matter how remote, which facilitated the performance of an activity is to be deemed part of that activity. Legislators and drafters of treaties may adopt a theory of inclusive causality. The question is whether the drafters of the OSPAR Convention did. Some parts of Article 9(2) are, indeed, quite expansive, but other parts make abundantly clear that while the drafters sought inclusiveness with respect to some aspects of the information covered by Article 9(2), they had no intention of adopting a theory of inclusive causality. The Tribunal now turns its attention to these matters.

165. Article 9(2) identifies three categories, within each of which "any available information" falls within the obligations of Article 9, unless that category has a restriction. The drafters' selection of the adjectives "any" and "available" in Article 9(2) is significant.

166. The adjective "available" indicates that the drafters were not imposing an obligation on a Contracting Party to gather and process information of a certain sort upon the request of any natural or legal person, but rather were limiting the obligation of the Contracting Parties under Article 9 to information which had already been gathered and was already available to them. This provision is thus similar, in effect, to Article 14(1) of the

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[120] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 50.

Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment of 1993,[121] which establishes access to information simply if it is "held by public authorities." In this respect, the obligation of Article 9(2) differs from obligations in certain national instruments, under which a claimant with standing may require that a government or its agency or instrumentality gather, process, and make available certain types of information.

167. The adjective "any" indicates that, unless set out explicitly within the three categories enumerated in Article 9(2), no selections or restrictions are implied. One such explicit class of restrictions is to be found in the rights of refusal to a request for information under the grounds specified in Article 9(3). Apart from exceptions, the insertion by the drafters of the adjective "any" requires an applier to interpret extensively *within* each of the three categories. Once a matter is found to fall within one of the categories of Article 9(2), the presumption is that it is within the scope of the OSPAR Convention. This mandate for an extensive construction of the provision is reinforced by the drafters' selection of the term "information."

168. Article 1 does not define "information" but it is clear that it is a broad and inclusive reference with respect to the state of the maritime area. The point of emphasis, however, is that it is "information" about the state of the maritime area. The three categories of "information ... on the state of the maritime area" in Article 9(2) are

> (i) "any available information" on "the state of the maritime area,"
>
> (ii) "any available information" on "activities or measures adversely affecting or likely to affect. . . the maritime area,"
>
> (iii)"any available information" on "activities or measures introduced in accordance with the Convention."

169. In their submissions to the Tribunal, both Parties focused attention on the second category of Article 9(2). In their responses to the Tribunal's *Decision No. 5* requesting their views on the third category, both Parties again indicated that the critical category for decision was the second. Accordingly, the Tribunal will direct its attention to this category, relying on the other categories, insofar as appropriate, for purposes of interpreting the second, as did the Parties in their responses.

170. It is clear that Article 9(2) is not a general freedom of information statute. The information here is restricted in a number of ways. First, as noted, it is restricted by the term "maritime area," which appears in the first and second categories of Article 9(2), and is given a specific definition in Article l(a) and l(b), which provide

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[121] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 21 June 1993, ETS 150.

> (a) 'Maritime area' means the internal waters and the territorial seas of the Contracting Parties, the sea beyond and adjacent to the territorial sea under the jurisdiction of the coastal state to the extent recognised by international law, and the high seas, including the bed of all those waters and its sub-soil, situated within the following limits:
>
> > (i) those parts of the Atlantic and Arctic Oceans and their dependent seas which lie north of 36° north latitude and between 42° west longitude and 51° east longitude, but excluding:
> >
> > > (1) the Baltic Sea and the Belts lying to the south and east of lines drawn from Hasenore Head to Gniben Point, from Korshage to Spodsbjerg and from Gilbjerg Head to Kullen,
> > >
> > > (2) the Mediterranean Sea and its dependent seas as far as the point of intersection of the parallel of 36° north latitude and the meridian of 5° 36' west longitude;
> >
> > (ii) that part of the Atlantic Ocean north of 59° north latitude and between 44° west longitude and 42° west longitude.
>
> (b) 'Internal waters' means the waters on the landward side of the baselines from which the breadth of the territorial sea is measured, extending the case of watercourses up to the freshwater limit.

As so defined, the area covered by the OSPAR Convention includes the internal waters and territorial seas of Ireland and the United Kingdom as well as the Irish Sea between them, but Article 1 does not indicate whether particular information is relevant to that maritime area.

171. Each of the second and third categories of Article 9(2) relates to "activities or measures." Neither of these terms is defined in Article 1 of the Convention, but it is clear from other parts of the OSPAR Convention (e.g., Article 2(1)(a)) that the term "measures" refers generically to regulatory initiatives by any part of the governmental apparatus of the Contracting Parties with respect to matters covered by the OSPAR Convention, while "activities" refers to the actions, whether emanating from or effected by governmental or non-governmental entities, that would be the object of the "measures."

172. In commenting on identical language in Article 2(a) of Directive 90/313, the ECJ in *Mecklenburg*,[122] remarked on "the term 'measures' as serving merely to make it clear that the acts governed by the directive

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[122] *See supra* note 106.

included all forms of administrative activity."[123] Plainly, the inclusion of both "activities" and "measures" indicates that the drafters intended a regime in the second category covering "any available information" about a wide, rather than narrow, range of matters relating to the specific subject matter of each of those categories, but the Tribunal notes, once again, that the information must relate to the state of the maritime area.

173. The second category of Article 9(2) relates to two types of activities or measures. First, activities or measures that are already adversely affecting the maritime area and, second, activities or measures that are likely to affect it. The second type of activity or measure may be underway and already be affecting or likely to affect adversely the maritime area or it may not be underway, but if and when it is, it must be likely to affect adversely the maritime area if it is to fall within the second category. Thus the second category of Article 9(2) includes prospective activities and measures as well as activities and measures already underway.

174. Each of the three categories in Article 9(2) is cast in the broad terms that are consistent with the "any information" formula. As such, they might warrant an interpretation of inclusive causality. However, it is only the second category that contains an additional threshold of inclusion/exclusion that is manifestly designed by the drafters to be more restrictive than the first and third categories. While the scope of Article 9 covers *simpliciter* "any available information""on the state of the maritime area" (first category) and "any available information""on activities or measures introduced in accordance with the Convention" (third category), the second category of Article 9(2) qualifies the obligation to provide "any available information" on activities or measures "adversely affecting or likely to affect" the maritime area.

175. The adverb "adversely" qualifies both existing and prospective activities and measures and raises the threshold of inclusion, as does the adverb "likely." Even were the Tribunal to accept, *arguendo,* Ireland's submission of inclusive causality, the submission would founder on the adverb "adversely" and "likely." Had the adverbs "adversely" and "likely" not been inserted in the provision, the scope of that part of Article 9(2) would have included any present or prospective activity or measure having *any* effect on the maritime area and might, as a result, have indicated an intention of inclusive causality. By including those two adverbs, the drafters have excluded from the scope of the obligation of Article 9 current activities or measures that affected or were likely to affect the maritime area, but did not affect it *adversely* and prospective activities that were not likely to affect *adversely* the maritime area.

176. It may be that the object and purpose of this restrictive provision was based on a *de minimis* policy and was intended to preclude claims under Article 9 for available information about activities and measures that did not have adverse impacts on the maritime area. Alternatively, the restrictive

[123] *Id.*, at para. 20.

character of the language may simply reflect a reluctance on the part of the Contracting Parties, at least at that stage, to undertake a broader obligation. In either case, the restrictive effect of the language in the second category is clear and is the standard which the Tribunal must apply.

177. The relevant parts of the *travaux préparatories* show that Article 9(2) drew upon Directive 90/313. Article 2(a) of Directive 90/313, which speaks of "information relating to the environment," also establishes, as the criterion of inclusion, activities and measures "adversely affecting or likely so to affect ...."[124] The decision of the ECJ in *Mecklenburg* (para. 150 above), relied upon in this regard by Ireland, is not helpful. The Court was not there concerned with how the word "adversely" should be interpreted, but with how inclusively the term "information relating to the environment" should be construed.[125]

178. In fact, the phrase "information relating to the environment" does not appear in Article 9(2) of the OSPAR Convention. Even if such a phrase did, it is doubtful if that would help Ireland, for it is far from clear that the 14 categories of redacted information identified by Ireland would fall within even that broader class. In any case, even if they did, the ultimate question is not the inclusiveness of the word "information" in Article 9(2), but the effect to be given to the additional and qualified threshold of adverse effect which is established by the second category of that provision.

179. In the opinion of the Tribunal, Ireland has failed to demonstrate that the 14 categories of redacted items in the PA and ADL Reports, insofar as they may be taken to be activities or measures with respect to the commissioning and operation of a MOX Plant at Sellafield, are "information ... on the state of the maritime area" or, even if they were, are likely adversely to affect the maritime area.

180. Rather than engage the requirement of establishing an adverse effect, Ireland has focused its arguments on the questions of directness of the effect and whether or not the information considered as a whole was "environmental." To buttress its arguments, Ireland has sought to rely upon treaties that are as yet unratified and not in force as between the Parties or regional legislative initiatives that have not been finalized nor entered into force for the Parties. Although, it is arguable – but in the view of the Tribunal not conclusive – that Ireland's claim might have succeeded under some of these drafts, the Tribunal is not empowered to apply legally unperfected instruments. The OSPAR Convention does not adopt a lower threshold

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[124] The Tribunal notes a minor discrepancy between the language of the Directive and that of the OSPAR Convention – namely, that the former includes the phrase "likely *so* to affect" (italics supplied) rather than "likely to affect." However, the drafting history in the record gives no indication that the word "so" was dropped with meaningful intent, and it is the Tribunal's view that the phrases were both intended to express a requirement of adverse effect of potential activities as well as current ones.

[125] *Supra* note 106, at para. 6. Curiously, the adverb "adversely" appears to have been dropped in the *Umweltinformationsgesetz* of 8 July 1994 which transposed the Directive into German law.

requiring no more than an activity or measure that "affects" rather than one that "affects adversely" the maritime area.

181. Ireland has also argued that Article 9(2) relates to any environmental information as such. But, wholly aside from the difficult question of whether the PA and ADL Reports dealt with environmental information (as opposed to information about economic justification), the words "environmental information" do not appear in Article 9(2) nor, indeed, in any part of Article 9. Even if such words did, it is doubtful that the 14 categories listed in paragraph 161 above would come within that class.

182. Hence the Tribunal finds that Ireland has not established that the class of redacted information that it seeks from the PA and ADL Reports under the second category of Article 9(2) falls under Article 9(2).

X. COSTS

183. The Rules enabled the Tribunal to award costs, and each Party argued for its costs.

184. The dispute is the first consideration of the OSPAR Convention. The Parties engaged the issues at a high level of dispassionate and professional competence. In all the circumstances, it is the Tribunal's decision to order that the costs of the Tribunal be equally divided between the Parties, and that there be no other order for costs.

XI. CONCLUSION

185. For the above reasons, the Tribunal

(i) by unanimous decision rejects the United Kingdom's request that the Tribunal find that it lacks jurisdiction over the dispute;

(ii) by unanimous decision rejects the United Kingdom's request that Ireland's claims are inadmissible;

(iii) by majority decision rejects the United Kingdom's submission that the implementation of Article 9(1) is assigned exclusively to the competent authorities in the United Kingdom and not to a tribunal established under the OSPAR Convention;

(iv) by majority decision finds that Ireland's claim for information does not fall within Article 9(2) of the OSPAR Convention;

(v) by majority decision finds that as a consequence, Ireland's claim – that the United Kingdom has breached its obligations under Article 9 of the OSPAR Convention, by refusing, on the basis of its understanding of the requirements of Article 9(3)(d), to make available information – does not arise; and

(vi) by unanimous decision decides that each Party will bear its own costs and an equal share of the costs of this arbitration.

FINAL AWARD

The Claims by Ireland are dismissed.

(*Signed*) Professor W. Michael Reisman
Chairman

(*Signed*) Gavan Griffith QC

(*Signed*) Lord Mustill

Declaration of Professor W. Michael Reisman

1. I do not concur in the majority's interpretation of Article 9(1) of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic ("the OSPAR Convention").[1] In my opinion, Ireland's proposed interpretation of Article 9(1) should have been rejected.

2. The question here, as I understand it, is

> (i) whether Article 9(1) of the OSPAR Convention requires Contracting Parties to establish an internal regime that must make information – as defined by Article 9(2) and subject to the exceptions set out in Article 9(3) – available to persons requesting it, in the ways specifically prescribed by Article 9(1)
>
> *or*
>
> (ii) whether Article 9(1) simply requires Contracting Parties to make the information available.

In the context of this case, the first of these possible interpretations would make the exclusive forum for disputes about *applications in specific cases* of the United Kingdom's obligations under this part of the OSPAR Convention the appropriate United Kingdom municipal law institutions. The only question for an international tribunal established under Article 32 of the OSPAR Convention with respect to complaints about the United Kingdom's Article 9(1) performance would be whether the United Kingdom had, in fact, established an internal regime that meets the requirements of Article 9(1).

3. The United Kingdom proposes the first of these two possible meanings while Ireland proposes the second. Everyone agrees that the answer to the question as to which meaning is the proper one is to be found in the text and context of the OSPAR Convention as interpreted in accordance with the Vienna Convention on the Law of Treaties ("Vienna Convention").[2]

4. Article 9(1) of the OSPAR Convention provides:

> The Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months.

5. Ireland's proposed meaning would require deletion of a critical phrase in Article 9(1), which can be demonstrated by an overstrike of seven critical words.

> The Contracting Parties shall ~~ensure that their competent authorities are required to~~ make available the information described in paragraph 2 of this Article to any natural or legal

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[1] Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, 32 ILM 1069 (1992).

[2] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months.

6. But the drafters of the OSPAR Convention included those seven words. In the *Anglo-Iranian Oil Company* case, the International Court of Justice ("ICJ") observed that the principle "that a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text ... should in general be applied when interpreting the text of a treaty."[3] The injunction is pertinent. The words "ensure that their competent authorities are required to," which Ireland's submission would require the Tribunal to ignore, make Article 9(1) an obligation to adjust domestic law in a prescribed way by providing for certain institutional recourses, for which specific criteria are provided. Article 9(1) is not expressed in terms to establish an obligation on the international plane to provide information, with the performance of that obligation in specific cases to be subject to the jurisdiction of a Tribunal established under Article 32.

7. This plain reading of Article 9(1) appears both to reflect its objects and purposes and to produce a reasonable and economic means for implementing Article 9(2) and (3) obligations. Indeed, it would be rather anomalous and duplicative for Article 9(1) to require Contracting Parties to ensure that their national competent authorities should do something and to prescribe how it should be done, yet then to assign the application role in specific cases to an international tribunal. The more plausible reading in terms of objects and purposes is that the implementation of the obligations and exceptions to those obligations for providing access to information was to be effected by those same national institutions.

8. This reading is consistent with the achievement of other goals expressed in Article 9(1). Recall that Article 9(1) also requires that the internal procedures make the information available within a reasonable time and in any case in no more than two months. This demand for expedited decision is consistent with cognate municipal freedom of information actions, which usually involve current political issues, with respect to which delay about determining whether the information should be provided to the public would either deprive citizens of a right which the law seeks to protect or would suspend collective political action because the issue is *sub judice*. Such a delay could compromise the rights of other citizens to a timely decision. But the dispute resolution mechanism of Article 32 of the Convention is a slow and cumbersome one, which, under the best of circumstances, could not possibly be accomplished within two months.

9. If the Parties plainly intended to do something internally inconsistent or even, *arguendo*, producing an unreasonable result, an arbitrator might, strictures of the Vienna Convention notwithstanding, feel obliged to give effect to their intention. But such a hypothetical intention is far from plain and

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[3] *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objection, Judgment of 22 July 1952, 1952 ICJ Rep. 93, at p. 105.

encounters textual and historical difficulties. As a textual matter, Article 9 is the only provision in the Convention which refers to another dispute resolution mechanism, in this instance a municipal one; this singularity hardly suggests that the obligations of Article 9 were being given the same treatment as the obligations of the other provisions of the Convention. As a historical matter, neither of the antecedent treaties that was incorporated in the OSPAR Convention, the Oslo Convention of 1972 and the Paris Convention of 1974,[4] included a provision comparable to Article 9. The Oslo Convention had no dispute resolution mechanism. The Paris Convention included arbitration provisions akin to Article 32 of the OSPAR Convention. The introduction into the OSPAR Convention of Article 9, which is thus unique among all the obligations imposed by the treaty in that it alone has its own dispute resolution mechanism, suggests that the Contracting Parties did not intend to subject those aspects of Article 9 that were assigned to a municipal remedy to the international provisions of Article 32.

10. The *travaux préparatoires* of Article 9(1) indicate that the language of what was to become Article 9(1) was adjusted to ensure that it was in conformity with EC Directive 90/313/EEC ("Directive 90/313") on Freedom of Access to Environmental Information.[5] This fact, which was not in contention, should have led the Tribunal, according to the United Kingdom, to read Article 9(1), in the light of the same objects and purposes as the Contracting Parties would appear to have been pursuing in Directive 90/313. As against this, Ireland referred to the fact that Directive 90/313 specifies that recourse would be had in domestic courts, while Article 9 does not do so. Article 4 of Directive 90/313 states:

> A person who considers that his request for information has been unreasonably refused or ignored, or has been inadequately answered by a public authority, may seek a judicial or administrative review of the decision in accordance with the relevant national legal system.

11. Ireland's observation is correct, as far as it goes, but it seems to me to be incomplete, for the comparison of Directive 90/313 with Article 9(1) underlines how closely linked is the obligation of Directive 90/313 and an exclusive municipal remedy. It is striking that the currently operative revision of Directive 90/313 of 2003,[6] which comes long after the OSPAR Convention, could have adopted an international remedy akin to Article 32 of the OSPAR Convention or, indeed, assigned decision competence to a standing instance within the European system. Instead, it reinforced and, indeed, elaborated the municipal remedial process.

12. The result of the interpretation of Article 9 that I believe is required is consistent with a not uncommon treaty practice in which states are obliged to make adjustments in domestic law and, to the extent that they do so

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[4] The Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo), 932 UNTS 3 (1972), and the Convention for the Prevention of Marine Pollution from Land-based Sources (Paris), 13 ILM 352 (1974).

[5] Directive 90/313/EEC, 1990 OJ (L 158) 56.

[6] Directive 2003/4/EC on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, 2003 OJ (L 41).

appropriately, they have fulfilled their treaty obligations. The International Law Commission ("ILC") has had occasion to review this practice in the course of its work on International Liability for injurious consequences arising out of acts not prohibited by international law.[7] Article 5 of the ILC draft on this subject provides:

> States concerned shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present articles.[8]

13. In the third paragraph of its Commentary to this provision, the ILC said:

> To say that States must take the necessary measures does not mean that they must themselves get involved in operational issues relating to the activities to which article 1 applies. *Where these activities are conducted by private persons or enterprises, the obligation of the State is limited to establishing the appropriate regulatory framework and applying it in accordance with those articles. The application of that regulatory framework in the given case will then be a matter of ordinary administration or, in the case of disputes, for the relevant courts of tribunals*, aided by the principle of non-discrimination contained in article 15.[9]

14. In this regard, I find the recent decision of the ICJ in the *LaGrand* case,[10] construing the Vienna Convention on Consular Relations, instructive. Article 36(2) of the Vienna Convention on Consular Relations, like Article 9(1) of the OSPAR Convention, obliges States to ensure that their municipal laws enable an object of the Convention. In the former case, States must ensure that their municipal laws enable full effect to be given to the consular rights and obligations enumerated in Article 36(1); in the latter, States must "ensure that their competent authorities are required [by some municipal law mechanism] to make available the information" described in Article 9(2). In both cases, the only international claim that lies is that the respondent State failed to ensure that its municipal law was created or structured in such a way as to accomplish the objectives prescribed by the Convention. A direct claim for failure to accomplish those objectives in a specific case (provision of consular rights or certain information, respectively) does not lie because that is not how the specific obligation imposed by the relevant treaty provision is framed.

15. Thus, the ICJ said that if United States municipal law should continue to fail to enable full effect to be given to Article 36(1), thereby violating Article 36(2), with the result that a foreign national suffers prolonged detention or severe punishment, the United States must permit "review and reconsideration" under its municipal law. But because the treaty provision that creates the obligation, Article 36(2) of the Vienna Convention

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[7] *International Liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities)*, Report of the International Law Commission, 53rd Session, Supp. No. 10, UN Doc. A/56/10, 366 (2001).

[8] *Id.*, at p. 398.

[9] *Id.*, at p. 399 (italics supplied).

[10] *LaGrand (Germany v. United States ofAmerica)*, Judgment of 27 June 2001, 2001 ICJ Rep. 104.

on Consular Relations, speaks of ensuring that a State's municipal law give full effect to the purposes for which the rights in Article 36(1) are intended, the Court observed that "[t]his obligation can be carried out in various ways. The choice of means must be left to the United States."[11]

16. Ireland contended that the United Kingdom's Department for the Environment, Transport and the Regions ("DETR") and its successor the Department of the Environment, Food and Rural Affairs ("DEFRA") were the competent authorities and that it requested the information from DEFRA and from the Foreign and Commonwealth Office without success. I would see the question of the identification of the competent authority as a matter to be resolved by the United Kingdom's law and review procedures. Where, as here, international law assigns a competence to national law, the assumption is that claims are to be pursued through the review mechanisms of that national system.

17. Ireland has also argued that, as a claimant, it is entitled to choose its forum. But this begs the question – whether cases of specific applications of Article 9(1) may be brought to a tribunal established under Article 32 – by assuming that the Convention provides for two fora: one under Article 9(1), the other under Article 32. In my view, questions of specific applications under Article 9(1) are assigned to the competent authorities within the United Kingdom. Hence there is no choice of forum.

18. The interpretation that appears correct to me does not mean that Article 9(1) is not subject to international standards. Although such a provision must allow a certain discretion or "margin of appreciation" as to its implementation to the Contracting Parties, the national arrangements must nonetheless meet whatever objective criteria are set out in the provision if they are not to be in breach of the Convention.

19. The objective criteria specified in Article 9(1) are that the information must be made available:

(i) to any natural or legal person;

(ii) in response to a reasonable request;

(iii) without the requester having to prove an interest;

(iv) without unreasonable charges; and

(v) as soon as possible but at the latest within two months.

20. Issues relating to alleged violations of these criteria would have been admissible under Article 32. In fact, Ireland does not claim that there are defects within the system that the United Kingdom had in place in its municipal law with respect to its obligations under Article 9(1), such that the United Kingdom's system falls below the standards required by the OSPAR Convention. It would be difficult to make such a claim, as Regulation 3 of the

[11] *Id.*, at para. 125.

1992 United Kingdom Regulations, the relevant legislative component in the United Kingdom, gives effect to Directive 90/313.

21. Ireland also sought to rely upon the fact that the OSPAR Convention has not been incorporated in United Kingdom law. In my view, the test of compliance at the national level for this sort of provision is substantive and not formal. In requiring that "Contracting Parties *ensure* . . .", Article 9(1) does not, by its terms, require a party to enact or re-enact dedicated confirmatory laws, if its domestic competent authorities are already legally bound under municipal law to make the relevant information available in ways that meet the criteria set out in that provision.

W. Michael Reisman

2 July 2003

Dissenting Opinion of Gavan Griffith QC

I here express my reasons for my disagreement with Parts VII and IX of the Majority Opinion and my dissent from the majority's decision to dismiss Ireland's claims.

For the reason that the majority has determined in Part IX that the whole of the redacted material in the PA and ADL Reports is not information within Article 9(2) I have joined in signing the Final Award as dispositive of the dispute.

APPLICABLE LAW – PART VII IN THE MAJORITY OPINION

1. I disagree with the reasons of the restrictive interpretation of applicable law adopted by the majority and its rejection of the normative value of various international instruments invoked by Ireland in support of its position.

2. I regard other international legal sources as having direct relevance to the construction of this arbitration for several reasons –

> (1) As constituted under Article 32 of the OSPAR Convention,[1] the Tribunal is instructed to take into account relevant rules of international law in terms that: *"the arbitral tribunal shall decide according to the rules of international law and, in particular, those of the Convention."* The content of this mandate must be informed by Article 38 of the Statute of the International Court of Justice ("ICJ") as the authoritative and orthodox catalogue of sources of international law. The Tribunal cannot be confined to international conventional law or the language of the OSPAR Convention exclusively. Customary rules and general principles of law, as embraced by Article 38, are as much included in the general reference to *"rules of international law"* in Article 32(6)(a) as are treaties. Contrary to the majority (para. 92[2]), the Tribunal's mandate in this regard is not confined by the absence in Article 9(1) and 9(2) of specific reference to any other body of substantive conventional law.
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> (2) As an interpreting agency, the Tribunal is guided by Article 31(3)(c) of the Vienna Convention on the Law of Treaties ("Vienna Convention") which refers to rules of international law that correspond to the catalogue of sources in Article 38 of the ICJ Statute. Such rules must be relevant (i.e. concern the subject matter

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[1] Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, 32 ILM 1069 (1992).

[2] This and all further paragraph references, unless otherwise indicated, are to the Majority Opinion.

in question) and applicable at least to Ireland and the United Kingdom.

(3) Further and in any event, the language of Article 9(3) specifically directs the Tribunal to take account of international regulations.

3. As it is common ground between Ireland and the United Kingdom ("the Parties") that the reference to international rules and regulations in the OSPAR Convention cannot extend the competence of the Tribunal to the consideration of obligations the Parties might have under other instruments, the discussion of the majority on this issue in paragraph 85 is merely a confirmatory statement of an agreed position.

4. Further, I accept that the OSPAR Convention stands as a *lex specialis* between the Parties to be interpreted within the general context of other relevant rules and principles of international law. Its drafters plainly perceived the OSPAR Convention as an integral part of a matrix of international instruments directed to environmental protection. The Preamble affirms that the Convention has been drafted to be consistent with customary and conventional international law. Further, its provisions repeatedly and explicitly require close consideration of international legal sources, including –

- Article 1 under paragraphs –
  - (a) (*"to the extent recognised by international law"*);
  - (g) (i) (*"other applicable international law"*);
  - (iii) (*"other relevant international law"*); and
  - (h) (i) (*"applicable international law"*);
- Article 7 (*"other international conventions"*);
- Article 10(1)(c) of Annex II (*"to the extent recognised by international law"*);
- Article 9(2) of Annex III (*"entitled under international law"*); and
- Article 3(1)(b)(ii) of Annex V (*"consistent with international law"*).

5. Hence, the explicit mandate of the Tribunal in interpreting Article 9 is to apply the OSPAR Convention as a *lex specialis* between the Parties consistently with "international law" broadly defined, and not confined merely to treaty and conventional law in force binding on the Parties (*cf.* para. 105).

6. To my mind the incantation by the majority, in paragraph 180, that *"the Tribunal is not empowered to apply legally unperfected instruments"* does not excuse the Tribunal from the examination of the extent to which the points of intentional reference invoked by Ireland inform the construction of Article 9(2).

7. In this regard, I depart from the majority's rejection of the normative value and applicability of the various international instruments invoked by Ireland, and in particular its rejection of the relevance of the Aarhus Convention[3] and EC legislative proposals to inform the meaning of Article 9(2) on the grounds that these instruments are not law and that the Tribunal is not instructed to apply law *in statu nascendi* (paras. 99 to 106).

8. I support my position by analysis of the status of these instruments.

Aarhus Convention

9. Since neither of the Parties to this dispute has ratified it, I accept that the Aarhus Convention is not *ex facie* an instance of binding international law under Article 31(3)(c) of the Vienna Convention. I also accept the United Kingdom's contention that the question of interpretation of the Aarhus Convention lies outside the scope of the competence of this Tribunal.[4]

10. However, it does not follow that the Aarhus Convention cannot inform the issues of construction of Article 9 that arise in this dispute. To the contrary, it is my opinion that the Aarhus Convention, to which each of the United Kingdom and Ireland is a signatory, does have a relevant normative and evidentiary value that is not denied merely because neither the United Kingdom nor Ireland has yet ratified it.

11. The Aarhus Convention entered into force on 30 October 2001 (that happens also to be the date of constitution of the Tribunal). Some 22 of the 39 signatory States have subsequently ratified it. Hence, as a *lex lata*, the majority is incorrect to discard the Aarhus Convention as merely *"'almost' law"* (para. 99) or *"material that has not yet become law"* (para. 103).

12. Although certain provisions of the Aarhus Convention may be recognised as reflecting or codifying customary practice and general principles of international law that are binding on the Parties, the Tribunal has no competence to pronounce on the customary nature of the provisions of the Aarhus Convention.

13. However, and at the least, Article 18 of the Vienna Convention applies to require the United Kingdom as a signatory State to the Aarhus Convention, to refrain from acts that would defeat its objects and purposes. Hence, to a limited extent it may be said that the Vienna Convention has the effect that the United Kingdom is bound by its object and purpose pending ratification.

14. Speaking generally, the discernment of the object and purpose of a treaty is a flexible and abstract process. As well as the text of a treaty itself,[5] interpreting bodies may derive understanding from various sources, including

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[3] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 38 ILM 517 (1999).

[4] United Kingdom's Counter-Memorial, para. 4.13. Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 52 and p. 87.

[5] United Kingdom's Counter-Memorial, para. 273.

the preambular provisions and *travaux préparatoires*,[6] titles of treaties[7] and even their spirit.[8] Although some writers have proposed that the object and purpose may be interpreted as *"a normative element beyond the rules laid down in a treaty"*,[9] for present purposes it is unnecessary to advance to such further reaches of international sources of meaning and approach.

15. Independently of the Vienna Convention, the recent *dictum* of the ICJ in *Qatar v. Bahrain* accepted the principle that unratified treaties may possess an evidentiary value that help establish and identify the views and intentions of signatories, in terms that –

> *signed but unratified treaties may constitute an accurate expression of the understanding of the parties at the time of signature.*[10]

16. This principle has apparent application to the process of determining whether Ireland is correct to contend that the Aarhus Convention may be invoked to inform the proper construction of Article 9(2). At the least, it enables the Tribunal to regard the Aarhus Convention as evidence of the views of the United Kingdom and Ireland on the scope of the definition of environmental information.[11]

17. Even though this cannot be used as a self-standing legal argument, in fact the United Kingdom has maintained its intention to be bound by, and to implement, the obligations of the Aarhus Convention.[12] Most recently, in its Proposal for a Revised Regime for Public Access to Environmental Information,"[13] the Department of the Environment, Food and Rural Affairs

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[6] *See*, for instance, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, 1951 ICJ Rep. 15, at p. 23.

[7] Diversion of Water from the River Meuse, 1937 PCIJ (Ser. A) No. 70, at 21.

[8] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, 1986 ICJ Rep. 14, at para. 275.

[9] Willem Riphagen, State Responsibility: New Theories of Obligations in Interstate Relations, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 581 et seq., and at 601 (R. St.J. McDonald and D.M. Johnson, eds., 1983). *See also* the *Nicaragua* case, *supra* fn. 8, paras. 270-182.

[10] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Judgment of 16 March 2001, 2001 ICJ Rep. 40, at para. 89.

[11] In its Judgment, the ICJ held that "the Anglo-Ottoman Convention does represent evidence of the views of Great Britain and the Ottoman Empire as to the factual extent of the authority of the Al-Thani ruler in Qatar up to 1913". Further, the ICJ gave special consideration to the unambiguous language of the 1913 Treaty and the fact that Article 11 of the said treaty was later incorporated into the Anglo-Ottoman Treaty of 1914. *Id.*, at paras. 89-91.

[12] On 15 July 2002, the United Kingdom Department of Environment, Food and Rural Affairs ("DEFRA") launched a "public consultation period for new Environmental Information Regulations, illustrating the government's commitment to freedom of information and to greater openness and transparency .... The new regulations are a step towards the full implementation of the Freedom of Information Act 2000 and will enable the UK to fulfil its obligations under the UNECE (United Nations Economic Commission for Europe) 'Aarhus Convention'". *See* DEFRA's website at www.defra.gov.uk.

[13] Public Access to Environmental Information. Proposals for a Revised Regime. Regulatory Impact Assessment. Proposal for a Directive of the European Parliament and of the Council on Public Access to Environmental Information [COM(2000) 402 Final]. This document can be found at DEFRA's website at www.defra.gov.uk.

("DEFRA") reiterated that *"the UK is committed to ratifying the Aarhus Convention as soon as possible"*.[14] After noting that *"the Freedom of Information Act 2000 contains a power to enable Regulations to be made to bring the existing regime into line with the Aarhus regime ahead of action at the Community level (such as this proposal)"*,[15] DEFRA went on to identify a number of specific examples confirming that the United Kingdom is already incorporating provisions of the Aarhus Convention into its domestic legislation.[16]

18. Hence, although the formal act of ratification that would establish on the international plane the consent of the United Kingdom to be bound by the Aarhus Convention has not yet occurred, the United Kingdom's intention to treat the Aarhus Convention as a binding instrument is unequivocally confirmed.

19. Contrary to the majority I conclude that the Aarhus Convention falls within the definition of applicable law and Article 31(3)(c) of the Vienna Convention as a legal source that possesses some normative and evidentiary value to the extent that regard may be had to it to inform and confirm the content of the definition of information contained in Article 9(2) of the OSPAR Convention.

International Practice

20. In its Memorial, Ireland invited the Tribunal to interpret the definitions of Article 9(2) in accordance with international law and practice.[17]

21. The stated grounds of the majority (paras. 100 and 101) in refusing to take into account various examples from international practice invoked by Ireland as informing the meaning of information are that the Tribunal was not requested by the Parties to apply evolving law and that a similar provision cannot be found in the language of the OSPAR Convention. That much is accepted. Nonetheless, in my opinion international practice nonetheless is a relevant matter for consideration.

22. Again the Vienna Convention is invoked. The relevance of the EC and United Kingdom legislative proposals is founded on Article 32(2)(b), which directs consideration of *"any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"*. Relevantly the reference here is not to *law* but to the *subsequent practice* in the application.

23. Although the particular curial references relied upon by Ireland may be relevant for interpreting EC Directive 90/313/EEC ("Directive 90/313"),[18] their application to the OSPAR Convention is not so obvious. However, it is

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[14] *Id.*, para. 4.
[15] *Id.*, para. 7.
[16] *Id.*, paras. 9, 12, 16, and others.
[17] Ireland's Memorial, paras. 100-101.
[18] Directive 90/313/EEC, 1990 OJ (L 158) 56.

the common ground between the Parties that the definitions of the OSPAR Convention closely follow the language of this Directive, on which it appears to be based.[19] Further the drafters of Directive 90/313 and the OSPAR Convention were much the same persons representative of the same States and international organisations. To my mind, ordinary principles of comity and interpretation may here be invoked to suggest that the same State parties broadly may be assumed to understand similarly or identically worded obligations in the same way.

24. In this regard, the subsequent practice of the European Union as a principal party to the OSPAR Convention,[20] also may be invoked as directly relevant to the interpretation of its provisions.[21] There is an emerging recognition that the practice of international organisations and State parties to an international agreement may inform the interpretation of that agreement: for example, in the 1998 *Fisheries Jurisdiction (Spain v. Canada)* case the ICJ examined the meaning of *"conservation and management measures"* by referring to the subsequent practice of States, the European Union (*e.g.* EC Regulations) and North-West Atlantic Fisheries Organization ("the NAFO").[22]

25. This is not to say that the construction of Article 9 is in any relevant sense to be driven by regard to subsequent practice. The Tribunal here should be conservative in this aspect of interpretation, and give due weight to the consideration that the United Kingdom has not ratified the Aarhus Convention and that neither it nor the OSPAR Convention is an EU instrument. In my opinion, the Vienna Convention nonetheless may enable the EC legislative proposals and the 2000 DEFRA Proposals referred to by Ireland to be taken

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[19] *See*, for instance, Counsel for Ireland, Transcript, Day 1 Proceedings, p. 26: "Directive 90/313 whose provisions are to all intents and purposes identical to those of Article 9"; Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 78: "The travaux confirm that the wording of Articles 9(1) and 9(3) were specifically amended in order to secure conformity with Articles 3(1) and (2) of Directive 90/313/EEC."

[20] The OSPAR Convention has been signed by the representatives of the EC Commission on behalf of the European Union. *See* http://www.ospar.org/eng/.

[21] It should be noted that the 1969 Vienna Convention on the Law of Treaties does not include international organisations in the definition of a party to an international agreement *(see* Article 1(g)). However, there are claims as to the emergence of customary rules on this issue. The capacity of international organisations to conclude international agreements and participate in the interpretation and modification of their terms has been recognised by the International Law Commission itself. *See*, for instance, the Preamble to the 1986 Convention on the Law of Treaties Between States and International Organisations or Between International Organisations. Article 31 of the 1986 Convention is identical to Article 31 of the 1969 Vienna Convention on the Law of Treaties.

[22] " . . . The same usage is to be found in the practice of States. Typically, in their enactments and administrative acts, States describe such measures by reference to such criteria as ... (see, among very many examples, Algerian Legislative Decree No. 94-13 of 28 May 1994 ... as well as, for the European Union, the basic texts formed by Regulation (EEC) No. 3760/92 of 20 December 1992, establishing a Community system for fisheries and aquaculture, and Regulation (EC) No. 894/97 of 29 April 1997, laying down certain technical measures for the conservation of fisheries resources. For NAFO practice, see its document entitled Conservation and Enforcement Measures (NAFO/FC/Doc. 96/1)). International law thus characterizes 'conservation and management measures' by reference to factual and scientific criteria." *See Fisheries Jurisdiction (Spain v. Canada)*, Judgment of 4 December 1998, 1999 ICJ Rep., para. 70.

into account by this Tribunal so as to inform and confirm the proper construction of Article 9(2). At the least, these matters may be said to reflect subsequent interpretation by the Parties to the OSPAR Convention of a definition nearly identical to Article 9(2). In the context that a more consistent interpretation appears reasonably to be open, at the least such comparisons invite reflection as to whether the confined construction applied by the majority is correct on having regard to all relevant circumstances.

26. Further, I contest the failure of the majority to refer to, or to take into account, the adoption on 28 January 2003 of Council Directive 2003/4/EC ("Directive 2003/4") on public access to environmental information, in substitution for Directive 90/313.[23] Directive 2003/4 entered into force on 14 February 2003 and is required to be fully implemented by EU Member States by 15 February 2005. To my mind this instrument is a significant development in EU environmental legislation promulgated after the oral hearings. The majority does not consider it, presumably on the ground that as an EC instrument issued subsequent to the hearing it has no relevance to the issues of construction of Article 9(2).

27. I disagree with such a strict temporal approach. It must be a relevant matter for consideration that during the pendency of this Tribunal's award relevant EC legislative proposals have been transformed into a *lex lata* by Directive 2003/4.

28. Hence, even if the attribution of normative value to the Aarhus Convention or EC legislative practice is contested, Directive 2003/4 now independently constitutes a relevant international regulation that provides for a broad definition of information consistent with the meaning of Article 9(2) advanced by Ireland to apply as a binding obligation upon the United Kingdom.

29. As an instrument in force, it is my opinion that Directive 2003/4 must be accepted as material relevant to the determination of the meaning of "information" in Article 9(2). On its face Directive 2003/4 favours Ireland's interpretation of the definition of Article 9(2) as including commercial data and economic analyses, and it explicitly applies like definitions to those of the Aarhus Convention as relevantly binding on both the United Kingdom and Ireland.[24] Whether or not this is so, the point here made in consideration of the applicable law issue is that, at the least, it is necessary to consider the position of Directive 2003/4.

30. In this context, I regard the *Gabcíkovo-Nagymaros* case, relied upon by Ireland[25] and rejected by the majority as irrelevant in paragraph 101, as confirming these conclusions. There the ICJ observed that –

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[23] Directive 2003/4/EC on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, 2003 OJ (L 41).

[24] *See,* in particular, para. 5 of Directive 2003/4 which reaffirms that it is meant to bring EU legislation in accord with the Aarhus Convention.

[25] Ireland's Reply, pp. 15-16, para. 102.

> *... new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.*[26]

31. Contrary to the majority (para. 103), I conclude that such new *law* here may be found in a number of instruments, and, in particular, in the Aarhus Convention and Directive 2003/4.

32. In summary, on the issue of applicable law I agree with the majority's statement (para. 103) that an international tribunal *"must certainly engage in actualisation or contemporization when construing an international instrument that was concluded in an earlier period"*. My criticism is that the majority adopts an impermissibly restrictive view in confining the applicable law to positive *lex scripta* by failing to take account of relevant, and to my mind applicable, existing international obligations of the Parties.

33. On the other hand, the relevance or permissive force of such other instruments must not be overstated to divert the enquiry from its objective to ascertain the applicable interpretation of the terms of Article 9. My departure from the majority is their refusal to have any regard to such other instruments.

FINDINGS WITH RESPECT TO ARTICLE 9(2) – PART IX SECTION 2 OF THE MAJORITY OPINION

Second Category of Information

34. The finding of the majority in rejection of the application of the second category of information under Article 9(2) is expressed as predicated on the position that –

> (1) As for the first category, the second category also is limited to information *"on the state of the maritime area"* (paras. 163, 168 and 179), and
>
> (2) the onus is on Ireland to establish that the MOX fuel production is an activity which is likely adversely to affect the maritime area, which Ireland has failed to demonstrate (*e.g.*, paras. 179 and the final 185).

I disagree with both conclusions.

On the State of the Maritime Area

35. On the first issue, I reject the majority's generalised interpretation of the definition of the second and third categories of information of Article 9(2) (advanced in paras. 163 to 168 of the Majority Opinion) of applying as an overarching requirement that the information for each of the three categories be confined to information *"on the state of the maritime area"*.

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[26] *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, 1997 ICJ Rep., at p. 7, para. 140.

36. The second and third categories specifically and relevantly are differently defined by reference to information *"on activities or measures adversely affecting or likely to affect"* the maritime area and *"activities or measures introduced in accordance with the Convention"* respectively. As categories separate from the first category, it is no part of the definition of either of these two later categories that they be confined to information *"on the state of the maritime area"*. Indeed, the third category is not defined by reference to the maritime area at all, rather that it concern *"activities or measures introduced in accordance with the Convention"*.

37. To make my objection plain, the majority in paragraph 163 asserts as a *"manifest"* conclusion that none of the 14 categories of information identified by them in the Majority Opinion may *"plausibly be characterized"* as *"information ... on the state of the maritime area"* in terms that –

> *Article 9(2), whose chapeau is 'Access to Information,' establishes the scope of information to which, subject to specific enumerated rights of refusal in Article 9(3), the obligation in Article 9(1) relates. The scope of the information in the provision is not environmental, in general, but, in keeping with the focus of the OSPAR Convention, 'the state of the maritime area.' It is manifest to the Tribunal that none of the above 14 categories in Ireland's list can plausibly be characterized as 'information ... on the state of the maritime area.'*

And in paragraph 168 that –

> *The point of emphasis, however, is that it is 'information' about the state of the maritime area. The three categories of 'information ... on the state of the maritime area' in Article 9(2) are*
>
> *(i) 'any available information' on 'the state of the maritime area,'*
>
> *(ii) 'any available information' on 'activities or measures adversely affecting or likely to affect ... the maritime area,'*
>
> *(iii) 'any available information' on 'activities or measures introduced in accordance with the Convention.'*

38. To my mind, it is more the case that it is the majority's error that here becomes manifest by reason of its misstatement of the terms of Article 9(2). As a matter of unambiguous grammatical construction, the expression of the second category of information is incapable of being confined to *"information ... on the state of the maritime area"* in the same terms as the first category of information (not invoked by Ireland). It could not be more clearly expressed that it is no part of the definition of the second or third categories of information to requires attachment of the information as *"on the state of the maritime area"*. For this reason the majority's conclusion (in para. 163) that it could have rested *"its decision on the fact that none of the material in the 14 categories falls within the definition of 'information'"* cannot be sustained by the text of Article 9(2).

Wider Issues

39. I now turn to identify the other errors in the determination of the majority, including onus.

40. It is accepted that the Tribunal's task is not to issue an advisory opinion as to the abstract meaning of Article 9(2). To this end, Ireland's request for relief is sufficiently specific and directed to the disclosure of the 14 categories of information redacted from the PA and ADL Reports ("the Reports") as the legal remedy sought in these proceedings.

41. However, the scope of issues submitted by the Parties is not confined to the simplistic application of the definition under review to the 14 categories of redacted items. The Parties have called upon the Tribunal to interpret the extent and meaning of the definition of Article 9(2), with particular emphasis on the second category of information, and to establish whether a sufficient link exists between the Reports and measures or activities. Amongst others, the Parties disagree on whether the commercial nature of the Reports precludes them from falling within the scope of the definition. Hence, one of the main contentious issues between the Parties is the extent and inclusiveness of the definition.

42. In finding that the primary task of the Tribunal is to examine whether any of the 14 categories of redacted information fall within the definition of Article 9(2), the majority (para. 161) explicitly refuses to consider these wider issues raised for determination. Its approach suggests that the Reports ought to be dissected into separate pieces of information, each of which is to be tested against the definition.

43. Since the majority concludes (para. 179) that there is no activity that has the potential adversely to affect the marine environment, it does not go into the details of the adopted line of analysis. However, had the majority reached the contrary conclusion at this point, on its approach it would have been required then to engage in the examination and characterisation of each redacted item in its consideration of Article 9(2). At this secondary level such an analysis could not be limited to the categories of redactions in disregard of their contents. It then could not be established whether a link existed between a specific item and a hazardous activity without studying and extrapolating its exact content. Under such circumstances, the separation of form from content, as the majority suggests in paragraph 161, would have been unattainable. In turn, that might have lead to finding some sections of the Reports were undisclosable under Article 9(2) due to their failure to satisfy the necessary requirements of the assumed definition.

44. I reject this unnaturally confined approach of the majority. The correct position appears to me to be that the exercise of interpretation under Article 9(2) must engage the Tribunal in identifying whether the Reports as a whole *in principle* fall within the scope of the definition. At this level, the Tribunal's main task must be to elucidate and clarify the meaning of the terms used in Article 9(2) and to apply the established meaning to the entire Reports.

45. To this end, the regime for the disclosure of specific items is controlled by Article 9(1) to impose a wide obligation on the Contracting Parties to ensure that information is provided. Article 9(3) then lists specific exceptions to that obligation. Article 9(2) merely supports the definition of

what is information within Article 9(1). In other words, once established that the information contained in each Report is, in principle, within Article 9(2), the entire Reports have to be made available under the terms of Article 9(1) except as to parts protected as excepted matter under Article 9(3). There appears no room for a further analysis of redactions, category by category, in the Article 9(2) exercise in the manner summarily engaged by the majority.

46. My conclusion that this inclusive all-in or all-out approach under Article 9(1) and (2) is mandated as a matter of construction also appears to me to be consistent with international and also United Kingdom domestic jurisprudence.

47. In the *Mecklenburg* case the European Court of Justice ("ECJ") applied the definition of information contained in Directive 90/313 to a statement of views put forward by a countryside protection authority. In testing the statement against the definition the ECJ concluded that –

> *In order to constitute 'information relating to the environment for the purposes of the directive', it is sufficient for the statement of views put forward by an authority, such as the statement concerned in the main proceedings, to be an act capable of adversely affecting or protecting the state of one of the sectors of the environment covered by the directive. That is the case, as the referring court mentioned, where the statement of views is capable of influencing the outcome of the development consent proceedings as regards interests pertaining to the protection of the environment.*[27]

48. In finding that the statement as a whole was to be characterised as a measure, the ECJ did not suggest any analysis of specific provisions or parts of the statement in light of the Directive. Instead, the ECJ found that the appropriate test at this level is confined to the establishment of the existence of a causal link between an act and a hazardous activity. I see no basis for a different approach to characterisation under Article 9.

49. Further, in *R. v. Secretary of State & Ors ex p. Alliance against the Birmingham Northern Relief Road & Ors*,[28] cited by Ireland,[29] Sullivan J, sitting in the Queen's Bench Division of the High Court, held that the 1992 Environmental Regulations (implementing Directive 90/313) embraced, within the meaning of *"information relating to the environment"* an agreement for the construction of a toll motorway. Relevantly, he applied, as the appropriate approach to construction, a wide view of the definition; and left it for the specific regulations protecting the release of commercially confidential information to limit the particular disclosure, in terms –

> *The fact that the Agreement can be described as a 'commercial document' does not mean that it does not contain information which related to the environment. It simply means that if such information is contained in the Agreement it may fall within one of the exceptions in regulation 4 ....*
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> *The definition of 'information relating to the environment' in Article 2 of the Directive (90/313) is very broad, in my view deliberately so, and this broad definition has been*

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[27] C-321/96, *Mecklenburg v. Kreis Pinneberg – Der Landrat*, [1999] 2 CMLR 418, 435, at para. 21.

[28] [1999] Envtl. L. Rev. 447, 470.

[29] Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 43-44.

carried through in to the Regulations .... The fact that ... regulation 2 may cover a large range of documentation is not a valid argument for a narrow interpretation.

50. I accept the analysis of Sullivan J is as apt also to describe the regime of Article 9 as for Directive 90/313 and the 1992 Environment Regulations. In pursuit of its policy for disclosure, each adopts a deliberately broad definition of information that implicitly may include commercial and confidential information, and then provides for extensive and defined categories of exceptions from that broad category. In the case of Article 9, the detailed and comprehensive regime for exceptions from the wide reach of the definition of environmental information falling within Article 9(1) and (2) is furnished by Article 9(3).

51. In this context, it appears to me that there is no scope for the introduction of an intervening limitation (as has been applied by the majority) to exclude categories of admittedly commercial information from the embrace of the general definition of information at the level of the definitions of Article 9(2). The scheme of both Directive 90/313 and Article 9 (and, if it matters, the applicable 1992 Environment Regulations giving effect in the United Kingdom to both Directive 90/313 and also the obligations of Article 9) is as stated by Sullivan J. Information in these excepted categories falls to be determined at the second level of the application of the excepting provisions to such general disclosure. In the case of Article 9, this work is done by Article 9(3), much as for the 1992 Regulations the regime for exception is provided by Regulation 4.

52. In my opinion, the majority is in error in applying its subjective approach that Article 9 could not have intended the disclosure of obviously commercial information at the level of the threshold definitions of information in Article 9(2) rather than leaving the issue to be resolved under the next level of the comprehensive scheme of exceptions under Article 9(3). The majority should have deferred to this plain definitional structure, and left the exceptions from disclosure to be determined at the level of Article 9(3).

53. My further point of criticism is that the majority focuses on the second category of information covered by Article 9(2) as the critical category indicated by the Parties.[30] In so doing the majority does not pay sufficient attention to the Tribunal's *Decision No. 5* issued 26 January 2003 requesting the views of the Parties set out in paragraph 76 of the Majority Opinion.

54. This request by the Tribunal was directed to clarify the Parties' positions on the relevance and meaning of the third category of information defined by reference to *"activities or measures introduced in accordance with the Convention"*. The Majority Opinion merely makes passing references to

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[30] *See* Ireland's Memorial, para. 96. *See also* United Kingdom's Counter-Memorial, para. 4.2; Counsel for Ireland, Transcript, Day 1 Proceedings, p. 50; Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 86.

[30] *See* Ireland's Memorial, para. 96. *See also* United Kingdom's Counter-Memorial, para. 4.2; Counsel for Ireland, Transcript, Day 1 Proceedings, p. 50; Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 86.

this issue without responding meaningfully to the responses advanced by the Parties.

55. In summary, I consider that the task of the Tribunal was to interpret the entire Article 9(2) and consider its definitions of the second and third categories of information to the contentious issues of –

> (1) identifying an activity or measure which adversely affects or is likely to affect the marine environment of the Irish Sea;
>
> (2) establishing whether the link exists between such an activity or measure and the PA and ADL Reports; and
>
> (3) examining whether the information contained in the Reports may simultaneously fall under both the second and third category of information of Article 9(2).

56. At the outset of the hearing, the primary basis for Ireland's claims for the disclosure of the information redacted from the PA and ADL Reports was premised on the grounds that Ireland must be in a position to assess likely impacts on the maritime area, and should be enabled itself to engage in a process of assessing objectively the justification of the MOX Plant.[31] Ireland contended that the data contained in the PA and ADL Reports must constitute information on activities or measures likely to affect the maritime area[32] because (as the United Kingdom recognised) the MOX fuel production would have an adverse impact on the maritime area covered by the Convention.[33]

57. The United Kingdom answered that the relevant question was not whether the MOX production could affect the maritime area and more whether the information requested is information on activities or measures adversely affecting or likely to affect the maritime area.[34] The United Kingdom identified the relevant activity as *"the discharging of radioactive elements from the MOX plant into the maritime area, and not the wider activity of the MOX plant which in many of its aspects has nothing whatsoever*

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[31] Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 5-11 and 26.

[32] In Ireland's words, ". . . [I]t is self-evident that the information in both Reports constitutes information 'on activities . . . adversely affecting or likely to affect [the maritime area]' within the meaning of Article 9(2) . . . . MOX production is an activity which will inevitably and certainly affect the maritime area, including Ireland's waters. It will do so principally in three ways: (1) routine (intentional) discharges from MOX; (2) routine (intentional) discharges from THORP, due to the intensification of activity aimed at producing materials for the MOX plant; (3) discharges from possible accidents or terrorist attacks, either from the MOX plant itself or from transports of radioactive waste to, or MOX from, the plant." *See* Ireland's Memorial, para. 96. *See also* United Kingdom's Counter-Memorial, para. 4.2; Counsel for Ireland, Transcript, Day 1 Proceedings, p. 48.

[33] Ireland's Memorial, para. 97. In support of this argument Ireland refers to the Sintra Ministerial Statement of 1998, in which the UK has itself recognised the long-term damage done to the marine environment by radioactive discharges, and has undertaken to reduce background radiation to "close to zero" by 2020. *Ibid. See also* Ireland's Memorial, Annex 5, referring to DEFRA Decision of October 2001. *See also* Ireland's Reply, para. 12; Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 46-48.

[34] United Kingdom's Counter-Memorial, para. 4.3.

to do with the maritime area".[35] Therefore, the information was not *"directly and proximately related to . . . activities or measures adversely affecting or likely to affect the maritime area".*[36]

58. The United Kingdom also contested the fact that radioactive discharges from the MOX Plant were of a potentially adverse character.[37]

59. The Parties diverged on the threshold question whether the commercial nature of the Reports precluded them falling within the scope of Article 9(2). Although it obviously related to commercial activities, Ireland contended that the information also directly affected the environment,[38] and that, as such, the fact that it also was of a commercial character was irrelevant.[39]

60. The United Kingdom asserted that the Reports' plainly commercial nature was determinative, and that, once it had been concluded in the determination process that the balance was broadly neutral, no issue of information under Article 9(2) could arise with respect to the characterisation of this "commercial information". It contended that the information then ceased to be capable of being regarded relevant to the environment because –

> *. . . given [the Government's] conclusion on environmental and other issues, that the balance is broadly neutral, the draft decision then went on to consider the economic case concluded that there was a case for approval. This is the point in the stage of consultations at which consideration of the environmental issues was concluded and from this point onwards, essentially, the issues being considered are no longer environmental, . . . the issues considered hereafter were the commercial arguments for and against the plant or the process.*[40]

61. On this first issue of what constitutes a harmful activity to which the Reports may be related, I agree with the United Kingdom's characterisation of the relevant activity as *"the discharging of radioactive elements from the MOX plant into the maritime area".*[41]

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[35] Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 86.

[36] United Kingdom's Counter-Memorial, paras. 4.8-4.9.

[37] Counsel for the United Kingdom, Transcript, Day 2 Proceedings, pp. 62-63.

[38] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 48. *See also* para. 66 of the Written Outline of submissions on behalf of Ireland on file at the Permanent Court of Arbitration (Professor Sands): "the information relates to commercial activity, but it is (presumably) not in dispute that the consequences of the activity may be harmful to the environment".

[39] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 48. In support of this statement Ireland refers, amongst others, to the case *ex parte* Alliance against Birmingham Northern Relief Road: "the fact that that Agreement can be described as a commercial document does not mean that it does not contain information which relates to the environment".

[40] Counsel for the United Kingdom, Transcript, Day 2 Proceedings, pp. 68-69.

[41] *Id.*, p. 86.

Adverse Effect

62. It follows that the second issue for determination is whether this activity may be characterised as having the potential adversely to affect the marine environment of the Irish Sea.

63. With respect to the hazardous nature of the MOX production Ireland submitted –

> *MOX production is an activity which will inevitably and certainly affect the maritime area, including Ireland's waters. It will do so principally in three ways: (1) routine (intentional) discharges from MOX; (2) routine (intentional) discharges from THORP, due to the intensification of activity aimed at producing materials for the MOX plant; (3) discharges from possible accidents or terrorist attacks, either from the MOX plant itself or from transports of radioactive waste to, or MOX from, the plant.*[42]

64. The United Kingdom did not respond adequately to this contention, but rather focused its arguments on establishing the link between the Reports and future discharges and contended that –

> *the relevant question ... is not whether the MOX production will affect the maritime area: it is whether the information requested is information on activities or measures adversely affecting or likely to affect the maritime area.*[43]

65. Hence, the issue of adverse effect under the second category of information, that has been elevated by the majority so as to emerge as decisive in the result, received only a passing reference and attention in the written submissions of the Parties and the oral pleadings.[44]

66. The majority (para. 179) finds against Ireland on the ground that –

> *In the opinion of the Tribunal, Ireland has failed to demonstrate that the Indicative List's 14 categories of redacted items in the PA and ADL Reports, insofar as they may be taken to be activities or measures with respect to the commissioning and operation of a MOX plant at Sellafield, are 'information ... on the state of the maritime area' or, even if they were, are likely adversely to affect the maritime area.*

67. In maintaining this conclusion against the second category of information of Article 9(2) the majority summarily rejects the possibility of substantial environmental damage to the Irish Sea by –

> (1) casting an onus on Ireland to prove adverse effect that has not been discharged; and
>
> (2) criticising Ireland for focussing on the wrong issues.

68. To my mind this is to mistake the issues for determination. Neither Party contended that the PA and ADL Reports are in themselves activities or measures with respect to the commissioning and operation of the MOX Plant. Although it may be that the Reports may in any event fall within the scope of

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[42] *See* Ireland's Memorial, para. 96. *See also* United Kingdom's Counter-Memorial, para. 4.2; Counsel for Ireland, Transcript, Day 1 Proceedings, p. 46; Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 85.

[43] United Kingdom's Counter-Memorial, para. 4.3.

[44] Counsel for the United Kingdom, Transcript, Day 2 Proceedings, pp. 62-63.

regulatory initiatives, the primary point of dispute between the Parties was whether the Reports contained information *on* activities or measures within Article 9(2). The Parties' common position was that the Tribunal must first identify the subject activity or measure, and then consider whether a link exists between it and the Reports.

69. Albeit that the United Kingdom contended that such effect was small and broadly neutral, the Parties were agreed that the manufacture of MOX fuel may affect the maritime area.[45] Indeed, the entire justification exercise engaged by the United Kingdom was in the context that negative environmental effect arising from the commissioning of the Plant was a given, and that commissioning should not be approved unless the proven economic effect outweighed the detriment.

70. The underlying substantive disagreement between the Parties, which is not the subject of the arbitration, is whether future radioactive emissions are of such a magnitude that they may significantly harm the marine environment of the Irish Sea. It was this admitted environmental detriment that supported the Tribunal's mandate to consider the Reports and to apply the definitions of Article 9(2).

71. I conclude that it was not open to the majority to find no adverse effect as a determinative finding of fact. I contest the majority's assumption that its mandate enabled it to make this summary finding as determinative to its decision adverse to Ireland.

Burden of Proof

72. In my opinion the majority also is in error to assume, and to apply, the burden of proof as falling on Ireland. In this regard, I maintain that the obvious application of the precautionary principle (not considered by the majority) must shift the burden to the United Kingdom.

73. As an established customary principle of international law,[46] the precautionary principle is embraced by Article 2(2)(a) of the OSPAR Convention[47] –

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[45] While the United Kingdom does not admit that explicitly in the proceedings, it at the same time submits that the information on potential environmental impacts of the MOX Plant has been made available to Ireland: "Ireland has known for many years what the liquid and gaseous discharges from the MOX Plant are likely to be; it has known for many years what the radiological impact of the MOX Plant is likely to be (and moreover it does not challenge the United Kingdom's estimates on radiation doses from the MOX Plant) " United Kingdom's Counter-Memorial, para. 4.7. *See also* Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 86

[46] While one might contest the customary nature of the precautionary principle, on this matter I am guided by the views expressed by the European Union institutions. Amongst others, in 2000 the European Commission issued a Communication on Precautionary Principle, in which it suggested that the principle "has been progressively consolidated in international environmental law, and so it has since become a full-fledged and general principle of international law". In support of its position the Commission cited international legal instruments, EU legislation as well as its own practice, and in particular: Ministerial Declaration of the Second International

ARTICLE 2 GENERAL OBLIGATIONS

2. The Contracting Parties shall apply:

a. the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects; ...

At the least, the precautionary principle, as expressed in Article 2(2)(a), to apply *"even when there is no conclusive evidence of a causal relationship between the import and the effects"*, directs the majority to consider the application of the principle. In my opinion it goes further and explicitly has the effect of transferring the responsibility for providing scientific evidence to the producer of hazardous substances (or, as here, to the Ministers of State as the decision-makers).

74. To adapt the European Commission, the OSPAR Convention *"by way of precaution, has clearly reversed the burden of proof by requiring that the substances be deemed hazardous until proven otherwise"*.[48] It must follow from the fact that the OSPAR Convention incorporates the precautionary principle as a General Obligation under Article 2 that on these issues arising under Article 9 it is the United Kingdom that bears responsibility for proving that future damage is insignificant and that there is no likelihood of adverse effect.

Conference on the Protection of the North Sea (1987); Convention on Biological Diversity (1992); Framework Convention on Climate Change (1992); Paris Convention for the Protection of the Marine Environment of the North-East Atlantic (22 September 1992) and WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS); Resolution of the European Parliament of 10 March 1998 concerning the Green Paper on the General Principles of Food Law in the European Union of 30 April 1997, Council Resolution of 13 April 1999 and Resolution of the Joint Parliamentary Committee of the EEA (European Economic Area) of 16 March 1999 (Annex I, Refs. 8-12); Communication of 30 April 1997 on consumer health and food safety (COM(97) 183 final), Green Paper on the General Principles of Food Law in the European Union of 30 April 1997 (COM(97) 176 final). *See* European Commission Communication on the Precautionary Principle, COM(2000) 1. *See http://europa.eu.int/comm/food/fs/ifsi/eupositions/ccgp/ccgp01_en.html*. Shortly after the circulation of the Communication, the Nice Council adopted a Resolution reiterating that "the precautionary principle is gradually asserting itself as a principle of international law in the fields of environmental and health protection". *See* Presidency Conclusions, Nice European Council Meeting, 7, 8 and 9 December 2000, Annex III, Council Resolution on the precautionary principle. *See*, in particular, para. 3.

[47] Article 2(1)(a) of the OSPAR Convention reads: "the Contracting Parties shall, in accordance with the provisions of the Convention, take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected."

[48] Communication from the EC Commission on the precautionary principle. COM(2000) 1, para. 6.4. *See also* the following observation: "the main effect of the [precautionary] principle ... is to require states to submit proposed activities affecting the global commons to international scrutiny." Patricia W. Birnie and Alan E. Boyle, International Law and the Environment, at 98 (1995).

75. The finding by the majority that Ireland *"has failed to demonstrate"* adverse effect within the second category of information ignores Article 2(2)(a). For this reason, I conclude that the majority has misdirected itself on the question of onus. I regard the precautionary principle so engaged by Article 2(2)(a) as requiring that any finding adverse to Ireland be made in terms inverse to those found by the majority, namely that such a result was and is only open to be made on a finding that *in fact* there was no such potentially adverse effect. Clearly this was not a matter of fact established on the material before the Tribunal. Nor, as I understand its position, was that contended for by the United Kingdom.

76. As the majority did not consider the precautionary principle and misdirected itself on the question of onus, I conclude that its finding that Ireland *"has failed to demonstrate"* adverse effect within the second category of information must be vitiated as predicated upon the wrong approach to the burden of proof.

77. In any event, even were the burden of proof on this issue on Ireland (as the majority assumes), in focussing on the nature of the link between the Reports and hazardous activity Ireland was primarily refuting the United Kingdom's argument cited above, namely –

> *The relevant question, however, is not whether MOX production will affect the maritime area. It is whether the* information requested *is information on activities or measures adversely affecting or likely to affect the maritime area ....*[49]

Further,

> *[T]he material words of provision cover only information which is directly and proximately related to the state of the maritime area or to activities or measures adversely affecting or likely to affect the maritime area. On first impression, the information sought by Ireland fails to meet this test.*[50]

78. Were it relevant, the fact that it appears to the majority that Ireland had not addressed the issue of adverse effect adequately could not be used as a self-standing legal argument in favour of ruling out the possibility of significant environmental harm. Were that the case, the Tribunal should have ensured that the Parties were given an opportunity to present their positions in a comprehensive way by further submissions, as on the third category issue which is the subject matter of *Decision No. 5*. The Tribunal was not in a

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[49] *See* United Kingdom's Counter-Memorial, para. 4.3.

[50] *See* United Kingdom's Counter-Memorial, para. 4.8. In its oral representations Ireland summarised the main arguments employed by the United Kingdom: "What does the United Kingdom say? It makes three arguments. Firstly, the information is of a purely commercial character; secondly, the information is not directly and proximately related to activities or measures adversely affecting or likely to affect the maritime area and, thirdly, Ireland's approach is based on the *Mecklenburg* case of the European Court of Justice, which is not on point, and the Aarhus Convention which is not applicable in the exercise of the progressive development which is not in force." Counsel for Ireland, Transcript, Day 1 Proceedings, p. 46. Wholly aside from the question whether this summary is correct, Ireland perceived the United Kingdom's position in the way described and focused its defence on refuting the above submissions.

position to determine the matter on the basis of the submissions made up to the end of the hearings, and should not have done so.

Likely Adverse Effect

79. As a further matter of dissent, I disagree with the interpretation of the adverb *"likely"* propounded by the majority in paragraph 175. That finding suggests that its inclusion in Article 9(2) creates an additional, and therefore higher, threshold for qualifying negative impacts. In my view, it signifies the opposite. This is because the definition of Article 9(2) does not instruct the Tribunal to find that it is established that there *will be* significant detriment to the Irish Sea. It speaks only of *potentially* adverse effect.

80. The difference between these two approaches is self-evident. In the first case, definite and unavoidable harm would have to be shown as a fact. In the second case, it suffices to demonstrate that significant damage was probable.

81. In this context *"likely"* in its ordinary meaning means *"probable"* as something expected but not certain to happen.[51] The result of *"likely adverse effect"* is not a fact that is required to be proven empirically, but is merely to be recognised as a possibility as something that *may*, but not necessarily *will* happen. Perhaps the phrase *"reasonably to be expected"* accurately expresses the standard.

82. In other words, when qualifying an activity as potentially harmful the Tribunal must be guided by the word *"likely"* that applies a lower threshold of proof for satisfaction at the level that it is not *"adverse effect"* that must be established, but merely the likelihood of such adverse effect.

Findings of Fact

83. A further criticism against the majority's approach on these issues of findings of fact is that it fails to acknowledge the general legal context in which the dispute is being resolved. To my mind, the majority has impermissibly made its summary determination adverse to Ireland as an unsubstantiated judgement on the principal issue raised by the Parties in disregard of their submissions.

84. The issue of adverse effect lies at the heart of the various legal actions pursued by Ireland against the United Kingdom. The environmentally adverse character of the MOX Plant operation is subject to parallel sets of proceedings. In its oral submissions[52] the United Kingdom referred to the fact that the issue has been extensively argued between the same Parties in the International Tribunal for the Law of the Sea ("ITLOS") proceedings in November 2001.[53] The Tribunal in those proceedings has not pronounced on

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[51] Oxford English Dictionary, 2nd ed.

[52] Counsel for the United Kingdom, Transcript, Day 2 Proceedings, pp. 62-63.

[53] *The Mox Plant Case (Ireland v. United Kingdom)*, Request for Provisional Measures, Order Dated December 3, 2001, International Tribunal for the Law of the Sea, Case No. 10. The Order of the Tribunal and the transcript of the Parties' written and oral submissions can be accessed on

the question of future environmental detriment,[54] but has ordered the Parties to co-operate fully, and in particular to –

> *(a) exchange further information with regard to possible consequences for the Irish Sea arising out of commissioning of the MOX plant;*
>
> *(b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea;*
>
> *(c) devise, as appropriate, measures to prevent pollution of the marine environment which might result from the operation of the MOX plant.*[55]

85. This conclusion of the ITLOS indicates that the question of future adverse effect is still open. The mandate of the arbitral tribunal established in accordance with Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS") is defined by Ireland as –

> *to address the dispute which concerns '(a) pollution of the Sea arising from operation of the plant and (b) the risks arising from movements of material to and from the plant, and relates to the failure of the United Kingdom (1) to co-operate with Ireland, (2) to protect the marine environment and (3) to take all necessary measures to prevent, reduce and control pollution.* [66]

The matters before the UNCLOS Tribunal remain unresolved following its June 2003 hearings.

86. In these continuing circumstances of disputation, at the least the issue joined between the United Kingdom and Ireland as to the potentially adverse environmental harm is undecided. The evidence is inconclusive. The Parties continue exchanging evidence to that effect, and the debate at the European Union level over the consequences of the commissioning of the MOX Plant continues.[57]

87. In contrast with the fact of the majority making a determinative finding on this perceived issue of fact, before the Tribunal the Parties more focused their submissions on interpreting the inclusiveness of the definition and proving whether the link exists between the Reports and the commissioning of the MOX Plant. I regard this issue of enquiry identified by the Parties as the primary task for this Tribunal.

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the ITLOS website at http://www.itlos.org. Oral hearings took place in Hamburg on 19 and 20 November 2001.

[54] This particular issue was not within its mandate.

[55] *Supra* note 53, dispositif, para. 1.

[56] Official statement by Joe Jacob, TD, Minister with responsibility for Nuclear Safety, of 26 October 2002, citing a Notification by Ireland of the "Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea" with a Statement of Claim and Grounds upon which it is based Published at http://www.irlgov.ie/tec/press01/october26th01.htm.

[57] *See*, for instance, Commission Opinion of 26 November 2002 concerning the plan for the disposal of radioactive waste arising from the operation of the MOX Demonstration Facility at Sellafield located in the United Kingdom, in accordance with Article 37 of the EURATOM Treaty, 2002 OJ (C 292), pp. 0007-0008. *See also* Written Question E-0649/02 by European Parliament, Nuala Ahern (Verts/ALE), to the Commission on the subject of radioactive discharges, 2002 OJ (C 229), pp. 0113-0114.

88. I characterise the majority's conclusion against Ireland on the adverse effect issue as an unsupported assertion made without any reference to the materials of the case. The Majority Opinion considers none of the matters militating to the contrary contained in the examination of future environmental detriment advanced in Ireland's Memorial,[58] Reply,[59] or oral submissions,[60] or the references to the issue of adverse effect made by the United Kingdom in the course of oral pleadings.[61]

89. Hence, I regard this summary finding by the majority against the likelihood of adverse effect to the Irish Sea as made without any assessment and identification of its factual basis, and in apparent disregard of the admitted environmental damage, the lower threshold of proof and the long-standing dispute over the threat to the marine environment associated with the MOX Plant.

90. As the United Kingdom has not established the fact of no adverse effect (as required by the application of the precautionary principle) it is unnecessary to make a finding. In any event, and were it a matter for determination, I am inclined to conclude that the material adduced by Ireland militates in favour of the probability of substantial environmental damage. The 1993 MOX Plant Environmental Impact Statement (which has never been revised or updated) must be read as premised on the view that the Plant may adversely affect the environment.[62] Each of the 1998 Proposed Decision on Justification [63] and the 2001 DEFRA Decision extensively analyses environmental impacts and safety concerns related to the Plant [64] and emphasises that there will be radioactive discharges into the marine area of the Irish Sea.[65] Such waste inherently has the potential to harm marine life and damage human health. Further, the 1998 Sintra Ministerial Decision, signed by the United Kingdom, requires that –

> *discharges, emissions and losses of radioactive substances are reduced by the year 2020 to levels where the additional concentrations in the marine environment above historic levels, resulting from such discharges, emissions and losses, are close to zero.*[66]

91. However, in my opinion such matters of likely fact may be put on one side, as I regard the issue of adverse effect as one with respect to which this Tribunal does not have competence and one which is not open to the majority to determine as a fact dispositive of these proceedings.

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[58] *See*, amongst others, Ireland's Memorial, paras. 19-23 and 96-97.

[59] *See*, for instance, Ireland's Reply, paras. 12-13.

[60] *See*, amongst others, Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 61-62.

[61] Counsel for the United Kingdom, Transcript, Day 2 Proceedings, pp. 62-63.

[62] Ireland's Memorial, Annex 9.

[63] *See* paras. 22-31 of the Proposed Decision. Ireland's Memorial, Annex 5.

[64] *See* Decision of the Secretary of State for Environment, Food and Rural Affairs and the Secretary of State for Health of October 3, 2001, paras. 56-70. Ireland's Memorial, Annex 5.

[65] *See* paras. 56-70 of the 2001 Decision. Ireland's Memorial, Annex 5.

[66] *See* the 1998 Sintra Ministerial Statement. Ireland's Memorial, Annex 8.

92. In summary, and for these reasons, my objections against the majority interpretation of the extent and meaning of adverse effect in Article 9(2) are that –

(1) it fails to address the admitted environmental harm to the marine environment of the Irish Sea, as well as the fact that Article 9(2) only speaks of the likelihood of adverse effect. These two factors create a lower threshold of proof for Ireland;

(2) in accordance with the precautionary principle, the burden of proof lies with the United Kingdom;

(3) the majority conclusion appears to be unfounded, since no factual evidence was presented in support of its finding; and

(4) the available material militates in favour of the conclusion that the probability of adverse effect might be demonstrated.

Relationship Between the Reports and Activities Likely Adversely to Affect the Marine Environment

93. The defining issue for the Tribunal's consideration is whether a link exists between the harmful activity and the information contained in the PA and ADL Reports.

94. In answering this question, the majority invokes and considers what it calls the *"theory of inclusive causality"*. The majority maintains that *"under an interpretative theory of inclusive causality, anything, no matter how remote, which facilitated the performance of an activity is to be deemed part of that activity"* (para. 164). This theory is then picked up as the vehicle for denunciation of Ireland's arguments in the following paragraphs of Part XI, with the majority concluding (para. 174) that because Article 9(2) establishes an additional threshold of adversity, the concept of *"inclusive causality"* fails.

95. The sources and definition of this *"theory of inclusive causality"* embraced by the majority are unknown to me. The expression was not part of either Party's submissions, and it conveys nothing beyond what I discern from the majority's references to it. I have had a nil return on my searches of textbooks on international law, Lexis-Nexis, a bibliography on causation,[67] dictionaries and the like, and I have not found any reference to the semantic linking of the words *"inclusive"* and *"causality"*. In explanation, it may be that the majority is doing no more than attaching to Ireland's arguments their own creative appellation. If so, such a nomenclature in no way assists in the consideration of the case.

96. Plainly, the PA and ADL Reports are a cause (or, more correctly, one of the causes) necessary for a harmful activity to occur, in the sense that at least the following are demonstrated –

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[67] *See* Partial Bibliography on Causation, compiled by Ellery Eels and Dan Hausmann, published at http://www.vanderbilt.edu/quantmetheval/causality.htm.

– the submission of the Reports was causally prior to the occurrence of the harmful activity;

– the commissioning of the Reports and the actual harmful activity are two distinct factual events; and that

– in the circumstances, had the Reports not been provided, the harmful activity would not be authorised or occur.

97. I support the United Kingdom's proposition that information falling within the scope of Article 9(2) is required to concern a harmful activity and its effect on the state of the maritime area.[68] However, and contrary to its submissions,[69] I conclude that Article 9(2) does not require this link to be direct and proximate,[70] or even sufficiently proximate.[71] In my opinion, Article 9(2) merely requires the existence of *any* relationship between future negative effects of the MOX Plant operation and the information contained in the PA and ADL Reports. In this regard, the justification exercise carried out by the United Kingdom is of primary importance to establishing this link.

98. The United Kingdom does not contest its obligation to justify the operation of the MOX Plant by a process that *"requires a consideration of whether the benefits of the practice outweigh the detriments"*.[72] It also agreed with Ireland that the PA and ADL Report processes were carried out *"within the context of the justification exercise under Euratom Directive 96/29 (replacing Directives 80/836 and 84/467)"*.[73]

99. Ireland contended that the obligation to justify requires an identification of the economic costs and benefits of the MOX Plant operation, and that, because of the omission of the economic data from the public domain versions of the PA and ADL Reports, Ireland is unable to assess whether potential negative environmental consequences of the MOX Plant operations are justified from the economic standpoint.[74]

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[68] Counsel for the United Kingdom, Transcript, Day 1 Proceedings, p. 92 United Kingdom's Counter-Memorial, para. 4.12.

[69] *See*, for instance, the following statement: "the material words of that provision [Article 9(2)] cover only information which is directly and proximately related to the state of the maritime area or to activities or measures adversely affecting or likely to affect the maritime area." United Kingdom's Counter-Memorial, para. 4.8.

[70] Ireland maintains that even though Article 9(2) does not contain such a condition, both the PA and ADL Reports meet the requirement of directness and proximity. *See* Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 49-50.

[71] United Kingdom's Counter-Memorial, para. 4 12.

[72] *Id.*, footnote 5, at pp. 3-4.

[73] *Id.*, para. 1.3.

[74] Ireland's Memorial, para. 40; Counsel for Ireland, Transcript, Day 1 Proceedings, p. 11 and Day 4 Proceedings, p. 66. *See also* Letter from Renee Dempsey to Michael Wood, 7 August 2001, para. 13. *See also* the Second MacKerron Report which reads: "This is an admission that without the information sought, the economic case for the SMP cannot be assessed. This goes contrary to Article 6 of the Directive 80/836/EURATOM and Article 6 of Directive 96/269. Ireland, who has a material interest in the environmental consequences of the SMP, is unable to assess without the information sought, whether there ever was an economic justification to the SMP. The statement by David Wadsworth confirms this." (Appendix B, para. B.1.1). Ireland's Reply, para. 34.

100. To this extent, it appears that the Parties were agreed that the assessment of benefits, including economic benefits, constitutes an integral part of the justification exercise. They diverged on the issue whether information concerning such benefits in the assessment process may fall within the scope of the definition of Article 9(2).

101. The United Kingdom contended that the information excised from the PA and ADL Reports was of a purely commercial nature[75] and that each of the PA and ADL Reports was an independent review of the business case for the commissioning of the MOX Plant.[76] It submitted that the information ceased to be relevant to the environment[77] upon the Executive concluding that the balance was broadly neutral.

102. Although Ireland accepted that the redacted information related to the commercial activity of the operation of the MOX Plant,[78] it submitted that, nonetheless, such information directly affected the environment[79] and that its commercial character was not determinative of characterisation as information within Article 9(2).[80]

103. Ireland identified that the *"purpose of the PA and ADL Reports is to examine the justification of the MOX Plant, taking into account inter alia the economic costs of its environmental consequences and of measures taken to limit those environmental consequences"*.[81] It further submitted that the redacted commercial data is directly related to the environment because it sheds light on –

> *. . . whether all the costs have been properly integrated into the design and operation of the plant; whether best environmental practices are being budgeted for; whether best available technology is being used; whether best available technology will continue to be used in the coming years as technology evolves.*[82]

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[75] United Kingdom's Counter-Memorial, para. 4.10; Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 67.

[76] Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 96.

[77] *See*, for instance, the following statement: "given its conclusion on environmental and other issues, that the balance is broadly neutral, the draft decision then went on to consider the economic case concluded that there was a case for approval. This is the point in the stage of consultations at which consideration of the environmental issues was concluded and from this point onwards, essentially, the issues being considered are no longer environmental, ... the issues considered hereafter were the commercial arguments for and against the plant or the process." Counsel for the United Kingdom, Transcript, Day 2 Proceedings, pp. 68-69.

[78] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 48.

[79] *Supra* note 38.

[80] *Supra* note 39.

[81] Written outline of submissions on behalf of Ireland, on file at the offices of the PCA (Professor Sands), para. 62.

[82] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 26. *See also* the following statement: "the very purpose of the PA and ADL reports is to examine the justification of the MOX plant taking into account all economic costs and those economic costs include the cost of environmental consequences, include the costs of ensuring against environmental damage, include the costs of ensuring against transport accidents, include the costs of ensuring that the plant is safe and complies with all domestic and international environmental standards." Counsel for Ireland, Transcript, Day 1 Proceedings, p. 46.

104. The United Kingdom was required to "justify" the MOX Plant under the applicable approval processes before its operation may be authorised. This relevant obligation first imposed on the United Kingdom in 1980 by Directive 80/836/EURATOM, Article 6, which provided –

> *. . . the limitation of individual and collective doses resulting from controllable exposures shall be based on the following general principles: (a) every activity resulting in an exposure to ionising radiation shall be justified by the advantages which it produces,*[83]

was replaced in 1996 by Directive 96/29/EURATOM, Article 6(1) in terms –

> *Member States shall ensure that all new classes or types of practice resulting in exposure to ionising radiation are justified in advance of being adopted by their economic, social or other benefits in relation to the health detriment they may cause.*[84]

105. The applicability of these 1996 EURATOM standards to the "justification test" is accepted by the Parties.[85]

106. The intention and purpose of the United Kingdom to treat economic data as having direct relevance to the environment is discerned from the contents of the DEFRA Decision ("the Decision") on the justification of the MOX Plant, adopted on 3 October 2001,[86] and, in particular, from the circumstances that –

– the essence of the obligation of justification is described by the Decision as: *"the requirement of justification is based on the internationally accepted principle of radiological protection that no practice involving exposure to radiation should be adopted unless it produces sufficient benefits to the exposed individuals or to society in general to offset radiation and any other detriment it may cause"*;[87]

– the Decision states that *"the application of the justiftcation test requires the consideration of environmental, safety, economic, social and other benefits and disbenefits"*;[88]

– the Decision explicitly relies on the EURATOM Regulations as grounds for conclusions regarding the justification of the MOX Plant:[89] paragraph 91 states that *"The Secretaries of State have concluded that the manufacture of MOX fuel is justified in accordance with the requirements of Article 6(1) of Directive 96/26/EURATOM"*; and

– paragraphs 56-70 of the Decision extensively analyse environmental detriments that may be caused by the manufacture of MOX fuel as well as

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[83] Ireland's Memorial, para. 37; United Kingdom's Counter-Memorial, para. 1.13; Counsel for Ireland, Transcript, Day 1 Proceedings, p. 6; Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 64.

[84] Ireland's Memorial, para. 38.

[85] *See*, for instance, United Kingdom's Counter-Memorial, paras. 1.3 and 1.11.

[86] *Supra* fn. 64; United Kingdom's Counter-Memorial, paras. 2.22-2.23; Counsel for the United Kingdom, p. 73.

[87] *Supra* fn. 64, para. 13.

[88] *Id.*, para. 28.

[89] *See supra* fn. 64, paras. 13-20.

safety and security concerns associated with the Plant's operation. These detriments are further balanced against economic and other benefits in paragraphs 71-81. This balance, of environmental concerns *vis-à-vis* future profits, is based primarily on the calculations produced by ADL in its Report.[90]

107. I demur to the contention of the United Kingdom that each of the PA and ADL Reports has nothing to do with the state of the maritime area embraced by the Convention. This is because each was commissioned by the United Kingdom Government in the framework of the mandated justification exercise considering whether economic benefits offset environmental harm.[91] This balancing process was acknowledged in the United Kingdom's Counter-Memorial as requiring *"a consideration of whether the benefits of the practice outweigh the [environmental] detriments"*.[92]

108. The significance of the environmental factors during the economic analysis is further confirmed by the explicit language of the ADL Report –

> [the Plant] cannot operate without passing a test of justification: *the benefits of a practice involving ionising radiation need to outweigh any environmental or other detriments.*[93]

109. The economic data collected and presented in the PA and ADL Reports was an integral and necessary part of the required process to determine whether the pollution of the marine environment might be legitimised under the nuclear regimes. It was this data that was deployed by the decision-makers, (at the executive level of Ministers of State) in the justification exercise for the commissioning of the MOX Plant.

110. At this point, the interdependence between economic data and environmental impacts becomes evident. It is inherent in the justification test that economic analyses may be determinative of whether future environmental harm is legitimate and whether the activity that is likely adversely to affect the maritime area should be authorised. Without economic data the exercise of justification becomes meaningless, as the second integral part of the entire test (namely the economic, social, and any other benefits in justification) will be missing.[94]

111. It is the economic analyses that provide the balancing factor to the scales of assessment in a justification process calibrated by the EURATOM Regulations to favour the environment. In the terms of physics, the moment tilting the balance against approval can only be offset by a larger moment arising from the justification exercise. That was the inherent function of the Reports. As information so directly integral to the process of assessment, such information must be characterised as bearing a most direct relevance to the

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[90] *See*, in particular, paras. 76-77, 85 and 89 of the DEFRA Decision.

[91] *Supra* fn 64, para. 13.

[92] United Kingdom's Counter-Memorial, footnote 5, at pp. 3-4

[93] ADL Report, para. 1.

[94] In his testimony, Mr. MacKerron alleges that "justification has been established in prior cases as amounting to net economic advantage which should outweigh any radiological betterment". *See* Testimony of Mr. Gordon MacKerron, Transcript, Day 2 Proceedings, p. 6.

state of the marine environment of the North-East Atlantic. To my mind, it would be futile for the exercise, and also confound the purpose of the justification regime, to qualify by unexpressed limitations the broad definition of information under Article 9(2) (as has the majority) to enable access only to the purely environmental side of the balance and to exclude the information taken into account on the other side of the scale.

112. For these reasons, the fact that the Parties are agreed that the PA and ADL Reports are comprehensive reviews of the business case[95] and contain commercial information,[96] cannot in itself exclude the relevance of the Reports to an activity which is likely to adversely affect the maritime area.

Other Considerations

113. Ireland supported its non-restrictive interpretation of Article 9(2) as consistent with international and domestic law and practice[97] arising from the Aarhus Convention[98] as confirming the validity of the approach taken by Ireland in its broad definition.[99] It also relied upon cited ECJ jurisprudence,[100] EC legislative proposals and domestic sources.[101]

114. The United Kingdom responded that such sources were either irrelevant or inapplicable in the relations between the Parties,[102] or support the United Kingdom's position.[103]

115. Plainly, it is not the function of the Tribunal to consider or determine whether the Aarhus Convention and EC legislation reflect a progressive development of international environmental laws and regulations.[104] Nor to engage in the interpretation of such instruments. The relevant enquiry is whether the terms of these instruments relevantly and permissibly inform the proper interpretation of Article 9(2). In this regard, Article 2(3)(b) of the

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[95] Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 96.

[96] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 48.

[97] Ireland's Memorial, para. 100. Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 55-57.

[98] Article 2(3) of the Aarhus Convention reads as follows:

> 'Environmental information' means any information in written, visual, aural, electronic or any other material form on: ... (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making; ...

[99] Counsel for Ireland, Transcript, Day 1 Proceedings, p. 52.

[100] *See, e.g., Mecklenburg, supra* note 27, Ireland's Memorial, para. 102. Counsel for Ireland, Transcript, Day 1 Proceedings, p. 55.

[101] Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 56-57.

[102] United Kingdom's Rejoinder, para. 21. Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 51.

[103] *See*, for instance, the United Kingdom's interpretation of the conclusions reached by the ECJ in the *Mecklenburg* case. United Kingdom's Counter-Memorial, para. 4.11.

[104] In the UK's view, the definition of the Aarhus Convention reflects "an exercise of progressive development of the law relating to 'environmental information"'. United Kingdom's Counter-Memorial, para. 4.13.

Aarhus Convention expressly includes in the definition of environmental information *"cost-benefit and other economic analyses and assumptions used in environmental decision-making"*.

116. For the reasons stated, I have concluded that the Convention possesses normative and evidentiary value and should be included in the complex of rules of international law in accordance with which the Tribunal is required to resolve the dispute at bar.

117. Further and beyond the Aarhus Convention, other of the materials put before the Tribunal by the Parties confirm regional trends exposing the intention of States and the European Union itself to include economic analyses in the definition of environmental information.[105] At the least, these trends appear to broaden the content of the definition of environmental information so as explicitly to include cost-benefit and other economic analyses.

118. Be that as it may, more significantly for the issues of definition arising under the OSPAR Convention, the EU and United Kingdom proposals noted in the previous paragraph refer to the *clarification* of the existing formulation of Directive 90/313 rather than the adoption of a new definition.[106] This "clarification" approach also is evident from the unambiguous language of the 2002 EC Common Position[107] expressed by the

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[105] *See*, in particular, Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 68-71; United Kingdom's Counter-Memorial, para. 4.13. *See also* "Report from the Commission to the Council and the European Parliament on the experience gained in the application of Council Directive 90/313/EEC on freedom of access to information on the environment" (COM(2000) 400 final). *See* Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 87; Outline of written submissions on behalf of the United Kingdom (Mr. Wordsworth); the "Proposal for a Directive of the European Parliament and of the Council on public access to environmental information" (COM(2000) 402 final. Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 88); "Amended Proposal for a Directive of the European Parliament and of the Council on public access to environmental information" (COM(2001) 303 final); Common Position "with a view to adopting Directive 2002/... /EC ... on public access to environmental information and repealing Council Directive 90/313/EEC" (Counsel for the United Kingdom, Transcript, Day 2 Proceedings, pp. 88-90); DEFRA "Proposals for a revised public access to environmental information consultation paper" (Ireland, Authorities Bundle I, Tab 5, paras. 13-15. *See also* Counsel for Ireland, Transcript, Day 1 Proceedings, pp. 52-53. *But see* Oral Pleadings, Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 88).

[106] *See*, for instance, para. 14 of the DEFRA "Proposals for a revised public access to environmental information consultation paper": *"the definition of environmental information is clarfied to refer specifically to the atmosphere, landscape, biological diversity etc. It is also defined to include cost benefit economic analyses and other assumptions used in the decision making process"*. Para. 15 further states that *"these are minor changes. They are not expected to broaden the practical application of the regime"*.

[107] Para. 10 of the Common Position reads: "The definition of environmental information should be clarified so as to encompass. . ." Common Position "with a view to adopting Directive 2002/.../EC ... on public access to environmental information and repealing Council Directive 90/313/EEC" (Counsel for the United Kingdom, Transcript, Day 2, p. 90).

EU Commission as based on the experience gained by Member States in the operation of Directive 90/313.[108]

119. In its ordinary sense, such a "clarification" does not so much extend meaning but merely confirms the content of existing meaning, including in the context of definitions within Article 9 of the OSPAR Convention.

120. Directive 2003/4 on public access to environmental information entered into force on 14 February 2003, to replace Directive 90/313,[109] and confirms that its main purpose is to bring EU law in compliance with the Aarhus Convention (para. 5) and environmental information is defined as –

> *The definition of environmental information should be* clarified *so as to encompass information in any form on the state of the environment, on factors, measures or activities affecting or likely to affect the environment or designed to protect it,* on cost-benefit and economic analyses used within the framework of such measures *or activities and also information on the state of human health and safety, including the contamination of the food chain, conditions of human life, cultural sites and built structures in as much as they are, or may be, affected by any of those matters.*[110] *(emphasis added)*

121. Again, it is the language of clarification, rather than of extension or substitution, that is invoked. As Article 9(2) is nearly identical to the language of the old Directive, at the least the drafters of the Directive 2003/4 must be taken to have understood the definition of Article 9(2) in the same way. Hence, as much as for directive 90/313 that it replaced, Directive 2003/4 thereby appears also relevant to understanding the meaning of "information" under the Article 9(2) definition by making explicit that which already was implicit under the OSPAR Convention.[111]

122. It follows that international environmental regulations as binding as Directive 2003/4 now define that facts similar in nature to the PA and ADL Reports fall within the definition of disclosable information. Since Directive 2003/4 presently is binding on the United Kingdom, it is not amenable to be characterised as soft law or progressive development of law that is irrelevant to the interpretation of Article 9(2). And, contrary to the United Kingdom's view,[112] there is now a clear consensus and practice with the European Union as to the meaning and application of the Aarhus Convention's terms.

123. I regret that I have not had the advantage of the submissions of the Parties as to the relevance of Directive 2003/4 that came into force during the pendency of this Tribunal's award. My conditional conclusion is that Directive

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[108] "Report from the Commission to the Council and the European Parliament on the experience gained in the application of Council Directive 90/313/EEC on freedom of access to information on the environment", COM(2000) 400 final. *See* Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 88; Outline of written submissions on behalf of the United Kingdom (Mr. Wordsworth).

[109] *Supra* fn. 23.

[110] *Id.*, para. 10.

[111] Ireland's Memorial, para. 100. Counsel for Ireland, Transcript, Day 1 Proceedings, p. 52. Counsel for the United Kingdom, Transcript, Day 2 Proceedings, p. 89.

[112] United Kingdom's Counter-Memorial, para. 4.13.

2003/4 is confirmatory (but certainly not determinative) of the interpretation of Article 9(2).

Conclusion on Second Category of Information

124. For the reasons stated, I am of the opinion that the production of MOX fuel falls within the scope of the second category of Article 9(2) to the extent that it constitutes an activity which has the potential of adversely affecting the maritime area of the Irish Sea, and that, properly characterised, the entire balancing process, including consideration of the economic case in justification, is an enquiry concerning information within the terms of Article 9(2).

Third Category of Information

125. The Tribunal's *Decision No. 5*, to which the Parties responded, raised with the Parties the question whether the information contained in the PA and ADL Reports may fall within the third category of information within Article 9(2) as related to an activity or measure introduced in accordance with the OSPAR Convention.

126. Plainly, the three categories of information are not disjunctive, and material may fall within more than one category. For this reason it appears to me appropriate to consider whether the relevant material also constitutes information under the third category. As I am of the opinion that in any event it falls under the second category this enquiry is not essential for my dissent. However, as the majority is of the contrary view on the second category, it appears to me that the majority determination is in error and incomplete by then failing to consider the third category.

127. For information to fall under the third category a relationship has to be established between an activity or measure and a specific provision of the Convention in accordance with which such a measure has been undertaken and activity carried out.

128. In this regard, the third category does not require a direct relationship between the state of the maritime area and information on such activities or measures. I reject the United Kingdom's contention to the contrary as in that case the second and third categories would be otiose as subsumed in the first category. In effect, Article 9(2) then would be read as if it provided for *"any available information . . . on the state of the maritime area*, and in particular *information on activities or measures . . .*". Plainly such a construction is not open to be made.

129. A different issue is whether a measure is directly related to the state of the marine environment. The examples used by the United Kingdom's response to the Tribunal's *Decision No. 5* demonstrate the link between a measure and the state of the marine area. In my view, this is not an absolute requirement for all cases. However, even if one accepts the United Kingdom's proposition that a direct relationship is required in all instances, as clearly such relationship is evident here.

130. In the context of the OSPAR Convention, I support the majority's interpretation (para. 171) of the term *"measure"* as a regulatory initiative *"by any part of the governmental apparatus of the Contracting Parties with respect to matters covered by the OSPAR Convention"*. I derive support for this meaning from the ECJ Judgement in the *Mecklenburg* case,[113] where the ECJ has helpfully defined the term *"measure"* as an *"act linked to an individual case directed towards a specific aim and having determinative effect"*.[114] The ECJ further found that this term serves merely *"to make it clear that the acts governed by the directive [whose language, as recognised by both parties, is nearly identical to Article 9(2)] included all forms of administrative activity"*.[115]

131. The authorisation of the MOX Plant undoubtedly qualifies as a measure undertaken in accordance with the OSPAR Convention. It is a form of administrative activity exercised by the United Kingdom government which is directed towards a specific aim and designed to further the disparate objective of the OSPAR Convention. The relevant provision in accordance with which this complex of measures was introduced, is Article 2(1) of Annex I –

> *Point source discharges to the maritime area, and releases into water or air which reach and may affect the maritime area, shall be strictly subject to authorisation or regulation by the competent authorities of the Contracting Parties. Such authorisation or regulation shall, in particular, implement relevant decisions of the Commission which bind the relevant Contracting Party.*

132. The justification of the MOX Plant that the United Kingdom undertook by way of arranging public consultations and commissioning and considering the Reports clearly falls within such an authorisation. The process, including obtaining the PA and ADL Reports, was a necessary measure introduced in accordance with the OSPAR Convention designed to protect the marine environment. In its written response to the Decision Ireland has reiterated that the main reason for its enquiry was to assure itself that the authorisation of the MOX Plant was carried out in a manner consistent with the OSPAR Convention.[116] It sought information on the measures introduced in accordance with the OSPAR Convention that could be found in the Reports.[117]

133. Indeed, the United Kingdom's response to *Decision No. 5* acknowledged that Article 2(1) of Annex I constitutes a measure introduced in accordance with the Convention. It would seem to follow that the Reports would fall within the third category of information of Article 9(2) when the necessary link between the Reports and this provision is established. I

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[113] *See Mecklenburg, supra* note 27.

[114] *See* para. 18 of the Judgement.

[115] *Id.*, para. 20.

[116] *See* Letter from the Agent for Ireland to the Secretary of the Tribunal (February 21, 2003), footnote 4 on p. 2 providing a summary of Ireland's claims to that effect.

[117] *See*, for instance, the following statement: "what is at issue here is a measure and the measure is the process of justification". Counsel for Ireland, Transcript, Day 4 Proceedings, p. 56.

disagree with the United Kingdom's contention that the Reports are unrelated to the state of the marine environment for the reason that the information contained in the PA and ADL Reports was the key factor in the authorisation by the United Kingdom of radioactive discharges into the Irish Sea. The link could not be stronger.

134. As the majority states (para. 179), the PA and ADL Reports do not necessarily have to be measures or activities themselves. Neither the United Kingdom nor, more relevantly, Ireland has claimed that they do. Rather, for the purposes of application of the third category of information it suffices to establish that the Reports contain information related to distinct measures or activities introduced in accordance with the OSPAR Convention. This must be the position here. Plainly, the PA and ADL Reports have had determinative effects on the authorisation of discharges into the maritime area by the United Kingdom government, as the findings of the Reports were used by DEFRA in preparing the Decision for the Manufacture of MOX fuel.[118]

135. For these reasons, I conclude that the information contained in the PA and ADL Reports also qualifies as measures introduced in accordance with the Convention under the third category of information of Article 9(2).

Summary

In summary, I identify the principal vitiating errors of the majority in finding that none of the redacted items was information within the definition of Article 9(2) arose from its approach of –

(1) interpreting the OSPAR Convention as if it were an isolated legal regime without regard to its context within a continuum of emerged and emerging legal instruments concerning the environment, including those in a relevant sense binding on the Parties;

(2) refusing to examine the PA and ADL Reports as a whole in light of the definition of Article 9(2) and suggesting instead to test each of the 14 categories of redacted items against the definition;

(3) confining, without any textual support, the second and third categories of information of Article 9(2) to being *"on the state of the maritime area"*;

(4) finding, incorrectly, that future radioactive discharges into the Irish Sea do not constitute an activity which is likely adversely to affect the state of the maritime area within the second category of information of Article 9(2);

(5) assuming, incorrectly, for the second category of information the onus of proof was on Ireland to establish that the MOX fuel production is an activity which is likely adversely to affect the maritime area;

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[118] *Supra* fn. 64.

(6) failing to characterise, for the second category of information, the justification exercise, of which the PA and ADL Reports were an integral part, as concerning the state of the maritime area; and

(7) failing adequately to examine the relevance of the third category of information of Article 9(2).

CONCLUSION

For these reasons I dissent from the dispositive conclusion of the majority accepting the United Kingdom's submissions that the whole of the redacted materials in the PA and ADL Reports is not information within Article 9(2) of the OSPAR Convention and that a final award presently should be made dismissing the claims of Ireland.

I am of the opinion that the whole of the PA and ADL Reports, including the redacted items, is information within Article 9(1) and (2) and that on such finding being made the dispute called for further hearing and consideration of the contention by the United Kingdom that Article 9(3)(d) justified the redactions made to these Reports.

Gavan Griffith

2 July 2003

PART III

Bank for International Settlements

Final Award of 19 September 2003

Banque des Règlements Internationaux

Décision du 19 septembre 2003

BANK FOR INTERNATIONAL SETTLEMENTS

ORDER ON THE REQUEST FOR EXCEPTIONAL REMEDIES, 31 AUGUST 2001

ORDONNANCE SUR LA DEMANDE DE MESURES EXCEPTIONNELLES, 31 AOÛT 2001

Potential claimant's request constitutes acknowledgement and invocation of Tribunal's jurisdiction--Rights of potential claimants not party to the arbitration--Tribunal's legal competence and equitable discretion to allocate costs to facilitate access to arbitration that ensures the fairness of the procedure and secures a meaningful award.

La requête d'un demandeur potentiel vaut reconnaissance et invocation de la compétence du Tribunal – Droits des demandeurs potentiels qui ne sont pas parties à l'arbitrage – Compétence juridique et pouvoir discrétionnaire du Tribunal, exercé en équité, pour répartir les frais d'une façon qui favorise l'accès à la procédure arbitrale, qui assure le déroulement en équité de la procédure et qui garantisse le prononcé d'une sentence significative.

In the matter of Reginald H. Howe v. Bank of International Settlements

ORDER

on the request of Reginald H. Howe for exceptional remedies

Whereas,

1. On July 25, 2001, in a communication by e-mail to the Tribunal concerning the Bank of International Settlements,[1] Mr. Reginald H. Howe stated that

a. He is "a former BIS shareholder," and has "an interest in any proceeding before the special Arbitral Tribunal recently appointed to hear disputes arising from the Bank's January freeze-out of its private shareholders."

b. Because "[i]n its 71st Annual Report dated June 11, 2001, the Bank states (at page 186): 'The Bank has declared that should the Arbitral

[1] Hereafter the Bank of International Settlements will be referred to as the "Bank for International Settlements" or "the Bank" and the Tribunal Concerning the Bank of International Settlements will be referred to as the "Tribunal Concerning the Bank of International Settlements" or "the Tribunal".

Tribunal increase the compensation, such increased amount would apply in respect of all repurchased shares[,]' . . . the Bank has effectively made any arbitration before the Tribunal the practical equivalent of a class action, raising all the issues of procedural fairness that necessarily attach to such proceedings, including whether the claimant fairly represents the class."

c. Mr. Howe indicates his awareness of the claim submitted by Dr. Reineccius and the date of the preparatory conference that had been scheduled for that claim.

d. Mr. Howe requests the Tribunal "to advise me as follows": "(1) the number of shares held by Dr. Reineccius"; "(2) whether any other former shareholders have filed claims with the Tribunal, and if so, who they are, how many shares they held, and where [he] can obtain copies of their notices of arbitration and/or statements of claim; (3) what, if any, proceedings are currently scheduled; and whether other former private shareholders may attend and participate."

2. By letter of July 30, 2001, the Bank of International Settlements was invited to comment on Mr. Howe's letter.

3. By letter of August 2, 2001, Counsel for the Bank of International Settlements responded and stated that

a. Mr. Howe had filed a lawsuit against, *inter alia*, the Bank of International Settlements which the Bank has moved to dismiss on various grounds including "that Mr. Howe's challenge to the price and validity of the mandatory redemption is subject to compulsory arbitration before the Tribunal under Article 54 of the Bank's Statutes."

b. If Mr. Howe files a claim with the Tribunal, he should be invited to the preparatory conference on September 7, 2001.

c. Mr. Howe does not, he should not be permitted to attend "the preparatory conference [which] is and should remain a forum for the parties alone" nor should he be permitted "to file papers, whether couched as requests for information or otherwise, commenting on arbitral proceedings in which he has declined to participate."

d. "Mr. Howe's assertion that 'the Bank has effectively made any arbitration before the Tribunal the practical equivalent of a class action' (a form of proceeding that does not even exist outside the United States) is incorrect."

e. Although "the Bank has also announced, in order to avoid repetitive arbitral proceedings, that it will voluntarily pay all former shareholders any additional compensation that the Tribunal may determine to be appropriate, without the necessity of their filing a claim," . . . "this does not mean that a former shareholder who files a claim "represents" anyone besides himself, and no former shareholder, whether he chooses to file a

claim or not, is legally bound by the actions of any other former shareholders."

f. "[T]he Tribunal [should] advise Mr. Howe that he should file a claim, so that he can participate in the proceedings before it."

4. By letter of August 2, 2001, Mr. Howe was invited to comment on the letter of the Bank.

5. By letter of August 17, 2001 delivered by e-mail on August 18, 2001, Mr. Howe responded and stated:

a. "The purpose of this letter is to request advice, clarification or information from the Tribunal on specific matters that . . . [he] must consider prior to filing any notice of arbitration . . .."

b. He is "neither in a position nor required . . . [to] file a formal notice or claim" in order to participate in the September 7 conference but that "any notice of arbitration or statement of claim that might in future be submitted by [him] will include challenges to the jurisdiction of the Tribunal and to the arbitrability of the dispute" which include issues relating to the appointment and impartiality of the Tribunal. In this regard, he requests from members of the Tribunal copies of all communications with any official of any signatory government or of the Bank relating to his appointment to the Tribunal and requests the Tribunal to order the Bank to provide copies of its correspondence. He further requests notice of and opportunity to present these arguments to the Tribunal (presumably as a non-party to the proceeding) should they be raised in any arbitration proceeding relating to what he refers to as the "freeze-out."

c. With respect to his contention that the Bank's commitment to "pay all former shareholders any additional compensation that the Tribunal may deem to be appropriate, without the necessity of their filing a claim. . ." (Letter of the Bank of August 2, 2001) transformed the proceeding into a class action, Mr. Howe states that "[w]hether or not one chooses to characterize the proceeding thus described as a class action . . . it presents many of the same problems. . . . " Among those problems are:

(i) multiple claimants may present varying evidence and contentions;

(ii) the Tribunal may be biased in later cases by presentations in prior ones;

(iii) in the event of multiple awards, it is not clear which will set the amount of the Bank's payments to former shareholders who do not file claims;

(iv) holders of relatively few shares, bringing their claims on an individual basis, may not gain enough from a potentially favorable award to cover their legal expenses, unless the Tribunal allows

former shareholders who have undertaken the expenses and risks of an arbitration to recover their legal expenses and costs as a charge against the enhanced payment to all. In this regard, Mr. Howe contends that "the Tribunal's own rules make no provision for the equitable allocation of costs in an arbitration involving the BIS on one side and its shareholders in more or less common cause on the other" but require each party to "pay its own expenses and an equal share of those of the Tribunal."

(v) the provisions in the Tribunal's rules with respect to assessment of costs by the Tribunal "give the Tribunal an unlimited call on the resources of the parties" and "appear designed for arbitration involving disputes between governments and the BIS" but "are wholly inappropriate and unfair when applied to an arbitration between the Bank and a private shareholder."

(vi) "no adequate provisions are in place for keeping former shareholders of the BIS properly informed about the status of the arbitration proceedings in which they have an interest."

d. Mr. Howe makes substantive allegations to the effect that "the BIS has been a key participant in a scheme to suppress gold prices orchestrated by top U.S. and British officials, including those who are directors of the Bank." Because, Mr. Howe contends, "the Tribunal will be unable to determine a correct freeze-out price for the Bank's shares without also addressing and investigating its involvement and that of certain of its directors. . ." "the Tribunal *might* want to consider whether it is the most appropriate forum to which to address the price fixing issues, and if not, whether to stay any arbitration proceedings relating to the freeze-out until after the U.S. courts have finally determined" his claims.

e. Mr. Howe inquires about the impartiality and independence of the arbitrators.

6. Because Mr. Howe had raised some new issues in his letter of August 17, 2001, the Bank was invited, by letter of August 21, 2001 to express its views only on those new issues.

7. By letter of August 23, 2001, Counsel for the Bank repeated that it was inappropriate for Mr. Howe to continue filing letter briefs and arguments when he has not filed a notice of arbitration or statement of claim and that "the obvious and only purpose of his continued correspondence is to misrepresent the Tribunal and its activities to the United States court where he is presently resisting arbitration of his dispute with the Bank." With respect to the new matters, the Bank responded:

a. "[t]he proper way to resolve his 'challenges to jurisdiction and arbitrability' . . . is for Mr. Howe to file a claim that raises these issues . . . [as] the Tribunal has the power to determine its jurisdiction under Article 16 of its Rules."

b. "the Tribunal's Rules in Article 5 provide for procedures by which a claimant may challenge the impartiality of any arbitrator. If Mr. Howe is serious about pursuing these matters, he should file a claim and raise them."

c. "As regard issues of costs, it is the Bank's understanding of Article 33 of the Tribunal's Rules that the Tribunal has equitable discretion to apportion costs as it sees fit, including awarding them to a successful claimant. . . . any advance deposit of costs under Article 34 could be subject to similar equitable allocation, which could appropriately take account of the circumstances of any particular claimant. The Bank does not wish that costs alone should serve to prohibit individual former private shareholders from arbitrating a claim. It is certainly not the Bank's understanding that multiple claimants, collectively, must bear more than half the Tribunal's costs, as Mr. Howe erroneously suggests. In the event that any individual, such as Mr. Howe, files a claim and attends the preparatory conference, the Bank would expect that individual to bear the costs of his or her travel and accommodation, but not an allocation of the costs of the Tribunal without prior notification. It remains, however, for the Tribunal to determine how any advance deposits should be apportioned based on the total number of claims ultimately filed and all the other facts and circumstances regarding such claims."

d. The Bank objects to Mr. Howe's request that submissions be made public on the Web or otherwise.

The Tribunal, having reviewed the submissions of Mr. Howe and the Bank of International Settlements and having deliberated, decides as follows:

A. With respect to the nature of Mr. Howe's requests: are the requests solely for information or also for permission to participate, in some form other than that explicitly prescribed by the legal regime of the Tribunal, in the arbitration initiated by Dr. Reineccius against the Bank and any other arbitration before the Tribunal?

A.1. The Tribunal is an institution created by the 1930 Agreement to make decisions with respect to matters that come within its jurisdiction *ratione materiae* and with respect to persons and entities within its jurisdiction *ratione personae*.

A.2. The Tribunal is designed and empowered to deal with cases and controversies and, while it may provide information relevant to the filing of claims to potential claimants, it is not competent to give advisory opinions, in the nature of the advisory jurisdiction of the International Court of Justice.

A.3. Mr. Howe's self-identification in his letter of July 25, 2001 and more explicitly in his letter of August 17, 2001, indicates that he is entitled to be a claimant before the Tribunal. The Bank's responses of August 2, 2001 and of August 21, 2001 indicate that it, too, is of the view that Mr. Howe is entitled to be a claimant. Given Mr. Howe's status, a

number of his requests, though often couched as a series of general questions, are, in fact, applications to the Tribunal, claimed as of legal right, on the basis of his legal status as a person entitled to be a claimant, for certain exceptional forms of participation and explicit requests for certain exceptional relief in a case pending before the Tribunal. While Mr. Howe requested a remedy from the Tribunal in his letter of July 25, 2001, his letter of August 17, 2001 makes clear that he wishes to secure that remedy without subjecting himself to the jurisdiction of the Tribunal.

A.4. In its letter of July 30, 2001, the Bank informed the Tribunal that Mr. Howe has sued the Bank and other entities in the courts of the state of Massachusetts in the United States on a matter *prima facie* within the jurisdiction of the Tribunal and that Mr. Howe has challenged there the jurisdiction of the Tribunal. This was a fact which Mr. Howe had not revealed in his letter of July 25, 2001, in which he sought the aforementioned remedies, but which he confirmed in his letter of August 17, 2001.

A.5. Given Mr. Howe's status as a potential claimant under Article 54 of the Statutes of the Bank and his request to the Tribunal, Mr. Howe's letter of July 25 acknowledged and invoked the jurisdiction of the Tribunal.

A.6. It is on the basis of that acknowledgment and invocation of its jurisdiction that this order is able to deal with the specific demands by Mr. Howe to participate, on the basis of a claimed legal right, in a form other than that of claimant, in a case pending before the Tribunal and such other matters as are related to that request.

B. With respect to the request of a person who is entitled but has elected not to be a claimant before the Tribunal: may that person be certified by the Tribunal as a member of a class and participate as part of a "class action" in an arbitration which another claimant has initiated against the Bank?

B.1. The Bank has stated in its response of August 2, 2001:

> The Bank has also announced, in order to avoid repetitive arbitral proceedings, that it will voluntarily pay all former shareholders any additional compensation that the Tribunal may determine to be appropriate, without the necessity of their filing a claim.

B.2. Mr. Howe, referring to the earlier statement of the Bank of June 11, 2001, (which appears, from the quoted section, to be consistent with the above quoted statement from the Bank's letter of August 2, 2001 but has not been submitted to the Tribunal), has stated that "the Bank has effectively made any arbitration before the Tribunal the practical equivalent of a class action." Mr. Howe reaffirmed this position in his letter of August 17, 2001. Hence Mr. Howe appears to claim the right to participate in the case initiated by Dr. Reinneccius, which is currently pending before the Tribunal, as a member of a class.

B.3. A "class action" is a procedure in United States law which involves a self-selected representative plaintiff who tries to secure a

judgment that will bind members of a class, including even those who have not joined the suit as voluntary participants. Class actions have been, until the present, an essentially American phenomenon, based on Rule 23 of the United States Federal Rules of Civil Procedure and the case law of the highest courts in the United States. The class action procedure depends in critical ways on the competence of a court to "certify" a class. A "class action" is different from a "group action," a term used in a number of European countries, referring to a procedure in which a number of plaintiffs voluntarily consolidate their claims in a single action whose judgments bind them and the defendant in their action but do not bind other individuals, who could have but elected not to join the group.

B.4. The Tribunal Concerning the Bank of International Settlements, as an Arbitration Tribunal, has only those powers that have been assigned to it by its constitutive instruments. Those instruments do not include or contemplate a class action comparable to the institution available in United States courts nor do they empower the Tribunal to certify a class. That is not to say that the Tribunal is unable to deal effectively with some of the problems for the solution of which the class action procedure was developed in the United States. The Tribunal may, for example, be prepared to conduct two or more arbitrations pending before it in a consolidated manner, whether by means of consolidation proper of the arbitrations, parallel conduct or otherwise, in the interest of arbitral economy, as long as such consolidation is compatible with the Tribunal's powers and does not prejudice the rights of individual claimants. Nor are individual claimants precluded from consolidating their own individual actions that were *in pari materiae* and then pursuing them as a single entity.

B.5. Hence Mr. Howe cannot be allowed to participate in the stages of the proceeding initiated by Dr. Reinneccius as a participant in a "class action" before the Tribunal.

C. With respect to the request of a person who is entitled but has elected not to be a claimant before the Tribunal: does that person have a right to participate in a preparatory conference with respect to an arbitration between the Bank and a person who is a claimant?

C.1. Article 9(1) of the BIS Arbitration Rules provides

> Subject to these Rules, the 1930 Hague Agreement, the 1907 Convention and the Terms of Submission, the Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case. (Underlining added)

Article 12(1) of the Rules requires "a preparatory conference with the parties to conclude the Terms of Submission in accord with Article XV(6) of the 1930 Hague Agreement." Because Article 9(1) requires that each party be given a full opportunity of presenting its case at any stage of the proceedings and the preparatory conference is a mandatory stage of the

proceedings, each party to a case is entitled to "a full opportunity" to participate in the preparatory conference. Hence, if Mr. Howe is one of the "parties" to the case whose Terms of Submission will be concluded at the preparatory conference, he is entitled to participate in that conference.

C.2. In the constitutive instruments of the Tribunal, "party" refers to a claimant or a defendant. In the case currently pending before the Tribunal in which Mr. Howe seeks some role other than as claimant, Dr. Reinneccius, the claimant, and the Bank, the defendant, are the parties.

C.3. While the Secretary of the Tribunal, in her letter of August 2, 2001, drew Mr. Howe's attention to the documents relevant to arbitration and Mr. Howe's letters indicate familiarity with and understanding of the procedures of the Tribunal, Mr. Howe has, at least until now, elected not to invoke the jurisdiction of the Tribunal by submitting to it a claim against the Bank.

C.4. As Mr. Howe is neither a claimant nor a defendant in this case, he is not a party and has no right to participate in the preparatory conference nor in any other stage of the proceedings, within the meaning of Article 9(1).

D. With respect to the request of a person who is entitled to but has elected not be a claimant before the Tribunal: does that person have a right merely to attend but not otherwise to participate in a preparatory conference with respect to an arbitration between the Bank and a person who is a claimant?

D.1. As Mr. Howe is not a party to the proceedings, a request to be present at the preparatory conference may be granted only if the Rules of the Tribunal, which take due account of its constitutive instruments, require that the preparatory conference be public.

D.2. Article 20(2) of the Rules requires that "Hearings shall be held in public." Article 28(6) of the Rules requires that "[t]he award shall be read out in public sitting . . . ." The Rules do not require any other stage of the proceedings to be public.

D.3. As the Rules indicate which stages of the proceeding must be held in public, but do not require the preparatory conference to be held in public, it is clear that the drafters intended to confine the preparatory conference to participation by the parties.

D.4. Hence a non-party to the arbitration, such as Mr. Howe, may not be present at the preparatory conference.

E. With respect to the request of a person who is entitled but has elected not to be a claimant before the Tribunal: may that person raise challenges to jurisdiction and arbitrability?

E.1. A challenge to jurisdiction and to arbitrability may be brought by a party to an arbitration. Article 16(2) of the Rules of the Tribunal

contemplates the possibility of challenges to the jurisdiction of the Tribunal and assigns a time limit for such challenges.

E.2. Article 16(1) states that "[t]he Tribunal shall have the power to decide the question as to its own jurisdiction."

E.3. There is no authorization in the Tribunal's Rules for the Tribunal to entertain a challenge to jurisdiction by a non-party.

E.4. Accordingly, a person who is entitled but has elected not to be a claimant before the Tribunal may not resort to an extra-arbitral procedure for challenging jurisdiction and arbitrability. This is without prejudice to the right of a person in Mr. Howe's position, if and when he elects to become formal claimant, to raise such challenges to jurisdiction and arbitrability as he may wish, as contemplated by the legal instruments that have constituted and govern the Tribunal.

F. With respect to the request of a person who is entitled to but has elected not be a claimant before the Tribunal: may that person challenge an arbitrator?

F.1. Articles 5 to 8 of the Tribunal's Rules provide a procedure for challenge to arbitrators. In particular, Article 5(1) provides that "[w]hen the Tribunal is seised of a case, each member of the Tribunal shall execute a Declaration of Impartiality and Independence and deposit it with the Secretary of the Tribunal." Article 5(3) requires the Secretary of the Tribunal to convey to the parties in the arbitration information in the Declaration about "a fact or relationship which may give rise to questions about [a member's] impartiality or independence but which the member does not believe actually impairs his or her independence and impartiality nor warrants recusal." Article 7 establishes the procedure by which and the time limits within which a party to an arbitration may challenge an arbitrator, whether on the basis of the information afforded in his or her Declaration or such other information as the party may have or acquire. Article 7(5) provides the procedure by which the Tribunal decides a challenge.

F.2. Accordingly, a party to an arbitration before the Tribunal may challenge an arbitrator on the grounds specified in the Rules.

F.3. The Rules do not provide for a procedure by which a person who is entitled to but has elected not to be a claimant before the Tribunal may challenge an arbitrator.

F.4. Accordingly, a person who is entitled to but has elected not be a claimant before the Tribunal may not challenge arbitrators in some sort of extra-arbitral procedure which is not contemplated by the Rules.

G. With respect to the request of a person who is entitled to but has elected not be a claimant before the Tribunal: is that person entitled to information with respect to arbitrations by other claimants concerning issues in pari materiae?

G.1. As stated above, the only phases of the arbitral process of the Tribunal that are required to be conducted in public are the hearings and the reading of the award.

G.2. The Tribunal is of the view that the reservation of the confidentiality of the other stages of the proceeding reflected a decision by the drafters which was designed to achieve a balance between the interest in providing public information and the interest of parties to an arbitration in the confidentiality of the proceedings.

G.3. The Tribunal is of the view that the same considerations apply to the current issue of valuation of shares.

G.4. The Tribunal is of the view, however, that the publication of information which does not infringe the privacy of the parties to an arbitration on this matter, insofar as it will, in any case, become public during the two public phases of each arbitration, but that is relevant to other persons, who, though not claimants, are eligible to become claimants, should be made available to such persons upon their application. The following information will be published on the website of the Tribunal at the Permanent Court of Arbitration [www.pca-cpa.org] and made available to potential claimants on request:

(a) The names of current or former shareholders who have filed claims with the Tribunal.

(b) The number of shares held by each current or former shareholder who has filed claims with the Tribunal.

(c) A copy of the relief sought by each current or former shareholder who has filed claims with the Tribunal as stated in the Notice of Arbitration and any amendment thereof, as well as any relief sought by the Bank.

(d) The schedule and status of proceedings currently pending before the Tribunal.

H. With respect to the allocation of deposits and costs: does the Tribunal have the legal competence or "equitable discretion" to allocate deposits and costs to take account of the circumstances of any particular claimant?

H.1. The 1930 Agreement and the 1907 Convention contemplated an equal division of the costs of an arbitration between the parties. As the context of those instruments was inter-state arbitration and not arbitration between a state or an international organization, on the one hand, and individual claimants on the other, that system of equal allocation was consistent with the notion of the sovereign equality of states and may have provided a formula that was likely to achieve equity in specific cases.

H.2. Article 54 of the Statutes of the Bank extended the jurisdiction of the Tribunal to disputes between the Bank and individual shareholders. In

this form of privity, the equal division of costs that was, not unreasonably, prescribed for inter-state arbitration could create inequities and even restrain or "chill" the access of individuals to arbitration. In this regard, the Tribunal takes note of the statement of the Bank in its letter of August 23, 2001, that "[t]he Bank does not wish that costs alone should serve to prohibit individual former private shareholders from arbitrating a claim." Wholly aside from the Bank's expression of its wish, an interpretation of a provision in one of the instruments of the Tribunal's regime that had the effect of prohibiting individuals entitled to arbitrate from doing so could hardly be lawful. As will be recalled, Article 9(1) of the Tribunal's Rules provides that

> Subject to these Rules and the Agreement and Convention under which it operates, the Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.

An allocation of deposits and costs that had the effect of not providing a party with a "full opportunity of presenting its case" would not meet the test of Article 9(1).

H.3. The "Rules for Arbitration Between the Bank for International Settlements and Private Parties," which were adapted on the basis of the authority in the 1930 Agreement to regulate arbitrations between the Bank and private shareholders, empower the Tribunal in Article 33 to "fix" the costs, a term which, in the context of this form of arbitration, includes the competence to allocate the costs in ways that further the shared objectives of the parties to the arbitration in order to achieve a fair process and a just outcome, consistent with law.

H.4. Hence, the Tribunal has the competence with respect to arbitrations under Article 54 of the Statutes of the Bank to allocate costs in ways that conduce to the optimum use of the arbitration as contemplated by the Article 54 and justice and fairness in the process of each arbitration.

H.5. The Tribunal takes note of the statement of the Bank in its letter of August 23, 2001 which says in relevant part that

> "it is the Bank's understanding of Article 33 of the Tribunal's Rules that the Tribunal has equitable discretion to apportion costs as it sees fit, including awarding them to a successful claimant. We also understand that any advance deposit of costs under Article 34 could be subject to similar equitable allocation, which could appropriately take account of the circumstances of any particular claimant. . . . It remains, however, for the Tribunal to determine how any advance deposits should be apportioned based on the total number of claims ultimately filed and all the other facts and circumstances regarding such claims."

H.6. Given the case-by-case and contextual imperative of any equitable allocation, the Tribunal cannot decide, in advance, the allocation of costs, all the more insofar as such an allocation is to "appropriately take account of the circumstances of any particular claimant." But even without knowing those circumstances in cases that have yet to advance or even to be filed, the Tribunal takes note of the Bank's statement that "[i]t is

certainly not the Bank's understanding that multiple claimants, collectively, must bear more than half the Tribunal's costs . . . ."

H.7. The foregoing observations also apply *mutatis mutandis* to the deposits for the arbitration as provided for by Articles 33 and 34 of the Rules of the Tribunal.

H.8. Accordingly, the Tribunal has the legal competence and equitable discretion to allocate costs in ways that contribute to access to the arbitral procedure provided for in Article 54 of the Statutes, that ensure the fairness of the procedure and that secure a meaningful award.

For the above reasons, the Tribunal orders that

1. Mr. Howe's requests to participate or attend the preparatory meeting between Dr. Reinneccius and the Bank are denied. The Tribunal notes, however, that Mr. Howe, as a present or former shareholder of the Bank, has the power to become a claimant against the Bank before this Tribunal if he so wishes, whereupon he will benefit from all the rights assured to him under its Rules, including the right to participate in a preparatory conference with respect to his case.

2. Mr. Howe's request for information about other arbitrations is granted. The Tribunal directs the Secretary of the Tribunal to make available through the Tribunal's website and to persons who request such information and identify themselves as eligible claimants:

(a) The names of current or former shareholders who have filed claims with the Tribunal.

(b) The number of shares held by each current or former shareholder who has filed claims with the Tribunal.

(c) A copy of the relief sought by each current or former shareholder who has filed claims with the Tribunal as stated in the Notice of Arbitration and any amendment thereof, as well as any relief sought by the Bank.

(d) The schedule and status of proceedings currently pending before the Tribunal.

3. The Tribunal has the competence to allocate deposits and costs of particular arbitrations to take account of the circumstances and needs of any particular party.

4. The Tribunal reserves the right to vary this order if the circumstances so require.

(*Signed*) W. Michael Reisman,
President of the Tribunal,
on behalf of the Tribunal

August 31, 2001

ORDER CONCERNING COSTS AND DEPOSITS FOR THE ARBITRATION, 11 OCTOBER 2001

ORDONNANCE CONCERNANT LES FRAIS D'ARBITRAGE ET LES AVANCES SUR FRAIS, 11 OCTOBRE 2001

Allocation of costs and deposits for arbitration between an international organization and individual claimants.

Répartition des frais et des avances sur les frais d'arbitrage entre une organisation internationale et des particuliers demandeurs.

THE TRIBUNAL CONCERNING THE BANK FOR INTERNATIONAL SETTLEMENTS

In an

ARBITRATION BETWEEN

DR. HORST REINECCIUS (CLAIMANT NO. 1) AND THE BANK FOR INTERNATIONAL SETTLEMENTS

AND

FIRST EAGLE SOGEN, FUNDS INC. (CLAIMANT NO. 2) AND THE BANK FOR INTERNATIONAL SETTLEMENTS

October 11, 2001

Having considered the submissions of the Parties as follows: letters from Dr. Horst Reineccius, (hereinafter, Claimant No. 1) dated September 12, 2001 and September 24, 2001, a letter from counsel for the Bank for International Settlements (hereinafter, the Bank) dated September 21, 2001, a letter from counsel for First Eagle SoGen Funds, Inc. (hereinafter, Claimant No. 2) dated September 21, 2001 and a letter from counsel for the Bank dated October 5, 2001 regarding the allocation of costs and deposits for the arbitration, the Tribunal directs the Parties:

1. The Bank will immediately deposit $334,057.00, half of the projected costs ($668,113.00) of the arbitration as detailed in the estimate submitted to the Parties at the First Preparatory Conference.

2. Each Claimant shall immediately deposit an amount equal to its pro-rata share of the remaining half of the estimated costs of the arbitration. Claimant No. 1 will deposit $731.00 or its equivalent in Euros and Claimant No. 2 will deposit $330,327.00. Claimants' share of the costs was determined by dividing the projected costs by the total number of private shares held by Claimant No. 1 and Claimant No. 2 to arrive at a cost of the arbitration per share ($36.50). Claimant No. 1 holds 20 shares and Claimant No. 2 holds

9085 shares. The same formula based on the number of privately held shares will be used to allocate costs for any additional claimants in the arbitration taking account of the possibility that additional parties may increase the costs of the arbitration.

3. The Tribunal has noted the submission of October 5, 2001 by the Bank with copies to all Claimants regarding the Bank's position concerning the distribution of costs among all the owners of privately held shares should they benefit from an Award made to the Claimants in the arbitration. In this eventuality, the costs of Claimant No. 1 and Claimant No. 2 could be reduced proportionally.

4. The Tribunal reserves the right to order a further deposit for costs should circumstances (such as, but not limited to, the complexity of issues raised in the Statements of Claim or Defense, the length of time required for the scheduling of testimony or analysis of reports from expert witnesses, the extension of the number of days required for hearings, or a need for more meetings than presently projected) increase the costs of the arbitration.

5. Upon receipt of the required deposits, having considered the submissions of the Parties and their substantial agreement regarding preliminary procedure and confidentiality stipulations, the Tribunal will issue an Order on Consent of the Parties.

Prof. Michael Reisman, President and on behalf of the Tribunal
October 11, 2001

PROCEDURAL ORDER NO. 6 (ORDER WITH RESPECT TO THE DISCOVERY OF CERTAIN DOCUMENTS FOR WHICH ATTORNEY-CLIENT PRIVILEGE HAS BEEN CLAIMED), 11 JUNE 2002

ORDONNANCE DE PROCÉDURE N° 6 (ORDONNANCE CONCERNANT LA COMMUNICATION DE CERTAINES PIÈCES POUR LESQUELLES LE SECRET DES COMMUNICATIONS ENTRE L'AVOCAT ET SON CLIENT A ÉTÉ INVOQUÉ), 11 JUIN 2002

Attorney-client privilege: requirement *ratione materiae* (legal communications), requirement *ratione personae* (authorized decision makers), voluntary waiver by publicity, "sword and shield rule".

Secret des communications entre l'avocat et son client : condition *ratione materiae* (communications juridiques), condition *ratione personae* (décideurs autorisés), renonciation volontaire par publicité, règle dite « de l'épée et du bouclier ».

Arbitration Tribunal Established Pursuant to Article XV of the Agreement Signed at The Hague on 20 January 1930

Dr. Horst Reineccius, Claimant v. Bank for International Settlements, Respondent (Claim No. 1)

First Eagle SoGen Funds, Inc., Claimant v. Bank for International Settlements, Respondent (Claim No. 2)

Pierre Mathieu and la Société Hippique de la Châtre, Claimants v. Bank for International Settlements, Respondent (Claim No. 3)

Procedural Order No. 6
(Order with Respect to the Discovery of Certain Documents for Which Attorney-Client Privilege Has Been Claimed)
11 June 2002

A. *Procedural History*

Pursuant to Procedural Order No. 5, First Eagle SoGen Funds, Inc. (hereafter First Eagle) and the Bank for International Settlements (hereafter the Bank) resolved certain questions concerning the production of documents under the terms of Procedural Order No. 3. They then contacted the Secretary of the Tribunal to set up a conference call to address First Eagle's remaining concerns. At the telephone conference on 13 May 2002, attended by counsel for First Eagle and the Bank and the Secretary of the Tribunal, First Eagle

indicated that still at issue with respect to their relevance were nine (9) documents, portions of which had been withheld by the Bank for alleged lack of relevance under Procedural Order No. 3 or because of assertions of attorney-client privilege.

Counsel for First Eagle and the Bank requested that the Secretary review the nine documents (as numbered in the document log dated 8 May 2002, prepared by the Bank to which First Eagle appended its Objections on 10 May 2002) that were kept in the Bank's offices in Basel, Switzerland, and then discuss by telephone conference with counsel for First Eagle and the Bank her recommendations regarding the relevance of the redacted portions. Counsel also agreed that they would submit legal memoranda to the Tribunal concerning the Bank's assertions of attorney-client privilege.

The Secretary reviewed the nine documents in question at the Bank's offices on 15 and 16 May and discussed with counsel the possible relevance of some parts of Documents Nos. 25, 26, 31, 33 and 35 to Section E.1.f of Procedural Order No. 5; counsel for the Bank agreed to produce portions of those five documents which had been previously redacted for lack of relevance. In a telephone conference with First Eagle's counsel and the Secretary on 16 May 2002, the Bank indicated to First Eagle that it would immediately produce those portions of the five documents. The parties agreed that Documents Nos. 7, 22, 36 and 40 had been appropriately redacted.

On 22 May 2002, the Bank submitted a Memorandum to the Tribunal on attorney-client privilege issues raised in First Eagle's 10 May 2002 Objections. First Eagle responded with a Memorandum in support of its Objections on 29 May 2002.

B. The Documents at Issue

Seventeen documents which fall within the purview of Section E. of Procedural Order No. 3 (Terms of Submission) were listed by the Bank; five documents were partially redacted and twelve documents were withheld entirely on the ground of attorney-client privilege. The documents are described in the log assembled by the Bank in compliance with Procedural Order No. 3 along with summaries of First Eagle's objections, as follows on pp. 3-8:

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
28	BIS00696-BIS00701	Explanatory Note to the Board of Directors Regarding Convening an Extraordinary General Meeting with a view to an Amendment of the Bank's Statutes, 10 September 2000	General Counsel	Board Members	00699-00701	Lack of sufficient relevance or materiality (IBA Art. 9(2)(a)) Portion of document produced was responsive to Paragraph E.1 (e) (documents relating to the Bank's valuation of the Bank's shares since 1990). Redacted portion discussed Board of Directors' activities unrelated to the valuation of shares. Legal impediment or privilege (IBA Art. 9(2)(b)) Summary of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion. No legal impediment or privilege is available where the Bank has already disclosed privileged advice.
31	BIS00765-BIS00767	Explanatory Note for the Board of Directors regarding an Extraordinary General Meeting with a	General Counsel	Board Members	00765-00767	Lack of sufficient relevance or materiality (IBA Art. 9(2)(a)) Portion of document produced was responsive to Paragraph E.1 (e) (documents relating to the Bank's valuation of the Bank's shares since 1990). Redacted portion discussed	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
		view to Amending the Bank's Statutes, Draft Resolutions, 12 December 2000				Board of Directors' activities unrelated to the valuation of shares. Legal impediment or privilege (IBA Art. 9(2)(b)) Summary of legal advice from outside counsel in relation to various issues	transaction.
32	BIS00772-BIS00777	Draft Explanatory Note for the Information of Central Banks represented at the Extraordinary General Meeting to be held on 8 January 2001	General Counsel	Member Central Banks	00775, 00777	Lack of sufficient relevance or materiality (IBA Art. 9(2)(a)) Portion of document produced was responsive to Paragraph E.1 (e) (documents relating to the Bank's valuation of the Bank's shares since 1990). Redacted portion discussed Board of Directors' activities unrelated to the valuation of shares. Legal impediment or privilege (IBA Art. 9(2)(b)) Summary of legal advice in relation to the proposed transaction	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion transaction. No legal impediment or privilege is available where the Bank has already disclosed privileged legal advice.

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
34	BIS00783-BIS00797	Opening Oral Statement of the Chairman of the Board of Directors at the Press Conference on 8 January 2001 and Public Record of the Proceedings of the Extraordinary General Meeting on 8 January 2001	General Counsel and Notary Public	Member Central Banks	00788, 00790	Lack of sufficient relevance or materiality (IBA Art. 9(2)(a)) Portion of document produced was responsive to Paragraph E.1 (e) (documents relating to the Bank's valuation of the Bank's shares since 1990). Redacted portion discussed Board of Directors' activities unrelated to the valuation of shares. Legal impediment or privilege (IBA Art. 9(2)(b)) Redacted portion consists of legal advice in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion transaction.
45	N/A	Legal Opinion dated 29 August 2000	Gide, Loyrette Nouel	General Counsel and Members of Senior Management	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
							exclusion
46	N/A	Correspondence relating to Legal Opinion dated 10 July 2000	Gide, Loyrette Nouel	General Counsel	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
47	N/A	Correspondence relating to Legal Opinion dated 21 July 2000	Gide, Loyrette Nouel	General Counsel	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
48	N/A	Correspondence relating to Legal Opinion dated 4 December 2000	Gide, Loyrette Nouel	General Counsel	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
						transaction.	and carrying out the exclusion
49	N/A	Legal Opinion dated 4 September 2000	Professor Frank Vischer	General Counsel and Members of Senior Management	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
50	N/A	Legal Opinion dated 1 December 2000	Professor Frank Vischer	General Counsel and Members of Senior Management	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
51	N/A	Summary of Legal Opinion dated 1 December 2000	Professor Frank Vischer	General Counsel and Members of Senior Management	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
						transaction.	related to planning and carrying out the exclusion
52	N/A	Legal Opinion dated 14 August 2000	Alain Hirsch	General Counsel and Members of Senior Management	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
53	N/A	Correspondence relating to Legal Opinion dated 31 July 2000	Alain Hirsch	General Counsel	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
54	N/A	Legal Opinion dated 6 December 2000	Winthrop, Stimson, Putnam &	Board Members	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in	No legal impediment or privilege is applicable to shareholders of the

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
			Roberts			relation to the proposed transaction.	Bank for legal advice related to planning and carrying out the exclusion
55	N/A	Correspondence relating to Legal Opinion dated 20 November 2000	Winthrop, Stimson, Putnam & Roberts	General Counsel	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
56	N/A	Correspondence relating to Legal Opinion dated 21 November 2000	Winthrop, Stimson, Putnam & Roberts	General Counsel	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal advice from outside counsel in relation to the proposed transaction.	No legal impediment or privilege is applicable to shareholders of the Bank for legal advice related to planning and carrying out the exclusion
57	N/A	Summary of Legal Opinion dated 6	Winthrop, Stimson, Putnam	Board Members	N/A	Legal impediment or privilege (IBA Art. 9(2)(b)) Document not produced consists of legal	No legal impediment or privilege is applicable to

Number	Doc. Bates Ranges	Description	Author	Recipients	Redacted pages	Reasons for Non-Production or Redaction Basis for Invocation	Reasons for Objections
		December 2000	& Roberts			advice from outside counsel in relation to the proposed transaction.	shareholders of the Bank for legal advice related to planning and carrying out the exclusion

C. The Parties' Contentions

In its Objections submitted on 10 May 2002, First Eagle, while acknowledging that "the attorney-client privilege may provide a basis to withhold documents from discovery in an international arbitration," [1] contended that the Bank was not entitled to invoke the attorney-client privilege as a justification for refusing to share legal advice paid for and owned by the Bank and, derivatively, its shareholders relating to the compulsory repurchase of the shares from the private shareholders. First Eagle also contended that the Bank could not invoke the attorney-client privilege selectively and that once it disclosed certain parts of the legal advice in question, all of the legal advice that had been given was no longer to be deemed privileged.

On 22 May 2002, the Bank stated in its Memorandum that attorney-client communications between the Bank and its counsel are protected by privilege in disputes between the Bank and its private shareholders because, under international law, "a corporation has a distinct legal personality from its shareholders," and "attorneys for a corporation do not represent the shareholders, but the corporation itself." When corporations find themselves in disputes with one or more shareholders, the corporation and the shareholder "invariably have separate legal advisers, representing their separate and adverse interests." [2] The Bank contended that seven legal opinions were provided only to Board members and not to the central bank shareholders.[3] Finally, the Bank contended that it had not engaged in "selective disclosure" as understood in United States jurisprudence "where a party uses privileged attorney-client communications as a "sword," to prove its case and is therefore in fairness not permitted to use the privilege as a "shield" to withhold related communications."[4]

In its Memorandum of 29 May 2002, First Eagle contended that under the governing law, which it stated was international law, there is a general principle of corporate law establishing "the duty of the Board of Directors of a company to exercise its powers in good faith and in disinterested fashion, and to treat all of its shareholders equally and fairly;"[5] the differential treatment accorded by the Bank to its private shareholders with respect to the communications which First Eagle sought to discover was inconsistent with this principle. First Eagle also contended that the Explanatory Note of 8 January 2001 which was distributed at the Extraordinary General Meeting and the "Public Record" of the proceedings were disclosed to all of the central bank shareholders. From this, First Eagle infers that there could no credible assertion of an expectation of confidentiality for the documents so distributed. First Eagle also contended that while a litigant is entitled to withhold documents generated to assist an anticipated or actual litigation, it may not

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[1] *Id.*, at page 4.
[2] *Ibid.*
[3] *Id.*, at page 5.
[4] *Id.*, at page 6, relying upon *United States v. Bilzerian*, 926 F2d 1285, 1292 (2d Cir. 1991).
[5] *Id.*, at page 2.

withhold advice "that was provided primarily to assess the legality, feasibility, or form of a transaction."[6] Under this analysis, six of the documents the Bank withheld, First Eagle stated, would not benefit from privilege as they were created prior to the Board's announcement of the compulsory repurchasing program. First Eagle also contended that the Bank could not unilaterally withdraw documents that it had "inadvertently" produced.

D. Decision

The attorney-client privilege, which is widely applied in domestic legal systems, has been recognized in public international and international commercial arbitration rules and arbitral awards. The privilege applies to corporate entities as well as to individuals; when claimed for corporate entities, it obtains with respect to those who are authorized to participate in the decisions. The attorney-client privilege has, in addition, been recognized and applied with respect to international organizations.

At the core of the attorney-client privilege in both domestic and international law is the appreciation that those who must make decisions on their own or others' behalf are entitled to seek and receive legal advice and that the provision of a full canvass of legal options and the exploration and evaluation of their legal implications would be chilled, were counsel and their clients not assured in advance that the advice proffered, along with communications related to it, would remain confidential and immune to discovery.

Ratione materiae, the legal communications which are entitled to an attorney-client privilege must be related to making a decision that is in or is in contemplation of legal contention; *ratione personae*, the legal communications must be between an attorney (whether in-house or outside) and those who are afforded his or her professional advice for purposes of making or in contemplation of that decision. Legal communications which would qualify for privilege on the basis of these criteria may lose their privileged status if the party entitled to it waives the privilege by word or deed or voluntarily publicizes the substance of the legal communications beyond the circle of those who are authorized to make or participate in the making of the decision. In addition, in circumstances in which the privilege is abused by using it in ways that would unfairly benefit the party entitled to it and unfairly prejudice the other party – the so-called "sword and shield rule" as it is called in United States' federal jurisprudence – the privilege will not be given effect. As the Court said in U.S. v. Bilzerian,

> the attorney-client privilege cannot be used as a shield and a sword. . . . A defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes.[7]

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[6] *Id.*, at page 8.

[7] *U.S. v. Bilzerian*, 926 F.2d 1285 (2nd Cir. 1991) at 1292.

Of the 17 documents which are summarized above, all would fulfil, *prima facie*, the attorney-client privilege requirement *ratione materiae*. Documents No. 45, 46, 47, 48, 49, 50, 51, 52 and 53, 55 and 56 are legal opinions of outside counsel to the General Counsel of the Bank and, in some of the documents, senior management of the Bank and, thus, would, *prima facie*, fulfil the attorney-client privilege requirement *ratione personae*.

Documents 28, 31, 54 and 57, involving summaries of legal advice, were communicated by the General Counsel or outside counsel to the members of the Board. Documents No. 32 and 34 were communicated to member central banks. Whether these documents fulfil the *ratione personae* requirement of the attorney-client privilege turns on whether the recipients of these documents were authorized by the relevant legal regime to participate in making the decision with respect to which the legal advice had been prepared. If the recipients were authorized decision makers, the documents would continue to benefit from the attorney-client privilege, for, notwithstanding the numerically larger circle of recipients, the purpose of the attorney-client privilege rule would be frustrated if the legal advice, whether in full or in summary, could not be made available to those who were legally charged with making the decision without surrendering the privilege. Indeed, the attorney-client privilege would then be an absurdity. If the recipients were neither authorized decision makers nor senior management, the communication to them of material that was otherwise privileged *ratione materiae* would constitute a waiver of the attorney-client privilege. Hence the resolution of this part of the dispute over the claims regarding the attorney-client privilege of the Bank will turn upon the decision making rules of the Bank.

Article 26 of the Statutes vests the administration of the Bank in the Board, whose membership is prescribed in Article 27. The rules for General Meetings and Extraordinary General Meetings of the Bank are set out in Chapter V of the Statutes. General Meetings are to be attended, according to Article 44, by nominees of the central banks or other financial institutions referred to in Article 14. An Extraordinary General Meeting is, according to Article 47, to be summoned to decide upon proposals of the Board, *inter alia*, to amend the Statutes. Hence all the central banks, and not merely the Board, would have to decide a proposed amendment of the Statutes. As the private shareholders did not have a right to vote or representation at the Extraordinary General meeting pursuant to Article 14 of the Statutes, they would not participate in a General Meeting or Extraordinary General Meeting. Since the communications for which attorney-client privilege is claimed related to the proposed amendment of the Statutes, the fact that a larger number of entities than those on the Board received the communications would not *per se* deprive them of the attorney-client privilege.

First Eagle contended that private shareholders owned the legal advice their corporation secured, but international law, like domestic systems, recognizes the separate legal personality of a corporate entity and the International Court of Justice has upheld this principle, even in circumstances

in which the legal effect of separate personality was unhelpful to the interests of the shareholders.[8]

First Eagle also contended that principles of equal treatment of all shareholders would require that any legal communications made available to central bank shareholders should also be made available to the private shareholders. But the attorney-client privilege obtains with regard to advice about taking a legal decision and under the terms of the Statutes, as explained above, only the central banks and not the private shareholders were accorded the competence to make the decisions in question (without prejudice to their legality, which question is to be decided by the Tribunal pursuant to Procedural Order No. 3 in a separate phase) and would, hence, have been entitled to the legal advice.

Nor is there evidence that, other than Document No. 34, insofar as it was disclosed at a press conference, the material that would otherwise benefit from the attorney-client privilege was publicized by the Bank, with the necessary consequence that it ceased to be privileged. The words "Notarized Public Record" of the Swiss notary appear to be a formula for certifying the minutes under Swiss law but do not indicate that the documents were made available publicly.

If the Extraordinary General Meeting had been open to the public, communications made there would cease to benefit from the attorney-client privilege. There is no indication that any General Meetings are open to the public. Article 44 of the Statutes permits attendance only by nominees of the central banks or other financial institutions referred to in Article 14.

Finally, there is no indication that giving effect to the claimed attorney-client privilege with respect to the documents in contention would constitute an abuse of rights or allow the beneficiary of the attorney-client privilege to use the contents of the documents as a sword, while using the privilege as a shield. In the pleadings to date, no parts of the legal opinions or their summaries are being selectively used as evidence.

E. Order

For the above reasons, the Tribunal orders the Bank to produce, insofar as it was disclosed at a press conference, Document No. 34. The Bank will produce said document to each of the claimants in accordance with Procedural Order No. 5. The Tribunal determines that Documents Nos. 28, 31, 32, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56 and 57 are subject to the attorney-client privilege and need not be produced.

Professor Michael Reisman, President, on behalf of the Tribunal

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[8] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain) Second Phase*, 1970 ICJ Reports 3.

PARTIAL AWARD ON THE LAWFULNESS OF THE RECALL OF THE PRIVATELY HELD SHARES ON 8 JANUARY 2001 AND THE APPLICABLE STANDARDS FOR VALUATION OF THOSE SHARES, DECISION OF 22 NOVEMBER 2002

SENTENCE PARTIELLE CONCERNANT LA LICÉITÉ DE LA REPRISE DES ACTIONS DÉTENUES PAR DES PERSONNES PRIVÉES DÉCIDÉE LE 8 JANVIER 2001 ET LES NORMES APPLICABLES À L'ÉVALUATION DESDITES ACTIONS, DECISION DU 22 NOVEMBRE 2002

Character and status of the Bank as a *sui generis* creation which is an international organization—international treaty origin, functions quintessentially public international in character; explicit recognition in international instruments. International organization may engage in private sector activities in implementation of its public functions without automatically and *pro tanto* losing its public international legal character. The issue was not the possibility of profit-making, but the purpose for which the Bank was created.

Applicable law—issues implicating the organic principles or internal governance of an international organization are governed by international law; an international actor does not, *qua* international actor and by virtue of that status, have sovereignty; the distinction between *acta jure imperii* and *acta jure gestionis* has no relevance in a public international forum.

Interpretation of constituent instruments of international organizations—subsequent practice.

Compulsory recall of privately held shares—*intra vires* the Bank's Statutes, a lawful exercise of the Bank's powers, not in violation of principles of international law (public interest, non-discrimination and compensation criteria).

Method of valuation: international law standard of valuation for "reparations" or "compensation"; valuation of shares is governed by *lex specialis* (i.e. the Constituent Instruments of the Bank as confirmed by its past practice); shareholders have equal rights to the aggregate assets of the Bank notwithstanding differences in other rights; shareholders are entitled to a proportionate share of the net asset value (NAV) of the Bank, discounted by 30% (based on a hypothetical liquidation value) subject to the additional NAV assessment for real estate, discounted by 30%.

Caractère et statut de la Banque, création *sui generis* qui est une organisation internationale – Origine tirée d'un traité international, fonctions à caractère essentiellement public et international; reconnaissance expresse dans des instruments internationaux. Une organisation internationale peut, dans l'accomplissement de sa mission publique, mener des activités dans le secteur privé sans perdre automatiquement et pour autant son caractère de droit international public. Ce n'est pas le fait que la Banque puisse faire des bénéfices qui importe, mais l'objet pour lequel elle a été créée.

Droit applicable – Les questions intéressant les principes organiques ou la gestion interne d'une organisation internationale sont régies par le droit international; un acteur international, en sa qualité d'acteur international et en vertu de ce statut, n'est pas souverain; la distinction entre *acta jure imperii* et *acta jure gestionis* n'est pas pertinente devant un tribunal international public.

Interprétation des instruments constitutifs d'organisations internationales –Pratique ultérieure.

Rachat obligatoire des actions détenues par des personnes privées – *intra vires* les statuts de la Banque, constitue un exercice légitime de ses pouvoirs par la Banque, ne viole aucun principe de droit international (critères de l'intérêt public, de la non-discrimination et de l'indemnisation).

Méthode d'évaluation : norme de droit international applicable à l'évaluation aux fins de « réparations » ou d'« indemnisation »; l'évaluation des actions est régie par la *lex specialis* (par exemple, les instruments constitutifs de la Banque, tels que confirmés par sa pratique); les actionnaires ont des droits égaux sur l'ensemble de l'actif de la Banque, nonobstant les différences qui peuvent exister en ce qui concerne d'autres droits; les actionnaires ont droit à une part proportionnelle de l'actif net réévalué de la Banque, avec application d'une décote de 30 % (sur la base d'une valeur de liquidation hypothétique), sous réserve d'une évaluation supplémentaire de l'actif net réévalué en ce qui concerne les biens immobiliers, avec application d'une décote de 30 %.

PERMANENT COURT OF ARBITRATION

ARBITRATION TRIBUNAL ESTABLISHED PURSUANT
TO ARTICLE XV OF THE AGREEMENT SIGNED AT
THE HAGUE ON 20 JANUARY 1930

Prof. W. Michael Reisman

Prof. Dr. Jochen A. Frowein

Prof. Dr. Mathias Krafft

Prof. Dr. Paul Lagarde

Prof. Dr. Albert Jan van den Berg

Phyllis Hamilton, Secretary

Permanent Court of Arbitration, Registry

DR. HORST REINECCIUS, CLAIMANT (CLAIM NO. 1)
FIRST EAGLE SOGEN FUNDS, INC., CLAIMANT (CLAIM NO. 2)
MR. PIERRE MATHIEU AND LA SOCIETE DE CONCOURS HIPPIQUE
DE LA CHATRE, CLAIMANTS (CLAIM NO. 3)
-VERSUS-
BANK FOR INTERNATIONAL SETTLEMENTS, RESPONDENT

Table of Contents

CHAPTER I – INTRODUCTION

1. On 20 January 1930, the Governments of Germany, Belgium, Great Britain, Italy, Japan and Switzerland concluded at The Hague, the Convention respecting the Bank for International Settlements. The Convention included the Constituent Charter and the Statutes of the Bank (hereafter the Convention, the Constituent Charter and the Statutes of the Bank will be referred to collectively as the "Constituent Instruments"). The Bank for International Settlements (hereafter the "Bank" or "BIS") was organized, by Article 1 of the Statutes, as "a Company limited by shares" and its objects, according to Article 3, were

> to promote the co-operation of central banks and to provide additional facilities for international financial operations; and to act as trustee or agent in regard to international financial settlements entrusted to it under agreements with the parties concerned.

2. In extending invitations to subscribe to capital in the Bank, Article 10 of the Statutes prescribed that "consideration shall be given by the Board [of Directors of the Bank] to the desirability of associating with the Bank the largest possible number of central banks."

3. The shares did not convey any rights in the governance of the Bank. Article 15 of the Statutes provided, in part:

> The ownership of shares of the Bank carries no right of voting or representation at the General Meeting. The right of representation and of voting, in proportion to the number of shares subscribed by each country, may be exercised by the central bank of that country or by its nominee.

4. Because some of the central banks were not, at the time of the founding of the Bank, in a position to subscribe and hold shares and others would have found the financial burden of acquiring and holding the shares onerous, Article 16 of the Statutes stated that "[a]ny subscribing institution or banking group may issue, or cause to be issued to the public the shares which it has subscribed." In accordance with this option, the United States Federal Reserve, the French Central Bank and the Belgian Central Bank issued all or some of the shares which they had subscribed for sale to private parties. At the time of the founding of the Bank, "a substantial part of [the] share holdings"[1] were held by private parties. French-issued shares were traded on the Paris marché au comptant; Belgian and American shares were traded on the Zurich Nebensegment/marché annexe.[2]

5. As of 2000, there were 529,165 shares of the Bank in issue of which 72,648 were held by private shareholders, *i.e.* 13.73% of the Bank's shares.

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[1] Henry H. Schloss, The Bank for International Settlements, p. 40 (North-Holland Publishing Company, Amsterdam, 1958).

[2] "In February, 1956, average quotations of Bank for International Settlements shares of the French issue on the Paris Bourse were ffrs. 88,140; unofficial quotations on the Brussels Bourse in February, 1956, were bfrs. 10,050 and 10,100 for the American and Belgian issue respectively. Source: Bank for International Settlements." *Id.*, at fn. 7.

On 11 September 2000, the Board of Directors of the Bank proposed to restrict in the future the right to hold shares in the Bank to central banks and, to this end, to call an Extraordinary General Meeting on 8 January 2001 to amend the Statutes so as to exclude private shareholders against payment of compensation of CHF 16,000, an amount, which the Board stated, represented a premium of 95% for the American shares, 105% for the Belgian shares and 155% for the French shares. The level of compensation was based on a recommendation of J.P. Morgan, which had prepared a report for the Bank.

6. Three claimants who have disputed the level of compensation, one of whom has also disputed the lawfulness of the Bank's recall of the privately held shares, have invoked the jurisdiction of the Arbitration Tribunal established pursuant to Article XV of the Agreement regarding the Complete and Final Settlement of the Question of Reparations, signed at The Hague on 20 January 1930 (see Appendix B to this Award).

CHAPTER II - PROCEDURAL HISTORY

7. This Tribunal Concerning the Bank for International Settlements (hereafter the "Tribunal") was constituted pursuant to Article XV of the Agreement regarding the Complete and Final Settlement of the Question of Reparations, signed at The Hague on 20 January 1930 (hereafter the "1930 Hague Agreement").

8. Article XV of the 1930 Hague Agreement provides as follows:

> 1. Any dispute, whether between the Governments signatory to the present Agreement or between one or more of those Governments and the Bank for International Settlements, as to the interpretation or application of the New Plan shall, subject to the special provisions of Annexes I, Va, VIa and IX be submitted for final decision to an arbitration tribunal of five members appointed for five years, of whom one, who will be the Chairman, shall be a citizen of the United States of America, two shall be nationals of States which were neutral during the late war; the two other shall be respectively a national of Germany and a national of one of the Powers which are creditors of Germany.
>
> For the first period of five years from the date when the New Plan takes effect this Tribunal shall consist of the five members who at present constitute the Arbitration Tribunal established by the Agreement of London of 30 August, 1924.
>
> 2. Vacancies on the Tribunal, whether they result from the expiration of the five-yearly periods or occur during the course of any such period, shall be filled, in the case of a member who is a national of one of the Powers which are creditors of Germany, by the French Government, which will first reach an understanding for this purpose with the Belgian, British, Italian and Japanese Governments; in the case of the member of German nationality, by the German Government; and in the cases of the three other members by the six Governments previously mentioned acting in agreement, or in default of their agreement, by the President for the time being of the Permanent Court of International Justice.
>
> 3. In any case in which either Germany or the Bank is plaintiff or defendant, if the Chairman of the Tribunal considers, at the request of one or more of the Creditor Governments parties to the proceedings, that the said Government or Governments are principally concerned, he will invite the said Government or Governments to appoint –

and in the case of more Governments than one by agreement – a member, who will take the place on the Tribunal of the member appointed by the French Government.

In any case in which, on the occasion of a dispute between two or more Creditor Governments, there is no national of one or more of those Governments among the Members of the Tribunal, that Government or those Governments shall have the right to appoint each a Member who will sit on that occasion. If the Chairman considers that some of the said Governments have a common interest in the dispute, he will invite them to appoint a single member. Whenever, as a result of this provision, the Tribunal is composed of an even number of members, the Chairman shall have a casting vote.

4. Before and without prejudice to a final decision, the Chairman of the Tribunal, or, if he is not available in any case, any other Member appointed by him, shall be entitled, on the request of any Party who makes the application, to make any interlocutory order with a view to preventing any violation of the rights of the Parties.

5. In any proceedings before the Tribunal the Parties shall always be at liberty to agree to submit the point at issue to the Chairman or any one of the Members of the Tribunal chosen as a single arbitrator.

6. Subject to any special provisions which may be made in the Submission – provisions which may not in any event affect the right of intervention of a Third Party – the procedure before the Tribunal or a single arbitrator shall be governed by the rules laid down in Annex XII. The same rules, subject to the same reservation, shall also apply to any proceedings before this Tribunal for which the Annexes to the present Agreement provide.

7. In the absence of an understanding on the terms of Submission, any Party may seize the Tribunal directly by a proceeding *ex parte*, and the Tribunal may decide, even in default of appearance, any question of which it is thus seized.

8. The Tribunal, or the single arbitrator, may decide the question of their own jurisdiction, provided always that, if the dispute is one between Governments and a question of jurisdiction is raised, it shall, at the request of either Party, be referred to the Permanent Court of International Justice.

9. The present provisions shall be duly accepted by the Bank for the settlement of any dispute, which may arise, between it and one or more of the signatory Governments as to the interpretation or application of its Statutes or the New Plan.

9. In accordance with the procedures prescribed in Article XV of the 1930 Hague Agreement, the Governments of Belgium, France, Germany, Italy and the United Kingdom appointed the five members of the Tribunal for a term of five years. The Government of France, in agreement with the Governments of Belgium, Italy and the United Kingdom, designated the Chairman of the Tribunal.[3] The procedures of the Tribunal are set out in Annex XII of the 1930 Hague Agreement (the full text may be found in Appendix A to this Award), which incorporates Chapter III of the Hague Convention of 1907 for the Pacific Settlement of International Disputes, except as modified by the 1930 Hague Agreement.

10. The members of the Tribunal, appointed in accordance with Article XV of the 1930 Hague Agreement, are Prof. W. Michael Reisman (United States of America), Chairman, Prof. Dr. Jochen A. Frowein (Germany), Prof. Dr. Mathias Krafft (Switzerland), Prof. Dr. Paul Lagarde (France) and Prof.

[3] Japan waived all its rights under the Agreement with Germany of 20 January 1930, including the Annexes to it, see Art. 8c of the Peace Treaty of 8 September 1951.

Dr. Albert Jan van den Berg (The Netherlands). On 17 January 2001, the Tribunal designated Mrs. Phyllis Hamilton of the Permanent Court of Arbitration (hereafter the "PCA") as its Secretary and the International Bureau of the PCA as Registry.

11. The present dispute between the Claimants named herein and the Bank arises under the Statutes of the Bank for International Settlements of 20 January 1930, as amended on 8 January 2001 (hereafter the "Statutes").

12. Article 54(1) of the Statutes provides as follows:

> If any dispute shall arise between the Bank, on the one side, and any central bank, financial institution, or other bank referred to in the present Statutes, on the other side, or between the Bank and its shareholders, with regard to the interpretation or application of the Statutes of the Bank, the same shall be referred for final decision to the Tribunal provided for by the Hague Agreement of January, 1930.

13. By a Notice of Arbitration and Statement of Claim dated 7 March 2001, Dr. Horst Reineccius (hereafter "Dr. Reineccius") notified the Tribunal of his dispute with the Bank. Dr. Reineccius claimed that the compensation for his shares in the Bank, which had been cancelled when the Bank amended its Statutes at an Extraordinary General Meeting on 8 January 2001, was less than the value to which he was entitled (Claim No. 1).

14. On 23 March 2001, the Tribunal, in accordance with Article 54 of the Statutes, Article XV and Annex XII of the 1930 Hague Agreement (which incorporates Chapter III of the Hague Convention of 1907 for the Pacific Settlement of International Disputes, except as modified by the 1930 Hague Agreement), adopted Rules of Procedure for Arbitration between the Bank and Private Parties (hereafter "Rules for Arbitration"). Pursuant to Article 10(1) of the Rules for Arbitration, the Tribunal has its site at The Hague.

15. On 25 July 2001, Mr. Reginald Howe, a former private shareholder of the Bank, requested information from the Registry about the Bank's former private shareholders. The Registry in a letter dated 30 July 2001 requested the Bank's comments on Mr. Howe's request. Counsel for the Bank responded in a letter dated 2 August 2001 that the type of information Mr. Howe requested would be dealt with at the preliminary conference of the Parties. Pursuant to the Rules for Arbitration, Counsel for the Bank continued, participation in the preliminary conference and exchange of the type of information sought by Mr. Howe would only be possible after Mr. Howe filed a Notice of Arbitration and Statement of Claim against the Bank. In a letter from the Registry on 2 August 2001, Mr. Howe was asked to comment on the Bank's letter.

16. In a letter to the Secretary of the Tribunal dated 17 August 2001, Mr. Howe responded requesting "advice, clarification or information" from the Tribunal. Mr. Howe noted that he was aware of the procedure for joining the arbitration but that he did not at that time intend to file a Notice of Arbitration. The Registry on 21 August 2001 requested the Bank's comments on the new requests in Mr. Howe's letter. The Bank responded on 23 August 2001 that it was inappropriate for Mr. Howe to be requesting *ex parte* extraordinary relief

and access to information without submitting to the jurisdiction of the Tribunal by submitting a Notice of Arbitration.

17. On 31 August 2001 the Tribunal responded with a Procedural Order that denied Mr. Howe's request to be allowed to attend the preliminary conference of the Parties without filing the requisite Notice of Arbitration. But the Order further directed the Secretary of the Tribunal to make available on the PCA website certain information regarding claims by former private shareholders against the Bank as well as a schedule of pending proceedings before the Tribunal.

18. By a Notice of Arbitration dated 31 August 2001, Claimant First Eagle SoGen Funds, Inc. (hereafter "First Eagle") initiated its proceedings against the Bank claiming that the compensation for its shares in the Bank which had been recalled by the Extraordinary General Meeting on 8 January 2001 was less than the value to which they were entitled (Claim No. 2).

19. On 7 September 2001, pursuant to Article 12 of the Rules for Arbitration, the Tribunal held a preparatory conference, at which it directed the Parties to confer with respect to the scheduling of proceedings, the terms of a confidentiality order and the production of requested documents relevant to the issues to be arbitrated and to report on those discussions by, as later extended, 21 September 2001.

20. On 10 October 2001, Mr. Pierre Mathieu submitted a Notice of Arbitration to the Tribunal claiming that the Bank had acted unlawfully in forcibly repurchasing his shares and a share held by the Société Hippique de La Châtre (hereafter collectively "Mr. Mathieu") (Claim No. 3).

21. On 11 October 2001, the Tribunal, having considered letters from the Parties regarding the subject of the allocation of the costs and deposits for the arbitrations, issued an Order on Costs directing that:

> 1. The Bank would immediately deposit half of the projected costs of the arbitration as detailed in the estimate submitted to the Parties at the First Preparatory Conference.
>
> 2. Each Claimant would immediately deposit an amount equal to its pro-rata share (based on the number of shares held by each Claimant) of the remaining half of the estimated costs of the arbitration. Further that the same formula based on the number of privately held shares would be used to allocate costs for any additional claimants in the arbitration taking into account the possibility that additional parties might increase the costs of the arbitration.

22. The Tribunal noted in its Order on Costs that, on 5 October 2001, the Bank had submitted its position concerning the distribution of costs among all the owners of privately held shares should they benefit from an Award made to the Claimants in the arbitration. In this eventuality, the costs of Claimant No. 1 and Claimant No. 2 could be reduced proportionally. The Tribunal also reserved the right to order a further deposit for costs should circumstances (such as, but not limited to, the complexity of issues raised in the Statements of Claim or Defense, the length of time required for the scheduling of testimony or analysis of reports from expert witnesses, the extension of the

number of days required for hearings, or a need for more meetings than presently projected) increase the costs of the arbitration.

23. On 17 October 2001, the Tribunal issued Procedural Order No. 1 (On Consent) containing a schedule of submissions including requirements for the timing and substance of each Claimant's Statement of Claim, Application for the Production of Documents, and Proposed Scheduling Order including the submission of pre-hearing Memorials of law and fact and of evidence in support of the claims. The Order directed the Bank to submit a Statement of Defense, a Response to the Application for the Production of Documents, and a Response to the Proposed Scheduling Order. The Order further provided that the Tribunal would convene a meeting, either in person or by telephone, to hear the Parties on the points in dispute arising from the Application for Production of Documents and Proposed Scheduling Orders and to make such orders and set such further proceedings as it deemed appropriate.

24. In addition, Procedural Order No. 1 directed the Secretary to post on the Registry's website a notice advising that any prospective claimant that intended that its claims be subject to proceedings coordinated with those on claims filed as of 17 October 2001 (the date of the Order) should file a Statement of Claim by 15 November 2001. The Order noted that this provision did not constitute consent to any form of consolidation or coordination with any claims filed as of the date of the Order or claims that might be filed prior to 15 November 2001. The Order noted that in the event of additional Statements of Claim, the Bank reserved its right to request an extension of time to file its Statement of Defense. Claimant First Eagle reserved its right to oppose any such extension of time.

25. On 17 October 2001, the Parties jointly submitted an agreed confidentiality order governing the production of documents. Subject to that confidentiality order, the Bank produced to First Eagle the J.P. Morgan Report described in the Note to Private Shareholders dated 15 September 2000.

26. On 7 February 2002, the Tribunal issued Procedural Order No. 2 (On Consent) noting that First Eagle had submitted on 12 November 2001, pursuant to Procedural Order No. 1, a Statement of Claim against the Bank and an Application for the Production of Documents; pursuant to the same Order, the Bank submitted its Statement of Defense and a Response to the Application for the Production of Documents on 14 January 2002, as well as an Application for the Production of Documents from First Eagle. First Eagle and the Bank further agreed that on or before 11 February 2002, First Eagle would submit a Memorandum responding to the Bank's Application for the Production of Documents and that on or before 20 February 2002, the Bank would submit a Memorandum concerning First Eagle's Response to the Bank's Application for the Production of Documents. The Parties agreed that the Tribunal would meet with the Parties on 26 February 2002 in a conference on the Terms of Submission, at which time the Tribunal would also hear the Parties on any unresolved issues of procedure.

27. The Tribunal met with the Parties and their counsel on 26 February 2002 at The Hague for the purposes of establishing the Terms of Submission in accord with Article 12 of the Rules for Arbitration Between the Bank and Private Parties (effective 23 March 2001).

28. At the 26 February conference, the Chairman referred to a 22 February 2002 letter from the Bank and a 25 February 2002 response from the Freshfields law firm in Paris that dealt with questions concerning a potential conflict of interest should counsel from the Freshfields firm in Paris represent Mr. Mathieu. Counsel for Mr. Mathieu discussed with counsel for the Bank and the Tribunal the Freshfields firm's representation of the Bank of England and Prof. van den Berg's previous association with the Freshfields firm in Amsterdam. Prof. van den Berg indicated that the association had been terminated. Counsel for the Bank then indicated the Bank was satisfied that a conflict of interest did not exist.

29. On 5 March 2002 the Tribunal issued Procedural Order No. 3 on the Terms of Submission. In the Order, the Tribunal noted that the Parties had stated they had no jurisdictional objections, but that the following matters remained at issue between all or a number of the Parties:

> (i) the lawfulness of the compulsory recall of the shares, including the procedures by which it was accomplished and the possible scope of the consequences of a finding of unlawfulness for all those who were private shareholders as of 8 January 2001;
>
> (ii) the identification of the applicable standards for the valuation of the compulsorily recalled shares;
>
> (iii) the application of the standards in (ii) above to the shares which were compulsorily recalled.

The Tribunal found it most economical to treat the first two issues in a single phase and to defer the third issue to a second, final phase, if it should prove necessary.

30. Although only Mr. Mathieu and the Bank had raised issue (i) above, both contended that a finding of unlawfulness would affect the recall program and all those who were shareholders as of 8 January 2001. A finding of unlawfulness of the compulsory recall of shares could therefore have affected all Claimants. Accordingly,

> (i) the Tribunal requested Mr. Mathieu and the Bank to address all matters they deemed relevant to their contentions with respect to the lawfulness of the recall program including its consequences for those who were shareholders as of 8 January 2001;
>
> (ii) the Tribunal requested Dr. Reineccius and First Eagle to address all matters they deemed relevant to the scope of the possible consequences of a finding of unlawfulness of the recall program for those who were shareholders as of 8 January 2001;
>
> (iii) all the Parties were requested to address all matters they deemed relevant to the nature and extent of the rights of the private shareholders and the applicable standards for the valuation of the compulsorily recalled shares.

31. Procedural Order No. 3 further directed that (1) Mr. Mathieu should submit a consolidated Statement of Claim no later than 12 March 2002; (2) the three Claimants should submit Memorials no later than 20 April 2002; (3) the Respondent should submit Counter-Memorials no later than 15 July 2002; and (4) Hearings in this phase of the arbitration would take place in the Peace Palace in The Hague during the week of 26 August 2002.

32. The Tribunal granted the following requests of First Eagle for discovery from the Bank to be provided by 15 March 2002:

> (i) documents relating to the Bank's offer to purchase shares held by private shareholders in or about 1975, including offering memoranda and other communications with shareholders, and valuations or other methods or analyses considered by the Bank in determining the offering price for such shares;
>
> (ii) all subscription agreements relating to the Bank's issuance of new shares since 1969;
>
> (iii) all documents relating to the Bank's determination of subscription prices for shares issued since 1969, including any valuations;
>
> (iv) all documents provided to subscribers of shares since 1969, to the extent that they were offering memoranda, prospectuses, solicitation letters and financial statements;
>
> (v) all documents since 1990 relating to the Bank's valuation of the Bank's shares;
>
> (vi) all documents since 1990 concerning any transfer of its shares by the Bank including the price therefor;
>
> (vii) all versions of the Bank's Statutes, as amended, since and including the original version adopted in or about 1930.

33. The Tribunal noted that Dr. Reineccius, Mr. Mathieu, and the Bank had stated that they had no discovery requests in this phase.

34. Pursuant to D.5 of Procedural Order No. 3 (Terms of Submission) dated 5 March 2002, the Parties agreed to modify the schedule for submissions contained in D.2-3 of that Order. Therefore, on 1 April 2002, the Tribunal issued Procedural Order No. 4 (On Consent) recording the Parties' agreement that:

> (i) First Eagle should submit its Memorial no later than 6 May 2002;
>
> (ii) Mr. Mathieu should submit his Memorial no later than 13 May 2002;
>
> (iii) Dr. Reineccius should submit his Memorial or additions to the First Eagle Memorial no later than 13 May 2002;
>
> (iv) the Respondent (the Bank) should submit Counter-Memorials no later than 22 July 2002.

35. The Tribunal further noted that having received pursuant to D.1 and E.3 of Procedural Order No. 3 the consolidated Statement of Claim of Mr. Mathieu on 12 March 2002 and both his Request for the Production of Documents dated 20 March 2002 and the Bank's Reply dated 26 March 2002, the Tribunal would grant the following requests of Mr. Mathieu for discovery on or before 5 April 2002 from the Bank:

(i) documents relating to the Bank's offer to purchase shares held by private shareholders in or about 1975, including offering memoranda and other communications with shareholders, and valuations or other methods or analyses considered by the Bank in determining the offering price for such shares;

(ii) all subscription agreements relating to the Bank's issuance of new shares since 1969;

(iii) all documents relating to the Bank's determination of subscription prices for shares issued since 1969, including any valuations;

(iv) all documents provided to subscribers of shares since 1969, to the extent that they are offering memoranda, prospectuses, solicitation letters and financial statements;

(v) all documents since 1990 relating to the Bank's valuation of the Bank's shares;

(vi) all documents since 1990 concerning any transfer of its shares by the Bank including the price therefor;

(vii) all versions of the Bank's Statutes, as amended, since and including the original version adopted in or about 1930;

(viii) documents described in paragraph 2(h) of Mr. Mathieu's 20 March 2002 Request.

36. The Tribunal received letters from the Parties concerning the production of documents in the arbitration in the course of April 2002. On 3 May 2002, the Tribunal issued Procedural Order No. 5 (Exchange of Documents Among Claimants, Access to BIS Archives, Assertion of Privilege) noting that the Parties had agreed that the Claimants would exchange documents with each other as well as sending copies to the Bank. However, all communications remained subject to the provisions of the Confidentiality Agreements between the Bank and Dr. Reineccius, First Eagle and Mr. Mathieu which had been concluded pursuant to paragraph 4 of Procedural Order No. 1 (On Consent).

37. Regarding First Eagle's Application dated 5 April 2002 for an Order directing the Bank to grant access to the Bank's archives and the Response thereto from the Bank dated 11 April 2002 opposing the Application, the Tribunal found that First Eagle's Application did not comply with the schedule agreed between the Parties in Procedural Order No. 1 nor with the schedule in Procedural Order No. 3, paragraph E, and was therefore out of order. The Application was therefore denied.

38. Procedural Order No. 5 granted First Eagle's Application for the Production of Documents as follows:

1. Non-production or redaction of the documents responsive to Procedural Order No. 3, paragraph E, based upon assertions of attorney-client privilege or special political or institutional sensitivity or other reasons consistent with those set forth in Article 9(2) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999) should be recorded by the Bank in a listing to be provided to First Eagle by 8 May 2002.

2. That listing should identify: (i) the bates number of the document, its author and recipients, (ii) the part of the document withheld or redacted, and (iii) the specific reason for non-production or redaction and the basis for the invocation of that reason. Any part of an otherwise responsive document withheld because the part is deemed not to be responsive should also be listed.

3. First Eagle should submit any objections to the reasons stated under paragraph 1 by 10 May 2002.

4. The Tribunal would dispatch its Secretary on 13 May 2002 to the place where the documents were retained by the Bank to resolve, in consultation with First Eagle and the Bank, the objections raised. Issues concerning document production under Procedural Order No. 3, paragraph E, which remained unresolved after the above review and consultation would be addressed to the Tribunal on or before 17 May 2002.

39. Pursuant to Procedural Order No. 5, First Eagle and the Bank resolved certain questions concerning the production of documents under the terms of Procedural Order No. 3. They then contacted the Secretary of the Tribunal to set up a conference call to address First Eagle's remaining concerns. At the telephone conference on 13 May 2002, attended by counsel for First Eagle and the Bank and the Secretary of the Tribunal, First Eagle indicated that still at issue with respect to their relevance were nine (9) documents, portions of which had been withheld by the Bank for alleged lack of relevance under Procedural Order No. 3 or because of assertions of attorney-client privilege. Counsel for First Eagle and the Bank requested that the Secretary review the nine documents (as numbered in the document log dated 8 May 2002, prepared by the Bank to which First Eagle appended its Objections on 10 May 2002) that were kept in the Bank's offices in Basle, Switzerland, and then discuss by telephone conference with counsel for First Eagle and the Bank her recommendations regarding the relevance of the redacted portions. Counsel also agreed that they would submit legal memoranda to the Tribunal concerning the Bank's assertions of attorney-client privilege.

40. The Secretary reviewed the nine documents in question at the Bank's offices on 15 and 16 May 2002 and discussed with counsel the possible relevance of some parts of five documents to Section E.1.f of Procedural Order No. 5; counsel for the Bank agreed to produce portions of those five documents which had been previously redacted for lack of relevance. In a telephone conference with First Eagle's counsel and the Secretary on 16 May 2002, the Bank indicated to First Eagle that it would immediately produce those portions of the five documents. The Parties agreed that four other documents had been appropriately redacted. On 22 May 2002, the Bank submitted a Memorandum to the Tribunal on attorney-client privilege issues raised in First Eagle's 10 May 2002 Objections. First Eagle responded with a Memorandum in support of its Objections on 29 May 2002.

41. Seventeen documents that fell within the purview of Section E of Procedural Order No. 3 (Terms of Submission) were listed by the Bank; five documents were partially redacted and twelve documents were withheld entirely on the ground of attorney-client privilege. The documents were described in the log assembled by the Bank in compliance with Procedural Order No. 5 along with summaries of First Eagle's objections.

42. In its Objections submitted on 10 May 2002, First Eagle contended that the Bank was not entitled to invoke the attorney-client privilege because a

company was not permitted to invoke the privilege against its own shareholders.

43. On 22 May 2002, the Bank stated in its Memorandum that attorney-client communications between the Bank and its counsel are protected by privilege in disputes between the Bank and its private shareholders under settled principles of law.

44. In its Memorandum of 29 May 2002, First Eagle contended that the differential treatment accorded by the Bank to its private shareholders with respect to the communications that First Eagle sought to discover was inconsistent with the principles of international law upon which First Eagle relied. Six of the documents the Bank withheld, First Eagle stated, would not benefit from privilege as they were created prior to the Board's announcement of the compulsory repurchasing program. First Eagle also contended that the Bank could not unilaterally withdraw documents that it had "inadvertently" produced.

45. On 11 June 2002, the Tribunal issued Procedural Order No. 6 (Order with Respect to the Discovery of Certain Documents for Which Attorney-Client Privilege Has Been Claimed) ordering the Bank to produce Document No. 34 to each of the Claimants in accordance with Procedural Order No. 5, insofar as it was disclosed at a press conference. The Tribunal determined that sixteen documents were subject to the attorney-client privilege.

46. In a letter dated 28 May 2002 to the Tribunal with copies to counsel for First Eagle and Respondent, the Bank, Dr. Reineccius requested that a banking expert be appointed. The Tribunal received in response to the letter from Dr. Reineccius comments from First Eagle on 4 June 2002, Mr. Mathieu on 10 June 2002, the Bank on 10 June 2002, and a further submission from Dr. Reineccius dated 11 June 2002. First Eagle and Mr. Mathieu, as well as the Bank, indicated that they considered the appointment of a banking expert at this stage of the arbitration to be premature since the matters that Dr. Reineccius proposed be submitted to a banking expert would not arise in the current phase of the arbitration.

47. The Tribunal reviewed the submissions of the Parties and on 17 June 2002 issued Procedural Order No. 7 (Order with Respect to the Request from Dr. Horst Reineccius, Claimant No. 1, that the Tribunal Appoint an Expert) finding the request from Dr. Reineccius for the appointment of an expert to be premature.

48. Having conferred with the Parties and received from each Party its agreement to a proposed schedule, the Secretary, pursuant to Article 20 of the Rules for Arbitration, on 10 August 2002, transmitted the Agenda for the Hearings on 26-29 August 2002 to the Tribunal and Parties and published the Agenda on the Registry's website.

49. On 23 August 2002, the Tribunal issued Procedural Order No. 8 (Computer Assisted Projections, Requirements for Late Submissions of Evidence or Authorities) in response to: (1) a letter from the Bank dated 19

August 2002; (2) a letter from First Eagle dated 20 August 2002; and (3) a letter from the Bank dated 21 August 2002. This correspondence indicated that the Bank and First Eagle were unable to agree on the procedural requirements for (1) the employment of computer technology to project evidence and illustrate oral argument during the Hearings; and (2) the submission of evidence or legal authorities after the deadlines established in consultation with the Parties and set forth in Procedural Orders Nos. 3 and 4. The Tribunal found that:

> (i) Use of demonstrative exhibits and other visual aids, whether computer assisted or otherwise, is not unusual in international arbitration hearings. Such visual aids may be employed by the Parties so long as the material concerned is based solely on evidence already in the record and has been shown to the opposing party prior to the Hearing for purposes of verification.
>
> (ii) Introduction of new evidence will not be permitted unless a proper application has been made to the Tribunal, the latter has granted leave, and the opposing party has sufficient opportunity to present its comments thereon.
>
> (iii) New legal authorities can be referred to at the Hearing as rebuttal or additional authorities, provided that they are not excessive in number.
>
> (iv) Issues concerning allegedly truncated copies of legal authorities are in the first instance to be resolved between counsel. The Party alleging that authorities are incomplete has the duty to identify them to the Party that submitted them.

50. The full text of all of the above referenced Procedural Orders can be found at www.pca-cpa.org.

51. Public Hearings pursuant to Article XV of the 1930 Hague Agreement and Article 20 of the Rules for Arbitration were held in the Great Hall of Justice at the Peace Palace in The Hague from 26-28 August 2002. At the request of the Parties, their separate claims were heard in parallel with some integration for efficiency and the convenience of the Parties. First Eagle was represented, throughout the hearings, by Mr. Donald Francis Donovan and Mr. Dietmar W. Prager of the Debevoise & Plimpton firm. Mr. Mathieu was represented by Mr. Elie Kleiman and Mr. Guillaume Tattevin of the Freshfields Bruckhaus Deringer firm. The Bank was represented by Mr. Jonathan I. Blackman, Mr. Laurent Cohen-Tanugi and Ms. Claudia Annacker of the Cleary, Gottlieb, Steen & Hamilton firm. Prof. Dr. Mario Giovanoli and Dr. James Freis were also present on behalf of the BIS Secretariat and Prof. Giovanoli intervened in response to a question from the Tribunal on the first day of the Hearings.[4] Dr. Reineccius, appeared *pro se*, on 27 and 28 August; he declined to exercise his right to attend on 26 August during the presentations on the legality of the Bank's actions since the Bank's right to repurchase the shares was not at issue in his claim.

52. In accordance with the 1930 Hague Agreement, simultaneous translations in English, French and German were provided for the Hearings.

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[4] Transcript, at p. 79.

53. On the first day of the Hearings, pursuant to Procedural Order No. 8, First Eagle requested permission to submit a binder with additional legal authorities and the Bank requested the Tribunal's permission to submit as additional evidence three annual reports of First Eagle. The Tribunal agreed to receive the late submitted materials on the condition that counsel refrain from referring to the materials introduced as new evidence until the following day's presentations, when Question 2 of Procedural Order No. 3 would be taken up, so as to allow time for opposing counsel to examine the late-submitted material.[5]

CHAPTER III – THE PARTIES AND THEIR CLAIMS

A. IDENTITY OF THE PARTIES

54. Claimant No. 1, Dr. Horst Reineccius, resides in Hannover, Germany, and owned 20 shares of the Bank.

55. Claimant No. 2, First Eagle SoGen Funds, Inc., is a U.S.-registered mutual fund group organized under the laws of the State of Maryland, United States of America. First Eagle is managed by Arnhold and S. Bleichroeder Advisers, Inc., a U.S.-registered investment advisor. First Eagle has its address and principal place of business at 1345 Avenue of the Americas, New York, New York 10105. First Eagle owned 9085 of the shares of the Bank.

56. Claimant No. 3, Mr. Pierre Mathieu, resides at Urmont, F-36400 Montgivray, France, and owned 8 of the shares of the Bank; la Société Hippique de La Châtre is a non-profit association which owned one share and for purposes of this arbitration shares the same address as Mr. Mathieu.

57. Respondent, the Bank, was established, as stated above, pursuant to the 1930 Hague Agreement as a company limited by shares. The Bank's headquarters are in Basle, Switzerland.

B. TERMS OF SUBMISSION

58. Article 3(g) of the Rules for Arbitration contains the definition: '"Terms of Submission': as understood in the 1930 Agreement, the question or questions to be submitted to the Tribunal and the specific procedures to be followed."

59. In Procedural Order No. 3 on the Terms of Submission, dated 5 March 2002, the Tribunal noted that although the Parties had stated they had no jurisdictional objections, the following matters remained at issue between all or a number of the Parties:

> (i) the lawfulness of the compulsory recall of the shares, including the procedures by which it was accomplished and the possible scope of the consequences of a finding of unlawfulness for all those who were private shareholders as of 8 January 2001;

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[5] *Id.*, at p. 83.

(ii) the identification of the applicable standards for the valuation of the compulsorily recalled shares;

(iii) the application of the standards in (ii) above to the shares which were compulsorily recalled.

The Tribunal found it most economical to treat the first two issues in a single phase and to defer the third issue to a second, final phase, if it should prove necessary.

C. THE PARTIES' SUBMISSIONS

1. Claimant No. 1, Dr. Reineccius

a. ARGUMENTS

60. "[The Bank's use of] the dividend perpetuity (DPM) model for the valuation of the shares applied by the experts charged by the Bank . . . is suitable if a company distributes the major portion of its net profits totally .... For the last two financial years, the Bank for International Settlements distributed less than a fifth of the net profit, the DPM is, therefore, not acceptable."

61. "As additional arguments, . . . the Bank refers to the low prices on the stock exchange and the lack of voting right of the private shareholders. The extreme undervaluation of the BIS shares was, first of all, caused by the small dividends and, therefore by the Bank itself. The business policy of the Bank is ruled by the founder members as major shareholders. There is no divisive voting in the General Meetings of the BIS, the exclusion of the private shareholders was decided unanimously, too. Therefore, no particular importance should be attached to the lack of voting right of the private shareholders."

62. "The earning-power value method gives the value of a share as the quotient of the net profit per share and the bond yield . . . . The method of adjusted net asset value for the valuation of the BIS share is, likewise, suitable – not, however, the discount of 45% 'estimated' by the experts of J.P. Morgan & Cie SA. On the contrary, in the case of a well earning bank, we have to think of a premium because the Bank will increase the net assets by its future profits."

63. Dr. Reineccius indicated at the Hearings[6] that he would stipulate that the J.P. Morgan calculations of net asset value ("NAV") were correct.

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[6] *Id.*, at p. 331.

b. RELIEF REQUESTED

64. Dr. Reineccius requested the Tribunal to find that:

> (i) compensation should be based on the full value of the shares (the higher of an NAV analysis or earning power method analysis) including interest of 3¼% per annum from 8 January 2001;
>
> (ii) the value of these shares cannot be smaller or lower than the NAV;
>
> (iii) a first payment of 17,000 Swiss francs per share should be made to him; and
>
> (iv) an expert should be appointed to calculate the earning power and the NAV of the Bank's shares on 8 January 2001 and explain which of the two results reflects the value of the shares correctly.

2. *Claimant No. 2, First Eagle*

a. ARGUMENTS

65. In its Memorial, First Eagle asserts:

> Under the Statutes, as well as international law, First Eagle is entitled to compensation equal to the full value of its proportionate interest in the Bank as a whole .... To measure the level of compensation due First Eagle, the Bank used a dividend perpetuity model, a variant of the discounted cash flow method. It used the model to value only the flow of dividends, however, even though the Bank regularly allocates the major portion of its profits to build up its assets. By valuing only the dividends, the Bank violated the excluded shareholders' right to participate equally in "the profits" of the Bank – all the profits.[7]
>
> The Bank also calculated its net asset value per share, which came to twice the level of compensation it paid. Rather than returning to the excluded shareholders their pro rata share of net asset value upon their exclusion from the company, the Bank applied discounts for lack of voting rights and non-marketability in the aggregate amount of 45%, which reduced the net asset value per share to roughly the level of compensation yielded by the valuation of the dividend flow .... [T]he Bank's shares are identical, and application of the discounts therefore violated the equal-rights guarantee of Article 13 of the Statutes.[8]

66. Exhibit 23, prepared by the Bank in 1969 for the benefit of the Board of Directors, was "an earlier instance of the distribution of profits and assets in which all shareholders were treated alike."[9] First Eagle asserts that the purpose of this memorandum was to determine the premium at which the third tranche would be priced ... the value of the shares above their par value. In the memo the Bank considered three ways of valuing the shares: (1) a discounted cash flow analysis; (2) the market value; and (3) "the mathematical method". First Eagle argues that the memo records that the Bank rejected methods (1) and (2) as flawed and recommended the mathematical method which First Eagle finds to be the NAV method.[10] First Eagle stated that the method determined in 1969 "has governed each of the issuances of shares to central bank shareholders and the Bank only departed from that method in the

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[7] FE Memorial, at paras. 15-16.
[8] *Id.*, at paras. 17-18.
[9] Transcript, at p. 170.
[10] *Id.*, at p. 171.

exclusion [of private shareholders] transaction . . . . In each of those [previous] cases the Bank used NAV minus 30 per cent."[11]

67. Exhibit 15, an internal BIS memorandum written in 1998, states that in a possible buy back, the price offered "should not be viewed as being less than the patrimonial value of each share."[12]

68. The imposition of the discounts would have violated international law even in the absence of the Article 13 guarantee. International Tribunals recognize that in an expropriation setting, the coercive character of the taking precludes the use of discounts for lack of voting rights or non-marketability to reduce the compensation due.[13]

69. First Eagle asserts that the Bank does not urge reliance on the dividend perpetuity model by which it set the excluded shareholders' compensation or the alternative measure of discounted net asset value. "Instead, [the Bank] argues that [it] has satisfied any obligation to the excluded shareholders by paying them compensation that exceeded the stock market trading prices . . . . [B]ecause the market for its shares is structurally flawed, trading prices do not provide reliable evidence of their value."

70. Market price, First Eagle asserts, is what the Bank offered in voluntary buy-back offers in 1936 and 1975; in both cases "they utterly failed."[14]

71. First Eagle asserted that the transfer of the shares was illegal because the taking of that property "was not accompanied by full compensation for the property interest that was taken."[15]

> Full compensation for the taking . . should be more than the Bank's net asset value, or NAV, per share.[16]
>
> Recognizing that NAV is both reliable and conservative, international tribunals have regularly granted compensation measured by NAV when requested to do so by the claimant. Using its own figures, the Bank has therefore deprived First Eagle of some $84 million.[17]

72. First Eagle further argued that:

> All shareholders of the Bank had an equal right, protected by international law, to participate in the fruits of the enterprise earned on the capital they contributed. If the non-central bank shareholders may now be excluded, their equal right to participate can only be vindicated by payment of compensation equal to their proportionate share of the value of the Bank as a whole, in the form of net assets, goodwill, and future prospects The excluded shareholders, along with the other shareholders, owned the Bank, and that ownership cannot be overridden by the exclusion transaction.[18]

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[11] *Id.*, at p. 172.
[12] *Id.*
[13] *Id.*, at p. 199.
[14] *Id.*, at p. 141.
[15] *Id.*, at p. 29.
[16] FE Memorial, at para. 22.
[17] *Id.*, at para. 25.
[18] *Id.*, at para. 30.

b. APPLICABLE LAW

73. In its Memorial, First Eagle stated that "general principles of international law govern this dispute" and that it, as well as the Bank, agrees that "the rules of general public international law apply to the interpretation of the Statutes and hence to the determination of the excluded shareholders' property interest in the Bank."[19] First Eagle added that "in particular the relevant provisions of the Bank's Statutes should be interpreted in accordance with general principles of international law governing the interpretation of treaties, which are expressed in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties of 1969."[20]

74. Further First Eagle referred to and itself relied on a statement of the Bank that the relations of the Bank "with its shareholders are governed by its constituent instruments . . . supplemented as appropriate by general public international law."[21]

c. RELIEF REQUESTED

75. In response to the Tribunal's request during the Hearings for the written, final submissions of the Parties, First Eagle submitted the request that the Tribunal issue an award declaring that:

> (i) The Bank has an obligation to pay First Eagle the full, undiscounted value of its proportionate interest in the Bank as a whole;
>
> (ii) The full value of First Eagle's proportionate interest in the Bank must, as a matter of law, equal, at a minimum, First Eagle's pro rata share of the Bank's undiscounted net asset value;
>
> (iii) The Bank's undiscounted net asset value must equal, at a minimum, the undiscounted net asset value calculated by the Bank in consultation with J.P. Morgan (that is, CHF 32,846 as of 30 November 2000), and First Eagle shall have the opportunity to present evidence as to the correct calculation of the Bank's net asset value in the next phase of this proceeding;
>
> (iv) First Eagle is also entitled to additional compensation representing the amount by which its proportionate interest in the Bank's value as a going concern exceeds its pro rata share of the Bank's undiscounted net asset value;
>
> (v) On the basis of the evidence before the Tribunal, and as a matter of law, the trading prices of the publicly traded shares cannot be considered in determining the full value of First Eagle's proportionate interest in the Bank as a whole;
>
> (vi) As a matter of law, the dividend perpetuity model cannot be used to determine the full value of First Eagle's proportionate interest in the Bank as a whole, and if any variant of the discounted cash flow method is used, the method must take account of the full profit making capacity of the Bank;
>
> (vii) If the dividend perpetuity model were to be used to determine the value of First Eagle's property interest in the Bank, First Eagle shall have the opportunity to present evidence on the proper application of that model in the next phase of this proceeding;

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[19] *Id.*, at para. 205.
[20] *Id.*, at para. 206.
[21] *Id.*, at para. 205.

(viii) First Eagle shall have the right to appropriate interest on the amounts awarded;

(ix) First Eagle shall be awarded the costs of the proceedings.

d. STIPULATION REGARDING CALCULATION OF NET ASSET VALUE

76. First Eagle stated during the oral hearings[22] that it was prepared to stipulate, if the Bank also so stipulated, that the net asset value is as determined by J.P. Morgan in Exhibit 43 of its report. However, since the J.P. Morgan Report did not contain a calculation of the value of the Bank's real estate, First Eagle proposed that the Tribunal appoint a Tribunal expert to determine the real estate value whose valuation would be final and would be added to the net asset value.

3. Claimant No. 3, Mr. Mathieu

a. ARGUMENTS

77. The resolution of 8 January 2001 amending the Statutes (modifying Articles 6, 12, 15-18, adding Article 18A) was illegal because it did not conform to the Constituent Instruments of the Bank. "An analysis of the Statutes and the Charter of the Bank in conformity with settled principles of international law regarding the interpretation of treaties,[23] does not authorize the addition of an article. Even if such an addition had been authorized, it should not have been effected pursuant to Article 57 of the Bank's Statutes which provides that amendments may be 'adopted by a majority of the General Meeting', but rather pursuant to Article 58 of the Statutes which provides that: 'the amendment must be adopted by a two-thirds majority of the Board, approved by a majority of the General Meeting and sanctioned by a law supplementing the Charter of the Bank'."[24]

78. Mr. Mathieu concluded that the resolution purporting to amend the Statutes, as an act of an international organization not in conformity with its Constituent Instruments, was null and void. Thus, the recall of the privately held shares is null and void as to all the private shareholders. Mr. Mathieu cited as evidence that the Bank did not have the power to exclude the private shareholders, an internal memo authored by Mr. Weiser in 1936 that stated: "one thing the General Meeting cannot do is to deprive shareholders of their membership in the common venture."[25]

79. The illegality of the Bank's resolution also constitutes an unlawful act (*acte illicite*) under international law subjecting the Bank to a claim for damages.

80. Further, even should the Tribunal not find the Bank's resolution to have been illegal, the compulsory recall of the shares constitutes an unlawful expropriation. The compulsory recall was carried out by a subject of

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[22] Transcript, at p. 329.
[23] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 31(3)(c).
[24] Transcript, at pp. 17-19, 25-26.
[25] Exhibit 35, Transcript, at p 12.

international law, deprived the claimant of his property, *i.e.* his shares, and was inspired by economic and financial rather than political considerations. Further, the Bank has violated general principles of international law because the conditions necessary for the lawful expropriation of property – the existence of a legislative foundation, service to the public interest, respect for the principle of non-discrimination, and just and fair compensation – were not met.

b. APPLICABLE LAW

81. Mr. Mathieu asserted that the present dispute is governed by the Constituent Instruments of the Bank. He further stated that "en l'absence de précision ou dispositions contraires des Instruments constitutifs de la BRI, le droit international général est également applicable".

82. Mr. Mathieu also contended that, since the award will be rendered in The Netherlands and since the award can conceivably be enforced in Switzerland where the Bank is located, the Tribunal must consider the international public policy of these two countries.

c. RELIEF REQUESTED

83. Mr. Mathieu, in his submission "Conclusions modificatives" of 28 August 2002, asked the following:

> M. Mathieu et la Société de Concours Hippique de La Châtre (ci après, "*le Demandeur*") requièrent qu'il plaise au Tribunal Arbitral recevoir les présentes conclusions modificatives qui annulent et remplacent les conclusions figurant en pages 56 à 58 du Mémoire en demande en date du 13 mai 2002 et, y faisant droit, statuer comme suit:
>
> 1. A titre principal:
>
> 1.1 Dire et juger que la résolution du 8 janvier 2001 est illégale;
>
> 1 2 La dire en conséquence nulle;
>
> 1.3 Constater le caractère irréversible des opérations de mise en œuvre de ladite résolution et, en particulier, l'impossibilité de réinscrire les actions de la Banque des Règlements Internationaux (ci-après "*la BRI*") à la cote des marchés boursiers réglementés de Paris et de Zurich; dire que cette impossibilité fait dès lors obstacle à toute restitution à l'identique;
>
> 1.4 Ordonner, en conséquence de l'illégalité de la résolution du 8 janvier 2001 et de la nullité l'invalidant, une restitution intégrale par équivalent, et en conséquence condamner la BRI au paiement au Demandeur d'une compensation financière correspondant: (i) à la valeur patrimoniale des actions dont le Demandeur a été privé, estimée au 8 janvier 2001, date de la résolution invalidée, augmentée des intérêts capitalisés ayant couru depuis cette date jusqu'à la date du parfait paiement au Demandeur; et (ii) au montant des dividendes dont le Demandeur a été privé depuis le 8 janvier 2001, avec intérêts capitalisés depuis la date de leur mise en versement jusqu'à la date de parfait paiement au Demandeur;
>
> 2. En outre:
>
> 2.1 Dire et juger qu'en adoptant une résolution illégale, la BRI a engagé sa responsabilité internationale;

2.2 Dire et juger que l'opération de retrait forcé constitue une expropriation illicite de nature à engager la responsabilité de la BRI;

2.3 Dire et juger que le Demandeur a subi un dommage du fait des actes illicites de la BRI;

2.4 En conséquence, condamner la BRI au paiement au Demandeur d'une compensation financière correspondant: (i) dans l'hypothèse où le Tribunal ne ferait pas droit aux demandes sollicitées au point 1. ci-dessus, à la valeur patrimoniale des actions dont le Demandeur a été privé, estimée au 8 janvier 2001, date de la résolution querellée, augmentée des intérêts capitalisés ayant couru depuis cette date jusqu'à la date du parfait paiement au Demandeur; et en toute hypothèse (ii) au préjudice matériel et moral subi par le Demandeur;

3. Dans tous les cas, aux fins de calcul de la réparation par équivalent pour la privation de la propriété des actions:

3.1 Rejeter les estimations de la BRI; et:

3.2 Ordonner, le cas échéant par une sentence intérimaire, qu'il soit fait application de la méthode de l'actif net réévalué pour estimer à la date du 8 janvier 2001 la valeur des actions reprises;

3.3 Dire qu'aucune décote ne viendra diminuer les estimations retenues;

3.4 Dire en conséquence que le montant du supplément d'indemnisation que devra verser la BRI au Demandeur, venant s'ajouter aux sommes que la BRI a d'ores et déjà reconnu devoir, correspondra à la différence entre le montant de l'indemnisation reconnue et celui qui sera établi par application de la méthode de l'actif net réévalué ;

4. Subsidiairement:

4.1 Dire et juger qu'en tout état de cause la BRI doit aux actionnaires évincés la valeur de leurs actions;

4.2 Constater que cet engagement n'a pas été rempli;

4.3 Retenir en conséquence une méthode plus appropriée pour évaluer la valeur des actions reprises;

4.4 Dire que cette valeur doit être déterminée par la méthode de l'actif net réévalué;

5. Dans l'hypothèse où la Sentence du Tribunal serait définitive, dire et juger que la BRI paiera au Demandeur les frais de toute nature exposés dans le cadre de la procédure arbitrale, et en particulier mettre à sa charge les honoraires des Conseils du Demandeur.

84. Mr. Mathieu indicated that he joined the other Claimants in the stipulation described in paragraph 76 above regarding the use of the NAV as determined in Exhibit 43 of the J.P. Morgan Report with the addition of the value of the Bank's real estate.[26]

[26] Transcript, at p. 318.

4. Respondent, The Bank for International Settlements

a. ARGUMENTS

(i) Lawfulness of the Share Redemption

85. The Bank filed its Statement of Defense and Counterclaim on 14 January 2002 and its Counter-Memorial on 22 July 2002. Pursuant to Procedural Order No. 3, the Bank first addressed the lawfulness of the compulsory redemption of the privately held shares. The Bank maintained that it had the authority to amend the Statutes of the Bank under Article 57 of the Statutes. The Bank asserted that "any Article of the Statutes", other than the "reserved" articles listed in Article 58, might be amended by a two-thirds majority of its Board of Directors and adoption of such proposal by a majority of the General Meeting "provided that such amendments are not inconsistent with the provisions of the Articles enumerated in Article 58."[27]

86. The Bank denied that a valid distinction existed between "adding" an article or "amending" an article as Mr. Mathieu contended. "'Amendment' includes any change, including by way of adding new terms to an existing instrument or agreement."[28] Further, there is no basis for Mr. Mathieu's argument that the Article 58 procedure for the amendment of reserved articles, requiring a supplement to the Bank's Charter and Swiss legislative approvals, should be applied to the unreserved articles. The Statutes explicitly distinguish between amendment of the unreserved articles by the procedures of Article 57 and amendment of the reserved articles under Article 58. The Bank has made no amendment of the reserved articles.[29]

(ii) The Consequences of a Finding of Unlawfulness

87. The Bank asserted that if the Tribunal finds the transaction illegal, (1) the Bank would have to restore the recalled shares to the private shareholders; or (2) the private shareholders could only elect to retain the compensation that they had been paid for their shares on the basis of a voluntary agreement with the Bank. The Bank argued that a finding of unlawfulness would render impossible the increase in compensation for the recalled shares sought by First Eagle.[30]

(iii) The Standard of Valuation

88. The Bank disputes First Eagle's assertion that the private shareholders possessed "a proportionate interest in the Bank as a whole".[31] The Bank contended that the shareholders of the Bank lack the fundamental characteristics of equity ownership; they lack: voting rights (Statutes, Article 14), the right "to elect members of the board (id)", and the right to "transfer shares without the approval of the Bank and the central bank of the state to

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[27] Counter-Memorial, at para 8.
[28] *Id.*, at para. 9.
[29] *Id.*, at para. 11.
[30] *Id.*, at para. 90.
[31] FE Memorial, at para. 15.

whose national issue the shares belong (Statutes, Art. 12)."[32] New central banks have paid more than the market price for shares of their own new national issue because "these shares could give them what no other shareholder could ever obtain, participation in the governance and control of the Bank through the voting rights that the existence of these new shares uniquely provided to them."[33]

89. As regards the method of valuation applied by the Bank in awarding compensation for the repurchased shares, the Bank asserted that the standard of valuation to be applied is the fair market value represented by the market price of the Bank's publicly traded shares rather than the value of the proportionate ownership in the Bank by the shareholders as suggested by Claimant First Eagle. The methods of valuation proposed by First Eagle are useful to "approximate what fair market value would be in the absence of a functioning market for the property at issue. Where there is such a market, the market price itself furnishes the standard of fair market value."[34]

90. The Bank further contended that the shares of the Bank lack the fundamental characteristics of equity ownership because they lack voting rights, the right to elect members of the Board of Directors, and the right to transfer shares without the consent of the Bank and the central banks of the respective member countries. Further the Bank maintains that shareholders have no right to participate in the profits of the Bank other than the right to receive dividends, and the right to participate in the assets of the Bank is limited to the event of the Bank's liquidation.[35]

91. The Bank also asserted that its shares are traded on recognized stock markets as opposed to the contention by First Eagle that the shares are not traded in a fully efficient market. International law does not require an "efficient market", but simply requires that the market price be freely and fairly determined in a regular market. Therefore, the market price for the Bank's shares furnishes the best and most logical indication of the fair market value at the time the private shareholders were notified of the mandatory redemption. The Bank further submitted that the redemption price satisfied the compensation standards of Human Rights law. The Bank relied on the Convention for the Protection of Human Rights and Fundamental Freedoms,[36] which the Bank contends does not confer on the expropriated owner an unqualified right to compensation of the full value of the expropriated property. The Bank also relied on the American Convention on Human Rights,[37] which provides for "just" as opposed to "full" compensation (Article 21(2) of the Convention). The Bank, therefore, asserts that the standard is one of appropriate, reasonable, fair or equitable compensation.

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[32] Counter-Memorial, at para. 20.
[33] *Id.*, at para. 24.
[34] *Id.*, at para. 27.
[35] *Id.*, at para. 104.
[36] 4 November 1950, 213 UNTS, p. 222 (Bank's LA-130).
[37] 22 November 1969, 123 UNTS, p. 1144 (Bank's LA-132).

92. While the Bank accepted that public international law applies to the dispute, it contended that the share redemption should be evaluated under the standards of Human Rights law. The Bank rejected First Eagle's contention that the redemption by the Bank of its own shares is subject to the rules governing the taking of "alien" property by a state. The Bank argued that there is no reason to conclude that private shareholders should be treated as having been aliens in their legal relations to the Bank. The relations between the Bank and its shareholders are subject to the Bank's exclusive organic jurisdiction, *i.e.* the jurisdiction of an organization over its constituents. The shareholders are part of the internal order of the Bank; Human Rights law is the correct standard for a decision concerning any alleged interference with property rights due to the exercise of legislative and administrative powers over the privately held shares. The share redemption was not discriminatory under the Human Rights standard; there was no differential treatment without an objective and reasonable justification and without a relationship of proportionality between the means employed and the aim sought to be realized. The repurchase did not constitute a fundamental change in the Bank that would have required Article 58 procedures. Rather "the existence of the private shareholders just arises out of a tolerance that was granted to central banks initially."[38] "Article 57 was chosen [because] it was not believed to be a change which would affect the basic character of the Bank."[39]

93. The Bank asserted that First Eagle wrote to the Bank on 23 June 2000 requesting that the Bank should "consider a public share repurchase on terms similar to the recent share issuances." The Bank concluded that First Eagle's allusion to recent share issuances "presumably refers to the 1999 subscription of new central banks at 30 per cent off net asset value."[40]

94. The Bank indicated it agreed to the use of the J.P. Morgan Report calculations (Exhibit 43) for any finding regarding NAV.[41]

95. The Bank counterclaimed against First Eagle requesting damages for breach by First Eagle of Article 54 of the Statutes in wrongfully ignoring that jurisdictional commitment and suing the Bank in the United States to avoid the jurisdiction of the Tribunal, and for the costs of the arbitration.

b. APPLICABLE LAW

96. The Bank stated that its internal governance, *i.e.* the relation of the Bank to its shareholders, and acts such as the compulsory redemption of the privately held shares performed by the Bank *jure imperii*, are governed by its Constituent Instruments, supplemented by applicable general public international law.[42]

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[38] Transcript, at p. 78.
[39] *Id.*, at p. 79.
[40] Exhibit 22, Transcript, at p. 325.
[41] Transcript, at p. 331.
[42] Counter-Memorial, at paras. 48-51.

97. The Bank contested Mr. Mathieu's assertion that the Tribunal should take into account Dutch and Swiss public policy. The Bank argued that the Tribunal's Award is governed solely by public international law and that national courts lack jurisdiction *ratione materiae* to annul or invalidate an award of an international court or Tribunal under international law, particularly when it involves a sovereign party acting *jure imperii*.[43]

98. The Bank argued that the share redemption is also subject to the rules of Human Rights law when property is taken for public purposes. "While international organizations usually do not exercise personal or organic jurisdiction over private parties other than their own officials, such jurisdiction may be conferred on an organization by its member states or by the private parties' voluntary acceptance of the organization's internal law" excluding their relations from the state's legislative, administrative, and adjudicative competence.[44] The Bank analogized the present case where it alleged the private party has chosen to become a part of an international organization to the bond between a state and its nationals or residents. The Bank's jurisdiction over private parties with whom it has this special relationship is "parallel to the jurisdiction of states over their nationals."[45] "...

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[43] *Id.*, at paras. 53-54.

[44] See, *e.g. Weiss v. Institute for Intellectual Cooperation*, 81 Journal de droit international, pp. 744,745 (Fr. Conseil d'Etat, 20 February 1953) ("[The claimant is] an official of a body with an international character; consequently the Conseil d'Etat has no jurisdiction, in the matter of a claim, in respect of difficulties arising between said international body and one of its officials.") (Bank's LA-101); *ICEM v. Chiti*, II Italian Y.B. of Int'l L., pp. 348, 350-351 (1976) (It. Cass., 7 November 1973) ("Case law has also upheld that acts of self-organisation and the regulation of organisational relations, amongst which are those of public employment, are an expression of the sovereign power of the international law subject in the same way that they are, in Italy, the expression of the sovereign power of the Italian State and are governed by public law .... [These acts] should be governed by the international organisation's own rules and are consequently exempted from the Italian legal system as well as from Italian jurisdiction, because of the said immunity.") (Bank's LA-102); *In re Dame Adrien*, 6 Ann. Dig., p. 33 (Fr. Conseil d'Etat, 17 July 1931) (Conseil d'Etat stating it had no competence because: "[t]he petitioners [French officials of the Reparations Commission] belonged to an international organisation and their position was determinable only by international public law") (Bank's LA-103); Finn Seyersted, *Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organisations (2)*, 14 ICLQ, pp. 493, 505 (1965) (Bank's LA-104); Hans-Peter Kunz-Hallstein, *Die Beteiligung Internationaler Organisationen am Rechts und Wirtschaftsverkehr*, Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil, pp. 819, 824 (1987) ("Aufgrund der Organisationsgewalt der Internationalen Organisationen [comprising personal jurisdiction] sind ihre inneren Angelegenheiten der Legislationsgewalt der Staaten und deren Gerichtsbarkeit der Sache nach (*ratione materiae*) unmittelbar entzogen.") (Bank's LA-105), *id.*, at p. 73, fn. 90.

[45] Counter-Memorial, at para. 124. First Eagle relies on the International Court of Justice's Advisory Opinion in *Reparations for Injuries Suffered in the Service of the United Nations* as support for its suggestion that the present organic dispute should nonetheless be subject to the rules governing the taking of alien property. FE Memorial, at para. 263. That case is not instructive here. There, the International Court of Justice ("ICJ") had to determine whether the United Nations had the capacity to bring a claim in respect of injury caused by a third party to an agent of the United Nations in the performance of his duties. When the ICJ stated that the legal bond between the United Nations and its staff cannot be assimilated to that of a state and its nationals it was considering the external relations between the United Nations and a third party, involving the concurrent jurisdiction of the official's national state, rather than internal relations. Nonetheless the ICJ held that the United Nations possesses a right of functional protection in

[T]he European Court of Justice has relied exclusively on Human Rights law to decide any alleged interferences with property rights by the European Community in the exercise of its legislative or administrative powers over private parties."[46] "*A fortiori*," the Bank asserted, "human rights law applies to the organic relations between the BIS and its shareholders ...."[47]

c. RELIEF REQUESTED

99. In response to the request of the Tribunal for final written submissions, the Bank stated:

> The Bank requests that the Tribunal issue an award:
>
> 1. declaring that the Bank is an international organization and that its relations with its shareholders are governed by its constituent instruments and applicable general public international law;
>
> 2. declaring that the mandatory redemption of the Bank's privately held shares was lawful;
>
> 3. declaring that the standard of compensation for the redeemed shares is fair market value;
>
> 4. declaring that the Bank paid fair market value for its shares by compensating the former private shareholders at roughly twice the market price of its shares on 8 September 2000, the last trading day before the mandatory redemption was announced;
>
> 5. granting the Bank damages for First Eagle's breach of Article 54(1) of the Statutes;
>
> 6. granting the Bank the costs of the arbitration; and
>
> 7. granting the Bank further relief as the Tribunal deems just and proper.

CHAPTER IV - QUESTION 1 OF PROCEDURAL ORDER NO. 3

100. Procedural Order No. 3 (Terms of Submission) of 5 March 2002, it will be recalled, identified the first of the three matters at issue between all or a number of the Parties as:

> 1. The lawfulness of the compulsory recall of the shares, including the procedures by which it was accomplished and the possible scope of the consequences of a finding of unlawfulness for all those who are private shareholders as of 8 January 2001.

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respect to its agents, recognizing the existence of some system of attribution even in external relations. *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, at pp. 184-185 (Bank's LA-59), Counter-Memorial, para. 124, at fn. 92.

[46] See, *e.g.* Case 4/73, *Nold v. Commission*, ECR I, pp. 491, 508, at para. 14 (1974) (Bank's LA-108); Case 44/79, *Hauer v. Rheinland-Pfalz*, ECR, pp. 3727, 3745-3746 (1979) (Bank's LA-109), *id.*, at p. 75, fn. 94.

[47] Counter-Memorial, at para. 125.

In Section C of Procedural Order No. 3, the Tribunal said:

> 1. Although only Mr. Mathieu and the Bank have raised Issue 1 above, both contend that a finding of unlawfulness would affect the recall program and all those who were shareholders as of 8 January 2001. A finding of unlawfulness of the compulsory recall of shares could therefore affect all the Claimants in these cases.

Accordingly, the Tribunal stated in Section C.1 and C.2:

> 1. The Tribunal requests Mr. Mathieu and the Bank to address all matters they deem relevant to their contentions with respect to the lawfulness of the recall program including its consequences for those who were shareholders as of 8 January 2001;
>
> 2. The Tribunal requests Dr. Reineccius and First Eagle to address all matters they deem relevant to the scope of the possible consequences of a finding of unlawfulness of the recall program for those who were shareholders as of 8 January 2001.

101. It will be recalled that Claimant No. 1, Dr. Reineccius, indicated that he did not believe that there was substance to the claim raised by Claimant No. 3 and, accordingly, would not make a written submission on this matter. However, he reserved his right to make comments on this matter at the Hearings. He later notified the Secretary of the Tribunal that he would not attend the Hearing on the day that this particular issue was examined.

102. Similarly, First Eagle, in its Memorial of 6 May 2002, stated that "The Bank's authority under its Statutes to effect a mandatory repurchase or partial liquidation upon payment of full compensation is not at issue in the proceeding between First Eagle and the Bank."[48] Nonetheless, First Eagle did avail itself of the opportunity to inform the Tribunal, in its Memorial and at the Hearing, of its view of the scope of possible consequences of a finding of unlawfulness of the recall program.

103. The Tribunal will consider first Mr. Mathieu's arguments with respect to the lawfulness of the recall program. Depending upon its decision about the lawfulness of the recall program, the Tribunal will then turn to the arguments of Mr. Mathieu and First Eagle with respect to the possible consequences of a finding of unlawfulness.

A. First Preliminary Issue: The Character and Status of the Bank

104. The first preliminary issue in the context of question 1 which the Tribunal must address is the legal character and status of the Bank.

105. The Tribunal notes that the rather complicated manner in which the Bank was established must be seen in light of the stage of development of international law in 1930. Apparently, at that time some of the parties to the treaty had doubts as to whether a treaty could establish under public

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[48] FE Memorial, at para. 362.

international law a company limited by shares and whether such a company could be generally recognized.

106. For these reasons the parties to the treaty chose to adopt a model whereby pursuant to the treaty obligation Switzerland undertook to grant the Constituent Charter of the Bank and thereby create the company. At the same time, however, the parties made clear that, even though the Charter, as an Annex to the treaty, was also issued under Swiss law, the company could not be subjected to Swiss law. This complicated system does not exclude the applicability of Swiss law for formalities, for instance as to the procedure for general meetings of the Bank, where this is not in conflict with the relevant instruments of international law.

107. Switzerland, however, which takes a monist approach, considers that international law is automatically valid in the Swiss legal order, *i.e.* without needing any act of transformation or incorporation. Accordingly, the Swiss Government granted the Charter by merely ratifying the Convention, after it had been approved by the Swiss Parliament, without enacting any additional legislation. This practice has been followed for all amendments that fell under Article 58 of the Statutes when a "reserved" article was being amended. The Government of Switzerland, by approving this amendment, "sanctioned [the amendment] by a law supplementing the Charter of the Bank" in the sense of Article 58 of the Statutes.

108. The Constituent Instruments confirm that the Bank was established under international law in conformity with a treaty between the Governments of Germany, Belgium, France, the United Kingdom, Italy, Japan[49] and Switzerland, which was concluded on 20 January 1930. Under Article 1 of the Convention, Switzerland undertook "to grant to the Bank for International Settlements, without delay, the following Constituent Charter having force of law . . . . " By approving the Convention, the Swiss Parliament gave the Swiss Government the competence to ratify this treaty and to grant the Constituent Charter, which is an integral part of the Convention. Article 1 of the Charter stated "[t]he Bank for International Settlements . . . is hereby incorporated". Article 2 of the said Charter added that the constitution, the operations and the activities of the Bank were "defined and governed by the annexed Statutes". The Statutes of the Bank and its Constituent Charter were thus determined by an intergovernmental agreement and were annexed to the Convention. The granting of the Charter by Switzerland did not thereby subordinate the Bank to Swiss law. Paragraph 5 of the Charter provided that

> The said Statutes and any amendments which may be made thereto in accordance with Paragraphs 3 or 4 hereof respectively shall be valid and operative notwithstanding any inconsistency therewith in the provisions of any present or future Swiss law.[50]

Thus, the sequence of steps by which the Bank was established demonstrates its international treaty origin. The Bank was created by Governments, through

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[49] See *supra* fn. 3.

[50] See also Constituent Charter, at para. 5.

an international instrument, which instrument obligated Switzerland to provide a venue and local status, as well as prescribed immunities. The Bank is chartered as a company limited by shares under Swiss law, while it is registered as an "Internationale Organisation mit eigenem Rechtsstatus" in the "Handelsregister des Kantons Basel-Stadt Hauptregister".[51]

109. The declaration of the Swiss Federal Council (Swiss Federal Government) to the Swiss Federal Parliament of 7 February 1930 makes the sequence of steps of establishment and the preeminence and independence of the international character of the Bank clear:

> La convention concernant la banque des règlements internationaux distingue entre les dispositions conventionnelles proprement dites et la charte constitutive de la banque, qui est réputée constituer un acte de droit interne suisse . . . . Par les premières, la Suisse s'engage à promulguer la charte constitutive et à ne pas la modifier sans le consentement des Etats signataires; en outre, la mise en vigueur et la durée du traité s'y trouvent réglées; enfin, il est prévu, pour le règlement de tous différends survenant entre les Etats contractants, une instance arbitrale . . . . Le contenu de la charte, qui doit être accordée par la Suisse, se trouve intégralement dans la convention. La charte octroie à la banque la personnalité juridique du droit suisse, sanctionne ses statuts nonobstant toute contradiction avec les dispositions impératives de ce droit, et énonce ses privilèges fiscaux et administratifs . . . .[52]

110. By the same token, the Swiss commitment not to apply Swiss law in particular to the operations and activities of the Bank was matched by a commitment by the treaty partners establishing the Bank not to change the Statutes in ways that would impose upon Switzerland a different regime, without Swiss concurrence:

> Dans la charte, la Suisse reconnaît, en outre, les statuts de la banque, ainsi que leurs modifications éventuelles, même si les statuts portent atteinte aux dispositions impératives du droit suisse actuel ou futur . . . . Il y a lieu de noter, en particulier, que les dispositions statutaires essentielles ne peuvent être modifiées que par une loi additionnelle à la charte de la banque . . . . Le caractère de la banque – c'est une des conditions de la conclusion de la convention par la Suisse – ne peut donc être modifié sans l'assentiment de notre pays.[53]

111. And, indeed, the Statutes, which were part of the Convention, specify, in Article 60 (currently Article 58), those provisions of the Statutes which, in addition to the adoption by the Bank's amendment procedure also required the enactment of a law "supplementing the Charter of the Bank." The same condition is inserted in Paragraph 4 of the Charter of the Bank, which was also part of the Convention.

112. While the internal structure of the Bank was, according to Article 1 of the Statutes, "a Company limited by Shares," and the Board of the Bank was comprised, on a permanent basis, of the governors of the central banks of the seven founding States and their nominees, the essential international character of the Bank is apparent from its treaty origin.

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[51] See Counter-Memorial, at para. 36, fn. 22.

[52] Feuille fédérale de la Confédération suisse, Vol. 1, p. 87 (1930)

[53] *Id.*, at pp. 92 and 93.

113. Moreover, the functions of the Bank were quintessentially public international in their character. Auboin, one of the first managing directors of the BIS, has written:

> After the first world war, however, and especially during the currency stabilizations of the period 1922-1930, the principal central banks frequently joined forces for the purpose of granting special "stabilization credits" either in connection with the reconstruction work undertaken by the Financial Committee of the League of Nations or independently of these schemes. It was therefore natural enough that the monetary and political authorities soon became interested in the idea of substituting for such ad hoc and temporary associations a more permanent system of cooperation.[54]

114. From its inception, the Bank was charged with the performance of a particularly urgent international task. Article 3 of the original Statutes (which is unchanged in the current Statutes) sets out the objects of the Bank in general terms:

> The objects of the Bank are: to promote the co-operation of central banks and to provide additional facilities for international financial operations; and to act as trustee or agent in regard to international financial settlements entrusted to it under agreements with the parties concerned.

Article 4 of the original Statutes, which was abrogated in 1969 (long after it ceased to be relevant to the work of the Bank), makes clear that the principal reason for the creation of the Bank was the management of the so-called "New Plan" or "Young Plan," as it has come to be known, for the settlement of German reparations, a major international and intergovernmental problem at that time.

115. The Bank has cited a number of international instruments that explicitly recognize the Bank as an international organization: [55] the Headquarters Agreement with Switzerland of 1987, [56] the Host Country Agreement Between the Bank and the People's Republic of China of 1998, [57] and the Host Country Agreement with Mexico of 2002.[58]

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[54] R. Auboin, The Bank for International Settlements, 1930-1955, Essays in International Finance, No. 22, Map 1955, at pp. 1-2 (Bank's LA-25).

[55] Counter-Memorial, at para. 40.

[56] Accord entre le Conseil fédéral suisse et la Banque des Règlements intenationaux en vue de déterminer le statut juridique de la Banque en Suisse (Agreement between the Swiss Federal Council and the Bank for International Settlements to determine the Bank's legal status in Switzerland), 10 February 1987, SR 0.192.122.971.3 (Bank's LA-16).

[57] Art. 1 (Legal Personality and Capacity) reads: "The Government acknowledges the international legal personality and the legal capacity of the Bank within the People's Republic of China, including the HKSAR." Host Country Agreement between the Bank for International Settlements and the People's Republic of China Relating to the Establishment and Status of a Representative Office for the Bank of International Settlements in the Hong Kong Special Administrative Region of the People's Republic of China, 11 May 1998 (Bank's LA-17).

[58] Art. 2, para. 1 (Legal Personality and Capacity) reads: "The State acknowledges the international legal personality and the legal capacity of the Bank with the State." Host Country Agreement between the Bank for International Settlements and the United Mexican States Relating to the Establishment and Status of a Representative Office of the Bank for International Settlements in Mexico, Diario Oficial de la Federación, 20 June 2002, at 3 (Bank's LA-18).

116. Dr. Reineccius and Mr. Mathieu accept the identity of the Bank as an international organization. First Eagle raises questions about the Bank's identity.[59] First Eagle is incorrect in stating that the above cited Headquarters Agreements do not recognize the Bank as an international organization. Such recognition clearly flows from the provisions of the Agreements. First Eagle begs the question when it contends that, unlike the World Bank and the International Monetary Fund, the Bank for International Settlements has private shareholders and thus cannot be an international organization. That is precisely the question being considered.

117. Nor is First Eagle correct in stating that because the Bank performs some commercial activities common to private sector banks, it cannot be an international organization. Any international organization may have to engage in some private sector activities in pursuit of its public functions and does not automatically and *pro tanto* lose its public international legal character because of them. The fact that international organizations use many of the same accounting techniques as private entities tells us nothing, for these are methods for control and efficiency which are required, in one form or another, in any large scale collaboration. Nor is the Bank the only international organization that shows a profit. But even if the Bank were singular in this regard, or its profits far exceeded those of other international organizations, First Eagle itself acknowledges that there is a difference between a profit-making and a profit-maximizing entity. In the declaration by the Swiss Federal Council (Swiss Federal Government), which was considered earlier,[60] it was noted that

> La banque n'a pas pour but principal de faire des bénéfices. Sans doute, les statuts prévoient-ils la possibilité de gains considérables, mais ceux-ci reviendront, en première ligne, aux banques d'émission qui ont le droit de souscrire les actions. La banque des règlements internationaux tend à des buts d'intérêt général . . . .[61]

The issue was not that the Bank might make profits, the possibility of which was taken for granted. It was the purpose for which the Bank was created, to which such profits had to be applied.

118. For the above reasons, the Tribunal finds that the Bank for International Settlements is a *sui generis* creation which is an international organization.

B. Second Preliminary Issue: The Applicable Law with Respect to Question 1

119. The Tribunal turns now to the second preliminary issue in the context of question 1, *viz.*, which law applies to the question of the legality of the Bank's recall of 8 January 2001. The question of the applicable law with respect to the valuation of the recalled shares, if the Tribunal reaches it, must be treated separately, as will be explained below.

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[59] See FE Memorial, at paras. 229-239.

[60] See *supra* para 109.

[61] Feuille fédérale de la Confédération suisse, *supra* fn. 52, at p. 95.

120. As will be recalled, neither Dr. Reineccius nor First Eagle challenged the legality of the recall or contended that it was *ultra vires* the Statutes. Mr. Mathieu, in contrast, did raise this argument, contending that the amendments of the Statutes of 8 January 2001 were void *ab initio* and asking for a *restitutio in integrum*, reinstating the private shareholders.[62]

121. Mr. Mathieu framed his argument in terms of the constituent instruments of the Bank, averring that only if there were *lacunae* or inclarities in the constituent instruments should there be a reference to international law. He also submitted that there was a contingent role for Dutch and Swiss *ordre public international.*

122. The Bank agreed on the role of the Constituent Instruments, but it was particularly concerned that municipal law not be applied and submitted that

> Because the Bank is an international organization, issues implicating its organic principles or internal governance (such as the relation of the Bank to its shareholders) are necessarily governed by public international law.[63]
>
> Claims arising out of an international organization's acts or omissions in the exercise of its sovereign powers can only be governed by public international law. In amending its Statutes to withdraw its privately held shares, the BIS did not act as a private party. Rather, it exercised its legislative authority under Article 57 of the Statutes, which authorizes the BIS to amend its Statutes, including private shareholders' statutory rights. The resolution of the EGM of 8 January 2001 which enacted the amendments effecting the redemption of the privately held shares therefore constitutes *a jure imperii* act which is governed by the BIS's constituent instruments and applicable general public international law.[64]
>
> In sum, the rights of shareholders in the BIS are governed by the BIS's constituent instruments and applicable general public international law, which likewise determine the validity and legality of the redemption of their shares and its legal consequences.[65]

123. The Bank is correct in asserting that "issues implicating its organic principles or internal governance" are governed by international law. But the Bank is wrong in assuming that this statement means that it has "sovereign powers" or that acts, such as the recall of shares, fall in the category of *acta jure imperii*. While states have sovereign powers, an international actor does not, *qua* international actor and by virtue of that status, have sovereignty. As for the distinction between *acta jure imperii* and *acta jure gestionis*, it is used in municipal courts in order to determine whether a foreign state or its agency or instrumentality that has not consented to the local jurisdiction will benefit from immunity from its judicial jurisdiction and execution. The distinction has no relevance in a public international forum, with respect to a state or to any other international actor which is subject to its jurisdiction.

124. Mr. Mathieu errs in contending that Dutch and Swiss *ordre public international* apply.[66] The clear intention of the Agreement between The

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[62] Mémoire en Demande, at pp. 5-6; Transcript, at p. 89, lines 18-27.
[63] Counter-Memorial, at para. 48.
[64] *Id.*, at para. 50.
[65] *Id.*, at para. 51.

Netherlands and the Permanent Court of Arbitration of 30 March 1999,[67] as well as of the Headquarters Agreement between the Bank for International Settlements and Switzerland of 10 February 1987[68] was to exclude the application, respectively, of Dutch and Swiss legislative jurisdiction. Moreover, the purpose of paragraph 5 of the Constituent Charter of the Bank, which is part of the 1930 Hague Agreement, would be frustrated if, its terms notwithstanding, Swiss *ordre public* principles applied.

125. The Constituent Instruments of the Bank[69] are assumed, by both Mr. Mathieu and the Bank, to resolve definitively the particular issue of the legality of the recall of the private shares by the amendment of the Statutes on 8 January 2001. Neither of these Parties adduced other legal instruments that might govern this issue, with the exception of the Vienna Convention on the Law of Treaties of 1969, which was invoked only to provide authoritative guidance on interpretation. Mr. Mathieu did, however, submit that the Tribunal should go beyond the Statutes, by contending that even if the recall amendments were *intra vires* and valid under the Statutes, they still were invalid under general international law. This contention will be considered below.

126. In the light of the above, the Tribunal will turn to an examination of the legality of the Bank's actions.

C. THE AMENDMENT OF THE BANK'S STATUTES

127. The Statutes of the Bank, in their current version, are comprised of fifty-eight articles. Article 57 (the substance of which has not changed since 1930) provides:

> Amendments of any Articles of these Statutes other than those enumerated in Article 58 may be proposed by a two-thirds majority of the Board to the General Meeting and if adopted by a majority of the General Meeting shall come into force, provided that such amendments are not inconsistent with the provisions of the articles enumerated in Article 58.

Article 58 provides:

> Articles 2, 3, 8, 14, 19, 24, 27, 44, 51, 54, 57 and 58 cannot be amended except subject to the following conditions: the amendment must be adopted by a two-thirds majority of the Board, approved by a majority of the General Meeting and sanctioned by a law supplementing the Charter of the Bank.

The above provisions, as well, have not changed, in substance, since 1930, although the numeration of the reserved articles in Article 58 has changed, due to other additions and deletions from the Statutes over the years.

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[66] Mémoire en Demande, at pp. 7-8.

[67] Agreement Concerning the Headquarters of the Permanent Court of Arbitration between the Kingdom of the Netherlands and the Permanent Court of Arbitration, 30 March 1999, Art 3.

[68] *Supra* fn. 56.

[69] The Statutes were concluded on 20 January 1930; the text currently in force is as amended on 8 November 1999.

128. Despite the fact that Article 57 speaks of amendments being proposed to the General Meeting, Article 47 of the Statutes provides:

> Extraordinary General Meetings shall be summoned to decide upon any proposals of the Board
>
> (a) to amend the Statutes;
>
> . . . .

The Statutes do not prescribe a special notice provision for Extraordinary General Meetings; it would appear that the requirement of three weeks' notice for General Meetings, as stated in Article 44, applies, as well, to Extraordinary General Meetings. Nor is there a significant difference in the voting requirements of General Meetings and Extraordinary General Meetings with respect to amending the Statutes.

129. Amendment of any articles of the Statutes, other than the twelve enumerated, reserved articles, requires a proposal by a two-thirds majority of the Board to the General Meeting and adoption by a simple majority of the General Meeting. Amendment of any of the twelve reserved articles, specified in Article 58 of the Statutes, requires *adoption* by a two-thirds majority of the Board and approval by a majority of the General Meeting. There would appear to be no substantial difference between the Board proposing by a two-thirds majority (Article 57 of the Statutes) or adopting by a two-thirds majority (Article 58 thereof). The only significant difference between amendment of the articles, except for the twelve reserved articles, is that Article 58 requires the sanction of Swiss law supplementing the Charter of the Bank after approval by a majority of the General Meeting, for reasons that were explained above. In contrast, amendment of the unreserved articles of the Statutes does not require the enactment of such a law.

130. The reserved articles enumerated in Article 58, for which the special amendment procedure is to be applied, relate to the following items:

(i) Moving the registered office of the Bank from Basle (Article 2);

(ii) Amending the objects of the Bank (Article 3);

(iii) Increasing or reducing the capital of the Bank and the prescribed distribution of an increase in the Bank's capital (Article 8);

(iv) Changing the regime which would assign voting or representation to shareholders as such (Article 14);

(v) Changing the principle that the operations of the Bank must conform to the monetary policies of the central banks of the countries concerned (Article 19);

(vi) Deciding to permit the Bank to do any of the six explicitly prohibited activities (Article 24);

(vii) Changing the statutory composition of the Board of Governors (Article 27);

(viii) Varying the rights of attendance and voting rights at General Meetings (Article 44);

(ix) Changing the regime for allocation and disbursement of annual profits (Article 51);

(x) Changing the amendment procedures for unreserved articles in the Statutes (Article 57);

(xi) Changing the amendment procedure of any of the reserved articles just considered (Article 58).

The reserved articles of the Statutes concern the special interests of the central banks and of Switzerland and were manifestly designed to protect them. It is only amendments to the Statutes that involve an increase or decrease of the capital of the Bank which require adoption by a two-thirds majority of the General Meeting. As stated above, except for Article 8, the voting procedures for amendment of both reserved and unreserved articles are essentially the same in both the Board of Governors and General Meeting phases. But amendment of the enumerated reserved articles also requires an adjustment of the Charter of the Bank by an act of Swiss legislation, as explained above.

D. Mr. Mathieu's Allegations of Illegality and the Bank's Response Thereto

131. When the Bank decided to recall all of the shares held by private shareholders at its Extraordinary General Meeting on 8 January 2001, the procedure was that of amendment of unreserved articles of the Statutes in accordance with Article 57 of the Statutes. Mr. Mathieu contended that the amendment of the Statutes was illegal because it was not in compliance with the Constituent Instruments of the Bank. In his Memorial, Mr. Mathieu argued:

> La Résolution amendant les Statuts est illégale, ayant été adoptée en violation de la Charte et des Statuts. En effet, la Résolution a prévu l'ajout d'un nouvel article (1.1) ce que ne permettent pas les Instruments constitutifs de la Banque (1.2). Subsidairement, quand bien même il serait possible d'ajouter un nouvel article, il aurait à tout le moins fallu le faire en application de la procédure renforcée (1.3).

Thus, Mr. Mathieu contended that Article 18A was not an amendment of an existing article but the addition of a new article and, as such, a type of modification of the Statutes that, he contended, is not permitted by Article 57 and is, as a result, null and void. As a subsidiary argument, he contended that even if it were possible to add a new article, it would have had to be accomplished under the special procedure set out in Article 58, rather than the general procedure set out in Article 57.

132. With respect to Mr. Mathieu's first argument, he contended that Article 18A is not an amendment, within the meaning of the Statutes, but a new article, which neither the Statutes nor the Charter authorized. He contended that the interpretation of the Charter and the Statutes must be accomplished in conformity with the rules of international law, specifically, Article 31 of the Vienna Convention on the Law of Treaties. On the basis of Article 31, Mr. Mathieu argued that a literal interpretation seeking the "ordinary meaning" demonstrates that Articles 57 and 58 of the Statutes refer to "amendments of any Articles of these Statutes." The reference is to *amendments*, or *modifications* in French, of existing articles, but not to *additions* or the introduction of new articles. Mr. Mathieu's core contention, then, was that the language of the text refers only to amendments of specific articles and not to the addition of new articles.

133. Mr. Mathieu contended that his reading of what he believes to be the plain and natural meaning of the Statutes is reinforced by an interpretation that looks to context, as that term is used in the Vienna Convention on the Law of Treaties. The Charter and the Statutes distinguish between ordinary articles, which may be amended in the ordinary fashion, and reserved articles which require, in addition to the ordinary amendment procedure, the enactment of an additional law. The specification of articles indicated, according to Mr. Mathieu, that the Statutes contemplated amendment of specific articles but not the Statutes as a whole.

134. Interpretation in the light of the object and purpose of the instrument being construed would further reinforce, according to Mr. Mathieu, the construction that he proposed. In his view, the precision with which the amendment provision was drafted manifested an intention on the part of the drafters to confine within strict limits the exercise of the activities and, in particular, the discretion of the Bank. This showed, in Mr. Mathieu's view, that the States that had created an entity with strictly limited powers did not want that entity to escape their control and to take any liberties with the powers that had been granted to it. Given the delicacy of the political assignments to the Bank at the time of its founding, Mr. Mathieu submitted that the founding States were particularly concerned to carefully delimit the discretionary power of the Bank. Moreover, he contended, no new article has been added to the Statutes since the establishment of the Bank and the only case of suppression of an article concerned the expiration of the Young Plan. The fact that the Bank's activities had evolved, Mr. Mathieu argued, does not permit the Bank to make adjustments in the Statutes, for, citing Judge Bedjaoui, in his individual opinion in the *Gabcíkovo-Nagymaros* case, the law that should govern the interpretation of a treaty is the law that was contemporary at its conclusion rather than law that has subsequently evolved.[70] Mr. Mathieu also cited the *Namibia* Opinion of the International Court of Justice in this regard.[71]

135. Furthermore, Mr. Mathieu contended that even if the new article is not deemed illegal on the ground that it is an addition rather than a modification or amendment, the Bank should have followed the reserved amendment procedure of Article 58 of the Statutes instead of the less rigorous procedure of Article 57. Mr. Mathieu submitted that authorizing the Bank to introduce new articles through the ordinary procedure would enable the Bank not simply to introduce articles that are objectively contrary to the enumerated reserved articles but even to create new elements and to develop the Statutes in ways that might conform to the letter of the enumerated reserved articles but be incompatible with the original purposes of the States Parties to the 1930 Hague Agreement. To avoid this, Mr. Mathieu contended, it would be

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[70] *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Judge Bedjaoui, ICJ Reports 1997, at para. 8.

[71] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, p. 16, at para. 53.

reasonable to demand that the additional articles become the object of an additional law, under the procedure of Article 58 of the Statutes. This, according to Mr. Mathieu, would preserve the interest of Switzerland, under Paragraph 6(c)[72] of the Charter, as well as the interests of the States which had concluded the 1930 Convention.

136. In its Counter-Memorial of 22 July 2002, the Bank contended that the ordinary meaning of the word "amendment" is "[a] change made by addition, deletion or correction."[73] Thus the Bank contended that the plain and natural meaning of the language of the Statutes contemplated amendments that would *add* articles and not simply amendments that would *change* existing articles. Moreover, the Bank argued that constituent instruments of international organizations have long been interpreted as including the subsequent practice of the organization, a proposition that is supported by Article 31(3)(b) of the Vienna Convention on the Law of Treaties and has been affirmed in a large number of opinions of the International Court of Justice.[74]

137. In this regard, the Bank drew the Tribunal's attention to important amendments of the Statutes which resulted in the addition of new articles through the procedure prescribed by Article 57. In 1969, an Extraordinary General Meeting amended Article 5 (as renumbered) and added the text of Article 6, and a new Article 9 to the Statutes. On two other occasions, Extraordinary General Meetings added new clauses to existing articles.

138. The Bank also contended that a number of other international organizations whose constitutive instruments permit amendment have, in practice, both added and deleted articles of their constituent instruments.[75]

139. With respect to Mr. Mathieu's contention that the intentions of the Bank's founders militated against the addition of new articles through the amendment procedure, the Bank noted the absence of any evidence for the contention and, as a matter of law, relying upon *Certain Expenses of the United Nations*, submitted that speculations about the intentions of the drafters of these instruments, "except such as may be gathered from its terms alone,"[76]

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[72] Para. 6(c) provides: "The Bank shall be exempt and immune from all taxation included in the following categories: all taxes on the Bank's capital, reserves or profits, whether distributed or not, and whether assessed on the profits of the Bank before distribution or imposed at the time of distribution under the form of a coupon tax payable or deductible by the Bank. This provision is without prejudice to the State's right to tax the residents of Switzerland other than the Bank as it thinks fit."

[73] Counter-Memorial, at para. 63, quoting Black's Law Dictionary.

[74] *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, p. 165; *Reparations for Injuries Suffered in the Service of the United Nations, supra* fn. 45, at pp. 174, 180; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), supra* fn. 71, at pp. 16, 22; *Judgments of the Administrative Tribunal of the International Labour Organization Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization*, ICJ Reports 1956, pp. 77, 91.

[75] Counter-Memorial, at para. 67, fn. 57, which lists three such constituent instruments.

[76] *Supra* fn. 74, at pp. 184-185.

are less important in the construction of the constituent instruments of international organizations.

140. With respect to Mr. Mathieu's submission that the share recall had to comply with the special procedure of Article 58 for the enumerated reserved provisions of the Statutes, the Bank argued that the reserved procedure only applies to the specified provisions. Since there was no inconsistency between the amendments that are at issue here and those provisions, there was no need to comply with the procedures of Article 58. The Bank also contended that, in substance, the amendments in question did not change the Bank's fundamental structure, objectives or purposes and hence would not have required the special procedure of Article 58.

141. With respect to Mr. Mathieu's argument that the amendment was illegal because it was inconsistent with Article 21(g) of the Statutes, restricting the Bank's ability to "buy and sell negotiable securities other than shares for its own account or for the account of central banks," the Bank observed that Article 21(g) is not one of the reserved provisions enumerated in Article 58. So even if there had been, *quod non*, a conflict between the new Article 18A and the preexisting Article 21(g), that conflict would not have required the special amendment procedure prescribed in Article 58.

E. THE TRIBUNAL'S CONSIDERATION REGARDING THE ALLEGED ILLEGALITY

142. The legality of the repurchase has been contested principally under the Statutes of the Bank and secondarily under principles of international law regarding expropriation. In the first case, the question is whether the modification of the Statutes, assuming conformity with principles of international law, was carried out in accordance with Articles 57 and 58 of the Statutes (see 1 below). If that question is answered in the affirmative, the validity of the modification must still be examined under principles of international law (see 2 below). There is no need to examine this under any municipal law.

1. Conformity of the Recall to the Statutes

143. Given the importance of the text, it will be useful to set out again the language of Articles 57 and 58 of the Statutes. Article 57 provides:

> Amendments of any Articles of these Statutes other than those enumerated in Article 58 may be proposed by a two-thirds majority of the Board to the General Meeting and if adopted by a majority of the General Meeting shall come into force, provided that such amendments are not inconsistent with the provisions of the Articles enumerated in Article 58.

Articles 58 provides:

> Articles 2, 3, 8, 14, 19, 24, 27, 44, 51, 54, 57 and 58 cannot be amended except subject to the following conditions: the amendment must be adopted by a two-thirds majority of the Board, approved by a majority of the General Meeting and sanctioned by a law supplementing the Charter of the Bank.

With the exception of the requirement of Swiss legislation to supplement the Charter of the Bank for amendment of the enumerated articles[77] in Article 58, the procedures in Article 57 and Article 58 are actually the same, except that Article 8 specifies that a change of the capital requires a two-thirds majority of the General Meeting rather than a simple majority.

144. The language of Article 57 introduces no substantive limitation on the amendment competence of the General Meeting other than the requirement that those amendments not be inconsistent with the enumerated articles in Article 58. Hence, as a simple textual matter, an amendment to the Statutes accomplished according to the procedures required by Article 57 would be *intra vires* and valid as long as it were not inconsistent with one of the enumerated reserved provisions in Article 58. There is no indication in Article 57 that the mode of formulation of an amendment, whether as an addition to an existing article or as an entirely new article designated by a new number, has any legal significance. Hence, an interpretation of the Statutes in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty, must find the amendment under discussion as valid and *intra vires* the Statutes.

145. Article 31(3)(b) of the Vienna Convention on the Law of Treaties[78] requires that account be taken of "any subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation." This provision takes on special meaning when applied, in accordance with Article 5 of the Vienna Convention, to the constituent instruments of international organizations. In *Reparations for Injuries Suffered in the Service of the United Nations*, the International Court of Justice held that "the rights and duties of an entity such as the Organization [the United Nations] must depend upon its purposes and functions as specified or implied in its constituent documents and *developed in practice*."[79] The fact that the Bank has, on a number of occasions, amended its Statutes by the introduction of a new article appears to be probative of the authoritative interpretation of the Statutes in this regard.

146. Mr. Mathieu stated that a strict interpretation of the powers of the Bank had been sought by the drafters lest the Bank, once established, escape their control and take liberties with the powers that had been accorded to them.[80] But the decision structure of the Bank, as established in Chapters IV and V of the Statutes, requires two-thirds of the Board to propose amendments and a majority of the General Meeting to approve them. Article 27 of the Statutes, which established the membership of the Board, gave the central banks of the founding States of the Bank a permanent position. Hence it

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[77] Art. 1 of the Convention stated that Switzerland undertook not to sanction amendments to the Statutes of the Bank referred to in Para. 4 of the Charter without the agreement of the other signatory Governments

[78] *Supra* fn. 23.

[79] *Supra* fn. 45, at pp. 174, 180 (emphasis added).

[80] Mémoire en Demande, at p. 12.

would not appear that Mr. Mathieu's concern is relevant to the interpretation of this part of the Statutes.

147. Article 18A concerning the compulsory repurchase of the privately held shares cannot be plausibly construed as engaging any of the reserved articles in Article 58 or any of the concerns that animated that provision. While the Bank would have been obliged to secure the approval of Switzerland (in agreement with the other signatory Governments; see Article 1 of the Convention) if an amendment of one of the articles enumerated in Article 58 were planned, such approval would only have been required for amendment of a reserved article. In fact, as was reported at the Hearing, the Bank did notify Switzerland of the proposed amendment and Switzerland did not register any demand or objection.[81] Similarly, all the central banks that were members of the Bank were given notice, as required by the Statutes of the Bank, from which fact it is fair to assume that their Governments were also made aware of the pending change. Nor would there appear to be anything implicit in the Statutes or the Charter that would have precluded the change.

148. For the above reasons, the Tribunal finds that the Bank had the authority to add Article 18A to its Statutes and that the compulsory recall of the shares, including the procedures by which it was accomplished, was *intra vires* the Statutes and was, accordingly, a valid exercise of the Bank's powers. The Tribunal would emphasize, however, that a finding that the recall of the private shares was *intra vires* the Constituent Instruments of the Bank, does not address the question of whether the recall by the Bank and the valuation that the Bank set upon the shares held by private parties were lawful for reasons other than compliance with Articles 57 and 58 of the Statutes. The Tribunal now turns to that question.

2. Conformity of the Recall with Substantive Standards of International Law

149. Mr. Mathieu contended that aside from the problem of alleged insufficient compensation, the Bank's action was unlawful because it violated two of international law's cardinal requirements for a lawful expropriation: that the taking be in the public interest and that it be non-discriminatory. The question arises as to whether the Bank's recall of privately held shares in 2001 is to be examined either under the law of State Responsibility, by analogizing the private shareholders to aliens and the Bank to a State engaged in expropriation, or under international Human Rights law, by assimilating the private shareholders to nationals and the Bank to their State engaged in an act of eminent domain. Without entering for the moment into these analogies, or into whether neither is apposite, the Tribunal observes that the Bank's actions of 8 January 2001 would have met the public interest and non-discrimination requirements of international expropriation law which Mr. Mathieu proposed be applied.

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[81] Prof. Giovanoli, Transcript, at p. 79.

a. THE PUBLIC INTEREST REQUIREMENT

150. Now, obviously, the Bank is not a state. If public interest were understood as meaning the public interest of a state, the Bank's actions could not meet the public interest test and would be *eo ipso* unlawful. The reason for this conclusion would not derive from the nature and purpose of the action, but from the fact that the Bank is not a state. That argument, which would be circular and quite sterile, is not the sense in which Mr. Mathieu made his submission. When applied to an actor which is an international entity, but is not a state, public interest must be understood, *mutatis mutandis*, as an action rationally, proportionately and necessarily related to the performance of one of the legitimate international public purposes of the actor undertaking it.

151. With respect to the public interest requirement, the Bank submitted evidence of its conclusion that the presence of private shareholders in an international organization increased certain costs for the Bank and impeded the performance of some of its international public functions. An internal memorandum, prepared by the Bank's Secretariat on 6 November 1998, in presenting the proposal for recalling the privately held shares in the Bank, observed that:

> The need to take into account the interests of private shareholders no doubt limits to some extent the freedom of action of the BIS with regard to its policy of distribution of profits. It should also be mentioned that, on various occasions, the existence of private shareholders negatively affected negotiations regarding jurisdictional, tax or other immunities of the BIS in a number of other countries.[82]

It is clear that there was a latent conflict between the Bank's responsibilities for discharging its public functions and the Bank's fiduciary responsibilities to its private shareholders. *Prima facie*, the Bank is able to show that, were the international law of expropriation applied, it could meet, *mutatis mutandis*, the public interest requirement.

b. THE REQUIREMENT THAT THE ACTION NOT BE DISCRIMINATORY

152. Nor would the Bank's actions with respect to the private shareholders be characterized as discriminatory under the international law of expropriation. Analytically, one must distinguish between the factual referent of "differentiations" and the legal referent of "discriminations." Not all differentiations are discriminations. A discrimination is an unlawful differentiation. The legal instruments indicate that from 1930 onwards, private shareholders and central banks, although having equal rights as shareholders, had a different status. Only central banks can have voting rights. Although these voting rights are not directly attached to the shares held by the central banks, they are indirectly linked to the shares subscribed to by or through the

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[82] Secret L-3, Share Capital of the BIS, 6 November 1998, FE Exhibits to Memorial, Tab 26, at p. 2. The same point was made at a restricted meeting of the Members of the Board on 9 November 1998, at p. 1, FE Exhibits to Memorial, Tab 27. First Eagle produced a document from the papers of Thomas H. McKittrick at the Harvard Library, which is dated June 1938, but unsigned. It also comments on the incompatibility of private shareholders in "a true Bank of Banks." FE Exhibits to Memorial, Tab 36, at p. 10.

central banks. This shows that central banks are in a different category from private shareholders.

153. In 1969, it will be recalled, one new share issue was reserved only for sale to central banks. By Resolution III of the Extraordinary General Meeting on 9 June 1969, the Board of Directors was authorized

> (1) to issue, on a single occasion or at intervals, a third tranche of 200,000 shares of 2,500 gold francs each, which will be paid up to the same extent as the shares in circulation on the date of issue, and which may not be subscribed or purchased by the general public.[83]

154. The very nature of the Bank as an international organization established, *inter alia*, to facilitate relations between the central banks and the functioning of the international monetary system imported a different treatment, for some purposes, of central banks and private shareholders, most dramatically in governance rights, none of which could be acquired by private shareholders.

155. Thus, even were, *arguendo*, the standards of the international law of expropriation to be applied to determine the validity of the Bank's recall of private shares, that transaction would have been lawful in terms of the criteria of public purpose and non-discrimination.

c. COMPENSATION

156. International law also requires that, in order to be lawful, an expropriation should be against payment of compensation. Indeed, the Bank recognized that the recall had the consequence for the private shareholders that they lost their rights. The Bank accepted from the beginning that such a deprivation of property could only be lawful against payment of compensation. The issues concerning the amount of compensation will be addressed separately. However, the Tribunal would underline that a decision by the BIS which has the effect of depriving the private shareholders of their property rights, *i.e.* their shares, cannot be considered lawful without the payment of compensation. This follows from the rules of general international law protecting private property as well as from general principles of law concerning share companies, a point which the Parties did not dispute.

157. Because the Bank has acknowledged that it is subject to the jurisdiction of this Tribunal and has committed itself to paying all the former private shareholders any addition to what it has already paid, if the Tribunal should so order it, this third criterion will, *nunc pro tunc*, meet the requirements of international law. The Tribunal will take up this matter below.

158. Accordingly, the Tribunal finds that the decision to recall the privately held shares by the Extraordinary General Meeting of 8 January 2001

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[83] Extraordinary General Meeting held in Basle on 9 June 1969, Public Record, FE Exhibits to Memorial, Tab 22.

was *intra vires* the Statutes and a lawful exercise of the Bank's powers. Nor did this exercise of the Bank's power violate any principles of international law that might apply.

159. Because of the finding of the Tribunal that the amendment of the Statutes by the addition of Article 18A was *intra vires* the Statutes and lawful, the question of the consequences of a finding of unlawfulness for all those who are private shareholders as of 8 January 2001 is moot and, as such, need not be considered.

CHAPTER V - QUESTION 2 OF PROCEDURAL ORDER NO. 3

A. INTRODUCTION

160. A central issue in this case is the adequacy of the amount which the Bank paid for the recalled shares. Whether this question is characterized as one of "reparations," implying that the recall was unlawful, or as "compensation," implying that the recall was expropriatory and that its lawfulness is contingent upon the Bank's paying international law's measure of compensation, or as one of "fair" price, implying, in a more neutral fashion, that the gravamen is simply one of determining the proper value of the recalled shares, all the Claimants and the Bank have agreed that the issue is one of valuation. In this regard, it was the Bank which invoked and relied heavily upon international law's standard.[84] Hence it is useful to begin by

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[84] The Bank also referred to cognate national practice. The Bank adduced a rather extensive state practice with respect to the special phenomenon of central banks recalling, in a compulsory program, the shares of private shareholders. The Bank argued that national practice seems particularly apposite to the case at bar, as the central banks, like the Bank for International Settlements, concluded that the earlier practice of permitting private shareholders in banks that were public institutions had become anachronistic and incompatible with the public functions of the national central banks. Hence the central banks adopted recall programs, not unlike that of the BIS in its decision of 8 January 2001. In virtually all of these compulsory recall programs, the valuation of the shares was based upon an averaging of the market value of the shares prior to the announcement of the recall. There is, however, no indication whether the stock market price approximated net asset value. As the Bank described in its Counter-Memorial, the Bank of Canada was nationalized in 1938 by the Bank of Canada Act Amendment Act (Bank's LA-119). The Bank of Canada was organized as a stock corporation with a capitalization of CAD 5,000,000, with each share carrying a nominal value of CAD 50. Pursuant to the Act, new stock, owned by the Canadian Government, was issued in the amount of CAD 5,100,000, giving the Government a sufficient majority to buy out the private shareholders. Each former private shareholder received CAD 59.20 per share, the market price pertaining at the time (Bank of Canada Act Amendment Act, 1938, Art. 9 (Bank's LA-119)). Similarly the French Government nationalized the Banque de France in 1945 (Loi 45-14 (Bank's LA-115)). At the time the Banque de France had 46,809 shareholders. The price for each share was set at 28,029 francs, an amount equal to the average trading price of the Banque de France shares over a prior twelve-month reference period (Arrêté du juillet, 1946, J.O., 21 juillet 1946, at p. 6538 (Bank's LA-115)). Counter-Memorial, at paras. 153-159. In 1949, the Norwegian Government nationalized the Norges Bank. Norway assumed the shares previously owned by private shareholders against the payment of compensation fixed at 180% of the nominal value of the shares (20 Norges Bank Bulletin, No. 4-5, 21 November 1949, at pp. 57, 59 (Bank's LA-121)). This 180% figure was just higher than the market price of 178% of nominal value pertaining at the time. In 1962, Banco de España shareholders received

considering international law on this matter, even though it may not apply where the Parties have established a *lex specialis*.

B. INTERNATIONAL JURISPRUDENCE

161. In situations of expropriation of the shares of foreign investors, the practice of international law rather consistently has valued the shares by reference to their market value, in circumstances in which an efficient market operated.

162. In *American Int'l Group, Inc.*, the claimant sought compensation for its minority shareholding in an Iranian insurance company that was nationalized by the Government of Iran.[85] The claimant requested the "full value" of its interest as of the date of nationalization and the Tribunal concluded that the compensation due was the claimant's share of the fair market value of the property nationalized.[86] In calculating the fair market value, the Tribunal ascertained the "higher and lower limits of the range within which the value of the company could reasonably be assumed to lie," and then arrived at a compensation value by way of an "approximation of that value, taking into account all relevant circumstances of that case."[87]

163. In the case of *James Saghi*, the claimants were the majority shareholders of two Iranian companies that were put under management of the Iranian Government. The claimants alleged deprivation of ownership rights in the companies even though there was no formal expropriation. The Tribunal observed that fair market value would be the applicable standard of compensation and summarized the state of customary international law with respect to fair market value as follows:

> Fair market value may be defined as "the amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalization itself or the anticipation thereof, and excluding

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compensation based upon the fair market value of their shares following nationalization. The compensation paid to former shareholders consisted of 5% more than the greater of either the average price on the stock exchange over the preceding five years, or the maximum price of the previous year (Ley 2/1962, 14 April 1962 (BOE de 16) (Bank's LA-123)). New Zealand nationalized the Reserve Bank of New Zealand in 1936; the buy-out price was set at the share price pertaining on a certain date in the preceding year (New Zealand Parliamentary Debates, Vol. 244, 25 March-6 May 1936, at p. 144 (comments of Hon. Mr. Nash, Minister of Finance) (Bank's LA-114)). Portugal nationalized its central bank, the Banco de Portugal, and the Banco Nacional Ultramarino in 1974, using the average of the year trading price of their stock to set the compensation (Decreto-Lei n° 452/74, 13 Setembro 1974 Art. 5 (Bank's LA-122); see Decreto-Lei n° 451/74, 13 Setembro 1974, Relatório do Conselho de Administração, Art. 5 (Bank's LA-122)). Venezuela nationalized its central bank, the Banco Central de Venezuela, in 1974; the 6,170 private shareholders received a price of the average market value over the preceding six months (Banco Central de Venezuela, 1974 Memoria (Annual Report), p. 14 (Bank's LA-118). Footnote to Counter-Memorial, para. 159).

[85] *American Int'l Group, Inc v. Islamic Republic of Iran*, Award No. 93-2-3, 4 Iran-U.S. C.T.R. (19 December 1983).

[86] *Id.*, at para. 109.

[87] *Id.*

> consideration of events thereafter that might have increased or decreased the value of the shares." On the other hand, while any diminution of value caused by the deprivation of property itself should be regarded, "prior changes in the general political, social and economic conditions which might have affected the enterprise's business prospects as of the date the enterprise was taken should be considered."[88]

The Tribunal applied a method of "reasonable approximation" in arriving at the fair market value, taking into account the impact of the Iranian Revolution and currency inflation.[89]

164. International jurisprudence supports finding fair market value by reference to a share trading price when available. In *Faith Lita Khosrowshahi*, the claimant sought compensation for its shareholding in an Iranian company that had been compulsorily acquired by the Government of Iran.[90] The claimant submitted alternative valuations for its lost shares to the Tribunal, including a valuation based on "a weighted average of three different valuation techniques: an asset accumulation approach, an income capitalization approach, and a market approach" derived from the last traded stock price for the shares which had been publicly traded on the Tehran Stock Exchange.[91] The respondent's valuation relied on a net book value analysis that resulted in a negative value for the shares.[92] Applying a fair market standard of valuation, the Tribunal found that a "contemporaneous market price is clearly the best available evidence" of the value of the expropriated shares.[93] The Tribunal then used the last trading price of the shares as set forth in the Annual Report of the Tehran Stock Exchange "as the basis of the valuation analysis" and applied a 25% discount to account for the negative effect of the Iranian Revolution on the market value of the shares during the eight month period between the last trade and the expropriation of the shares.[94]

165. The *ACSYNGO* case related to shares held by private investors in a French conglomerate that were compulsorily transferred to the French State in 1982.[95] Compensation to the dispossessed shareholders was paid on the basis of the average stock exchange quotation for the shares during a reference period, with adjustments made for the effects of inflation and lost dividends.[96] With respect to the compensation paid by the French State, the Belgian commercial court held that "[t]he fact that the average stock exchange quotation, the effects of inflation and expected dividends were all taken into

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[88] *James M. Saghi v. Islamic Republic of Iran*, Award No. 544-298-2, 29 Iran-U.S. C.T.R., pp. 20, 46 (22 January 1993).

[89] *Id.*, at para. 103.

[90] *Faith Lita Khosrowshahi v. Islamic Republic of Iran*, Award No. 558-178-2, 30 Iran-U.S. C.T.R., p. 76 (30 June 1994).

[91] *Id.*, at p. 90.

[92] *Id.*, at p. 91.

[93] *Id.*, at p. 92.

[94] *Id.*, at pp. 93-94.

[95] *"ACSYNGO" and Others v. Compagnie de Saint-Gobain (France) SA and Others*, 82 ILR, p. 127, at p. 130 (1986).

[96] *Id.*, at p. 135.

account, leads to the conclusion that, from the point of view of public international law, the calculation of compensation cannot be criticized."[97]

166. In *Amoco Int'l Fin. Corp.*, although the Iran-U.S. Claims Tribunal eventually found there to be no "market giving rise to the fixing of an objective market value" for claimant's expropriated interest in an Iranian joint venture, it first stated that market value is the "most commendable standard" and is "regularly referred to in case of nationalization where the nationalized undertaking is a corporation the capital stock of which is freely traded in the stock exchange."[98] The Tribunal further opined that market value is "most easily ascertained when a market exists for identical or similar assets, *i.e.* when the assets are the object of a continuous flow of free transactions."[99]

167. First Eagle contended that the *conditio sine qua non* for the application of the above standard was an efficient market and that such a market did not obtain for the shares of the BIS. The Bank contended that the Zurich and Paris Exchanges were quite efficient and that any problems of comparative illiquidity of the shares in the Bank arose from the nature of those shares and not from the exchanges in which they were traded. It is certainly correct that the shares of the Bank were illiquid, compared to other shares trading on the French or Swiss exchanges. Factors such as (i) the small number of such shares being traded; (ii) the requirement of double-approval by the central bank to which they had been issued as well as by the Bank for International Settlements before shares could be sold; and (iii) the possibility of the Bank calling for payment of the other 75% of the value of the shares all contributed to the comparative illiquidity of these shares on the markets in which they were bought and sold. But the inefficiency derived from the nature of the shares and not from the markets in which they were traded and the market discounted these inefficiencies, as markets do. Arguments about relative efficiency or liquidity aside, the fact remains that the Bank itself never referred to the stock market price when it evaluated the shares prior to this arbitration (see paras. 193 *et seq.* below).

168. Furthermore, the Tribunal is not persuaded by the Bank's conception of the international legal standard of compensation as one of "appropriate" compensation. While it is true that the jurisprudence of the European Court of Human Rights has adopted a flexible standard, described as one of "appropriate" compensation for takings by a state of the property of its nationals, the analogy of the Bank to a state taking the property of the shareholders, who are to be deemed its "nationals" is unpersuasive. The issue of the general relevance of regional Human Rights law aside, the mainstream of general international law, were it to apply to this case, has required full compensation. While that standard may have been qualified during the Cold War and may have been adjusted in some cases in which certain developing

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[97] *Id.*, at p. 137.

[98] *Amoco Int'l Fin. Corp. v. The Government of the Islamic Republic of Iran and Others*, Partial Award No. 310-56-3, 15 Iran-U.S. C.T.R., pp. 189, 255-256 (14 July 1987).

[99] *Id.*

countries, particularly with respect to petroleum, nationalized their single or primary resource,[100] it is clear that it has been reestablished in the recent jurisprudence.

169. Thus, the full compensation standard was applied in an *ad hoc* arbitration carried out under the UNCITRAL Arbitration Rules, where the Government of Ghana was found to have expropriated the claimants' investment in Ghana.[101] There, the Tribunal held that "[u]nder the principles of customary international law, a claimant whose property has been expropriated by a foreign state is entitled to full – *i.e.* to prompt, adequate and effective – compensation."[102]

170. The general trend in the Iran-U.S. Claims Tribunal has also been to apply the full compensation standard in a number of cases. In *Sedco*, when deciding the proper standard of compensation for claimant's expropriated shareholder interest in SEDIRAN Drilling Company, the Tribunal found that full compensation was the applicable standard.[103] The Tribunal stated that while some commentators had voiced support for a lesser standard in cases of nationalization by developing countries, full compensation was still the accepted standard in cases of individual expropriation.[104] In *Sola Tiles*, the Tribunal awarded full compensation for claimant's expropriated assets.[105] In deciding whether the Treaty of Amity between the United States and Iran provided a *lex specialis* governing the standard of compensation, the Tribunal found that the treaty's requirement that compensation "shall represent the full equivalent of the property taken" was the same as the standard required by customary law.[106] While the Tribunal recognized that the term "appropriate" had been widely applied to the standard of compensation in cases of expropriation, it found that its meaning could encompass "full compensation".[107]

171. Finally, it is to be noted that on the advice of its consultant, J.P. Morgan, the Bank, using a Dividend Perpetuity Model method, actually paid the private shareholders almost double the market exchange value of the recalled shares. Under the standard of the international law of expropriation, were it to apply, the Bank's level of compensation would have met the international standard. But, in fact the Bank paid twice the stock market value of the recalled shares and only argued for the application of the stock market price in the arbitration. Banks operate under strict rules with respect to the money entrusted to them; they may not give money away without a proper

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[100] *Aminoil v. Kuwait*, 66 ILR, p. 518 (1982).

[101] *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, 95 ILR, p. 183 (1993).

[102] *Id.*, at p. 211.

[103] *Sedco, Inc. v. National Iranian Oil Company, et al.*, Award No. 59-129-3, 10 Iran-U.S. C.T.R., pp. 180, 188 (27 March 1986)

[104] *Id.*, at p. 188.

[105] *Sola Tiles, Inc. v. Islamic Republic of Iran*, Award No. 298-317-1, 14 Iran-U.S. C.T.R., p. 223 (22 April 1987).

[106] *Id.*, at p. 234.

[107] *Id.*, at p. 236.

legal basis. Moreover, the record reveals that the internal documents of the Bank indicate that the Bank did not use stock market price for establishing the premium for new tranches. The Bank's behavior raises doubts about its own contemporaneous conviction with respect to the application of the market value standard detailed above, especially in a case that is not an expropriation but rather a forced recall of shares.

C. THE BANK'S CONSTITUENT INSTRUMENTS AND INTERNATIONAL LAW

172. The Tribunal has found that the Bank is an international organization. While the Bank is, thus, subject to international law, all Parties agree that the rights of shareholders are, in the first instance, determined by the Constituent Instruments. Dr. Reineccius, representing himself, did not explicitly address the question of the applicable law, but clearly based his submission on his understanding of the Statutes and, in his view, their necessary implications. First Eagle, in its Memorial, also based its claim, in the first instance, on an interpretation of the Statutes.[108] Mr. Mathieu, in his Memorial, based his argument, also in the first instance, on the Constituent Instruments of the Bank, submitting that only if they failed to provide an answer was the Tribunal to turn to general international law. In its Statement of Defense, the Bank said that "its relations with its shareholders are governed by its constituent instruments . . . supplemented as appropriate by general public international law."[109] In its Counter-Memorial, the Bank stated that "the rights attached to the shares in the BIS must be determined by reference to the terms of the Statutes rather than by recourse to municipal corporate law concepts or dictionary definitions of share ownership."[110]

173. Thus the Parties agree that the issue that falls to be decided here must be resolved by reference to the Bank's Constituent Instruments and only by international law should the Constituent Instruments fail to provide an answer. Because the Parties agree that the questions posed to the Tribunal should be resolved in the first instance by reference to the Constituent Instruments of the Bank, the relationship of the Statutes to international law must be clarified. The Constituent Instruments of the Bank constitute a *lex specialis* as between the Parties. Insofar as the *lex specialis* in this case – the 1930 Agreement, the Charter and the Statutes – provides an answer to the questions arising in this case, the Tribunal would not be permitted to turn to international law - unless the *lex specialis* purported to incorporate an explicit *renvoi* to general international law or would have violated a fundamental principle of international law.

174. In fact, neither the applicable law clause of the 1907 Convention for the Pacific Settlement of International Disputes nor the 1930 Hague

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[108] FE Memorial, at para. 205.
[109] Statement of Defense, at para. 85.
[110] Counter-Memorial, at para. 94.

Agreement incorporate a *renvoi* to international law, as such. Article 15 of the 1930 Agreement does not include an explicit applicable law clause. Nor does Annex XII of the 1930 Agreement, entitled, "Arbitration. Rules of Procedure" contain an explicit choice of law clause. But Annex XII does incorporate, by reference, Chapter III of The Hague Convention of 1907 for the Pacific Settlement of International Disputes, whose provisions are to apply, unless and to the extent modified by the provisions of Annex XII or the 1930 Agreement. Article 73 of the 1907 Convention speaks simply of "applying the principles of law." Article 26 of the "Rules for Arbitration between the Bank for International Settlements and Private Parties" provides that "The Tribunal shall apply the instruments relevant to the case as well as other relevant principles of law." In sum, the *lex specialis* of this case – the 1930 Agreement, the Charter and the Statutes – was conceived as self-contained and not incorporating general international law, except insofar as the *lex specialis* failed to provide an answer to a question that might arise or violated a fundamental principle of international law. In that eventuality, a Tribunal seised of the case was to turn to general international law.[111]

175. The right to compensation is part of both general international law and the specific area of Human Rights law and it is quite possible that an action purporting to abrogate such a right might be held to be invalid for violation of international law. If the Statutes had purported to deny shareholders compensation, a general international law problem could have arisen. But in the instant case, the Statutes did require compensation and the fact that the *lex specialis*, because of the specific provisions of the Statutes establishing the equal rights of the shares, might prescribe a higher amount than would general international law cannot be considered a breach of international law. Hence there is no ground for the Tribunal to depart from the *lex specialis* applicable to the Parties and to use the international law standard which would apply market value for the shares.

D. VALUATION

176. The Tribunal now turns to the issue of valuation. The Bank has acknowledged, from the first discussions of the recall program, that its recall had to be accompanied by a valuation of the shares and payment to the shareholders. In contrast to Mr. Mathieu, who accused the Bank of suppressing information and relying upon external advisers who lacked independence, Dr. Reineccius stated his belief that the Bank was quite correct in presenting full information about its valuation data and methods. Dr. Reineccius' gravamen related to the method that the Bank adopted on the advice of its consultants: the DPM model. Having considered the record, the Tribunal finds no evidence of bad faith on the part of the Bank.

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[111] In this respect, the sequential legal regime created by the *lex specialis*, may be compared to Art. 42 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("1965 Washington Convention").

1. The Earning Power Method

177. Dr. Reineccius submitted that the appropriate model for valuation was not DPM, but either an earning power method ("EPM"), which, he stated, is widely used in Germany for situations in some ways comparable to the one confronting the Tribunal, or, alternatively, a proportionate share of net asset value. The Tribunal should select, he submitted, whichever proved to be higher. First Eagle and Mr. Mathieu also submitted that a proportionate share of NAV was the proper valuation methodology. In fact, Dr. Reineccius' preference for EPM is linked to his assumption (shared by Mr. Mathieu and, with some qualifications, by First Eagle) that each share in the Bank for International Settlements is entitled to a proportionate share of its profits. EPM presumes that a shareholder is entitled to the profits of the company. Dr. Reineccius felt that the DPM "is appropriate when a company distributes the major part of its net profit as a dividend,"[112] but inappropriate when a company follows a policy of husbanding profits and issuing very low dividends.

178. The assumption for Dr. Reineccius' view that DPM is an inappropriate valuation method is that companies should act for the welfare of their shareholders, whose interest is receiving profits in the form of dividends and, who, accordingly, expect the company in which they own shares to distribute as much as is consistent with the future productivity of the firm. That is a valid assumption for most domestic and private sector corporations in advanced capitalist systems. But as explained earlier, the Bank for International Settlements is *sui generis*, in that it is an international organization but is organized, in the language of Article 1 of the Statutes, as a "company limited by shares." It has a public international mandate, in the performance of which considerable profits may be generated. The private shareholders wished the profits to be expressed in larger dividends, yet the Bank's public international mandate was, in the view of the Board, best served by a significant reduction in dividends and a corresponding accumulation of profits in the various statutory reserves of the Bank.

179. Thus Dr. Reineccius' implicit analogy of the Bank's profit/dividend practice to that of private municipal corporations' profit/dividend policies is inapposite. Moreover, it does not have a basis in the *lex specialis*. The statutory right of BIS shareholders is not to profits *simpliciter*, but to profits as determined by a decision process specified in Article 51 of the Statutes which deals with the annual net profits. Article 13 of the Statutes provides:

> The shares shall carry equal rights to participate in the profits of the Bank and in any distribution of assets under Articles 51, 52 and 53 of the Statutes.

Dr. Reineccius would read Article 13 as if it said only "The shares shall carry equal rights to participate in the profits of the Bank [.]" without the qualifying language that follows. If Article 13 were, in fact, truncated in the fashion in which Dr. Reineccius understands the provision, with a full-stop after "the

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[112] Transcript, at p. 202, lines 36-37.

Bank," then net profits would perforce be equivalent to dividends, which then would, indeed, have to be distributed equally. But Article 51 qualifies each share's "equal rights to profits" in Article 13, by granting the General Meeting on the recommendation of the Board the power to exercise a wide discretion in setting the dividend (Article 51, paragraphs 2 and 4). Thus, assuming that the proper procedures were followed, the discrepancy between large profits and small dividends, if decided in the proper procedure, would be valid for the Bank under the Statutes.

180. In the Governors' Meeting of 9 April 1936, a decision was taken unanimously to seek to repurchase the privately held shares of the French and Belgian issues and, of particular importance in this context, to amend the dividend policy in Article 53 of the Statutes:

> During the year 1936-1937 steps will be taken in order to change Article 53 sub b and c of the Statutes with the object of abolishing the cumulative character of the dividend . . . and creating provision that any residue of the net profits . . . will be placed to the credit of a dividend reserve fund to be distributed to the shareholders if and when the General Meeting will decide so; the meaning of this being that this fund will only be distributed at a moment when the General Meeting decides (on the advice of the Board) that this fund is no longer needed as a reserve.
>
> In changing Article 53 it will be made clear, that this will also apply to the existing dividend reserve fund, which therefore will not be distributed before the General Meeting decides so; therefore, this meeting will be under no obligation to distribute this fund even if less than 6% dividend is paid from net profits.[113]

In 1975, at an Extraordinary General Meeting, Articles 51 and 52 of the Statutes were amended, in the language of the Chairman of the Board of Directors,

> to remove the concept of a dividend related to the amount of the paid-up capital. As a result, the Board and the General Meeting would have greater discretion then [sic] hitherto when deciding on the application of the net profits either in the form of dividend or of appropriations to the reserves.[114]

The Director added that

> [i]n view of the importance of the proposed reform, however, it seemed appropriate to provide these shareholders, if they so wish, with the opportunity to dispose of their shares on fair term, *viz.* at the price of 3,100 Swiss francs per share [115]

That price was based on the average share price of the American issue in Basle rounded up to the nearest hundred francs over the previous six weeks. The offer was taken up by only a few shareholders.

181. It is the different and potentially conflicting responsibilities of the Bank to profit and dividend policy for private shareholders, on the one hand, and to its public functions, on the other, that is one of the public interest

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[113] Draft Minutes, Basle, 9 April 1936, FE Exhibits to Memorial, at Tab 20.

[114] Extract from the speech delivered by the Chairman of the Board of Directors on the occasion of the Extraordinary General Meeting of the Bank for International Settlements held on 8th July 1975, Annex III to Notice to Shareholders (other than the central banks) of the American Issue of the Bank's Capital, in FE Exhibits to Memorial, Tab 8, at p. 7.

[115] *Id.*, at p. 8.

reasons that may justify the recall of the private shares under international law, as explained above in paragraph 151.

182. For these reasons, the Tribunal concludes that EPM, despite its cogency for private sector domestic corporations, is an inapt method for valuation of the shares of the Bank for International Settlements.

2. The Net Asset Value (NAV) Method

183. All three Claimants have submitted that the appropriate method for valuation, either exclusively or, for Dr. Reineccius, alternatively, is a per share proportionate part of the undiscounted net asset value or NAV of the Bank. As stated earlier, all the Parties concurred that an interpretation of the Constituent Instruments is critical in deciding this issue and that only if it did not yield an answer should the Tribunal turn to general international law.

184. First Eagle based its submission, first, on Articles 1 and 13 of the Statutes and their necessary implications, to wit, that "the shares of the Bank in the aggregate, like those of any other company limited by shares, constitute the entire ownership interest in the company."[116] Unlike Dr. Reineccius, however, First Eagle invoked Article 13 in order to show that all the shares, in the words of the Bank, "carry identical property rights."[117] First Eagle, like Dr. Reineccius, would read Article 13 of the Bank's Statutes as if it were unqualified. But, unlike Dr. Reineccius' principal argument, First Eagle also contends that

> the only way for the shareholders to continue to participate equally in profits of the Bank that are not distributed as dividends in the year they are earned is to carry an equal right to the accumulated assets of the Bank and to its accumulated reserves.[118]

This argument is not affected by the statutory power assigned to the Board and the General Meeting, under Article 51 of the Statutes, to determine how much, if any, of the profits should be distributed as dividends.

185. The Statutes, while carefully drafted to deal with the usual range of corporate events, do not address, either directly or by implication, the right to conduct and the consequences for a compulsory recall of any shares. But, for First Eagle, if a mandatory redemption of shares is permissible

> the equality of property rights in the ongoing profits of the business and its assets on liquidation that the Statutes expressly recognize would apply with no less force in the context of the newly authorized exclusion.[119]

First Eagle contended that the recall of shares was a partial liquidation, because it was financed by the conversion of assets of the Bank to pay for them, which assets were thereby reduced by that amount. By the same token, the shareholders' interests, which were converted to cash, were also

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[116] FE Memorial, at para. 213.

[117] Bank for International Settlements, Note to Private Shareholders: Withdrawal of All Shares of the Bank for International Settlements Held by Its Private Shareholders, 15 September 2000, at p. 2. Cited in FE Memorial, at para. 218.

[118] *Id.*, at para. 221.

[119] *Id.*, at para. 224.

liquidated.[120] Hence the contingency for application of Articles 13 and 52, unnumbered paragraph 3, was fulfilled.

186. Mr. Mathieu argued, like First Eagle, that a proper interpretation of Articles 13 and 51 to 53 demonstrates that the equality of shares means an equality with respect to profits and distributions.

187. The Bank agreed that the question falls, in the first instance, to be decided by reference to the Constituent Instruments. The central argument of the Bank was that Article 13:

> does not vest in shareholders unqualified rights to participate in the profits and assets of the BIS, clearly subjecting such rights to, and determining them by, specific reference to Articles 51, 52, and 53.[121]

Because, the Bank continued, (i) sale of shares is subject to approval of both the Bank and the central bank to whose national issue the shares belong; and (ii) shares do not carry any governance rights, the shares lack fundamental characteristics of equity ownership.[122] These various encumbrances, the Bank argued, were taken account of by the markets which discounted the proportionate NAV of the shares by 75%.[123]

188. The interpretation of the Statutes proffered here by the Bank is only partially correct. Given the nature of the shares, the special encumbrances to which they are subjected and their lack of governance rights, the Bank is correct in characterizing its shares as different from the equity of conventional private corporations. The Bank is also correct in its contention that, as explained above, the Statutes do not give shares equal rights to profits *simpliciter*, but to profits as determined by the Board and General Meeting, under Article 51 of the Statutes.[124]

189. But the words "to participate" in the Bank's argument that Article 13:

> does not vest in shareholders unqualified rights to participate in the profits and assets of the BIS, clearly subjecting such rights to, and determining them by, specific reference to Articles 51, 52, and 53[125]

refer indiscriminately to governance rights and rights to participate in the distribution of assets. Article 13 states: "Shares shall carry equal rights . . . to participate in the . . . distribution of assets." The procedural disabilities which the Statutes impose on shareholders, *qua* shareholders, with respect to participating in governance, have nothing to do with the substantive rights of the shareholders to the assets of the Bank upon distribution.

190. The Bank also errs in implying that the clearly qualified rights in Article 13 and Articles 51 and 52 with respect to profits are matched by

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[120] *Id.*, at para. 225.
[121] Counter-Memorial, at para. 95.
[122] *Id.*, at paras. 97 and 98.
[123] *Id.*, at para. 102.
[124] *Id.*, at para. 95.
[125] *Id.*

correspondingly qualified rights with respect to the assets in a liquidation. While the shareholders, *qua* shareholders, have no rights to participate in a liquidation decision, the imperative language of Article 52's unnumbered paragraph 3 makes clear that in a liquidation, the shareholders have equal rights:

> These reserve funds, in the event of liquidation, and after the discharge of the liabilities of the Bank and the costs of liquidation, shall be divided among the shareholders.

The qualifications to a right to profits in the second part of Article 13, which is subjected to the procedures of Articles 51, and which, effectively, transformed a right to participate in profits into a right to such dividends as the governing process of the Bank might decide, do not apply to a liquidation. From this, one infers from the Statutes that shareholders do, indeed, have equal rights to the aggregate assets of the Bank.

191. With respect to First Eagle's claim that the Statutes' provisions with respect to liquidation apply to the instant case, the Bank argued that the liquidation provisions apply only to a total dissolution of the Bank and that such an event requires a decision by a three-fourths majority of the General Meeting, which did not occur on 8 January 2001.[126] The Bank likened its share recall to a voluntary share repurchase program which is lawful in a number of municipal systems.[127] But, of course, the predicate of the dispute before the Tribunal is that the recall was involuntary. Given its compulsory character, the closest domestic analogue, were it appropriate to resort to it, would be a "squeeze-out." The Bank, as stated, rejected the notion that any domestic corporation law applies to this case.[128]

192. Neither the Bank nor First Eagle was able to find convincing support in the Statutes for its respective submission. As already noted, the Statutes did not directly contemplate a compulsory recall of the shares held by private parties. Indeed, the Bank's president, in 1936, when considering "getting rid of the private shareholders," was apparently advised that such an operation would be *ultra vires* the Statutes.[129] As for First Eagle's submission, it is true that one of the legal meanings of the word "liquidation" is any transformation of an asset or claim into cash. But it seems apparent that Article 52, unnumbered paragraph 3, was drafted in anticipation of a dissolution of the Bank.

193. For the proper interpretation of the relevant legal instruments, it is clearly of importance to examine how the BIS itself understood the requirements for a recall of the privately held shares. A note from the papers of former Bank President McKittrick dated June 1938, which had considered a buy-out of the private shareholders, proposed, as the method of valuation of

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[126] *Id.*, at paras. 107 and 109. In fact, the decision of 8 January 2001 was passed unanimously.
[127] *Id.*, at para. 113 and see also fn. 83 there.
[128] *Id.*, at para. 153, fn. 61.
[129] 1936 Weiser Memorandum, at pp. 3-4, FE Exhibits to Memorial, Tab 35.

the shares, determining "the actual or break-up value of the B.I.S. shares."[130] An internal memorandum prepared by the Secretariat, for the 318th Meeting of the Board of Directors of the Bank on 8 September 1969, took for granted that the private shareholders had a "potential share of the Bank's provisions and reserves."[131] It is also instructive that the valuation method recommended by the Secretariat for pricing a new issue of shares was based upon a discounted net asset value.[132] The recommendation was adopted by the Board at the 319th Meeting of the Board on 17 November 1969.[133] An internal memorandum of 6 November 1998, prepared by the Bank's Legal Service, noted the need "to respect the principle of equal rights for all shareholders in any distribution of profits or assets, which principle is embodied in Art. 13 of the Statutes."[134] It is to be noted that the exclusion memo specifically refers to the need to pay the full patrimonial value of each share of the Bank. "Patrimonial" value here can only have referred to the real value of the assets of the Bank. In none of the internal deliberations of the Bank about compulsory repurchase was the market value of the shares considered the appropriate standard for the calculation of the value of the shares. The J.P. Morgan Report of 7 September 2000, which will be examined in more detail below, also noted that "[i]n its recent issue of shares to the 4 new members of BIS, the share price has been calculated by BIS based on net asset value."[135] The NAV for that issue was US$ 20,080 per share, which was discounted by 30% to US$ 14,056 or 5,020 gold francs per share. The Report also noted that "for a previous share issue of total [sic] 44,000 shares to 13 member central banks in November 1996 the NAV calculation yielded a value of US$18,772 per share, representing an equivalent of [...]3,643 [gold francs]."[136]

194. In sum, from 1936 onwards, the Bank, in its internal deliberations, appears, from the evidence available to the Tribunal, to have assumed that all shares were entitled to an equal proportionate share of the assets of the Bank, to have priced new shares on that basis (with a discount which will be considered below) and to have taken for granted that, if it were to compulsorily repurchase its privately held shares, the Statutes would require it to price the shares by using a method of valuation of shares based on some form of the net assets of the Bank. In none of the internal deliberations of the Bank about compulsory repurchase was the stock price considered to be the proper standard for the calculation of the price of the shares.

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[130] Untitled Document, FE Exhibits to Memorial, Tab 36, at p. 11

[131] Agenda for the 318th Meeting, Adjustment of the capital of the Bank and amendment of its Statutes, FE Exhibits to Memorial, Tab 23, at p. 2.

[132] *Id.*, at p. 4

[133] Agenda for the 319th Meeting, Tab 24, at p. 7.

[134] Secret L-3, Share Capital of the BIS, 6 November 1998, *supra* fn. 82, at p. 3.

[135] J.P. Morgan, Project Primus Presentation to the Board of Directors of the Bank for International Settlements (BIS) Valuation Report and Suggested Transaction Price Range, 7 September 2000. FE Exhibits to Memorial, Tab 43, at p 24; Statement of Defense, Exhibit 23.

[136] *Id.*, at unnumbered note at bottom of page.

3. The Question and Scope of a Possible Discount

195. Having determined that a proportionate share of net asset value is the method required by the Constituent Instruments as confirmed by the past practice of the Bank, the Tribunal turns to the question of whether and to what extent the per share proportionate NAV should be discounted. In this regard, the Tribunal has found particularly instructive the internal document, already referred to, entitled AGENDA FOR THE THREE HUNDRED AND EIGHTEENTH MEETING OF THE BOARD OF DIRECTORS OF THE BANK FOR INTERNATIONAL SETTLEMENTS,[137] which was prepared by the Legal Counsel, then approved by the Consultative Committee of the Board of Directors and finally approved by the Board of Directors itself on 17 November 1969.[138] Item 8 of that document, entitled "Adjustment of the capital of the Bank and amendment of its Statutes (318/E(1) & (2))", was prepared to provide background and a recommendation for the Board of Directors on the pricing of a new tranche of 200,000 shares of 2,500 gold francs each, which could be subscribed only by central banks. The document noted that the question of a premium for shares had never arisen before[139] and explored the different considerations that could influence such a determination.

196. The Report continued, "[t]he Board . . . needs to find an objective base on which to calculate a premium ...."[140] The Report proceeded to review the "three most generally recognized methods,"[141] which were

(i) future profitability of the enterprise;

(ii) market value of the shares; and

(iii) the mathematical method.

The future profitability method (which is akin to the DPM, used by J.P. Morgan and adopted by the Board in its decision at the Extraordinary General Meeting of 8 January 2001), presented a number of problems. There were wide fluctuations in profits and no predictability as to future price and the Bank's dividend policy was dictated by concern for the objects of the Bank rather than for profit for shareholders. Accordingly, the Report dismissed that method. As for the market value method, the Report opined that, given the nature of the shares of the Bank, the various stock exchanges on which they were bought and sold, and the special position of the Bank itself, it was "an unreliable basis on which to calculate the premium."[142]

197. As for the mathematical method, akin to the NAV, the Report found, in the case of the BIS, this was:

> . . . the only reliable way . . . as it avoids as far as possible the capricious nature of the other methods considered above and is not affected by external circumstances. It also

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[137] *Supra* fn. 131, at Tab 23.
[138] *Supra* fn. 133.
[139] *Supra* fn. 131, at p. 1.
[140] *Id.*, at pp. 2-3.
[141] *Id.*
[142] *Id.*

> has an additional advantage in that the balance sheet of the BIS offers a more exact picture of the value of the enterprise than the balance sheet of an ordinary commercial enteiprise; the BIS has no real hidden reserves and apart from the value attributable to its full-amortised buildings and land, which of course would always be open to discussion, the balance sheet gives a fairly accurate picture of the actual worth of the enterprise.[143]

The Report proceeded to calculate the net asset value, if the Bank were to be liquidated forthwith. But because the ordinary net asset value does not take account of a hypothetical liquidation, the Report tried to factor in the impacts that would have occasioned a liquidation, such as:[144]

> (i) heavy losses, leading to substantially reduced reserves;
>
> (ii) reduced value of land and buildings in a liquidation;
>
> (iii) the exhaustion of the Special Dividend Reserve Fund.

The Report concluded

> . . . it appears that the premium should be calculated by the mathematical method, but that it would be equitable to apply a discount to the total of the Bank's own funds in order to take account of all the considerations discussed above. It is suggested that a discount of 30 per cent. would be appropriate.[145]

198. The J.P. Morgan Report of 7 September 2000 also addressed the question of discounting share value in an NAV methodology. Although some of its numerical conclusions roughly parallel those of the 1969 Board of Directors' report, the method it deployed was quite different. For one thing, the J.P. Morgan Report makes no mention of Articles 1 and 13 of the Statutes, which establish the equality of shares. It is worth recalling that Article 1 provides:

> There is constituted under the name of the Bank for International Settlements . . . a Company limited by shares.

and Article 13 provides:

> The shares shall carry equal rights to participate in the profits of the Bank and in any distribution of the assets under Articles 51, 52, and 53 of the Statutes.

For another, the Board of Directors' report arrived at its discount largely by introducing the variables of a hypothetical liquidation, which could be expected to lower value; the J.P. Morgan Report makes no reference to an adjusted liquidation price, but discounts for (i) lack of voting rights; (ii) reduced marketability; and (iii) the restriction arising from a double veto over sales of shares.[146]

199. Although the analysis which J.P. Morgan undertakes is rigorous and sophisticated, the Tribunal would note that it confuses two methods of valuation: share price as determined by the market and NAV valuation. The

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[143] *Id.*, at p. 4.
[144] *Id.*, at p. 5.
[145] *Id.*, at pp. 5-6.
[146] *Id.*, at p. 28 *et seq.* The J.P. Morgan Report also creates an additional category of "further considerations" but ultimately concludes that it is not applicable.

three factors which the J.P. Morgan Report identifies may help to explain the disparity between market price and proportionate NAV price but they are not relevant to an NAV analysis for an entity whose constituent documents establish the essential equality of all the shares with respect to their rights to the assets of the Bank. Thus, much of the data on the basis of which J.P. Morgan reached its 30% discount for lack of voting rights is derived from market trends.[147] Similarly, J.P. Morgan's proposal to apply an additional 15% discount for marketability may be appropriate in determining the proper market value of a traded share, but is inapposite in an NAV analysis in an entity whose constituent instruments establish the equality of the right of all shares to the assets of the company.

200. The Arthur Andersen report, which also recognized the inappropriateness of a stock market value method in view of the Bank's characteristics, reviewed the J.P. Morgan Report and concluded that the price of CHF 16,000 per share "is a fair price."[148] But some of its brief observations are not entirely consistent with the approach of the J.P. Morgan Report. The Arthur Andersen report, for example, notes that "the value of a listed share cannot be higher than the price paid by central banks at the time of an increase in capital;"[149] in fact, the J.P. Morgan Report fixed the price of the recalled shares at considerably less "than the price paid by central banks at the time of an increase in capital." Although it raises a number of other questions about some of the J.P. Morgan Report's estimations, it too ignores the *lex specialis* of the Statutes and largely shares the major assumptions upon which J.P. Morgan operated.

201. For the reasons stated, the Tribunal does not find the discount analyses in the J.P. Morgan Report or the Arthur Andersen report, legally pertinent to the case at bar. Rather the Tribunal finds that the discount analysis of the Board of Directors in 1969, which has been applied in pricing the various tranches of newly issued shares which were designated for sale to new central banks thereafter, is appropriate for determining a discount of NAV. The use of a hypothetical liquidation value, which was the approach taken by the Board of Directors in 1969 and thereafter is also apposite, in view of the fact that First Eagle has argued that the most fitting analogy in the Statutes is to a liquidation or "partial liquidation;" the Board of Directors' approach was based upon a projected liquidation value. Moreover, the resulting price per share that emerges from this analysis appears to have been what at least one of the Claimants, First Eagle, had thought to be an appropriate price when it approached the Bank on 23 June 2000 and proposed a public share repurchase "on terms similar to the recent share issuances."[150] But the most telling evidence in favor of a discount of 30% is the consistent use of it by the Bank in pricing shares issued to new central banks.

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[147] *Id.*, at p. 29.
[148] FE Exhibits to Memorial, Tab 45, at p. 16; Statement of Defense, Exhibit 21, at pp. 7-8.
[149] *Id.*
[150] Statement of Defense, Exhibit 22.

Accordingly, the Tribunal finds that the appropriate discount of the NAV is 30%.

202. For the foregoing reasons, the Tribunal finds that the appropriate compensation for the recalled shares, as required by the Statutes, was a proportionate share of the NAV of the Bank, discounted by 30%, subject to the additional NAV assessment for real estate. As the Bank paid less than this amount, it is obliged to pay the difference to each private shareholder.

4. The NAV of the Bank as of 8 January 2001

203. The J.P. Morgan Report assessed the NAV of the Bank, averaging it from valuations at three different dates. The J.P. Morgan Report arrived at a figure of US$ 10,072,000,000 or US$ 19,034 (CHF 33,820) per share for the 529,165 shares in the Bank. Dr. Reineccius indicated that he would accept this figure as the NAV. Mr. Mathieu wished an opportunity to litigate the issue of the value of the real estate of the Bank, as it was not included in the J.P. Morgan Report.[151] First Eagle suggested, contingently, that it would accept the NAV in the J.P. Morgan Report if a valuation of real estate were made by an expert.[152] The Tribunal will reserve the question of the Bank's NAV as discounted for the next and final phase of this arbitration.

CHAPTER VI - OTHER MATTERS

A. INTEREST

204. In light of the foregoing, a precise sum to be determined in the next phase plus interest is due. With respect to interest, the present state of the record does not enable the Tribunal to determine the amount of interest owing and the rate to be applied, the date from which it should be paid, the amount with respect to which it should be paid and whether simple or compounded interest is owed.

B. REAL ESTATE VALUATION

205. Since the agreed net asset value does not include the Bank's real estate, this valuation must also be effected in the next phase of the arbitration. The valuation of real estate will be made by an expert. The choice of the expert, his or her terms of reference, and the timetable for the valuation, will be determined by the Tribunal after consultation with the Parties.

C. THE BANK'S COUNTERCLAIM

206. It is to be recalled that the Bank counterclaimed against First Eagle requesting damages for breach by First Eagle of Article 54 of the Statutes in wrongfully ignoring that jurisdictional commitment and suing the Bank in the

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[151] See para. 84 *supra*; Transcript, at p. 318.
[152] See para. 76 *supra*; Transcript, at p. 329.

United States to avoid the jurisdiction of the Tribunal, and for the costs of the arbitration.

207. In the present state of the record, the Tribunal is insufficiently informed of the contentions of the Bank and First Eagle in regard to that counterclaim, including the quantification thereof. Consequently, the Tribunal determines that the issue of the counterclaim is to be resolved in the next phase of the arbitration according to a schedule to be decided in consultation with the Parties.

D. COSTS

208. The Tribunal is insufficiently informed regarding claims for costs in the arbitration. The Tribunal determines that the issue of costs is to be resolved in the next phase of the arbitration according to a schedule to be decided in consultation with the Parties, taking account, insofar as they deem relevant, the Tribunal's *Order In the Matter of Reginald H. Howe v. Bank of International Settlements.*

CHAPTER VII - DECISIONS

209. FOR THE FOREGOING REASONS, the Arbitral Tribunal unanimously renders the following decisions:

1. DETERMINES that the amendment of the Statutes of the Bank for International Settlements of 8 January 2001 to the effect that private shareholders are excluded as shareholders of the Bank was lawful;

2. DETERMINES that Claimants Nos. 1, 2 and 3 are entitled to a compensation for each of their recalled shares in the Bank for International Settlements corresponding to a proportionate share of the Net Asset Value of the Bank, discounted by 30%;

3. NOTES that, for the purposes of the compensation referred to in Decision No. (2), Claimants Nos. 1, 2 and 3 accept that the Net Asset Value of the Bank for International Settlements is US$ 10,072,000,000, being US$ 19,034 (equivalent to CHF 33,820) per share, not counting the value of the real estate of the Bank;

4. GRANTS the relief sought by Claimants Nos. 1, 2 and 3 to the extent that it is consistent with the foregoing Decisions and DISMISSES all other relief sought by Claimants Nos. 1, 2 and 3 inconsistent therewith as well as the relief sought by the Bank for International Settlements relating to those Decisions;

5. RETAINS jurisdiction with respect to the valuation of the real estate of the Bank for International Settlements, the determination of the exact amount owing by the Bank per share including interest thereon to Claimants Nos. 1, 2 and 3, the counterclaim of the Bank for International Settlements against

Claimant No. 2 (First Eagle), and the costs of the arbitration, as well as any relief requested by any of the Parties relating to those matters;

6. DETERMINES that it will issue one or more Procedural Orders with respect to the conduct of the next phase of the arbitration concerning the matters mentioned in Decision No. (5) after consultation with the Parties.

Done at the Peace Palace, The Hague, this 22nd day of November 2002,

(*Signed*)
Professor W. Michael Reisman

(*Signed*)
Professor Dr. Jochen A. Frowein

(*Signed*)
Professor Dr. Mathias Krafft

(*Signed*)
Professor Dr. Paul Lagarde

(*Signed*)
Professor Dr. Albert Jan van den Berg

(*Signed*)
Phyllis P. Hamilton, Secretary

APPENDIX A

Agreement regarding the Complete and Final Settlement of the Question of Reparations (signed at The Hague on 20 January 1930)

ANNEX XII

ARBITRATION. RULES OF PROCEDURE

1. The proceedings in any arbitration shall be governed by the dispositions of Chapter III of The Hague Convention of 1907 for the Pacific Settlement of International Disputes, except in so far as the same are modified by the following provisions or by those of the Agreement of The Hague of January, 1930:

   In particular Article 85 of The Hague Convention shall apply to these proceedings, and each Party shall pay its own expenses and an equal share of those of the Tribunal.

2. The Tribunal shall sit at The Hague or such other place as may be fixed by the Tribunal.

   The date of sitting shall be determined by the Chairman and at least fourteen days' previous notice shall be given to the Parties.

3. Each Party shall appoint a representative.

   Any communication between the Parties and the Tribunal or between the Parties themselves shall be conducted through these representatives.

   The Tribunal shall appoint a Secretary to whom communications shall be addressed.

4. The procedure shall consist of two stages:

   (1) Written cases or pleadings; and

   (2) Oral debates.

   The oral discussion shall be public.

5. The Party which is in the position of plaintiff shall deliver its case within six weeks from the date of the special agreement or a date to be fixed by the Chairman or by the Tribunal, and the other Party shall present its counter-case within six weeks from the date on which it receives the case of the first Party.

If any dispute shall arise as to which Party is in the position of Plaintiff in any particular case, the matter shall be decided summarily by the President of the Tribunal or any Member thereof appointed for this purpose by the President.

6. Cases shall contain: –

   (1) a statement of the facts on which the claim is based;

   (2) a statement of law;

   (3) a statement of conclusions;

   (4) a list of the documents in support; these documents shall be attached to the Case.

   Counter-Cases shall contain:

   (1) the affirmation or contestation of the facts stated in the Case;

   (2) a statement of additional facts, if any;

   (3) a statement of law;

   (4) conclusions based on the facts stated; these conclusions may include counter-claims, in so far as the latter come within the jurisdiction of the Tribunal;

   (5) a list of the documents in support; these documents shall be attached to the Counter-Case.

7. The Parties shall also respectively have the right to deliver a reply and rejoinder within three weeks after the receipt of the last preceding pleading.

   All cases shall be printed, six copies at least to be delivered to the opposing Party and twelve at least to the Tribunal. Each Party shall acknowledge the receipt of any document to the Party which has delivered it, and shall inform the Tribunal of the date of receipt.

   Certified copies of any documents on which reliance is placed shall be annexed to the pleading in which they are referred to.

8. The periods above fixed may be extended either by the agreement of the Parties or by a decision of the Chairman or of the Tribunal.

9. The written proceedings may be in English, French or (where Germany is a Party) in German. It shall, however, be open to any member of the Tribunal to require that any pleading or other document (including any translation) delivered in one of those three languages should be translated into another and, if necessary, duly certified.

10. Not more than two advocates may appear on behalf of each Party for each separate question submitted to arbitration.

11. The advocates may address the Tribunal in their own language, subject to the right of any member of the Tribunal or an opposing Party to require a translation into English or French.

12. Shorthand minutes shall be taken on behalf of the Tribunal of all oral arguments, and transcripts shall be supplied with all possible despatch to the members of the Tribunal and to the Parties. The Secretary of the Tribunal shall be responsible for the execution of this clause and for the preparation of the necessary minutes.

13. For all the purposes of the arbitration up to the commencement of the oral proceedings, the President or any two members of the Tribunal appointed by him shall be qualified to take in the name and on behalf of the Tribunal any decisions which the Tribunal is authorised to take.

14. No Party may, without the consent of the other Party, make use in the course of the discussion of any document which has not been previously communicated to the other Party.

15. Any member of the Tribunal may put to the Parties during the discussion any questions which he thinks proper. The Tribunal may at any time before reaching a decision employ any means of information which it considers necessary, and may ask for any supplementary notes, memoirs or documents which it thinks desirable. Should, however, the Tribunal resort to other means of information than those supplied by the Parties, it will allow them to submit arguments on the additional information.

16. No oral explanation will be received from either Party unless the other Party is present or has been duly summoned.

17. Any request or communication addressed to the Tribunal by one of the Parties will be communicated at the same time to the other.

18. The Secretary of the Tribunal shall notify all proceedings instituted before the Tribunal to all Parties to The Hague Agreement of January 1930.

19. When any signatory Power or the Bank for International Settlements considers that it has an interest of a legal nature which may be affected by the decision in a case, it may submit a request to the Tribunal to be permitted to intervene as a third Party.

    In the absence of an agreement between the Parties, the Chairman or any member of the Tribunal appointed by him for that purpose shall fix the time within which the Party intervening is to deliver his case.

    Subject to any contrary decision of the Tribunal, the foregoing rules and the provisions as to Arbitration of the Agreement of The Hague of January 1930, and in particular those relating to the appointment of an additional member in certain cases, shall apply to a Party intervening in the same manner as to the original Parties.

APPENDIX B

Agreement regarding the Complete and Final Settlement of the Question of Reparations (signed at The Hague on 20 January 1930)

Article XV

1. Any dispute, whether between the Governments signatory to the present Agreement or between one or more of those Governments and the Bank for International Settlements, as to the interpretation or application of the New Plan shall, subject to the special provisions of Annexes I, Va, VIa and IX be submitted for final decision to an arbitration Tribunal of five members appointed for five years, of whom one, who will be the Chairman, shall be a citizen of the United States of America, two shall be nationals of States which were neutral during the late war; the two other shall be respectively a national of Germany and a national of one of the Powers which are creditors of Germany.

   For the first period of five years from the date when the New Plan takes effect this Tribunal shall consist of the five members who at present constitute the Arbitration Tribunal established by the Agreement of London of 30 August, 1924.

2. Vacancies on the Tribunal, whether they result from the expiration of the five-yearly periods or occur during the course of any such period, shall be filled, in the case of a member who is a national of one of the Powers which are creditors of Germany, by the French Government, which will first reach an understanding for this purpose with the Belgian, British, Italian and Japanese Governments; in the case of the member of German nationality, by the German Government; and in the cases of the three other members by the six Governments previously mentioned acting in agreement, or in default of their agreement, by the President for the time being of the Permanent Court of International Justice.

3. In any case in which either Germany or the Bank is plaintiff or defendant, if the Chairman of the Tribunal considers, at the request of one or more of the Creditor Governments parties to the proceedings, that the said Government or Governments are principally concerned, he will invite the said Government or Governments to appoint – and in the case of more Governments than one by agreement – a member, who will take the place on the Tribunal of the member appointed by the French Government.

   In any case in which, on the occasion of a dispute between two or more Creditor Governments, there is no national of one or more of those Governments among the Members of the Tribunal, that Government or those Governments shall have the right to appoint each a Member who

will sit on that occasion. If the Chairman considers that some of the said Governments have a common interest in the dispute, he will invite them to appoint a single member. Whenever, as a result of this provision, the Tribunal is composed of an even number of members, the Chairman shall have a casting vote.

4. Before and without prejudice to a final decision, the Chairman of the Tribunal, or, if he is not available in any case, any other Member appointed by him, shall be entitled, on the request of any Party who makes the application, to make any interlocutory order with a view to preventing any violation of the rights of the Parties.

5. In any proceedings before the Tribunal the Parties shall always be at liberty to agree to submit the point at issue to the Chairman or any one of the Members of the Tribunal chosen as a single arbitrator.

6. Subject to any special provisions which may be made in the Submission – provisions which may not in any event affect the right of intervention of a Third Party – the procedure before the Tribunal or a single arbitrator shall be governed by the rules laid down in Annex XII.

   The same rules, subject to the same reservation, shall also apply to any proceedings before this Tribunal for which the Annexes to the present Agreement provide.

7. In the absence of an understanding on the terms of Submission, any Party may seize the Tribunal directly by a proceeding *ex parte*, and the Tribunal may decide, even in default of appearance, any question of which it is thus seized.

8. The Tribunal, or the single arbitrator, may decide the question of their own jurisdiction, provided always that, if the dispute is one between Governments and a question of jurisdiction is raised, it shall, at the request of either Party, be referred to the Permanent Court of International Justice.

9. The present provisions shall be duly accepted by the Bank for the settlement of any dispute which may arise between it and one or more of the signatory Governments as to the interpretation or application of its Statutes or the New Plan.

FINAL AWARD ON THE CLAIMS FOR COMPENSATION FOR THE SHARES FORMERLY HELD BY THE CLAIMANTS, INTEREST DUE THEREON AND COSTS OF THE ARBITRATION AND ON THE COUNTERCLAIM OF THE BANK AGAINST FIRST EAGLE SOGEN FUNDS, INC., DECISION OF 19 SEPTEMBER 2003

SENTENCE DÉFINITIVE CONCERNANT LES DEMANDES D'INDEMNISATION POUR LES ACTIONS ANCIENNEMENT DÉTENUES PAR LES DEMANDEURS, LES INTÉRÊTS DUS EN CONSÉQUENCE ET LES FRAIS D'ARBITRAGE ET CONCERNANT LA DEMANDE RECONVENTIONNELLE FORMÉE PAR LA BANQUE CONTRE FIRST EAGLE SOGEN FUNDS, INC., DÉCISION DU 19 SEPTEMBRE 2003

Bank is entitled to pay only shareholders of record inscribed on the Bank's share register.

Determination of the exact amount owed for compulsory repurchase of shares—time of valuation for purposes of determining the exchange rate; general rule concerning the obligation to pay interest; determination of interest rate and applicable time period; valuation of real estate

Private actors, purchasing shares, *accepted* the dispute resolution regime provided for in the Statutes of the Bank, including the immunity of the Bank from national courts and the competence of an Arbitration Tribunal to decide its own jurisdiction and to issue provisional measures.

A power or option provided by national law (i.e. procedure to test the validity of an arbitral agreement) cannot justify violation of a commitment under international law (i.e. dispute resolution regime with exclusive jurisdiction).

The Award, as a *res judicata* between the parties, is final and binding; no other remedy is available to the Parties *inter se* with respect to the issues determined in the arbitration. The Tribunal's authoritative interpretation of the Bank's Statutes is applicable to all those who are subject thereto.

The principle that each party shall pay its own expenses must be interpreted and applied in light of the principle of effective access to justice in the context of a suit between individual claimants and an international organization; the obligation to provide for fair access to justice is a correlative of the immunity of international organizations; the Tribunal is competent to allocate the costs of access to justice for individual claimants with limited financial resources so as not to chill their formal procedural opportunities.

The principle that each party shall pay an equal share of the expenses of the Tribunal must be applied in light of the human rights law principle of effective access to justice so that access to justice for every shareholder is not only theoretically possible but, in reality, feasible.

La Banque n'a le droit d'adresser le paiement qu'aux actionnaires inscrits, dont le nom apparaît dans son registre.

Fixation du montant exact dû pour le rachat obligatoire des actions – Date de l'évaluation aux fins de la détermination du taux de change; règle générale concernant l'obligation de payer des intérêts; détermination du taux d'intérêt et de la date à partir de laquelle les intérêts sont dus; évaluation de l'immobilier.

Les acteurs privés, lorsqu'ils ont acheté leurs actions, ont *accepté* le régime de règlement des différends prévu dans les statuts de la Banque, y compris l'immunité de la Banque à l'égard des tribunaux nationaux et le pouvoir reconnu au Tribunal arbitral de statuer sur sa propre compétence et d'ordonner des mesures conservatoires.

Une option ou un droit prévu par le droit national (en l'occurrence la possibilité d'introduire une procédure pour vérifier la validité d'une convention d'arbitrage) ne peut pas servir à justifier la violation d'une obligation qui relève du droit international (en l'occurrence un régime de règlement des différends prévoyant une compétence exclusive).

Une sentence, qui a l'autorité de la chose jugée entre les parties, est définitive et a force obligatoire; aucune autre voie de recours n'est ouverte aux parties *inter se* s'agissant des questions tranchées par l'arbitrage. L'interprétation des statuts de la Banque par le Tribunal fait autorité à l'égard de tous ceux auxquels lesdits statuts sont applicables.

La disposition selon laquelle chaque partie doit supporter ses propres frais doit être interprétée et appliquée à la lumière du principe de l'accès effectif à la justice dans le contexte spécifique d'une action en justice opposant des demandeurs privés à une organisation internationale; l'obligation de garantir un accès équitable à la justice est un corollaire de l'immunité des organisations internationales; le Tribunal est compétent pour répartir les frais d'accès à la justice de demandeurs individuels dont les moyens financiers sont limités, de façon que les voies de recours qui leur sont ouvertes ne restent pas de pure forme.

La disposition selon laquelle chaque partie doit supporter une fraction égale des frais du Tribunal doit être appliquée à la lumière du principe (qui relève du droit des droits de l'homme) de l'accès effectif à la justice, de sorte que chaque actionnaire ait accès à la justice non seulement en théorie mais aussi en pratique.

PERMANENT COURT OF ARBITRATION

ARBITRATION TRIBUNAL ESTABLISHED PURSUANT TO ARTICLE XV OF THE AGREEMENT SIGNED AT THE HAGUE ON 20 JANUARY 1930

Prof. W. Michael Reisman

Prof. Dr. Jochen A. Frowein

Prof. Dr. Mathias Krafft

Prof. Dr. Paul Lagarde

Prof. Dr. Albert Jan van den Berg

Phyllis Hamilton, Secretary

Permanent Court of Arbitration, Registry

DR. HORST REINECCIUS, CLAIMANT (CLAIM NO. 1)
FIRST EAGLE SOGEN FUNDS, INC., CLAIMANT (CLAIM NO. 2)
MR. PIERRE MATHIEU AND LA SOCIÉTÉ DE CONCOURS HIPPIQUE DE LA CHÂTRE, CLAIMANTS (CLAIM NO. 3)
-VERSUS-
BANK FOR INTERNATIONAL SETTLEMENTS, RESPONDENT

Table of Contents

CHAPTER I – INTRODUCTION

1. On 22 November 2002, the Tribunal Concerning the Bank for International Settlements (hereafter the "Tribunal") unanimously rendered a Partial Award (hereafter "Partial Award") in the cases concerning Dr. Horst Reineccius (hereafter "Dr. Reineccius" or "Claimant No. 1"), First Eagle SoGen Funds, Inc. (hereafter "First Eagle" or "Claimant No. 2") and Mr. Pierre Mathieu and the Société de Concours Hippique de La Châtre (hereafter collectively "Mr. Mathieu" or "Claimant No. 3") against the Bank for International Settlements (hereafter the "Bank" or "BIS"). In that Partial Award, the Tribunal rendered the following decisions:

> 1. DETERMINES that the amendment of the Statutes of the Bank for International Settlements of 8 January 2001 to the effect that private shareholders are excluded as shareholders of the Bank was lawful;
>
> 2. DETERMINES that Claimants Nos. 1, 2 and 3 are entitled to a compensation for each of their recalled shares in the Bank for International Settlements corresponding to a proportionate share of the Net Asset Value of the Bank, discounted by 30%;
>
> 3. NOTES that, for the purposes of the compensation referred to in Decision No. (2), Claimants Nos. 1, 2 and 3 accept that the Net Asset Value of the Bank for International Settlements is US$ 10,072,000,000, being US$ 19,034 (equivalent to CHF 33,820) per share, not counting the value of the real estate of the Bank;
>
> 4. GRANTS the relief sought by Claimants Nos. 1, 2 and 3 to the extent that it is consistent with the foregoing Decisions and DISMISSES all other relief sought by Claimants Nos. 1, 2 and 3 inconsistent therewith as well as the relief sought by the Bank for International Settlements relating to those Decisions;
>
> 5. RETAINS jurisdiction with respect to the valuation of the real estate of the Bank for International Settlements, the determination of the exact amount owing by the Bank per share including interest thereon to Claimants Nos. 1, 2 and 3, the counterclaim of the Bank for International Settlements against Claimant No. 2 (First Eagle), and the costs of the arbitration, as well as any relief requested by any of the Parties relating to those matters;
>
> 6. DETERMINES that it will issue one or more Procedural Orders with respect to the conduct of the next phase of the arbitration concerning the matters mentioned in Decision No. (5) after consultation with the Parties.[1]

[1] Partial Award, at para. 209.

CHAPTER II – PROCEDURAL HISTORY

2. Upon receipt of the Partial Award, the Parties agreed upon an exchange of documents and a schedule of written submissions addressed to the matters still before the Tribunal: the Counterclaim of the Bank against First Eagle, the value of the Bank's buildings and their contents (hereafter the "real estate"), the amount still owed to each private shareholder, the issues of interest, costs and expenses of the Arbitration,[2] and any related matters.[3] In the second phase of the Arbitration, Dr. Reineccius, First Eagle and the Bank agreed that, if the Tribunal used the 7 September 2000 exchange rate, the proper NAV per share was CHF 33,936.[4]

3. The Parties notified the Tribunal of their agreement regarding the procedural schedule for the second phase of the Arbitration which the Tribunal confirmed on 31 January 2003 in Procedural Order No. 9 (Order on Consent with Respect to the Schedule for Documents, and Appointment of An Expert in the Second Phase) (hereafter "Procedural Order No. 9 (On Consent)").

4. Pursuant to the terms of the Partial Award, the Tribunal received: (1) an Application dated 17 January 2003 from First Eagle for the Production of Documents from the Bank, (2) an Application dated 17 January 2003 from the Bank for the Production of Documents from First Eagle, (3) a Revised Application dated 21 January 2003 from First Eagle for Documents from the Bank, (4) First Eagle's Objections to the Bank's Application dated 28 January 2003, (5) the Bank's Response and Objections to First Eagle's Application dated 28 January 2003, (6) a Reply of the Bank dated 30 January 2003 to First Eagle's Objections, and (7) First Eagle's Reply dated 4 February 2003 to the Objections of the Bank. The Bank and First Eagle were unable to agree on:

(i) First Eagle's request for documents relating to the formation of the Tribunal,

(ii) First Eagle's request for documents which would permit the calculation of the Bank's NAV on 8 January 2001, and

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[2] See also, Order on Costs (5 October 2001). The full text of all of the referenced Procedural Orders can be found at www.pca-cpa.org.

[3] Partial Award, at para. 209(5).

[4] The Tribunal noted in para. 203 of the Partial Award that the J.P. Morgan Report arrived at a Net Asset Value ("NAV") of the Bank of US$ 10,072,000,000 or US$ 19,034 (CHF 33,820) per share. As both the Bank and First Eagle agree (see First Eagle's Memorial Pursuant to Partial Award ("FE Memorial Part. Award"), at para. 59), "this was presumably a clerical error, as it actually reflects the data from only one of the three months from which J.P. Morgan calculated an average NAV amount. The conclusion in the report is that: 'J.P. Morgan has derived the net asset value of BIS of US$ 19,099 (CHF 33,936) per share ....' J.P. Morgan Valuation Report 21 (7 Sept. 2000) (the J.P. Morgan Report (Ex. 54))." Counter-Memorial Pursuant to Partial Award ("BIS Counter-Memorial Part. Award"), at para. 2, fn. 2. Claimant No. 1 also used this value in his prayer for relief. Transcript, at p. 386, ln. 29; see also *infra* para. 19. Claimant No. 3 used the CHF 33,936 figure in his Reply Memorial. Mathieu Mémoire en Duplique sur la Seconde Phase de l'Arbitrage ("Mathieu Mémoire en Duplique Seconde Phase"), at p. 5.

(iii) the Bank's request for documents relating to First Eagle's decision to sue the Bank and documents relating to communications between First Eagle and its shareholders or public officials concerning the exclusion transaction.[5]

5. The Tribunal considered the submissions of the Parties and issued Procedural Order No. 10 deciding that

First Eagle's Application in (i) above disregards the schedule agreed between the Parties for a phase within which jurisdictional or lack of independence objections were to be lodged. Requesting documents relating to the formation of the Tribunal in this phase of the arbitration, after the Parties' explicit acceptance[6] of the jurisdiction and independence of the Tribunal, is untimely.

The Tribunal deferred a decision upon First Eagle's request in (ii) above to a later date "should the Tribunal hold that the 8 January 2001 date be used to calculate the U.S. dollar/Swiss franc exchange rate in determining the amount to be paid to claimants."[7]

6. The Tribunal granted the Bank's Application in (iii) above, for documents relating to the Bank's claim that First Eagle violated Article 54(1) of the Statutes of the Bank for International Settlements of 20 January 1930; text as amended on 8 January 2001 (hereafter "Statutes of the Bank" or "Bank's Statutes"). First Eagle was ordered to produce to the Bank:

a. All non-privileged documents relating to First Eagle's decision to sue the Bank in the United States and the conduct of such suit ("First Eagle's United States Litigation"), other than briefs, affidavits and other materials filed by First Eagle with the United States courts;

b. All documents created on or after 11 September 2000 (the public announcement of the Bank's intention to amend its Statutes to exclude private shareholders) and before 31 August 2001 (the date of First Eagle's Notice of Arbitration) reflecting communications among First Eagle and any shareholder (or purported shareholder) of the Bank (including any advisor of such shareholder) regarding (i) the transaction by which the Bank withdrew its shares held by persons other than central banks (the "exclusion transaction") and (ii) First Eagle's United States Litigation;

c. All communications among First Eagle and its own shareholders concerning (i) the exclusion transaction and (ii) First Eagle's United States Litigation; and

d. All documents reflecting First Eagle's communications with public officials in the United States (other than courts) seeking to block the exclusion transaction.[8]

7. Further, the Tribunal confirmed the appointment of the Zurich office of C.B. Richard Ellis, the firm proposed by the Parties, to appraise the Bank's buildings in Basle and their contents pursuant to the Parties' stipulation of their selection of the Ellis firm subject to the requirement that the appraiser provide a statement of its independence in the matter.[9] The Secretary requested a proposal and fee estimate for the appraisal from the Ellis firm that

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[5] Procedural Order No. 10 (9 March 2003) ("Procedural Order No. 10").

[6] Procedural Order No. 3 (Terms of Submission) (5 March 2002), at para. 1, recorded the Parties' statements at the 26 February 2002 meeting of the Parties with the Tribunal to establish the Terms of Reference that "they have no jurisdictional objections."

[7] Procedural Order No. 10, at para. B.

[8] *Id.*, at para. C.

[9] *Id.*, at para. D.

was provided and circulated to the Parties on 5 April 2003. The Parties confirmed their acceptance of the Ellis firm's proposal.

8. The Parties exchanged documents pursuant to Procedural Order No. 9 (On Consent) and the rulings in Procedural Order No. 10. The Tribunal received from Dr. Reineccius a letter, dated 24 January 2003, stating his arguments and the relief he requested, referencing his letters of 27 November 2002 and 3 January 2003. The Tribunal received from Claimants Nos. 2 and 3: (1) a Memorial dated 28 February 2003 from First Eagle, (2) a Memorial on its Counterclaim dated 28 February 2003 from the Bank, (3) a Memorial dated 3 March 2003 from Mr. Mathieu, (4) a Counter-Memorial dated 21 April 2003 from First Eagle, (5) a Counter-Memorial dated 21 April 2003 from the Bank, (6) a Reply from First Eagle dated 16 May 2003, (7) a Reply from Mr. Mathieu dated 16 May 2003, and (8) a Reply from the Bank dated 16 May 2003.

9. The Tribunal issued Procedural Order No. 11 (On Consent) on 16 May 2003 (hereafter "Procedural Order No. 11") which recorded that:

> [T]he Tribunal received from the expert its statement of independence in this matter as required by the Parties on 7 April 2003, and the expert, accompanied by the Secretary of the Tribunal, inspected all of the properties on 16 April 2003, and then provided on 28 April 2003 a Certificate of Valuation and underlying Valuation Reports which were circulated to, and accepted by, the Parties ....
>
> ....
>
> B. The Tribunal will use the value of CHF 168,094,000 (One hundred and sixty-eight million, ninety-four thousand Swiss Francs), as determined by the expert, for the purpose of valuing as of 7 September 2000 the Bank's buildings and their contents as required by the 22 November 2002 Partial Award.[10]

In addition, the Tribunal confirmed the agenda for oral argument.

10. On 25 May 2003 the Tribunal issued Procedural Order No. 12 (On Consent) (Re: Proposed New Exhibit 104) granting First Eagle's application to file new Exhibit 104.

11. The Tribunal issued Procedural Order No. 13 (On Consent) on 27 May 2003 granting Dr. Reineccius' application to file a one-page bank statement as Exhibit 1.

12. Public Hearings in the final phase of the Arbitration pursuant to Article XV of the Agreement regarding the Complete and Final Settlement of the Question of Reparations, signed at The Hague on 20 January 1930 (hereafter the "1930 Hague Agreement") and Article 20 of the Rules for Arbitration were held in the Great Hall of Justice at the Peace Palace in The Hague from 28-29 May 2003. At the request of the Parties, their

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[10] Claimants Nos. 1 and 2 objected during the 28 May 2003 Hearings to the value that the expert determined. See also *supra* paras. 7 and 9, and *infra* fn. 17 and paras. 18, 19(ii), and 32. The Bank requested that the Tribunal abide by the determination in the Partial Award that one expert would determine the value of the real estate and the Parties' explicit selection of the Ellis firm to determine the value. Transcript, at pp. 604-605.

separate claims were heard in parallel with some integration for efficiency and the convenience of the Parties. First Eagle was represented, throughout the Hearings, by Mr. Donald Francis Donovan and Mr. Dietmar W. Prager of the Debevoise & Plimpton firm. Mr. Mathieu was represented by Mr. Elie Kleiman and Mr. Guillaume Tattevin of the Freshfields Bruckhaus Deringer firm. The Bank was represented by Mr. Jonathan I. Blackman, Mr. Laurent Cohen-Tanugi and Ms. Claudia Annacker of the Cleary, Gottlieb, Steen & Hamilton firm. Prof. Dr. Mario Giovanoli and Dr. James Freis were also present on behalf of the BIS Secretariat. Dr. Reineccius appeared *pro se* on 28 May.

13. In accordance with the Convention respecting the Bank for International Settlements of 20 January 1930 (hereafter the "1930 Hague Convention"), simultaneous translations in English, French and German were provided for the Hearings.

CHAPTER III – THE PARTIES' CLAIMS

A. CLAIMANT NO. 1, DR. REINECCIUS

1. Arguments

a. CALCULATION OF COMPENSATION

14. In his 27 November 2002 letter, Dr. Reineccius requested that the Tribunal decide that CHF 33,820[11] plus the proportional amount of the Bank's real estate be paid to him in Swiss francs. Dr. Reineccius had indicated at the Hearings in August of 2002[12] that he would stipulate that the J.P. Morgan calculations of the NAV were correct for the purpose of calculating the additional payment to private shareholders. In his letter of 24 January 2003, Dr. Reineccius again requested that the Tribunal award him CHF 33,820 pursuant to paragraph 209(5) of the Partial Award plus the amount determined by the expert for the buildings' value.

b. INTEREST

15. He requested interest on that amount at a minimum of 3¼% per annum which he analogized to the CHF-*Geldmarktzins* prior to 17 September 2001. He noted that the rate was lower after September 2001 but maintained that valuation prior to that time was appropriate.[13]

c. COSTS OF THE ARBITRATION

16. In his 3 January 2003 letter, Dr. Reineccius requested that the Tribunal direct reimbursement by the Bank of his deposits for the costs of the Arbitration.

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[11] See *supra* fn. 4, but see *infra* para. 19(i).
[12] Transcript, at p. 331.
[13] *Id.*, at p 388.

d. SUBMISSIONS

17. Dr. Reineccius, in his letter of 24 January 2003, notified the Tribunal of his intention to participate in the Hearings on 28-29 May 2003. He approved the schedule of submissions in Procedural Order No. 9 (On Consent) and requested that copies be sent to him of: (1) documents exchanged by the Parties pursuant to Procedural Order No. 9, paragraphs 5-8, and (2) the written submissions set forth in the Order.

e. STIPULATIONS

18. Dr. Reineccius indicated his willingness to stipulate to the J.P. Morgan calculation of the NAV of the Bank as described in paragraph 2 *supra*. Regarding the valuation of the real estate pursuant to paragraph 205 of the Partial Award, Dr. Reineccius wrote on 27 November 2002:

> Ich überlasse es First Eagle, in ihrem und in meinem Namen einen Vorschlag für die Benennung eines Immobilien-Experten und seinen Zeitplan für die Bewertung zu machen.[14]

First Eagle stipulated to the appointment of an expert.[15]

2. Relief Requested

19. Dr. Reineccius requested the Tribunal to find that:

(i) as decided by the Tribunal in para. 209(3) of the Partial Award, he should be paid a proportion of the J. P. Morgan Report NAV of the Bank which he calculated to be CHF 33,936 per share compensation for his compulsorily recalled shares;[16]

(ii) the proportionate value of the Bank's buildings and their contents to be paid to him should be CHF 767 per share;[17]

(iii) the Bank must pay him interest at a minimum of 3¼% per annum from 8 January 2001 to the date of payment on the above compensation;[18]

(iv) his costs of the Arbitration (the deposits he made to the BIS Tribunal Account), *i.e.* EUR 1,852.64 should be reimbursed and compensation should be paid to him for his expense and his efforts (*Bemühungen*) in bringing his case to the Tribunal;[19]

(v) a specific date for payment of this compensation including interest is ordered;[20]

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[14] I leave it up to First Eagle to make a proposal in their and my name as to the nomination of a real estate expert and the schedule for the valuation. [Translation provided by the Tribunal.]

[15] See *infra* para. 32.

[16] Transcript, at p 386.

[17] *Id.*, at p. 387. At the Hearings on 28 May 2003, Dr. Reineccius requested that the Tribunal substitute the value for which the Bank's real estate was insured for the value determined by the expert. See also *supra* paras. 7, 9, and fn. 10, and *infra* para. 32.

[18] Transcript, at p. 388.

[19] Letter from Dr. Reineccius to Secretary to the Tribunal (27 November 2002).

[20] Transcript, at p. 387.

(vi) the Tribunal should "expressly forbid the Bank from making upcoming payments dependent on signing a waiver".[21]

B. CLAIMANT NO. 2, FIRST EAGLE

1. Arguments

a. CALCULATION OF COMPENSATION

20. First Eagle maintained that, pursuant to the Partial Award, it is entitled to an award of CHF 7,755.20 (excluding the real estate value) on each of the 9,110 shares it owned,[22] with "interest at a rate of at least 7%[23] compounded monthly[24] . . . from 8 January 2001 through the date of payment,"[25] plus the costs, fees, and expenses it incurred in this proceeding.[26]

21. First Eagle argued in its submissions of 28 February 2003 and 16 May 2003 that the Bank's NAV for the purposes of determining the base award of First Eagle's damages must be set at CHF 33,936 per share, the value calculated by J.P. Morgan in its report of 7 September 2000.[27]

> [T]his result is compelled by the parties' stipulation at the August 2002 hearing accepting J.P. Morgan's calculation of the Bank's NAV. By so stipulating, the parties agreed to accept as conclusive a September 2000 valuation analysis ... in the event that the January 2001 exchange rate were to be used, the NAV would have to be recalculated as of that date as well.[28]

Without such a recalculation, First Eagle would be forced to "bear the downside effect of changing currency conversion rates . . . without calculating the offsetting increase in the Bank's NAV as of the later date."[29]

22. First Eagle characterized the Bank's argument that the date of Swiss franc to U.S. dollar exchange should be 8 January 2001, not 7 September 2000, as "an attempt to deny First Eagle the compensation to which the Partial Award entitles it."[30] First Eagle asserted that the Bank's actual use of the J.P. Morgan Report in the exclusion transaction relied upon J.P. Morgan's Swiss franc calculations.

> In the exclusion transaction out of which First Eagle's claim arises, the Bank first, on 10 September 2000, fixed a redemption price in Swiss francs. It did so in reliance on the J.P. Morgan Report, which used exchange rates prevailing in September 2000 ....

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[21] *Id.*, at p. 388.
[22] First Eagle's Reply Memorial Pursuant to Partial Award ("FE Reply Memorial Part. Award"), at para. 186(a).
[23] *Id.*, at para. 154.
[24] *Id.*, at para. 162.
[25] *Id.*, at paras 151 and 186(e).
[26] *Id.*, at para. 186(d) and (e).
[27] FE Memorial Part. Award, at para. 10; FE Reply Memorial Part. Award, at para. 4.
[28] FE Reply Memorial Part. Award, at para. 5.
[29] FE Memorial Part. Award, at para 70.
[30] FE Reply Memorial Part. Award, at para. 3.

> The Bank then, on 8 January 2001, committed to pay (and subsequently did pay) that same redemption price in Swiss francs.[31]

23. First Eagle argued that the Bank's past share issuance practice was irrelevant but nonetheless supported reliance on J.P. Morgan's September 2000 Swiss franc NAV:[32]

> [P]ast share practices were of little or no significance compared to the Bank's actual practice in the exclusion transaction, which was to set a purchase price in Swiss francs in September 2000, based on the then-prevailing exchange rates, and to hold that price constant over the entire period of the share repurchase.[33]

24. First Eagle dismissed the Bank's argument[34] that three documents proved it had been monitoring post-September 2000 exchange rate fluctuations as irrelevant, because the Bank did not take any action as a result.[35] Further, First Eagle observed, when J.P. Morgan updated its entire valuation analysis, the documents "show that the Bank itself did not apply post September 2000 exchange rates to the September 2000 NAV .... [T]he Bank recalculated the NAV at the same time it recalculated the exchange rate, rather than apply new exchange rates to the September NAV...."[36]

b. COSTS OF THE ARBITRATION AND EXPENSES

25. First Eagle asserted:

> First Eagle is also entitled to reimbursement from the Bank of the costs of the arbitration and its legal fees and expenses. *First*, as the prevailing party, First Eagle is entitled to its costs and fees in order to be fully compensated for the Bank's refusal to pay lawful compensation at the time it was due. *Second*, because this proceeding was necessary to correct the otherwise unlawful compensation paid by the Bank, and hence to ensure that the transaction met the requirements of international law, First Eagle's costs, fees, and expenses constitute a component of the transaction costs necessary to put into effect the exclusion transaction. *Finally*, at a minimum, because First Eagle's efforts have substantially benefitted all the Bank's excluded shareholders, those shareholders should share, pro rata, in First Eagle's expenses.[37]

c. INTEREST

26. First Eagle maintained it was entitled to interest from 8 January 2001 "on the outstanding compensation payment, as well as [on] its costs, fees, and expenses, at a rate of at least 7% compounded monthly."[38] First Eagle reasoned that 7% interest

> reflects the minimum return First Eagle would have expected to earn on alternative investments of the same risk had it received full compensation when it was due. If

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[31] FE Memorial Part. Award, at para. 76.
[32] FE Reply Memorial Part. Award, at para. 83.
[33] *Id.*
[34] The Bank "actively monitored movements in the market exchange rate of Swiss francs and U.S. dollars up until the EGM decision." BIS Counter-Memorial Part. Award, at para. 77.
[35] FE Reply Memorial Part. Award, at para. 79.
[36] *Id.*, at para. 80.
[37] *Id.*, at para. 9.
[38] *Id.*, at para. 12.

> First Eagle were paid less than 7% interest, the Bank would earn a windfall . . . and thereby be unjustly enriched.[39]

Interest should be compounded monthly, First Eagle stated, "in accordance with the current international law and financial practice, including that of the Bank itself".[40]

d. DECLARATORY JUDGMENTS

27. First Eagle opposed the Bank's request for a final Award declaring that "the Tribunal has exclusive jurisdiction over any claims against the Bank arising out of or in connection with the validity, procedures and amount of compensation provided in the 8 January 2001 [compulsory repurchase]".[41] First Eagle argued that the Tribunal cannot render "an advisory opinion on matters outside its jurisdiction."[42]

28. First Eagle further argued it was entitled to an award ordering the Bank to pay compensation and interest due on all 9,110 shares claimed by First Eagle, both those registered to First Eagle and those held by a custodian. On 8 January 2001, First Eagle was the registered owner of 5,250 shares in the Bank.[43] However, First Eagle claimed compensation for 9,110 shares of the Bank. First Eagle indicated that the 3,860 shares for which First Eagle claims compensation, but is not the registered owner,

> were held by two custodians in whose names the shares were registered . . . . Serving as the Swiss subcustodian for the Bank of New York, Credit Suisse First Boston . . . held 3655 shares, and serving as the Swiss subcustodian for J.P. Morgan Chase, UBS held 205 shares . . . . For purposes of this proceeding, each of the Bank of New York and J.P. Morgan Chase has confirmed that, if any compensation is paid to them rather than First Eagle on the shares they held as custodian, they will pay that compensation over to First Eagle.[44]

First Eagle further explained that it had

> earlier claimed in this proceeding for 9085 shares, or 25 shares less than the total for which it now claims . . . in January 2001, a prospective trade was pending . . . [which] was cancelled after the exclusion transaction prevented it from settling . . . . It now seeks the additional compensation due on those shares as well.[45]

e. FIRST EAGLE'S DEFENSE TO THE BANK'S COUNTERCLAIM

29. First Eagle asserted it had the right to litigate in the U.S. District Court on both its securities law claims and the dispute over arbitral jurisdiction; it requested the Tribunal to deny the Bank's claim for damages for breach of Article 54(1) of the Bank's Statutes since those claims did not fall within the agreement to arbitrate.

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[39] *Id.*, at para. 13.
[40] *Id.*
[41] Memorial ("BIS Memorial"), at para. 70.
[42] FE Reply Memorial Part. Award, at para. 14.
[43] FE Memorial Part. Award, at paras. 28-29.
[44] *Id.*, at paras. 30-31.
[45] *Id.*, at paras. 32-33.

30. First Eagle alleged that the bulk of the litigation in the United States concerned the securities law claims [46] and "arose from First Eagle's application for interim measures." [47] First Eagle defended its recourse to the District Court as action that did not breach Article 54(1) because municipal jurisdictions in general do not give the arbitrator the right to rule first on jurisdiction.[48] Therefore, First Eagle asserted, it had the right to litigate "both the securities law claims and the dispute over arbitral jurisdiction, and because the fees the Bank incurred . . . resulted only from litigating those two matters, the Bank's claim for breach of Article 54(1) must be denied."[49]

31. First Eagle also argued that Article 54 was unenforceable. When First Eagle filed suit in the United States, the Tribunal did not yet exist and "the appointment of each of the members after the dispute arose by governments with an interest in the dispute – did not comport with basic principles of public policy."[50]

f. STIPULATIONS

32. First Eagle stated during the Hearings that it was prepared to stipulate, if the Bank also so stipulated, that the NAV of the Bank is as determined by J.P. Morgan in Exhibits in Support of First Eagle's Memorial (hereafter "FE Ex.") 43. Regarding a stipulation concerning the value of the Bank's real estate, First Eagle stated:

> In their 7 January 2003 stipulation the parties agreed that they would "attempt to resolve by agreement the value of the real estate of the Bank and, failing agreement on the value, seek to propose an agreed process and schedule by which the question might be determined." The parties have since agreed to the Tribunal's retention of an appraiser to value the real estate.[51]

First Eagle, with the other Parties, proposed that the Zurich office of the firm of C.B. Richard Ellis be appointed by the Tribunal to determine the value of the Bank's buildings and their contents whose valuation would be final and would be added to the NAV.[52]

2. Applicable Law

33. In its Memorial, First Eagle stated that general principles of international law govern this dispute and that it, as well as the Bank, agrees that "the rules of general public international law apply to the interpretation of

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[46] Transcript, at pp. 533-534.

[47] First Eagle's Counter-Memorial in Opposition to Counterclaim ("FE Counter-Memorial Counterclaim"), at para. 77.

[48] *Id.*, at para. 89.

[49] *Id.*, at para. 97.

[50] *Id.*, at para. 118.

[51] FE Memorial Part. Award, at para. 58.

[52] See also Procedural Order No. 9 (On Consent); Partial Award, at para. 205; Mémoire en Demande sur la Seconde Phase de l'Arbitrage ("Mathieu Mémoire en Demande Seconde Phase"), at p. 4; Transcript, at pp. 329-331.

the Statutes and hence to the determination of the excluded shareholders' property interest in the Bank."[53]

34. First Eagle challenged the *lex specialis* basis for the Tribunal's jurisdiction. First Eagle stated that while it had clearly submitted to the Tribunal's jurisdiction, that consent formed the basis for the jurisdiction, not the *lex specialis*. It cited *Siemens AG v. Dutco Constr. Co.*[54] in support of its claim that it was entitled to seek a ruling on the validity of the arbitration agreement in a domestic court. As further support for its argument that Article 54 was unenforceable, First Eagle relied[55] upon the New York Convention because "the composition of the arbitral authority ... was not in accordance with the agreement of the parties."[56]

3. Relief Requested

35. First Eagle requested in its Reply Memorial that the Tribunal issue a final award ordering the Bank to:

> a) pay First Eagle additional compensation of CHF 7755.20 per share (equal to 70% of NAV of CHF 33,936 per share less the CHF 16,000 per share compensation already received) for each of the 9110 shares held by First Eagle, or a total of CHF 70,649,872;
>
> b) pay First Eagle its share of the value of the Bank's real estate;
>
> c) pay First Eagle its costs of the arbitration, which currently amount to $546,913.40, or, at a minimum, the share of such costs in excess of First Eagle's share of the total amount of the shares subject to the exclusion transaction;
>
> d) pay First Eagle its legal fees and expenses in an amount to be fixed after the May 2000 [sic] hearing in this matter in a manner to be directed by the Tribunal or, at a minimum, the share of such legal fees and expenses in excess of First Eagle's share of the total amount of the shares subject to the exclusion transaction;
>
> e) pay First Eagle interest at a rate of at least 7% compounded monthly and running, as to the additional compensation, from 8 January 2001 through the date of payment of such compensation and, as to First Eagle's costs and fees, from the date of payment by First Eagle through the date of reimbursement by the Bank;
>
> f) deny all relief requested by the Bank, BIS CM2 p. 91; and

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[53] First Eagle's Memorial ("FE Memorial"), at para. 205.

[54] Cour de Cassation (France), 7 January 1992, reprinted in XVIII Y.B. Comm. Arb. p. 140, at pp. 141-142 (1993).

[55] Transcript, at p. 520.

[56] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, Art. V(1)(d), 21 UST p. 2517, 330 UNTS p. 38 ("New York Convention").

g) provide First Eagle such other and further relief as the Tribunal may deem just and proper.[57]

C. CLAIMANT NO. 3, MR. MATHIEU

1. Arguments

a. CALCULATION OF COMPENSATION

36. Mr. Mathieu asked the Tribunal to calculate the additional compensation owed to the former private shareholders pursuant to the 22 November 2002 Partial Award utilizing the 6 September 2000 rate of exchange:

> Dire que la date devant être retenue pour déterminer le taux de change applicable en vue de la conversion en francs suisses de l'actif net réévalué de la BRI libellé en dollars américains a d'ores et déjà été fixée par le Tribunal au 6 septembre 2000.[58]

37. Mr. Mathieu argued that the Bank's proposed substitution of the 8 January 2001 date contradicted the Parties' stipulation to the NAV in the J.P. Morgan Report.[59] Further, Mr. Mathieu argued, the Bank's claims that its past practice justified the use of the 8 January exchange rate were irrelevant to the compulsory repurchase:

> [L]a BRI a en effet soutenu dans son Contre-mémoire que le calcul de l'indemnité doit se faire sur la base de son procédé habituel de calcul des montants en matière d'émission d'actions nouvelles. Cependant, cet usage n'a aucun titre à être appliqué à l'instance. La BRI fait en réalité une interprétation contestable du raisonnement du Tribunal dans la Sentence partielle. Qui plus est, la méthode proposée n'est pas adaptée à la situation du retrait forcé.[60]

38. If the Tribunal were to use the 8 January 2001 date proposed by the Bank, the NAV of the Bank must be recalculated, by an expert of the Tribunal's choosing, at the Bank's expense:

> A titre subsidiaire, si le Tribunal devait décider qu'il convient de retenir le taux de change applicable au 8 janvier 2001, dire que l'actif net de la BRI devra être réévalué à cette même date et désigner à cette fin, aux frais de la BRI, tel expert indépendant qu'il plaira au Tribunal de nommer . . . .[61]

b. DATE UPON WHICH EXCHANGE RATE IS SET

39. Mr. Mathieu argued that 6 September 2000 is the date, consistent with the Partial Award and the J.P. Morgan valuation, to set the exchange rate for the additional compensation to be paid to the former shareholders:

> La différence est en effet significative : en appliquant le taux de change ayant cours au 6 septembre 2000, à savoir 0,5628 dollar américain pour un franc suisse, une action de la banque évaluée à 19.034 dollars américains se convertit à la somme de 33.820

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[57] FE Reply Memorial Part. Award, at para. 186; on 22 May 2003, First Eagle made a further deposit in respect of the costs of arbitration of US$ 259,173.00, bringing its total contribution to the costs of the arbitration to US$ 806,086.40.

[58] Mathieu Mémoire en Duplique Seconde Phase, at p. 15.

[59] *Id.*, at p. 5.

[60] *Id.*, at p. 3.

[61] *Id.*, at p. 15.

> francs suisses. Si, comme le soutient la Banque, le taux de change devant être retenu était celui applicable au 8 janvier 2001, à savoir 0,6256 dollar américain pour un franc suisse, la contre-valeur en francs suisses de cette même action ne serait plus que de 30.425,80. La controverse porte donc sur un enjeu d'un montant de 3.394,20 francs suisses par action. Ce montant correspond, pour la Banque, à l'économie qu'elle espère réaliser sur l'indemnisation que le droit international lui impose de verser en contrepartie des actions, dont elle conserve pour l'avenir la propriété et les espérances de plus values qui leur sont attachées – ne serait-ce qu'en considération de la décote de 30% sur la valeur d'actif net retenue aux termes de la Sentence.[62]

c. INTEREST

40. Mr. Mathieu requested that interest should be paid on the additional amount to be paid to the private shareholders from 8 January 2001.[63]

41. Mr. Mathieu further requested that he be paid interest on the CHF 16,000 which the Bank had offered as compensation but which Mr. Mathieu had declined to accept until after the Tribunal's 22 November 2002 Partial Award.

> Le Demandeur, *dans son Mémoire en demande du 13 mai 2002, développe ainsi trois* moyens: (i) l'illégalité de la résolution amendant les statuts, (ii) l'illicéité de l'opération de rachat forcé des actions et (iii) l'insuffisance de l'indemnité accordée aux actionnaires privés.
>
> Le Demandeur aura par conséquent, du premier jour du litige jusqu'à la Sentence du 22 novembre 2002, toujours soutenu que l'opération de rachat forcée était illégale et *qu'en raison de cette illégalité, il possédait toujours sa qualité d'actionnaire de la* Banque. Il n'est dès lors pas surprenant que ce dernier se soit toujours opposé à percevoir l'indemnité qui lui était proposée, afin de rester cohérent dans sa démarche à l'encontre de la Banque. L'on ne saurait, en effet, demander une chose et son contraire.[64]

42. Mr. Mathieu requested that the Tribunal award 7% compound interest by reference to the J.P. Morgan Report that stated the Bank's cost of capital to be in the 6.7-7% range.[65] Compound interest should be paid in keeping with the requirements of international law and modern commercial practice:

> Le principe de réparation intégrale exige enfin que les intérêts soient capitalisés. En effet les intérêts à percevoir contribuent à former un capital et doivent donc eux-mêmes être porteurs d'intérêts, ainsi que l'exige une jurisprudence établie en droit international. Conformément aux usages du commerce international, ces intérêts seront capitalisés sur une base mensuelle.[66]

d. COSTS OF THE ARBITRATION AND EXPENSES

43. Mr. Mathieu argued that the Bank as the losing Party should pay the costs of the Arbitration including their legal expenses. However, if the Tribunal does not decide to have the Bank bear the cost of the Arbitration, then the expenses of the Arbitration and Claimants' legal

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[62] Mathieu Mémoire en Demande Seconde Phase, at p. 5 (internal citations omitted).
[63] Mathieu Mémoire en Duplique Seconde Phase, at pp. 11-12.
[64] Mathieu Mémoire en Demande Seconde Phase, at p. 14.
[65] *Id.*, at p. 15.
[66] *Id.*, at p. 16.

fees should be apportioned among all the private shareholders. Such apportionment is equitable because the expenses were incurred in actions that conferred a benefit upon the entire group of former private shareholders. Mr. Mathieu stated that his costs and expenses should be paid by the Bank and interest paid thereon equal to the rate of interest awarded for the additional payment. Mr. Mathieu further requested payment of the expenses and disbursements he and his lawyers incurred during the course of the Arbitration, EUR 4,321.67.[67]

e. DECLARATORY JUDGMENT

44. Further, Mr. Mathieu argued that the Tribunal should not grant the Bank's request for a ruling that the Award in this Arbitration be final and binding upon all Parties and dispositive of any potential claims.[68]

f. STIPULATIONS

45. Mr. Mathieu indicated that he joined the other Claimants in the stipulations described in paragraph 32 *supra* regarding the use of the NAV as determined in the J.P. Morgan Report (FE Ex. 43) with the addition of the value of the Bank's real estate.[69]

2. Applicable Law

46. Mr. Mathieu argued that the constituent instruments of the Bank and general international law were applicable in deciding the rights of the shareholders. Further, Mr. Mathieu argued that the international public policy of both Switzerland and The Netherlands should be respected as the place of Arbitration and the place of potential enforcement.[70]

3. Relief Requested

47. Mr. Mathieu, in his submission of 16 May 2003, requested the following relief:

> Le Demandeur requiert qu'il plaise au Tribunal Arbitral de:
>
> Dire que la date devant être retenue pour déterminer le taux de change applicable en vue de la conversion en francs suisses de l'actif net réévalué de la BRI libellé en dollars américains a d'ores et déjà été fixée par le Tribunal au 6 septembre 2000;
>
> A titre subsidiaire, si le Tribunal devait décider qu'il convient de retenir le taux de change applicable au 8 janvier 2001, dire que l'actif net de la BRI devra être réévalué à cette même date et désigner à cette fin, aux frais de la BRI, tel expert indépendant qu'il plaira au Tribunal de nommer;
>
> Dire que les intérêts dus par la BRI au Demandeur ont couru, à compter du 8 janvier 2001, et à titre subsidiaire à compter du 14 février 2001, tant sur le complément d'indemnité en cours de détermination et ce jusqu'à parfait paiement, que sur la somme

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[67] *Id.*, at p. 18; see *infra* para. 48.

[68] Mathieu Mémoire en Duplique Seconde Phase, at p. 13.

[69] Transcript, at p. 330; see *supra* para. 18 and *infra* para. 67; Mathieu Mémoire en Demande Seconde Phase, at p. 4.

[70] Mémoire en Demande ("Mathieu Mémoire"), at pp. 7-8.

de 16.000 francs suisses entre le 8 janvier 2001 et le 9 janvier 2003 par la BRI, au taux minimum de 7%; ordonner la capitalisation des intérêts sur une base mensuelle;

Dire que la BRI supportera seule l'intégralité des frais liés au présent arbitrage; à titre subsidiaire, dans l'hypothèse où le Tribunal déciderait du contraire, donner acte au Demandeur de l'engagement de la BRI de supporter en toute hypothèse la moitié des frais d'arbitrage, et dire que toute partie de ces frais qui ne sera pas mise à la charge de la BRI sera répartie entre la totalité des actionnaires privés de celle-ci proportionnellement au nombre d'actions dont chacun de ces actionnaires était propriétaire au 8 janvier 2001 rapporté au nombre total de 74.952 [sic] actions; réserver la justification des frais (pour mémoire);

Dire que des intérêts sont dus par la BRI sur les frais d'arbitrage à compter de la date du déboursement effectif de ces sommes jusqu'à parfait paiement par la BRI, au taux minimum de 7% avec capitalisation sur une base mensuelle;

Condamner, en toute hypothèse, la BRI à régler au Demandeur la totalité des honoraires d'avocat encourus dans le cadre du présent arbitrage (pour mémoire);

Enfin, rectifier dans la sentence finale le nom de la Société de Concours hippique de La Châtre.[71]

48. Mr. Mathieu further requested reimbursement of his expenses, EUR 4,436.75, and reimbursement of the amounts he deposited for the costs of the Arbitration, EUR 760.25.[72]

D. RESPONDENT, THE BANK FOR INTERNATIONAL SETTLEMENTS

1. Arguments

a. COUNTERCLAIM

49. The Bank argued that First Eagle's suit in the United States[73] which challenged (1) the Bank's right to carry out the redemption and (2) the amount of compensation provided by Article 18A of the Bank's Statutes, seeking money damages "in the amount of the full value of plaintiffs' proportionate interest in the Bank,"[74] breached Article 54. "As a result of this breach, the Bank incurred direct economic damages in excess of US$ 587,000 defending First Eagle's lawsuit, as well as wasted internal legal and management resources."[75]

50. The Bank challenged First Eagle's representation that it intended to obtain disclosure,[76] and "to determine the validity" of its "agreement" to arbitrate under Article 54.[77] The Bank argued that even if the "securities claims had been independent of First Eagle's claims for conversion,

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[71] Mathieu Mémoire en Duplique Seconde Phase, at pp. 15-16.

[72] Mathieu Mémoire en Demande Seconde Phase, at p. 18; Letter from Mr. Mathieu to the Tribunal and the Bank (27 August 2003).

[73] *First Eagle SoGen Funds, Inc. v. Bank for Int'l Settlements*, No. 01 Civ. 0087(RO), 2001 WL 1150323 (S.D.N.Y., 28 September 2001)

[74] Reply Memorial Pursuant to Partial Award ("BIS Reply Memorial Part. Award"), at para. 4 (internal citations omitted).

[75] *Id.*, at para. 2.

[76] FE Counter-Memorial Counterclaim, at para. 38.

[77] *Id.*, at para. 5.

breach of contract and breach of fiduciary duty . . . that would not somehow excuse First Eagle from its obligation to arbitrate the latter under Article 54."[78]

51. The Bank cited the text of Article 54(1):

> If any dispute shall arise between the Bank, on the one side, and any central bank, financial institution, or other bank referred to in the present Statutes, on the other side, or between the Bank and its shareholders, with regard to the interpretation or application of the Statutes of the Bank, the same shall be referred for final decision to the Tribunal provided for by the Hague Agreement of January, 1930.[79]

The Bank alleged:[80]

> First Eagle tried to avoid its duty to arbitrate these issues under Article 54 by pretending that the shares recall was a voluntary tender offer rather than a mandatory redemption. But this did not fool the District Court, which found that "[p]laintiff's only real issue is with the price and method of valuation."[81] . . . Nor did it fool the Court of Appeals, which recognized that "[i]ndeed, the primary complaint advanced by First Eagle appears to be that the valuation methods employed by J.P. Morgan and Arthur Andersen undervalued the privately held shares."[82]

Article 54(2) specifically provides that the Tribunal has "power to decide all questions [concerning the terms of submission under Article 54(1)] (including the question of its own jurisdiction)" ... [and] Article 16(1) of the Tribunal's Rules of Procedure, which provides that "[t]he Tribunal shall have the power to decide the question as to its own jurisdiction ...."[83] All questions of jurisdiction in disputes between the Bank and its shareholders with regard to the interpretation or the application of the Statutes must therefore be raised exclusively before the Tribunal.[84]

52. The Bank distinguished the legal authorities cited by First Eagle as assuming the existence of "an agreement to arbitrate entered into upon the election of the parties, or a specific arbitral regime that explicitly or implicitly provides for recourse to national judiciaries."[85]

53. The Bank argued that the rules which bind it, including those concerning its dispute-resolution forum, are not the subject of private agreement.

> The obligation of the Bank and its shareholders to refer questions of arbitrability exclusively to the Tribunal is ... an obligation created by the treaty mechanism establishing the Bank, which provides its own exclusive mechanism for resolving internal disputes over "the interpretation or application of the Statutes of the Bank."

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[78] BIS Reply Memorial Part. Award, at para. 5.

[79] *Id.*, at para. 10.

[80] *Id.*, at para. 14.

[81] Exhibits to Memorial ("BIS Ex.") 25 (*First Eagle SoGen Funds, Inc. v. Bank for Int'l Settlements*, No. 01 Civ. 0087 (RO), 2001 WL 66321, at p. *3 n. 6 (S.D.N.Y., 26 January 2001)).

[82] BIS Ex. 50 (*First Eagle SoGen Funds, Inc. v. Bank for Int'l Settlements*, 252 F.3d p. 604, at p. 607 (2d. Cir. 2001)).

[83] BIS Legal Authorities, at 39.

[84] BIS Reply Memorial Part. Award, at para. 21.

[85] *Id.*, at para 22.

> Such disputes implicating an international organization's internal law are excluded from municipal legislative, administrative, and adjudicative competence.[86]

54. The Bank denied "First Eagle's assertion that there is a universal principle that parties to an arbitration may seek interim measures from a court". [87] The Bank quoted the United Nations Commission on International Trade Law ("UNCITRAL") Working Group for Arbitration and Conciliation, in paragraph 22 of its Note on Preparation of Uniform Provisions on Interim Measures of Protection of January 2002:

> Other laws provide that the authority to issue interim relief is vested exclusively in the arbitral tribunal and the courts do not have the power to issue interim measures in support of arbitration. The court's lack of jurisdiction may be the result of provisions that oust the jurisdiction of the court where there is an arbitration agreement.[88]

55. The Bank further distinguished the legal authorities cited by First Eagle as indicating that in the context of a commercial arbitration agreement, the right of a party to seek interim measures from a court exists where the rules governing the arbitration or the parties' agreement reserve that option. The Bank argued that the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID")[89] treaty regime provides a closer analogy.

> [T]he Rules of Procedure for Arbitration Proceedings, Arbitration Rules under the 1965 Convention on the Settlement of Investment Disputes provides that a party can apply to a non-ICSID forum for provisional relief only if the arbitration agreement permits such applications.[90]

56. The Bank argued that First Eagle's arguments regarding the validity of Article 54 were raised unsuccessfully in the United States and were abandoned by First Eagle in the proceedings before the Tribunal.[91]

57. The Bank pointed out that:

> [M]embers of international courts and tribunals, including courts and tribunals that decide disputes between the states concerned and private parties, are usually appointed by governments. The role of national governments in appointing members of international courts and tribunals has never been considered incompatible with the independence of members of international courts and tribunals. As regards internal disputes of international organizations, such disputes are typically referred to internal courts or arbitration. From an organizational point of view, the courts or tribunals established by or within the framework of an international organization are organs of the organization concerned. As a result, the organization or the governments of its member states, rather than the parties to the dispute, exercise rights in respect of the tribunal's composition, competence and procedure that are not reserved to the tribunal itself. The European Court of Human Rights confirmed in *Waite and Kennedy v. Germany* that the dispute settlement procedure provided for in the European Space Agency (the "ESA") Convention, which subjects disputes between the Agency and its

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[86] *Id.*, at para. 23 (internal citations omitted).
[87] *Id.*, at para. 34.
[88] *Id.*, at para. 35.
[89] Washington, 18 March 1965, TIAS p 6090, 575 UNTS p. 159.
[90] BIS Reply Memorial Part. Award, at para. 35.
[91] *Id.*, at para. 54.

> staff members and former staff members to the ESA's Appeals Board, satisfies the standards of the European Convention on Human Rights.[92]

58. First Eagle did not, the Bank observed, complain that the appointment procedures in any way led to bias or prejudice with respect to any party.[93]

59. The Bank stated that its expenses in litigating arbitrable claims in the U.S. court are compensable and that it should receive the full measure of the costs and legal fees it claimed.[94]

b. THE BANK'S POSITION REGARDING THE CALCULATION OF COMPENSATION

60. The Bank answered the Claimants' arguments regarding the calculation of the sum owed the former private shareholders:

> The Bank believed [its stipulation at the August Hearings regarding the J.P.Morgan NAV calculation] this to be an agreement to the accuracy of the J.P. Morgan-calculated NAV of U.S. $19,099 and nothing more .... Consistent with the Tribunal reasoning in adopting the NAV minus 30% formula and the underlying principle of equal treatment of all shareholders (both central bank and former private shareholders), that formula should be applied to the NAV calculated by J.P. Morgan in the same manner as the Bank has consistently applied it to the pricing of shares for central bank subscriptions. Under a consistent application of the NAV minus 30% formula to the withdrawn shares, as illustrated in Part III.A.2 *infra*, the total amount of additional compensation would be CHF 4,494 per share.
>
> Alternatively, if instead of following past practice the Tribunal were simply to take the J.P. Morgan-calculated NAV and apply it to the statutory obligation that arose on the 8 January 2001 share withdrawal under Article 18A to pay compensation in Swiss francs for the private shareholders interest in that NAV, the most straightforward method of converting the discounted U.S. dollar NAV to the amount of Swiss franc compensation would be to use the 8 January 2001 exchange rate. This would result in additional compensation of CHF 5,458 per share.[95]

c. DATE UPON WHICH EXCHANGE RATE IS SET

61. The Bank argued that the J.P. Morgan-calculated NAV should be adjusted by reference to the January 2001 Swiss franc/U.S. dollar exchange rate. The Bank maintained

> that its balance sheet is effectively in US dollars (its official unit of account for the period at issue was the gold franc, which had a fixed parity of US$ 1.94149) and that its consistent past practice in applying the discounted NAV formula has been for the board of directors to decide on a share issuance, at a fixed gold franc price, with payments in hard currencies to be made applying the exchange rate of the date of payment; hence, the discounted NAV stated in US dollars in the J.P. Morgan report should be converted to Swiss francs as of the 8 January 2001 date of withdrawal of the privately owned shares, rather than applying the 6 September 2000 exchange rate stated in the J.P. Morgan report ... [96]

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[92] *Id.*, at para. 58 (internal citations omitted).
[93] *Id.*, at para. 59.
[94] *Id.*, at para. 47.
[95] BIS Counter-Memorial Part. Award, at paras. 2-3 (internal citations omitted).
[96] Procedural Order No. 9 (On Consent).

d. THE BANK'S REQUEST FOR A DECLARATORY JUDGMENT

62. The Bank requested, and First Eagle opposed, a ruling from the Tribunal that it has "exclusive jurisdiction over any claims against the Bank arising out of or in connection with the validity, procedures and amount of compensation provided in the 8 January 2001 redemption of the Bank's privately held shares".[97]

e. INTEREST

63. The Bank contended:

> 1. neither international law nor special rules applicable to the BIS require the Tribunal to award interest to the Claimants in these proceedings;
>
> 2. should the Tribunal nevertheless determine to award interest on the additional amount of the compensation, it should be at no more than the Swiss franc market rate for the period between 8 January 2001 and the date of the final award;
>
> 3. there is no basis for awarding compound interest; and
>
> 4. in the case of First Eagle and M. Mathieu, no interest should be awarded at all.[98]

64. The Bank offered to pay interest, if the Tribunal were to decide "that interest is due on the additional compensation to be awarded to former private shareholders . . . from the date when the right to initial compensation arose, *i.e.* 8 January 2001, to the date on which the Tribunal renders its final award."[99] The Bank justified the choice of the date of the final Award by analogy to the payments decided 8 January 2001. Interest had not been paid then on the time between 8 January and the actual payment to shareholders.

65. The Bank argued[100] further that First Eagle's claim for interest on its costs and legal fees from the date on which those costs and fees were paid[101] was without legal authority. The Bank reasoned that any liability to pay costs or expenses incurred by First Eagle, if such existed, would not accrue until the date of the Tribunal's decision.

f. COSTS OF THE ARBITRATION AND EXPENSES

66. The Bank asserted that the *lex specialis* of the Bank precludes an award of costs and fees.

> These claims have no basis in the *lex specialis* of the Bank, which the Tribunal determined to be the governing law of these proceedings. Under the *lex specialis*, consisting of the Bank's Statutes and the treaties under which they were enacted, the costs of the Tribunal are required to be divided equally between Claimants and the Bank; the Tribunal has the power to allocate the Claimants' portion of these costs among the various Claimants, but not to impose that portion on the Bank. The *lex*

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[97] FE Counter-Memorial Counterclaim, at para. 140; BIS Reply Memorial Part. Award, at para. 70(a).
[98] BIS Counter-Memorial Part. Award, at para. 114.
[99] *Id.*, at para. 138.
[100] *Id.*, at para. 147.
[101] FE Memorial Part. Award, at para. 163.

specialis also expressly requires each party to bear its own expenses, which includes legal expenses.[102]

g. STIPULATIONS

67. The Bank indicated it agreed to the use of the J.P. Morgan Report calculations for any finding regarding NAV.[103] The Bank joined the other Parties in proposing that the Tribunal appoint the Zurich Office of the C.B. Richard Ellis firm to value the Bank's real estate.

h. IDENTITY OF RECIPIENTS OF PAYMENT

68. The Bank resisted First Eagle's demand that First Eagle be paid for 9,110 shares.

> The BIS does not register shares in the name of a "nominee" acting as holder of record for an unidentified beneficial owner . . . . Article 18 [of the Bank's Statutes] conclusively establishes that First Eagle has a valid and enforceable interest in only those shares registered in the Bank's books under its name. The Bank share register shows that on 8 January 2001 First Eagle owned 5,250 shares, and not the 9,110 shares First Eagle has claimed to have owned . . . . Any beneficial interest First Eagle may purport to have had in the shares as a result of contractual relations with third parties is invalid, irrelevant to and unenforceable against the Bank.[104]

2. Applicable Law

69. In its Counter-Memorial Pursuant to Partial Award, the Bank argued that "the rights of shareholders in the BIS are governed by the BIS's constituent instruments and applicable general public international law".[105] In doing so, the Bank countered First Eagle's assertion that the Bank is a private organization, and asserted the importance of an international organization being governed by public international law. Relying on its status as an international organization, the Bank also objected to First Eagle's argument that municipal law should apply, stating that "[t]here is no basis to apply municipal corporate law to these issues, and attempts to impose municipal law ... on the significantly different legal regime established by the Statutes of the Bank should be rejected."[106]

3. Relief Requested

70. The Bank requested that the Tribunal render an award:

> (a) declaring that the Tribunal has exclusive jurisdiction over any claims against the Bank arising out of or in connection with the validity, procedures and amount of compensation provided in the 8 January 2001 redemption of the Bank's privately held shares;
>
> (b) finding that First Eagle violated Article 54(1) of the Statutes by suing the Bank in the United States courts on claims committed to the Tribunal's exclusive jurisdiction;

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[102] BIS Counter-Memorial Part. Award, at para 6.
[103] Transcript, at p. 331.
[104] BIS Counter-Memorial Part. Award, at paras. 159-161.
[105] Counter-Memorial ("BIS Counter-Memorial"), at para. 51.
[106] *Id.*

(c) granting the Bank damages from First Eagle in an amount of US$ 587,413.49 in reimbursement of direct legal expenses and additional relief the Tribunal deems appropriate for First Eagle's breach of Article 54(1) of the Statutes[;][107]

[d] declaring that the Tribunal's award is final and binding on the parties and that payment of additional compensation of CHF 4,494 per share to Claimants for each share registered in their own names on the books of the Bank on 8 January 2001 discharges the Bank from any obligation towards Claimants in connection with the compulsory recall of its former privately held shares;

[e] dismissing Claimants' requests for legal fees and costs;

[f] dismissing Claimants' requests for interest, or alternatively awarding interest at the Swiss franc market rate from 8 January 2001 to the date of the final award; and

[g] granting the Bank further relief as the Tribunal deems just and proper.[108]

CHAPTER IV - THE AWARD

A. DETERMINATION OF THE EXACT AMOUNT OWED BY THE BANK FOR INTERNATIONAL SETTLEMENTS PER SHARE

71. The J.P. Morgan Report (7 September 2000) stated its view of the amount to be paid to the shareholders in the Bank's compulsory repurchase of private shares.[109] The Report indicated the amount in U.S. dollars, followed parenthetically by the equivalent amount, as of the date of the Report, in Swiss francs. Claimants pray for the value of the supplementary payment—which the Partial Award determined was owed by the Bank—in Swiss francs at the U.S. dollar/Swiss franc exchange rate that obtained on 7 September 2000. The Bank prays for a calculation of the amount of the supplementary payment at the U.S. dollar/Swiss franc exchange rate that obtained on 8 January 2001, the date of the implementation of the compulsory share repurchase or, in the alternative, for a calculation at the U.S. dollar/Swiss franc exchange rate that obtains on the date of payment set in the final award. Because the value of the Swiss franc in relation to the U.S. dollar increased approximately 10% between 7 September 2000 and 8 January 2001, the disposition of this matter by the Tribunal will have an appreciable effect on the amount owed by the Bank.

72. Procedural Order No. 9 (On Consent) provided in pertinent part:

Whereas the Parties are agreed that the Bank's net asset value (NAV) in US dollars for purposes of the final award shall be as stated in the J.P. Morgan report (with the addition of the value of the real estate), but

(a) the Bank takes the position that its balance sheet is effectively in US dollars (its official unit of account for the period at issue was the gold franc, which had a fixed parity of US $1.94149) and that its consistent past practice in applying the discounted NAV formula has been for the board of directors to decide on a share issuance, at a fixed gold franc price, with payments in hard currencies to be made

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[107] BIS Memorial Part. Award, at para. 70.
[108] BIS Counter-Memorial Part. Award, at Relief Requested.
[109] See *supra* fn. 4.

applying the exchange rate of the date of payment; hence, the discounted NAV stated in US dollars in the J.P. Morgan report should be converted to Swiss francs as of the 8 January 2001 date of withdrawal of the privately owned shares, rather than applying the 6 September 2000 exchange rate stated in the J.P. Morgan report, while

(b) [First Eagle takes] the position that the Tribunal should award the net asset value in Swiss francs stated in the J.P. Morgan report (as noted in paragraph 209(3) of the Partial Award), but that if the US dollar value were converted as of 8 January 2001 (which it should not be) instead of as in the J.P. Morgan report, the Bank's net asset value should be reassessed as of that date to take account of the impact of the change in the conversion rate on the Bank's nondollar denominated assets, and hence on its net asset value, as well as of any retained earnings since the J P. Morgan valuation date.

73. While the parties argued extensively over the meaning of the stipulation in the Procedural Order No. 9 (On Consent), the Tribunal does not find it dispositive, as the Order merely states, in pertinent part, that "the Parties are agreed that the Bank's net asset value (NAV) in US dollars for purposes of the final award shall be as stated in J.P. Morgan Report ...." That agreement does not resolve the question before the Tribunal and, indeed, the rest of the quoted section of Procedural Order No. 9 proceeds to state precisely the issue in controversy here. Nor does the Tribunal find dispositive the Bank's submission that:

> Consistent with the Tribunal's reasoning in adopting the NAV minus 30% formula and the underlying principle of equal treatment of all shareholders (both central bank and former private shareholders), that formula should be applied to the NAV calculated by J.P. Morgan in the same manner as the Bank has consistently applied it to the pricing of shares for central bank subscriptions. Under a consistent application of the NAV minus 30% formula to the withdrawn shares, as illustrated in Part III.A.2 infra, the total amount of additional compensation would be CHF 4,494 per share.
>
> Alternatively, if instead of following past practice the Tribunal were simply to take the J.P. Morgan-calculated NAV and apply it to the statutory obligation that arose on the 8 January 2001 share withdrawal under Article 18A to pay compensation in Swiss francs for the private shareholders' interest in that NAV, the most straightforward method of converting the discounted U.S. dollar NAV to the amount of Swiss franc compensation would be to use the 8 January 2001 exchange rate. This would result in additional compensation of CHF 5,458 per share.[110]

Nor is assistance to be found in the dividend payment practice of the Bank, as the transaction under review here is not a dividend payment, but a compulsory repurchase of shares.

74. In its Partial Award, the Tribunal found the Bank's practice in pricing tranches of newly issued shares indicative of the Bank's and the new shareholders' valuation of each share in the Bank, i.e. what the Bank and the central banks deemed the shares to be worth.[111] But the Tribunal finds no comparable assistance in the procedures by which the central bank purchasers could pay for the newly issued shares, for that involved an entirely consensual transaction in which, moreover, the times of payment for the purchase could,

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[110] BIS Counter-Memorial Part. Award, at paras. 2-3.

[111] Partial Award, at para. 201.

within certain limits, be decided by the purchaser. That consensual transaction is quite different from the compulsory repurchase procedure of Article 18A of the Statutes.

75. That said, the Tribunal finds the practice of the Bank with respect to the pricing and exchange rate mechanism which the Bank itself put in place for the compulsory repurchase program dispositive of this issue. As will be recalled, the Bank adopted a valuation method on 7 September 2000 which it implemented in its decision on 8 January 2001; the amount which had been determined in Swiss francs on 7 September 2000, was paid in Swiss francs on 8 January 2001, without regard to the change in value relative to other convertible currencies. In its Partial Award, the Tribunal held that the recall itself was a valid exercise of the Bank's power and that the procedures followed in the recall of the privately held shares were lawful.[112] It was only the valuation method for the compulsorily repurchased shares which the Bank applied that was incorrect. But the fact is that the Bank paid on 8 January 2001 the amount it had determined in Swiss francs at the U.S. dollar/Swiss franc conversion rate that had obtained on 7 September 2000. As noted above, in the interval between 7 September 2000 and 8 January 2001, the value of the Swiss franc had increased relative to the U.S. dollar, such that if the Bank had applied the payment theory it now proposes to the Tribunal, it would have recalculated the conversion rate of dollars to francs on 8 January 2001 and paid the private shareholders approximately 10% less than they would have received on 7 September 2000. In fact, the Bank did not do this. Rather than taking advantage of the decline of the U.S. dollar in the exchange rate and obtaining benefits from a currency exchange, the Bank paid the shareholders the per share Swiss franc amount that had been determined in the 7 September 2000 report. The Bank is not a for-profit institution,[113] but it is by its very character a profit-maximizer with, moreover, fiduciary duties to all of its shareholders. If the Bank had believed that it was legally entitled to benefit from a change in currency values, it would have been legally obliged to do so and would have done so.

76. As stated, the Partial Award held that the Bank's compulsory share repurchase program was lawful, but that an incorrect valuation method was applied: the Bank should have paid per share a proportionate amount of the Bank's NAV, discounted by 30%, and the Tribunal has ordered the Bank to do so. But the Tribunal found no fault with the rest of the payment structure and procedure which the Bank had established and followed. Accordingly, the per share valuation of 7 September 2000 must now be replaced by a per share valuation of NAV (as determined by the J.P. Morgan Report and stipulated by the parties) discounted by 30%, and the difference between what was paid on 8 January 2001 and what was lawfully required must now be paid. In these circumstances, the same procedure which the Bank followed on 8 January 2001 should, *mutatis mutandis*, be replicated.

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[112] *Id.*, at paras. 142-158.

[113] This is not to say that it may not realize profits, as was observed by the Swiss Federal Council in 1930 See Partial Award, at para. 117.

77. In this regard, the Tribunal notes the fact that the Bank itself took for granted that this would be the exchange rate for fulfilling the Partial Award. On 25 November 2002, *i.e.* three days after the publication of the Partial Award, the Bank issued a press release in which it summarized the Tribunal's principal holding and then stated, "[a]s a consequence, the Bank will be called upon to make an additional payment of about half of the amount already paid...."[114] The Bank's projection on 25 November of what was owing was clearly based on the assumption that the U.S. dollar/Swiss franc conversion date was 7 September 2000.

78. Hence, the amount which was owed in Swiss francs to the private shareholders for the compulsory purchase of their shares is the per share value of the Bank's NAV, as calculated by the J.P. Morgan Report, discounted by 30%, plus the per share value of the Bank's real estate, discounted by 30%. As noted, Dr. Reineccius, First Eagle and the Bank agreed that, if the Tribunal were to use the 7 September 2000 exchange rate, the value, per share, was CHF 33,936.[115] That sum must be discounted by 30%, as determined in the Partial Award, producing a remainder of CHF 23,755. As the Bank had paid each private shareholder CHF 16,000, the Bank owes each of the Claimants (subject to certain qualifications which are set out below), a supplementary payment of CHF 7,755.20 per share. To this sum must be added 70% of the per share value of the real estate, a matter to which the Tribunal will return below.

B. IDENTITY OF RECIPIENTS

79. First Eagle requested[116] that the Tribunal order the Bank to pay the additional compensation due under the Partial Award to First Eagle in accord with First Eagle's records that it owns 9,110 shares, either outright or through a custodian.[117] The Bank prefers to make the payment from the Bank's books recording share ownership, as it did with the payment of the compensation approved at the 8 January 2001 Extraordinary General Meeting.[118] Because Article 18 of the Statutes of the Bank provides that "[t]he registration of the name of a shareholder in the books of the Bank establishes the title to ownership of the shares so registered" (which, moreover, First Eagle recognized),[119] the Tribunal holds that the Bank is entitled to pay only the shareowners of record as they are inscribed in the Bank's share register.

C. INTEREST: APPLICABILITY AND RATE

80. Dr. Reineccius claimed interest on the additional compensation due under the Partial Award, reasoning that on 8 January 2001 he had become "a

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[114] BIS Press Release, *Hague Arbitral Tribunal decision regarding the repurchase of privately held shares of the Bank for International Settlements* (25 November 2002).

[115] See *supra* fn. 4.

[116] FE Memorial Part Award, at paras 28-33; Transcript, at p. 371.

[117] See *supra* para. 19.

[118] BIS Counter-Memorial Part. Award, at paras. 159-161.

[119] Transcript, at p. 371.

creditor of the Bank. Therefore, the compensation due to me has to carry interest . . . the money market interest in Swiss francs on that particular date . . ."[120] which he quantified as no less than 3¼% per annum.[121] First Eagle maintained it was entitled to interest from 8 January 2001 on the outstanding compensation payment, as well as on its costs, fees, and expenses, at a rate of at least 7% compounded monthly. Mr. Mathieu also requested a minimum of 7% interest with "la capitalisation des intérêts sur une base mensuelle".[122] First Eagle and Mr. Mathieu base their claim for interest on the principle of full compensation. As Mr. Mathieu contended:

> En tout état de cause, les intérêts ayant pour fonction d' *"(. . .) indemniser un créancier de l'absence, pendant un certain temps, des fonds qui lui sont dus (. . .)*", le Demandeur a droit aux intérêts portant sur la somme qui *aurait dû* être versée le 8 janvier 2001.[123]

81. First Eagle and Mr. Mathieu argued that the measure of interest should be the return the Bank would have received on the retained funds. First Eagle also reasoned that 7% interest reflects the minimum return First Eagle would have expected to earn on alternative investments of the same risk had it received full compensation when it was due. First Eagle argued that were it paid less than 7% interest, the Bank would earn a windfall from the compensation withheld and thereby be unjustly enriched. First Eagle asserted:

> A reasonable rate of interest should first and foremost reflect the fact that the Bank retained part of the compensation payment due the private shareholders and had the funds available for its own use as equity.[124]

82. Similarly, Mr. Mathieu stated:

> Le Tribunal tiendra également compte du fait que la Banque a réalisé une économie substantielle en retenant le complément d'indemnité dû aux actionnaires évincés et qu'elle a pu faire libre usage de ce capital obtenu sans rien débourser entre la date de rachat forcé et la date où elle devra effectivement verser le complément d'indemnité.[125]

83. First Eagle and Mr. Mathieu claimed alternatively that the interest rate should be the rate used by J.P. Morgan to discount future dividend payments in its Dividend Perpetuity Model[126] analysis, because payment of interest is analogous in this case to a dividend payment.[127]

84. Mr. Mathieu also claimed interest on the original payment of compensation from 8 January 2001.[128]

85. The Bank responded at the May 2003 Hearings[129] that an award of interest was not provided for by the Bank's Statutes, the *lex specialis* of

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[120] *Id.*, at p. 387.
[121] *Id.*
[122] Mathieu Mémoire en Demande Seconde Phase, at p. 19.
[123] *Id.*, at p. 10 (internal citations omitted).
[124] FE Memorial Part. Award, at para 166.
[125] Mathieu Mémoire en Demande Seconde Phase, at p. 15.
[126] Partial Award, at para. 171.
[127] FE Memorial Part. Award, at para. 170; Mathieu Mémoire, at pp. 14-15.
[128] Mathieu Mémoire en Demande Seconde Phase, at p. 10.

the Arbitration, nor, argued the Bank, was it mandated under international law. However, if the Tribunal should award interest on the additional compensation due under the Award, the Bank took the view that it should pay simple interest at the three-month Swiss franc LIBOR (London Interbank Offered Rate) on the additional compensation the Bank has agreed to pay to all the former private shareholders.

86. The Bank argued:

> [T]he Bank's *lex specialis* does not speak directly to the question of interest. However, Article 18A of the Statutes clearly provides that compensation after the 8 January 2001 share recall will be paid to former private shareholders only after they present their share certificates to the Bank and does not provide for the accrual or payment of interest during the open-ended period for presentation of share certificates, verification by the Bank and payment of the recall price. Nor is an award of interest required under general principles of international law. Should the Tribunal nonetheless make such an award with respect to the additional amount of compensation, it should be made at the Swiss (non-compounded) market rate, since the compensation is payable in Swiss francs and Switzerland is the place where payment is due.[130]

87. Further, the Bank addressed the Claimants' argument that interest should be determined by reference to the rate of return on its investments stated in the Morgan Report:

> [A]ny other argument that the former private shareholders should receive interest that is in any way linked to the profits or returns of the Bank, is fundamentally inconsistent with the Tribunal's decision upholding the lawfulness of the shares withdrawal. While shareholders, they did have a claim on the profits of the Bank (in the attenuated form of dividends, as declared by the Board of Directors under Article 51), but on 8 January 2001 that property right was transformed into something different, i.e., a statutory claim for compensation not in any way related to the earnings or profits of the Bank.[131]

88. With respect to Mr. Mathieu's claim for interest on the original offer of compensation from the Bank, the Bank contended that no interest at all should be due. The Bank pointed out that receipt of the original compensation had been within the control of Mr. Mathieu. His refusal to tender his shares should not make the Bank liable for interest.

89. As indicated above, the Claimants have proposed rates of interest varying from 3¼% to 7%, based upon different theories of public international law (including theories of unjust enrichment), international commercial law and Swiss practice. The Tribunal also heard extensive arguments on recent international arbitral decisions awarding compound interest and on the extent to which it may or may not have become customary international law.

90. Neither the 1930 Hague Agreement, nor the 1907 Hague Convention,[132] nor the Statutes of the Bank prescribes, *expressis verbis*, a rate

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[129] Transcript, at p. 427.

[130] BIS Counter-Memorial Part. Award, at para. 7.

[131] *Id.*, at para. 133.

[132] Convention (II) for the Pacific Settlement of International Disputes, The Hague, 18 October 1907 ("1907 Hague Convention").

of interest for any purpose, let alone for a compulsory repurchase of privately held shares. Yet, as it stated in the Partial Award, the Tribunal is of the opinion that interest is due,[133] for it is a general rule that interest is owed where payments are to be made on a specific date but are not made. The Tribunal has found that this rule also applies to the Bank as far as its relations with its shareholders are concerned. The question is the proper rate of interest.

91. International law does not prescribe a specific rate of interest, but several other legal systems, which do so, could be relevant. In circumstances in which the laws of several different legal systems could be applied to a particular transaction or event, it is a frequent practice to select the law of the legal system with which the question to be decided has, in the specific case, the closest contacts. In this regard, the Tribunal notes that Article 2 of the Statutes of the Bank designates Basle, Switzerland, as the place where the registered office of the Bank shall be situated and that Switzerland has consistently been the siège and operational center of the activities of the Bank. In addition, the Bank has made dividend payments in Swiss francs, and the currency in which interest must be paid is the Swiss franc. Moreover, the private shareholders dealt with the Bank in Switzerland, and their dividends were paid in Swiss francs. These reciprocal relationships between the Bank and its shareholders constitute elements of practice. All of these facts, extending over more than seven decades of continuous operation of the Bank, indicate that the Swiss legal system is the one having the closest contacts with this question.

92. In the view of the Tribunal, these facts make it appropriate to refer to Swiss law[134] for guidance on the rate of interest. Article 73 of the Code of Obligations provides:

> 1. Celui qui doit des intérêts dont le taux n'est fixé ni par la convention, ni par la loi ou l'usage, les acquitte au taux annuel de 5 pour cent.
>
> 2. La répression des abus en matière d'intérêt conventionnel est réservée au droit public.

Article 104 (*intérêt moratoire*) of the Code provides:

> 1. Le débiteur qui est en demeure pour le paiement d'une somme d'argent doit l'intérêt moratoire à 5 pour cent l'an, même si un taux inférieur avait été fixé pour l'intérêt conventionnel.
>
> 2. Si le contrat stipule, directement ou sous la forme d'une provision de banque périodique, un intérêt supérieur à 5 pour cent, cet intérêt plus élevé peut également être exigé du débiteur en demeure.
>
> 3. Entre commerçants, tant que l'escompte dans le lieu de paiement est d'un taux supérieur à 5 pour cent, l'intérêt moratoire peut être calculé au taux de l'escompte.

Swiss law thus applies a 5% simple rate for moratory interest.

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[133] Partial Award, at para. 204

[134] Code des obligations (Loi fédérale complétant le Code civil suisse, Livre cinquième: Droit des obligations du 30 mars 1911).

93. As is apparent, the decision to apply Swiss moratory interest is the result of the application of a number of factors with respect to the practice of the Bank and the preponderance of contacts with Swiss law. It is not based upon any assumption of subjection of the Bank to Swiss law. Nor should the Tribunal's decision be taken as indicating any position for or against recent trends with respect to the application of compound interest in contemporary international law; that is a question that does not arise in this case, in view of the dispositive effect of the Bank's practice and the preponderance of contacts with the Swiss legal system insofar as interest in the present case is concerned.

94. Accordingly, the Tribunal decides that the rate of interest to be paid by the Bank is 5% simple interest.

D. TIME FROM WHICH INTEREST IS TO BE PAID

95. First Eagle argued that interest be calculated for the period between the date payment should have been made, or 8 January 2001, and the date it is actually made.[135] Dr. Reineccius[136] and Mr. Mathieu[137] also requested interest from 8 January 2001 until the date payment is made. Mr. Mathieu further requested interest on the CHF 16,000 payment for the time between 8 January 2001 and 9 January 2003 when he presented his shares for payment.[138]

96. The Bank proposed that interest be paid, if the Tribunal should find interest due on the additional compensation, from 8 January 2001 until the date of the final Award. The Bank further proposed that the Bank should not pay post-Award interest unless it failed to make payment of the additional compensation within a reasonable time period that could be established by the Tribunal.[139]

97. Moratory interest under Swiss law is to be paid from the time at which the debt becomes due until the time the debtor tenders payment. With respect to the Bank's compulsory repurchase of private shares, the word "debt" has a number of component references. For all Claimants, there is a debt owing from the Bank for the supplementary payment which results from the difference between what the Bank paid on 8 January 2001 and the application of the formula of NAV minus 30% which the Tribunal determined in its Partial Award to be the lawful standard for valuing individual shares. Accordingly, 5% simple interest is calculated for all Claimants with respect to that supplement from 8 January 2001 until the date of this Award.

98. In contrast to Claimant No. 1, Dr. Reineccius, who presented his sharesto the Bank in accordance with the decision of the Extraordinary General Meeting (reserving his right to the additional payment to which he was entitled) and was paid, Claimants Nos. 2 and 3 did not present their shares

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[135] Transcript, at pp. 373-375.
[136] *Id.*, at p. 388.
[137] Mathieu Mémoire en Demande Seconde Phase, at p. 19.
[138] Transcript, at pp. 395-396.
[139] *Id.*, at pp. 432-433.

until later dates, whereupon the Bank paid them the amount fixed on 8 January 2001. Claimant No. 3 has claimed interest on this amount from 8 January 2001 until the date upon which he presented his shares for payment.

99. The predicate of moratory interest is that the debtor has withheld payment; moratory interest is not owing in circumstances in which the debtor indicates willingness and capacity to pay, but delay in payment is due solely to refusal or failure of the creditor to take the steps necessary to receive payment. With respect to Claimant No. 3, the debtor in this context, the Bank, was prepared to make payment from 8 January 2001 and, moreover, to respect any reservations of rights concerning the valuation of shares. Hence moratory interest is not owing to Claimant No. 3 for the period from 8 January 2001 until the shares were presented for payment and timely paid.

E. VALUATION OF THE REAL ESTATE

100. The NAV computation in the J.P. Morgan Report to which all the parties, as noted in paragraphs 18, 32, 45, and 67 supra, stipulated their agreement did not include a current valuation of the real estate of the Bank. In paragraph 205 of the Partial Award, the Tribunal stated that the valuation of the real estate would be made by an expert, whose identity, terms of reference and timetable would be determined by the Tribunal after consultation with the Parties. As the Parties could not resolve by agreement the value of the real estate, in accordance with paragraph 209(5) of the Partial Award, the Parties notified the Tribunal of their selection of the Zurich office of C.B. Richard Ellis to determine the value of the real estate. The Tribunal confirmed to the Parties its appointment of the Ellis firm in Procedural Order No. 10. The Tribunal received from the expert the statement of independence as required by the Parties, and the expert, accompanied by the Secretary of the Tribunal, inspected all of the properties and provided a Valuation Report on 28 April 2003, whereupon the Secretary of the Tribunal circulated copies of the Report to the Parties, with an invitation for comments. None were forthcoming. On 16 May 2003, in Procedural Order No. 11 (On Consent), the Tribunal stated:

> The Tribunal will use the value of CHF 168,094,000 (...), as determined by the expert, for the purpose of valuing as of 7 September 2000 the Bank's buildings and their contents as required by the 22 November 2002 Partial Award.

101. At the Hearings in May 2003, Dr. Reineccius and First Eagle raised, for the first time, certain objections to the Ellis Report.[140] As agreement to the Report had been stipulated by the Parties and, that notwithstanding, a further and ample opportunity had been afforded to the Parties to comment upon the Report before the Procedural Order No. 11 (On Consent) of 16 May 2003 was issued, the Tribunal holds the objections raised at the hearing out of time and inadmissible and confirms the Ellis Report as final.

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[140] See *supra* para. 31.

102. The per share value of CHF 168,094,000 is CHF 317.66 which when discounted by 30%[141] results in an additional payment to the Claimants of CHF 222.36 per share. This amount will be added to the sum set out in paragraph 78 *supra*, CHF 7,755.20 per share.

F. CONCLUSIONS WITH RESPECT TO COMPUTATIONS

103. The Tribunal concludes that the Bank must pay each claimant an additional CHF 7,977.56 per share. That sum represents 70% of the comprehensive per share NAV of the Bank, *i.e.* the sum of CHF 33,936 per share (J.P. Morgan Report calculation of per share NAV[142]) and CHF 317.66 per share (the value of the Bank's real estate[143]), discounted by 30%, minus the CHF 16,000 per share already paid by the Bank to each private shareholder. Moratory interest is to be paid on this sum from 8 January 2001 until the date of this Award at 5% simple interest.

G. COUNTERCLAIM

104. The Bank claimed that First Eagle's suit in the United States[144] which (1) challenged the Bank's right to carry out the redemption and the amount of compensation provided by Article 18A of the Bank's Statutes, and (2) sought money damages "in the amount of the full value of plaintiffs' proportionate interest in the Bank," breached Article 54 of the Statutes of the Bank.[145]

> As a result of this breach, the Bank incurred direct economic damages in excess of U.S. $587,000 defending First Eagle's lawsuit, as well as wasted internal legal and management resources.[146]

105. The Bank challenged First Eagle's representation that First Eagle's "attempt to enjoin the shares recall"[147] was intended to obtain disclosure,[148] and its refusal to arbitrate was intended "to determine the validity" of its "agreement" to arbitrate under Article 54.[149] Instead, the Bank argued, First Eagle had "disregarded Article 54, and sued the Bank in the United States for a judgment [and] . . . money damages in the amount of the full value of plaintiff's proportionate interest in the Bank, together with interest thereon".[150] The Bank argued that even if the "securities claims had been independent of First Eagle's claims for conversion, breach of contract

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[141] Partial Award, at para. 209(2) and (3).
[142] See *supra* fn. 4.
[143] See *supra* paras. 99-101.
[144] *First Eagle SoGen Funds, Inc. v. Bank for Int'l Settlements*, No. 01 Civ. 0087(RO), 2001 WL 1150323 (S.D.N.Y., 28 September 2001).
[145] BIS Reply Memorial Part. Award, at para. 1.
[146] *Id.*, at para. 2.
[147] *Id.*, at para. 3.
[148] FE Counter-Memorial Counterclaim, at para. 38.
[149] *Id.*, at para 5.
[150] BIS Reply Memorial Part. Award, at para. 4 (internal citations omitted).

and breach of fiduciary duty . . . that would not somehow excuse First Eagle from its obligation to arbitrate the latter under Article 54."[151]

106. The Bank argued that First Eagle's second defense (that it had invoked the jurisdiction of the U.S. courts "to determine the validity and applicability of [its] agreement to arbitrate"[152] was "doubly false":

> [L]egally, because Article 54 is not a private commercial "agreement to arbitrate," but an integral part of a self-contained legal regime that excludes the competence of national courts with respect to the "interpretation or application of the Statutes of the Bank," including issues of the Tribunal's jurisdiction; and factually, because First Eagle in any case did not seek a declaration regarding the validity of Article 54, but sued the Bank for damages in breach of that Article.[153]

The Bank pointed out that it is an international organization:[154]

> governed . . . by a self-contained statutory legal regime, created by the 1930 Hague Agreement, the Convention and the Constituent Charter of the Bank. Under that regime, the rights and duties of its shareholders *vis à vis* the Bank, including their rights and duties under Article 54, must be resolved by reference to the Bank's constituent instruments. *See* Partial Award ¶¶173-74 . . . . National courts do not have the competence to adjudicate the organic disputes of an international organization, unless that competence is specifically and affirmatively provided for in the organization's governing instruments . . . Article 55(1) of the Statutes confirms the Bank's *immunity* from national court jurisdiction, subject only to the narrow (and inapplicable) exceptions provided therein.[155]
>
> Article 54(2) specifically provides that the Tribunal has "power to decide all questions [concerning the terms of submission under Article 54(1)] (including the question of its own jurisdiction)" ... [and] Article 16(1) of the Tribunal's Rules of Procedure, which provides that "[t]he Tribunal shall have the power to decide the question as to its own jurisdiction". All questions of jurisdiction in disputes between the Bank and its shareholders with regard to the interpretation or the application of the Statutes must therefore be raised exclusively before the Tribunal.[156]

107. The Bank reasoned that "the nature of the Bank as an international organization" requires that issues "be determined on a uniform and consistent basis." The probability of inconsistencies inherent in decision-making by individual national courts requires "that disputes implicating an international organization's internal law are entrusted to internal courts or tribunals or arbitration."[157]

108. As to First Eagle's assertion that it was free to seek interim measures from a municipal court, the Bank argued that the *lex specialis* of the Bank's Statutes provides for interim measures of protection:

> Before giving a final decision and without prejudice to the questions at issue, the President of the Tribunal, or, if he is unable to act in any case, a member of the Tribunal to be designated by him forthwith, may, on the request of the first party

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[151] *Id.*, at para 5.
[152] FE Counter-Memorial Counterclaim, at para. 59.
[153] BIS Reply Memorial Part. Award, at para. 17
[154] *Id* , at para. 19.
[155] *Id.*, at paras. 19-20 (some internal citations omitted).
[156] *Id.*, at para. 21 (internal citations omitted).
[157] *Id.*, at para. 24.

applying therefor, order any appropriate provisional measures in order to safeguard the respective rights of the parties.[158]

109. The Bank continued that this power to grant provisional measures is not "concurrent with the jurisdiction of municipal courts. On the contrary, Article 55 confirms the Bank's immunity from municipal jurisdiction, subject to very narrow and specific exceptions."[159] The Bank stated that Article 54 does not contain any exception to this immunity although, as Article 55 demonstrates, the States Parties to the 1930 Hague Agreement could have provided for such an exception.

110. First Eagle asserted that it had the right to litigate in the U.S. District Court on both its securities law claims and the dispute over arbitral jurisdiction; it requested the Tribunal to deny the Bank's claim for damages for breach of Article 54(1) of the Bank's Statutes. First Eagle sought to distinguish its claims under U.S. securities law arguing that both the Bank and the U.S. District Court acknowledged that those claims did not fall within the agreement to arbitrate. First Eagle argued that when the Bank asked the District Court to rule on the merits of the securities law claims, it "confirmed that First Eagle's securities law claims did not fall within the scope of Article 54(1)."[160]

111. First Eagle alleged that the bulk of the litigation in the United States concerned the securities law claims and "arose from First Eagle's application for interim measures."[161] In addition, First Eagle cited a number of authorities[162] to support its contention that "[u]nder all arbitration laws the parties to an arbitration agreement may apply to the court for provisional relief without getting in conflict with the arbitration agreement."[163] Further, First Eagle provided citations to authorities examining the relation of the New York Convention to suits before national courts.[164]

112. First Eagle defended its recourse to the District Court as action that did not breach Article 54(1) because "courts are entitled to review the existence and validity of the arbitration agreement on which the arbitrators' jurisdiction is based ...."[165] Thus, First Eagle asserted, it had the right to litigate "both the securities law claims and the dispute over arbitral jurisdiction, and because the fees the Bank incurred ... resulted only from litigating those two matters, the Bank's claim for breach of Article 54(1) must be denied."[166]

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[158] *Id.*, at para. 31 (quoting Bank's Statutes, Art. 54(3)).
[159] *Id.*, at para. 32.
[160] FE Counter-Memorial Counterclaim, at para. 64.
[161] *Id.*, at para. 77.
[162] *Id.*, at paras. 85-88.
[163] Klaus Peter Berger, INTERNATIONAL ECONOMIC ARBITRATION 331 (1993).
[164] FE Counter-Memorial Counterclaim, at paras. 91-93.
[165] FOUCHARD, GAILLARD & GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶667 (E. Gaillard & J. Savage eds., 1999).
[166] FE Counter-Memorial Counterclaim, at para. 97.

113. The Tribunal notes at the outset that the *lex specialis* of the Bank for International Settlements is comprised of the 1930 Hague Convention, the Constituent Charter of the Bank for International Settlements (20 January 1930) (hereafter "Constituent Charter"), and the Statutes of the Bank. These are international instruments, a characteristic that is particularly important when assessing the relation between them and municipal law. Article 54(1) of the Statutes provides:

> If any dispute shall arise between the Bank, on the one side, and any central bank, financial institution, or other bank referred to in the present Statutes, on the other side, or between the Bank and its shareholders, with regard to the interpretation or application of the Statutes of the Bank, the same shall be referred for final decision to the Tribunal provided for by the Hague Agreement of January, 1930.

Article 55(1) of the Statutes provides:

> The Bank shall enjoy immunity from jurisdiction, save:
>
> a) to the extent that such immunity is formally waived in individual cases by the President, the General Manager of the Bank, or their duly authorized representatives; or
>
> b) in civil or commercial suits, arising from banking or financial transactions, initiated by contractual counter-parties of the Bank, except in those cases in which provision for arbitration has been or shall have been made.

114. The regime that emerges is quite unique. Article 55 of the Statutes is, besides being part of the international legal structure of the Bank, a bilateral commitment that operates parallel to Article 54 and Article 17. By accepting the Statutes pursuant to Article 17, shareholders also accept Article 54 and thus the jurisdiction of a Tribunal established under the 1930 Agreement, and agree not to pursue actions within the jurisdiction of such a Tribunal before national courts. The regime that emerges from these provisions makes clear that disputes between, *inter alia*, the Bank and its shareholders with regard to the interpretation or application of the Statutes were to be referred to a Tribunal established in accordance with the 1930 Hague Agreement. Such a Tribunal was empowered to decide "all questions (including the question of its own jurisdiction)" and, in addition, to "order any appropriate provisional measures in order to safeguard the respective rights of the parties."[167] Article 55 underlines the exclusive character of a Tribunal's jurisdiction by establishing the immunity of the Bank from other national jurisdictions, with two explicit exceptions, neither of which is relevant to the case at bar.

115. A private shareholder of the Bank could not be a formal party to the 1930 Hague Agreement. But a private shareholder, purchasing shares, acquired a special and equally binding type of privity with respect to the dispute resolution regime described above. Article 17 of the Bank's Statutes states that "[o]wnership of shares of the Bank implies acceptance of the Statutes of the Bank." Each share certificate carried the same notice. The Prospectus for shares stated the exclusive jurisdictional regime. A Declaration

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[167] Bank's Statutes, Art. 54(2) and (3).

of Acceptance of Shares included an agreement to accept the dispute resolution regime. In sum, private actors, purchasing shares, accepted, through manifold instruments whose multiplicity and reiteration belie any possibility of misunderstanding, the dispute resolution regime, including the immunity of the Bank from national courts and the competence of a Tribunal formed under the 1930 Hague Agreement and the Statutes to decide its own jurisdiction and to issue provisional measures. The Tribunal would emphasize the critical factor of *acceptance* of the regime. With respect to the question of the competent jurisdiction, private shareholders accepted the international legal status of the Bank unconditionally.

116. Much attention was directed to national practice with respect to the application of Article II of the New York Convention. The Tribunal need not enter into the question of whether, the explicit language of Article II of that instrument notwithstanding, there is a general right under that treaty to test in the national courts of States Parties the validity of an agreement to arbitrate beyond confirmation of whether the agreement "is null and void, inoperative or incapable of being performed."[168] Nor, indeed, need the Tribunal take up the question of whether an arbitration award under the 1930 Hague Agreement even falls under the purview of the New York Convention. The question before the Tribunal is much more narrowly focused. A procedure to test the validity of an arbitral agreement may be available in the United States to putative parties to that agreement. But even if it is, it is not a legal imperative, which requires resort to that procedure. It is a power or option, but not an obligation. A power or option provided by U.S. law cannot be used to justify violation of a commitment that operates on the level of international law. In trying to exercise an option that may have been available to it under U.S. law, First Eagle violated the obligations it had assumed in the Statutes of the Bank and, in particular, with respect to Article 54.

117. Nor does the Tribunal find persuasive the contention that the Tribunal did not exist at the time of First Eagle's attempt to divert its dispute into a U.S. court. Many arbitration tribunals are not standing, but have to be constituted after a dispute arises. As long as there was a workable mechanism for establishing the Tribunal, the action by First Eagle violated its obligations under the Bank's Statutes. The *Siemens AG v. Dutco Constr. Co.* case,[169] relied upon by Claimants Nos. 2 and 3, does not teach otherwise. Dutco concerned parties disputing a private contractual agreement to arbitrate. This Tribunal's jurisdiction arises from the 1930 Hague Agreement, the Constituent Charter and the Statutes of the Bank, an international framework accepted by the private shareholders when they purchased shares.

118. First Eagle has contended that some of its claims before a U.S. court were not within the jurisdiction of this Tribunal and were only available in an appropriate U.S. court. The Bank argued that those claims were only

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[168] *Supra* fn. 56, at Art. II.
[169] *Supra* fn. 55.

pretexts, a conclusion to which the U.S. courts in question appear to have come. In any case, both parties acknowledged that the issues were intertwined. What is beyond doubt is that key critical issues were within the exclusive jurisdiction of the Tribunal.

119. For the above reasons, the Tribunal finds that in pursuing its claims against the Bank in a U.S. court, First Eagle violated its obligations under the Bank's Statutes and unlawfully required the Bank to expend a considerable amount in defending its rights under the Statutes, giving the Bank a right to reparation. Accordingly, First Eagle must reimburse the Bank for the Bank's expenses in the U.S. litigation. The US$ 587,413.49 claimed by the Bank, which the Tribunal finds to be reasonable, may be set off by the Bank at the U.S. dollar/Swiss franc exchange rate obtaining on the date of this award against sums owing to First Eagle as a consequence of this award.

H. REQUEST FOR DECLARATORY RELIEF

120. As part of its Counterclaim, the Bank has requested the following declaratory relief.

> For all of the foregoing reasons, the Bank requests that the Tribunal render an award:
>
> a. declaring that the Tribunal has exclusive jurisdiction over any claims against the Bank arising out of or in connection with the validity, procedures and amount of compensation provided in the 8 January 2001 redemption of the Bank's privately held shares . . .[170]

121. Dr. Reineccius requested in his prayer for relief that the Tribunal "expressly forbid the Bank from making upcoming payments dependent on signing a waiver" of rights to resort to ordinary courts to obtain a more favorable judgment.[171]

122. First Eagle opposed the Bank's request for the declaratory Award proposed above.[172] First Eagle argued that the Tribunal cannot render an advisory opinion "on matters outside its jurisdiction." Further, First Eagle continued, the Tribunal should not impose any conditions on the excluded shareholders' receipt of their rightful payments.[173]

123. The Tribunal is confronted with a request for a declaratory judgment and must ascertain if the Bank has demonstrated a specific interest that the Tribunal must address. Because Claimant No. 2 has clearly contemplated return to another forum,[174] and Claimant No. 1 has apparently not excluded such a possibility,[175] that requirement is satisfied.

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[170] BIS Memorial, at para. 70
[171] Transcript, at p. 388.
[172] FE Reply Memorial Part Award, at paras. 170-175.
[173] *Id.*, at para. 173
[174] Transcript, at pp. 590-600.
[175] *Id* , at p. 388

124. It is in the nature of an award, as a *res judicata* between the parties, that it declares the law that obtains with respect to the matter being arbitrated as between the parties to an arbitration. As between the Parties to this Arbitration, this decision is final and binding; no other remedy is available to the Parties *inter se* with respect to the issues determined in the present Arbitration. Moreover, a tribunal must interpret the instruments invoked by the parties in the exercise of its jurisdiction. By virtue of the exclusive jurisdiction which this Tribunal has concerning the interpretation and application of the Statutes of the Bank, its holdings with respect to the meaning of the Statutes in regard to the issues before it represent the authoritative interpretation of the Statutes. Therefore, the holdings of the Tribunal interpreting the Statutes with respect to jurisdiction in this matter, with respect to the validity of the procedures followed by the Bank in the compulsory recall of privately held shares in its decision of 8 January 2001, and with respect to the proper standard for valuation of the recalled shares represent the authoritative interpretation of the Statutes of the Bank applicable to all those who are subject thereto.

I. EXPENSES OF THE PARTIES

125. The Tribunal now turns to the expenses of the Parties. The Tribunal notes that Claimants Nos. 1, 2, and 3 have requested that they be paid their expenses, and Claimant No. 2 has requested payment of its legal fees. The Tribunal notes that the Arbitration Annex XII to the 1930 Hague Agreement provides that each party shall pay "its own expenses". The Tribunal is of the view that this provision must be interpreted and applied in light of the principle of effective access to justice, as outlined earlier in the specific context of a suit between private shareholders and the Bank.

126. In the *Waite* case,[176] the European Court of Human Rights held that a correlative of the immunity of international organizations is an obligation to provide for fair access to justice. In the view of the Tribunal, that holding is consonant with a general principle of law. The Bank indicated its appreciation of the fact that the costs of access to justice must be regulated in such a way that access to justice is not effectively rendered impossible for single shareholders who lack the resources of major corporate bodies. Claimants Nos. 1 and 3 are individual claimants with limited financial resources. Claimant No. 1 was not represented by counsel. Claimant No. 3 was represented *pro bono* by the Paris office of the Freshfields Bruckhaus Deringer law firm.[177] Therefore, it is only necessary for the Bank to pay the expenses, EUR 4,436.75, incurred by Claimant No. 3.[178] The Tribunal notes with satisfaction that the Bank, fully recognizing the principle of effective access to justice, has from the beginning made clear its willingness to accept the competence of the Tribunal to allocate the costs of access to justice for

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[176] *Waite & Kennedy v. Germany*, App. No. 26083/94, 30 ECHR p. 261 (1999).

[177] Transcript, at p. 477.

[178] Mathieu Mémoire en Demande Seconde Phase, at p. 18; letter from Mr. Mathieu to the Secretary to the Tribunal, copy to the Bank (27 August 2003).

individual claimants in such a way as not to chill their formal procedural opportunities. Therefore, the expenses (EUR 4,436.75) of Claimant No. 3 will be borne by the Bank and reimbursed by it directly to Claimant No. 3.

127. Claimant No. 2 is a corporate entity with substantial financial resources, and has, moreover, been assured of substantial additional payments of compensation by the Bank through its success in these proceedings. The Tribunal also notes that the Bank, for its part, has prevailed in the Counterclaim procedure. As to the question whether expenses and legal fees should be paid by the Bank to Claimant No. 2, the Tribunal first notes that effective access to justice was not at issue for First Eagle in defending its claims. Indeed, First Eagle first brought costly proceedings in the United States before turning to this Tribunal.

128. The Tribunal is of the opinion that it is within its discretion to award expenses and fees also to Claimant No. 2 where either the principle of effective access to justice or any other principle concerning the fairness of the Arbitration procedure would so require. The Tribunal is not of the view that any such principle applies here. The Tribunal has noted the argument by Claimant No. 2 that this procedure has been beneficial to many other shareholders. However, Claimant No. 2, being the former owner of one of the largest private shareholdings, was defending its own rights and interests. First Eagle should therefore pay its own expenses.

129. As to the expenses of the Bank, the Tribunal is of the view that there are no reasons to depart from the rule according to which each party bears its own expenses. Therefore, the Bank shall pay its expenses and legal fees.

130. Subject to the special circumstances set out in *supra* paragraph 126, each Party will accordingly bear its own attorney's fees.

J. COSTS OF THE ARBITRATION

131. The Tribunal now turns to the costs of the Arbitration.[179] The Tribunal notes that Annex XII ("Arbitration. Rules of Procedure") of the 1930 Hague Agreement [180] provides: "In particular Article 85 of the Hague Convention shall apply to these proceedings, and each Party shall pay its own expenses and an equal share of those of the Tribunal." Article 85 of the 1907 Hague Convention reads: "Each Party pays its own expenses and an equal share of the expenses of the Tribunal."

132. The provisions referred to above are clearly binding on the Tribunal for interstate proceedings or proceedings between a State and the

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[179] Article 33 of the Rules of Procedure provides that:

> The Tribunal shall fix the costs of arbitration in its award. The term 'costs' includes: (a) The fees of the Tribunal to be fixed by the Tribunal itself; (b) The travel and other expenses incurred by the arbitrators; (c) The costs of expert advice and of other assistance required by the Tribunal; (d) [T]he fees and expenses of the Secretary of the Tribunal and the International Bureau.

[180] 1930 Hague Agreement, Annex XII, at para 1.

Bank as envisaged in Article XV of the 1930 Hague Agreement. The question arises, however, whether the rules for governmental entities enshrined in the cited Articles are fully applicable for disputes between the Bank and other private shareholders. All shareholders are covered by the arbitration provision in Article 54 of the Statutes of the Bank, but proceedings involving non-State shareholders are not distinguished in the Arbitration Annex or in the 1907 Hague Convention.

133. In applying the obligations of Article 54(1) to private shareholders as well as central banks, the drafters clearly intended to establish a regime that would enable, rather than prevent, private shareholders to exercise that right. Hence, the Tribunal is of the view that Article 54 of the Bank's Statutes[181] providing for Arbitration between shareholders and the Bank must be interpreted in a way which makes access to justice for every shareholder not only theoretically possible but, in reality, feasible. This has been recognized by the Bank from the very beginning of these proceedings. [182] The reference to Article 85 of the 1907 Hague Convention must be applied in the light of this principle of effective access to justice which is fully recognized in present-day human rights law. Even if this rule was not fully developed in 1930, international law has evolved and the Tribunal must apply the law in its contemporary acceptance.

134. In its 31 August 2001 Procedural Order Concerning R. Howe, the Tribunal stated:

> H. With respect to the allocation of deposits and costs: does the Tribunal have the legal competence or "equitable discretion" to allocate deposits and costs to take account of the circumstances of any particular claimant?
>
> H.1. The 1930 Agreement and the 1907 Convention contemplated an equal division of the costs of an arbitration between the parties. As the context of those instruments was inter-state arbitration and not arbitration between a state or an international organization, on the one hand, and individual claimants on the other, that system of equal allocation was consistent with the notion of the sovereign equality of states and may have provided a formula that was likely to achieve equity in specific cases.
>
> H.2. Article 54 of the Statutes of the Bank extended the jurisdiction of the Tribunal to disputes between the Bank and individual shareholders. In this form of privity, the equal division of costs that was, not unreasonably, prescribed for inter-state arbitration could create inequities and even restrain or "chill" the access of individuals to arbitration. In this regard, the Tribunal takes note of the statement of the Bank in its letter of August 23, 2001, that "[t]he Bank does not wish that costs alone should serve to prohibit individual former private shareholders from arbitrating a claim."

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[181] Under Article 54(1):

> If any dispute shall arise between the Bank, on the one side, and any central bank, financial institution, or other bank referred to in the present Statutes, on the other side, or between the Bank and its shareholders, with regard to the interpretation or application of the Statutes of the Bank, the same shall be referred for final decision to the Tribunal provided for by the Hague Agreement of January, 1930.

[182] See *infra* para. 134, H.5.

Wholly aside from the Bank's expression of its wish, an interpretation of a provision in one of the instruments of the Tribunal's regime that had the effect of prohibiting individuals entitled to arbitrate from doing so could hardly be lawful. As will be recalled, Article 9(1) of the Tribunal's Rules provides that

> Subject to these Rules and the Agreement and Convention under which it operates, the Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.

An allocation of deposits and costs that had the effect of not providing a party with a "full opportunity of presenting its case" would not meet the test of Article 9(1).

H.3. The "Rules for Arbitration Between the Bank for International Settlements and Private Parties," which were adapted on the basis of the authority in the 1930 Agreement to regulate arbitrations between the Bank and private shareholders, empower the Tribunal in Article 33 to "fix" the costs, a term which, in the context of this form of arbitration, includes the competence to allocate the costs in ways that further the shared objectives of the parties to the arbitration in order to achieve a fair process and a just outcome, consistent with law.

H.4. Hence, the Tribunal has the competence with respect to arbitrations under Article 54 of the Statutes of the Bank to allocate costs in ways that conduce to the optimum use of the arbitration as contemplated by the Article 54 and justice and fairness in the process of each arbitration.

H.5. The Tribunal takes note of the statement of the Bank in its letter of August 23, 2001 which says in relevant part that:

> [I]t is the Bank's understanding of Article 33 of the Tribunal's Rules that the Tribunal has equitable discretion to apportion costs as it sees fit, including awarding them to a successful claimant. We also understand that any advance deposit of costs under Article 34 could be subject to similar equitable allocation, which could appropriately take account of the circumstances of any particular claimant . . . It remains, however, for the Tribunal to determine how any advance deposits should be apportioned based on the total number of claims ultimately filed and all the other facts and circumstances regarding such claims.

H.6. Given the case-by-case and contextual imperative of any equitable allocation, the Tribunal cannot decide, in advance, the allocation of costs, all the more insofar as such an allocation is to "appropriately take account of the circumstances of any particular claimant." But even without knowing those circumstances in cases that have yet to advance or even to be filed, the Tribunal takes note of the Bank's statement that "[i]t is certainly not the Bank's understanding that multiple claimants, collectively, must bear more than half the Tribunal's costs . . . ."

H.7. The foregoing observations also apply *mutatis mutandis* to the deposits for the arbitration as provided for by Articles 33 and 34 of the Rules of the Tribunal.

H.8. Accordingly, the Tribunal has the legal competence and equitable discretion to allocate costs in ways that contribute to access to the arbitral procedure provided for in Article 54 of the Statutes, that ensure the fairness of the procedure and that secure a meaningful award.

It will be recalled that the Bank, for its part, stated in H.5. *supra*: "it is the Bank's understanding of Article 33 of the Tribunal's Rules that the Tribunal has equitable discretion to apportion costs as it sees fit, including awarding them to a successful claimant."

135. For a case between two States, or a State and the Bank, the quoted Articles provide for an equal distribution between the parties. For the Bank, an international organization with significant financial assets, such a distribution would cause no impediment to justice. In contrast, were this provision applied to individual claimants, requiring them to pay half of the costs of the Tribunal, it would make their access to justice illusory. Considering all of these circumstances, including the fact that the Bank lost in important parts of the dispute, though successful in some others, and including the agreement between the parties with respect to the Tribunal's competence to exercise an equitable discretion to apportion costs as it sees fit, the Tribunal holds that the Bank will bear the full costs of the Arbitration.

136. The costs of the Arbitration, as defined by Article 33 of the Rules of Arbitration, shall be fully borne by the Bank as follows: the Bank shall reimburse directly to Claimant No. 1 EUR 1,852.64; the Bank shall reimburse directly to Claimant No. 2 US$ 806,086.40; the Bank shall reimburse directly to Claimant No. 3 EUR 760.25.

137. In its discretion, the Tribunal denies the Claimants' requests[183] for interest on the sums paid for the costs of the Arbitration.

CHAPTER V - DECISIONS

138. FOR THE FOREGOING REASONS, the Arbitral Tribunal unanimously renders the following decisions:

1. DETERMINES that the amount now to be paid to each Claimant is CHF 7,977.56 per share.

2. DETERMINES that with respect to the shares claimed by Claimant No. 2 (First Eagle) that are not registered in its name, the Bank is entitled to pay the above amount only to the share owners of record as they are inscribed in the Bank's share register.

3. DETERMINES that Claimant No. 2 (First Eagle) must reimburse the Bank US$ 587,413.49, the Bank's costs in defending the law suit brought by Claimant No. 2 (First Eagle) in the United States, which the Bank may set off against the sums owing to Claimant No. 2 (First Eagle) as a consequence of this Award.

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[183] See *supra* paras. 26, 35(e), 43, and 47.

4. DETERMINES that 5% simple interest is to be paid to all of the Claimants on the amount in paragraph 138(1) *supra* from 8 January 2001 until the date of this Award.

5. REJECTS the claim of Claimant No. 3 (Mr. Mathieu) for interest on the amount set by the Extraordinary General Meeting on 8 January 2001 under Article 18A of the Statutes of the Bank.

6. DETERMINES that the Bank shall reimburse directly to Claimant No. 3 (Mr. Mathieu) EUR 4,436.75 for expenses. The Tribunal also determines that Claimant No. 2 (First Eagle) shall bear its own attorneys' fees and other expenses.

7. DETERMINES that the costs of the Arbitration shall be fully borne by the Bank as follows: the Bank shall reimburse directly to Claimant No. 1 (Dr. Reineccius) EUR 1,852.64; the Bank shall reimburse directly to Claimant No. 2 (First Eagle) US$ 806,086.40; the Bank shall reimburse directly to Claimant No. 3 (Mr. Mathieu) EUR 760.25.

8. REJECTS the Claimants' requests for interest on the sums paid for the costs of the Arbitration.

9. DETERMINES that all of the above amounts are to be paid within 90 days.

10. DETERMINES that no other remedy is available to the Parties *inter se* with respect to the issues determined in the present Arbitration.

11. DISMISSES all other relief inconsistent with the foregoing Decisions.

Done at the Peace Palace, The Hague, this 19th day of September 2003,

(*Signed*)
Professor W. Michael Reisman

(*Signed*)
Professor Dr. Jochen A. Frowein

(*Signed*)
Professor Dr. Mathias Krafft

(*Signed*)
Professor Dr. Paul Lagarde

(*Signed*)
Professor Dr. Albeit Jan van den Berg

(*Signed*)
Phyllis P. Hamilton, Secretary

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