

**REPORTS OF INTERNATIONAL  
ARBITRAL AWARDS**

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**RECUEIL DES SENTENCES  
ARBITRALES**

**Bank for International settlements - Partial Dispute with former private  
shareholders**

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**PART III**

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**Bank for International Settlements**

**Final Award of 19 September 2003**

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**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 garantit 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,<sup>1</sup> 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 71<sup>st</sup> Annual Report dated June 11, 2001, the Bank states (at page 186): ‘The Bank has declared that should the Arbitral

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<sup>1</sup> 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 to 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](http://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.

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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<sup>o</sup> 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

## BANK FOR INTERNATIONAL SETTLEMENTS

172

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

## BANK FOR INTERNATIONAL SETTLEMENTS

174

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



## BANK FOR INTERNATIONAL SETTLEMENTS

176

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

## BANK FOR INTERNATIONAL SETTLEMENTS

178

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,”<sup>1</sup> 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.”<sup>2</sup> The Bank contended that seven legal opinions were provided only to Board members and not to the central bank shareholders.<sup>3</sup> 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.”<sup>4</sup>

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;”<sup>5</sup> 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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<sup>1</sup> *Id.*, at page 4.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Id.*, at page 5.

<sup>4</sup> *Id.*, at page 6, relying upon *United States v. Bilzerian*, 926 F2d 1285, 1292 (2d Cir. 1991).

<sup>5</sup> *Id.*, at page 2.

withhold advice “that was provided primarily to assess the legality, feasibility, or form of a transaction.”<sup>6</sup> 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.

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<sup>6</sup> *Id.*, at page 8.

<sup>7</sup> *U.S. v. Bilzerian*, 926 F.2d 1285 (2<sup>nd</sup> 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.<sup>8</sup>

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.

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Professor Michael Reisman, President, on behalf of the Tribunal

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<sup>8</sup> *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 .....	187
Chapter II – Procedural History .....	188
Chapter III – The Parties and Their Claims .....	199
A. Identity of the Parties .....	199
B. Terms of Submission .....	199
C. The Parties' Submissions .....	200
1. Claimant No. 1, Dr. Reineccius .....	200
a. Arguments .....	200
b. Relief Requested .....	201
2. Claimant No. 2, First Eagle .....	201
a. Arguments .....	201
b. Applicable Law .....	203
c. Relief Requested .....	203
d. Stipulation Regarding Calculation of Net Asset Value .....	204
3. Claimant No. 3, Mr. Mathieu .....	204
a. Arguments .....	204
b. Applicable Law .....	205
c. Relief Requested .....	205
4. Respondent, The Bank for International Settlements ....	207
a. Arguments .....	207
(i) Lawfulness of the Share Redemption .....	207
(ii) The Consequences of a Finding of Unlawfulness .....	207
(iii) The Standard of Valuation .....	207
b. Applicable Law .....	209
c. Relief Requested .....	211
Chapter IV – Question 1 of Procedural Order No. 3 .....	211
A. First Preliminary Issue: The Character and Status of the Bank	212
B. Second Preliminary Issue: The Applicable Law with Respect to Question 1 .....	216

C. The Amendment of the Bank's Statutes .....	218
D. Mr. Mathieu's Allegations of Illegality and the Bank's Response Thereto .....	220
E. The Tribunal's Consideration Regarding the Alleged Illegality .....	223
1. Conformity of the Recall to the Statutes .....	223
2. Conformity of the Recall with Substantive Standards of International Law .....	225
a. The Public Interest Requirement .....	226
b. The Requirement That the Action Not Be Discriminatory .....	226
c. Compensation .....	227
Chapter V – Question 2 of Procedural Order No. 3 .....	228
A. Introduction .....	228
B. International Jurisprudence .....	229
C. The Bank's Constituent Instruments and International Law ..	233
D. Valuation .....	234
1. The Earning Power Method .....	235
2. The Net Asset Value (NAV) Method .....	237
3. The Question and Scope of a Possible Discount .....	241
4. The NAV of the Bank as of 8 January 2001 .....	244
Chapter VI – Other Matters .....	244
A. Interest .....	244
B. Real Estate Valuation .....	244
C. The Bank's Counterclaim .....	244
D. Costs .....	245
Chapter VII – Decisions .....	245
Appendix A – Agreement regarding the Complete and Final Settlement of the Question of Reparations, Annex XII: Arbitration. Rules of Procedure .....	247
Appendix B – Agreement regarding the Complete and Final Settlement of the Question of Reparations, Article XV .....	250

## 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"<sup>1</sup> 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*.<sup>2</sup>

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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<sup>1</sup> Henry H. Schloss, *The Bank for International Settlements*, p. 40 (North-Holland Publishing Company, Amsterdam, 1958).

<sup>2</sup> "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.<sup>3</sup> 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.

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<sup>3</sup> 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](http://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.<sup>4</sup> 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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<sup>4</sup> 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.<sup>5</sup>

### **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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<sup>5</sup> *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<sup>6</sup> that he would stipulate that the J.P. Morgan calculations of net asset value ("NAV") were correct.

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<sup>6</sup> *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.<sup>7</sup>

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.<sup>8</sup>

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."<sup>9</sup> 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.<sup>10</sup> 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

<sup>7</sup> FE Memorial, at paras. 15-16.

<sup>8</sup> *Id.*, at paras. 17-18.

<sup>9</sup> Transcript, at p. 170.

<sup>10</sup> *Id.*, at p. 171.

exclusion [of private shareholders] transaction . . . . In each of those [previous] cases the Bank used NAV minus 30 per cent."<sup>11</sup>

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."<sup>12</sup>

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.<sup>13</sup>

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."<sup>14</sup>

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."<sup>15</sup>

Full compensation for the taking . . . should be more than the Bank's net asset value, or NAV, per share.<sup>16</sup>

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.<sup>17</sup>

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.<sup>18</sup>

<sup>11</sup> *Id.*, at p. 172.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, at p. 199.

<sup>14</sup> *Id.*, at p. 141.

<sup>15</sup> *Id.*, at p. 29.

<sup>16</sup> FE Memorial, at para. 22.

<sup>17</sup> *Id.*, at para. 25.

<sup>18</sup> *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."<sup>19</sup> 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."<sup>20</sup>

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."<sup>21</sup>

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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<sup>19</sup> *Id.*, at para. 205.

<sup>20</sup> *Id.*, at para. 206.

<sup>21</sup> *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<sup>22</sup> 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,<sup>23</sup> 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'.<sup>24</sup>

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."<sup>25</sup>

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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<sup>22</sup> Transcript, at p. 329.

<sup>23</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 31(3)(c).

<sup>24</sup> Transcript, at pp. 17-19, 25-26.

<sup>25</sup> 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 Constaté 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.<sup>26</sup>

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<sup>26</sup> 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."<sup>27</sup>

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."<sup>28</sup> 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.<sup>29</sup>

##### *(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.<sup>30</sup>

##### *(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".<sup>31</sup> 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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<sup>27</sup> Counter-Memorial, at para 8.

<sup>28</sup> *Id.*, at para. 9.

<sup>29</sup> *Id.*, at para. 11.

<sup>30</sup> *Id.*, at para. 90.

<sup>31</sup> FE Memorial, at para. 15.



whose national issue the shares belong (Statutes, Art. 12)."<sup>32</sup> 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."<sup>33</sup>

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."<sup>34</sup>

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.<sup>35</sup>

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,<sup>36</sup> 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,<sup>37</sup> 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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<sup>32</sup> Counter-Memorial, at para. 20.

<sup>33</sup> *Id.*, at para. 24.

<sup>34</sup> *Id.*, at para. 27.

<sup>35</sup> *Id.*, at para. 104.

<sup>36</sup> 4 November 1950, 213 UNTS, p. 222 (Bank's LA-130).

<sup>37</sup> 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."<sup>38</sup> "Article 57 was chosen [because] it was not believed to be a change which would affect the basic character of the Bank."<sup>39</sup>

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."<sup>40</sup>

94. The Bank indicated it agreed to the use of the J.P. Morgan Report calculations (Exhibit 43) for any finding regarding NAV.<sup>41</sup>

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.<sup>42</sup>

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<sup>38</sup> Transcript, at p. 78.

<sup>39</sup> *Id.*, at p. 79.

<sup>40</sup> Exhibit 22, Transcript, at p. 325.

<sup>41</sup> Transcript, at p. 331.

<sup>42</sup> 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*.<sup>43</sup>

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.<sup>44</sup> 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."<sup>45</sup> "...

<sup>43</sup> *Id.*, at paras. 53-54.

<sup>44</sup> 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 Legislativegewalt der Staaten und deren Gerichtsbarkeit der Sache nach (*ratione materiae*) unmittelbar entzogen.") (Bank's LA-105), *id.*, at p. 73, fn. 90.

<sup>45</sup> 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."<sup>46</sup> "A fortiori," the Bank asserted, "human rights law applies to the organic relations between the BIS and its shareholders ...."<sup>47</sup>

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.

<sup>46</sup> 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.

<sup>47</sup> 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."<sup>48</sup> 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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<sup>48</sup> 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<sup>49</sup> 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.<sup>50</sup>

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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<sup>49</sup> See *supra* fn. 3.

<sup>50</sup> 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".<sup>51</sup>

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 . . .<sup>52</sup>

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.<sup>53</sup>

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.

<sup>51</sup> See Counter-Memorial, at para. 36, fn. 22.

<sup>52</sup> Feuille fédérale de la Confédération suisse, Vol. 1, p. 87 (1930)

<sup>53</sup> *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.<sup>54</sup>

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:<sup>55</sup> the Headquarters Agreement with Switzerland of 1987,<sup>56</sup> the Host Country Agreement Between the Bank and the People's Republic of China of 1998,<sup>57</sup> and the Host Country Agreement with Mexico of 2002.<sup>58</sup>

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<sup>54</sup> 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).

<sup>55</sup> Counter-Memorial, at para. 40.

<sup>56</sup> *Accord entre le Conseil fédéral suisse et la Banque des Règlements internationaux 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).

<sup>57</sup> 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).

<sup>58</sup> 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.<sup>59</sup> 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,<sup>60</sup> 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 . . .<sup>61</sup>

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.

<sup>59</sup> See FE Memorial, at paras. 229-239.

<sup>60</sup> See *supra* para 109.

<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup>

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.<sup>64</sup>

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.<sup>65</sup>

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.<sup>66</sup> The clear intention of the Agreement between The

<sup>62</sup> Mémoire en Demande, at pp. 5-6; Transcript, at p. 89, lines 18-27.

<sup>63</sup> Counter-Memorial, at para. 48.

<sup>64</sup> *Id.*, at para. 50.

<sup>65</sup> *Id.*, at para. 51.

Netherlands and the Permanent Court of Arbitration of 30 March 1999,<sup>67</sup> as well as of the Headquarters Agreement between the Bank for International Settlements and Switzerland of 10 February 1987<sup>68</sup> 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<sup>69</sup> 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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<sup>66</sup> Mémoire en Demande, at pp. 7-8.

<sup>67</sup> 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.

<sup>68</sup> *Supra* fn. 56.

<sup>69</sup> 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 *Gabcikovo-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.<sup>70</sup> Mr. Mathieu also cited the *Namibia* Opinion of the International Court of Justice in this regard.<sup>71</sup>

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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<sup>70</sup> *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Judge Bedjaoui, ICJ Reports 1997, at para. 8.

<sup>71</sup> *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)<sup>72</sup> 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."<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup>

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,"<sup>76</sup>

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<sup>72</sup> 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."

<sup>73</sup> Counter-Memorial, at para. 63, quoting Black's Law Dictionary.

<sup>74</sup> *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.

<sup>75</sup> Counter-Memorial, at para. 67, fn. 57, which lists three such constituent instruments.

<sup>76</sup> *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<sup>77</sup> 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<sup>78</sup> 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*."<sup>79</sup> 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.<sup>80</sup> 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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<sup>77</sup> 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

<sup>78</sup> *Supra* fn. 23.

<sup>79</sup> *Supra* fn. 45, at pp. 174, 180 (emphasis added).

<sup>80</sup> *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.<sup>81</sup> 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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<sup>81</sup> 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.<sup>82</sup>

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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<sup>82</sup> 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.<sup>83</sup>

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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<sup>83</sup> 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.<sup>84</sup> Hence it is useful to begin by

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<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> 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."<sup>87</sup>

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).

<sup>85</sup> *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).

<sup>86</sup> *Id.*, at para. 109.

<sup>87</sup> *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."<sup>88</sup>

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.<sup>89</sup>

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.<sup>90</sup> 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.<sup>91</sup> The respondent's valuation relied on a net book value analysis that resulted in a negative value for the shares.<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup>

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.<sup>95</sup> 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.<sup>96</sup> 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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<sup>88</sup> *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).

<sup>89</sup> *Id.*, at para. 103.

<sup>90</sup> *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).

<sup>91</sup> *Id.*, at p. 90.

<sup>92</sup> *Id.*, at p. 91.

<sup>93</sup> *Id.*, at p. 92.

<sup>94</sup> *Id.*, at pp. 93-94.

<sup>95</sup> *"ACSYNGO" and Others v. Compagnie de Saint-Gobain (France) SA and Others*, 82 I.L.R., p. 127, at p. 130 (1986).

<sup>96</sup> *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."<sup>97</sup>

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."<sup>98</sup> 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."<sup>99</sup>

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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<sup>97</sup> *Id.*, at p. 137.

<sup>98</sup> *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).

<sup>99</sup> *Id.*



countries, particularly with respect to petroleum, nationalized their single or primary resource,<sup>100</sup> 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.<sup>101</sup> 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."<sup>102</sup>

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.<sup>103</sup> 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.<sup>104</sup> In *Sola Tiles*, the Tribunal awarded full compensation for claimant's expropriated assets.<sup>105</sup> 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.<sup>106</sup> 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".<sup>107</sup>

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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<sup>100</sup> *Aminoil v. Kuwait*, 66 ILR, p. 518 (1982).

<sup>101</sup> *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, 95 ILR, p. 183 (1993).

<sup>102</sup> *Id.*, at p. 211.

<sup>103</sup> *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)

<sup>104</sup> *Id.*, at p. 188.

<sup>105</sup> *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).

<sup>106</sup> *Id.*, at p. 234.

<sup>107</sup> *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.<sup>108</sup> 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."<sup>109</sup> 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."<sup>110</sup>

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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<sup>108</sup> FE Memorial, at para. 205.

<sup>109</sup> Statement of Defense, at para. 85.

<sup>110</sup> 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 seized of the case was to turn to general international law.<sup>111</sup>

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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<sup>111</sup> 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,"<sup>112</sup> 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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<sup>112</sup> 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.<sup>113</sup>

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 than [sic] hitherto when deciding on the application of the net profits either in the form of dividend or of appropriations to the reserves.<sup>114</sup>

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<sup>115</sup>

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

<sup>113</sup> Draft Minutes, Basle, 9 April 1936, FE Exhibits to Memorial, at Tab 20.

<sup>114</sup> 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 8<sup>th</sup> 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.

<sup>115</sup> *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."<sup>116</sup> 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."<sup>117</sup> 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.<sup>118</sup>

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.<sup>119</sup>

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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<sup>116</sup> FE Memorial, at para. 213.

<sup>117</sup> 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.

<sup>118</sup> *Id.*, at para. 221.

<sup>119</sup> *Id.*, at para. 224.

liquidated.<sup>120</sup> 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.<sup>121</sup>

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.<sup>122</sup> These various encumbrances, the Bank argued, were taken account of by the markets which discounted the proportionate NAV of the shares by 75%.<sup>123</sup>

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.<sup>124</sup>

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<sup>125</sup>

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

<sup>120</sup> *Id.*, at para. 225.

<sup>121</sup> Counter-Memorial, at para. 95.

<sup>122</sup> *Id.*, at paras. 97 and 98.

<sup>123</sup> *Id.*, at para. 102.

<sup>124</sup> *Id.*, at para. 95.

<sup>125</sup> *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.<sup>126</sup> The Bank likened its share recall to a voluntary share repurchase program which is lawful in a number of municipal systems.<sup>127</sup> 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.<sup>128</sup>

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.<sup>129</sup> 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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<sup>126</sup> *Id.*, at paras. 107 and 109. In fact, the decision of 8 January 2001 was passed unanimously.

<sup>127</sup> *Id.*, at para. 113 and see also fn. 83 there.

<sup>128</sup> *Id.*, at para. 153, fn. 61.

<sup>129</sup> 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."<sup>130</sup> An internal memorandum prepared by the Secretariat, for the 318<sup>th</sup> 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."<sup>131</sup> 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.<sup>132</sup> The recommendation was adopted by the Board at the 319<sup>th</sup> Meeting of the Board on 17 November 1969.<sup>133</sup> 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."<sup>134</sup> 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."<sup>135</sup> 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]."<sup>136</sup>

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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<sup>130</sup> Untitled Document, FE Exhibits to Memorial, Tab 36, at p. 11

<sup>131</sup> Agenda for the 318<sup>th</sup> Meeting, Adjustment of the capital of the Bank and amendment of its Statutes, FE Exhibits to Memorial, Tab 23, at p. 2.

<sup>132</sup> *Id.*, at p. 4

<sup>133</sup> Agenda for the 319<sup>th</sup> Meeting, Tab 24, at p. 7.

<sup>134</sup> Secret L-3, Share Capital of the BIS, 6 November 1998, *supra* fn. 82, at p. 3.

<sup>135</sup> 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.

<sup>136</sup> *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,<sup>137</sup> 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.<sup>138</sup> 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<sup>139</sup> 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 ...."<sup>140</sup> The Report proceeded to review the "three most generally recognized methods,"<sup>141</sup> 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."<sup>142</sup>

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

<sup>137</sup> *Supra* fn. 131, at Tab 23.

<sup>138</sup> *Supra* fn. 133.

<sup>139</sup> *Supra* fn. 131, at p. 1.

<sup>140</sup> *Id.*, at pp. 2-3.

<sup>141</sup> *Id.*

<sup>142</sup> *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 enterprise; 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.<sup>143</sup>

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:<sup>144</sup>

- (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.<sup>145</sup>

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.<sup>146</sup>

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

<sup>143</sup> *Id.*, at p. 4.

<sup>144</sup> *Id.*, at p. 5.

<sup>145</sup> *Id.*, at pp. 5-6.

<sup>146</sup> *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.<sup>147</sup> 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."<sup>148</sup> 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;"<sup>149</sup> 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."<sup>150</sup> 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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<sup>147</sup> *Id.*, at p. 29.

<sup>148</sup> FE Exhibits to Memorial, Tab 45, at p. 16; Statement of Defense, Exhibit 21, at pp. 7-8.

<sup>149</sup> *Id.*

<sup>150</sup> 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.<sup>151</sup> 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.<sup>152</sup> 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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<sup>151</sup> See para. 84 *supra*; Transcript, at p. 318.

<sup>152</sup> 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 22<sup>nd</sup> 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 .....	256
Chapter II – Procedural History .....	257
Chapter III –The Parties' Claims .....	260
A. Claimant No. 1, Dr. Reineccius .....	260
1. Arguments .....	260
a. Calculation of Compensation .....	260
b. Interest .....	260
c. Costs of the Arbitration .....	260
d. Submissions .....	261
e. Stipulations .....	261
2. Relief Requested .....	261
B. Claimant No. 2, First Eagle .....	262
1. Arguments .....	262
a. Calculation of Compensation .....	262
b. Costs of the Arbitration and Expenses .....	263
c. Interest .....	263
d. Declaratory Judgments .....	264
e. First Eagle's Defense to the Bank's Counterclaim ...	264
f. Stipulations .....	265
2. Applicable Law .....	265

	FINAL AWARD	255
3.	Relief Requested .....	266
C.	Claimant No. 3, Mr. Mathieu .....	267
1.	Arguments .....	267
a.	Calculation of Compensation .....	267
b.	Date upon Which Exchange Rate is Set .....	267
c.	Interest .....	268
d.	Costs of the Arbitration and Expenses .....	268
e.	Declaratory Judgment .....	269
f.	Stipulations .....	269
2.	Applicable Law .....	269
3.	Relief Requested .....	269
D.	Respondent, The Bank for International Settlements .....	270
1.	Arguments .....	270
a.	Counterclaim .....	270
b.	The Bank's Position Regarding the Calculation of Compensation .....	273
c.	Date upon Which Exchange Rate is Set .....	273
d.	The Bank's Request for a Declaratory Judgment .....	274
e.	Interest .....	274
f.	Costs of the Arbitration and Expenses .....	274
g.	Stipulations .....	275
h.	Identity of Recipients of Payment .....	275
2.	Applicable Law .....	275
3.	Relief Requested .....	275
	Chapter IV – The Award .....	276
A.	Determination of the Exact Amount Owed by the Bank for International Settlements per Share .....	276
B.	Identity of Recipients .....	279
C.	Interest: Applicability and Rate .....	279
D.	Time from Which Interest is to be Paid .....	283
E.	Valuation of the Real Estate .....	284
F.	Conclusions with Respect to Computations .....	285



G. Counterclaim .....	285
H. Request for Declaratory Relief .....	290
I. Expenses of the Parties .....	291
J. Costs of the Arbitration .....	292
Chapter V – Decisions .....	295

## 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.<sup>1</sup>

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<sup>1</sup> 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,<sup>2</sup> and any related matters.<sup>3</sup> 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.<sup>4</sup>

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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<sup>2</sup> 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](http://www.pca-cpa.org).

<sup>3</sup> Partial Award, at para. 209(5).

<sup>4</sup> 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, In. 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.<sup>5</sup>

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<sup>6</sup> 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."<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup> The Secretary requested a proposal and fee estimate for the appraisal from the Ellis firm that

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<sup>5</sup> Procedural Order No. 10 (9 March 2003) ("Procedural Order No. 10").

<sup>6</sup> 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."

<sup>7</sup> Procedural Order No. 10, at para. B.

<sup>8</sup> *Id.*, at para. C.

<sup>9</sup> *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.<sup>10</sup>

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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<sup>10</sup> 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<sup>11</sup> 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<sup>12</sup> 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.<sup>13</sup>

###### 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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<sup>11</sup> See *supra* fn. 4, but see *infra* para. 19(i).

<sup>12</sup> Transcript, at p. 331.

<sup>13</sup> *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.<sup>14</sup>

First Eagle stipulated to the appointment of an expert.<sup>15</sup>

**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;<sup>16</sup>

(ii) the proportionate value of the Bank's buildings and their contents to be paid to him should be CHF 767 per share;<sup>17</sup>

(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;<sup>18</sup>

(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;<sup>19</sup>

(v) a specific date for payment of this compensation including interest is ordered;<sup>20</sup>

<sup>14</sup> 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.]

<sup>15</sup> See *infra* para. 32.

<sup>16</sup> Transcript, at p. 386.

<sup>17</sup> *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.

<sup>18</sup> Transcript, at p. 388.

<sup>19</sup> Letter from Dr. Reineccius to Secretary to the Tribunal (27 November 2002).

<sup>20</sup> Transcript, at p. 387.

(vi) the Tribunal should "expressly forbid the Bank from making upcoming payments dependent on signing a waiver".<sup>21</sup>

## B. CLAIMANT NO. 2, FIRST EAGLE

### I. 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,<sup>22</sup> with "interest at a rate of at least 7%"<sup>23</sup> compounded monthly<sup>24</sup> . . . from 8 January 2001 through the date of payment,<sup>25</sup> plus the costs, fees, and expenses it incurred in this proceeding.<sup>26</sup>

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.<sup>27</sup>

[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.<sup>28</sup>

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."<sup>29</sup>

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."<sup>30</sup> 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 . . .

<sup>21</sup> *Id.*, at p. 388.

<sup>22</sup> First Eagle's Reply Memorial Pursuant to Partial Award ("FE Reply Memorial Part. Award"), at para. 186(a).

<sup>23</sup> *Id.*, at para. 154.

<sup>24</sup> *Id.*, at para. 162.

<sup>25</sup> *Id.*, at paras 151 and 186(e).

<sup>26</sup> *Id.*, at para. 186(d) and (e).

<sup>27</sup> FE Memorial Part. Award, at para. 10; FE Reply Memorial Part. Award, at para. 4.

<sup>28</sup> FE Reply Memorial Part. Award, at para. 5.

<sup>29</sup> FE Memorial Part. Award, at para 70.

<sup>30</sup> 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.<sup>31</sup>

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:<sup>32</sup>

[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.<sup>33</sup>

24. First Eagle dismissed the Bank's argument<sup>34</sup> 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.<sup>35</sup> 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...."<sup>36</sup>

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.<sup>37</sup>

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."<sup>38</sup> 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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<sup>31</sup> FE Memorial Part. Award, at para. 76.

<sup>32</sup> FE Reply Memorial Part. Award, at para. 83.

<sup>33</sup> *Id.*

<sup>34</sup> 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.

<sup>35</sup> FE Reply Memorial Part. Award, at para. 79.

<sup>36</sup> *Id.*, at para. 80.

<sup>37</sup> *Id.*, at para. 9.

<sup>38</sup> *Id.*, at para. 12.



First Eagle were paid less than 7% interest, the Bank would earn a windfall . . . and thereby be unjustly enriched.<sup>39</sup>

Interest should be compounded monthly, First Eagle stated, "in accordance with the current international law and financial practice, including that of the Bank itself".<sup>40</sup>

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]".<sup>41</sup> First Eagle argued that the Tribunal cannot render "an advisory opinion on matters outside its jurisdiction."<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup>

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.

<sup>39</sup> *Id.*, at para. 13.

<sup>40</sup> *Id.*

<sup>41</sup> Memorial ("BIS Memorial"), at para. 70.

<sup>42</sup> FE Reply Memorial Part. Award, at para. 14.

<sup>43</sup> FE Memorial Part. Award, at paras. 28-29.

<sup>44</sup> *Id.*, at paras. 30-31.

<sup>45</sup> *Id.*, at paras. 32-33.

30. First Eagle alleged that the bulk of the litigation in the United States concerned the securities law claims<sup>46</sup> and "arose from First Eagle's application for interim measures."<sup>47</sup> 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.<sup>48</sup> 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."<sup>49</sup>

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."<sup>50</sup>

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.<sup>51</sup>

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.<sup>52</sup>

**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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<sup>46</sup> Transcript, at pp. 533-534.

<sup>47</sup> First Eagle's Counter-Memorial in Opposition to Counterclaim ("FE Counter-Memorial Counterclaim"), at para. 77.

<sup>48</sup> *Id.*, at para. 89.

<sup>49</sup> *Id.*, at para. 97.

<sup>50</sup> *Id.*, at para. 118.

<sup>51</sup> FE Memorial Part. Award, at para. 58.

<sup>52</sup> 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."<sup>53</sup>

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.*<sup>54</sup> 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<sup>55</sup> upon the New York Convention because "the composition of the arbitral authority ... was not in accordance with the agreement of the parties."<sup>56</sup>

### 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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<sup>53</sup> First Eagle's Memorial ("FE Memorial"), at para. 205.

<sup>54</sup> Cour de Cassation (France), 7 January 1992, reprinted in XVIII Y.B. Comm. Arb. p. 140, at pp. 141-142 (1993).

<sup>55</sup> Transcript, at p. 520.

<sup>56</sup> 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.<sup>57</sup>

## C. CLAIMANT NO. 3, MR. MATHIEU

### I. 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.<sup>58</sup>

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.<sup>59</sup> 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.<sup>60</sup>

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 . . .<sup>61</sup>

#### 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

<sup>57</sup> 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.

<sup>58</sup> Mathieu Mémoire en Duplique Seconde Phase, at p. 15.

<sup>59</sup> *Id.*, at p. 5.

<sup>60</sup> *Id.*, at p. 3.

<sup>61</sup> *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.<sup>62</sup>

#### 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.<sup>63</sup>

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.<sup>64</sup>*

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.<sup>65</sup> 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.<sup>66</sup>*

#### 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

<sup>62</sup> Mathieu Mémoire en Demande Seconde Phase, at p. 5 (internal citations omitted).

<sup>63</sup> Mathieu Mémoire en Duplique Seconde Phase, at pp. 11-12.

<sup>64</sup> Mathieu Mémoire en Demande Seconde Phase, at p. 14.

<sup>65</sup> *Id.*, at p. 15.

<sup>66</sup> *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.<sup>67</sup>

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.<sup>68</sup>

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.<sup>69</sup>

**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.<sup>70</sup>

**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

<sup>67</sup> *Id.*, at p. 18; see *infra* para. 48.

<sup>68</sup> Mathieu Mémoire en Duplique Seconde Phase, at p. 13.

<sup>69</sup> Transcript, at p. 330; see *supra* para. 18 and *infra* para. 67; Mathieu Mémoire en Demande Seconde Phase, at p. 4.

<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup>

#### **D. RESPONDENT, THE BANK FOR INTERNATIONAL SETTLEMENTS**

##### ***I. Arguments***

###### **a. COUNTERCLAIM**

49. The Bank argued that First Eagle's suit in the United States<sup>73</sup> 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,"<sup>74</sup> 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."<sup>75</sup>

50. The Bank challenged First Eagle's representation that it intended to obtain disclosure,<sup>76</sup> and "to determine the validity" of its "agreement" to arbitrate under Article 54.<sup>77</sup> The Bank argued that even if the "securities claims had been independent of First Eagle's claims for conversion,

<sup>71</sup> Mathieu Mémoire en Duplique Seconde Phase, at pp. 15-16.

<sup>72</sup> Mathieu Mémoire en Demande Seconde Phase, at p. 18; Letter from Mr. Mathieu to the Tribunal and the Bank (27 August 2003).

<sup>73</sup> *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)

<sup>74</sup> Reply Memorial Pursuant to Partial Award ("BIS Reply Memorial Part. Award"), at para. 4 (internal citations omitted).

<sup>75</sup> *Id.*, at para. 2.

<sup>76</sup> FE Counter-Memorial Counterclaim, at para. 38.

<sup>77</sup> *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."<sup>78</sup>

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.<sup>79</sup>

The Bank alleged:<sup>80</sup>

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."<sup>81</sup> . . . 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."<sup>82</sup>

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 ...."<sup>83</sup> 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.<sup>84</sup>

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."<sup>85</sup>

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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<sup>78</sup> BIS Reply Memorial Part. Award, at para. 5.

<sup>79</sup> *Id.*, at para. 10.

<sup>80</sup> *Id.*, at para. 14.

<sup>81</sup> 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)).

<sup>82</sup> 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)).

<sup>83</sup> BIS Legal Authorities, at 39.

<sup>84</sup> BIS Reply Memorial Part. Award, at para. 21.

<sup>85</sup> *Id.*, at para 22.



Such disputes implicating an international organization's internal law are excluded from municipal legislative, administrative, and adjudicative competence.<sup>86</sup>

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".<sup>87</sup> 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.<sup>88</sup>

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")<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup>

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

<sup>86</sup> *Id.*, at para. 23 (internal citations omitted).

<sup>87</sup> *Id.*, at para. 34.

<sup>88</sup> *Id.*, at para. 35.

<sup>89</sup> Washington, 18 March 1965, TIAS p 6090, 575 UNTS p. 159.

<sup>90</sup> BIS Reply Memorial Part. Award, at para. 35.

<sup>91</sup> *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.<sup>92</sup>

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.<sup>93</sup>

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.<sup>94</sup>

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.<sup>95</sup>

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 ...<sup>96</sup>

<sup>92</sup> *Id.*, at para. 58 (internal citations omitted).

<sup>93</sup> *Id.*, at para. 59.

<sup>94</sup> *Id.*, at para. 47.

<sup>95</sup> BIS Counter-Memorial Part. Award, at paras. 2-3 (internal citations omitted).

<sup>96</sup> 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".<sup>97</sup>

## 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.<sup>98</sup>

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."<sup>99</sup> 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<sup>100</sup> 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<sup>101</sup> 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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<sup>97</sup> FE Counter-Memorial Counterclaim, at para. 140; BIS Reply Memorial Part. Award, at para. 70(a).

<sup>98</sup> BIS Counter-Memorial Part. Award, at para. 114.

<sup>99</sup> *Id.*, at para. 138.

<sup>100</sup> *Id.*, at para. 147.

<sup>101</sup> FE Memorial Part. Award, at para. 163.

*specialis* also expressly requires each party to bear its own expenses, which includes legal expenses.<sup>102</sup>

g. STIPULATIONS

67. The Bank indicated it agreed to the use of the J.P. Morgan Report calculations for any finding regarding NAV.<sup>103</sup> 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.<sup>104</sup>

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".<sup>105</sup> 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."<sup>106</sup>

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;

<sup>102</sup> BIS Counter-Memorial Part. Award, at para 6.

<sup>103</sup> Transcript, at p. 331.

<sup>104</sup> BIS Counter-Memorial Part. Award, at paras. 159-161.

<sup>105</sup> Counter-Memorial ("BIS Counter-Memorial"), at para. 51.

<sup>106</sup> *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[;]<sup>107</sup>

[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.<sup>108</sup>

## 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.<sup>109</sup> 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

<sup>107</sup> BIS Memorial Part. Award, at para. 70.

<sup>108</sup> BIS Counter-Memorial Part. Award, at Relief Requested.

<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup> 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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<sup>110</sup> BIS Counter-Memorial Part. Award, at paras. 2-3.

<sup>111</sup> 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.<sup>112</sup> 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,<sup>113</sup> 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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<sup>112</sup> *Id.*, at paras. 142-158.

<sup>113</sup> 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...."<sup>114</sup> 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.<sup>115</sup> 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<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup> 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),<sup>119</sup> 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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<sup>114</sup> BIS Press Release, *Hague Arbitral Tribunal decision regarding the repurchase of privately held shares of the Bank for International Settlements* (25 November 2002).

<sup>115</sup> See *supra* fn. 4.

<sup>116</sup> FE Memorial Part Award, at paras 28-33; Transcript, at p. 371.

<sup>117</sup> See *supra* para. 19.

<sup>118</sup> BIS Counter-Memorial Part Award, at paras 159-161.

<sup>119</sup> 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 . . ."<sup>120</sup> which he quantified as no less than 3¼% per annum.<sup>121</sup> 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".<sup>122</sup> 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.<sup>123</sup>

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.<sup>124</sup>

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 déboursier entre la date de rachat forcé et la date où elle devra effectivement verser le complément d'indemnité.<sup>125</sup>

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<sup>126</sup> analysis, because payment of interest is analogous in this case to a dividend payment.<sup>127</sup>

84. Mr. Mathieu also claimed interest on the original payment of compensation from 8 January 2001.<sup>128</sup>

85. The Bank responded at the May 2003 Hearings<sup>129</sup> that an award of interest was not provided for by the Bank's Statutes, the *lex specialis* of

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<sup>120</sup> *Id.*, at p. 387.

<sup>121</sup> *Id.*

<sup>122</sup> Mathieu Mémoire en Demande Seconde Phase, at p. 19.

<sup>123</sup> *Id.*, at p. 10 (internal citations omitted).

<sup>124</sup> FE Memorial Part. Award, at para 166.

<sup>125</sup> Mathieu Mémoire en Demande Seconde Phase, at p. 15.

<sup>126</sup> Partial Award, at para. 171.

<sup>127</sup> FE Memorial Part. Award, at para. 170; Mathieu Mémoire, at pp. 14-15.

<sup>128</sup> 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.<sup>130</sup>

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.<sup>131</sup>

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,<sup>132</sup> nor the Statutes of the Bank prescribes, *expressis verbis*, a rate

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<sup>129</sup> Transcript, at p. 427.

<sup>130</sup> BIS Counter-Memorial Part. Award, at para. 7.

<sup>131</sup> *Id.*, at para. 133.

<sup>132</sup> 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,<sup>133</sup> 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<sup>134</sup> 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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<sup>133</sup> Partial Award, at para. 204

<sup>134</sup> 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.<sup>135</sup> Dr. Reineccius<sup>136</sup> and Mr. Mathieu<sup>137</sup> 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.<sup>138</sup>

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.<sup>139</sup>

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 share to 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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<sup>135</sup> Transcript, at pp. 373-375.

<sup>136</sup> *Id.*, at p. 388.

<sup>137</sup> Mathieu Mémoire en Demande Seconde Phase, at p. 19.

<sup>138</sup> Transcript, at pp. 395-396.

<sup>139</sup> *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.<sup>140</sup> 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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<sup>140</sup> See *supra* para. 31.

102. The per share value of CHF 168,094,000 is CHF 317.66 which when discounted by 30%<sup>141</sup> 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<sup>142</sup>) and CHF 317.66 per share (the value of the Bank's real estate<sup>143</sup>), 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<sup>144</sup> 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.<sup>145</sup>

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.<sup>146</sup>

105. The Bank challenged First Eagle's representation that First Eagle's "attempt to enjoin the shares recall"<sup>147</sup> was intended to obtain disclosure,<sup>148</sup> and its refusal to arbitrate was intended "to determine the validity" of its "agreement" to arbitrate under Article 54.<sup>149</sup> 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".<sup>150</sup> 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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<sup>141</sup> Partial Award, at para. 209(2) and (3).

<sup>142</sup> See *supra* fn. 4.

<sup>143</sup> See *supra* paras. 99-101.

<sup>144</sup> *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).

<sup>145</sup> BIS Reply Memorial Part. Award, at para. 1.

<sup>146</sup> *Id.*, at para. 2.

<sup>147</sup> *Id.*, at para. 3.

<sup>148</sup> FE Counter-Memorial Counterclaim, at para. 38.

<sup>149</sup> *Id.*, at para 5.

<sup>150</sup> 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."<sup>151</sup>

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"<sup>152</sup> 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.<sup>153</sup>

The Bank pointed out that it is an international organization:<sup>154</sup>

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.<sup>155</sup>

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.<sup>156</sup>

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."<sup>157</sup>

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

<sup>151</sup> *Id.*, at para 5.

<sup>152</sup> FE Counter-Memorial Counterclaim, at para. 59.

<sup>153</sup> BIS Reply Memorial Part. Award, at para. 17

<sup>154</sup> *Id.*, at para. 19.

<sup>155</sup> *Id.*, at paras. 19-20 (some internal citations omitted).

<sup>156</sup> *Id.*, at para. 21 (internal citations omitted).

<sup>157</sup> *Id.*, at para. 24.

applying therefor, order any appropriate provisional measures in order to safeguard the respective rights of the parties.<sup>158</sup>

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."<sup>159</sup> 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)."<sup>160</sup>

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."<sup>161</sup> In addition, First Eagle cited a number of authorities<sup>162</sup> 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."<sup>163</sup> Further, First Eagle provided citations to authorities examining the relation of the New York Convention to suits before national courts.<sup>164</sup>

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 ...."<sup>165</sup> 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."<sup>166</sup>

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<sup>158</sup> *Id.*, at para. 31 (quoting Bank's Statutes, Art. 54(3)).

<sup>159</sup> *Id.*, at para. 32.

<sup>160</sup> FE Counter-Memorial Counterclaim, at para. 64.

<sup>161</sup> *Id.*, at para. 77.

<sup>162</sup> *Id.*, at paras. 85-88.

<sup>163</sup> Klaus Peter Berger, *INTERNATIONAL ECONOMIC ARBITRATION* 331 (1993).

<sup>164</sup> FE Counter-Memorial Counterclaim, at paras. 91-93.

<sup>165</sup> FOUCHARD, GAILLARD & GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, ¶667 (E. Gaillard & J. Savage eds., 1999).

<sup>166</sup> 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."<sup>167</sup> 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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<sup>167</sup> 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."<sup>168</sup> 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,<sup>169</sup> 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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<sup>168</sup> *Supra* fn. 56, at Art. II.

<sup>169</sup> *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 . . .<sup>170</sup>

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.<sup>171</sup>

122. First Eagle opposed the Bank's request for the declaratory Award proposed above.<sup>172</sup> 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.<sup>173</sup>

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,<sup>174</sup> and Claimant No. 1 has apparently not excluded such a possibility,<sup>175</sup> that requirement is satisfied.

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<sup>170</sup> BIS Memorial, at para. 70

<sup>171</sup> Transcript, at p. 388.

<sup>172</sup> FE Reply Memorial Part Award, at paras. 170-175.

<sup>173</sup> *Id.*, at para. 173

<sup>174</sup> Transcript, at pp. 590-600.

<sup>175</sup> *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,<sup>176</sup> 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.<sup>177</sup> Therefore, it is only necessary for the Bank to pay the expenses, EUR 4,436.75, incurred by Claimant No. 3.<sup>178</sup> 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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<sup>176</sup> *Waite & Kennedy v. Germany*, App. No. 26083/94, 30 ECHR p. 261 (1999).

<sup>177</sup> Transcript, at p. 477.

<sup>178</sup> 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.<sup>179</sup> The Tribunal notes that Annex XII ("Arbitration. Rules of Procedure") of the 1930 Hague Agreement<sup>180</sup> 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

<sup>179</sup> 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.

<sup>180</sup> 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<sup>181</sup> 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.<sup>182</sup> 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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<sup>181</sup> 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.

<sup>182</sup> See *infra* para. 134, H.5.

## BANK FOR INTERNATIONAL SETTLEMENTS

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<sup>183</sup> 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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<sup>183</sup> 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 19<sup>th</sup> 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