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

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

The Hague, 22 November 2002

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CHAPTER I – INTRODUCTION

1. On 20 January 1930, the Governments of Germany, Belgium, Great Britain, Italy, Japan and Switzerland concluded at The Hague, the Convention respecting the Bank for International Settlements. The Convention included the Constituent Charter and the Statutes of the Bank (hereafter the Convention, the Constituent Charter and the Statutes of the Bank will be referred to collectively as the "Constituent Instruments"). The Bank for International Settlements (hereafter the "Bank" or "BIS") was organized, by Article 1 of the Statutes, as "a Company limited by shares" and its objects, according to Article 3, were

> to promote the co-operation of central banks and to provide additional facilities for international financial operations; and to act as trustee or agent in regard to international financial settlements entrusted to it under agreements with the parties concerned.

2. In extending invitations to subscribe to capital in the Bank, Article 10 of the Statutes prescribed that "consideration shall be given by the Board [of Directors of the Bank] to the desirability of associating with the Bank the largest possible number of central banks."

3. The shares did not convey any rights in the governance of the Bank. Article 15 of the Statutes provided, in part:

> The ownership of shares of the Bank carries no right of voting or representation at the General Meeting. The right of representation and of voting, in proportion to the number of shares subscribed by each country, may be exercised by the central bank of that country or by its nominee.

4. Because some of the central banks were not, at the time of the founding of the Bank, in a position to subscribe and hold shares and others would have found the financial burden of acquiring and holding the shares onerous, Article 16 of the Statutes stated that "[a]ny subscribing institution or banking group may issue, or cause to be issued to the public the shares which it has subscribed." In accordance with this option, the United States Federal Reserve, the French Central Bank and the Belgian Central Bank issued all or some of the shares which they had subscribed for sale to private parties. At the time of the founding of the

Bank, "a substantial part of [the] share holdings"[1] were held by private parties. French-issued shares were traded on the Paris marché au comptant; Belgian and American shares were traded on the Zurich Nebensegment/marché annexe.[2]

5. As of 2000, there were 529,165 shares of the Bank in issue of which 72,648 were held by private shareholders, *i.e.* 13.73% of the Bank's shares. 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).

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[1] Henry H. Schloss, The Bank for International Settlements, p. 40 (North-Holland Publishing Company, Amsterdam, 1958).

[2] "In February, 1956, average quotations of Bank for International Settlements shares of the French issue on the Paris Bourse were ffrs. 88,140; unofficial quotations on the Brussels Bourse in February, 1956, were bfrs. 10,050 and 10,100 for the American and Belgian issue respectively. Source: Bank for International Settlements." *Id.*, at fn. 7.

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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 9. The present provisions shall be duly accepted by the Bank for the settlement of any dispute, which may arise, between it and one or more of the signatory Governments as to the interpretation or application of its Statutes or the New Plan.

9. In accordance with the procedures prescribed in Article XV of the 1930 Hague Agreement, the Governments of Belgium, France, Germany, Italy and the United Kingdom appointed the five members of the Tribunal for a term of five years. The Government of France, in agreement with the Governments of Belgium, Italy and the United Kingdom, designated the Chairman of the Tribunal.[3] The procedures of the Tribunal are set out in Annex XII of the 1930 Hague Agreement (the full text may be found in Appendix A to this Award), which incorporates Chapter III of the Hague Convention of 1907 for the Pacific Settlement of International Disputes, except as modified by the 1930 Hague Agreement.

[3] Japan waived all its rights under the Agreement with Germany of 20 January 1930, including the Annexes to it, see Art. 8c of the Peace Treaty of 8 September 1951.

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. 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.
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> 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.
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> 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.
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> 3. First Eagle should submit any objections to the reasons stated under paragraph 1 by 10 May 2002.
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> 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.
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> (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.
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> (iii) New legal authorities can be referred to at the Hearing as rebuttal or additional authorities, provided that they are not excessive in number.

(iv) Issues concerning allegedly truncated copies of legal authorities are in the first instance to be resolved between counsel. The Party alleging that authorities are incomplete has the duty to identify them to the Party that submitted them.

50. The full text of all of the above referenced Procedural Orders can be found at www.pca-cpa.org.

51. Public Hearings pursuant to Article XV of the 1930 Hague Agreement and Article 20 of the Rules for Arbitration were held in the Great Hall of Justice at the Peace Palace in The Hague from 26-28 August 2002. At the request of the Parties, their separate claims were heard in parallel with some integration for efficiency and the convenience of the Parties. First Eagle was represented, throughout the hearings, by Mr. Donald Francis Donovan and Mr. Dietmar W. Prager of the Debevoise & Plimpton firm. Mr. Mathieu was represented by Mr. Elie Kleiman and Mr. Guillaume Tattevin of the Freshfields Bruckhaus Deringer firm. The Bank was represented by Mr. Jonathan I. Blackman, Mr. Laurent Cohen-Tanugi and Ms. Claudia Annacker of the Cleary, Gottlieb, Steen & Hamilton firm. Prof. Dr. Mario Giovanoli and Dr. James Freis were also present on behalf of the BIS Secretariat and Prof. Giovanoli intervened in response to a question from the Tribunal on the first day of the Hearings.[4] Dr. Reineccius, appeared *pro se*, on 27 and 28 August; he declined to exercise his right to attend on 26 August during the presentations on the legality of the Bank's actions since the Bank's right to repurchase the shares was not at issue in his claim.

52. In accordance with the 1930 Hague Agreement, simultaneous translations in English, French and German were provided for the Hearings.

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

[4] Transcript, at p. 79.

counsel refrain from referring to the materials introduced as new evidence until the following day's presentations, when Question 2 of Procedural Order No. 3 would be taken up, so as to allow time for opposing counsel to examine the late-submitted material.[5]

[5] *Id.*, at p. 83.

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;

(ii) the identification of the applicable standards for the valuation of the compulsorily recalled shares;

(iii) the application of the standards in (ii) above to the shares which were compulsorily recalled.

The Tribunal found it most economical to treat the first two issues in a single phase and to defer the third issue to a second, final phase, if it should prove necessary.

C. THE PARTIES' SUBMISSIONS

1. Claimant No. 1, Dr. Reineccius

a. ARGUMENTS

60. "[The Bank's use of] the dividend perpetuity (DPM) model for the valuation of the shares applied by the experts charged by the Bank . . . is suitable if a company distributes the major portion of its net profits totally . . . . For the last two financial years, the Bank for International Settlements distributed less than a fifth of the net profit, the DPM is, therefore, not acceptable."

61. "As additional arguments, . . . the Bank refers to the low prices on the stock exchange and the lack of voting right of the private shareholders. The extreme undervaluation of the BIS shares was, first of all, caused by the small dividends and, therefore by the Bank itself. The business policy of the Bank is ruled by the founder members as major shareholders. There is no divisive voting in the General Meetings of the BIS, the exclusion of the private shareholders was decided unanimously, too. Therefore, no particular importance should be attached to the lack of voting right of the private shareholders."

62. "The earning-power value method gives the value of a share as the quotient of the net profit per share and the bond yield . . . . The method of adjusted net asset value for the valuation of the BIS share is, likewise, suitable – not, however, the discount of 45% 'estimated' by the experts of J.P. Morgan & Cie SA. On the contrary, in the case of a well earning bank, we have to think of a premium because the Bank will increase the net assets by its future profits."

63. Dr. Reineccius indicated at the Hearings[6] that he would stipulate that the J.P. Morgan calculations of net asset value ("NAV") were correct.

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.

[6] *Id.*, at p. 331.

2. Claimant No. 2, First Eagle

a. ARGUMENTS

65. In its Memorial, First Eagle asserts:

> Under the Statutes, as well as international law, First Eagle is entitled to compensation equal to the full value of its proportionate interest in the Bank as a whole . . . . To measure the level of compensation due First Eagle, the Bank used a dividend perpetuity model, a variant of the discounted cash flow method. It used the model to value only the flow of dividends, however, even though the Bank regularly allocates the major portion of its profits to build up its assets. By valuing only the dividends, the Bank violated the excluded shareholders' right to participate equally in "the profits" of the Bank – all the profits.[7]
>
> The Bank also calculated its net asset value per share, which came to twice the level of compensation it paid. Rather than returning to the excluded shareholders their pro rata share of net asset value upon their exclusion from the company, the Bank applied discounts for lack of voting rights and non-marketability in the aggregate amount of 45%, which reduced the net asset value per share to roughly the level of compensation yielded by the valuation of the dividend flow . . . . [T]he Bank's shares are identical, and application of the discounts therefore violated the equal-rights guarantee of Article 13 of the Statutes.[8]

66. Exhibit 23, prepared by the Bank in 1969 for the benefit of the Board of Directors, was "an earlier instance of the distribution of profits and assets in which all shareholders were treated alike."[9] First Eagle asserts that the purpose of this memorandum was to determine the premium at which the third tranche would be priced . . . the value of the shares above their par value. In the memo the Bank considered three ways of valuing the shares: (1) a discounted cash flow analysis; (2) the market value; and (3) "the mathematical method". First Eagle argues that the memo records

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[7] FE Memorial, at paras. 15-16.
[8] *Id.*, at paras. 17-18.
[9] Transcript, at p. 170.

that the Bank rejected methods (1) and (2) as flawed and recommended the mathematical method which First Eagle finds to be the NAV method.[10] First Eagle stated that the method determined in 1969 "has governed each of the issuances of shares to central bank shareholders and the Bank only departed from that method in the exclusion [of private shareholders] transaction . . . . In each of those [previous] cases the Bank used NAV minus 30 per cent."[11]

67. Exhibit 15, an internal BIS memorandum written in 1998, states that in a possible buy back, the price offered "should not be viewed as being less than the patrimonial value of each share."[12]

68. The imposition of the discounts would have violated international law even in the absence of the Article 13 guarantee. International Tribunals recognize that in an expropriation setting, the coercive character of the taking precludes the use of discounts for lack of voting rights or non-marketability to reduce the compensation due.[13]

69. First Eagle asserts that the Bank does not urge reliance on the dividend perpetuity model by which it set the excluded shareholders' compensation or the alternative measure of discounted net asset value. "Instead, [the Bank] argues that [it] has satisfied any obligation to the excluded shareholders by paying them compensation that exceeded the stock market trading prices . . . . [B]ecause the market for its shares is structurally flawed, trading prices do not provide reliable evidence of their value."

70. Market price, First Eagle asserts, is what the Bank offered in voluntary buy-back offers in 1936 and 1975; in both cases "they utterly failed."[14]

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[10] *Id.*, at p. 171.
[11] *Id.*, at p. 172.
[12] *Id.*
[13] *Id.*, at p. 199.
[14] *Id.*, at p. 141.

71. First Eagle asserted that the transfer of the shares was illegal because the taking of that property "was not accompanied by full compensation for the property interest that was taken."[15]

> Full compensation for the taking . . . should be more than the Bank's net asset value, or NAV, per share.[16]
>
> Recognizing that NAV is both reliable and conservative, international tribunals have regularly granted compensation measured by NAV when requested to do so by the claimant. Using its own figures, the Bank has therefore deprived First Eagle of some $84 million.[17]

72. First Eagle further argued that:

> All shareholders of the Bank had an equal right, protected by international law, to participate in the fruits of the enterprise earned on the capital they contributed. If the non-central bank shareholders may now be excluded, their equal right to participate can only be vindicated by payment of compensation equal to their proportionate share of the value of the Bank as a whole, in the form of net assets, goodwill, and future prospects. The excluded shareholders, along with the other shareholders, owned the Bank, and that ownership cannot be overridden by the exclusion transaction.[18]

b. APPLICABLE LAW

73. In its Memorial, First Eagle stated that "general principles of international law govern this dispute" and that it, as well as the Bank, agrees that "the rules of general public international law apply to the interpretation of the Statutes and hence to the determination of the excluded shareholders' property interest in the Bank."[19] First Eagle added that "in particular the relevant provisions of the Bank's Statutes

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[15] *Id.*, at p. 29.
[16] FE Memorial, at para. 22.
[17] *Id.*, at para. 25.
[18] *Id.*, at para. 30.
[19] *Id.*, at para. 205.

should be interpreted in accordance with general principles of international law governing the interpretation of treaties, which are expressed in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties of 1969."[20]

74. Further First Eagle referred to and itself relied on a statement of the Bank that the relations of the Bank "with its shareholders are governed by its constituent instruments . . . supplemented as appropriate by general public international law."[21]

c. RELIEF REQUESTED

75. In response to the Tribunal's request during the Hearings for the written, final submissions of the Parties, First Eagle submitted the request that the Tribunal issue an award declaring that:

(i) The Bank has an obligation to pay First Eagle the full, undiscounted value of its proportionate interest in the Bank as a whole;

(ii) The full value of First Eagle's proportionate interest in the Bank must, as a matter of law, equal, at a minimum, First Eagle's pro rata share of the Bank's undiscounted net asset value;

(iii) The Bank's undiscounted net asset value must equal, at a minimum, the undiscounted net asset value calculated by the Bank in consultation with J.P. Morgan (that is, CHF 32,846 as of 30 November 2000), and First Eagle shall have the opportunity to present evidence as to the correct calculation of the Bank's net asset value in the next phase of this proceeding;

(iv) First Eagle is also entitled to additional compensation representing the amount by which its proportionate interest in the Bank's value as a going concern exceeds

[20] *Id.*, at para. 206.
[21] *Id.*, at para. 205.

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;

(viii) First Eagle shall have the right to appropriate interest on the amounts awarded;

(ix) First Eagle shall be awarded the costs of the proceedings.

d. STIPULATION REGARDING CALCULATION OF NET ASSET VALUE

76. First Eagle stated during the oral hearings[22] that it was prepared to stipulate, if the Bank also so stipulated, that the net asset value is as determined by J.P. Morgan in Exhibit 43 of its report. However, since the J.P. Morgan Report did not contain a calculation of the value of the Bank's real estate, First Eagle proposed that the Tribunal appoint a Tribunal expert to determine the real estate value whose valuation would be final and would be added to the net asset value.

[22] Transcript, at p. 329.

3. Claimant No. 3, Mr. Mathieu

a. ARGUMENTS

77. The resolution of 8 January 2001 amending the Statutes (modifying Articles 6, 12, 15-18, adding Article 18A) was illegal because it did not conform to the Constituent Instruments of the Bank. "An analysis of the Statutes and the Charter of the Bank in conformity with settled principles of international law regarding the interpretation of treaties,[23] does not authorize the addition of an article. Even if such an addition had been authorized, it should not have been effected pursuant to Article 57 of the Bank's Statutes which provides that amendments may be 'adopted by a majority of the General Meeting', but rather pursuant to Article 58 of the Statutes which provides that: 'the amendment must be adopted by a two-thirds majority of the Board, approved by a majority of the General Meeting and sanctioned by a law supplementing the Charter of the Bank'."[24]

78. Mr. Mathieu concluded that the resolution purporting to amend the Statutes, as an act of an international organization not in conformity with its Constituent Instruments, was null and void. Thus, the recall of the privately held shares is null and void as to all the private shareholders. Mr. Mathieu cited as evidence that the Bank did not have the power to exclude the private shareholders, an internal memo authored by Mr. Weiser in 1936 that stated: "one thing the General Meeting cannot do is to deprive shareholders of their membership in the common venture."[25]

79. The illegality of the Bank's resolution also constitutes an unlawful act (*acte illicite*) under international law subjecting the Bank to a claim for damages.

80. Further, even should the Tribunal not find the Bank's resolution to have been illegal, the compulsory recall of the shares constitutes an unlawful expropriation. The compulsory recall was carried out by a subject of

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[23] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 31(3)(c).
[24] Transcript, at pp. 17-19, 25-26.
[25] Exhibit 35, Transcript, at p. 12.

international law, deprived the claimant of his property, *i.e.* his shares, and was inspired by economic and financial rather than political considerations. Further, the Bank has violated general principles of international law because the conditions necessary for the lawful expropriation of property – the existence of a legislative foundation, service to the public interest, respect for the principle of non-discrimination, and just and fair compensation – were not met.

b. APPLICABLE LAW

81. Mr. Mathieu asserted that the present dispute is governed by the Constituent Instruments of the Bank. He further stated that "en l'absence de précision ou dispositions contraires des Instruments constitutifs de la BRI, le droit international général est également applicable".

82. Mr. Mathieu also contended that, since the award will be rendered in The Netherlands and since the award can conceivably be enforced in Switzerland where the Bank is located, the Tribunal must consider the international public policy of these two countries.

c. RELIEF REQUESTED

83. Mr. Mathieu, in his submission "Conclusions modificatives" of 28 August 2002, asked the following:

> M. Mathieu et la Société de Concours Hippique de La Châtre (ci après, *"le Demandeur"*) requièrent qu'il plaise au Tribunal Arbitral recevoir les présentes conclusions modificatives qui annulent et remplacent les conclusions figurant en pages 56 à 58 du Mémoire en demande en date du 13 mai 2002 et, y faisant droit, statuer comme suit:
>
> 1. A titre principal:
>
> 1.1. Dire et juger que la résolution du 8 janvier 2001 est illégale;
>
> 1.2. La dire en conséquence nulle;

1.3. Constater le caractère irréversible des opérations de mise en œuvre de ladite résolution et, en particulier, l'impossibilité de réinscrire les actions de la Banque des Règlements Internationaux (ci-après *"la BRI"*) à la cote des marchés boursiers réglementés de Paris et de Zurich; dire que cette impossibilité fait dès lors obstacle à toute restitution à l'identique;

1.4. Ordonner, en conséquence de l'illégalité de la résolution du 8 janvier 2001 et de la nullité l'invalidant, une restitution intégrale par équivalent, et en conséquence condamner la BRI au paiement au Demandeur d'une compensation financière correspondant: (i) à la valeur patrimoniale des actions dont le Demandeur a été privé, estimée au 8 janvier 2001, date de la résolution invalidée, augmentée des intérêts capitalisés ayant couru depuis cette date jusqu'à la date du parfait paiement au Demandeur; et (ii) au montant des dividendes dont le Demandeur a été privé depuis le 8 janvier 2001, avec intérêts capitalisés depuis la date de leur mise en versement jusqu'à la date de parfait paiement au Demandeur;

2. En outre:

2.1. Dire et juger qu'en adoptant une résolution illégale, la BRI a engagé sa responsabilité internationale;

2.2. Dire et juger que l'opération de retrait forcé constitue une expropriation illicite de nature à engager la responsabilité de la BRI;

2.3. Dire et juger que le Demandeur a subi un dommage du fait des actes illicites de la BRI;

2.4. En conséquence, condamner la BRI au paiement au Demandeur d'une compensation financière correspondant: (i) dans l'hypothèse où le Tribunal

ne ferait pas droit aux demandes sollicitées au point 1. ci-dessus, à la valeur patrimoniale des actions dont le Demandeur a été privé, estimée au 8 janvier 2001, date de la résolution querellée, augmentée des intérêts capitalisés ayant couru depuis cette date jusqu'à la date du parfait paiement au Demandeur; et en toute hypothèse (ii) au préjudice matériel et moral subi par le Demandeur;

3. Dans tous les cas, aux fins de calcul de la réparation par équivalent pour la privation de la propriété des actions:

3.1. Rejeter les estimations de la BRI; et:

3.2. Ordonner, le cas échéant par une sentence intérimaire, qu'il soit fait application de la méthode de l'actif net réévalué pour estimer à la date du 8 janvier 2001 la valeur des actions reprises;

3.3. Dire qu'aucune décote ne viendra diminuer les estimations retenues;

3.4. Dire en conséquence que le montant du supplément d'indemnisation que devra verser la BRI au Demandeur, venant s'ajouter aux sommes que la BRI a d'ores et déjà reconnu devoir, correspondra à la différence entre le montant de l'indemnisation reconnue et celui qui sera établi par application de la méthode de l'actif net réévalué;

4. Subsidiairement:

4.1. Dire et juger qu'en tout état de cause la BRI doit aux actionnaires évincés la valeur de leurs actions;

4.2. Constater que cet engagement n'a pas été rempli;

4.3. Retenir en conséquence une méthode plus appropriée pour évaluer la valeur des actions reprises;

4.4. Dire que cette valeur doit être déterminée par la méthode de l'actif net réévalué;

5. Dans l'hypothèse où la Sentence du Tribunal serait définitive, dire et juger que la BRI paiera au Demandeur les frais de toute nature exposés dans le cadre de la procédure arbitrale, et en particulier mettre à sa charge les honoraires des Conseils du Demandeur.

84. Mr. Mathieu indicated that he joined the other Claimants in the stipulation described in paragraph 76 above regarding the use of the NAV as determined in Exhibit 43 of the J.P. Morgan Report with the addition of the value of the Bank's real estate.[26]

4. Respondent, The Bank for International Settlements

a. ARGUMENTS

(i) Lawfulness of the Share Redemption

85. The Bank filed its Statement of Defense and Counterclaim on 14 January 2002 and its Counter-Memorial on 22 July 2002. Pursuant to Procedural Order No. 3, the Bank first addressed the lawfulness of the compulsory redemption of the privately held shares. The Bank maintained that it had the authority to amend the Statutes of the Bank under Article 57 of the Statutes. The Bank asserted that "any Article of the Statutes", other than the "reserved" articles listed in Article 58, might be amended by a two-thirds majority of its Board of Directors and adoption of such proposal by a majority of the General Meeting "provided that such amendments are not inconsistent with the provisions of the Articles enumerated in Article 58."[27]

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[26] Transcript, at p. 318.
[27] Counter-Memorial, at para. 8.

86. The Bank denied that a valid distinction existed between "adding" an article or "amending" an article as Mr. Mathieu contended. "'Amendment' includes any change, including by way of adding new terms to an existing instrument or agreement."[28] Further, there is no basis for Mr. Mathieu's argument that the Article 58 procedure for the amendment of reserved articles, requiring a supplement to the Bank's Charter and Swiss legislative approvals, should be applied to the unreserved articles. The Statutes explicitly distinguish between amendment of the unreserved articles by the procedures of Article 57 and amendment of the reserved articles under Article 58. The Bank has made no amendment of the reserved articles.[29]

(ii) The Consequences of a Finding of Unlawfulness

87. The Bank asserted that if the Tribunal finds the transaction illegal, (1) the Bank would have to restore the recalled shares to the private shareholders; or (2) the private shareholders could only elect to retain the compensation that they had been paid for their shares on the basis of a voluntary agreement with the Bank. The Bank argued that a finding of unlawfulness would render impossible the increase in compensation for the recalled shares sought by First Eagle.[30]

(iii) The Standard of Valuation

88. The Bank disputes First Eagle's assertion that the private shareholders possessed "a proportionate interest in the Bank as a whole".[31] The Bank contended that the shareholders of the Bank lack the fundamental characteristics of equity ownership; they lack: voting rights (Statutes, Article 14), the right "to elect members of the board (id)", and the right to "transfer shares without the approval of the Bank and the central bank of the state to whose national issue the shares belong (Statutes, Art. 12)."[32] New central banks have paid more than the market price for

[28] *Id.*, at para. 9.
[29] *Id.*, at para. 11.
[30] *Id.*, at para. 90.
[31] FE Memorial, at para. 15.
[32] Counter-Memorial, at para. 20.

shares of their own new national issue because "these shares could give them what no other shareholder could ever obtain, participation in the governance and control of the Bank through the voting rights that the existence of these new shares uniquely provided to them."[33]

89. As regards the method of valuation applied by the Bank in awarding compensation for the repurchased shares, the Bank asserted that the standard of valuation to be applied is the fair market value represented by the market price of the Bank's publicly traded shares rather than the value of the proportionate ownership in the Bank by the shareholders as suggested by Claimant First Eagle. The methods of valuation proposed by First Eagle are useful to "approximate what fair market value would be in the absence of a functioning market for the property at issue. Where there is such a market, the market price itself furnishes the standard of fair market value."[34]

90. The Bank further contended that the shares of the Bank lack the fundamental characteristics of equity ownership because they lack voting rights, the right to elect members of the Board of Directors, and the right to transfer shares without the consent of the Bank and the central banks of the respective member countries. Further the Bank maintains that shareholders have no right to participate in the profits of the Bank other than the right to receive dividends, and the right to participate in the assets of the Bank is limited to the event of the Bank's liquidation.[35]

91. The Bank also asserted that its shares are traded on recognized stock markets as opposed to the contention by First Eagle that the shares are not traded in a fully efficient market. International law does not require an "efficient market", but simply requires that the market price be freely and fairly determined in a regular market. Therefore, the market price for the Bank's shares furnishes the best and most logical indication of the fair market value at the time the private shareholders were notified of the mandatory redemption. The Bank further submitted that the redemption price satisfied the compensation standards of Human Rights law. The

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[33] *Id.*, at para. 24.
[34] *Id.*, at para. 27.
[35] *Id.*, at para. 104.

Bank relied on the Convention for the Protection of Human Rights and Fundamental Freedoms,[36] which the Bank contends does not confer on the expropriated owner an unqualified right to compensation of the full value of the expropriated property. The Bank also relied on the American Convention on Human Rights,[37] which provides for "just" as opposed to "full" compensation (Article 21(2) of the Convention). The Bank, therefore, asserts that the standard is one of appropriate, reasonable, fair or equitable compensation.

92. While the Bank accepted that public international law applies to the dispute, it contended that the share redemption should be evaluated under the standards of Human Rights law. The Bank rejected First Eagle's contention that the redemption by the Bank of its own shares is subject to the rules governing the taking of "alien" property by a state. The Bank argued that there is no reason to conclude that private shareholders should be treated as having been aliens in their legal relations to the Bank. The relations between the Bank and its shareholders are subject to the Bank's exclusive organic jurisdiction, *i.e.* the jurisdiction of an organization over its constituents. The shareholders are part of the internal order of the Bank; Human Rights law is the correct standard for a decision concerning any alleged interference with property rights due to the exercise of legislative and administrative powers over the privately held shares. The share redemption was not discriminatory under the Human Rights standard; there was no differential treatment without an objective and reasonable justification and without a relationship of proportionality between the means employed and the aim sought to be realized. The repurchase did not constitute a fundamental change in the Bank that would have required Article 58 procedures. Rather "the existence of the private shareholders just arises out of a tolerance that was granted to central banks initially."[38] "Article 57 was chosen [because] it was not believed to be a change which would affect the basic character of the Bank."[39]

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[36] 4 November 1950, 213 UNTS, p. 222 (Bank's LA-130).
[37] 22 November 1969, 123 UNTS, p. 1144 (Bank's LA-132).
[38] Transcript, at p. 78.
[39] *Id.*, at p. 79.

93. The Bank asserted that First Eagle wrote to the Bank on 23 June 2000 requesting that the Bank should "consider a public share repurchase on terms similar to the recent share issuances." The Bank concluded that First Eagle's allusion to recent share issuances "presumably refers to the 1999 subscription of new central banks at 30 per cent off net asset value."[40]

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

95. The Bank counterclaimed against First Eagle requesting damages for breach by First Eagle of Article 54 of the Statutes in wrongfully ignoring that jurisdictional commitment and suing the Bank in the United States to avoid the jurisdiction of the Tribunal, and for the costs of the arbitration.

b. APPLICABLE LAW

96. The Bank stated that its internal governance, *i.e.* the relation of the Bank to its shareholders, and acts such as the compulsory redemption of the privately held shares performed by the Bank *jure imperii*, are governed by its Constituent Instruments, supplemented by applicable general public international law.[42]

97. The Bank contested Mr. Mathieu's assertion that the Tribunal should take into account Dutch and Swiss public policy. The Bank argued that the Tribunal's Award is governed solely by public international law and that national courts lack jurisdiction *ratione materiae* to annul or invalidate an award of an international court or Tribunal under international law, particularly when it involves a sovereign party acting *jure imperii*.[43]

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[40] Exhibit 22, Transcript, at p. 325.
[41] Transcript, at p. 331.
[42] Counter-Memorial, at paras. 48-51.
[43] *Id.*, at paras. 53-54.

98. The Bank argued that the share redemption is also subject to the rules of Human Rights law when property is taken for public purposes. "While international organizations usually do not exercise personal or organic jurisdiction over private parties other than their own officials, such jurisdiction may be conferred on an organization by its member states or by the private parties' voluntary acceptance of the organization's internal law" excluding their relations from the state's legislative, administrative, and adjudicative competence.[44] The Bank analogized the present case where it alleged the private party has chosen to become a part of an international organization to the bond between a state and its nationals or residents. The Bank's jurisdiction over private parties with whom it has this special relationship is "parallel to the jurisdiction of states over their nationals."[45] " . . . [T]he European Court of Justice has relied

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[44] See, *e.g. Weiss v. Institute for Intellectual Cooperation*, 81 Journal de droit international, pp. 744, 745 (Fr. Conseil d'Etat, 20 February 1953) ("[The claimant is] an official of a body with an international character; consequently the Conseil d'Etat has no jurisdiction, in the matter of a claim, in respect of difficulties arising between said international body and one of its officials.") (Bank's LA-101); *ICEM v. Chiti*, II Italian Y.B. of Int'l L., pp. 348, 350-351 (1976) (It. Cass., 7 November 1973) ("Case law has also upheld that acts of self-organisation and the regulation of organisational relations, amongst which are those of public employment, are an expression of the sovereign power of the international law subject in the same way that they are, in Italy, the expression of the sovereign power of the Italian State and are governed by public law . . . . [These acts] should be governed by the international organisation's own rules and are consequently exempted from the Italian legal system as well as from Italian jurisdiction, because of the said immunity.") (Bank's LA-102); *In re Dame Adrien*, 6 Ann. Dig., p. 33 (Fr. Conseil d'Etat, 17 July 1931) (Conseil d'Etat stating it had no competence because: "[t]he petitioners [French officials of the Reparations Commission] belonged to an international organisation and their position was determinable only by international public law") (Bank's LA-103); Finn Seyersted, *Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organisations (2)*, 14 ICLQ, pp. 493, 505 (1965) (Bank's LA-104); Hans-Peter Kunz-Hallstein, *Die Beteiligung Internationaler Organisationen am Rechts und Wirtschaftsverkehr*, Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil, pp. 819, 824 (1987) ("Aufgrund der Organisationsgewalt der Internationalen Organisationen [comprising personal jurisdiction] sind ihre inneren Angelegenheiten der Legislationsgewalt der Staaten und deren Gerichtsbarkeit der Sache nach (*ratione materiae*) unmittelbar entzogen.") (Bank's LA-105), *id.*, at p. 73, fn. 90.

[45] Counter-Memorial, at para. 124. First Eagle relies on the International Court of Justice's Advisory Opinion in *Reparations for Injuries Suffered in the Service of the United Nations* as support for its suggestion that the present organic dispute should nonetheless be subject to the rules governing the taking of alien property. FE Memorial, at para. 263. That case is not instructive here. There, the International Court of Justice ("ICJ") had to determine whether the

exclusively on Human Rights law to decide any alleged interferences with property rights by the European Community in the exercise of its legislative or administrative powers over private parties."[46] "*A fortiori*," the Bank asserted, "human rights law applies to the organic relations between the BIS and its shareholders . . . ."[47]

c. RELIEF REQUESTED

99. In response to the request of the Tribunal for final written submissions, the Bank stated:

> The Bank requests that the Tribunal issue an award:
>
> 1. declaring that the Bank is an international organization and that its relations with its shareholders are governed by its constituent instruments and applicable general public international law;
>
> 2. declaring that the mandatory redemption of the Bank's privately held shares was lawful;
>
> 3. declaring that the standard of compensation for the redeemed shares is fair market value;
>
> 4. declaring that the Bank paid fair market value for its shares by compensating the former private shareholders at roughly twice the market price of its shares on 8

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 respect to its agents, recognizing the existence of some system of attribution even in external relations. *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, at pp. 184-185 (Bank's LA-59), Counter-Memorial, para. 124, at fn. 92.

[46] See, *e.g.* Case 4/73, *Nold v. Commission*, ECR I, pp. 491, 508, at para. 14 (1974) (Bank's LA-108); Case 44/79, *Hauer v. Rheinland-Pfalz*, ECR, pp. 3727, 3745-3746 (1979) (Bank's LA-109), *id.*, at p. 75, fn. 94.

[47] Counter-Memorial, at para. 125.

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.

In Section C of Procedural Order No. 3, the Tribunal said:

> 1. Although only Mr. Mathieu and the Bank have raised Issue 1 above, both contend that a finding of unlawfulness would affect the recall program and all those who were shareholders as of 8 January 2001. A finding of unlawfulness of the compulsory recall of shares could therefore affect all the Claimants in these cases.

Accordingly, the Tribunal stated in Section C.1 and C.2:

> 1. The Tribunal requests Mr. Mathieu and the Bank to address all matters they deem relevant to their contentions with respect to the lawfulness of the recall program including its consequences for those who were shareholders as of 8 January 2001;
>
> 2. The Tribunal requests Dr. Reineccius and First Eagle to address all matters they deem relevant to the scope of the possible consequences of a finding of unlawfulness of the recall program for those who were shareholders as of 8 January 2001.

101. It will be recalled that Claimant No. 1, Dr. Reineccius, indicated that he did not believe that there was substance to the claim raised by Claimant No. 3 and, accordingly, would not make a written submission on this matter. However, he reserved his right to make comments on this matter at the Hearings. He later notified the Secretary of the Tribunal that he

would not attend the Hearing on the day that this particular issue was examined.

102. Similarly, First Eagle, in its Memorial of 6 May 2002, stated that "The Bank's authority under its Statutes to effect a mandatory repurchase or partial liquidation upon payment of full compensation is not at issue in the proceeding between First Eagle and the Bank."[48] Nonetheless, First Eagle did avail itself of the opportunity to inform the Tribunal, in its Memorial and at the Hearing, of its view of the scope of possible consequences of a finding of unlawfulness of the recall program.

103. The Tribunal will consider first Mr. Mathieu's arguments with respect to the lawfulness of the recall program. Depending upon its decision about the lawfulness of the recall program, the Tribunal will then turn to the arguments of Mr. Mathieu and First Eagle with respect to the possible consequences of a finding of unlawfulness.

A. FIRST PRELIMINARY ISSUE: THE CHARACTER AND STATUS OF THE BANK

104. The first preliminary issue in the context of question 1 which the Tribunal must address is the legal character and status of the Bank.

105. The Tribunal notes that the rather complicated manner in which the Bank was established must be seen in light of the stage of development of international law in 1930. Apparently, at that time some of the parties to the treaty had doubts as to whether a treaty could establish under public 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

[48] FE Memorial, at para. 362.

company could not be subjected to Swiss law. This complicated system does not exclude the applicability of Swiss law for formalities, for instance as to the procedure for general meetings of the Bank, where this is not in conflict with the relevant instruments of international law.

107. Switzerland, however, which takes a monist approach, considers that international law is automatically valid in the Swiss legal order, *i.e.* without needing any act of transformation or incorporation. Accordingly, the Swiss Government granted the Charter by merely ratifying the Convention, after it had been approved by the Swiss Parliament, without enacting any additional legislation. This practice has been followed for all amendments that fell under Article 58 of the Statutes when a "reserved" article was being amended. The Government of Switzerland, by approving this amendment, "sanctioned [the amendment] by a law supplementing the Charter of the Bank" in the sense of Article 58 of the Statutes.

108. The Constituent Instruments confirm that the Bank was established under international law in conformity with a treaty between the Governments of Germany, Belgium, France, the United Kingdom, Italy, Japan[49] and Switzerland, which was concluded on 20 January 1930. Under Article 1 of the Convention, Switzerland undertook "to grant to the Bank for International Settlements, without delay, the following Constituent Charter having force of law . . . . " By approving the Convention, the Swiss Parliament gave the Swiss Government the competence to ratify this treaty and to grant the Constituent Charter, which is an integral part of the Convention. Article 1 of the Charter stated "[t]he Bank for International Settlements . . . is hereby incorporated". Article 2 of the said Charter added that the constitution, the operations and the activities of the Bank were "defined and governed by the annexed Statutes". The Statutes of the Bank and its Constituent Charter were thus determined by an intergovernmental agreement and were annexed to the Convention. The granting of the Charter by Switzerland did not thereby subordinate the Bank to Swiss law. Paragraph 5 of the Charter provided that

[49] See *supra* fn. 3.

> The said Statutes and any amendments which may be made thereto in accordance with Paragraphs 3 or 4 hereof respectively shall be valid and operative notwithstanding any inconsistency therewith in the provisions of any present or future Swiss law.[50]

Thus, the sequence of steps by which the Bank was established demonstrates its international treaty origin. The Bank was created by Governments, through an international instrument, which instrument obligated Switzerland to provide a venue and local status, as well as prescribed immunities. The Bank is chartered as a company limited by shares under Swiss law, while it is registered as an "Internationale Organisation mit eigenem Rechtsstatus" in the "Handelsregister des Kantons Basel-Stadt Hauptregister".[51]

109. The declaration of the Swiss Federal Council (Swiss Federal Government) to the Swiss Federal Parliament of 7 February 1930 makes the sequence of steps of establishment and the preeminence and independence of the international character of the Bank clear:

> La convention concernant la banque des règlements internationaux distingue entre les dispositions conventionnelles proprement dites et la charte constitutive de la banque, qui est réputée constituer un acte de droit interne suisse . . . . Par les premières, la Suisse s'engage à promulguer la charte constitutive et à ne pas la modifier sans le consentement des Etats signataires; en outre, la mise en vigueur et la durée du traité s'y trouvent réglées; enfin, il est prévu, pour le règlement de tous différends survenant entre les Etats contractants, une instance arbitrale . . . . Le contenu de la charte, qui doit être accordée par la Suisse, se trouve intégralement dans la convention. La charte octroie à la banque la personnalité juridique du droit suisse, sanctionne ses statuts nonobstant toute contradiction avec les dispositions impératives de ce droit, et énonce ses privilèges fiscaux et administratifs . . . .[52]

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[50] See also Constituent Charter, at para. 5.
[51] See Counter-Memorial, at para. 36, fn. 22.
[52] Feuille fédérale de la Confédération suisse, Vol. 1, p. 87 (1930).

110. By the same token, the Swiss commitment not to apply Swiss law in particular to the operations and activities of the Bank was matched by a commitment by the treaty partners establishing the Bank not to change the Statutes in ways that would impose upon Switzerland a different regime, without Swiss concurrence:

> Dans la charte, la Suisse reconnaît, en outre, les statuts de la banque, ainsi que leurs modifications éventuelles, même si les statuts portent atteinte aux dispositions impératives du droit suisse actuel ou futur . . . . Il y a lieu de noter, en particulier, que les dispositions statutaires essentielles ne peuvent être modifiées que par une loi additionnelle à la charte de la banque . . . . Le caractère de la banque – c'est une des conditions de la conclusion de la convention par la Suisse – ne peut donc être modifié sans l'assentiment de notre pays.[53]

111. And, indeed, the Statutes, which were part of the Convention, specify, in Article 60 (currently Article 58), those provisions of the Statutes which, in addition to the adoption by the Bank's amendment procedure also required the enactment of a law "supplementing the Charter of the Bank." The same condition is inserted in Paragraph 4 of the Charter of the Bank, which was also part of the Convention.

112. While the internal structure of the Bank was, according to Article 1 of the Statutes, "a Company limited by Shares," and the Board of the Bank was comprised, on a permanent basis, of the governors of the central banks of the seven founding States and their nominees, the essential international character of the Bank is apparent from its treaty origin.

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

[53] *Id.*, at pp. 92 and 93.

> reconstruction work undertaken by the Financial Committee of the League of Nations or independently of these schemes. It was therefore natural enough that the monetary and political authorities soon became interested in the idea of substituting for such ad hoc and temporary associations a more permanent system of cooperation.[54]

114. From its inception, the Bank was charged with the performance of a particularly urgent international task. Article 3 of the original Statutes (which is unchanged in the current Statutes) sets out the objects of the Bank in general terms:

> The objects of the Bank are: to promote the co-operation of central banks and to provide additional facilities for international financial operations; and to act as trustee or agent in regard to international financial settlements entrusted to it under agreements with the parties concerned.

Article 4 of the original Statutes, which was abrogated in 1969 (long after it ceased to be relevant to the work of the Bank), makes clear that the principal reason for the creation of the Bank was the management of the so-called "New Plan" or "Young Plan," as it has come to be known, for the settlement of German reparations, a major international and intergovernmental problem at that time.

115. The Bank has cited a number of international instruments that explicitly recognize the Bank as an international organization:[55] the Headquarters Agreement with Switzerland of 1987,[56] the Host Country Agreement

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[54] R. Auboin, The Bank for International Settlements, 1930-1955, Essays in International Finance, No. 22, Map 1955, at pp. 1-2 (Bank's LA-25).

[55] Counter-Memorial, at para. 40.

[56] Accord entre le Conseil fédéral suisse et la Banque des Règlements 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).

Between the Bank and the People's Republic of China of 1998,[57] and the Host Country Agreement with Mexico of 2002.[58]

116. Dr. Reineccius and Mr. Mathieu accept the identity of the Bank as an international organization. First Eagle raises questions about the Bank's identity.[59] First Eagle is incorrect in stating that the above cited Headquarters Agreements do not recognize the Bank as an international organization. Such recognition clearly flows from the provisions of the Agreements. First Eagle begs the question when it contends that, unlike the World Bank and the International Monetary Fund, the Bank for International Settlements has private shareholders and thus cannot be an international organization. That is precisely the question being considered.

117. Nor is First Eagle correct in stating that because the Bank performs some commercial activities common to private sector banks, it cannot be an international organization. Any international organization may have to engage in some private sector activities in pursuit of its public functions and does not automatically and *pro tanto* lose its public international legal character because of them. The fact that international organizations use many of the same accounting techniques as private entities tells us nothing, for these are methods for control and efficiency which are required, in one form or another, in any large scale collaboration. Nor is the Bank the only international organization that shows a profit. But even if the Bank were singular in this regard, or its profits far exceeded those of other international organizations, First Eagle itself acknowledges that

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[57] Art. 1 (Legal Personality and Capacity) reads: "The Government acknowledges the international legal personality and the legal capacity of the Bank within the People's Republic of China, including the HKSAR." Host Country Agreement between the Bank for International Settlements and the People's Republic of China Relating to the Establishment and Status of a Representative Office for the Bank of International Settlements in the Hong Kong Special Administrative Region of the People's Republic of China, 11 May 1998 (Bank's LA-17).

[58] Art. 2, para. 1 (Legal Personality and Capacity) reads: "The State acknowledges the international legal personality and the legal capacity of the Bank with the State." Host Country Agreement between the Bank for International Settlements and the United Mexican States Relating to the Establishment and Status of a Representative Office of the Bank for International Settlements in Mexico, Diario Oficial de la Federación, 20 June 2002, at 3 (Bank's LA-18).

[59] See FE Memorial, at paras. 229-239.

there is a difference between a profit-making and a profit-maximizing entity. In the declaration by the Swiss Federal Council (Swiss Federal Government), which was considered earlier,[60] it was noted that

> La banque n'a pas pour but principal de faire des bénéfices. Sans doute, les statuts prévoient-ils la possibilité de gains considérables, mais ceux-ci reviendront, en première ligne, aux banques d'émission qui ont le droit de souscrire les actions. La banque des règlements internationaux tend à des buts d'intérêt général . . . .[61]

The issue was not that the Bank might make profits, the possibility of which was taken for granted. It was the purpose for which the Bank was created, to which such profits had to be applied.

118. For the above reasons, the Tribunal finds that the Bank for International Settlements is a *sui generis* creation which is an international organization.

B. Second Preliminary Issue: The Applicable Law with Respect to Question 1

119. The Tribunal turns now to the second preliminary issue in the context of question 1, *viz*., which law applies to the question of the legality of the Bank's recall of 8 January 2001. The question of the applicable law with respect to the valuation of the recalled shares, if the Tribunal reaches it, must be treated separately, as will be explained below.

120. As will be recalled, neither Dr. Reineccius nor First Eagle challenged the legality of the recall or contended that it was *ultra vires* the Statutes. Mr. Mathieu, in contrast, did raise this argument, contending that the amendments of the Statutes of 8 January 2001 were void *ab initio* and asking for a *restitutio in integrum*, reinstating the private shareholders.[62]

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[60] See *supra* para. 109.
[61] Feuille fédérale de la Confédération suisse, *supra* fn. 52, at p. 95.
[62] Mémoire en Demande, at pp. 5-6; Transcript, at p. 89, lines 18-27.

121. Mr. Mathieu framed his argument in terms of the constituent instruments of the Bank, averring that only if there were *lacunae* or inclarities in the constituent instruments should there be a reference to international law. He also submitted that there was a contingent role for Dutch and Swiss *ordre public international*.

122. The Bank agreed on the role of the Constituent Instruments, but it was particularly concerned that municipal law not be applied and submitted that

> Because the Bank is an international organization, issues implicating its organic principles or internal governance (such as the relation of the Bank to its shareholders) are necessarily governed by public international law.[63]
>
> Claims arising out of an international organization's acts or omissions in the exercise of its sovereign powers can only be governed by public international law. In amending its Statutes to withdraw its privately held shares, the BIS did not act as a private party. Rather, it exercised its legislative authority under Article 57 of the Statutes, which authorizes the BIS to amend its Statutes, including private shareholders' statutory rights. The resolution of the EGM of 8 January 2001 which enacted the amendments effecting the redemption of the privately held shares therefore constitutes a *jure imperii* act which is governed by the BIS's constituent instruments and applicable general public international law.[64]
>
> In sum, the rights of shareholders in the BIS are governed by the BIS's constituent instruments and applicable general public international law, which likewise determine the validity and legality of the redemption of their shares and its legal consequences.[65]

[63] Counter-Memorial, at para. 48.
[64] *Id.*, at para. 50.
[65] *Id.*, at para. 51.

123. The Bank is correct in asserting that "issues implicating its organic principles or internal governance" are governed by international law. But the Bank is wrong in assuming that this statement means that it has "sovereign powers" or that acts, such as the recall of shares, fall in the category of *acta jure imperii*. While states have sovereign powers, an international actor does not, *qua* international actor and by virtue of that status, have sovereignty. As for the distinction between *acta jure imperii* and *acta jure gestionis*, it is used in municipal courts in order to determine whether a foreign state or its agency or instrumentality that has not consented to the local jurisdiction will benefit from immunity from its judicial jurisdiction and execution. The distinction has no relevance in a public international forum, with respect to a state or to any other international actor which is subject to its jurisdiction.

124. Mr. Mathieu errs in contending that Dutch and Swiss *ordre public international* apply.[66] The clear intention of the Agreement between The Netherlands and the Permanent Court of Arbitration of 30 March 1999,[67] as well as of the Headquarters Agreement between the Bank for International Settlements and Switzerland of 10 February 1987[68] was to exclude the application, respectively, of Dutch and Swiss legislative jurisdiction. Moreover, the purpose of paragraph 5 of the Constituent Charter of the Bank, which is part of the 1930 Hague Agreement, would be frustrated if, its terms notwithstanding, Swiss *ordre public* principles applied.

125. The Constituent Instruments of the Bank[69] are assumed, by both Mr. Mathieu and the Bank, to resolve definitively the particular issue of the legality of the recall of the private shares by the amendment of the Statutes on 8 January 2001. Neither of these Parties adduced other legal instruments that might govern this issue, with the exception of the Vienna Convention on the Law of Treaties of 1969, which was invoked

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[66] Mémoire en Demande, at pp. 7-8.

[67] Agreement Concerning the Headquarters of the Permanent Court of Arbitration between the Kingdom of the Netherlands and the Permanent Court of Arbitration, 30 March 1999, Art. 3.

[68] *Supra* fn. 56.

[69] The Statutes were concluded on 20 January 1930; the text currently in force is as amended on 8 November 1999.

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.

128. Despite the fact that Article 57 speaks of amendments being proposed to the General Meeting, Article 47 of the Statutes provides:

> Extraordinary General Meetings shall be summoned to decide upon any proposals of the Board
>
> (a) to amend the Statutes;
>
> . . . .

The Statutes do not prescribe a special notice provision for Extraordinary General Meetings; it would appear that the requirement of three weeks' notice for General Meetings, as stated in Article 44, applies, as well, to Extraordinary General Meetings. Nor is there a significant difference in the voting requirements of General Meetings and Extraordinary General Meetings with respect to amending the Statutes.

129. Amendment of any articles of the Statutes, other than the twelve enumerated, reserved articles, requires a proposal by a two-thirds majority of the Board to the General Meeting and adoption by a simple majority of the General Meeting. Amendment of any of the twelve reserved articles, specified in Article 58 of the Statutes, requires *adoption* by a two-thirds majority of the Board and approval by a majority of the General Meeting. There would appear to be no substantial difference between the Board proposing by a two-thirds majority (Article 57 of the Statutes) or adopting by a two-thirds majority (Article 58 thereof). The only significant difference between amendment of the articles, except for the twelve reserved articles, is that Article 58 requires the sanction of Swiss law supplementing the Charter of the Bank after approval by a majority of the General Meeting, for reasons that were explained above. In contrast, amendment of the unreserved articles of the Statutes does not require the enactment of such a law.

130. The reserved articles enumerated in Article 58, for which the special amendment procedure is to be applied, relate to the following items:

> (i) Moving the registered office of the Bank from Basle (Article 2);
>
> (ii) Amending the objects of the Bank (Article 3);

(iii) Increasing or reducing the capital of the Bank and the prescribed distribution of an increase in the Bank's capital (Article 8);

(iv) Changing the regime which would assign voting or representation to shareholders as such (Article 14);

(v) Changing the principle that the operations of the Bank must conform to the monetary policies of the central banks of the countries concerned (Article 19);

(vi) Deciding to permit the Bank to do any of the six explicitly prohibited activities (Article 24);

(vii) Changing the statutory composition of the Board of Governors (Article 27);

(viii) Varying the rights of attendance and voting rights at General Meetings (Article 44);

(ix) Changing the regime for allocation and disbursement of annual profits (Article 51);

(x) Changing the amendment procedures for unreserved articles in the Statutes (Article 57);

(xi) Changing the amendment procedure of any of the reserved articles just considered (Article 58).

The reserved articles of the Statutes concern the special interests of the central banks and of Switzerland and were manifestly designed to protect them. It is only amendments to the Statutes that involve an increase or decrease of the capital of the Bank which require adoption by a two-thirds majority of the General Meeting. As stated above, except for Article 8, the voting procedures for amendment of both reserved and unreserved articles are essentially the same in both the Board of Governors and General Meeting phases. But amendment of the enumerated reserved articles also requires an adjustment of the Charter of the Bank by an act of Swiss legislation, as explained above.

D. MR. MATHIEU'S ALLEGATIONS OF ILLEGALITY AND THE BANK'S RESPONSE THERETO

131. When the Bank decided to recall all of the shares held by private shareholders at its Extraordinary General Meeting on 8 January 2001, the procedure was that of amendment of unreserved articles of the Statutes in accordance with Article 57 of the Statutes. Mr. Mathieu contended that the amendment of the Statutes was illegal because it was not in compliance with the Constituent Instruments of the Bank. In his Memorial, Mr. Mathieu argued:

> La Résolution amendant les Statuts est illégale, ayant été adoptée en violation de la Charte et des Statuts. En effet, la Résolution a prévu l'ajout d'un nouvel article (1.1) ce que ne permettent pas les Instruments constitutifs de la Banque (1.2). Subsidairement, quand bien même il serait possible d'ajouter un nouvel article, il aurait à tout le moins fallu le faire en application de la procédure renforcée (1.3).

Thus, Mr. Mathieu contended that Article 18A was not an amendment of an existing article but the addition of a new article and, as such, a type of modification of the Statutes that, he contended, is not permitted by Article 57 and is, as a result, null and void. As a subsidiary argument, he contended that even if it were possible to add a new article, it would have had to be accomplished under the special procedure set out in Article 58, rather than the general procedure set out in Article 57.

132. With respect to Mr. Mathieu's first argument, he contended that Article 18A is not an amendment, within the meaning of the Statutes, but a new article, which neither the Statutes nor the Charter authorized. He contended that the interpretation of the Charter and the Statutes must be accomplished in conformity with the rules of international law, specifically, Article 31 of the Vienna Convention on the Law of Treaties. On the basis of Article 31, Mr. Mathieu argued that a literal interpretation seeking the "ordinary meaning" demonstrates that Articles 57 and 58 of the Statutes refer to "amendments of any Articles of these Statutes." The reference is to *amendments*, or *modifications* in French, of existing articles, but not to *additions* or the introduction of new articles. Mr. Mathieu's core contention, then, was that the language of

the text refers only to amendments of specific articles and not to the addition of new articles.

133. Mr. Mathieu contended that his reading of what he believes to be the plain and natural meaning of the Statutes is reinforced by an interpretation that looks to context, as that term is used in the Vienna Convention on the Law of Treaties. The Charter and the Statutes distinguish between ordinary articles, which may be amended in the ordinary fashion, and reserved articles which require, in addition to the ordinary amendment procedure, the enactment of an additional law. The specification of articles indicated, according to Mr. Mathieu, that the Statutes contemplated amendment of specific articles but not the Statutes as a whole.

134. Interpretation in the light of the object and purpose of the instrument being construed would further reinforce, according to Mr. Mathieu, the construction that he proposed. In his view, the precision with which the amendment provision was drafted manifested an intention on the part of the drafters to confine within strict limits the exercise of the activities and, in particular, the discretion of the Bank. This showed, in Mr. Mathieu's view, that the States that had created an entity with strictly limited powers did not want that entity to escape their control and to take any liberties with the powers that had been granted to it. Given the delicacy of the political assignments to the Bank at the time of its founding, Mr. Mathieu submitted that the founding States were particularly concerned to carefully delimit the discretionary power of the Bank. Moreover, he contended, no new article has been added to the Statutes since the establishment of the Bank and the only case of suppression of an article concerned the expiration of the Young Plan. The fact that the Bank's activities had evolved, Mr. Mathieu argued, does not permit the Bank to make adjustments in the Statutes, for, citing Judge Bedjaoui, in his individual opinion in the *Gabcíkovo-Nagymaros* case, the law that should govern the interpretation of a treaty is the law that was contemporary at its conclusion rather than law that has subsequently

evolved.[70] Mr. Mathieu also cited the *Namibia* Opinion of the International Court of Justice in this regard.[71]

135. Furthermore, Mr. Mathieu contended that even if the new article is not deemed illegal on the ground that it is an addition rather than a modification or amendment, the Bank should have followed the reserved amendment procedure of Article 58 of the Statutes instead of the less rigorous procedure of Article 57. Mr. Mathieu submitted that authorizing the Bank to introduce new articles through the ordinary procedure would enable the Bank not simply to introduce articles that are objectively contrary to the enumerated reserved articles but even to create new elements and to develop the Statutes in ways that might conform to the letter of the enumerated reserved articles but be incompatible with the original purposes of the States Parties to the 1930 Hague Agreement. To avoid this, Mr. Mathieu contended, it would be reasonable to demand that the additional articles become the object of an additional law, under the procedure of Article 58 of the Statutes. This, according to Mr. Mathieu, would preserve the interest of Switzerland, under Paragraph 6(c)[72] of the Charter, as well as the interests of the States which had concluded the 1930 Convention.

136. In its Counter-Memorial of 22 July 2002, the Bank contended that the ordinary meaning of the word "amendment" is "[a] change made by addition, deletion or correction."[73] Thus the Bank contended that the plain and natural meaning of the language of the Statutes contemplated amendments that would *add* articles and not simply amendments that

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[70] *Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Judge Bedjaoui, ICJ Reports 1997, at para. 8.

[71] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, p. 16, at para. 53.

[72] Para. 6(c) provides: "The Bank shall be exempt and immune from all taxation included in the following categories: all taxes on the Bank's capital, reserves or profits, whether distributed or not, and whether assessed on the profits of the Bank before distribution or imposed at the time of distribution under the form of a coupon tax payable or deductible by the Bank. This provision is without prejudice to the State's right to tax the residents of Switzerland other than the Bank as it thinks fit."

[73] Counter-Memorial, at para. 63, quoting Black's Law Dictionary.

would *change* existing articles. Moreover, the Bank argued that constituent instruments of international organizations have long been interpreted as including the subsequent practice of the organization, a proposition that is supported by Article 31(3)(b) of the Vienna Convention on the Law of Treaties and has been affirmed in a large number of opinions of the International Court of Justice.[74]

137. In this regard, the Bank drew the Tribunal's attention to important amendments of the Statutes which resulted in the addition of new articles through the procedure prescribed by Article 57. In 1969, an Extraordinary General Meeting amended Article 5 (as renumbered) and added the text of Article 6, and a new Article 9 to the Statutes. On two other occasions, Extraordinary General Meetings added new clauses to existing articles.

138. The Bank also contended that a number of other international organizations whose constitutive instruments permit amendment have, in practice, both added and deleted articles of their constituent instruments.[75]

139. With respect to Mr. Mathieu's contention that the intentions of the Bank's founders militated against the addition of new articles through the amendment procedure, the Bank noted the absence of any evidence for the contention and, as a matter of law, relying upon *Certain Expenses of the United Nations*, submitted that speculations about the intentions of the drafters of these instruments, "except such as may be gathered from its terms alone,"[76] are less important in the construction of the constituent instruments of international organizations.

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[74] *Certain Expenses of the United Nations*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, p. 165; *Reparations for Injuries Suffered in the Service of the United Nations*, *supra* fn. 45, at pp. 174, 180; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, *supra* fn. 71, at pp. 16, 22; *Judgments of the Administrative Tribunal of the International Labour Organization Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization*, ICJ Reports 1956, pp. 77, 91.

[75] Counter-Memorial, at para. 67, fn. 57, which lists three such constituent instruments.

[76] *Supra* fn. 74, at pp. 184-185.

140. With respect to Mr. Mathieu's submission that the share recall had to comply with the special procedure of Article 58 for the enumerated reserved provisions of the Statutes, the Bank argued that the reserved procedure only applies to the specified provisions. Since there was no inconsistency between the amendments that are at issue here and those provisions, there was no need to comply with the procedures of Article 58. The Bank also contended that, in substance, the amendments in question did not change the Bank's fundamental structure, objectives or purposes and hence would not have required the special procedure of Article 58.

141. With respect to Mr. Mathieu's argument that the amendment was illegal because it was inconsistent with Article 21(g) of the Statutes, restricting the Bank's ability to "buy and sell negotiable securities other than shares for its own account or for the account of central banks," the Bank observed that Article 21(g) is not one of the reserved provisions enumerated in Article 58. So even if there had been, *quod non*, a conflict between the new Article 18A and the preexisting Article 21(g), that conflict would not have required the special amendment procedure prescribed in Article 58.

E. THE TRIBUNAL'S CONSIDERATION REGARDING THE ALLEGED ILLEGALITY

142. The legality of the repurchase has been contested principally under the Statutes of the Bank and secondarily under principles of international law regarding expropriation. In the first case, the question is whether the modification of the Statutes, assuming conformity with principles of international law, was carried out in accordance with Articles 57 and 58 of the Statutes (see 1 below). If that question is answered in the affirmative, the validity of the modification must still be examined under principles of international law (see 2 below). There is no need to examine this under any municipal law.

1. Conformity of the Recall to the Statutes

143. Given the importance of the text, it will be useful to set out again the language of Articles 57 and 58 of the Statutes. Article 57 provides:

> Amendments of any Articles of these Statutes other than those enumerated in Article 58 may be proposed by a two-thirds majority of the Board to the General Meeting and if adopted by a majority of the General Meeting shall come into force, provided that such amendments are not inconsistent with the provisions of the Articles enumerated in Article 58.

Articles 58 provides:

> Articles 2, 3, 8,14, 19, 24, 27, 44, 51, 54, 57 and 58 cannot be amended except subject to the following conditions: the amendment must be adopted by a two-thirds majority of the Board, approved by a majority of the General Meeting and sanctioned by a law supplementing the Charter of the Bank.

With the exception of the requirement of Swiss legislation to supplement the Charter of the Bank for amendment of the enumerated articles[77] in Article 58, the procedures in Article 57 and Article 58 are actually the same, except that Article 8 specifies that a change of the capital requires a two-thirds majority of the General Meeting rather than a simple majority.

144. The language of Article 57 introduces no substantive limitation on the amendment competence of the General Meeting other than the requirement that those amendments not be inconsistent with the enumerated articles in Article 58. Hence, as a simple textual matter, an amendment to the Statutes accomplished according to the procedures required by Article 57 would be *intra vires* and valid as long as it were not inconsistent with one of the enumerated reserved provisions in Article 58. There is no indication in Article 57 that the mode of

[77] Art. 1 of the Convention stated that Switzerland undertook not to sanction amendments to the Statutes of the Bank referred to in Para. 4 of the Charter without the agreement of the other signatory Governments.

formulation of an amendment, whether as an addition to an existing article or as an entirely new article designated by a new number, has any legal significance. Hence, an interpretation of the Statutes in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty, must find the amendment under discussion as valid and *intra vires* the Statutes.

145. Article 31(3)(b) of the Vienna Convention on the Law of Treaties[78] requires that account be taken of "any subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation." This provision takes on special meaning when applied, in accordance with Article 5 of the Vienna Convention, to the constituent instruments of international organizations. In *Reparations for Injuries Suffered in the Service of the United Nations*, the International Court of Justice held that "the rights and duties of an entity such as the Organization [the United Nations] must depend upon its purposes and functions as specified or implied in its constituent documents and *developed in practice*."[79] The fact that the Bank has, on a number of occasions, amended its Statutes by the introduction of a new article appears to be probative of the authoritative interpretation of the Statutes in this regard.

146. Mr. Mathieu stated that a strict interpretation of the powers of the Bank had been sought by the drafters lest the Bank, once established, escape their control and take liberties with the powers that had been accorded to them.[80] But the decision structure of the Bank, as established in Chapters IV and V of the Statutes, requires two-thirds of the Board to propose amendments and a majority of the General Meeting to approve them. Article 27 of the Statutes, which established the membership of the Board, gave the central banks of the founding States of the Bank a permanent position. Hence it would not appear that Mr. Mathieu's concern is relevant to the interpretation of this part of the Statutes.

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[78] *Supra* fn. 23.
[79] *Supra* fn. 45, at pp. 174, 180 (emphasis added).
[80] Mémoire en Demande, at p. 12.

147. Article 18A concerning the compulsory repurchase of the privately held shares cannot be plausibly construed as engaging any of the reserved articles in Article 58 or any of the concerns that animated that provision. While the Bank would have been obliged to secure the approval of Switzerland (in agreement with the other signatory Governments; see Article 1 of the Convention) if an amendment of one of the articles enumerated in Article 58 were planned, such approval would only have been required for amendment of a reserved article. In fact, as was reported at the Hearing, the Bank did notify Switzerland of the proposed amendment and Switzerland did not register any demand or objection.[81] Similarly, all the central banks that were members of the Bank were given notice, as required by the Statutes of the Bank, from which fact it is fair to assume that their Governments were also made aware of the pending change. Nor would there appear to be anything implicit in the Statutes or the Charter that would have precluded the change.

148. For the above reasons, the Tribunal finds that the Bank had the authority to add Article 18A to its Statutes and that the compulsory recall of the shares, including the procedures by which it was accomplished, was *intra vires* the Statutes and was, accordingly, a valid exercise of the Bank's powers. The Tribunal would emphasize, however, that a finding that the recall of the private shares was *intra vires* the Constituent Instruments of the Bank, does not address the question of whether the recall by the Bank and the valuation that the Bank set upon the shares held by private parties were lawful for reasons other than compliance with Articles 57 and 58 of the Statutes. The Tribunal now turns to that question.

2. Conformity of the Recall with Substantive Standards of International Law

149. Mr. Mathieu contended that aside from the problem of alleged insufficient compensation, the Bank's action was unlawful because it violated two of international law's cardinal requirements for a lawful expropriation: that the taking be in the public interest and that it be non-discriminatory. The question arises as to whether the Bank's recall of privately held shares in 2001 is to be examined either under the law of

[81] Prof. Giovanoli, Transcript, at p. 79.

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.

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 nego-

> tiations regarding jurisdictional, tax or other immunities of the BIS in a number of other countries.[82]

It is clear that there was a latent conflict between the Bank's responsibilities for discharging its public functions and the Bank's fiduciary responsibilities to its private shareholders. *Prima facie*, the Bank is able to show that, were the international law of expropriation applied, it could meet, *mutatis mutandis*, the public interest requirement.

b. THE REQUIREMENT THAT THE ACTION NOT BE DISCRIMINATORY

152. Nor would the Bank's actions with respect to the private shareholders be characterized as discriminatory under the international law of expropriation. Analytically, one must distinguish between the factual referent of "differentiations" and the legal referent of "discriminations." Not all differentiations are discriminations. A discrimination is an unlawful differentiation. The legal instruments indicate that from 1930 onwards, private shareholders and central banks, although having equal rights as shareholders, had a different status. Only central banks can have voting rights. Although these voting rights are not directly attached to the shares held by the central banks, they are indirectly linked to the shares subscribed to by or through the 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

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[82] Secret L-3, Share Capital of the BIS, 6 November 1998, FE Exhibits to Memorial, Tab 26, at p. 2. The same point was made at a restricted meeting of the Members of the Board on 9 November 1998, at p. 1, FE Exhibits to Memorial, Tab 27. First Eagle produced a document from the papers of Thomas H. McKittrick at the Harvard Library, which is dated June 1938, but unsigned. It also comments on the incompatibility of private shareholders in "a true Bank of Banks." FE Exhibits to Memorial, Tab 36, at p. 10.

> issue, and which may not be subscribed or purchased by the general public.[83]

154. The very nature of the Bank as an international organization established, *inter alia*, to facilitate relations between the central banks and the functioning of the international monetary system imported a different treatment, for some purposes, of central banks and private shareholders, most dramatically in governance rights, none of which could be acquired by private shareholders.

155. Thus, even were, *arguendo*, the standards of the international law of expropriation to be applied to determine the validity of the Bank's recall of private shares, that transaction would have been lawful in terms of the criteria of public purpose and non-discrimination.

c. COMPENSATION

156. International law also requires that, in order to be lawful, an expropriation should be against payment of compensation. Indeed, the Bank recognized that the recall had the consequence for the private shareholders that they lost their rights. The Bank accepted from the beginning that such a deprivation of property could only be lawful against payment of compensation. The issues concerning the amount of compensation will be addressed separately. However, the Tribunal would underline that a decision by the BIS which has the effect of depriving the private shareholders of their property rights, *i.e.* their shares, cannot be considered lawful without the payment of compensation. This follows from the rules of general international law protecting private property as well as from general principles of law concerning share companies, a point which the Parties did not dispute.

157. Because the Bank has acknowledged that it is subject to the jurisdiction of this Tribunal and has committed itself to paying all the former private shareholders any addition to what it has already paid, if the Tribunal should so order it, this third criterion will, *nunc pro tunc*, meet the

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[83] Extraordinary General Meeting held in Basle on 9 June 1969, Public Record, FE Exhibits to Memorial, Tab 22.

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 was *intra vires* the Statutes and a lawful exercise of the Bank's powers. Nor did this exercise of the Bank's power violate any principles of international law that might apply.

159. Because of the finding of the Tribunal that the amendment of the Statutes by the addition of Article 18A was *intra vires* the Statutes and lawful, the question of the consequences of a finding of unlawfulness for all those who are private shareholders as of 8 January 2001 is moot and, as such, need not be considered.

CHAPTER V – QUESTION 2 OF PROCEDURAL ORDER NO. 3

A. INTRODUCTION

160. A central issue in this case is the adequacy of the amount which the Bank paid for the recalled shares. Whether this question is characterized as one of "reparations," implying that the recall was unlawful, or as "compensation," implying that the recall was expropriatory and that its lawfulness is contingent upon the Bank's paying international law's measure of compensation, or as one of "fair" price, implying, in a more neutral fashion, that the gravamen is simply one of determining the proper value of the recalled shares, all the Claimants and the Bank have agreed that the issue is one of valuation. In this regard, it was the Bank which invoked and relied heavily upon international law's standard.[84] Hence it

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[84] The Bank also referred to cognate national practice. The Bank adduced a rather extensive state practice with respect to the special phenomenon of central banks recalling, in a compulsory program, the shares of private shareholders. The Bank argued that national practice seems particularly apposite to the case at bar, as the central banks, like the Bank for International Settlements, concluded that the earlier practice of permitting private shareholders in banks that were public institutions had become anachronistic and incompatible with the public functions of the national central banks. Hence the central banks adopted recall programs, not unlike that of the BIS in its decision of 8 January 2001. In virtually all of these compulsory recall programs, the valuation of the shares was based upon an averaging of the market value of the shares prior to the announcement of the recall. There is, however, no indication whether the stock market price approximated net asset value. As the Bank described in its Counter-Memorial, the Bank of Canada was nationalized in 1938 by the Bank of Canada Act Amendment Act (Bank's LA-119). The Bank of Canada was organized as a stock corporation with a capitalization of CAD 5,000,000, with each share carrying a nominal value of CAD 50. Pursuant to the Act, new stock, owned by the Canadian Government, was issued in the amount of CAD 5,100,000, giving the Government a sufficient majority to buy out the private shareholders. Each former private shareholder received CAD 59.20 per share, the market price pertaining at the time (Bank of Canada Act Amendment Act, 1938, Art. 9 (Bank's LA-119)). Similarly the French Government nationalized the Banque de France in 1945 (Loi 45-14 (Bank's LA-115)). At the time the Banque de France had 46,809 shareholders. The price for each share was set at 28,029 francs, an amount equal to the average trading price of the Banque de France shares over a prior twelve-month reference period (Arrêté du juillet 1946, J.O., 21 juillet 1946, at p. 6538 (Bank's LA-115)). Counter-Memorial, at paras. 153-159. In 1949, the Norwegian Government nationalized the Norges Bank. Norway assumed the shares previously owned by private shareholders against the payment of compensation fixed at 180% of the nominal value of the shares (20 Norges Bank Bulletin, No. 4-5, 21 November 1949, at pp. 57, 59 (Bank's LA-121)). This 180% figure was just higher than the market price of 178% of nominal value pertaining at the time. In 1962, Banco de España shareholders received compensation based upon the fair market value of their shares following nationalization. The compensation paid to former shareholders consisted of 5% more

is useful to begin by considering international law on this matter, even though it may not apply where the Parties have established a *lex specialis*.

B. INTERNATIONAL JURISPRUDENCE

161. In situations of expropriation of the shares of foreign investors, the practice of international law rather consistently has valued the shares by reference to their market value, in circumstances in which an efficient market operated.

162. In *American Int'l Group, Inc*., the claimant sought compensation for its minority shareholding in an Iranian insurance company that was nationalized by the Government of Iran.[85] The claimant requested the "full value" of its interest as of the date of nationalization and the Tribunal concluded that the compensation due was the claimant's share of the fair market value of the property nationalized.[86] In calculating the fair market value, the Tribunal ascertained the "higher and lower limits of the range within which the value of the company could reasonably be assumed to lie," and then arrived at a compensation value by way of an "approxi-

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than the greater of either the average price on the stock exchange over the preceding five years, or the maximum price of the previous year (Ley 2/1962, 14 April 1962 (BOE de 16) (Bank's LA-123)). New Zealand nationalized the Reserve Bank of New Zealand in 1936; the buy-out price was set at the share price pertaining on a certain date in the preceding year (New Zealand Parliamentary Debates, Vol. 244, 25 March-6 May 1936, at p. 144 (comments of Hon. Mr. Nash, Minister of Finance) (Bank's LA-114)). Portugal nationalized its central bank, the Banco de Portugal, and the Banco Nacional Ultramarino in 1974, using the average of the year trading price of their stock to set the compensation (Decreto-Lei n° 452/74, 13 Setembro 1974 Art. 5 (Bank's LA-122); see Decreto-Lei n° 451/74, 13 Setembro 1974, Relatório do Conselho de Administração, Art. 5 (Bank's LA-122)). Venezuela nationalized its central bank, the Banco Central de Venezuela, in 1974; the 6,170 private shareholders received a price of the average market value over the preceding six months (Banco Central de Venezuela, 1974 Memoria (Annual Report), p. 14 (Bank's LA-118). Footnote to Counter-Memorial, para. 159).

[85] *American Int'l Group, Inc. v. Islamic Republic of Iran*, Award No. 93-2-3, 4 Iran-U.S. C.T.R. (19 December 1983).

[86] *Id.*, at para. 109.

mation of that value, taking into account all relevant circumstances of that case."[87]

163. In the case of *James Saghi*, the claimants were the majority shareholders of two Iranian companies that were put under management of the Iranian Government. The claimants alleged deprivation of ownership rights in the companies even though there was no formal expropriation. The Tribunal observed that fair market value would be the applicable standard of compensation and summarized the state of customary international law with respect to fair market value as follows:

> Fair market value may be defined as "the amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalization itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares." On the other hand, while any diminution of value caused by the deprivation of property itself should be regarded, "prior changes in the general political, social and economic conditions which might have affected the enterprise's business prospects as of the date the enterprise was taken should be considered."[88]

The Tribunal applied a method of "reasonable approximation" in arriving at the fair market value, taking into account the impact of the Iranian Revolution and currency inflation.[89]

164. International jurisprudence supports finding fair market value by reference to a share trading price when available. In *Faith Lita Khosrowshahi*, the claimant sought compensation for its shareholding in an Iranian company that had been compulsorily acquired by the Government of Iran.[90] The claimant submitted alternative valuations for

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[87] *Id.*

[88] *James M. Saghi v. Islamic Republic of Iran*, Award No. 544-298-2, 29 Iran-U.S. C.T.R., pp. 20, 46 (22 January 1993).

[89] *Id.*, at para. 103.

[90] *Faith Lita Khosrowshahi v. Islamic Republic of Iran*, Award No. 558-178-2, 30 Iran-U.S. C.T.R., p. 76 (30 June 1994).

its lost shares to the Tribunal, including a valuation based on "a weighted average of three different valuation techniques: an asset accumulation approach, an income capitalization approach, and a market approach" derived from the last traded stock price for the shares which had been publicly traded on the Tehran Stock Exchange.[91] The respondent's valuation relied on a net book value analysis that resulted in a negative value for the shares.[92] Applying a fair market standard of valuation, the Tribunal found that a "contemporaneous market price is clearly the best available evidence" of the value of the expropriated shares.[93] The Tribunal then used the last trading price of the shares as set forth in the Annual Report of the Tehran Stock Exchange "as the basis of the valuation analysis" and applied a 25% discount to account for the negative effect of the Iranian Revolution on the market value of the shares during the eight month period between the last trade and the expropriation of the shares.[94]

165. The *ACSYNGO* case related to shares held by private investors in a French conglomerate that were compulsorily transferred to the French State in 1982.[95] Compensation to the dispossessed shareholders was paid on the basis of the average stock exchange quotation for the shares during a reference period, with adjustments made for the effects of inflation and lost dividends.[96] With respect to the compensation paid by the French State, the Belgian commercial court held that "[t]he fact that the average stock exchange quotation, the effects of inflation and expected dividends were all taken into account, leads to the conclusion that, from the point of view of public international law, the calculation of compensation cannot be criticized."[97]

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[91] *Id.*, at p. 90.
[92] *Id.*, at p. 91.
[93] *Id.*, at p. 92.
[94] *Id.*, at pp. 93-94.
[95] *"ACSYNGO" and Others v. Compagnie de Saint-Gobain (France) SA and Others*, 82 ILR, p. 127, at p. 130 (1986).
[96] *Id.*, at p. 135.
[97] *Id.*, at p. 137.

166. In *Amoco Int'l Fin. Corp.*, although the Iran-U.S. Claims Tribunal eventually found there to be no "market giving rise to the fixing of an objective market value" for claimant's expropriated interest in an Iranian joint venture, it first stated that market value is the "most commendable standard" and is "regularly referred to in case of nationalization where the nationalized undertaking is a corporation the capital stock of which is freely traded in the stock exchange."[98] The Tribunal further opined that market value is "most easily ascertained when a market exists for identical or similar assets, *i.e*. when the assets are the object of a continuous flow of free transactions."[99]

167. First Eagle contended that the *conditio sine qua non* for the application of the above standard was an efficient market and that such a market did not obtain for the shares of the BIS. The Bank contended that the Zurich and Paris Exchanges were quite efficient and that any problems of comparative illiquidity of the shares in the Bank arose from the nature of those shares and not from the exchanges in which they were traded. It is certainly correct that the shares of the Bank were illiquid, compared to other shares trading on the French or Swiss exchanges. Factors such as (i) the small number of such shares being traded; (ii) the requirement of double-approval by the central bank to which they had been issued as well as by the Bank for International Settlements before shares could be sold; and (iii) the possibility of the Bank calling for payment of the other 75% of the value of the shares all contributed to the comparative illiquidity of these shares on the markets in which they were bought and sold. But the inefficiency derived from the nature of the shares and not from the markets in which they were traded and the market discounted these inefficiencies, as markets do. Arguments about relative efficiency or liquidity aside, the fact remains that the Bank itself never referred to the stock market price when it evaluated the shares prior to this arbitration (see paras. 193 *et seq*. below).

168. Furthermore, the Tribunal is not persuaded by the Bank's conception of the international legal standard of compensation as one of "appropriate"

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[98] *Amoco Int'l Fin. Corp. v. The Government of the Islamic Republic of Iran and Others*, Partial Award No. 310-56-3, 15 Iran-U.S. C.T.R., pp. 189, 255-256 (14 July 1987).
[99] *Id.*

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 countries, particularly with respect to petroleum, nationalized their single or primary resource,[100] it is clear that it has been reestablished in the recent jurisprudence.

169. Thus, the full compensation standard was applied in an *ad hoc* arbitration carried out under the UNCITRAL Arbitration Rules, where the Government of Ghana was found to have expropriated the claimants' investment in Ghana.[101] There, the Tribunal held that "[u]nder the principles of customary international law, a claimant whose property has been expropriated by a foreign state is entitled to full – *i.e.* to prompt, adequate and effective – compensation."[102]

170. The general trend in the Iran-U.S. Claims Tribunal has also been to apply the full compensation standard in a number of cases. In *Sedco*, when deciding the proper standard of compensation for claimant's expropriated shareholder interest in SEDIRAN Drilling Company, the Tribunal found that full compensation was the applicable standard.[103] The Tribunal stated that while some commentators had voiced support for a lesser standard in cases of nationalization by developing countries, full compensation was still the accepted standard in cases of individual expropriation.[104] In *Sola Tiles*, the Tribunal awarded full compensation for claimant's

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[100] *Aminoil v. Kuwait*, 66 ILR, p. 518 (1982).

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

[102] *Id.*, at p. 211.

[103] *Sedco, Inc. v. National Iranian Oil Company, et al.*, Award No. 59-129-3, 10 Iran-U.S. C.T.R., pp. 180, 188 (27 March 1986).

[104] *Id.*, at p. 188.

expropriated assets.[105] In deciding whether the Treaty of Amity between the United States and Iran provided a *lex specialis* governing the standard of compensation, the Tribunal found that the treaty's requirement that compensation "shall represent the full equivalent of the property taken" was the same as the standard required by customary law.[106] While the Tribunal recognized that the term "appropriate" had been widely applied to the standard of compensation in cases of expropriation, it found that its meaning could encompass "full compensation".[107]

171. Finally, it is to be noted that on the advice of its consultant, J.P. Morgan, the Bank, using a Dividend Perpetuity Model method, actually paid the private shareholders almost double the market exchange value of the recalled shares. Under the standard of the international law of expropriation, were it to apply, the Bank's level of compensation would have met the international standard. But, in fact the Bank paid twice the stock market value of the recalled shares and only argued for the application of the stock market price in the arbitration. Banks operate under strict rules with respect to the money entrusted to them; they may not give money away without a proper 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

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[105] *Sola Tiles, Inc. v. Islamic Republic of Iran*, Award No. 298-317-1, 14 Iran-U.S. C.T.R., p. 223 (22 April 1987).
[106] *Id.*, at p. 234.
[107] *Id.*, at p. 236.

the rights of shareholders are, in the first instance, determined by the Constituent Instruments. Dr. Reineccius, representing himself, did not explicitly address the question of the applicable law, but clearly based his submission on his understanding of the Statutes and, in his view, their necessary implications. First Eagle, in its Memorial, also based its claim, in the first instance, on an interpretation of the Statutes.[108] Mr. Mathieu, in his Memorial, based his argument, also in the first instance, on the Constituent Instruments of the Bank, submitting that only if they failed to provide an answer was the Tribunal to turn to general international law. In its Statement of Defense, the Bank said that "its relations with its shareholders are governed by its constituent instruments . . . supplemented as appropriate by general public international law."[109] In its Counter-Memorial, the Bank stated that "the rights attached to the shares in the BIS must be determined by reference to the terms of the Statutes rather than by recourse to municipal corporate law concepts or dictionary definitions of share ownership."[110]

173. Thus the Parties agree that the issue that falls to be decided here must be resolved by reference to the Bank's Constituent Instruments and only by international law should the Constituent Instruments fail to provide an answer. Because the Parties agree that the questions posed to the Tribunal should be resolved in the first instance by reference to the Constituent Instruments of the Bank, the relationship of the Statutes to international law must be clarified. The Constituent Instruments of the Bank constitute a *lex specialis* as between the Parties. Insofar as the *lex specialis* in this case – the 1930 Agreement, the Charter and the Statutes – provides an answer to the questions arising in this case, the Tribunal would not be permitted to turn to international law – unless the *lex specialis* purported to incorporate an explicit *renvoi* to general international law or would have violated a fundamental principle of international law.

174. In fact, neither the applicable law clause of the 1907 Convention for the Pacific Settlement of International Disputes nor the 1930 Hague

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[108] FE Memorial, at para. 205.
[109] Statement of Defense, at para. 85.
[110] Counter-Memorial, at para. 94.

Agreement incorporate a *renvoi* to international law, as such. Article 15 of the 1930 Agreement does not include an explicit applicable law clause. Nor does Annex XII of the 1930 Agreement, entitled, "Arbitration. Rules of Procedure" contain an explicit choice of law clause. But Annex XII does incorporate, by reference, Chapter III of The Hague Convention of 1907 for the Pacific Settlement of International Disputes, whose provisions are to apply, unless and to the extent modified by the provisions of Annex XII or the 1930 Agreement. Article 73 of the 1907 Convention speaks simply of "applying the principles of law." Article 26 of the "Rules for Arbitration between the Bank for International Settlements and Private Parties" provides that "The Tribunal shall apply the instruments relevant to the case as well as other relevant principles of law." In sum, the *lex specialis* of this case – the 1930 Agreement, the Charter and the Statutes – was conceived as self-contained and not incorporating general international law, except insofar as the *lex specialis* failed to provide an answer to a question that might arise or violated a fundamental principle of international law. In that eventuality, a Tribunal seised of the case was to turn to general international law.[111]

175. The right to compensation is part of both general international law and the specific area of Human Rights law and it is quite possible that an action purporting to abrogate such a right might be held to be invalid for violation of international law. If the Statutes had purported to deny shareholders compensation, a general international law problem could have arisen. But in the instant case, the Statutes did require compensation and the fact that the *lex specialis*, because of the specific provisions of the Statutes establishing the equal rights of the shares, might prescribe a higher amount than would general international law cannot be considered a breach of international law. Hence there is no ground for the Tribunal to depart from the *lex specialis* applicable to the Parties and to use the international law standard which would apply market value for the shares.

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[111] In this respect, the sequential legal regime created by the *lex specialis*, may be compared to Art. 42 of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("1965 Washington Convention").

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.

1. The Earning Power Method

177. Dr. Reineccius submitted that the appropriate model for valuation was not DPM, but either an earning power method ("EPM"), which, he stated, is widely used in Germany for situations in some ways comparable to the one confronting the Tribunal, or, alternatively, a proportionate share of net asset value. The Tribunal should select, he submitted, whichever proved to be higher. First Eagle and Mr. Mathieu also submitted that a proportionate share of NAV was the proper valuation methodology. In fact, Dr. Reineccius' preference for EPM is linked to his assumption (shared by Mr. Mathieu and, with some qualifications, by First Eagle) that each share in the Bank for International Settlements is entitled to a proportionate share of its profits. EPM presumes that a shareholder is entitled to the profits of the company. Dr. Reineccius felt that the DPM "is appropriate when a company distributes the major part of its net profit as a dividend,"[112] but inappropriate when a company follows a policy of husbanding profits and issuing very low dividends.

178. The assumption for Dr. Reineccius' view that DPM is an inappropriate valuation method is that companies should act for the welfare of their shareholders, whose interest is receiving profits in the form of dividends

[112] Transcript, at p. 202, lines 36-37.

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 Bank," then net profits would perforce be equivalent to dividends, which then would, indeed, have to be distributed equally. But Article 51 qualifies each share's "equal rights to profits" in Article 13, by granting the General Meeting on the recommendation of the Board the power to exercise a wide discretion in setting the dividend (Article 51, paragraphs 2 and 4). Thus, assuming that the proper procedures were followed, the discrepancy between large profits and small dividends, if decided in the proper procedure, would be valid for the Bank under the Statutes.

180. In the Governors' Meeting of 9 April 1936, a decision was taken unanimously to seek to repurchase the privately held shares of the French and Belgian issues and, of particular importance in this context, to amend the dividend policy in Article 53 of the Statutes:

> During the year 1936-1937 steps will be taken in order to change Article 53 sub b and c of the Statutes with the object of abolishing the cumulative character of the dividend . . . and creating provision that any residue of the net profits . . . will be placed to the credit of a dividend reserve fund to be distributed to the shareholders if and when the General Meeting will decide so; the meaning of this being that this fund will only be distributed at a moment when the General Meeting decides (on the advice of the Board) that this fund is no longer needed as a reserve.
>
> In changing Article 53 it will be made clear, that this will also apply to the existing dividend reserve fund, which therefore will not be distributed before the General Meeting decides so; therefore, this meeting will be under no obligation to distribute this fund even if less than 6% dividend is paid from net profits.[113]

In 1975, at an Extraordinary General Meeting, Articles 51 and 52 of the Statutes were amended, in the language of the Chairman of the Board of Directors,

> to remove the concept of a dividend related to the amount of the paid-up capital. As a result, the Board and the General Meeting would have greater discretion then [sic] hitherto when deciding on the application of the net profits either in the form of dividend or of appropriations to the reserves.[114]

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[113] Draft Minutes, Basle, 9 April 1936, FE Exhibits to Memorial, at Tab 20.

[114] Extract from the speech delivered by the Chairman of the Board of Directors on the occasion of the Extraordinary General Meeting of the Bank for International Settlements held on 8th July 1975, Annex III to Notice to Shareholders (other than the central banks) of the American Issue of the Bank's Capital, in FE Exhibits to Memorial, Tab 8, at p. 7.

The Director added that

> [i]n view of the importance of the proposed reform, however, it seemed appropriate to provide these shareholders, if they so wish, with the opportunity to dispose of their shares on fair term, *viz*. at the price of 3,100 Swiss francs per share.[115]

That price was based on the average share price of the American issue in Basle rounded up to the nearest hundred francs over the previous six weeks. The offer was taken up by only a few shareholders.

181. It is the different and potentially conflicting responsibilities of the Bank to profit and dividend policy for private shareholders, on the one hand, and to its public functions, on the other, that is one of the public interest reasons that may justify the recall of the private shares under international law, as explained above in paragraph 151.

182. For these reasons, the Tribunal concludes that EPM, despite its cogency for private sector domestic corporations, is an inapt method for valuation of the shares of the Bank for International Settlements.

2. The Net Asset Value (NAV) Method

183. All three Claimants have submitted that the appropriate method for valuation, either exclusively or, for Dr. Reineccius, alternatively, is a per share proportionate part of the undiscounted net asset value or NAV of the Bank. As stated earlier, all the Parties concurred that an interpretation of the Constituent Instruments is critical in deciding this issue and that only if it did not yield an answer should the Tribunal turn to general international law.

184. First Eagle based its submission, first, on Articles 1 and 13 of the Statutes and their necessary implications, to wit, that "the shares of the Bank in the aggregate, like those of any other company limited by shares, constitute the entire ownership interest in the company."[116] Unlike Dr.

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[115] *Id.*, at p. 8.
[116] FE Memorial, at para. 213.

Reineccius, however, First Eagle invoked Article 13 in order to show that all the shares, in the words of the Bank, "carry identical property rights."[117] First Eagle, like Dr. Reineccius, would read Article 13 of the Bank's Statutes as if it were unqualified. But, unlike Dr. Reineccius' principal argument, First Eagle also contends that

> the only way for the shareholders to continue to participate equally in profits of the Bank that are not distributed as dividends in the year they are earned is to carry an equal right to the accumulated assets of the Bank and to its accumulated reserves.[118]

This argument is not affected by the statutory power assigned to the Board and the General Meeting, under Article 51 of the Statutes, to determine how much, if any, of the profits should be distributed as dividends.

185. The Statutes, while carefully drafted to deal with the usual range of corporate events, do not address, either directly or by implication, the right to conduct and the consequences for a compulsory recall of any shares. But, for First Eagle, if a mandatory redemption of shares is permissible

> the equality of property rights in the ongoing profits of the business and its assets on liquidation that the Statutes expressly recognize would apply with no less force in the context of the newly authorized exclusion.[119]

First Eagle contended that the recall of shares was a partial liquidation, because it was financed by the conversion of assets of the Bank to pay for them, which assets were thereby reduced by that amount. By the same token, the shareholders' interests, which were converted to cash,

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[117] Bank for International Settlements, Note to Private Shareholders: Withdrawal of All Shares of the Bank for International Settlements Held by Its Private Shareholders, 15 September 2000, at p. 2. Cited in FE Memorial, at para. 218.

[118] *Id.*, at para. 221.

[119] *Id.*, at para. 224.

were also liquidated.[120] Hence the contingency for application of Articles 13 and 52, unnumbered paragraph 3, was fulfilled.

186. Mr. Mathieu argued, like First Eagle, that a proper interpretation of Articles 13 and 51 to 53 demonstrates that the equality of shares means an equality with respect to profits and distributions.

187. The Bank agreed that the question falls, in the first instance, to be decided by reference to the Constituent Instruments. The central argument of the Bank was that Article 13:

> does not vest in shareholders unqualified rights to participate in the profits and assets of the BIS, clearly subjecting such rights to, and determining them by, specific reference to Articles 51, 52, and 53.[121]

Because, the Bank continued, (i) sale of shares is subject to approval of both the Bank and the central bank to whose national issue the shares belong; and (ii) shares do not carry any governance rights, the shares lack fundamental characteristics of equity ownership.[122] These various encumbrances, the Bank argued, were taken account of by the markets which discounted the proportionate NAV of the shares by 75%.[123]

188. The interpretation of the Statutes proffered here by the Bank is only partially correct. Given the nature of the shares, the special encumbrances to which they are subjected and their lack of governance rights, the Bank is correct in characterizing its shares as different from the equity of conventional private corporations. The Bank is also correct in its contention that, as explained above, the Statutes do not give shares equal rights to profits *simpliciter*, but to profits as determined by the Board and General Meeting, under Article 51 of the Statutes.[124]

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[120] *Id.*, at para. 225.
[121] Counter-Memorial, at para. 95.
[122] *Id.*, at paras. 97 and 98.
[123] *Id.*, at para. 102.
[124] *Id.*, at para. 95.

189. But the words "to participate" in the Bank's argument that Article 13:

> does not vest in shareholders unqualified rights to participate in the profits and assets of the BIS, clearly subjecting such rights to, and determining them by, specific reference to Articles 51, 52, and 53[125]

refer indiscriminately to governance rights and rights to participate in the distribution of assets. Article 13 states: "Shares shall carry equal rights . . . to participate in the . . . distribution of assets." The procedural disabilities which the Statutes impose on shareholders, *qua* shareholders, with respect to participating in governance, have nothing to do with the substantive rights of the shareholders to the assets of the Bank upon distribution.

190. The Bank also errs in implying that the clearly qualified rights in Article 13 and Articles 51 and 52 with respect to profits are matched by 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.

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[125] *Id.*

191. With respect to First Eagle's claim that the Statutes' provisions with respect to liquidation apply to the instant case, the Bank argued that the liquidation provisions apply only to a total dissolution of the Bank and that such an event requires a decision by a three-fourths majority of the General Meeting, which did not occur on 8 January 2001.[126] The Bank likened its share recall to a voluntary share repurchase program which is lawful in a number of municipal systems.[127] But, of course, the predicate of the dispute before the Tribunal is that the recall was involuntary. Given its compulsory character, the closest domestic analogue, were it appropriate to resort to it, would be a "squeeze-out." The Bank, as stated, rejected the notion that any domestic corporation law applies to this case.[128]

192. Neither the Bank nor First Eagle was able to find convincing support in the Statutes for its respective submission. As already noted, the Statutes did not directly contemplate a compulsory recall of the shares held by private parties. Indeed, the Bank's president, in 1936, when considering "getting rid of the private shareholders," was apparently advised that such an operation would be *ultra vires* the Statutes.[129] As for First Eagle's submission, it is true that one of the legal meanings of the word "liquidation" is any transformation of an asset or claim into cash. But it seems apparent that Article 52, unnumbered paragraph 3, was drafted in anticipation of a dissolution of the Bank.

193. For the proper interpretation of the relevant legal instruments, it is clearly of importance to examine how the BIS itself understood the requirements for a recall of the privately held shares. A note from the papers of former Bank President McKittrick dated June 1938, which had considered a buy-out of the private shareholders, proposed, as the method of valuation of the shares, determining "the actual or break-up value of the B.I.S. shares."[130] An internal memorandum prepared by the Secretariat, for the 318th Meeting of the Board of Directors of the Bank on 8 September

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[126] *Id.*, at paras. 107 and 109. In fact, the decision of 8 January 2001 was passed unanimously.
[127] *Id.*, at para. 113 and see also fn. 83 there.
[128] *Id.*, at para. 153, fn. 61.
[129] 1936 Weiser Memorandum, at pp. 3-4, FE Exhibits to Memorial, Tab 35.
[130] Untitled Document, FE Exhibits to Memorial, Tab 36, at p. 11.

1969, took for granted that the private shareholders had a "potential share of the Bank's provisions and reserves."[131] It is also instructive that the valuation method recommended by the Secretariat for pricing a new issue of shares was based upon a discounted net asset value.[132] The recommendation was adopted by the Board at the 319th Meeting of the Board on 17 November 1969.[133] An internal memorandum of 6 November 1998, prepared by the Bank's Legal Service, noted the need "to respect the principle of equal rights for all shareholders in any distribution of profits or assets, which principle is embodied in Art. 13 of the Statutes."[134] It is to be noted that the exclusion memo specifically refers to the need to pay the full patrimonial value of each share of the Bank. "Patrimonial" value here can only have referred to the real value of the assets of the Bank. In none of the internal deliberations of the Bank about compulsory repurchase was the market value of the shares considered the appropriate standard for the calculation of the value of the shares. The J.P. Morgan Report of 7 September 2000, which will be examined in more detail below, also noted that "[i]n its recent issue of shares to the 4 new members of BIS, the share price has been calculated by BIS based on net asset value."[135] The NAV for that issue was US$ 20,080 per share, which was discounted by 30% to US$ 14,056 or 5,020 gold francs per share. The Report also noted that "for a previous share issue of total [sic] 44,000 shares to 13 member central banks in November 1996 the NAV calculation yielded a value of US$18,772 per share, representing an equivalent of [. . .]3,643 [gold francs]."[136]

194. In sum, from 1936 onwards, the Bank, in its internal deliberations, appears, from the evidence available to the Tribunal, to have assumed that all shares were entitled to an equal proportionate share of the assets of the Bank, to have priced new shares on that basis (with a discount

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

[132] *Id.*, at p. 4.

[133] Agenda for the 319th Meeting, Tab 24, at p. 7.

[134] Secret L-3, Share Capital of the BIS, 6 November 1998, *supra* fn. 82, at p. 3.

[135] J.P. Morgan, Project Primus Presentation to the Board of Directors of the Bank for International Settlements (BIS) Valuation Report and Suggested Transaction Price Range, 7 September 2000. FE Exhibits to Memorial, Tab 43, at p. 24; Statement of Defense, Exhibit 23.

[136] *Id.*, at unnumbered note at bottom of page.

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.

3. The Question and Scope of a Possible Discount

195. Having determined that a proportionate share of net asset value is the method required by the Constituent Instruments as confirmed by the past practice of the Bank, the Tribunal turns to the question of whether and to what extent the per share proportionate NAV should be discounted. In this regard, the Tribunal has found particularly instructive the internal document, already referred to, entitled AGENDA FOR THE THREE HUNDRED AND EIGHTEENTH MEETING OF THE BOARD OF DIRECTORS OF THE BANK FOR INTERNATIONAL SETTLEMENTS,[137] which was prepared by the Legal Counsel, then approved by the Consultative Committee of the Board of Directors and finally approved by the Board of Directors itself on 17 November 1969.[138] Item 8 of that document, entitled "Adjustment of the capital of the Bank and amendment of its Statutes (318/E(1) & (2))", was prepared to provide background and a recommendation for the Board of Directors on the pricing of a new tranche of 200,000 shares of 2,500 gold francs each, which could be subscribed only by central banks. The document noted that the question of a premium for shares had never arisen before[139] and explored the different considerations that could influence such a determination.

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[137] *Supra* fn. 131, at Tab 23.
[138] *Supra* fn. 133.
[139] *Supra* fn. 131, at p. 1.

196. The Report continued, "[t]he Board . . . needs to find an objective base on which to calculate a premium . . . . "[140] The Report proceeded to review the "three most generally recognized methods,"[141] which were

(i) future profitability of the enterprise;

(ii) market value of the shares; and

(iii) the mathematical method.

The future profitability method (which is akin to the DPM, used by J.P. Morgan and adopted by the Board in its decision at the Extraordinary General Meeting of 8 January 2001), presented a number of problems. There were wide fluctuations in profits and no predictability as to future price and the Bank's dividend policy was dictated by concern for the objects of the Bank rather than for profit for shareholders. Accordingly, the Report dismissed that method. As for the market value method, the Report opined that, given the nature of the shares of the Bank, the various stock exchanges on which they were bought and sold, and the special position of the Bank itself, it was "an unreliable basis on which to calculate the premium."[142]

197. As for the mathematical method, akin to the NAV, the Report found, in the case of the BIS, this was:

> . . . the only reliable way . . . as it avoids as far as possible the capricious nature of the other methods considered above and is not affected by external circumstances. It also 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

[140] *Id.*, at pp. 2-3.
[141] *Id.*
[142] *Id.*

> open to discussion, the balance sheet gives a fairly accurate picture of the actual worth of the enterprise.[143]

The Report proceeded to calculate the net asset value, if the Bank were to be liquidated forthwith. But because the ordinary net asset value does not take account of a hypothetical liquidation, the Report tried to factor in the impacts that would have occasioned a liquidation, such as:[144]

(i) heavy losses, leading to substantially reduced reserves;

(ii) reduced value of land and buildings in a liquidation;

(iii) the exhaustion of the Special Dividend Reserve Fund.

The Report concluded

> . . . it appears that the premium should be calculated by the mathematical method, but that it would be equitable to apply a discount to the total of the Bank's own funds in order to take account of all the considerations discussed above. It is suggested that a discount of 30 per cent. would be appropriate.[145]

198. The J.P. Morgan Report of 7 September 2000 also addressed the question of discounting share value in an NAV methodology. Although some of its numerical conclusions roughly parallel those of the 1969 Board of Directors' report, the method it deployed was quite different. For one thing, the J.P. Morgan Report makes no mention of Articles 1 and 13 of the Statutes, which establish the equality of shares. It is worth recalling that Article 1 provides:

> There is constituted under the name of the Bank for International Settlements . . . a Company limited by shares.

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[143] *Id.*, at p. 4.
[144] *Id.*, at p. 5.
[145] *Id.*, at pp. 5-6.

and Article 13 provides:

> The shares shall carry equal rights to participate in the profits of the Bank and in any distribution of the assets under Articles 51, 52, and 53 of the Statutes.

For another, the Board of Directors' report arrived at its discount largely by introducing the variables of a hypothetical liquidation, which could be expected to lower value; the J.P. Morgan Report makes no reference to an adjusted liquidation price, but discounts for (i) lack of voting rights; (ii) reduced marketability; and (iii) the restriction arising from a double veto over sales of shares.[146]

199. Although the analysis which J.P. Morgan undertakes is rigorous and sophisticated, the Tribunal would note that it confuses two methods of valuation: share price as determined by the market and NAV valuation. The three factors which the J.P. Morgan Report identifies may help to explain the disparity between market price and proportionate NAV price but they are not relevant to an NAV analysis for an entity whose constituent documents establish the essential equality of all the shares with respect to their rights to the assets of the Bank. Thus, much of the data on the basis of which J.P. Morgan reached its 30% discount for lack of voting rights is derived from market trends.[147] Similarly, J.P. Morgan's proposal to apply an additional 15% discount for marketability may be appropriate in determining the proper market value of a traded share, but is inapposite in an NAV analysis in an entity whose constituent instruments establish the equality of the right of all shares to the assets of the company.

200. The Arthur Andersen report, which also recognized the inappropriateness of a stock market value method in view of the Bank's characteristics, reviewed the J.P. Morgan Report and concluded that the price of CHF 16,000 per share "is a fair price."[148] But some of its brief

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[146] *Id.*, at p. 28 *et seq.* The J.P. Morgan Report also creates an additional category of "further considerations" but ultimately concludes that it is not applicable.

[147] *Id.*, at p. 29.

[148] FE Exhibits to Memorial, Tab 45, at p. 16; Statement of Defense, Exhibit 21, at pp. 7-8.

observations are not entirely consistent with the approach of the J.P. Morgan Report. The Arthur Andersen report, for example, notes that "the value of a listed share cannot be higher than the price paid by central banks at the time of an increase in capital;"[149] in fact, the J.P. Morgan Report fixed the price of the recalled shares at considerably less "than the price paid by central banks at the time of an increase in capital." Although it raises a number of other questions about some of the J.P. Morgan Report's estimations, it too ignores the *lex specialis* of the Statutes and largely shares the major assumptions upon which J.P. Morgan operated.

201. For the reasons stated, the Tribunal does not find the discount analyses in the J.P. Morgan Report or the Arthur Andersen report, legally pertinent to the case at bar. Rather the Tribunal finds that the discount analysis of the Board of Directors in 1969, which has been applied in pricing the various tranches of newly issued shares which were designated for sale to new central banks thereafter, is appropriate for determining a discount of NAV. The use of a hypothetical liquidation value, which was the approach taken by the Board of Directors in 1969 and thereafter is also apposite, in view of the fact that First Eagle has argued that the most fitting analogy in the Statutes is to a liquidation or "partial liquidation;" the Board of Directors' approach was based upon a projected liquidation value. Moreover, the resulting price per share that emerges from this analysis appears to have been what at least one of the Claimants, First Eagle, had thought to be an appropriate price when it approached the Bank on 23 June 2000 and proposed a public share repurchase "on terms similar to the recent share issuances."[150] But the most telling evidence in favor of a discount of 30% is the consistent use of it by the Bank in pricing shares issued to new central banks. 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

[149] *Id.*
[150] Statement of Defense, Exhibit 22.

to the additional NAV assessment for real estate. As the Bank paid less than this amount, it is obliged to pay the difference to each private shareholder.

4. The NAV of the Bank as of 8 January 2001

203. The J.P. Morgan Report assessed the NAV of the Bank, averaging it from valuations at three different dates. The J.P. Morgan Report arrived at a figure of US$ 10,072,000,000 or US$ 19,034 (CHF 33,820) per share for the 529,165 shares in the Bank. Dr. Reineccius indicated that he would accept this figure as the NAV. Mr. Mathieu wished an opportunity to litigate the issue of the value of the real estate of the Bank, as it was not included in the J.P. Morgan Report.[151] First Eagle suggested, contingently, that it would accept the NAV in the J.P. Morgan Report if a valuation of real estate were made by an expert.[152] The Tribunal will reserve the question of the Bank's NAV as discounted for the next and final phase of this arbitration.

[151] See para. 84 *supra*; Transcript, at p. 318.
[152] See para. 76 *supra*; Transcript, at p. 329.

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 United States to avoid the jurisdiction of the Tribunal, and for the costs of the arbitration.

207. In the present state of the record, the Tribunal is insufficiently informed of the contentions of the Bank and First Eagle in regard to that counterclaim, including the quantification thereof. Consequently, the Tribunal determines that the issue of the counterclaim is to be resolved in the next phase of the arbitration according to a schedule to be decided in consultation with the Parties.

D. COSTS

208. The Tribunal is insufficiently informed regarding claims for costs in the arbitration. The Tribunal determines that the issue of costs is to be resolved in the next phase of the arbitration according to a schedule to be decided in consultation with the Parties, taking account, insofar as they deem relevant, the Tribunal's *Order In the Matter of Reginald H. Howe v. Bank of International Settlements*.

CHAPTER VII – DECISIONS

209. FOR THE FOREGOING REASONS, the Arbitral Tribunal unanimously renders the following decisions:

1. DETERMINES that the amendment of the Statutes of the Bank for International Settlements of 8 January 2001 to the effect that private shareholders are excluded as shareholders of the Bank was lawful;

2. DETERMINES that Claimants Nos. 1, 2 and 3 are entitled to a compensation for each of their recalled shares in the Bank for International Settlements corresponding to a proportionate share of the Net Asset Value of the Bank, discounted by 30%;

3. NOTES that, for the purposes of the compensation referred to in Decision No. (2), Claimants Nos. 1, 2 and 3 accept that the Net Asset Value of the Bank for International Settlements is US$ 10,072,000,000, being US$ 19,034 (equivalent to CHF 33,820) per share, not counting the value of the real estate of the Bank;

4. GRANTS the relief sought by Claimants Nos. 1, 2 and 3 to the extent that it is consistent with the foregoing Decisions and DISMISSES all other relief sought by Claimants Nos. 1, 2 and 3 inconsistent therewith as well as the relief sought by the Bank for International Settlements relating to those Decisions;

5. RETAINS jurisdiction with respect to the valuation of the real estate of the Bank for International Settlements, the determination of the exact amount owing by the Bank per share including interest thereon to Claimants Nos. 1, 2 and 3, the counterclaim of the Bank for International Settlements against Claimant No. 2 (First Eagle), and the costs of the arbitration, as well as any relief requested by any of the Parties relating to those matters;

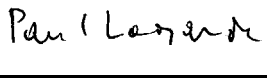
6. DETERMINES that it will issue one or more Procedural Orders with respect to the conduct of the next phase of the arbitration concerning the matters mentioned in Decision No. (5) after consultation with the Parties.

Done at the Peace Palace, The Hague, this 22nd day of November 2002,

Professor W. Michael Reisman

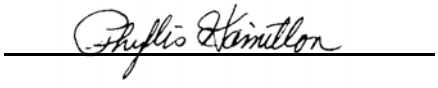
Professor Dr. Jochen A. Frowein

Professor Dr. Mathias Krafft



Professor Dr. Paul Lagarde

Professor Dr. Albert Jan van den Berg



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.